BEFORE THE FEDERAL TRADE COMMISSION
UNITED STATES OF AMERICA

PETITION TO PROHIBIT FALSE AND MISLEADING ADVERTISING

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Submitted by the
Center for Science in the Public Interest

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Pursuant to Section 4(d) of the Administrative Procedure Act, 5 U.S.C. § 553(e), and 16 C.F.R. § 2.1, the Center for Science in the Public Interest (CSPI) requests that the Federal Trade Commission halt misleading claims made by The Coca Cola Company, Nestlé S.A., and Beverage Partners Worldwide (Beverage Companies) for the carbonated beverage Enviga. These claims constitute false advertisements as defined by Sections 12 and 15 of the Federal Trade Commission Act (Act), 15 U.S.C. §§ 52, 55, and are “unfair” and “deceptive” under Section 5 of the Act, 15 U.S.C. § 45, as interpreted by the Commission in its “Statement on Deception.”

FACTS

Enviga is a carbonated beverage manufactured and marketed by the Beverage Companies. It is made with a proprietary blend of caffeine and epigallocatechin gallate (EGCG), an antioxidant that occurs in green tea. The marketing for Enviga (which includes all forms of advertising and labeling) claims that it actually burns more calories than it provides, resulting in “negative calories.” The Beverage Companies claim that: (1) the combination of EGCG and caffeine speeds up metabolism and increase energy use; (2) there is a “calorie burning effect

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1 CSPI is a non-profit consumer organization with 900,000 members and subscribers, which has worked since 1971 to improve national health policies. CSPI is especially concerned about the effect of food advertising on consumer health.
2 Enviga was developed by Beverage Partners Worldwide (BPW), which is a joint venture between Nestlé S.A. and The Coca Cola Company. On March 27, 2007, Nestlé S.A. and The Coca Cola Company announced that Nestlé has licensed the Enviga brand to The Coca-Cola Company in the United States and to BPW for the rest of the world.
from a single can”; (3) using Enviga is “much smarter than fads, quick-fixes, and crash diets”; and (4) Enviga keeps “those extra calories from building up.”

The Beverage Companies make these claims on the product label, in press releases, on the product website, on outdoor billboards, in print ads, and on in-store signage. These claims are false and misleading and the Beverage Companies do not have adequate prior substantiation for them. At best, some individuals in a discrete segment of the United States population (healthy and physically active young people with below-normal body weight) might see a minor benefit from prolonged and frequent use of Enviga. There is no evidence that anyone else would benefit at all. Therefore, these practices constitute false advertising under the FTC Act, are deceptive and unfair, and should be halted.

REPRESENTING THAT ENVIGA BURNS MORE CALORIES THAN IT PROVIDES AND MARKETING ENVIGA AS A WEIGHT-LOSS PRODUCT ARE FALSE AND DECEPTIVE PRACTICES THAT VIOLATE THE ACT.

A. Advertising standard

The Act makes it unlawful to engage in unfair or deceptive commercial practices to induce consumers to purchase certain products through advertising that is misleading in a material respect. Under the Act, an advertisement (or indeed any unfair or deceptive practice or omission affecting commerce) is considered deceptive if it contains a material representation or omission that is likely to mislead consumers, acting reasonably, to their detriment. A representation may be made by express or implied claims. An express claim directly makes a representation while an implied claim requires an examination of the advertisement’s overall impression. Omission of

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5 15 U.S.C. §45
6 15 U.S.C. §§52, 55
7 F.T.C. Policy Statement on Deception, Issued October 14, 1983; F.T.C. v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir. 1986).
information can also be deceptive if it leaves consumers with a misimpression about the product. A material representation or omission is one that is likely to affect a consumer’s choice or use of the product. Express claims are presumptively material.\(^8\)

**B. False advertising**

The Beverage Companies expressly represent in advertising and labeling that Enviga increases a consumer’s metabolism and causes a consumer to burn more calories than he consumes (as long as he drinks three cans a day). This is an express claim that is, by its very nature, material.\(^9\) The representation is also false, leading reasonable consumers to believe that if they consume Enviga, they will lose weight\(^10\) without having to exercise or restrict calories. This is to the detriment of the consumer, especially since Enviga costs a hefty $1.39 for a twelve-ounce can. Enviga drinkers are being suckered into paying a premium for calorie-burning benefits they are not receiving. The Beverage Companies’ claims about Enviga are simply untrue.

