

Pepsi Unsuccessful In Attempt To Derail Powerade ION4 Launch*

Article By:

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In the latest battle between soft-drink giants Coke and Pepsi, Pepsi's Stokely-Van Camp ("SVC") division – the division behind GATORADE -- unsuccessfully sought to derail the launch of Coke's reformulated POWERADE sports drink marketed under the name POWERADE ION4. In refusing to preliminarily enjoin Coke's advertising and promotion of the new POWERADE ION4 product, Judge Koeltl of the Southern District of New York ruled that SVC had established neither a likelihood of success on the merits of its claims, nor a probability that it would be irreparably harmed if Coke were not preliminarily enjoined pending the case's ultimate resolution. Moreover, the court found that under the unclean hands doctrine, SVC's prior actions were sufficient to preclude its request for injunctive relief under the present circumstances.

SVC's GATORADE and Coke's POWERADE products are the leaders in the sports drink category; however, sales of GATORADE products comprise upwards of 75% of the market. In an effort to increase its market share, beginning in 2007 the Coca-Cola Company division responsible for POWERADE, Energy Brands, Inc., took steps to reformulate its product. The goal behind the reformulation was to develop a product that more precisely mimicked the fluids lost by athletes during exercise, i.e., sweat. To achieve this goal, Coke added the electrolytes calcium and magnesium to the POWERADE formula, a formula which already contained sodium and potassium. The quantities of these four electrolytes were adjusted so that the reformulated POWERADE product contained the electrolytes in approximately the same ratio that such electrolytes are typically lost in sweat.

The marketing strategy developed by Coke for its re-launch of POWERADE included an advertising campaign with two phases – a first, "Seed" phase of short duration which was intended to be competitive in nature was designed to compare the reformulated product to the leader in the field, GATORADE; and a second, "Launch" phase which was designed to focus on the new product and to explain the science behind the product and the product's benefits to consumers. The Seed phase employed billboards and widespread print advertising in sports-related magazines, and directly (and indirectly) compared the GATORADE and POWERADE ION4 products by featuring, for example, images of the GATORADE bottle (or portions thereof), together with statements focusing on the fact that GATORADE did not have the calcium and magnesium electrolytes found in the reformulated POWERADE ION4 product. The Seed portion of the campaign touted the POWERADE ION4 product as the "Complete" sports drink because of its electrolyte formulation, and encouraged consumers to

“Upgrade Your Formula. Upgrade Your Game”. As anticipated, the comparative “Seed” ads ran for a short period of time (less than 60 days).

Coke’s second-phase “Launch” ads focused less on comparing POWERADE ION4 to GATORADE and more on explaining to consumers the science behind reformulated POWERADE. The Launch ads did, however, continue to refer to the new product as the “Complete” sports drink and continued to analogize the formula to the composition of sweat.

Upset by the Coke POWERADE ION4 campaign, SVC filed suit against Coke in the Southern District of New York alleging false advertising, trademark dilution (by tarnishment), deceptive acts and practices, injury to business reputation and unfair competition under both federal and state law. SVC thereafter sought a preliminary injunction in connection with its false advertising and its dilution claims (it did not seek preliminary relief in connection with its remaining claims).

The court began its analysis by explaining that under Second Circuit law, in order to satisfy its burden of proof on its motion for a preliminary injunction SVC would need to show a likelihood of irreparable harm in the absence of the preliminary relief, and either a likelihood of success on the merits of its claims, or sufficiently serious questions going to the merits of its claims so as to make them a fair ground for litigation, with the balance of hardships tipping squarely in its favor.

With respect to the dilution by tarnishment claim -- a claim based on the use by Coke of images (or partial images) of the GATORADE bottle and the use of other GATORADE trademarks and logos -- the court quickly disposed of SVC’s request for preliminary injunctive relief. Because Coke had stopped making use of the GATORADE marks in its ads, there was no need for the requested relief.

Addressing the false advertising claims, the court pointed out that SVC objected to four specific elements of the POWERADE ION4 advertising: (i) the claim that POWERADE ION4 is “the complete sports drink”, thereby implying that GATORADE is an “incomplete” sports drink that is missing the key -- “critical” -- electrolytes calcium and magnesium; (ii) the claim that the POWERADE ION4 product replenishes the key electrolytes lost in sweat while others -- i.e., GATORADE -- do not; (iii) the allegation in the POWERADE ION4 ads that calcium and magnesium are “critical” electrolytes; and (iv) the use of the slogan “Upgrade Your Formula. Upgrade Your Game.”

As to the first element, the court was able to easily conclude that SVC could not meet its burden -- Coke had already stopped running the ads which alleged that GATORADE was incomplete because it was “missing” two electrolytes. Thus, as with the dilution claim, SVC’s request for preliminary relief on this front was moot. The fact that Coke had stopped running the offending ads, and the promise by Coke that such ads would not return during the pendency of the litigation were enough for the Court to conclude that there was no need for preliminary relief as SVC’s first claim for false advertising.

