25-1378-cv

United States Court of Appeals

for the

Second Circuit

ISSAMADE ASINGA,

Plaintiff-Appellant,

– v. –

THE GATORADE COMPANY, a division of PepsiCo, Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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I. Jurisdictional Statement

The District Court for the Southern District of New York had jurisdiction over this lawsuit under 28 U.S.C. § 1332, because the parties are citizens of different states and the matter in controversy exceeds $75,000, exclusive of interests and costs. Plaintiff-Appellant Issamade Asinga ("Issam" or "Mr. Asinga") is a resident of Texas. First Amended Complaint ("FAC"), A-13, ¶ 34. Defendant-Appellee The Gatorade Company ("Gatorade/Pepsi") is a business division of PepsiCo, Inc., which is a North Carolina corporation headquartered in Harrison, New York. FAC, A-13, ¶ 35; *see also* Opinion and Order ("Opinion"), A-141, n.4.

Appellate jurisdiction lies with this court pursuant to 28 U.S.C. § 1291, because the appeal is from a final judgment disposing of all claims. *See* Opinion, A-154; Notice of Appeal, A-156; Fed. R. Civ. P. 54. A timely Notice of Appeal was filed on May 27, 2025 (A-156), which was within 30 days of the entry of final judgment on April 28, 2025. Judgment, A-155; Fed. R. App. P. 4.

II. Statement Of Issues Presented For Review

Issue One. Was the District Court incorrect to apply the economic loss doctrine to bar Mr. Asinga's claims for strict product liability, negligence, and negligent misrepresentation, where he alleges that as a result of Defendant-Appellee Gatorade/Pepsi's tortious conduct he ingested a nutritional supplement that was contaminated with a banned substance and which caused immediate

harmful physical changes, rendering him physically incapable of meeting requirements to compete in his sport?

Issue Two. Has Mr. Asinga alleged that he was a "consumer" with standing to bring claims under the Texas Deceptive Trade Practices Act, even though he did not purchase the Gatorade Recovery Gummies with money, when he alleges that Gatorade/Pepsi provided him with the gummies in exchange for marketing opportunities linked to his valuable name, image, and likeness?

Issue Three. Has Mr. Asinga adequately alleged facts supporting his claim for tortious interference with contract, where he alleges that Gatorade/Pepsi was aware of his contractual obligations to keep his body free from banned substances in order to compete in his sport; that Gatorade/Pepsi willfully interfered with that contract by refusing to provide a sealed version of Gatorade Recovery Gummies from the lot it had provided to Mr. Asinga; and that it knew that the consequence of withholding the supplement was that Mr. Asinga could not show that he complied with those contracts and receive their benefits?

Issue Four. Has Mr. Asinga adequately pleaded a claim for intentional infliction of emotional distress, where he alleges that that Gatorade/Pepsi engaged in "extreme and outrageous" conduct by intentionally refusing to provide a sealed supplement from the correct lot for testing because it wanted to preserve its pecuniary interests at the cost of Mr. Asinga's reputation and ability to compete in

his sport; and that losing his good name, his world records, the ability to compete in the Olympics and for his university, and other harms caused him extreme emotional distress?

III. Statement Regarding Oral Argument

Plaintiff-Appellant Issam Asinga requests oral argument. Oral argument will be beneficial because this case involves important issues of law, including whether the economic loss doctrine was appropriately imposed to bar recovery in tort for claims alleging that unwitting ingestion of a banned substance caused detrimental physical changes and led to a failed drug screening.

IV. Statement of the Case

Plaintiff-Appellant Issam Asinga alleges that Defendant-Appellee Gatorade/Pepsi provided him a mislabeled nutritional supplement product which was contaminated with a banned substance and which, when ingested, caused him immediate detrimental physical changes that caused him to fail a drug screening and thereby rendered him physically incapable to compete in his sport. In the decision below, Honorable Cathy Seibel, judge for the District Court for the Southern District of New York, dismissed all of Mr. Asinga's claims under Fed. R. Civ. P. 12(b)(6), holding that he has no recourse for these wrongs under product liability, negligence, consumer protection, or other tort theories. *Asinga v. The Gatorade Company*, 2025 WL 1225212 (S.D.N.Y. April 27, 2025), A-135. In this

appeal, Mr. Asinga asks this Court to overturn that decision, allowing him to proceed to discovery on all of his claims.

A. The Complaint

The following well-pleaded allegations in the First Amended Complaint are relevant to this appeal and must, for purposes of the appeal, be accepted as true. *Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016).

1. Issam Asinga's startling success as a teenage sprinter

In the spring of 2023, eighteen-year-old Issam Asinga was the most talked-about high school sprinter on the planet. FAC, A-8 – A-9, ¶ 1–6; A-13 – A-14, ¶ 38–43. While running as a senior for Montverde Academy in Montverde, Florida, Issam shattered multiple records. FAC, A-13 – A-14, ¶¶ 39, 41–42; A-21, ¶ 83. He had exciting plans for the coming year: he would be a freshman at Texas A&M University, where he had earlier accepted a four-year athletic scholarship to run track, and would compete for his father's country, Suriname, in the 2023 World Athletics Championships and then the 2024 Paris Olympics. FAC, A-10, ¶ 15; A-12, ¶ 31; A-14, ¶ 40; A-34, ¶ 173; A-35, ¶ 179. Though only in high school, Issam had reached a level of competition that required him to contract with the Athletics Integrity Unit ("AIU"), the governing body for his sport, to ensure that his body remained free from banned substances; this was a necessary condition for him to be

allowed to compete on the world stage. *See* FAC, A-10 ¶¶ 13–14; A-16 ¶ 56; A-19 ¶ 73.

2. Gatorade/Pepsi's capitalization upon Issam's reputation and fame

Issam's startling success while only a teenager meant that his name, image, and likeness had become valuable commodities. FAC, A-9, ¶¶ 3–6; A-14, ¶¶ 44–46; A-15, ¶¶ 49, 52. Defendant Gatorade/Pepsi wanted in. FAC, A-14, ¶¶ 44–46. In order to capitalize upon Issam's fame and reputation, it awarded him its National High School Player of the Year Award for Track and Field and created a marketing blitz to accompany the award so that it could link its brand to his name. FAC, A-14 ¶¶ 45–46; A-15 ¶¶ 48–49. As part of this marketing campaign, Gatorade/Pepsi created high-production media content for its Gatorade brand on the day it surprised Issam with the award at his high school, and published the content on a widespread scale. FAC, A-15, ¶ 49. Gatorade/Pepsi then flew Issam, along with twelve other high-school athletic luminaries who also were given the Player of The Year award for their sports, to Los Angeles, California, where it held a glitzy award ceremony and treated them like the celebrities they were quickly becoming. FAC, A-15, ¶¶ 50–51.

At the Player of the Year ceremony, Gatorade/Pepsi presented Issam and the other athletes with customized sports lockers that were decorated with their names and Gatorade's lightning bolt trademark and filled with Gatorade-branded products.

FAC, A-15 – A-16, ¶¶ 51–54. Gatorade/Pepsi's intention in providing this "celebrity swag" was not selfless: it did this to generate buzz around its products by continuing to align its name with Issam's (FAC, A-15, ¶ 49), and to encourage him to purchase more products and become loyal to its brand. FAC, A-15, ¶¶ 51–52. As alleged in the Complaint, "another purpose of these 'gifts' was to turn Issam and the other athletes into walking marketing machines for Gatorade. Gatorade knew that if Issam was seen using its products, others around him would want to purchase them as well." FAC, A-15, ¶ 52. Because these "freebies" were not given selflessly, but instead for Gatorade/Pepsi's gain, the Complaint at times refers to them using quotation marks around the word "gift." *See id.*

3. The defective Gatorade Recovery Gummies and Gatorade/Pepsi's knowing misrepresentation about their "certified" safety

Among the "gifts" Gatorade provided to Issam was a container of a nutritional supplement product called Gatorade Recovery Gummies. FAC, A-16, ¶ 54. The Gatorade Recovery Gummies were marketed as helping athletes recover better from their workouts. FAC, A-16, ¶ 55. Having only months before signed a written commitment with AIU/World Athletics to keep his body free from banned substances, Issam wanted to be careful about what he ingested. FAC, A-19, ¶ 73. But he was reassured for several reasons that the Gatorade Recovery Gummies would be safe. Most importantly, the Gatorade Recovery Gummies bore an express

promise of purity on their label: the National Sanitation Foundation ("NSF") Certified For Sport mark. FAC, A-17, ¶¶ 57–60.

By distributing the Gatorade Recovery Gummies with this mark on their label, Gatorade/Pepsi made an express promise that the Recovery Gummies product lot provided to Issam had undergone the NSF's rigorous post-manufacture product certification process – and that the NSF had confirmed through this process that the product lot which bore the certification had been found to be clear from banned substance contamination. FAC, A-17, ¶¶ 57–58. The purpose of the NSF Certified for Sport designation is to address the known risk that nutritional supplements can become contaminated with banned substances, despite those substances not appearing on their ingredient lists, and to allow professional athletes like Issam to make safe choices when deciding whether to take them. FAC, A-17, ¶ 59. Gatorade/Pepsi desired the NSF Certified For Sport Mark on the Recovery Gummies because it knew that world-class athletes like Issam were subject to rigorous anti-doping requirements, and it wanted to market to such athletes. FAC, A-16, ¶ 56.

