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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Center for Science in the Public Interest,

Plaintiff,

v.

**The Coca-Cola Company, Nestlé USA, Inc.,
and Beverage Partners Worldwide (North
America),**

Defendants.

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Civil Action No. 1:07-cv-00-00539

AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff, the Center for Science in the Public Interest (CSPI), brings this action on its own behalf and on behalf of its Members and subscribers residing in New Jersey against defendants who together have repeatedly engaged in illegal, fraudulent, and deceptive business practices that harm New Jersey consumers.

2. The Coca-Cola Company, Nestlé USA, Inc., and Beverage Partners Worldwide (North America) (jointly, Defendants) have conspired to introduce a drink called Enviga in New Jersey.

3. Enviga is a carbonated beverage, with a proprietary blend of caffeine and epigallocatechin gallate (EGCG), an antioxidant that occurs in green tea.

4. If Defendants simply marketed Enviga simply as a soft drink, they would be perfectly legal.

5. However, 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.” Defendants claim that (1) the combination of EGCG and caffeine speed up metabolism and increase energy use; (2) there is a “calorie burning effect 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.”

6. Defendants made these claims without adequate prior substantiation for them. In fact, Defendants made these claims knowing that there was no evidence showing that most New Jersey consumers would realize any calorie-burning benefit, while at most a discrete segment of New Jersey residents — healthy young people with normal body weight — might see at best a minor benefit from prolonged and frequent use of Enviga.

7. Defendants chose New Jersey as a test market for Enviga.

8. CSPI seeks injunctive relief, declaratory relief, restitution or disgorgement, attorneys’ fees, and costs against Defendants.

PARTIES

9. The Center for Science in the Public Interest (CSPI) is a non-profit organization based in Washington, DC, with approximately 900,000 members and subscribers in the United

States and Canada who subscribe to its *Nutrition Action Healthletter*. CSPI has worked to improve the nation's health by advocating for better nutrition and safer food since 1971. CSPI has over 6000 members and over 28,000 subscribers who reside in New Jersey. CSPI sues on its own behalf and on behalf of its New Jersey members and subscribers who purchased Enviga (jointly, Members).

10. The Coca-Cola Company (Coke) is a Delaware corporation, which may be given notice of this action by service to its registered agent C T Corporation System, 1201 Peachtree Street NE, Atlanta, Georgia. Coke has done business in the State of New Jersey at all times relevant to this lawsuit.

11. Nestlé USA, Inc. (Nestlé) is a Delaware corporation, which may be given notice of this action by serving its registered agent C T Corporation System, 1201 Peachtree Street NE, Atlanta, Georgia. Nestlé has done business in the State of New Jersey at all times relevant to this lawsuit.

12. Beverage Partners Worldwide (North America) (BPW) is a joint venture of Coke and Nestlé S.A.. BPW may be given notice of this action by serving Coke through its registered agent, C T Corporation System, 1201 Peachtree Street NE, Atlanta, Georgia. BPW has done business in the State of New Jersey at all times relevant to this lawsuit.

13. The events complained of occurred in the State of New Jersey.

JURISDICTION AND VENUE

14. Jurisdiction of this Court arises under 28 U.S.C. § 1332, because plaintiff and defendants are citizens of different states and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

15. Venue in this Court is proper in that defendants transacted business in this county and the conduct complained of occurred in this district, as well as elsewhere in New Jersey.

CONDITIONS PRECEDENT

16. All conditions precedent have been performed or have occurred.

FACTS

17. Defendants have jointly conspired to market a new product called “Enviga,” which is a canned soft drink containing a proprietary combination of caffeine and an extract of green tea called “epigallocatechin gallate” or “EGCG.”

18. New Jersey is one of the test markets for Enviga. Defendants’ advertising campaign is so extensive that, in some places, every single advertisement in a bus or train car consists of Enviga ads. Billboards containing extravagant Enviga claims are ubiquitous.

19. To the average reasonable consumer, in New Jersey and elsewhere in the United States, burning calories or reducing caloric consumption results in losing weight, or at least offsetting weight gained from other calories.

20. Defendants market Enviga as a weight-loss or weight-control product, based on a novel claim that drinking three cans of Enviga (over a quart) every day over a lengthy period of time will actually cause the expenditure of far more calories than the product contains.

