

Defendants' Deceptive Advertising for Powerade ION⁴

23. SVC and Defendants are competitors in a multi-billion dollar market for sports drinks. More than fifteen years ago, Coca-Cola launched its Powerade sports drink. Over the years, Defendants have released various products under its Powerade line in an attempt to compete directly with GATORADE. Most recently, Defendants launched a new product called Powerade ION⁴. A true and correct copy of the product label for Powerade ION⁴ is attached hereto as Exhibit A (the "Label"). According to the Label, Powerade ION⁴ contains an "ADVANCED ELECTROLYTE SYSTEM" which "replenishes 4 critical electrolytes in the same ratio typically lost in sweat." The Label also claims that "[o]ther sports drinks don't." The Label identifies the four allegedly "critical" electrolytes as sodium, potassium, calcium and magnesium and contends that the formulation for Powerade ION⁴ represents "the evolut ION⁴ of sports drinks." The Label concludes by promising consumers that they will "[u]pgrade [their] formula" and "[u]pgrade [their] game" if they purchase this product.

24. During the week beginning March 22, 2009, Defendants launched an aggressive multi-media advertising campaign for its new Powerade ION⁴ product, which includes print, point-of-sale, billboard and internet advertising, as well as an advertising partnership with ESPN that involves print and video/text advertisements through various electronic media.

25. In these advertisements, Defendants make the literally false and highly deceptive claim that GATORADE is "INCOMPLETE" because it is "MISSING TWO ELECTROLYTES" (specifically, magnesium and calcium) and that Powerade ION⁴ is "COMPLETE" because it includes these two electrolytes. What Defendants do not tell consumers is that magnesium and calcium are not essential for sports drinks and, in any event, are found in Powerade ION⁴ in such low trace levels that they will have no physiological or nutritional effect. The advertisements

further specifically communicate that, due to this difference in formulation, the use of Powerade ION⁴ as compared to GATORADE will enhance performance during athletic activity.

26. As part of this campaign, Defendants have erected, in cities across the nation, a series of billboard advertisements that purport to compare GATORADE with Powerade ION⁴ (the “Billboard Advertising”). Upon information and belief, Defendants have installed or intend to install Billboard Advertising in at least sixteen major markets across the United States. There are at least two different versions of the Billboard Advertising.

27. The first version of the Billboard Advertising is actually a series of two billboards. The first billboard in the series shows the vertical half of the famous GATORADE bottle on one side, with the other side of the billboard left uncovered. The text “DON’T SETTLE FOR AN INCOMPLETE SPORTS DRINK” is emblazoned above the distorted GATORADE bottle. Below this, an arrow points to the GATORADE bottle with the following text, highlighted in a bold, bright orange font against a contrasting dark background:

MISSING TWO ELECTROLYTES
Ca CALCIUM Mg MAGNESIUM

A few feet down the road, or directly across the road from the first billboard, sits another billboard, this one showing a fully intact bottle of Powerade ION⁴. It reads “INTRODUCING THE COMPLETE SPORTS DRINK with ION⁴.” A photograph of an example of the first version of the Billboard Advertising is attached hereto as Exhibit B. This Billboard Advertising is currently up in several major markets, including in the New York and Miami metropolitan areas. Upon information and belief, unless enjoined, Defendants plan to roll out this type of Billboard Advertising in additional markets across the country.

28. Defendants are also running a second version of the Billboard Advertising that contains, on a single billboard, all of the content described above. Specifically, in this version,

the left side of the billboard includes the photograph of the GATORADE bottle, sliced in half and labeled as “INCOMPLETE,” and the right side of the billboard contains the photograph of the allegedly “COMPLETE” Powerade ION⁴ bottle. The headlines and copy are identical to that described in paragraphs 25 and 26 above. A photograph of an example of the second version of the Billboard Advertising is attached hereto as Exhibit C. This second type of Billboard Advertising is currently up in the Chicago metropolitan area. Upon information and belief, unless enjoined, Defendants plan to roll out this second type of Billboard Advertising in additional markets across the country.