In addition to the NSF certification, Issam was further reassured because the Recovery Gummies had been manufactured by Gatorade, which he and those around him considered to be a trustworthy manufacturer; for example, even before he consumed the gummies, Issam's mother texted his then-coach a picture of the bottle's ingredient list to confirm he could eat them, to which his coach replied:

"Gatorade doesn't make products that are against sporting rules." FAC, A-19 ¶¶ 73–75. Assured by the NSF Certified For Sport mark, the ingredient list, and Gatorade's reputation as an experienced manufacturer of sports products, Issam began taking the gummies at the recommended daily dose. FAC, A-17, ¶ 60; A-20, ¶ 76.

In fact, Issam should not have been so confident: Gatorade/Pepsi had misrepresented that the gummies were NSF Certified. FAC, A-18, ¶¶ 62–65. Within weeks of their manufacture, Gatorade/Pepsi received notice that the lot it gave Issam had been mislabeled, and had not been inspected by NSF. FAC, A-28, ¶132, 133. Months before providing the Recovery Gummies to Issam, it had come to recognize that there were problems with the manufacture, distribution, and labeling of the Recovery Gummies, and had taken them off the market. FAC, A-18, ¶ 64; FAC, A-24, ¶ 100 (explaining that Gatorade/Pepsi's agent represented to Issam that there had been "manufacturing issues" with the gummies, causing them to be discontinued).

As it turned out, the Gatorade Recovery Gummies were not only mislabeled with an express promise that they came from a lot which was certified to be free from banned substances: they were, in fact, contaminated with trace amounts of banned performance-enhancing drug known as "cardarine" (also commonly referred to as "GW1516"). FAC, A-18, ¶¶ 65–69; A-21, ¶ 85; A-23, ¶ 94. On July 18, 2023, one month after testing clean for all banned substances during his first-ever routine anti-doping screening (FAC, A-19, ¶ 72) and one week after beginning consumption

of the Gatorade Recovery Gummies at the recommended serving of two gummies per day (FAC, A-20, ¶ 76), Issam provided a random urine sample to the AIU. FAC, A-21, ¶ 78. It was not until weeks later, on August 9, 2023, that Issam would learn that the urine sample he provided on July 18 had tested positive for trillionths of a gram of caradarine metabolites. FAC, A-21, ¶ 85. By the time he learned of this result, Issam had already been subjected to a third random doping screening on July 28, 2023; this third screen, which occurred after Issam had stopped taking the Recovery Gummies, would come back clean of all banned substances, including GW1516. FAC, A-21, ¶¶ 81–82.

After learning on August 9, 2023, that he had tested positive for trace amounts of cardarine, Issam submitted the Recovery Gummies and other items he had ingested prior to the test to a World Anti-Doping Agency-accredited laboratory, Sports Medicine Research and Testing Laboratory or "SMRTL." FAC, A-22, ¶¶ 91–93. Of the products he submitted, only the Gatorade Recovery Gummies were found to contain GW1516. FAC, A-22 – A-23, ¶¶ 92–94. The trace amounts found in the gummies by SMRTL were pharmacokinetically consistent with the trace amounts detected in Issam's positive urine sample (FAC, A-25, ¶ 113), confirming to Issam that the gummies were the source of his failed doping screening.

Nonetheless, under AIU's rules, Issam had not yet cleared his name. His obligations as a World Athletics athlete placed the burden on him to prove to the

AIU, the body charged with prosecuting and investigating his anti-doping rule violation, that his ingestion of GW1516 was unintentional. FAC, A-30, ¶ 147; A-31, ¶ 150. To prove this, Issam was asked to submit a sealed bottle from the *same* lot of Gatorade Recovery Gummies that he ingested. FAC, A-30, ¶ 147. Without proof of contamination in a sealed container from the same product lot, the inference would be drawn that Issam himself had contaminated the gummies before sending them for testing, in order to create an excuse for himself or cover his tracks. FAC, A-35 ¶ 179; A-33 ¶ 171.

4. Gatorade's months-long refusal to provide a sealed supplement for testing

Finding a sealed supplement from the correct lot should not have posed much of an obstacle; after all, Gatorade/Pepsi was required to keep such bottles on hand, in quantities twice what would be necessary to conduct testing to confirm they meet specifications, under FDA regulations. FAC, A-23 – A-24, ¶¶ 99–101; 21 CFR § 111.83. Surprisingly, Gatorade/Pepsi repeatedly represented, both to AIU and also directly to Issam, that it had failed to comply with this regulation and no such bottles were available for testing. FAC, A-23 – A-24, ¶¶ 99–101. In fact, as Issam would learn only too late, Gatorade/Pepsi actually *did* have possession of the sealed supplement he needed for testing, but it was intentionally failing to provide it and misrepresenting to AIU and Issam that it did not exist. FAC, A-11, ¶¶ 21-22; A-12 ¶¶ 25-29; A-23 ¶ 98; A-24 ¶ 101.

Gatorade/Pepsi chose to intentionally mislead AIU and Issam about the existence of a sealed exemplar because it was aware of a high risk - or even certainty - that the sealed supplement would test positive for cardarine; after all, it knew that it had "cut corners" in the production, sale, and distribution of the product; it knew that there were problems and "issues" with their manufacture, distribution and labeling; and it knew – even as of the date that it provided the Recovery Gummies to Issam – that the lot he had been given had never actually been inspected or certified by NSF. FAC, A-18, ¶¶ 63–65; A-28 ¶¶ 131–134. The foregoing, in combination with the fact that Issam's Recovery Gummies had tested positive for trace amounts of GW1516 which were pharmacokinetically consistent with the amounts in his urine, made the conclusion inescapable: the testing of a sealed supplement from the correct lot was likely or certain to show contamination. FAC, A-25 – A-26, ¶ 113, 116. This would strike a blow to Gatorade/Pepsi's reputation and profits, and it acted to protect its own interests by misrepresenting that no sealed bottle from the correct production lot remained to be tested. FAC, A-26, ¶¶ 115–116.

Not only did Gatorade/Pepsi withhold the correct supplement bottle for testing and mislead Issam and the AIU by claiming it did not exist, it also took another affirmative step to fuel the false narrative that his Recovery Gummies could not possibly have been contaminated with GW1516 during manufacture.

Approximately five months after it was first asked to provide a sealed supplement from the correct lot for testing, Gatorade located provided the AIU with an exemplar bottle from a *different* lot of Recovery Gummies. FAC, A-26, ¶ 119. The bottle it chose to provide had come from a lot which, unlike Issam's, had actually been tested and certified by NSF. FAC, A-26 – A-27, ¶¶ 119–121. Gatorade falsely represented that this was the only bottle available for testing and that it was functionally the "same" as the bottle it had given to Issam, even though it came from a different lot. FAC, A-26 ¶ 117; A-27 ¶ 127. Gatorade knew that the NSF-tested bottle would test clean, and submitted it in order to further fuel the false narrative that Issam Asinga had been given "clean" gummies and tampered them on his own. FAC, A-29, ¶ 136.

5. Gatorade/Pepsi's conduct and misrepresentations result in Issam's ban

Unfortunately for Issam, Gatorade's bait-and-switch worked: when the bottle from a different, NSF-certified lot turned up negative for GW1516, the AIU formally instituted proceedings against Issam. FAC, A-27, ¶¶ 127–128. During the prosecution, Gatorade/Pepsi worked directly with the AIU to help it make its case against Issam, such as by providing AIU with dubious "proof" that the Recovery Gummies had been pristinely manufactured and therefore could not have become contaminated. FAC, A-29, ¶¶ 137–140. Without "gold standard" evidence of contamination in the sealed bottle from the same lot, Issam was found to have not

met his burden to establish his innocence, and he was handed a four-year ban from sport. FAC, A-30 – A-31, ¶¶ 147–148.

Issam's ban is now on appeal *de novo* with the Court of Arbitration for Sport (the Supreme Court for Sport), based in Switzerland, (FAC, A-32, ¶ 155) and as of the filing of this Brief, he awaits a decision on that appeal. Meanwhile, he has been stripped of his records, he has been unable to compete or even train with his team since August 9, 2023, and he has lost his scholarship and the opportunity to run for Suriname in World Athletics championships and in the Paris Olympics. FAC, A-34, ¶ 172; A-35 ¶ 179. These are opportunities he will never get back.

The saga surrounding Gatorade/Pepsi's conduct did not end with Issam's ban. In fact, after the decision banning Issam was formally entered (and approximately seven months after Gatorade/Pepsi first alleged that no representative sample was available for testing purposes) Gatorade surprised Issam and the AIU when it claimed, without further explanation, that it had suddenly located a sealed bottle of Gatorade Recovery Gummies manufactured in the same lot as the consumed by Issam. FAC, A-43, ¶ 232. When it submitted this bottle, Gatorade/Pepsi knew that no cardarine would be detectible even if it was at origination identical to Mr. Asinga's bottle. FAC, A-44 ¶ 233. Gatorade/Pepsi was motivated to provide this bottle for testing at this late stage because it wanted to remedy bad press it had been receiving; after all, NSF had now published a violation notice informing the public

that the Recovery Gummies had been falsely labeled, and Issam's ban had brought attention to the situation. FAC, A-32, ¶ 158; A-43 – A-44, ¶¶ 232–235; FAC Ex. 2 (NSF Public Notice), A-49.

Issam and his counsel soon discovered why Gatorade/Pepsi had been confident: the cardarine was not stable and had become undetectable over time. FAC, A-33, ¶ 169. When the correct lot submitted by Gatorade/Pepsi did not reveal contamination with GW1516 in June of 2024, Isam was shocked. But he did not stop searching for answers. Issam and his team then requested that SMRTL re-test the Recovery Gummies which had been submitted by Issam to the lab nine months earlier and had remained stored at the laboratory since having tested positive for cardarine; when re-tested, the previously positive Recovery Gummies, like those submitted by Gatorade in June of 2024, no longer demonstrated a detectable amount of cardarine. FAC, A-33, ¶¶ 166–168.

