

**MCAC 01 2013**

***COMPLAINT BY ROCHE PRODUCTS (PTY) LTD (DIAGNOSTICS/DIABETES DIVISION)***

***AGAINST BAYER (PTY) LTD (HEALTH CARE DIVISION)***

**Adjudication**

11 September 2013

**Committee Members:**

3 MCA Panelists (1 legal)

Consideration was given to the complaint stated by Roche as “the claim made on the packaging is a comparative claim (being “advanced accuracy”) implying superior accuracy in comparison to competitor products”.

The panel considered 2 aspects in the finding namely:

That advanced accuracy on the way it is on the package insert is a standalone claim

And

The” Comparative claim”

By Bayer’s own admission it is a comparison.

The panel found that the comparative nature of the claim is misleading or likely to be misleading in term of section par 45 of the Code in that it is not clear who the comparison is made against and can be construed as a competitor product on the same shelf.

The first consideration on the stand alone Code par 45: The claim is seen as a standalone with reference to the attributes of the product displayed on the packaging as well as the marketing or advertising material submitted for consideration.

Considerations: the comparative nature of the claim is misleading or likely to be misleading in terms of par 45 of the Code, in that it is not clear who the comparison is made against and can be constructed by an ordinary consumer as a competitor product on the same shelf. In this instance we referred to the CPA par 22 (2).

Deliberating aspects used to deliberate on the case in the complaints:

On 11 September 2013, the panellists were dealing with only 1 issue and thus only 1 finding on the “advanced accuracy” claim. The comparison can be reasonably drawn in relation to the competitor products by an ordinary consumer (CPA 22 (2)) who could be misled (Code 45 and 42.3.3) to believe it refers to competitor products especially since it is a product displayed on the general shelving.

With reference to “Contour Next” on the US packaging we concur that it is best practice, as it contextualizes any claims and does not use “advanced accuracy” as a standalone claim.

In our deliberation we did look at different marketing material on the website and thus could conclude there is a better practice that will reduce the comparative claim towards competitor products.

We looked at the definition normally referred to by a reasonable consumer – the Google free online dictionary has several descriptors of the word “advanced”, of which the most pertinent is “being at a higher level than others”.

With regard to the CDE congress use of the claim on the stand, we find that the fact that they showed the 2 models alongside each other contextualized the use of the phrase. Thus no finding was made with respect to the CD congress.

The panellists agree that the use of other jurisdictions is acceptable where the codes are similar. We did not apply ASA ruling as the wording and circumstance are different. We also referred to the PMCPA case rulings; however they were not part of our findings.

#### Findings and Sanction

Finding is that BAYER is in breach of the code with reference to par 45 and 42.3.3 and thus within the powers of par 57.3 with reference to the material (standalone and un-contextualized claim of “Advanced Accuracy”) being misleading in the manner in which the perception of consumers will be affected.

Sanction is for BAYER to cease the use of the standalone claim of “advanced accuracy” in the consumer environment. (With relation to the “ordinary consumer” in the CPA) This directive is to implemented within the time period of 3 months of issue of this finding. We would recommend for example the use of the words:

*“More advanced accuracy than the Contour TS” is acceptable, or the US website statement “innovative technology provides even more accurate results”.*

## **Appeal**

28<sup>th</sup> October 2014

### **Committee Members:**

3 MCA Panelists (1 legal)

In this matter the complainant Roche alleged that Bayer were in breach of the SA Code of Marketing Practice in that the comparative claim “advanced accuracy” appeared on the packaging of Bayer’s Contour® Plus blood glucose monitoring product.

Both the Adjudication and Appeals Committees found:

1. That the words “advanced accuracy” constituted a comparative claim and such claim could be regarded as “misleading” or “likely to be misleading” to the consumer in terms of paragraph 45 and 42.3.3 of the Marketing Code (version of the Code at the time of the complaint).
2. The words “advanced accuracy” as they appear on the package does not constitute plain and understandable language for the ordinary consumer as required in terms of section 22 of the CPA.
3. In the absence of facts or scientific evidence appearing on the package the words were regarded as incomplete and by implication misled the ordinary consumer to drawing a comparison with similar products.
4. Bayer was in breach of the Code and the sanction imposed was for Bayer to cease the use of the stand-alone claim “advanced accuracy” in the consumer environment within 3 months of the date of the Appeal ruling.

The Appeals Committee further held that:

1. The Marketing Code had been specifically designed for the health products industry. Cases of the Advertising Standards Authority that were based on a different Code were therefore not applicable.

**Expedited**

28<sup>th</sup> October 2014

**Committee Members:**

3 MCA Panelists (1 legal)

The Appeals Committee acknowledge that we have not explicitly stated that products be relabelled forthwith but that same be done within 3 months of our ruling i.e. by 28 January 2014. We have done this on the basis that the sanctions policy of the Code did not require the respondent to take emergency corrective action.

Addendum to Appeals Committee ruling of 28 October 2013:

- Given the lack of a clear directive regarding the withdrawal of the products from the retail environment, we accordingly direct as follows:
- That Bayer ensures that all Contour Plus products bearing the “advanced accuracy” claim be withdrawn from all retail outlets and relabelled by 30 June 2014.