Furthermore, there is not enough scientific evidence to substantiate these claims. Under the “prior substantiation” doctrine enunciated under Section 5 of the Act, before a claim is made an advertiser is required to have: (1) at least the advertised level of substantiation for that claim and (2) a “reasonable basis” for the claim.\(^11\) To make an affirmative product claim without at least the advertised level of substantiation and/or a reasonable basis for making that claim is a deceptive practice under Section 5.\(^12\) The Beverage Companies do not have the advertised level

\(^{8}\) *Id.*

\(^{9}\) FTC Policy Statement on Deception, Issued October 14, 1983.

\(^{10}\) Enviga advertising and labeling impliedly claim Enviga will cause weight loss without the need for additional physical activity, a claim the Commission considers deceptive (discussed in Section E, supra).

\(^{11}\) FTC Policy Statement Regarding Advertising Substantiation, Issued August 2, 1984; *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

\(^{12}\) While the prior substantiation doctrine is rooted in a theory of unfairness rather than deception (unfair because consumers are in no position to test the truth of product claims), the Commission
of substantiation (reliable scientific studies proving Enviga’s calorie burning properties in the general population) or even a reasonable basis for expressly claiming Enviga increases one’s metabolism or claiming Enviga will cause weight loss.

The claims the Beverage Companies have made concerning Enviga’s calorie-burning properties are: (1) false and misleading and (2) without prior substantiation. Hence, these claims are unfair and deceptive under the Act.

C. False representations of “calorie burning”

To induce consumers to purchase Enviga, the Beverage Companies have disseminated or caused to be disseminated numerous false and deceptive advertisements for Enviga, touting Enviga’s calorie-burning properties.

The product website, www.enviga.com, says:

• “Enviga is a precise balance of ingredients that have been proven to invigorate your metabolism helping you burn more calories.”

• Enviga contains the “powerful EGCG.”

• Including Enviga in the diet is “much smarter than following fads, quick-fixes, and crash diets.”

• Each can of Enviga causes a consumer to “end up burning more [calories] than you consume — so for the first time you can actually ‘drink negative.’”

• Enviga provides “another way to keep those extra calories from building up.”

has decided to analyze these claims as deceptive practices. In re Pfizer, 81 F.T.C. at 62; In re Bristol-Meyers Co., 102 F.T.C. 21, FN 119 (1983); See also In re Thompson Medical Co., 104 F.T.C. 648 (1984).

• “Enviga provides negative calories.”

• “Enviga actually provides a negative calorie effect that’s never before been proven in a ready-to-drink green tea.”

• “There is a calorie burning effect from a single can.”

• “Enviga is expected to have a comparable effect on individuals over 35.”

• “Consuming the equivalent of three cans of Enviga beverage over the course of the day helped participants increase calorie burning by an average of 106 calories.”

• “Enviga is the perfect refresher for you: everyday you do your bit to cut out or burn a few extra calories, Enviga is there doing its little bit to help.”

Outdoor advertising makes even plainer statements:

• “The calorie burner.”

• “Burning calories is now officially delicious.”

• “Be positive. Drink negative.”

• “Invigorate your metabolism.”

Magazine ads have been running in national magazines including “Shape” and “Men’s Health” which state:

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20 [www.enviga.com/#FAQs](http://www.enviga.com/#FAQs) (accessed April 2, 2007). This is the language as stated on the Enviga website as of November, 2006. This language has since been changed to say, “prior scientific literature indicates that a single can would slightly increase your metabolism.”
• “Proven to burn calories”\textsuperscript{24}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{image1}
\caption{Proven to burn calories.}
\end{figure}

• “The refreshing way to burn calories.”\textsuperscript{25}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{image2}
\caption{The refreshing way to burn calories.}
\end{figure}

\textsuperscript{24} Men’s Fitness Magazine, April 2007, p. 13.
\textsuperscript{25} Shape Magazine, April 2007, p. 55.
Large, prominent in-store signage next to Enviga in the water and energy drink aisle of the local supermarket proclaims, “Proven to burn calories.”

