

Decision of the ADVERTISING REGULATORY BOARD

Advertiser	Fair Cape Dairies (Pty) Ltd
Consumer/Competitor	Consumer
File reference	3297 - Fair Cape Dairies
Outcome	Dismissed
Date	10 July 2024

The Directorate of the Advertising Regulatory Board has been called upon to consider a consumer complaint against Fair Cape Dairies' advertising for its full cream chocolate flavoured milk product.

Description of the advertising

The package advertisement for the Advertiser's Barbie-merchandised full cream chocolate flavoured milk product is depicted in the images below ("the Advertisement"):



Directors: GD Schimmel (CEO) K Denalane (Chair)

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Complaint

The Complainant's submissions are reproduced below:

"The product is clearly an unhealthy sugary drink, yet it is designed to appeal to young children through the use of the Barbie doll image. The Food and Beverage Code provides in 7.3. that 'Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product'."

Response

Robert de Rooy & Associates Inc. responded to the complaint on behalf of the Advertiser. The Advertiser disputed the validity of the complaint on three bases.

Firstly, it denied that the product is "unhealthy" within the meaning of the relevant provision of the Code of Advertising Practice ("the Code"), as alleged by the Complainant. It makes the following submissions in support of this:

"Our client is of the view that the product is in fact a nutritious whole milk dairy product. But be that as it may: 1) the Product's packaging makes no claims about benefits from the use of the product, and 2) even if it did make such claims (which it does not) the standard is not the subjective opinion of the complainant, but what the reasonable person would judge as provided for in Section 3 of Appendix J of the Code.

Moreover, the complaint fails to recognise the fact that a substantial part of the sugar contained in the product is intrinsic sugar in the form of lactose. Intrinsic sugars are defined as "sugars that are naturally occurring and which form an integral part of certain unprocessed foodstuffs, the most important being whole fruits and vegetables, that are enclosed in the cell, (mainly fructose, glucose and sucrose) and which are always accompanied by other nutrients;" (GNR.146 of 1 March 2010: Regulations: Labelling and advertising of foodstuffs published in terms of section 15 (1) of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act 54 of 1972).

Should the complaint prevail, any product that contains any sugar in packaging that may appeal to children may not be advertised in any way. Such an approach to food and beverage advertising would clearly be absurd".

Secondly, the Complainant submits that the Complainant has cited Section 3 of Appendix J of the Advertising Code “*out of context*”:

“Section 7.3 is a subsection of the Social Values promoted by the Code, the first of which require that children are not misled about product’s benefits, and the econd [sic] and third of which is that the advertisement should not directly or indirectly undermine the role of parents.

“7.3 Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.” [writer’s emphasis]

Section 7.3 must therefore be read in this context and cannot just be read or applied in isolation. Section 7.3 does not say that: “Food and beverage product advertising should not directly appeal to children of twelve years old and under (full stop)”.

By this standard, any products (not only products that contain sugar) that are likely to be of interest to children may not be advertised in any way. Again, such an approach to food and beverage advertising is clearly absurd”.

The Advertiser submits that the purpose of Clause 7.3 is aimed at advertisers actively communicating with children in a way that seeks to undermine the role of parents or guardians.

Thirdly, the Advertiser submits that Clause 7.3 must be read together with Clause 8 of Appendix J to the Code. Clause 8.1 prohibits celebrity or character merchandising in television advertisements targeted at children of twelve years old and under for products that do not represent healthy dietary choices and a healthy lifestyle. Clause 8.3 contains a *proviso* to Clause 8.1 stating that it “does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under”.

While the Advertiser concedes that Clause 8 may not necessarily apply to its product, as it makes no health claims nor does it appear in television advertising, its submits that Clause 8.3 “*is very clear and puts this matter beyond dispute*” as it demonstrates that the Code “*expressly allows for the use of characters on packaging*”, subject to the limitation in Clause 8.1.

The Advertiser concludes its response with the following:

“The complainant is of course entitled to have a view about whether the product is healthy or unhealthy, and whether to buy Fair Cape’s sweetened chocolate milk for her children or not, and whether the cartoon character on the packaging is appropriate. But when product has been on the market for 15 years throughout South Africa without a single complaint, but for the complaint we are called to respond to, it can be safely deduced that this complaint does not represent the view of the “reasonable person” as required in Section 3 of Appendix J of the Code”.

Application of the Code of Advertising Practice

The following clauses were considered in this matter:

- Clause 7.3 of Appendix J

Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

Clause 7 of Appendix J is reproduced below, in its entirety:

7. Social values

- 7.1 *As it is recognised that children of twelve years old and under are impressionable, food and beverage advertising should not mislead children about product benefits from use of the product. Such benefits include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.*
- 7.2 *Food and beverage product advertising should not undermine the role of parents or others responsible for a child’s welfare in guiding diet and lifestyle choices.*
- 7.3 *Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.*

The Directorate agrees with the Advertiser that one cannot dissect the provisions of Clause 7.3. It clearly states that “*Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.*”

In other words, the advertising may not tell children to persuade their parents to buy the product, or tell children that there will be negative consequences if they do not buy the product. This packaging does neither. This interpretation is consistent with Clause 7 read in its entirety, which underlines the role of parents.

The Directorate also noted the provisions of Clause 8 of Appendix J. Although the Complainant did not raise it, it is relevant.

8. Product endorsement

- 8.1 *Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or **characters licensed from third-parties (such as cartoon characters)** in television advertisements targeted at children of twelve years old and under.*
- 8.2 *Clause 9.1 does not apply to company-owned characters.*
- 8.3 *Clause 9.1 does not apply to the use of characters **on packaging**, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.*

The reference to Clause 9.1 above is clearly a typo and Clauses 8.2 and 8.3 are intended to both be *provisos* to Clause 8.1.

Clause 8.1 of Appendix J prohibits the use of character merchandising (if the product is not healthy) **only** in television commercials. Clause 8.3 confirms this interpretation by specifically excluding product packaging (unless it appears in a television commercial). There is nothing before the Directorate to suggest that this packaging is used in television commercials.

Clause 8 therefore lends further support to the above interpretation of Clause 7.3, as Clause 7.3 could not have been meant to entirely prohibit character merchandising, as this would be in direct contradiction of Clause 8. The Appendix read in its entirety specifically allows for character merchandising on packaging.

Finally, it is noted that in the circumstances, it is unnecessary for the Directorate to make any finding as to whether the product is indeed unhealthy.

The advertising is not in breach of Clause 7.3 of Appendix J.