

**NAD Fast-Track SWIFT Case #7047 (10/06/2021)**

**Parties:** BA Sports Nutrition, LLC / Stokely-Van Camp, Inc.

**Product:** BodyArmor Sports Drink

**Product Type:** Food/Beverage

**Disposition:** Modified/Discontinued

**Claim:** Disparagement Claims

**BBB NATIONAL PROGRAMS**

**NATIONAL ADVERTISING DIVISION**

STOKELY-VAN CAMP, INC.,  
*Challenger,*

BA SPORTS NUTRITION, LLC,  
*Advertiser.*

Case No. 7047

Closed 10/06/2021

**FAST-TRACK SWIFT CASE**

- Emojis frequently substitute for the written word in contemporary communications and some Emojis more clearly communicate feelings or emotions than others.
- Exaggerated images and humor can be used to emphasize a message provided, however, that the underlying message is truthful.

**Basis of Inquiry:** As part of NAD’s Fast-Track SWIFT program designed to quickly and efficiently review advertising claims that involve a single well-defined advertising issue, Stokely-Van Camp, Inc. (“SVC” or “Challenger”) challenged BA Sports Nutrition, LLC’s (“BodyArmor” or “Advertiser”) claims in social media posts that (1) Gatorade is “awful”; (2) having to drink Gatorade is “not cool”; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it.

## I. Fast-Track SWIFT Eligibility Determination<sup>1</sup>

NAD thanks the Advertiser for its voluntary participation in the NAD Fast-Track SWIFT process. The Advertiser's BodyArmor flavored sports drinks compete with the Challenger's Gatorade flavored sports drink.

The Challenger alleged that certain social media posts from August 2021 communicated falsely disparaging messages about Gatorade. The posts first appeared on the social media accounts of Baker Mayfield, Cleveland Browns quarterback and former Heisman Trophy winner. Mr. Mayfield is one of many prominent athletes who are BodyArmor endorsers and the video in his original post was shared by BodyArmor's social media accounts shortly thereafter.<sup>2</sup>

The short video at issue begins with the caption "BLIND BODYARMOR TASTE TEST WITH BAKER MAYFIELD [eyes emoji]." Standing on a practice football field dressed in workout attire, Mr. Mayfield engages in a blind "taste test", attempting to identify which of BodyArmor's various flavors he has been handed by an individual who is off-screen. As Mr. Mayfield correctly verbally identifies the first three BodyArmor SuperDrink and BodyArmor Lyte flavors he samples, a green checkmark appears on the screen after each correct answer. He is then handed what is clearly a bottle of Gatorade's Orange Thirst Quencher drink. After taking a sip, a green emoji depicting a face holding back vomit is displayed on the screen (the "Nauseated Face Emoji"), alongside the popular yellow laughing "Face with Tears of Joy Emoji." Mr. Mayfield spits the Gatorade out on to the ground, and says to the camera, "Yo, that is not cool. That's awful," while removing his blindfold and shaking his head. Mr. Mayfield's accounts caption the video with, "I'm not sure I'll ever forgive you for this." As shared by BodyArmor, the video is captioned "C'mon @BakerMayfield, please return our calls! We're very sorry!!! [3 Face with Tears of Joy emojis] #TeamBODYARMOR."<sup>3</sup>

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<sup>1</sup> A challenge is appropriate for determination in SWIFT if it involves a single, well-defined issue such as an express claim that does not require review of complex legal argument or evidence and is capable of resolution within the SWIFT timeline. NAD/NARB Procedures Sec. 1.1(E)(2). NAD has also designated specific categories of cases that it considers for SWIFT: (1) the prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews; (2) misleading pricing and sales claims; and (3) misleading express claims that do not require review of complex evidence or substantiation such as a review of clinical or technical testing or consumer perception evidence. To ensure that the challenged claim meets this criteria, NAD/NARB Procedures require an initial review by NAD when the SWIFT challenge is first filed and then again in response to an advertiser's objection to the challenge being resolved in SWIFT. NAD/NARB Procedures, Sec. 6.1(C) and 6.2 (A). Further, if it becomes clear at any point during the pendency of a challenge that it is no longer appropriate for SWIFT, NAD will administratively close the case and it may be transferred to standard or complex track. NAD/NARB Procedures 6.2(C).

<sup>2</sup> As of this writing, Baker Mayfield has approximately 1.7 million Instagram followers.

<sup>3</sup> The video was shared on BodyArmor's Twitter, Facebook, Instagram, and TikTok accounts.

The Advertiser objected to the Challenger’s request that the matter be heard under the Fast-Track SWIFT process for three reasons. BodyArmor argued that (i) SVC asked NAD to address implied claims, which are not appropriate for resolution under the SWIFT process; (ii) the challenge will require review of complex legal arguments, which are not appropriate for resolution under the SWIFT process; and (iii) the challenge involves more than a single issue, which is not appropriate for resolution under the SWIFT process.