Far from exonerating Gatorade, the additional testing conducted by SMRTL in July 2024 proved that Gatorade's months-long refusal to provide an exemplar had spoliated the evidence and deprived Issam of his only opportunity to meet the "gold standard" requirement of proving contamination in the same supplement lot, robbing him of the scientific evidence which would have established his innocence. FAC, A-33, ¶ 170. As a direct result of Gatorade/Pepsi's conduct, the AIU inferred that Issam had tampered with the Recovery Gummies himself before submitting them to

SMRTL for testing, and he was handed a four-year ban from competition in his sport. FAC, A-33, ¶ 171.

B. Gatorade/Pepsi's Motion to Dismiss

Gatorade/Pepsi moved to dismiss Issam's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Gatorade/Pepsi Motion to Dismiss ("Motion"), A-51 – A-84. Its primary argument was that, in alleging that he had ingested a contaminated supplement which caused him to fail an anti-doping screening but did not cause cancer or another ailment, Mr. Asinga did not allege a physical injury, and therefore all his product liability claims, whether in negligence or strict liability, were barred by the "economic loss doctrine." *See* Motion, A-51, A-61. In addition to these grounds, Gatorade/Pepsi argued that Mr. Asinga failed to adequately plead legally sufficient bases for all of his other claims, including tortious interference with contract (Motion, A-61 – A-63, at 9-11), intentional infliction of emotional distress (Motion, A-63 – A-65, at 11-13), violations of the Texas Deceptive Trade Practices Act (Motion, A-65 – A-69, at 13-17), and negligent misrepresentation (Motion, A-75 – A-77, at 23-25).

Mr. Asinga opposed all aspects of the Motion to Dismiss (Plaintiff's Opposition to Motion to Dismiss ("Opposition"), A-85 – A-113) and requested oral argument. *Id.*; ECF Docket Report, A-6 at Dkt. 36.

C. The District Court's Dismissal of All Claims in the Lawsuit

On April 28, 2025, without the benefit of oral argument, the Court granted Gatorade/Pepsi's motion entirely, dismissing all of Plaintiff's claims. ECF Docket Report, A-6, at Dkt. 37, 38. The Court ruled as follows: *first*, that Mr. Asinga could not bring tort claims against Pepsi/Gatorade for strict product liability, negligence, and negligent misrepresentation because he had not alleged a physical injury and such claims were therefore barred by the economic loss doctrine (A-142); *second*, that Mr. Asinga had no standing under Texas's Consumer Fraud and Deceptive Trade Practices Act because he alleged that was given the product in exchange for access to his name, image and likeness, but not in exchange for money or other consideration typical to a traditional consumer transaction (A-146); *third*, that Mr. Asinga could not state a claim for tortious interference with contract because he did not allege the existence of a contract, that Gatorade's conduct prevented him from fulfilling a contract, or that Gatorade's failures were intentional as opposed to merely negligent (A-148); and *fourth*, that Mr. Asinga failed to plausibly allege in support of his claim for intentional infliction of emotional distress that Gatorade/Pepsi's conduct in failing to provide the sealed supplement bottle over the course of several months was extreme and outrageous, that Gatorade/Pepsi acted with intent to cause him severe emotional distress, or that he actually did suffer such distress. Opinion,

A-150. Finally, the court considered *sua sponte* whether to grant leave to amend and denied it. A-154.

Plaintiff filed a timely Notice of Appeal on May 27, 2025. A-6 at Dkt. 39.

V. Summary of the Arguments

This lawsuit arises out of a physical injury to Mr. Asinga's body – the unwanted ingestion of a banned substance through a contaminated product – from which physical, dignitary, emotional, and economic harms flowed. As such, Mr. Asinga's allegations fit snugly within the bounds of strict liability and negligence torts. In fact, Mr. Asinga's tort-based claims for product liability and negligence are not just *appropriate* vehicles to pursue the wrongs he suffered, but they are quite possibly the m*ost precise and accurate* theories available to him. Furthermore, the economic loss doctrine should not have been applied to bar these claims, because his are typical personal injury claims which are not "contract-like" in nature, and because the policy-based justifications for the economic loss doctrine do not apply here. The reliance on the economic loss doctrine to dismiss Mr. Asinga's claims for strict product liability and negligence was particularly inappropriate where Mr. Asinga was left no other avenue (and no better avenue exists) to pursue redress for his wrongs.

The District Court was also incorrect to dismiss Mr. Asinga's claims under the Texas Consumer Fraud and Deceptive Trade Practices Act on the ground that

he had no standing. Mr. Asinga adequately pleads he is a "consumer" with standing under the act because he alleges that he was provided the Recovery Gummies in a commercial transaction in which Gatorade/Pepsi traded the "freebies" in exchange for access to Mr. Asinga's valuable name, image, and likeness.

The District Court erred in dismissing Mr. Asinga's claim for tortious interference with contract, because he adequately alleged the existence of contracts of which Gatorade/Pepsi was aware, and alleged that by withholding the sealed version of the Gatorade Recovery Gummies from the correct lot and preventing its testing, Gatorade/Pepsi took action which it knew would cause him to continue to be unable to comply with his contracts and receive their benefits.

Finally, the District Court was wrong to dismiss Mr. Asinga's claim for intentional infliction of emotional distress. A reasonable jury could conclude, based on the Complaint's specific and plausible allegations and the inferences that can be drawn therefrom, that Gatorade/Pepsi's conduct was extreme and outrageous when, after first capitalizing on Mr. Asinga's fame and good character for marketing reasons, it then chose to prioritize its own profits and reputation over his future, refusing to turn over a sealed version of the Recovery Gummies from the correct lot for testing even though it knew this would have devastating consequences for Issam. Likewise, the District Court was wrong to conclude, at

this early stage, that Mr. Asinga has not plausibly pleaded that he actually suffered severe emotional distress. It is plausible to infer that he suffered such distress as a result of Gatorade/Pepsi's conduct, which led to Mr. Asinga being formally accused and adjudged on the world stage to have been a liar and a cheater, robbed him of the opportunity to compete in the Paris Olympics and to compete and train with his team at the Texas A&M University, stripped him of his world records, and caused him to lose his scholarship.

VI. Argument

A. Standard of Review

This Court reviews *de novo* the grant of a Rule 12(b)(6) motion to dismiss. *Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016). In evaluating such a motion, the court is tasked with determining whether a complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim will be determined to have "facial plausibility" if it includes enough factual content to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). In this analysis, "the only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor, in deciding whether the complaint alleges sufficient facts to survive." *Doe v. Columbia Univ.*, 831 F.3d at

48 (internal citations omitted). So, too, must all ambiguities be resolved in the plaintiff's favor. *Id.*

B. Choice of Law

As this case was filed in the Southern District of New York under diversity jurisdiction, the choice of law rules of the forum state, New York, should be applied. *See In Re Zyprexa Prods. Liabl. Litig*., 489 F. Supp. 2d 230, 264 (E.D.N.Y 2007). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. (Stolarz – New Jersey Mfrs. Inc. Co.)*, 613 N.E.2d 936, 937 (1993). A court is forced to make a determination of which state's laws apply only when such a conflict exists. *See id.* In situations where a plaintiff's claims invoke conduct-regulating rules, such as a manufacturer's duties towards consumers of its products, "the law of the jurisdiction where the [allegedly tortious acts] occurred" is normally applied, "because that jurisdiction has the greatest interest in regulating behavior within its borders." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 50 (2d Cir. 2013) (internal citations omitted).

Gatorade/Pepsi filed its Motion to Dismiss with reference to only New York's laws. In opposing the motion, Mr. Asinga asserted that there was no significant conflict among applicable laws as to relevant issues but that, to the extent such a

conflict existed, New York law would not apply to this dispute. Opposition, A-94; A-95 n.2. That is because the events giving rise to this developed when he ingested the Recovery Gummies daily after his team workouts in Montverde, Florida and his body chemistry was changed, and concluded in Texas, his place of residence and where Gatorade's obstructive conduct caused the majority of harms to befall him. *Id.*, A-95 n.2. Thus, under New York's choice of law rules, either the laws of Florida or Texas – the place of the detrimental reliance and physical impact, or the place of residence and harm, respectively – would apply. *Id*.

In this Court, Mr. Asinga maintains that choice of law questions are not determinative and need not be evaluated, because no significant conflicts exist; in other words, Mr. Asinga's position here, as it was below, is that his claims are viable under the laws of New York just as they are under the laws of Texas and Florida, and that it is therefore unnecessary to engage in the fact-intensive choice of law determination at this stage. *See* Opposition, A-94; A-95 n.2.; *see also Bristol-Myers Squibb Co. v. Matrix Lab'ys Ltd.*, 655 Fed. App'x. 9, 13 (2d Cir. 2016) (often, "choice-of-law determinations are fact-intensive inquiries that would be premature to resolve at the motion-to-dismiss stage"). As Mr. Asinga also argued below, however, to the extent there *is* a conflict among the laws, the law of either Florida or Texas would apply to the product liability and negligence claims, and the law of Texas would apply to the claims for tortious interference with contract, intentional

infliction of emotional distress, and consumer protection. Opposition, A-94; A-95 n.2.

