

May 8, 2012

Honorable Jon Leibowitz, Chairman
Honorable J. Thomas Rosch, Commissioner
Honorable Edith Ramirez, Commissioner
Honorable Julie Brill, Commissioner
Honorable Maureen Ohlhausen, Commissioner
The Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Chairman and Members of the Commission:

We are writing to request that the Federal Trade Commission (FTC) use its authority under Section 5 of the Federal Trade Commission Act to investigate PepsiCo's current "Win from Within" commercial television advertisement and commercial website for its Gatorade sports drink product featuring Michael Jordan's performance during game 5 of the 1997 NBA Finals (hereinafter "Jordan Ad").¹ This game is popularly referred to as the "Flu Game." Enforcement action is warranted because the Jordan Ad:

- encourages teens to engage in dangerous behavior;
- sequences historical events to falsely enhance the role of Gatorade in Mr. Jordan's game-winning athletic performance; and
- contains deceptive product imagery.

We ask that the FTC seek relief on behalf of teen consumers to prevent further distribution of the Jordan Ad and that the FTC order PepsiCo to engage in corrective advertising.

Teens Are the Target Audience of the "Win from Within" Campaign

Teens and competitive athletes are "key cohort groups" for the brand health of PepsiCo's Gatorade product line.² When describing PepsiCo's "Win from Within" marketing campaign, Sarah Robb O'Hagan, President, Gatorade North America and Global Chief Marketing Officer, Sports Nutrition stated that

[w]e've been studying teen athletes' nutrition habits closely and found a huge gap in the attention they pay to nutrition versus training and equipment...At this point we have the products and solutions available to prove how the right fuel can improve their

¹ Gatorade.com, *The Flu Game*, <http://www.gatorade.com/default.aspx#home?s=mj> (last visited April 23, 2012).

² Pepsico.com, *Final Transcript PEP-Q1 2010 PepsiCo Earnings Conference Call 5* (April 22, 2010), http://www.pepsico.com/Download/Transcript_PEP-US_04222010_2982037.pdf (last visited April 23, 2012).

performance. “Win From Within” conveys that athletic achievement is driven from the inside out. Many athletes aren’t educated on how to fuel their bodies – yet. It’s our job to help them get to the next level.³

The “Win from Within” ad series is designed to target teens, and the campaign is intended to deliver sports nutrition information to teens.

PepsiCo’s media buys for the Gatorade Jordan Ad also appear to target teens (see attached). The average U.S. teen (12-17 years) saw 1.85 of these ads during the first quarter of 2012, 22% more ads than adults saw.⁴ More than half of this exposure occurred on teen-targeted cable networks, including Adult Swim, Teen Nick, ABC Family, and MTV.⁵

The Jordan Ad Encourages Teens to Engage in Dangerous Behavior

The Jordan Ad has been airing on television and is currently available on PepsiCo’s www.gatorade.com website. The landing page of the website for the Jordan Ad (see Exhibit A) states that

[i]n game 5 of the 1997 NBA Finals, Michael Jordan, visibly ill and with 103 degree fever, had one of the most epic-performances of his career. In this spot that retells the legendary tale, Coach Phil Jackson shares his first hand account of the gutsy, 38-point, 11-assist game. We see Jordan constantly hydrating with Gatorade and returning to the court as we hear Coach Jackson reveal how Jordan was able to persist-he had the will to win and the fuel to help him do it.⁶

The Jordan Ad openly promotes engaging in vigorous physical activity while suffering from a very high fever, in Jordan’s case 103 degrees. During the commercial, Mr. Jordan’s then coach Phil Jackson states that Mr. Jordan was so ill that at the end of the first half of the game he needed to be helped to the locker room. The ad copy on the website states that Mr. Jordan was constantly hydrating with Gatorade and returning to the game despite how ill he was. According to the ad copy, Jordan “was able to persist” because he had “the fuel to help him do it.” The “fuel” referenced is unmistakably Gatorade.

³ Pepsico.com, *Gatorade Launches New Campaign, Declaring What Athletes Put 'in' is Just as Important as What They Put 'on'*, <http://www.pepsico.com/Story/Gatorade-launches-new-campaign-declaring-what-athletes-put-in-is-just-as-importa01042012.html> (last visited April 23, 2012).

⁴ Yale Rudd Center for Food Policy & Obesity, *Gatorade television ads targeting teens* (May 1, 2012), http://yaleruddcenter.org/resources/upload/docs/what/advertising/TV_Advertising_Gatorade_2012.pdf.

