

**LEONARD v. PEPSICO, INC.**

United States District Court, Southern District of New York  
88 F. Supp. 2d 116 (1997)

WOOD, J.

This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi . . . The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo . . . [p]laintiff saw the Pepsi Stuff commercial that he contends constituted an offer of a Harrier Jet

The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog.

The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: "Now the more Pepsi you drink, the more great stuff you're gonna get."

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. [Looking very pleased with himself,] the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in more stylized script: "Drink Pepsi — Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is "typical of the 'Pepsi Generation' . . . he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." Plaintiff consulted the Pepsi Stuff Catalog . . . . The Catalog specifies the number of Pepsi Points required to obtain promotional merchandise. The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points. Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a "Jacket Tattoo" ("Sew 'em on your jacket, not your arm.)) to 3300 (for a "Fila Mountain Bike" ("Rugged. All-terrain. Exclusively for Pepsi.")). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable.

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise . . . . The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order.

Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he "would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough." Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion, and realized that buying Pepsi Points would be a more promising option. Through acquaintances, plaintiff ultimately raised about \$700,000.

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for \$700,008.50 . . . . At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. In a letter accompanying his submission, plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial."

On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

"The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program. The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use."

[Subsequently], in a letter dated May 30, 1996, BBDO Vice President Raymond E. McGovern, Jr., explained to plaintiff that:

I find it hard to believe that you are of the opinion that the Pepsi Stuff commercial really offers a new Harrier Jet. The use of the Jet was clearly a joke that was meant to make the Commercial more humorous

and entertaining. In my opinion, no reasonable person would agree with your analysis of the Commercial . . . .

Plaintiff's understanding of the commercial as an offer must . . . be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey. See *Kay-R Elec. Corp. v. Stone & Weber Constr. Co.*, 23 F.3d 55, 57 (2d Cir. 1994) ("We are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); *Mesaros*, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer.") . . . .

If it is clear that an offer was not serious, then no offer has been made:

An obvious joke, of course, would not give rise to a contract. See, e.g., *Graves v. Northern N.Y. Pub. Co.*, 22 N.Y.S.2d 537 (App. Div.1940) (dismissing claim to offer of \$1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. See *Barnes*, 549 P.2d at 1155 ("If the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); see also *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516, 518, 520 (Va. 1954) (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as "just a bunch of two doggoned drunks bluffing").

Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny . . . . The commercial is the embodiment of what defendant appropriately characterizes as "zany humor."

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact . . . and refrain from interpreting the promises of the commercial as being literally true.



Second, the callow youth featured in the commercial is a highly improbable pilot, one who could barely be trusted with the keys to his parents' car, much less the prize aircraft of the United States Marine Corps. Rather than checking the fuel gauges on his aircraft, the teenager spends his precious preflight minutes preening. The youth's concern for his coiffure appears to extend to his flying without a helmet. Finally, the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinces an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation.

Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. In this commercial, the fantasy is underscored by how the teenager's schoolmates gape in admiration, ignoring their physics lesson. The force of the wind generated by the Harrier Jet blows off one teacher's clothes, literally defrocking an authority figure. As if to emphasize the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian bike rack. This fantasy is, of course, extremely unrealistic. No school would provide landing space for a student's fighter jet, or condone the disruption the jet's use would cause.

Fourth, the primary mission of a Harrier Jet, according to the United States Marine Corps, is to "attack and destroy surface targets under day and night visual conditions." United States Marine Corps, Factfile: AV-8B Harrier II . . . . In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired "in a form that eliminates [its] potential for military use."

Fifth, the number of Pepsi Points the commercial mentions as required to "purchase" the jet is 7,000,000. To amass that number of points, one would have to drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years — an unlikely possibility), or one would have to purchase approximately \$700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly \$23 million dollars, a fact of which plaintiff was aware when he set out to gather the amount he believed necessary to accept the alleged offer. Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for \$700,000 is a deal too good to be true.

Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" in which the items in the commercial were presented . . . . In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.