29. The Billboard Advertising clearly communicates that the “COMPLETE” Powerade ION⁴ is superior to the “INCOMPLETE” GATORADE because Powerade ION⁴ contains magnesium and calcium which are “MISSING” from GATORADE. These claims are false. There is no scientific basis to support that Powerade ION⁴ performs better than GATORADE as a sports drink: Powerade ION⁴ will not help consumers achieve better hydration; Powerade ION⁴ will not provide consumers with energy in a faster or more efficient manner; and Powerade ION⁴ will not replenish any nutrients that will result in improved athletic performance. Specifically, there is no scientific basis to establish that the presence of trace amounts of magnesium and calcium in Powerade ION⁴ provides any functional benefit for consumers. In fact, the amount of calcium (2.5 milligrams per 8 ounces) and magnesium (1.2 milligrams per 8 ounces) present in Powerade ION⁴ represent, respectively, less than one-half of one percent of the recommended dietary intake levels for adults. These amounts are nutritionally insignificant.

30. The Billboard Advertising is only one component of Defendants’ false and misleading advertising campaign for Powerade ION⁴. Defendants are also running an advertisement on the front cover and inside cover of the current issue of *ESPN Magazine* which

was delivered to more than one million subscribers during the first week of April (the “ESPN Cover Take-Over”). In this advertisement, the cover of *ESPN Magazine* contains an additional half-page flap that is folded over the right hand side of the cover. The flap is white, contains the half of the magazine masthead, and creates the illusion that half of the magazine cover is missing. To drive the point home, the text “(YOU WOULDN’T SETTLE FOR AN INCOMPLETE COVER)” is printed on the flap. When the flap is opened, the reader sees an image of the distinctive GATORADE bottle, chopped in half vertically, with the text: “THEN DON’T SETTLE FOR AN INCOMPLETE SPORTS DRINK.” An arrow points to the GATORADE bottle with the following text, highlighted in a bold, orange font against a contrasting dark background:

MISSING TWO ELECTROLYTES
Ca CALCIUM Mg MAGNESIUM

31. Inside the front cover of the magazine (and attached to the flap) is a two-page Powerade ION⁴ advertisement that shows an image of a full Powerade ION⁴ bottle, with the headline “INTRODUCING THE COMPLETE SPORTS DRINK.” Below the headline, the copy reads “COMPLETE WITH 4 ELECTROLYTES IN THE SAME RATIO TYPICALLY LOST IN SWEAT.” The electrolytes are identified, again in a capitalized font, as sodium, potassium, calcium, and magnesium. The advertisement concludes with the statement: “UPGRADE YOUR FORMULA. UPGRADE YOUR GAME.” A true and correct copy of the ESPN Cover Take-Over is attached to this Complaint as Exhibit D.

32. Defendants have run an advertisement which is virtually identical to the ESPN Cover Take-Over on the cover of the magazine *Stack*, a publication directed at high school athletes and the high school sports community (the “Stack Cover Take-Over”). However, in the Stack Cover Take-Over, Defendants make the additional claim that the four electrolytes that it

replaces (including magnesium and calcium) are “CRITICAL.” A true and correct copy of the Stack Cover Take-Over is attached to this Complaint as Exhibit E.

33. An alternative version of the print ad (“The Alternative Print Ad”) has run within the *Sports Business Journal* and, on information and belief, other publications. The Alternative Print Ad consists of two separate advertisements that appear on consecutive pages within the publication. The first advertisement is identical to the back of the flap of the ESPN Cover Take-Over, with the exception that the headline reads: “DON’T SETTLE FOR AN INCOMPLETE SPORTS DRINK.” The second advertisement is very similar to the one that appears inside the cover of the ESPN Cover Take-Over. A true and correct copy of the Alternative Print Ad is attached to this Complaint as Exhibit F.

34. The ESPN Cover Take-Over, the Stack Cover Take-Over, and the Alternative Print Ad include the same false and deceptive claims found in the Billboard Ads. Once again, Defendants are making the false and deceptive claim that GATORADE is incomplete and does not serve its intended purpose as a sports drink, whereas the allegedly complete Powerade ION⁴ is superior and consumption of Powerade ION⁴ will result in superior performance. Defendants cannot substantiate this superiority claim. There is no science that establishes or even suggests that GATORADE is not highly efficacious or is not able to serve its intended purpose as a sports drink or that it is in any way inferior to Powerade ION⁴.