21. However, the truth is that weight-loss representations for the product (whether express or implied) cannot be substantiated because the small number of studies that exist are conflicting and inadequate to substantiate the representations.

22. 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.”

23. The Enviga can itself makes multiple representations. The Principal Display Panel touts Enviga as “The Calorie Burner,” and the side panel contains 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.”

24. The product website, www.enviga.com, makes similar claims, including:

- “Enviga is a precise balance of ingredients that have been proven to invigorate your metabolism helping you burn more calories.”¹
- Enviga contains the “powerful EGCG.”²
- Including Enviga in the diet is “much smarter than following fads, quick-fixes, and crash diets.”³
- 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.’”⁴
- Enviga provides “another way to keep those extra calories from building up.”⁵
- “Enviga results in negative calories, because you burn more calories than you consume.”⁶
- “Enviga actually provides a negative calorie effect that’s never before been proven in a ready-to-drink green tea.”⁷
- “There is a calorie burning effect from a single can.”⁸
- “Enviga is expected to have a comparable effect on individuals over 35.”⁹

1 www.enviga.com/#Benefits (accessed November 27, 2006).

2 www.enviga.com/#Benefits (accessed November 27, 2006).

3 www.enviga.com/#Benefits (accessed November 27, 2006).

4 www.enviga.com/#Benefits (accessed November 27, 2006).

5 www.enviga.com/#Benefits (accessed November 27, 2006).

6 www.enviga.com/#FAQs (accessed November 27, 2006).

7 www.enviga.com/#CalorieBurning (accessed January 25, 2007).

8 www.enviga.com/#FAQs (accessed November 27, 2006).

9 www.enviga.com/#FAQs (accessed November 27, 2006).

- “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.”¹⁰
- “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.”¹¹

25. Outdoor advertising makes even plainer statements:

- “The calorie burner.”
- “Burning calories is now officially delicious.”
- “Be positive. Drink negative.”
- “Invigorate your metabolism.”

26. All of these claims are based on the abstract of a single, small, and short-term study — funded by one or more Defendants. This single study is, by itself, meaningless unless it is corroborated by larger and longer-term studies.

27. The small study itself showed that the EGCG and caffeine apparently actually *lowered* energy expenditure in some of the 31 subjects. Thus, the chemicals in Enviga would conceivably *contribute to weight gain, not loss*, for some consumers.

28. Defendants market this product to all New Jersey consumers, without qualification. However, the subjects in this study were young and lean. The 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+).

29. In contrast, approximately 37 percent of New Jersey residents are overweight and 22 percent are obese.¹²

¹⁰ www.enviga.com/#FAQs (accessed November 27, 2006).

¹¹ www.enviga.com/#BePositiveFeelGreat (accessed November 27, 2006).

¹² www.state.nj.us/health/chs/monthlyfactsheets/jul06_obesity.pdf (accessed January 24, 2007). In all likelihood, these percentages have increased since these statistics were collected.

30. This study neither substantiates nor provides a reasonable basis for the claims made by Defendants regarding Enviga.

31. There is in fact no substantiation or reasonable basis for claiming that Enviga (or the amounts of EGCG and caffeine in three cans of Enviga) has any effect on caloric balance or weight for the majority of adults, who are not young, healthy, and thin.

32. In addition, this study was a short-term (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 Defendants' hired scientists.

33. Even if Defendants' 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 defendants' marketing efforts), the effect would be minimal and it would be necessary (and unrealistic) to drink several cans of Enviga every day over many months just to obtain the minimal effect.

34. To lose one pound, a person must burn 3,500 calories. Defendants' study showed that, *at best*, a healthy, active, average-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 100 extra calories worth of other foods.

35. And this is the best case from the study. The low end of effect claimed by defendants is 60 calories per day. At this rate, it would take this consumer almost 60 days —nearly 180 cans and \$250 — to see a one-pound drop. Maybe. After almost two months.

36. In fact, Enviga has no effect or possibly even the opposite effect on a significant proportion of consumers.¹³ Enviga in theory might then cause some consumers to burn fewer — not more — calories. Thus, if defendants' 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*.

37. Defendants' study was presented at a conference sponsored by The Obesity Society (also known as "NAASO," North American Association for the Study of Obesity), 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 the statement in defendants' study that "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."