In reaching its decision below, the District Court appears to have mistaken Mr. Asinga's argument regarding the non-existence of a conflict as a concession that if his claims do not survive under New York's laws, the inquiry can be over. *See* Opinion, A-141 ("While Plaintiff argues that a full choice of law analysis may result in other states' laws governing several of his claims, both parties agree that the outcome of the instant motion would not change regardless of what state's law applies."). That was not Mr. Asinga's intended position below, nor is it here. Instead, Mr. Asinga asks this Court to recognize that, to the extent it concludes that any claim is not viable under New York law, such an interpretation would indeed raise a significant conflict with Mr. Asinga's interpretation of the laws of Texas and Florida. In other words, while it continues to be Mr. Asinga's position that his claims survive no matter which state's laws apply, it would be incorrect to affirm the dismissal under the law of New York, a place with no significant contacts to this dispute, without also examining the cited authorities from Florida and Texas.

C. Mr. Asinga Plausibly Pleads Claims For Product Liability, Negligence, And Negligent Misrepresentation, And The Economic Loss Doctrine Does Not Apply

Issam Asinga suffered an unwanted bodily impact and invasion due to Gatorade/Pepsi's distribution of a nutritional supplement which was contaminated

with a banned substance, and this impact caused detrimental physical changes which were injurious. Gatorade/Pepsi's false promise that the Recovery Gummies were "NSF Certified Sport" was an express recognition of the very risk which befell Issam, and a demonstration of the foreseeability of his harm. As described further below, Mr. Asinga's allegations fit precisely within the contours of traditional product liability claims, and the District Court was wrong to apply the economic loss doctrine to bar him from pursuing them in tort. That decision worked a particularly serious injustice in this case, because it left Mr. Asinga with no other avenues to pursue redress for the wrongs he alleges.

1. Gatorade/Pepsi committed tortious conduct in distributing the mislabeled, tainted Recovery Gummies

In alleging that the Gatorade Recovery Gummies had become tainted with GW1516 during manufacture due to "poor ingredient sourcing or other poor manufacturing processes" (FAC, A-18 ¶ 65), Mr. Asinga makes plausible, straightforward, and traditional allegations of product defect. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (explaining that a product may be defective when it contains "harmful ingredients" or ingredients "not characteristic of the product itself either as to presence or quantity."); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 844 (Tex. 2000) ("A product has a manufacturing defect if its construction or quality deviates from the specifications or planned output in a way that is unreasonably dangerous."); *Merino v. Ethicon Inc.*, 536 F. Supp. 3d 1271,

1281 (S.D. Fla. 2021). Mr. Asinga's claims invoke one of the oldest recognized duties in product liability law: the "high degree of responsibility" imposed upon those engaged in the sale of products intended for human consumption toward the consumers of those products. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (explaining that the origins of strict product liability lie in cases holding sellers "to a high degree of responsibility for their products" where they have "supplied 'corrupt' food and drink.").

As for Mr. Asinga's claim for negligent misrepresentation in conjunction with the distribution of the Gatorade Recovery Gummies, he has plausibly and specifically alleged that by labeling the Recovery Gummies with the NSF Certified For Sport mark, Gatorade/Pepsi negligently, recklessly, or knowingly made an express and affirmative promise that the product had been lot-tested and was confirmed to be free from banned substances, and that it knew this promise was false because the Recovery Gummies were never lot-tested and NSF Certified for Sport. FAC, A-16 ¶ 56; A-17 ¶ 59; A-28 ¶133. The express purpose of making that representation was to entice consumers like Issam, who are subject to anti-doping testing requirements, to use the product. *Id*. Issam relied on the promise of the NSF Certified for Sport mark when he took the gummies (FAC, A-20 ¶ 76), and he was harmed because they actually posed the very risk they were promised to be free from, and as a result they detrimentally changed his body. FAC, A-21 ¶

80. This, too, falls squarely within the bounds of well-accepted product liability precedents, which hold that manufacturers are responsible in tort for having made a false statement as to the quality or character of their products which poses a risk of physical injury. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965) (stating that a seller who, by "advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel … is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation," even where the consumer has not bought the chattel or entered into contractual relation with the seller); *Crocker v. Winthrop Lab'ys, Div. of Sterling Drug, Inc.*, 514 S.W.2d 429, 431 (Tex. 1974) (affirming Section 402B liability where a drug manufacturer "positively and specifically represents its product to be free and safe" from the risk ultimately posed to the plaintiff); *Albertson v. Richardson-Merrell, Inc.*, 441 So.2d 1146, 1150 (Fla. Dist. Ct. App. 1983).

Mr. Asinga's allegations also fall squarely within the framework of other concepts of tort liability which hold all persons to a duty to refrain from making negligent representations causing a risk of physical harm to another. RESTATEMENT (SECOND) OF TORTS § 311 (1965) ("One who negligently gives false information to another... for physical harm caused by action taken by the other in reasonable reliance upon such information[.]"). The tort of negligent misrepresentation

causing risk of physical harm is recognized in Texas, where Issam's damages occurred; in Florida, where he took the gummies; and even in California, where the initial negligent misrepresentation was made to him. *See Edco Production, Inc. V. Hernandez*, 794 S.W.2d 69, 76–77 (Tex. Ct. App. 1990); *Hill v. Celebrity Cruises, Inc.*, No. 09-23815-CIV, 2011 WL 5360247, at *3 (S.D. Fla. Nov. 7, 2011); *Randi W. v. Livingston Union Sch. Dist*., 48 Cal. Rptr. 2d 378, 386 (Cal. Ct. App.). It is also recognized in New York, although New York's law would not apply to these claims. *Brown v. Neff*, 603 N.Y.S.2d 707, 708–09 (N.Y. Sup. Ct. 1993).

2. Mr. Asinga suffered injury when he ingested the cardarine-tainted Recovery Gummies

Gatorade/Pepsi argued in the District Court that Mr. Asinga did not suffer an injury when he ingested cardarine-tainted Recovery Gummies that poisoned his body and made him unable to compete in his sport. Motion, A-67. Gatorade/Pepsi's own conduct belies the disingenuity of this argument; after all, Pepsi/Gatorade acknowledged this exact risk to the physical integrity of athletes like Issam when it chose to mark the Recovery Gummies as NSF Certified For Sport, an accreditation which is specifically addressed the recognized risk that nutritional supplements could be contaminated with banned substances during manufacture and put athletes at risk of losing their careers. FAC, A-9 ¶ 8. But even setting that irony aside, under longstanding legal precedent and indeed blackletter legal definitions, Mr. Asinga has

clearly alleged that he suffered a personal injury as a result of Gatorade/Pepsi's tortious conduct.

The term "injury" means the "the invasion of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS § 7(1) (1965). A "bodily injury" occurs when such an invasion occurs to the human body. *Injury*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "bodily injury" as "physical damage to a person's body."). Here, the Complaint alleges that ingesting the Recovery Gummies "fundamentally altered" Issam's body (FAC, A-21 ¶ 80) and "caused immediate physical harm and change" to it. FAC, A-21, ¶ 77. It goes on to specify that consuming the Recovery Gummies "contaminated [Issam's] blood, organs, and urine with an illegal banned substance that resulted in his physical inability to meet a threshold qualification required of a world-class runner: a body free of banned substances." FAC, A-21, ¶ 77. Thus, Mr. Asinga has plausibly and specifically alleged a quintessential bodily injury: his unwanted ingestion of a banned drug and the subsequent poisoning of his body's chemistry with that drug, causing him to experience adverse physiological effects that rendered him unable to compete in his sport. FAC, A-21 ¶¶ 80, 85.

This Court's recent decision in *Horn v. Med. Marijuana, Inc.*, 80 F.4th 130, 133 (2d Cir. 2023), *cert. granted,* 144 S. Ct. 1454 (2024), and *aff'd and remanded*, 145 S. Ct. 931 (2025), may serve as a useful, if non-dispositive, foil to this one. In that case, this Court described a failed drug screening resulting from unintentional

ingestion of a banned substance as an "antecedent personal injury" – even where the plaintiff himself characterized it as a purely economic one. *Id.* at 135.

In *Horn,* the plaintiff had prioritized RICO claims, seeking to describe his injuries from ingesting a supplement that was tainted with THC and subsequent failure to pass an employment-related drug screening as solely "economic" damages in order to conform his allegations to a RICO claim. *See Horn v. Med. Marijuana, Inc*., 383 F. Supp. 3d 114, 134 (W.D.N.Y. 2019).

Given the plaintiff's pleading choices, the arguments of the parties, and the procedural history of *Horn,* neither the Second Circuit nor the Supreme Court was squarely presented with the opportunity to decide whether or not Mr. Horn had stated a physical injury redressable in strict product liability or tort; however, of significance here, both courts assumed for the purposes of making a decision that the unintentional ingestion of a banned substance was an "antecedent personal injury." *Horn*, 80 F. 4th at 133 n.2; *Horn*, 145 S. Ct. at 938; *and cf. Horn*, 145 S. Ct. at 948 (J. Thomas, dissenting) ("whether economic losses flowing from personal injuries are *injuries* to business or property for purposes of civil RICO, or merely *damages"* is a question that "necessarily assumes the existence of a personal injury as the starting point."). Ultimately, this Court concluded (and the Supreme Court affirmed) that a plaintiff may bring RICO claims even if he has suffered a physical

injury from which other harms flowed. *Horn*, 80 F.4th at 143; *Horn*, 145 S. Ct. at 938.

Here, Mr. Asinga chose to frame his case in terms of the legal theories which are most befitting of what occurred, and as the "master of his complaint," he cannot be faulted for choosing to pursue traditional theories of tort liability instead of reaching to allege a pattern of racketeering activity. See *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913) (Holmes, J.) ("the party who brings a suit is master to decide what law he will rely upon"). Iny any case, the *Horn* decisions are by no means inconsistent with Mr. Asinga's claim in this lawsuit, and if anything would support them. In fact, this Court's ruling in *Horn* appears to embrace the fundamental tenet that lost earnings flowing from a detrimental bodily injury are inherently "derivative of [] a personal injury." *Horn*, 80 F.4th at 133 n.2.