35. The ESPN Cover Take-Over, and the Stack Cover Take-Over also contain the false and misleading claim that Powerade ION⁴ is “complete with 4 electrolytes in the same ratio typically lost in sweat.” Science overwhelmingly confirms that there is no “ratio [of electrolytes] typically lost in sweat.” Instead, the electrolyte composition of sweat is highly variable, both across individuals and even within the same individual depending on factors such as the rate of secretion, the state of training, and the state of heat acclimation. Moreover, Defendants do not

make any attempt to identify whether the alleged “ratio” is relative to the volume of liquid or something else, such as the amount of electrolytes relative to each other.

36. The ESPN Cover Take-Over, the Stack Cover Take-Over, and the Label also contain the tag line “Upgrade your formula. Upgrade your game,” thus claiming to consumers that Powerade ION⁴ is superior to other sports drinks, including GATORADE, and provides consumers with a performance benefit. These claims are also unsubstantiated by science and highly misleading.

37. In addition, Defendants are displaying, or causing the display of, false and deceptive point-of-sale materials at supermarkets and other retailers that state that Powerade ION⁴ is “COMPLETE WITH 4 CRITICAL ELECTROLYTES,” once again identifying the electrolytes as sodium, potassium, calcium and magnesium. A true and correct copy of the Powerade ION⁴ in-store display is attached to this Complaint as Exhibit G.

38. Defendants have also recently relaunched the Powerade website, found at www.us.powerade.com to continue their false and deceptive advertising for Powerade ION⁴ (the “Website Ad”). True and correct copies of the webpages constituting the Website Ad are attached hereto as Exhibit H. Visitors logging on to the Powerade website are confronted with an animation with multiple screens presented sequentially. Specifically, the first page of the Website Ad to load shows a full blank page labeled “COMPLETE WEBSITE,” quickly followed by a half sized blank page with a “loading” note, labeled “INCOMPLETE WEBSITE” and containing the statement “YOU WOULDN’T SETTLE FOR AN INCOMPLETE WEBSITE.” After a few seconds, the consumer then sees an image of an unlabeled sports drink bottle cut in half, in conjunction with text identical to that seen in the Billboard Advertising: “THEN DON’T SETTLE FOR AN INCOMPLETE SPORTS DRINK” and “MISSING TWO ELECTROLYTES / Calcium Magnesium.” After a few more seconds, the screen is converted to a page showing a

full bottle of Powerade ION⁴ and the text “INTRODUCING THE COMPLETE SPORTS DRINK.” Other portions of Powerade’s U.S. website repeat the false and misleading claims that Powerade ION⁴ contains a “perfect match to the ratio typically last in sweat” and that Powerade ION⁴ will improve performance.

39. Again, Defendants’ Website Ad claims that its formulation for Powerade ION⁴ is “complete” (due to the addition of trace amounts of calcium and magnesium) and that other brands (including GATORADE) are “incomplete” if they do not contain these electrolytes, and these claims are false and deceptive. Defendants’ claim that the inclusion of calcium and magnesium will result in an “upgrade” is also false and deceptive. Although the distorted bottle in the Website Ad does not have a GATORADE label on it, consumers familiar with GATORADE and the other Powerade ION⁴ advertisements in this campaign will undoubtedly understand that a comparison is being made to GATORADE. Indeed, because GATORADE is the overwhelming market leader of sports drinks, any comparison to other sports drinks will necessarily include a comparison to GATORADE. In fact, in an article about Defendant’s advertising campaign that appeared in the on March 23, 2009 issue of *Advertising Age*, the senior VP for marketing for Powerade acknowledged that “[Gatorade is] the lion in the category People associate [Gatorade] with the category.” A true and correct copy of this article is attached hereto as Exhibit I.

40. Each of the advertisements described above also communicates to consumers that Powerade ION⁴ provides levels of calcium and magnesium that are significantly from a dietary perspective. This is false. Powerade ION⁴ contains a mere 2.5 milligrams of calcium and 1.2 milligrams of magnesium per eight ounce serving. These levels represent, respectively, less than 0.25% and 0.38% of the recommended dietary intake level for adults for these nutrients and are not nutritionally or physiologically significant.