The product label itself touts Enviga as “The Calorie Burner,” and makes many other claims:

• Enviga “increases your metabolism to gently increase calorie burning.”
• Enviga gives “your body a little extra boost.”
• The caffeine and EGCG in Enviga “invigorate your metabolism to burn calories.”
• The caffeine alone “stimulates your body to enhance the calorie burning process.”

These erroneous claims deceive consumers into thinking that if they buy this rather expensive product and drink it, they will burn more calories than they consume. Enviga advertising and labeling make express, material claims that mislead reasonable consumers into buying the product. This is to the consumer’s detriment because the product: (1) is costly and (2) does not work. These claims are deceptive under Section 5 of the Act.  

D. Lack of substantiation

One press release for Enviga, dated October 11, 2006, reflects the companies’ marketing plan: “The accumulated body of scientific research shows the ability of green tea’s powerful antioxidant EGCG (epigallocatechin gallate) to speed up metabolism and increase energy use, especially when combined with caffeine,” said Nestlé researcher Dr. Hilary Green. That same release also says, “Enviga is a great tasting beverage that invigorates your metabolism to gently burn calories.”

When an ad contains an express statement regarding the amount of support the advertiser has for a claim, the Commission expects the advertiser to have at least the advertised level of

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26 15 U.S.C. § 45
substantiation. However, the representations the Beverage Companies are making for Enviga (whether express or implied) cannot be substantiated because the small number of studies that exist are conflicting and inadequate to substantiate the representations.

The Beverage Companies cite only one study that used the exact levels of caffeine and EGCG in Enviga – their own self-funded study. In that study 31 men and women who consumed green tea catechins, caffeine, and calcium in amounts equivalent to about three cans of Enviga per day for three days expended an average of an extra 106 calories during the third day. However, six of the 31 subjects actually burned fewer—not more—calories after drinking the equivalent of three cans of Enviga. Thus, the chemicals in Enviga would conceivably contribute to weight gain, not loss, for some consumers. Nowhere in its promotional advertising for Enviga do the Beverage Companies disclose that their product may have the opposite effect in one in five consumers. Furthermore, this was a single, small, short-term study that is almost meaningless unless it is corroborated by larger and longer-term studies.

The Beverage Companies market Enviga to all consumers, without qualification. However, the subjects in the self-funded study were young and lean. Their average age was approximately 23, with a range of 18-35. The Body Mass Index (BMI) for the test subjects averaged 22, which is well within healthy weight levels. Someone six feet tall with a BMI of 22 weighs 160 pounds. In contrast, the great majority of American adults are overweight (BMIs of 25-30) or obese (BMIs of 30+). This study does not provide the advertised level of substantiation for the claims the Beverage Companies make regarding Enviga.

There is in fact no scientific proof that Enviga (or the amounts of EGCG and caffeine in three cans of Enviga) has any effect on caloric balance or, more importantly, weight for the majority of adults who are not young, healthy, and thin. In addition, this study was a short-term

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28 *Id.*

(72-hour) study of a small number of test subjects in a tightly controlled environment. There is no evidence at all that Enviga has any positive effect of any kind on free-living consumers, whose every act and every calorie consumed is not controlled by the Beverage Companies’ hired scientists.

Even if the Beverage Companies’ one study is eventually shown by subsequent studies to apply to actual weight loss for consumers of all ages, shapes, and weights (the audience targeted by the Beverage Companies’ marketing efforts), the effect would be minimal and it would be necessary (and unrealistic) that people would drink several cans of Enviga every day over many months just to obtain the minimal effect. To lose one pound, a person must burn 3,500 calories. The Beverage Companies’ study showed that, at best, a healthy, active, normal weight person might see a 100-calorie drop every day he or she drank three cans of Enviga. Thus, it would take 35 days of constant consumption of Enviga — 105 cans at a cost of about $146 (at $1.39 per can) — to see even one pound of possible weight loss — and that assumes that the consumers would not eat any extra calories from food during that time to compensate for that possible loss.