3. Mr. Asinga suffered harm when the cardarine-tainted Recovery Gummies caused detrimental physical changes

Having established that Gatorade/Pepsi committed tortious conduct (the distribution of a product meant for human consumption which was tainted, unexpectedly and contrary to express promises, with a banned substance) and that this tortious conduct led to Mr. Asinga's injury (the unconsented-to invasion of his physical body with that banned substance), the next question must be whether Mr. Asinga's injury led to actual *harm*. The answer to that question is a definitive "yes."

The word "harm" is used in tort law "to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause." RESTATEMENT (SECOND) OF TORTS § 7(2) (1965). This definition includes not only those harms resulting from detrimental "alteration or change in [plaintiff's] person," but "also to the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests." *Id.* at cmt. b. This definition is a subjective one, in that it takes into account the individual characteristics of any given plaintiff to determine whether, as to that person, the injurious conduct was detrimental. *Id.* ("Acts or conditions which affect the personal tastes, likes, or dislikes of a person may be either beneficial to him, or detrimental, or of no consequence . . . In so far as these acts or conditions are detrimental to him, he suffers harm."). Importantly, harm is not defined with respect to its severity (a test which would surely be unworkable) but merely based upon whether it caused any detriment to the plaintiff seeking redress. *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 15 cmt. a (1965) (explaining that there is "impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm."); RESTATEMENT (THIRD) OF TORTS: Phys. & Emot. Harm § 4 cmt. (2010) ("[A]ny level of physical impairment is sufficient for liability; no

minimum amount of physical harm is required. Thus, any detrimental change in the physical condition of a person's body or property counts as a harmful impairment; there is no requirement that the detriment be major.").

Outside of the legal treatises, relevant case law also supports the blackletter principle that bodily injury which causes a person detrimental changes is a redressable harm. The Supreme Court of Florida has explained that legal precedents "clearly demonstrate … that an individual who sustains an injury due to the wrongful conduct of another—regardless of the particular level of physical symptoms or impairment—may maintain a cause of action against the person or entity that allegedly inflicted the injury if injury has occurred." *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 128–29 (Fla. 2011). In *Cavitt v. Jetton's Greenway Plaza Cafeteria*, 563 S.W.2d 319 (Tex. App. 1978), where a plaintiff found a roach in her food at a restaurant and subsequently suffered from nausea, embarrassment, and difficulty eating in public, the Texas Court of Appeals explained that this constituted a physical injury as a matter of law. *Id*. at 324, 322 ("a person is injured if he receives damage or harm to the physical structure of his body.").

Even setting aside the fact that Mr. Asinga clearly alleges a physical injury in the form of a toxic substance having entered his body and having changed his physical makeup for the worse, in Texas, Florida, and New York it has long been the case that a plaintiff can recover in tort where there has been no physical injury

at all, so long as there has been a bodily impact such as the ingestion of a substance. For example, the Supreme Court of Florida has explained that "a plaintiff may recover for emotional injuries caused by the consumption of a contaminated food or beverage despite the lack of additional physical injury." *Hagan v. Coca-Cola Bottling Co*., 804 So.2d 1234, 1240 (Fla. 2001) (allowing recovery for plaintiff's fear of its contracting AIDS after drinking from a bottle later observed to contain a used condom); *see also Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (Fla. 2007) (stating that there are only "rather slight requirements" necessary for a plaintiff to prove impact warranting recovery for emotional injury); *Cavitt,* 563 S.W.2d 319. And even in New York (whose law would not apply, but which nonetheless is not contradictory), an appellate court held that a plaintiff could recover for emotional injuries where she suffered the mild "physical impact" of having been "struck by a blast of air filled with glass and wooden splinters" – and expressly held that "it is immaterial that her actual injuries resulting from the impact were…relatively minor." *Sawyer v. Dougherty*, 144 N.Y.S.2d 746, 747 (N.Y. App. Div. 1955).

The District Court's conclusion that Mr. Asinga has merely alleged "physical change" without "physical injury" disregards these well-established principles. Instead, the District Court drew support from precedents which are neither applicable or supportive in this context. For example, the District Court relied

upon a footnote to a comment in a tentative draft of a Restatement section on Medical Monitoring for the proposition that "the mere existence of subcellular changes to, or presence of toxins in, the plaintiff's body traditionally do not qualify as compensable injuries." Opinion, A-143, citing RESTATEMENT (THIRD) OF TORTS: Miscellaneous Provisions § ___. Medical Monitoring Reporters' Note cmt. b n.1 (Am. L. Inst., Tentative Draft No. 2, 2023). As a preliminary matter, it would require factual finding outside the Complaint (and likely reliant on expert testimony) to conclude that Mr. Asinga experienced only "subcellular changes" or merely the "presence of toxins" without any harm, as opposed to, as he alleges, an "immediate physical harm and change" (FAC, A-21, ¶ 77) which "fundamentally altered" his body (FAC, A-21 ¶ 80). Even setting this problem aside, however, the citation does not support exclusion of Mr. Asinga's claims here.

There are three reasons why the District Court's reference to the tentative draft section on Medical Monitoring does not support exclusion of Mr. Asinga's tort claims. First, the tentative draft actually endorses (and even describes as "long-established") the understanding of injury that Mr. Asinga himself proposes, defining the term to mean "the invasion of any legally protected interest of another." RESTATEMENT (THIRD) OF TORTS: Miscellaneous Provisions §___at cmt. b. Second, the tentative draft would go much farther than Mr. Asinga asks or his case requires, allowing for the redressability of tortious conduct leading to physical

changes without present harm under certain circumstances, "even absent manifestation of present bodily harm[.]" *Id*. Third, the commentary quoted by the District Court, like the cases on which it relied for the same point, involved situations in which plaintiffs had alleged or established only that they had experienced minute physical changes but no present detrimental symptoms. *Id.*; *see also Gordon v. Hain Celestial Grp., Inc.*, No. 16-CV-6526 (KBF), 2017 WL 213815, at *3 (S.D.N.Y. Jan. 18, 2017) (cited at Opinion, A-143, at 9) (putative class representative alleged that a product contained a substance that *could* cause harm, not that it *had* done so, and only sought damages for purchasing something he would not have bought otherwise); *In re Chantix (Varenicline) Mktg., Sales Pracs. & Prods. Liab. Liti*g. (No. II), 735 F. Supp. 3d 352, 375, 405–06 (S.D.N.Y. 2024) (cited at Opinion, A-143) (plaintiffs' only alleged detrimental injury was having paid for a contaminated product they would not have purchased had they known of contamination); *Harris v. Pfizer Inc*., 586 F. Supp. 3d 231, 239 (S.D.N.Y. 2022) (noting that if plaintiffs had alleged *either* "emotional or physical" injury from taking defendant's drug, they could bring a product liability tort action under state law, but they had alleged neither).

Mr. Asinga's situation is fundamentally different from cases where no detrimental harms were alleged. As an athlete who was subject to strict anti-doping requirements and random drug screenings, the physical changes which he

experienced after ingesting the tainted Recovery Gummies did have a detrimental effect - indeed, a dramatically harmful one. FAC, A-20, ¶ 77. While the same ingestion might have caused different harms to a different plaintiff under different circumstances – or possibly even no harm at all – it did cause harm to Issam. *Id*. The District Court was wrong to conclude otherwise.

4. Mr. Asinga can recover for economic damages and personal suffering flowing from his damaging ingestion of cardarine

Because Mr. Asinga alleges that he suffered an invasion of a legally protected interest which caused detrimental harm and which is redressable under the tort theories of strict product liability and negligence, all of the losses which flowed from that injury are recoverable in tort. These include the pain and suffering caused by being seen by the world as a liar and a cheat and by missing the Olympics and other competitions, as well as pecuniary losses such as lost earning capacity from "name, image, and likeness" deals and, of course, his lost scholarship to Texas A&M University. *See Straus v. Cont'l Airlines, Inc.*, 67 S.W.3d 428, 435 (Tex. App. 2002) (loss of past and future earning capacity is a recoverable damage in a personal injury case); *Estrada v. Mercy Hosp., Inc.*, 121 So. 3d 51, 55 (Fla. Dist. Ct. App. 2013) (similar); RESTATEMENT (THIRD) OF TORTS: Prod. Liab. § 21 (1998) ("Loss of earnings and reductions in earning capacity are common forms of economic loss resulting from harm to the plaintiff's person[.]").

As discussed below, this is so whether or not such harms can be described as "economic."

5. The economic loss doctrine has no bearing on Mr. Asinga's claims arising out of detrimental physical changes caused by his unwanted ingestion of cardarine

Having held that Mr. Asinga "alleged no cognizable injury," the District Court dismissed his claims for strict product liability, negligence, and negligent misrepresentation under the economic loss doctrine. Opinion, A-143. As described above, this resulted from an erroneous understanding of the legal definitions of "injury" and "harm." As described below, this also resulted from an erroneous understanding of the economic loss doctrine itself. Here, there is no justification for imposing the economic loss doctrine to bar Mr. Asinga's claims, which do not allege that Gatorade/Pepsi failed to provide him with the bargained-for value of the Recovery Gummies, but rather that the Recovery Gummies contained a hidden danger outside of the reasonable expectations of a user and which caused him physical harm and resulting injury. The Court was wrong to impose the doctrine and dismiss his claims.

