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## Decision of the ADVERTISING REGULATORY BOARD

Complainant	Steers Proprietary Limited
Advertiser	Burger King South Africa (Proprietary) Limited
Consumer/Competitor	Competitor
File reference	Burger King-Steers
Outcome	Partially upheld
Date	25 September 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a complaint lodged by Steers Proprietary Limited against a television commercial flighted by Burger King South Africa (Proprietary) Limited.

### Description of the advertising

The commercial opens with a visual of fresh onions, and the hand of a person picking up an onion. The next scene is that onion being sliced in a mechanical slicer, followed by whole and halved tomatoes and a tomato being cut in a slicer. The vegetables all appear fresh. Burger patties cooking on a grill above open flames are then shown, followed by an in-store preparation station depicting fresh lettuce, sliced onions, sliced tomatoes, cheese and gherkins. A burger is then assembled and the advertiser's pay-off line GOOD FOOD, FAST then appears on-screen with a visual of the burger and its various

ingredients. The commercial ends with a scene of the Burger King logo encircled in flames.

## Complaint

McCann Worldgroup South Africa (Pty) Ltd submitted a complaint on behalf of Steers, in which they submit as follows.

The complainant only uses fresh lettuce, onions and tomatoes that they wash and cut in-store, and chips are made from fresh potatoes, that are also washed and cut in-store. In addition, fresh buns get baked and delivered to stores daily. Furthermore, Steers' products, and specifically beef burgers, are flame grilled on open flame gas burners. This sets the complainant apart from many fast food outlets, which do not flame grill their burger patties, but rather use other forms of heating or cooking.

The complainant's understanding is that the advertiser does not use ingredients that are prepared fresh in-store, but rather uses lettuce, onions and tomatoes that are pre-prepared and then delivered to stores. Chips and buns, they believe, are delivered frozen to the store. The complainant also submits that the advertiser does not "flame grill" its burgers but cooks its patties using a gas broiler. The complainant explains that a flame broiler is a commercial mechanical gas grill which consists of a ladder-type conveyor chain that transports patties over gas burners. The patties are flame broiled, meaning the patties pass through a gas flame that slightly chars the meat. The complainant submits that this method of cooking is very different from that which it employs, as the "open flames" that the advertiser's patties are exposed to are nothing like the open flame gas burners used by the complainant.

The complainant submits that, because the emphasis of the commercial is on the freshness of the ingredients, the consumer take-out is that the advertiser prepares its ingredients fresh and in-store. The complainant is of the view that this conflicts with its understanding of the true position, which is that the ingredients are not prepared fresh in-store and the advertiser is thus misrepresenting the freshness of its ingredients. The

commercial also depicts the patties engulfed by flames, whereas the actual gas flame broiler process is a far cry from these visuals. The end scene with flames reinforces the impression of “flame-grilled” and the advertiser is thus misrepresenting its cooking process by making use of a “grill and flames” visual execution rather than the true position, which is “flame broiled”.

The complainant therefore submits that the commercial is dishonest and misleading and calls for its withdrawal.

## Response

The respondent firstly stated that it is not a member of the ARB and does not consent to its jurisdiction. It nevertheless submitted the following response on the merits.

### Fresh ingredients

The advertiser states that it has an ingredient policy that focuses on authentic taste, using real ingredients. To ensure that it only receives fresh produce, it works with regional producers, allowing it to serve the freshest produce to its customers. Each morning, tomatoes and onions are freshly chopped and prepared in-store, as shown in the commercial.

### Flame-grilling

The advertiser submits that its patties are grilled on a proprietary gas flame broiler developed for its restaurants that flame grills its patties. The broiler consists of a ladder-type conveyor chain that transports patties over open flame gas burners. The broiler contains heating elements above the patties to aid the cooking process, that is gas operated. Importantly, patties are exposed to an open gas flame and, as a result, have the texture, flavor and look of flame-grilled patties. The advertiser therefore submits that it is entitled to use an image of a grill and flame in its advertising.

The advertiser concludes by submitting that its advertising is not misleading, and the complaint should be dismissed.

### Application of the Code of Advertising Practice

The following clauses were considered in this matter:

- Honesty- Clause 2 of Section II
- Honesty- Clause 4 of Appendix J (Food and beverage code)
- Misleading Claims- Clause 4.2.1 of Section II
- Misleading Claims- Clause 6 of Appendix J (Food and beverage code)

### Decision

#### Jurisdiction

The Advertiser has indicated that it is not a member of the ARB and that it does not consider itself bound by the ARB and the Code of Advertising Practice.