NAD determined that the challenge was appropriate for Fast-Track SWIFT review, concluding that there was a single issue presented relating to intertwined express claims identified by the Challenger. The single issue is the Advertiser’s alleged disparagement of Gatorade and whether any unsupported messages about Gatorade are reasonably conveyed through express statements and images in the video.<sup>4</sup> Further, NAD determined that it would not have to review complex evidence or legal arguments as the Advertiser’s arguments on whether any messages about Gatorade were non-actionable puffery or Mr. Mayfield’s properly expressed personal opinions could be resolved within the Fast-Track SWIFT process.

## **II. Decision**

The Challenger sought review of four express claims in the Baker Mayfield taste test video; (1) Gatorade is “awful”; (2) having to drink Gatorade is “not cool”; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it. The Challenger argued that the video falsely disparaged Gatorade.

The Advertiser contended that the video is merely a “social media joke” and not truly an advertisement. The Advertiser denied that the video is disparaging because it asserted that it does not advance any claim concerning BodyArmor or Gatorade products, comparative or otherwise. The Advertiser argued that reasonable viewers would understand Mr. Mayfield’s verbal statements to be his subjective opinion about being given Gatorade to drink, while blindfolded, instead of a bottle of BodyArmor that he expected. Even if some viewers believe that Mr. Mayfield is in fact stating an opinion about Gatorade, the Advertiser asserted that he is entitled to express that opinion on social media. The Advertiser additionally argued that the

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<sup>4</sup> Other examples of challenges with multiple claims or contexts that NAD has determined constituted a single issue were (1) variations of national and local “lowest prices” claim for a grocery store chain (*ALDI, Inc. (Aldi Groceries)*, Report #6962, NAD/CARU Case Reports (February 2021)); (2) “A better performing bar for sustained energy” claim appearing as a paid result when consumers googled KIND bars or energy bars (*Clif Bar & Co. (Clif Energy Bars)*, Report #6738, NAD/CARU Case Reports (June 2020)); and (3) whether a wireless coverage map truthfully and accurately identified the differences between its 4G and 5G services as the map appeared in several social media contexts (*Verizon Wireless (Verizon 5G Wireless Service)*, Report #6910, NAD/CARU Case Reports (December 2020)).

emojis and Mr. Mayfield's physical reactions in the video are obvious hyperbole (i.e., puffery) for which viewers do not expect substantiation.

Consumers will likely perceive the playful tone of the video and the social media interactions between BodyArmor and Mr. Mayfield and understand that the "taste test" video has some degree of hyperbole to it. Nevertheless, it is also clear that the video reasonably conveys a message about Gatorade through express statements and imagery.

In the "taste test," Mr. Mayfield samples three flavors of BodyArmor, which he is familiar with, and proudly identifies them. After being handed a fourth bottle, which unbeknownst to him, contains Gatorade, Mr. Mayfield sips it and immediately exclaims, "Yo, that is not cool. That's awful," while removing his blindfold, spitting out the Gatorade, and shaking his head. As this occurs, the Nauseated Face Emoji and the Face with Tears of Joy Emoji appear together prominently on screen. NAD concluded that the express statements that being surprised with Gatorade "is not cool" and "That's awful" are unmistakable negative references to Gatorade. The video's express message that Gatorade is undesirable is emphasized by a context in which Mr. Mayfield reacts physically by spitting out the Gatorade and otherwise conveying his displeasure through body language.

The Advertiser argued that use of emojis is inherently subjective and open to different interpretations as they depict human emotions, thoughts, and actions sometimes in exaggerated forms, and are thus less likely to cause consumers to believe that a literal, factual message is being conveyed. Emojis, however, also frequently substitute for the written word in contemporary communications and some Emojis more clearly communicate feelings or emotions than others. The Nauseated Face Emoji, for example, communicates a clear message that something is gross. The yellow Face with Tears of Joy Emoji is used as a reaction to a joke that one enjoys. In the video, the Nauseated Face Emoji's appearance is synchronized with Mr. Mayfield's reaction and conveys a negative message about Gatorade. When the green Nauseated Face Emoji is paired with the yellow Face with Tears of Joy Emoji the use of emojis in this context expresses Mr. Mayfield's reaction to a foul, nauseating beverage, after being pranked by his taste test partner.

The disparaging message about Gatorade is further reinforced by the fact that the Gatorade Orange Thirst Quencher drink, a well-established Gatorade flavor, is plainly visible and identifiable in the video. Thus, there is no ambiguity about the object of Mr. Mayfield's disgust. It is a harshly negative statement about a specific BodyArmor competitor, characterized as "awful," "uncool," "gross" or "nauseating" (via emoji) and undrinkable.