And that is only the best reported outcome. The low end effect claimed by the Beverage Companies is 60 calories per day. At that rate, it would take a consumer almost 60 days — nearly 180 cans and $250 — to see a one-pound drop. Maybe. After almost two months. And the study also shows that Enviga has no effect or possibly even the opposite effect on a significant proportion of consumers. Thus, if the Beverage Companies’ theory about the long-term action of Enviga turns out to be substantiated when adequate long-term studies are completed, a significant number of Enviga users might actually gain — not lose — weight.

The Beverage Companies’ study was presented at a conference sponsored by the North American Association for the Study of Obesity (“NAASO,” also known as The Obesity Society), a professional organization of obesity researchers. NAASO took the extraordinary step of issuing
its own rebuttal to the presentation, which said, in pertinent part, that a conclusion of the Beverage Companies’ study (“when consumed regularly as part of a healthy diet and exercise regime such a beverage may provide added benefits to help in weight control”) was “not a statement that the FDA or FTC or others would sanction [on the basis of] this study.” NAASO concluded that “it is improper to state or imply that the results of this study supports any weight loss or any statement related to this.”

There are a few other published studies on the calorie-burning or weight loss efficacy of EGCG in combination with caffeine. Two short-term studies have shown that EGCG and caffeine raises the average energy expenditure of healthy men over a 24-hour period by 67 to 80 kcals, but these studies lasted only one day and nearly half of the men did not respond to the EGCG and caffeine in amounts equivalent to nearly three cans of Enviga per day. The evidence from these studies does not support the claim that taking a combination of EGCG and caffeine regularly over weeks or months will increase energy expenditure or affect body weight. These studies were also done under the artificial conditions of a laboratory where the subjects’ diets were strictly controlled. There is no evidence that free-living consumers in the real world who expended more calories due to EGCG and/or caffeine would not simply make up for these calories by eating a few extra bites of food.

There is no evidence that the EGCG and caffeine found in one or two cans of Enviga daily would have any short-term or long-term effect on energy expenditure. Until recently, the Beverage Companies acknowledged on the Enviga web site that one can would not have a significant effect. However, they revised that language, so that the website now tells prospective customers that they can in fact see the calorie burning benefit from drinking just one can.

32 “While Nestlé’s study was performed on three cans per day, prior scientific literature indicates that a single can would slightly increase your metabolism. The size of this effect has not been
The few long-term studies on the combination of EGCG and caffeine on human metabolism (although in differing amounts from those present in Enviga) do not substantiate the claims made by the Beverage Companies regarding Enviga. The combination of EGCG and caffeine did not increase energy expenditure any more than a placebo on day 28 of an 83-day study of weight loss in 46 overweight women. Nor did it produce greater weight loss than a placebo by the end of the trial.\(^\text{33}\) The combination of EGCG and caffeine did not increase energy expenditure or affect body weight any more than a placebo in a 13-week study of weight-loss maintenance in 51 overweight men and women.\(^\text{34}\) In a follow-up study of weight-loss maintenance in 38 overweight men and women, a combination of EGCG and caffeine did not affect energy expenditure or weight loss more than a placebo, except in a subset of habitual “low-caffeine” consumers, who averaged about 150 mg of caffeine daily.\(^\text{35}\)

Thus, at this time, the scientific evidence does not substantiate the claims made by the Beverage Companies regarding Enviga. Product advertising and labeling must have at least the advertised level of substantiation for express claims like those the Beverage Companies are making for Enviga.\(^\text{36}\) The Beverage Companies simply do not have the advertised level of substantiation, making their claims deceptive under the Act. Furthermore, the Beverage Companies do not even have a reasonable basis for their claims. Absent an express or implied reference to a certain level of support, and absent other evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for claims.\(^\text{37}\) All objectively verifiable advertising claims must be quantified and would vary from person to person.” www.enviga.com/#FAQs (accessed April 2, 2007) (Emphases Added).


\(^{35}\) Obes Res. 2005 Jul;13(7):1195-204.


\(^{37}\) Id.
supported by a reasonable basis. The few and conflicting studies available on EGCG’s and
caffeine’s affects on human metabolism do not provide a reasonable basis for the Beverage
Companies’ claims that Enviga boosts metabolism and causes weight loss, providing yet another
reason these claims are deceptive under the Act.