The economic loss rule prevents plaintiffs from recovering in tort for claims arising merely out of "disappointed economic expectations" arising from a consumer transaction or resulting from a breach of contract. *See Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 401 (Fla. 2013); *Lamar*

Homes, Inc. v. Mid–Continent Cas. Co., 242 S.W.3d 1, 12 (Tex. 2007). The doctrine has been applied to bar recovery in tort in two types of situations: 1) where a defective product "suffered loss because the defective product simply malfunctioned or self-destructed;" and 2) where a plaintiff suffered loss which did not flow from damage to the plaintiff's person or other property. RESTATEMENT (THIRD) OF TORTS: Product Liability § 21 cmt. d.; *see also Equistar Chemicals, L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007) (stating that the doctrine "applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself") (internal citation omitted); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 788 F. Supp. 1203, 1205 (S.D. Fla. 1992) (explaining that the rule serves to bar only those claims which seek remedy for harm "to the product itself, absent personal injury or damage to other property").

The economic loss doctrine is a policy-driven rule which, in the product liability context, "developed as a way of enforcing the dictates of privity in product liability law and preventing tort remedies from eliminating the customary limitations involved in cases addressing the sale of goods." *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 16 (2d Cir. 2000). It is a recognition that products liability law "lies at the boundary between tort and contract" and that "some categories of loss. . . are more appropriately assigned to contract law and the remedies set forth in… the Uniform Commercial Code." RESTATEMENT (THIRD)

OF TORTS: Prod. Liab. § 21, cmt. a (1998). As such, it serves "to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided for by warranty law." *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*., 891 So. 2d 532, 538 (Fla. 2004).

Inevitably, the question of whether tort claims are barred under the economic loss doctrine requires fact-specific inquiry in combination with a policy-driven analysis. *See* RESTATEMENT (THIRD) OF TORTS: Prod. Liab. § 21 cmt. d (1998) (discussing policy considerations which underlie the doctrine). In this analysis, courts frequently consider whether the plaintiff was fully compensated for his injuries under other legal theories, whether allowing tort recovery would lead to an unlimited proliferation of claims, and whether or not it makes sense, under the circumstances, to impose the deterrent benefits of tort law duties to increase safety. *Id.* For example, in *East River Steam Ship Corporation*, the Supreme Court held that the economic loss doctrine would bar claims which merely target harms caused by "nonworking product" because, under such circumstances, "[t]he tort concern with safety is reduced when an injury is only to the product itself," and it also noted that imposition of tort duties was inappropriate because the disappointed purchaser was "sufficiently protect[ed]" under warranty law. *E. River S.S. Corp. v. Transamerica Delaval, Inc*., 476 U.S. 858, 871, 873 (1986). Likewise, in *Hydro Investors,* this Court concluded that the economic loss doctrine should not be

imposed to bar negligence claims involving breach of professional duties, despite the existence of a contract between the parties, because the plaintiff sought damages beyond those caused by the breach of contract. *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 17–18 (2d Cir. 2000). And in *Saratoga Fishing Co. v. J.M. Martinac & Co*., 520 U.S. 875, 880 (1997), the Supreme Court rejected the over-expansion of the doctrine where it doing so would create "a tort damage immunity beyond that set by any relevant tort precedent," and reaffirmed the importance of imposing tort duties in cases where losses are foreseeable in order "to provide appropriate safe-product incentives[.]" *Id.*

While it is true that the economic loss doctrine can apply in the product liability context "even when there is no contract at all between the parties" (Opinion, A-145, at 11 (quoting *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 863 F. Supp. 2d 288, 303 (S.D.N.Y. 2012)), that exception does not apply where a plaintiff's injuries cannot be adequately protected under contract, warranty, or other commercial theories. The question in analyzing whether the doctrine applies must, therefore, focus on whether or not the claimed damages are "essentially contractual in nature" as opposed to "tort-like," and whether the risk of the plaintiff's harm could have been negotiated by the parties, such as "reflected in the purchase price, UCC warranties or insurance[.]" *Hydro Invs., Inc.*, 227 F.3d at 16–17. Here, Mr. Asinga's allegations that Gatorade/Pepsi distributed a contaminated product which caused

him detrimental physical harm are unequivocally "tort-like" and not "contractual in nature."

Importantly, Mr. Asinga is not alleging that the Recovery Gummies failed to live up to their promise of helping him recover from workouts and thus failed to live up to his commercial expectations; rather, he is alleging that Recovery Gummies contained a hidden danger that caused him physical injury from which other harms flowed. Unlike the *King County* case cited by the District Court (Opinion, A-145, citing *King Cnty Wash.,* 863 F. Supp. 2d at 302), there is no need here to undertake a complicated analysis as to whether a new or unexpected tort duty should be imposed. After all, the duty of food manufacturers to ensure that their products remain free from contamination or other corruption is nearly ancient, recognized since the thirteenth century. *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. b (1965) (explaining that enhanced duties of care have been imposed on food manufacturers since 1266).

Likewise, none of the policy-based considerations that underly the economic loss doctrine warrant its application here. In this case, where Mr. Asinga invokes the long-recognized duty of food manufacturers to provide safe products for human consumption, the benefit and necessity tort of law's deterrent function evident and well-established. What is more, there can be no question that Mr. Asinga's injury was foreseeable to Gatorade/Pepsi, which contemplated the very risk that befell Mr.

Asinga (failing a drug screening due contamination of a nutritional supplement product), and capitalized on his fear of that risk to its marketing advantage by placing the false NSF certification. Because Mr. Asinga's injury was so foreseeable, his case raises no concerns about the unwanted proliferation of tort liability and indeed calls out for the important deterrent function of tort duties. *See Saratoga Fishing Co.*., 520 U.S. at 880, 881 (explaining the importance of imposing traditional tort duties where dangers are foreseeable to manufacturers "to provide appropriate safe-product incentives[.]").

While it quite possible that the failure to overturn the District Court's imposition of the economic loss doctrine will lead to confusing, contradictory precedent and that it could have far-reaching implications, it is certain that failing to do so would have devastating implications for Mr. Asinga himself. That is because the District Court's invocation of the economic loss doctrine, in conjunction with the remainder of its decision, had drastic consequences: the dismissal of an entire lawsuit, and the foreclosure of any possibility that Mr. Asinga can access justice to redress the serious wrongs he alleges. The significant unfairness of this result cannot be understated. After all, a core question imposed by economic loss doctrine is whether or not a plaintiff's interests are sufficiently or better protected under legal theories other than product liability or negligence, and this question that inherently assumes that a plaintiff has other avenues which are available to right the defendant's

alleged wrongs. Thus, not surprisingly, courts asked to impose the doctrine frequently analyze whether another cause of action or legal theory would better fit the facts of a plaintiff's position and could adequately ensure the plaintiff is made whole. *See, e.g., E. River S.S. Corp.,* 476 U.S. at 871 (holding that it was appropriate to apply the economic loss rule to tort-based claims where a plaintiff could be sufficiently protected under warranty claims). The Florida Supreme Court recognized this concern when it set up guard-rails for imposition of the economic loss doctrine, explaining that "actionable conduct that frustrates economic interests should not go uncompensated solely because the harm is unaccompanied by any injury to a person or other property" and held that cases which do not neatly fall into a category should therefore be allowed to proceed under tort theories. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*., 891 So. 2d 532, 543 (Fla. 2004). Critically, in each of the cases relied upon by the District Court in invoking the economic loss doctrine, courts contemplated whether or not other claims were better appropriate to provide redress for the alleged wrongs.[1]

[1] Nearly universally, plaintiffs in those other cases were left other avenues to pursue justice. *See In re Chantix*, 735 F. Supp. 3d 352, 406–407 (plaintiffs could pursue claims for negligent misrepresentation, breach of express warranty, breach of implied warranty of merchantability, state consumer protection, and unjust enrichment); *Gordon*, 2017 WL 213815, at *9 (plaintiffs could pursue claims for breach of express warranty, false advertising, and deceptive trade practices); *King Cnty Wash.,* 863 F. Supp. 2d 288, 316 (plaintiff could pursue negligent misrepresentation claim); *see also Harris*, 586 F. Supp. at 239 (acknowledging that if plaintiffs alleged *either* "emotional or physical" injury from taking the drug they

Here, although the District Court held that Mr. Asinga was barred from pursuing his tort remedies because of the economic loss doctrine, it simultaneously held (as discussed below) that he had not participated in any commercial transaction, and therefore consumer protection theories were equally unavailable. Opinion, A-146, at 12. Because the District Court's erroneous interpretation of the economic loss doctrine resulted in total foreclosure of Mr. Asinga's ability to access justice and was utterly inconsistent with the policy justifications for the doctrine, it demands heavy scrutiny. It should be reversed.

D. Mr. Asinga Adequately Pleads He Is a Consumer With Standing Under TDTPA

After having found that Mr. Asinga's tort claims should be dismissed under a doctrine whose intent is to hold parties to the expectations of their bargained-for commercial transactions, the District Court then found that Mr. Asinga had not entered into a commercial transaction in the first place and dismissed his consumer protection claim on that ground. This holding was not just ironic, but also factually and legally incorrect at this early stage. Mr. Asinga's claim under the Texas

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could bring a product liability tort action under state law); *Suffolk Cnty. v. Long Island Lighting Co.*, 728 F.2d 52, 59 (2d Cir. 1984) (noting that appellants could intervene in administrative proceedings and ultimately would "have recourse to federal courts" to enforce regulations). The only exception is one case in which the court explained that the plaintiff should have sued under defamation for claims which did not allege injury to property or person, but defamation was precluded only by statute of limitations. *Four Directions Air, Inc. v. United States*, No. 5:06-CV-283 NAM/GHL, 2007 WL 2903942, at *6 (N.D.N.Y. Sept. 30, 2007)

Consumer Fraud and Deceptive Trade Practices Act ("TDTPA") should be allowed to proceed.