NAD considered the Advertiser's argument that the video should be construed entirely as puffery. In determining whether or not a claim constitutes puffery, NAD considers several factors including whether the representations concern general matters that cannot be proven or disproved; whether the statements are

distinguishable from representations of specific characteristics that are measurable by research or test, or whether the wording uses expressions of opinion that will be discounted by consumers.<sup>5</sup> Specifically, NAD considers whether the challenged advertising “refers to specific attributes which are likely to suggest that a product is comparatively better in some recognizable or measurable way.”<sup>6</sup> If the advertisement communicates this message, “even in a humorous way, such message requires substantiation.”<sup>7</sup>

In support of its puffery argument, the Advertiser cited *Reynolds Consumer Products (Hefty Slider Bags)*, Report #6105, NAD/CARU Case Reports (August 2017) and *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, Report #5843, NAD/CARU Case Reports (May 2015), two cases in which NAD concluded that humorous advertisements did not reasonably convey disparaging messages about a competitor’s products.

In *Reynolds Consumer Products*, NAD found that a commercial depicting a cashier and a customer wildly throwing around the challenger’s plastic bags in a store did not convey a comparative performance message because it was “an attempt by the advertiser to humorously illustrate the cost advantage of purchasing Hefty slider bags and makes no specific mention of product attributes or storage bag performance.”<sup>8</sup>

In *Dollar Shave Club*, the advertiser sought to highlight the low prices for its razors. One commercial depicted a man purchasing a competing brand of razor blades being kicked in the groin by the supposed “free gift” that came with the razors. Another commercial features a man buying razors who is then demanded to turn over his money, his grandfather’s watch, and all his clothes. NAD found that the commercials were not falsely disparaging because there were “no comparative messages (express or implied) about the performance of competing products.”<sup>9</sup> Rather, the commercial “humorously conveys a message about the high prices paid for competing razors in retail stores without criticizing the specific performance benefits that such razors offer.”<sup>10</sup>

*Reynolds Consumer Products* and *Dollar Shave Club* are distinguishable from the present challenge because NAD here found that there is an express message

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<sup>5</sup> See, *French’s Food Company (French’s Tomato Ketchup and French’s Mustard)*, Report #6119, NAD/CARU Case Reports (September 2017).

<sup>6</sup> *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, Report #5843, NAD/CARU Case Reports (May 2015).

<sup>7</sup> *Id.*

<sup>8</sup> *Reynolds Consumer Products (Hefty Slider Bags)*, *supra*.

<sup>9</sup> *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, *supra*.

<sup>10</sup> *Id.*

reasonably conveyed about a competing product, Gatorade. The fact that the Baker Mayfield video may be humorous does not impact that conclusion.

Also instructive is *Traeger Pellet Grills LLC (Traeger Grills)*, Report #6327, NAD/CARU Case Reports (December 2019), where the express claim at issue also involved the alleged disparagement of a competitor's products. In *Traeger Pellet Grills* a commercial promoting the advertiser's wood pellet-burning grills depicted a scene at barbecue, contrasting their performance with the performance of competing gas grills. The commercial showed party-goers tasting hamburgers cooked off of a gas grill, with looks of disgust on their faces, and stating one after the next that their food "tastes like gas." NAD observed:

The claim at issue here is an express one—communicated in both language and via the facial expressions of the party-goers—that food cooked on a gas grill...results in food that 'tastes like gas' (or 'tastes like ass')—that is to say that use of propane imparts distasteful flavor to the food. This is an inherently objectively provable claim which requires reliable taste testing as support.<sup>11</sup>

NAD concluded that consumers would reasonably take away the message that gas/propane grills impart an undesirable flavor to cooked food. While the commercial contained several humorous notes, as NAD stated, "No amount of humor, however, can rectify an expressly false claim."<sup>12</sup>

Exaggerated images and humor can be used to emphasize a message provided, however, that the underlying message is truthful. Here the advertising makes an expressly disparaging statement that Gatorade is "awful," nauseating, or undrinkable. Because the Advertiser did not have any support for the messages about Gatorade, NAD recommended that the Advertiser discontinue the express claims made in the video.<sup>13</sup>

### **III. Conclusion**

NAD recommended that the Advertiser discontinue the challenged express claims, that (1) Gatorade is "awful"; (2) having to drink Gatorade is "not cool"; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Because NAD determined that the video reasonably conveyed an unsupported disparaging message about Gatorade and not merely Mr. Mayfield's personal opinion, it was not necessary for NAD to reach the question of whether the video included a properly expressed opinion about a product from an endorser.

#### **IV. Advertiser's Statement**

The short Baker Mayfield Instagram post was an obvious joke that was not intended to convey any express claims about Gatorade or BodyArmor products. Because SVC stated that the challenged claims were based on "implications," BODYARMOR is disappointed that NAD agreed to review them on the SWIFT fast track schedule. Though BODYARMOR vehemently disagrees with the NAD's decision, because the post is two months old, BODYARMOR will remove the post from its social media pages. (**#7047 ELU, closed 10/06/2021**)

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