38. There are a few other published studies on the calorie-burning or weight loss efficacy of EGCG in combination with caffeine. 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.

39. All these studies were 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.

¹³ See, e.g., Am J Clin Nutr. 1999 Dec;70(6):1040-5; J Nutr. 2001 Nov;131(11):2848-52.

40. There is no evidence that one or two cans of Enviga daily would have any effect on calorie balance or body weight. Until recently, Coca-Cola acknowledged on its web site that one can would not have a significant effect.

41. However, Coca-Cola 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.¹⁴

42. No long-term studies substantiate or provide a reasonable basis for the claims made by Defendants regarding Enviga.

43. 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.¹⁵

44. 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.¹⁶

45. 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.¹⁷

46. Thus, at this time, there are no studies that substantiate or provide a reasonable basis for the claims made by Defendants regarding Enviga.

¹⁴ "While Nestle'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 quantified and would vary from person to person." www.enviga.com/#FAQs (accessed January 26, 2007) (emphases added).

¹⁵ *Br J Nutr.* 2005 Dec;94(6):1026-34.

¹⁶ *Br J Nutr.* 2004 Mar;91(3):431-7.

¹⁷ *Obes Res.* 2005 Jul;13(7):1195-204.

COUNT I

Illegal Practices in Violation of the New Jersey Consumer Fraud Act NJSA 56:8-2 et seq.

47. As set forth above, defendants engaged in unconscionable commercial practices, deception, fraud, false pretence, false promise, misrepresentation, and knowing concealment or omission of material facts with the intent that others rely on such, in connection with the sale and advertisement of Enviga, in violation of the laws of New Jersey.

48. These acts in violation of the laws of New Jersey include, but are not limited to:
- a. Advertising Enviga without having prior substantiation for all advertised claims.
 - b. Advertising Enviga as effective by itself — e.g., “the calorie burner” — for weight control.
 - c. Advertising Enviga to all consumers, when Defendants knew that the minimal study evidence showed that Enviga had a desirable effect only on a discrete and minor segment of the population.
 - d. Advertising Enviga without the material fact that one would have to drink three cans daily (at a daily cost of over \$4.00) for as long as the person wanted to have whatever effect might occur.
 - e. Failing to disclose that it would be necessary to spend weeks drinking three cans of Enviga a day — at least 100 cans at an approximate cost of \$150 — just to enjoy a possible loss of one pound. One pound loss of weight over an extended period of time — in the unlikely event it did occur — is too minimal and conjectural to be meaningful.

49. This conduct violated the rights of CSPI and its Members residing in New Jersey, as set forth under New Jersey Law, i.e., the New Jersey Consumer Fraud Act.

50. CSPI and its Members suffered ascertainable losses as a direct result of this wrongful conduct and Defendants have obtained monies from CSPI's Members by means of the unlawful practices alleged herein.

COUNT II

Violations of New Jersey Food and Drug Laws, in Violation of the New Jersey Consumer Fraud Statute NJSA 56:8-2 et seq.

51. Throughout the period set forth in the complaint and for the reasons set out above, defendants violated New Jersey food and drug law by misbranding Enviga.

52. This conduct violated the rights of CSPI and its Members residing in New Jersey, as set forth under New Jersey Law, i.e., the New Jersey Consumer Fraud Act.

53. CSPI and its Members suffered ascertainable losses as a direct result of this wrongful conduct and Defendants have obtained monies from CSPI's Members by means of the unlawful practices alleged herein.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues triable by right before a jury.

PRAYER FOR RELIEF

THEREFORE, the Center for Science in the Public Interest prays for judgment as follows:

1. Finding that Defendants' conduct violates the New Jersey Consumer Fraud Act;
2. Enjoining Defendants from their unlawful conduct;
3. Ordering Defendants to refund all monies obtained by means of their violations of the New Jersey Consumer Fraud Act pursuant to N.J.S.A. 56:8-2.11;
4. Awarding attorneys' fees, expenses and costs of this suit;
5. Awarding Plaintiffs pre-judgment interest, compounded daily; and

6. Granting such other, further, and different relief that the Court deems necessary,

just, and proper.

Respectfully submitted,

CENTER FOR SCIENCE IN THE PUBLIC INTEREST

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