⁵ *Id.*

⁶ Gatorade.com, *Win From Within “Jordan”*, <http://www.gatorade.com/default.aspx#program?s=win-from-within> (last visited April 23, 2012).

The FTC has a history of taking enforcement action when an advertisement encourages vulnerable consumers, such as children, to engage in dangerous behavior.⁷ The FTC has looked to “commonly recognized safety principle[s]” when analyzing whether or not an advertisement has the tendency or capacity to induce behavior which is harmful or involves an unreasonable risk of harm.⁸

It is a generally recognized safety principle that teens and even professional athletes suffering from a severe fever and flu-like symptoms should not engage in vigorous physical activity. The Centers for Disease Control and Prevention recommends that people suffering from the flu should stay home and avoid contact with others.⁹ People suffering from the flu with a fever should remain home for at least 24 hours after the fever is gone.¹⁰ People also can suffer from a fever for a number of reasons other than the flu, including heat stroke. In describing the “Win from Within” campaign, PepsiCo stated, “At this point we have the products and solutions available to prove how the right fuel can improve their [teen athletes] performance.”¹¹ In keeping with this campaign theme, the Jordan Ad conveys the message that one can improve his athletic performance even when he has the flu or a high fever by drinking Gatorade. This assertion is not substantiated by reliable scientific evidence and shows a disregard for the health and safety of teens and athletes as they should not participate in sports when suffering from a fever or the flu. The Jordan Ad has the capacity or tendency to induce teens to engage in harmful behavior--engaging in vigorous physical activity while suffering from the flu or a fever.

⁷ See generally *In re AMF Inc.*, 95 F.T.C. 310 (1980) (ordering advertising agency to stop depicting young children riding bicycles and tricycles in an unsafe or illegal manner and ordering corrective advertising in the form of bicycle safety messages); *Mego International, Inc.*, 92 F.T.C. 186 (1978) (ordering toy company to stop depicting children using electrical appliances or toys “when such representation has the tendency or capacity to influence children to engage in behavior which creates an unreasonable risk of injury to person or property”); *In re General Foods Corp.*, 86 F.T.C. 831 (1975) (ordering food company to stop depicting consumption of wild plants in a natural setting because “[i]t is a commonly recognized safety principle that children should not eat any plants or parts thereof which they find growing or in natural surroundings except under adult supervision. The aforesaid advertisements have the tendency or capacity to influence children, when not under adult supervision, to eat plants or parts thereof which they find growing or in natural surroundings, which behavior is inconsistent with said safety principle”); *In re Uncle Ben’s, Inc., et al.* 89 F.T.C. 131 (1977) (finding that representations of children cooking without adult supervision had “the tendency or capacity to induce behavior which is harmful or involves an unreasonable risk of harm.”)

⁸ *In re General Foods Corp.*, 86 F.T.C. 831 (1975).

⁹ Centers for Disease Control and Prevention, *The Flu: What To Do if You Get Sick* (January 2012), <http://www.cdc.gov/flu/takingcare.htm> (last visited April 23, 2012).

¹⁰ *Id.*

¹¹ *Pepsico.com, Gatorade Launches New Campaign, Declaring What Athletes Put 'in' is Just as Important as What They Put 'on'*, <http://www.pepsico.com/Story/Gatorade-launches-new-campaign-declaring-what-athletes-put-in-is-just-as-importa01042012.html> (last visited April 23, 2012).

The Jordan Ad Sequences Historical Events to Falsely Enhance the Role of Gatorade in Mr. Jordan's Game-Winning Athletic Performance

The 30 second commercial features archival game footage from game 5 of the 1997 NBA Finals and clips from a more recent interview with former Chicago Bulls coach Phil Jackson. The first two seconds of the ad shows game footage of Mr. Jordan seated on a bench holding a Gatorade branded cup containing a vibrant orange liquid. His teammate, Scottie Pippen, places a towel around his shoulders while audio of sportscaster Marv Albert says, "He [Jordan] is suffering from flu-like symptoms" (see Exhibit B).

