

PROFESSIONAL SPORTS

Reprinted December 2018

and the **LAW**

Practical Considerations in Finding the Right Athlete to Endorse Your Products

By Edward H. Schauder, Esq.

When I was a kid I used to love drinking Yoo-Hoo. The drink was heavily promoted for years by the great Hall of Famer Yogi Berra and I am sure now that Yogi's endorsement had something to do with my love for Yoo-Hoo. Fast forward to 1994.

In 1994, I organized the 1969 Mets into the *Miracle of 1969 Enterprises* to capitalize on appearances, licensing, merchandising and endorsement opportunities during the 25th anniversary of the Miracle Mets' World Championship. The head of Farmland Dairies reached out regarding the possibility of having a group of the 1969 Mets promote their milk at a series of supermarkets in the metropolitan area. There was one catch; there would be no deal unless Yogi Berra, the coach of the 1969 Mets, would be one of the athletes in attendance.

With full knowledge of Yogi's ties to Yoo-Hoo I called him to discuss this opportunity. I didn't get very far when Yogi interrupted me and said: "I don't think that I can do a milk deal because I'm with Yoo-Hoo." Without skipping a beat he continued, "How much will they pay?" Yogi must have liked the answer because on the first day of appearances for Farmland Dairies there was Yogi in the VIP area mingling with guests.

For over a century companies have increased consumer recognition of brand by using athletes to pitch their products. It is

estimated that companies spend almost \$1 billion annually on athlete endorsements. With so much at stake, the balance of this article will focus on several practical considerations in finding the right athlete to endorse a company's product from the perspective of both the company and the athlete.

Choosing the Right Athlete to Meet a Company's Objectives from the Company's Perspective.

A professional sports team has a first round draft. Prior to selecting a particular athlete, any prudent team will conduct extensive due diligence on the various candidates and deploy its scouts to the various Combines to watch potential candidates go through rigorous physical drills and psychological testing. Teams will conduct detailed background checks on the candidates and speak with a candidate's coaches and friends before deciding to make a major financial investment in an athlete. A team will also consider their depth charts at various positions before making its choice.

A company that is considering making a significant financial investment in an athlete and entrusting that athlete with being the face of its brand should conduct the same level of intensive investigation and due diligence in choosing the right spokesperson for its brand. When advising companies seeking an athlete to endorse its

products it is imperative to outline in writing its objectives and what it is intending to accomplish. Critical considerations may include but are not limited to:

- What particular geographic market is the company looking to launch in?
- What particular product/brands is the company trying to promote?
- What is the demographic that the company is trying to appeal to?
- What is the advertising budget? How many athletes within a particular sport will endorse my product?
- Does the athlete currently use my product or be willing to try my product and stick with it?
- Does an athlete already endorse a competing product?
- By asking and answering these questions a company will be able to focus on and be able to create a short "wish list" of athletes.

While some might think that the foregoing exercise is an unnecessary, one would be astonished how many times the athlete/company endorsement relationship fails before it starts because a company does not do its homework. How many times do you hear about an athlete that has signed a deal to use a Louisville Slugger bat but mid-season switches to a Mazuno bat? How often do we read about an athlete endorsing

a steak house but he/she is a vegetarian? How many times will a company reach out to a local athlete to endorse a local business and the athlete is traded? How often do we see athletes endorsing competing products?

Once a company outlines its objectives and creates a short list, a basic internet search can provide a company with the additional information that it needs to narrow down its list. A client once asked me to reach out to Dan Marino to see if he was willing to endorse a pain relief product. As I started to do my homework, a pop-up ad appeared in which Mr. Marino was endorsing a competing product! Something as simple as an internet search can save a company the time and effort going down a dead-end with a athlete and may prevent the company from the embarrassment of entering into an agreement when the athlete already endorses a competing product.

Oftentimes, a short and candid conversation with an agent can save a company an enormous amount of time. A few years ago, a start-up beverage company developed a blend of seven anti-oxidants and was marketing the brand under the trademark "The Power of 7". They asked me to find athletes to endorse its product for a New York launch. Then New York Mets Short-stop Jose Reyes immediately came to mind since he wore the #7. I reached out to Mr. Reyes' agent and it quickly became apparent that Mr. Reyes wanted too much upfront cash and the company was only willing to offer a certain amount of cash up front with a significant equity kicker on the back end. In addition, Mr. Reyes did not have a no-trade clause in his contract so there was no assurance that he would definitely be in New York when the product was ready to be launched. As a result, my client needed to go in a different direction.

The cash concept is especially important; a company must be realistic about what it can afford to pay an athlete. Many

companies have small operating budgets offer an athlete so much cash consideration that it has no money left to implement its marketing plan. On the flip side, a company may have the financial ability to hire multiple current players from a particular sport to endorse their product. However, the use of personal licensing rights for more than three active players within a sport to endorse a particular product the company must deal with the sports' players association which has exclusive jurisdiction over group licensing deals.

Sometimes, it is important for an advisor to get creative in finding the right athlete to endorse a company's product. When a vitamin company with a small operating budget approached me to assist them in finding a well-known athlete to launch its product in Ohio, I knew that there was no way they could afford LeBron James. Instead, I suggested that they reach out to a local retired player in the Ohio area, Archie Griffin. Mr. Griffin was a retired athlete, who had played for the Cincinnati Bengals and who was a two-time winner of the prestigious Heisman Trophy at Ohio State. Often times a retired player that has been out of the spotlight is a less-expensive candidate. Another advantage of using a retired player for a vitamin company is that the athlete was still within the demographic that the client was targeting. Even more important to the client, Mr. Griffin was serving as the Executive Director of the Ohio State Buckeyes Alumni Association.