The Memorandum of Incorporation of the ARB states:

*“3.3 The Company has no jurisdiction over any person or entity who is not a member and may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. However, the Company may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its*

*members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.”*

In other words, if you are not a member and do not submit to the jurisdiction of the ARB, the ARB will consider and rule on your advertising for the guidance of our members.

The ARB will, however, rule on whatever is before it when making a decision for the guidance of its members. This ruling will be binding only on ARB members and on broadcasters in terms of the Electronic Communications Act.

The ARB will therefore proceed to consider this matter for the guidance of its members.

## **Merits**

Unfortunately, both the complainant and the respondent deal in bare allegations and denials in their complaint and response, with no calls for actual substantiation, and none provided. The Directorate therefore has no choice but to be guided by the allegations and denials put before it by both parties.

The essence of the issue before the Directorate is what the take-out of a hypothetical reasonable consumer would be. Given the nature of the on-screen visuals in the commercial, the Directorate is of the view that a consumer would think that all the visuals in the commercial, while perhaps artfully and favourably shot, reflect *actual* processes in the advertiser’s kitchens. This is the key to the ruling that follows.

## **Freshness**

The complainant makes an allegation based on its understanding of the freshness of the advertiser’s products and does not call for any substantiation of an implied freshness claim. Similarly, however, the advertiser makes a bare denial regarding the tomatoes and onions, without providing any compelling proof of the freshness of its products.

The Directorate has no reason, based on what is before it, not to accept the veracity of the response and accepts that the tomatoes and onions used by the advertiser are fresh.

**The visuals used of fresh tomatoes and onions are therefore not misleading or in breach of the cited clauses of the Code.**

The advertiser does not address the allegations around the freshness of its buns or the potatoes used to make its chips.

This having been said, the Directorate notes that the visuals in the commercial make no claims regarding the potatoes nor the buns. There are no visuals of potatoes nor of chips, although the visual of the onion being sliced may, at first viewing, look like a potato. However, given that it is immediately preceded by the visual of the onion being chosen, and given that it is cut into slices and not chips, it is very clearly an onion that is being depicted.

Similarly, the only visual of the bun is on the final image of the burger being assembled. There is no claim made as to how that bun arrived at the store, nor as to how it was prepared.

Given that no claims are made around the buns and the potatoes, the advertising cannot be found to be misleading in this regard.

**The Directorate is therefore satisfied that the commercial is not in breach of the cited clauses of the Code in this regard.**

#### Flame-grilled

Turning then to the flame-grilled issue, the Directorate is of the view that the commercial quite clearly creates the impression that the advertiser's patties are flame-grilled, both because of the visuals of the burger preparation, but also because of the closing visual of the commercial, namely the Burger King logo encircled in flames.

The question then is what a hypothetical reasonable consumer would expect "flame-grilled" to mean. Would such a consumer expect a traditional open flame gas burner or "braai", or would the flame broiler used by the advertiser in the making of its patties satisfy the consumer's expectations?

The take-out of the commercial by the hypothetical reasonable consumer is clearly that the patties are “braaied” or grilled above an open flame. As stated at the beginning, the consumer would expect that the visual shown would be an actual depiction of what occurs in the advertiser’s kitchen, although perhaps artfully shot.

The fact that there is some contact with a flame, inside a gas broiler system, does not satisfy the expectations of open flame grilling as portrayed in the advertiser’s commercial. The Directorate conducted lengthy research into the broiler device used the advertiser, and while there appears to be some contact with a flame during the course of the gas broiling process, the impression and expectation created by the commercial is not that the patties come into contact with a flame during a complicated cooking process. The visual in the commercial cannot, it appears, have been shot in the advertiser’s actual cooking process.

The clear take-out, rather, is that there is at least something that visually resembles an old-fashioned open flame grill or braai cooking process, which is *ex facie* not the case.

**The Directorate therefore concludes that this aspect of the commercial is misleading and in breach of Clause 4.2.1 of Section II of the Code.**

### Sanction

Members of the ARB are advised not to accept the advertising in question in its current format.

Members and the advertiser are reminded that Clause 15.5 of the Procedural Guide provides that advertising must be withdrawn from every medium in which it appears.