The next frame is a close-up of a profusely sweating Mr. Jordan, followed by interview footage with Coach Jackson saying, "We had to help him into the locker room." Archival footage of Mr. Jordan walking to the locker room next to his coach is shown. Viewers then see a series of clips of Mr. Jordan playing interspersed with pictures of him seated on the bench holding a Gatorade branded cup. Halfway through the commercial, Mr. Jordan is shown again seated on the bench next to Scottie Pippen holding a Gatorade cup with a towel on his shoulders (see Exhibit C). The commercial then shows Mr. Jordan making a three-point shot followed by footage of him drinking from a Gatorade cup. The commercial ends with footage of Mr. Jordan being helped to the bench by Scottie Pippen.

A review of actual game footage reveals a different story. With 6.2 seconds remaining in the game, a time out was called and Mr. Jordan was helped to the bench for the last time by Scottie Pippen. Towels were placed on his head and shoulders and he was filmed holding a Gatorade cup while Mr. Pippen rubbed his shoulder. He never re-entered the game. This footage of Mr. Jordan seated, covered in towels and holding a Gatorade cup is used twice during the commercial. Once at the very beginning and again in the middle—creating the distinct impression that the viewer is watching actual game footage of Mr. Jordan "refueling" with Gatorade during the game in order to give him the ability to win. In reality, this footage occurred when Mr. Jordan came out of the game for the final time. There were 6.2 seconds remaining on the game clock and he never re-entered the game

The Jordan Ad Contains Deceptive Product Imagery

Additional game footage also calls into question the actual content of the Gatorade branded cup Mr. Jordan is shown drinking from throughout the commercial and to what extent he was “refueling” with the actual Gatorade product during the game. The opening scene of the commercial gives consumers a view of the inside of a Gatorade branded cup containing a bright orange liquid (Figure 1).



Figure 1

As noted above, the opening clip of the commercial actually occurred at the end of the game. That said the image is intended to show viewers that the Gatorade branded cup Mr. Jordan was drinking from contained the actual Gatorade product.

Sports teams and stadiums routinely enter into exclusive pouring rights contracts with beverage companies. One can infer from the use of Gatorade branded cups during a nationally televised NBA Finals game that the cups were provided to the Chicago Bulls by Gatorade. The use of branded cups, however, does not mean that the cups actually contained the Gatorade product or that Mr. Jordan only drank Gatorade from the branded cups.

With 9 minutes to go in the actual game, during a time out Mr. Jordan walked to the bench and heavily sat down. A trainer placed an icepack on the back of his neck. The trainer offered a Gatorade branded cup to Mr. Jordan that appeared to have clear liquid in it. Mr. Jordan did not take the cup

(Figure 2). Sportscaster Bill Walton commented: “He won’t even take the Gatorade.” Another commentator then states “he doesn’t want to waste any energy. No high fives. No lifting water to his mouth. He is exhausted.”¹²



Figure 2

Five minutes later, with just under 4 minutes remaining in the 4th quarter another time out was called. Mr. Jordan was filmed seated on the bench holding a Gatorade branded cup containing a liquid with no discernible color and he took a sip from it before going back into the game (Figure 3).

¹² YouTube.com *Michael Jordan "Flu Game" – Bulls vs. Jazz, 1997 Finals: Game 5* at 7:27 (June 25, 2008) <http://www.youtube.com/watch?v=2os-hfXSUIA>.



Figure 3

This footage is at odds with the vibrant orange liquid featured in the opening scene of PepsiCo's Jordan Ad. We ask that the FTC investigate whether or not the color of the liquid in the cup featured in the opening seconds of the commercial was enhanced or altered? This is the only clip in the commercial where the viewer can actually see the contents of the cup. On its website description of the Jordan Ad, Pepsico asserts, "We see Jordan constantly hydrating with Gatorade and returning to the court." The use of archival game footage showing bright orange liquid in a Gatorade branded cup at the beginning of the commercial is intended to convey to consumers that the Gatorade branded cups Mr. Jordan drank from throughout the game contained the actual Gatorade product. Additional game footage and commentary, however, indicates that some of the cups likely contained plain water or a diluted electrolyte solution.