Mr. Asinga claims that Gatorade/Pepsi violated TDTPA when it passed off the Recovery Gummies as NSF Certified for Sport when it knew that they were not. FAC, A-40 – A-41, ¶¶ 202–216. The TDTPA prohibits this conduct, as it specifically states that it is unlawful to cause "confusion or misunderstanding as to the … approval, or certification of goods," or to represent that goods have sponsorship, approval, or ingredients which they do not have, or to falsely represent that goods are "of a particular standard, quality, or grade." TEX. BUS. & COM. CODE § 17.46(b)(2), (7). In dismissing the TDPTA claim, the District Court held that Mr. Asinga had not plausibly alleged that he was a "consumer" who was protected within the bounds of the TDTPA. Opinion, A-146, at 12. This decision too narrowly interpreted Texas's law on consumer standing in this context and failed to acknowledge Mr. Asinga's well-pleaded allegations and to draw inferences and resolving ambiguities in his favor.

In evaluating whether a person has "consumer status" under the TDTPA, courts must take "into account the legislature's intent that the [T]DTPA be liberally construed to protect the public against deceptive trade practices." *Martin v. Lou Poliquin Enterprises, Inc.,* 696 S.W.2d 180, 185 (Tex. App. 1985). A transaction falls within the scope of the TDTPA whenever "valuable consideration" is

exchanged – and this valuable consideration this "need not be *pecuniary* consideration." *Id.* at 185, n.7 (emphasis in original). While it does not appear that Texas courts have yet had the occasion to consider a case involving the exact type of exchange alleged here, recent decisions involving social media companies that interpret nearly identical state deceptive trade practice acts are illustrative and helpful. For example, an Indiana appellate court recently held that "free" downloads of TikTok are a "consumer transaction" because TikTok gives access to its content in exchange for access to end-user personal data and "under the plain and ordinary use of the word, that is a 'sale[.]'" *State v. TikTok Inc.*, No. 23A-PL-3110, 2024 WL 4340387, at *693 (Ind. Ct. App. Sept. 30, 2024). Likewise, a federal district court interpreting deceptive trade practices act claims involving twenty-eight state jurisdictions (including Texas), recently held that Facebook's corporate parent, Meta, could not shirk responsibility under certain states' acts merely because it allows its platform to be accessed for free, holding that "[a] social media company cannot exempt itself from consumer-protection law because its consumers exchange their personal data and time for a product or service rather than cash for goods." *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, 753 F. Supp. 849, 910–911 (N.D. Cal. 2024).[2]

[2] The Court did not reach the definition of "consumer" under TDTPA, having concluded that Meta had failed to develop any argument that plaintiffs were not consumers under that statute. *Id.* at 931.

Mr. Asinga has plausibly pleaded that he is a consumer under these standards. He alleges that Gatorade's motivation in providing him the Recovery Gummies was to generate marketing buzz by associating Issam's name, image, and likeness to its products. Pepsi/Gatorade used the "gifts" to encourage Issam and the other young athletes to be loyal to Gatorade's brand, and to turn them into "walking marketing machines for Gatorade." FAC, A-15, ¶ 52; A-40, ¶ 206. Pepsi/Gatorade wanted Mr. Asinga to use its products because it "knew that if Issam was seen using its products, others around them would want to purchase them as well." *Id*. This exchange was not offered to just any 18-year-old; along with the high-production value promotional materials and the celebrity treatment of being flown to LA for the ceremony, it was reserved for those athletes who, like Mr. Asinga, provide enormous value to Gatorade in the form of their name, image, and likeness. FAC, A-12, ¶ 31; A-15, ¶¶ 49–52.

Mr. Asinga's allegations are far different from the allegations in *Brashear v. Panini Am., Inc*., No. 05-22-01338-CV, 2023 WL 4540270, at *14 (Tex. App. July 14, 2023), upon which the District Court relied. *Id*. In that case, the court denied class certification to a putative class of plaintiffs who were unable to allege that all class members had made an exchange of valuable consideration in order to receive "free gift" baseball trading cards. *Id*. In holding that the inquiry as to whether the circumstances of an individual plaintiff's "free gift" transaction constituted a

consumer exchange was a plaintiff-specific inquiry which could not be decided broadly across a class, the *Brashear* court inherently acknowledged that under some circumstances, a "free gift" might indeed qualify a person as a consumer. *Id.*

Such a fact-specific inquiry, when applied to Mr. Asinga's unique circumstances, supports his claim for standing. Mr. Asinga alleges that he received the Recovery Gummies as part of a bargained-for exchange in which Gatorade/Pepsi provided the gummies only in return for access to his enormously valuable name, image, and likeness. Even if the extraordinary value of Mr. Asinga's reputation meant that he grossly overpaid for the Recovery Gummies, he paid nonetheless. *Cf. MLB Players Inc. v. DraftKings, Inc.*, 771 F. Supp. 3d 513, 534 (E.D. Pa. 2025) *motion to certify appeal denied*, No. CV 24-4884-KSM, 2025 WL 1462547 (E.D. Pa. May 21, 2025) (referring to name, image, and likeness as a "valuable interest" and sufficiently alleging the commercial value of MLB players' name, image, and likeness). Because Mr. Asinga alleges that Gatorade/Pepsi exchanged the Recovery Gummies as a commercial transaction, albeit one disguised as a "free gift," he has plausibly pleaded at this stage his entitlement to standing under the TDTPA. This claim should be allowed to proceed.

E. Mr. Asinga Adequately Pleads Tortious Interference With Contract

The District Court dismissed Mr. Asinga's claim for tortious interference with contract for two reasons. First, it held that Mr. Asinga did not specifically plead the

terms of any contract that was breached. Second, it held that Gatorade/Pepsi's conduct in refusing to provide a sealed sample could not be a legal basis for a tortious interference claim because it was not what induced the initial breach (the positive test result) in the first place. The District Court was incorrect on both grounds. In fact, the plausible allegations of the Complaint and the fair inferences that can be drawn therefore demonstrate that Gatorade/Pepsi "intentionally interfered with the fulfillment of a contractual provision," (Opinion, A-147, at 13) and therefore interfered with Mr. Asinga's ability to benefit from his contracts.

Under Texas law, the elements for tortious interference with contract are: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) that the act was the proximate cause of the plaintiff's damage; and (4) the actual damage or loss occurred. *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex. 1995). Mr. Asinga properly pleads each of these elements. FAC, A-10, ¶ 14; A-14, ¶ 40; A-26, ¶ 117.

First, Mr. Asinga has adequately alleged that Gatorade/Pepsi's conduct interfered with his contractual obligations to keep his body free from banned substances. The Complaint alleges that Issam had reached a level of competition in World Athletics competitions that required him to contract with the Athletics Integrity Unit ("AIU"), the governing body for his sport, to ensure that his body remained free from banned substances; this was a necessary condition for him to be

allowed to compete on the world stage. *See* FAC, A-10, ¶¶ 13–14; A-16, ¶ 56; A-19, ¶ 73. It also alleges that he had accepted a four-year scholarship to Texas A&M. FAC, A-14, ¶ 40. It alleges that he was contractually obligated to ensure that no banned substances entered his body and remain eligible to run in order benefit from his scholarship and maintain the chance to compete in World Athletics competitions. FAC, A-26, ¶ 117.

The Complaint further alleges that, despite Gatorade/Pepsi's knowledge of Mr. Asinga's contractual obligation to refrain free from banned substances and its awareness that turning over the correct sample for testing would prove that he had not willingly violated that term, it refused to turn over the bottle and thereby interfered with Mr. Asinga's ability to benefit from his contracts. FAC, A-26, ¶¶ 116–117. This ongoing, willful, and intentional withholding of the correct bottle, combined with the misrepresentation that the bottle did not exist, was the reason why Mr. Asinga could not clear his name and was formally charged and banned from his sport. FAC, A-26, ¶ 117. That Gatorade/Pepsi had the power to allow or prevent Mr. Asinga from enjoying his contracts for competition is revealed by the fact that he was not formally charged with an anti-doping violation during the months that Gatorade/Pepsi refused to provide a sealed sample for testing, while "[o]n the same date it received the clean results from the NSF Certified lot, in reliance on Gatorade's

representation that the results imputed purity to the lot ingested by Issam, the AIU formally charged Issam[.]"). FAC, A-27, ¶ 127.

The plausibility – indeed, certainty – of Gatorade/Pepsi's knowledge of Mr. Asinga's contractual obligations is revealed by allegations that Gatorade/Pepsi desired to include the NSF Certified For Sport mark on the Recovery Gummies so that it could market them to athletes who were under such obligations. FAC, A-16, ¶ 56 (alleging that Gatorade/Pepsi desired the NSF Certified mark because it was "cognizant that world-class athletes like Issam are keenly aware of their obligations to refrain from illegal performance-enhancing substances because of the devasting, career ending consequences of a positive doping test[.]"). Gatorade/Pepsi's direct communications with AIU during the suspension proceedings further support the plausibility of the allegations that it knew its actions would result in Issam being held in violation of his contracts. FAC, A-24, ¶ 100–101.