By clearly defining its objectives, developing a market plan and following a decisive operational budget for athlete endorsements a company has the stepping-stones to understanding their own needs, resources and limitations and are ready to commence their recruiting process. A company then must conduct due diligence, developing and then narrowing its "wish list". By applying these basic concepts a company should have

little difficulties finding the right current or former player to endorse its product.

Choosing the Right Product to Endorse from the Athlete's Perspective.

Much the same way that a prudent company will conduct its due diligence to select an ideal athlete, a prudent athlete should similarly conduct its own due diligence on the company and product which he/she is being asked to endorse.

In advising athletes in endorsement agreements it is best to prepare a checklist of due diligence considerations from the athlete's perspective. Such questions may include but are not limited to:

- Has the athlete endorsed, or invested in, any competing product?
- Has the athlete tried and genuinely likes the product he/she is being asked to endorse?

If the product to be endorsed is a nutritional supplement, food or beverage, what assurance is there that the product does not contain any banded substances?

If the company is paying the athlete in cash installments or by issuing shares of restricted stock, is the company financially solvent?

What is the company's marketing plan and does it have the economic ability to implement its plan?

First and foremost, an athlete and his or her adviser must keep careful track of all of the athlete's existing endorsements (and investments in the athlete's portfolio) to ensure that the potential endorsement will not conflict with any existing endorsement deals or significant investments. Failure to do so could prove to be very embarrassing for the athlete and the company. In an article written by Ben Maller, which appeared in *The Post Game* on July 21, 2012, Michael Vick was criticized for entering into "exclusive" advertising agreements with competing nutrition companies. Similarly, New York

Yankees Alex Rodriguez put himself in an embarrassing predicament when he signed an endorsement deal in June 2011 with Vita Coco when he was already a long-time investor in another rival coconut water brand called Zico. The foregoing mistakes, are easily avoidable when companies and athletes ask the right questions and conduct basic due diligence before entering into an endorsement relationship.

It is equally important that an athlete tries the product and genuinely believes in the merchandise that he/she is being asked to endorse. If a professional athlete enters into a major sneaker contract with Nike, for example, but is photographed in public (or worse playing) wearing a rival company's sneakers, this could have significant adverse financial consequences for the athlete under the endorsement agreement. If an athlete is paid significant money to be the public face of a product, the athlete must believe in it since the athlete will likely become synonymous with that product.

Some words of extreme caution- if an athlete has been approached to endorse any beverage, food or nutritional product, the athlete should refrain from sampling that product until the athlete is completely comfortable that such product does not contain any banned substances under the rules and regulations of that athlete's league or athletic association. There are several independent organizations such as NSF or Informed-Choice that tests products and then certifies that such products do not contain any banned substances. Athletes should insist that products which they are being asked to endorse go through such independent testing and certification before the athlete tries the product.

It is also imperative for an athlete or their representative to do financial due diligence on a company that approaches an athlete for an endorsement and to conduct a full background check on the principals of

the company. If the company is a public company, the athlete's adviser should review the company's recent public filings with the U.S. Securities and Exchange Commission's to ensure the company has sufficient capital to honor its compensation arrangements with the athlete and also to implement its marketing plan. It can be a cause of humiliation to an athlete's reputation to lend his or her name to a company only to then have that company fail. Athletes or their representatives MUST carefully review a company's finances. If a company is financially unstable, a representative might find alternative ways to structure the deal-perhaps with a personal guaranty of a stockholder or money being placed in escrow-so that sufficient funds are available to compensate the athlete and implement the company's marketing plan. Similarly, if an athlete is willing to take a chance to endorse a product for a struggling company, the athlete's representative should be sure to build into the endorsement agreement clear covenants and events of default that would excuse future performance(s) under certain specified circumstances and allow the athlete to, thereafter, endorse competing products.

I have always advocated that athletes should conduct background checks on a company's executive team. Perhaps no athlete took this suggestion more literally than New York Yankee Mariano Rivera. Before agreeing to endorse a beverage product for a client, Mr. Rivera and his agent insisted that the company's CEO and his advisors fly to Tampa, Florida to meet with them face to face. I will never forget the look in Mr. Rivera's eyes when he suddenly peered at the CEO -as if he was an opposing batter in the 9th inning of a one-run game- and asked the CEO: "Tell me all about yourself and why I should endorse your company's product?" ●

For more than 30 years, Ed has negotiated sponsorship and endorsement agreements in transactions involving some of the most iconic athletes, entertainers and brands of our generation including: the 1969 Mets, 1980 Olympic Hockey team, Tiger Woods, Arnold Schwarzenegger, The Cleveland Cavaliers, Derek Jeter, Mariano Rivera, Manchester City Football Club, Mike Tyson, Alex Rodriguez, 1994 New York Rangers, David Wright, Walt "Clyde" Frazier, Larry Bird, Odell Beckham, Jr., Triple Crown Winning Jockey victor Espinoza and countless Hall of Famers in all major sports league. Ed Has also represented Steiner Sports for the past 10 years including Steiner's player agreements and partnership agreements with the New York Yankees, Madison Square Garden, the Boston Red Sox, Notre Dame and Syracuse Universities and the Brooklyn Nets. Ed is also an experienced corporate lawyer who received his JD from Columbia University Law School in 1987. Ed has previously represented numerous public and private companies in complex M&A, financing and other strategic transactions.



*Edward H. Schauder
Partner
Phillips Nizer LLP
(212) 841-1340
eschauder@phillipsnizer.com*

PHILLIPS NIZER LLP