Addressing the other false advertising claims, the court was not persuaded that SVC had met its burden of establishing a likelihood of success on the merits, either because the ads amounted to no more than non-actionable puffery (e.g., the assertion by Coke that the POWERADE ION4 product was “complete”), or because SVC had not shown a likelihood of establishing that the Coke ads were false -- either literally false or, although literally true, likely to mislead and confuse consumers (i.e., false by necessary implication). The court reasoned that while the statement “*the* complete sports drink” could, in theory, be interpreted to mean that POWERADE ION 4 is more complete than

GATORADE, other interpretations were possible. For example, the statement could be interpreted by consumers to mean that the ION4 product is “a” complete drink, a statement that SVC’s own witness conceded was literally true. Indeed, the ads did not even necessarily imply a comparison to GATORADE. The court ruled that if SVC truly believed that the POWERADE ION4 advertising created a misleading commercial impression in the eyes of consumers, then SVC should have provided evidence -- survey evidence or actual consumer testimony -- that consumers view the ads as creating such a misleading impression. In the absence of such evidence, the court could not conclude that SVC had carried its burden on its implied falsity claim.

Turning to the claim relating to the presence in POWERADE ION4 of calcium, sodium, magnesium and potassium electrolytes in the same ratio as is “typically lost in sweat”, the court was not persuaded that the statement was literally false; rather, the court found the claim to be literally true, albeit meaningless. The court then pointed out that the fact that such statement may actually be meaningless does not make it literally false. Similarly, with respect to SVC’s objection to the characterization of calcium and magnesium as “critical”, the court sided with Coke finding that there was nothing literally or impliedly false about the claim. The POWERADE ION4 ads did not mention that the electrolytes were “critical” for any particular purpose -- which arguably would have provided a potential basis for such claims being false. Indeed, SVC did not and could not argue that the electrolytes are not vital to the human body.

The “Upgrade Your Formula. Upgrade Your Game” slogan was alleged by SVC to be literally false (because, SVC argued, it is intended to suggest a comparison between GATORADE and POWERADE ION4), and false by implication (because consumers could, according to SVC, read the slogan as making a comparative claim about GATORADE). Again, the court was not persuaded. The court found that the slogan could easily be viewed by consumers as suggesting that the new POWERADE ION4 formulation was an upgrade from the old formula -- an interpretation that was neither literally false nor disputed by SVC. As to whether the claim was false by necessary implication, again the court concluded that the claim could easily be read by consumers as comparing the old POWERADE formula to the new one -- a truthful claim on its face and thus one that “could not be held to ‘necessarily imply’ an alternative message.” Similarly, SVC did not dispute the fact that drinking GATORADE or POWERADE ION4 would provide athletes with hydration and performance benefits. While SVC alleged that the “Upgrade Your Game” element of the slogan suggested that the benefits provided by the POWERADE product would be more significant than those provided by GATORADE, the court found the line to be open to more than one interpretation and to be too vague to necessarily imply a direct comparison to GATORADE. More significantly, the court found the “Upgrade Your Game” statement to be non-actionable puffery.

Having failed to show a likelihood of success on the merits of its false advertising claims, the court concluded that SVC was not entitled to preliminary injunctive relief. However, the court went on to hold that injunctive relief was not appropriate at this stage because SVC had not made the necessary showing of irreparable harm. The court refused to accept SVC’s argument that irreparable harm should be “presumed” in a case such as this where the products are directly competitive and where the challenged ads make comparative claims. Similarly, the court dismissed as frivolous and wholly unsupported the proposition that SVC was being irreparably harmed because Coke’s allegedly false

advertisements were creating a danger to public health. The court also was not persuaded that the POWERADE ION4 ad campaign would cause a loss of consumer confidence or would result in lost goodwill for SVC and/or the GATORADE product. In this regard, the court concluded that if SVC believed the Coke campaign would cause such irreparable harm to it then it should have come forward with some direct evidence to support the claim. The court stated that “[g]iven SVC’s research capabilities and resources, its failure to present any concrete evidence of harm is striking.”

Finally, the court examined the Coke defensive argument that SVC was not entitled to the relief it was requesting because of SVC’s own unclean hands. Under the unclean hands doctrine, a party seeking equitable relief must come to the court in good faith. Here, the evidence presented made it clear that despite SVC’s complaints about Coke’s statements touting the benefits of calcium and magnesium in sports drinks, SVC had for years been producing a GATORADE formulation having these same ingredients (GATORADE Endurance Formula), and had been advertising the benefits of that product. Indeed, the evidence showed that SVC was working towards launching its own “ION +” product based on the formulation of its GATORADE Endurance Formula, and that at one point SVC had intended to counter the reformulated POWERADE ION4 product by focusing on its own calcium and magnesium containing sports drink. It was only after it became apparent that SVC could not obtain sufficient calcium to produce its revised GATORADE ION+ in commercially necessary quantities that the company changed tactics and began attacking the Coke position regarding the benefits of calcium and magnesium containing sports drinks. Under the circumstances, the court was unwilling to afford SVC with the benefits of preliminary relief, even had SVC been in the position to establish its entitlement to such relief.

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