E. Weight loss representations

The Beverage Companies have maintained that Enviga is not marketed as a weight-loss
product, while simultaneously claiming that Enviga is “much smarter than fads, quick-fixes, and
crash diets,” and that it keeps “those extra calories from building up.” These are merely code
words for weight loss. In fact, one Coca Cola Company official suggested that Enviga can
actually replace physical activity. “I can choose to walk up the stairs or I can choose to have a
can of Enviga,” Helen Falco, Coke’s director of nutrition and health policy, told USA Today.
The Beverage Companies are making implicit weight-loss claims when they advertise Enviga as
being “smarter than” other quick weight-loss methods such as fad and crash dieting and when
Coca Cola’s spokespeople proclaim that you can replace exercise with a can of Enviga.

Under the Act, the advertising of products and services for weight loss is governed by the
same legal standards that apply to all other product and service promotions. Therefore: (1) the ad
must be truthful and not misleading; and (2) before disseminating an ad, advertisers must have
adequate substantiation for all objective product claims. In general, competent and reliable
scientific evidence consists of tests, studies, or other scientific evidence that has been conducted
and evaluated according to standards that experts in the field accept as accurate and reliable.

13, 2007).
42 Id.
We have already demonstrated that the Beverage Companies do not have adequate substantiation for their Enviga claims and that these claims are false and materially misleading to reasonable consumers to their detriment, making them deceptive under the Act.

It is also worth mentioning, however, that the Commission considers claims of weight loss without the need for extra physical activity to be deceptive, especially to those consumers who are overweight and obese, but also to anyone who wants to lose weight in general (which, given the widespread popularity of quick-fix weight loss products and schemes, and the fact that 6 out of every ten Americans are overweight or obese, is most likely a large portion of the population). As the Commission has stated:

It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster.

In fact, in September 2002, in a report titled *Weight Loss Advertising: An Analysis of Current Trends*, the Commission concluded that the use of false or misleading claims in weight-loss advertising was rampant, with nearly 40% of 300 reviewed ads (for dietary supplements, meal replacements, hypnosis, food, diet plans, transdermal products, and wraps) making at least one representation that almost certainly was false, and 55% of the ads made at least one representation that was very likely to be false, or at the very least lacked adequate substantiation. Forty-two percent of all the ads promoted effortless

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44 Porter & Dietsch, 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

weight loss – that is, weight loss without the need for dieting and/or exercise.\textsuperscript{46} In December, 2003, the Commission released a staff report titled “Deception in Weight Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to stop Weight-Loss Fraud.” This report documented the findings of three panels designed to consider the scientific feasibility of certain claims made for weight-loss products and explore ways that members of the weight-loss industry and the media could contribute to curtailing weight-loss fraud.\textsuperscript{47} The panels also focused on two claims that are also of special interest in this case considering the claims the Beverage Companies are making about Enviga: (1) the product causes substantial weight loss without diet or exercise; and (2) the product causes substantial weight loss for all users.\textsuperscript{48}

While the Beverage Companies are not outright claiming Enviga causes “substantial” weight loss (although the panel never really defined this term), at their core the claims are the same: effortless weight loss for all consumers, at the low, low price of $1.39 a can. Given the Commission’s observation that easy-weight-loss-without-exercise claims are deceptive, and weight-loss-for-everybody claims are deceptive, the Beverage Companies’ claims about Enviga burning extra calories seem particularly reprehensible. In addition to already being false and misleading and lacking adequate substantiation (or even a reasonable basis) these claims are targeted toward a particularly vulnerable audience that wants to hear the Siren’s call, reinforcing their deceptive status under the Act.

\textsuperscript{46} Id. at 14.
\textsuperscript{48} Id. at 3.
CONCLUSION

For the foregoing reasons, CSPI requests that the Commission:

1. Immediately bring an action pursuant to Section 13 of the Act, 15 U.S.C. § 53, to enjoin further distribution of any claim by the Beverage Companies regarding the role of Enviga as a weight loss product pending issuance of a complaint under Section 5 of the Act, 15 U.S.C. § 45;

2. Initiate action under Section 5 of the Act, 15 U.S.C. § 45, to prohibit dissemination of the claim;

3. Require the payment of a monetary penalty; and

4. Require corrective advertising for Enviga.

Respectfully submitted,

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