When it comes to alleging the existence of a contract, a plaintiff is not obliged to allege at the pleading stage every element and detail of the contract, but rather enough facts to provide notice that "some obligatory provision of a contract has been breached." *McDonald Oilfield Operations, LLC v. 3B Inspection, LLC*, 582 S.W.3d 732, 750–51 (Tex. App. 2019) (quotation omitted). In the *McDonald Oilfield* case cited by the District Court, that test could not be met because the plaintiffs had merely alleged the existence of a "business relationship" and an agreement to inspect

a premises, but not that any specific contractual provision was interfered with. *Id.* In contrast, Mr. Asinga alleges that Gatorade/Pepsi's conduct interfered with a straightforward, simple, and understandable contractual obligation: the obligation to keep his body free from banned substances. FAC, A-10, ¶¶ 13–14. As such, he has properly alleged that Gatorade/Pepsi "ha[d] knowledge of the contract with which [it was] interfering and of the fact that [it was] interfering with the performance of the contract." RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1979); *see also, e.g., Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 796 (Tex. App. 1987) (interpreting New York law and holding that "that the defendant need not have full knowledge of all the detailed terms of the contract" but rather awareness of which obligations were breached). Gatorade/Pepsi's specific understanding of the importance of this contractual provision, and the consequences upon Issam of being unable to fulfill it, can be inferred by the fact that it was involved with and aware of the AIU's investigation and prosecution of Issam. FAC, A-29, ¶ 137.

The District Court also concluded that Mr. Asinga's claim for tortious interference with contract is inadequate because "at no point does [he] accuse Gatorade of intentionally causing Plaintiff to ingest a banned substance." Opinion, A-148, at 14. But that is not the gist of Mr. Asinga's claim; instead, he alleges that Gatorade/Pepsi's willful and ongoing refusal to provide the sealed supplement from

the correct lot meant that he was unable to demonstrate that he was in compliance with his contractual obligations, and unable to benefit from them.

The tort of interference with contract is both forward and backward-looking, and includes interference with both continuing and prospective business relationships. *Faucette v. Chantos*, 322 S.W.3d 901, 915 (Tex. App. 2010). As explained in the Restatement (cited favorably by the Texas Court of Appeals in in *Faucette v. Chantos*), "it is not necessary to show that the third party was induced to break the contract. Interference with the third party's performance may be by prevention of the performance." RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1979). Even if the initial poisoning of Mr. Asinga's body by Gatorade/Pepsi's Recovery Gummies was unintentional, every day over the course of seven months that Gatorade/Pepsi falsely claimed that no sealed bottle existed was another day that Mr. Asinga could not comply with his contracts and compete, and it grossly interfered with his enjoyment of them. Put another way, but for Gatorade's withholding of the correct bottle for testing, Issam would have been able to prove that he met his promises under the anti-doping provisions, and been entitled to run for World Athletics and Texas A&M under his scholarship agreement. The spoliation caused by Gatorade/Pepsi's delay means that he remained unable to benefit from those agreements to this day.

Finally, the District Court concluded that Mr. Asinga had not adequately alleged that Gatorade/Pepsi's conduct in refusing to provide the sealed supplement bottle was willful and intentional. The District Court held that while the Complaint includes "unsupported statements insisting that Gatorade was aware that a sealed bottle was available," these are mere "legal conclusion[s] couched as factual allegation[s]." Opinion, A-149, at 15 (citing *Twombly*, 550 U.S. at 555). This conclusion is wrong because Mr. Asinga's allegations as to the willfulness of Gatorade/Pepsi's conduct are not "legal conclusions," but specific factual allegations. He alleges that Gatorade/Pepsi knew all along that a sealed sample existed, but intentionally chose not to provide it because it wanted to avoid financial harm, and that it knew that this conduct would cause Mr. Asinga to remain unable to benefit from his contracts to run on the world stage. FAC, A-11, ¶¶ 21-22; A-12 ¶¶ 25-29; A-18, ¶¶ 63–65; A-23 ¶ 98; A-24 ¶ 101; A-26, ¶¶ 115–116; A-28, ¶¶ 131–134.

As this Court has explained, the task on a motion to dismiss "is simply whether the facts the plaintiff alleges, if true, are plausibly sufficient to state a legal claim," and in conducting this analysis the court must always draw all plausible inferences from the pleading in the plaintiff's favor. *Doe v. Columbia Univ.*, 831 F.3d at 48 (even if "the facts a plaintiff alleges in the complaint may turn out to be self-serving and untrue," a court at the motion to dismiss stage must not engage in

an effort to determine the true facts."). In tossing out Mr. Asinga's allegations regarding Gatorade/Pepsi's knowledge and intent, the District Court failed to follow this direction and instead did the opposite, drawing inferences against Mr. Asinga. This Court should reinstate his claim for tortious interference with contract, and allow it to proceed to discovery.

F. Mr. Asinga Adequately Pleads Intentional Infliction of Emotional Distress

The District Court dismissed Mr. Asinga's claim for intentional infliction of emotional distress, doing so without reference to Texas law. Opinion, A-150, at 16. This was also an error.

As Mr. Asinga explained below, Texas law would apply to his claim for intentional infliction of emotional distress. Opposition, A-95; A-105. Under Texas law, the tort of intentional infliction of emotional distress provides "redress for victims of conduct that is determined to be utterly intolerable in a civilized community." *Twyman v. Twyman*, 855 S.W.2d 619, 622 (Tex. 1993). The question of whether the conduct at issue is so outrageous as to meet this test is a factual one which takes into account the relationship of the parties and the "severity and duration of the challenged conduct." *Bill Wyly Dev., Inc. v. Smith*, 680 S.W.3d 679, 685 (Tex. App. 2023). Although some circumstances might allow courts to determine that conduct does not meet the test as a matter of law, "if reasonable minds may differ, it

is for the jury—subject to the court's control—to determine whether the particular conduct was sufficiently extreme and outrageous to result in liability." *Id.*

Mr. Asinga has raised plausible allegations of intolerable corporate conduct, and he should be allowed to proceed to discovery on this claim. Although a reasonable juror could interpret the facts differently, one could also conclude, based on the allegations described in the Complaint, that Gatorade/Pepsi's conduct in refusing to provide a sealed supplement bottle from the correct lot, and its misrepresentation that no such sealed bottle existed over the course of seven months and up until it was too late to help Issam, went beyond the bounds of what is expected in a civil and just society. FAC, A-44, ¶ 237. The Complaint alleges that in the fall of 2023, Gatorade/Pepsi had access to the correct exemplar and knew that submitting it for testing was necessary to help Issam clear his name, but that it chose to hide the exemplar and deny it existed in order to protect its own reputation and financial interests. FAC, A-43, ¶¶ 228, 230. After having used Mr. Asinga's fame and good name to make itself money through branding opportunities, Gatorade/Pepsi "threw the young athlete's reputation and future away when it better served its needs." FAC, A-44, ¶ 237.

Mr. Asinga also plausibly alleges, at this stage, that Gatorade/Pepsi's actions caused him severe emotional distress. In this context, severe emotional distress means "highly unpleasant mental reactions such as embarrassment, fright, horror,

grief, shame, humiliation, and worry" which are severe enough that no reasonable person should be expected to endure them. *Gonzales v. Gonzales*, 704 S.W.3d 54, 71 (Tex. App. 2024). The Complaint alleges that Gatorade/Pepsi knew that this would produce severe emotional distress including depression, anxiety, and shame. FAC, A-44, ¶ 234–237.

Here, the question of whether Issam experienced emotional distress, like the question of whether Gatorade/Pepsi's conduct was extreme and outrageous, should be left to the jury to decide. Especially at this early stage, without the benefit of any factual discovery, the plausible inference can be drawn that Mr. Asinga did indeed suffer extreme emotional distress because of Gatorade's knowing choice to protect its reputation at a cost to his own, which resulted in the loss of his scholarship, his world records, and his ability to compete in the Paris Olympics or train with his teams, and the fact that he has been accused on the world stage of having cheated by taking illegal substances and then lying about it to cover his tracks and that "many people now wrongly believe he is a cheat and a fraud." FAC, A-35 ¶ 179; A-33 ¶ 171. If Gatorade/Pepsi had not obstinately refused to produce a sealed supplement bottle from the correct lot in the fall of 2023 when it was first requested, none of these harms would have befallen him. FAC, A-34 – A-35, ¶ 172–179.

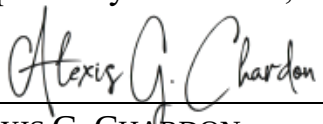
VII. Conclusion and Relief Sought

Issam Asinga alleges that Gatorade/Pepsi distributed a dangerous nutritional supplement which promised itself to be free from the very risk it carried, and that as a result his body was poisoned and his career and future upended. Because he alleges that Gatorade/Pepsi's tortious conduct caused him a bodily invasion with accompanying physical harm, his claims are properly raised in tort, and the District Court was wrong to apply the economic loss doctrine to dismiss them. So, too, was the court wrong in finding that Mr. Asinga has not plausibly alleged his other causes of action.

For the foregoing reasons, Mr. Asinga requests that this Court reverse the District Court's dismissal of his lawsuit, and allow his claims for strict product liability, negligence, negligent misrepresentation, violation of the TDTPA, tortious interference with contract, and intentional infliction of emotional distress to proceed.

Dated: July 25, 2025

Respectfully submitted,



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VIII. Certificate of Compliance

I, Alexis Garmey Chardon, hereby certify that the foregoing Principal Brief of Plaintiff-Appellant Issamade Asinga complies with the requirements of Fed. R. App. P. 32 and Second Circuit Local Rule 32.1, because it contains 13,872 words, not including the sections which are permitted to be excluded from length or word limit under Fed. R. App. P. 32(f), and this is less than the 14,000 word limitation contained in Local Rule 32.1.

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