

A Win for Keeps for Lance Armstrong?

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Shortly after Lance Armstrong admitted to doping during his seven Tour de France wins, a group of plaintiffs filed a class action against both Armstrong and FRS, the maker of over-the-counter energy products. The plaintiffs alleged that FRS and Armstrong, a former FRS endorser, had engaged in false advertising and breach of warranty when they promoted FRS products as Armstrong's "secret weapon." Last week, the court hearing the case dismissed the action. The court's decision rested primarily on a finding that the "secret weapon" claims were mere puffery. Key points from the decision include the following.

- "Plaintiffs do not allege [that] the [FRS] advertisements were deceptive because [the products] did not provide the advertised results [*i.e.*, promoting energy and supporting the immune system]. Nor do Plaintiffs allege that the advertisements were deceptive because Defendant Armstrong did not use the products. Rather Plaintiffs allege that the advertisements were deceptive because the products did not in fact constitute Defendant Armstrong's secret weapon. . . . [The phrase 'secret weapon' [however] is unquantifiable and [the] Plaintiffs allegations require an unreasonable inference in order to state a claim."
- "[T]he Court finds that the reasonable consumer would not make the inference that a healthy energy drink could be the proprietary reason a decorated cyclist achieves success. . . . Such an inference requires the reasonable consumer to discount extensive training, natural ability or even illegal PEDs use."
- Additionally, "[o]ther district courts have held that [similar] words and phrases like 'high quality,' 'more innovative,' 'of superb quality,' and 'packed with power' to be non-actionable puffery."

Despite the dismissal, the defendants may not have yet reached the final (Champs-Élysées) stage. The court in this case granted the plaintiffs leave to amend their complaint and effectively get a do-over. Given the court's puffery findings, it's difficult to imagine how the plaintiffs could successfully refile on the same "secret weapon" claims. One possibility, though, could be that the plaintiffs bring new allegations based on different advertising claims that involved Lance Armstrong's endorsement.