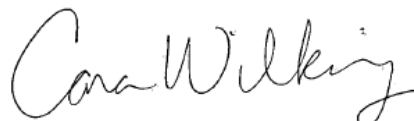
PepsiCo Should Be Ordered to Undertake Corrective Advertising Consistent with the CDC's Flu and Fever Recommendations and Stating That Gatorade Is Not Recommended to Enhance the Athletic Performance of Teens Suffering from the Flu or a Fever

PepsiCo has put itself in the position of being a messenger of sports nutrition and health information to its core Gatorade product demographic of teens. A reasonable teen consumer would interpret the Jordan Ad to mean that he can and should engage in vigorous physical activity even if he has the flu or a fever. There is already enormous pressure on teen athletes to win at all costs by practicing during extreme heat and playing through injuries. The Jordan Ad creates the distinct impression that so long as you are drinking Gatorade you should not sit out a game or stay home when you are seriously ill with a fever. This message contravenes the CDC's recommendations for people suffering from flu-like symptoms and fever and puts teens in danger. PepsiCo should be ordered to engage in corrective advertising that advises teens to not engage in physical activity when they have the flu or are suffering from a fever, describes the dangers of competing in sports when ill, and clearly states that Gatorade is not intended to be used to enhance the athletic performance of teens who are suffering from the flu or a fever.

Conclusion

The FTC has played an important role in protecting the health and safety of consumers by taking enforcement action when companies engage in unfair and deceptive acts and practices that have the tendency or capacity to influence consumers to engage in behavior which creates an unreasonable risk of harm. The Jordan Ad fits this standard and enforcement action is warranted to protect teens. Thank you for your attention to this matter.

Sincerely,



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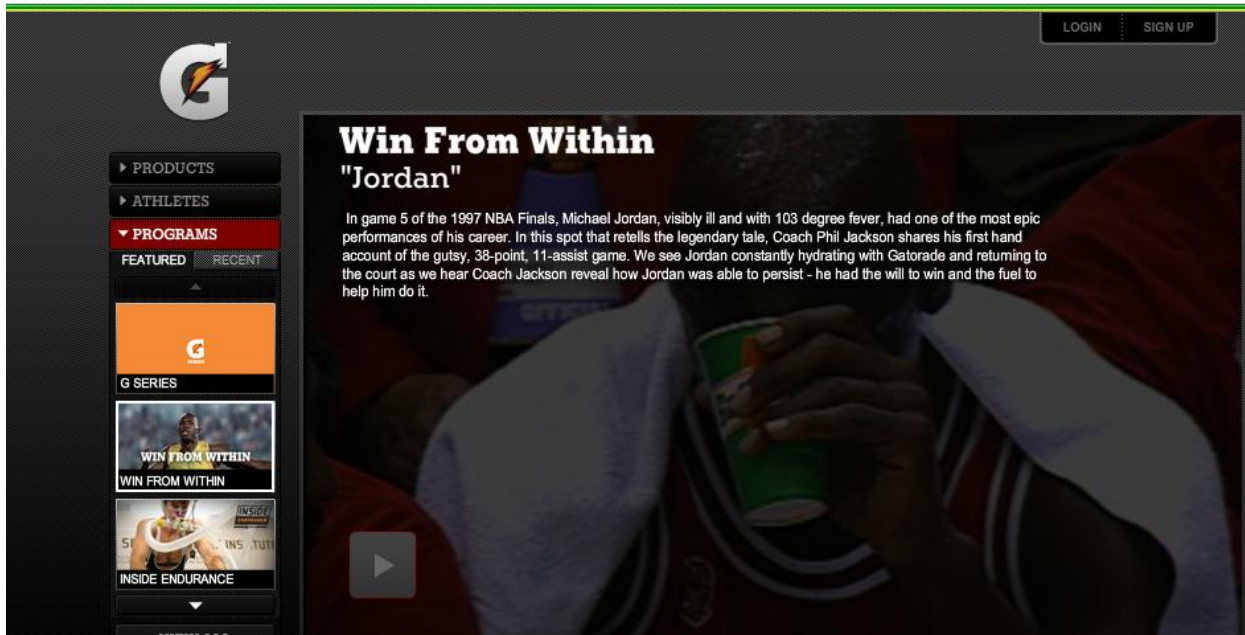
Organizational Signers:
Berkeley Media Studies Group
California Center for Public Health Advocacy
Center for Science in the Public Interest
Public Health Institute
Yale Rudd Center for Food Policy & Obesity

cc: David Vladeck, Director, Bureau of Consumer Protection
Mary K. Engle, Associate Director, Division of Advertising Practices

APPENDIX

Exhibit A

www.gatorade.com/default.aspx#program?s=win-from-within



Landing Page of PepsiCo's "Win From Within" Campaign

Exhibit B



Opening Frame of Jordan A

Exhibit C



Scene from Mid-Point of Jordan Ad

(using the same archival footage from the beginning of the commercial from a different camera angle)