STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30th JUDICIAL CIRCUIT
INGHAM COUNTY

IN THE MATTER OF:

Case No. 09-36-CP
Hon. Joyce Draganchuk

Coca-Cola Company, Nestle USA Inc.,
and Beverage Partners Worldwide North America

AG File No. 2007-008570-A

Respondents.
_____/

Assurance of Voluntary Compliance/Discontinuance between the State of Michigan and the Coca-Cola Company, Nestle USA Inc. and Beverage Partners Worldwide North America

This Assurance of Voluntary Compliance ("AVC") is entered into between the Coca-Cola Company, Nestle USA Inc. and Beverage Partners Worldwide North America (the "Respondents") and the Attorneys General of the states of Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Louisiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington and the District of Columbia ("the States").

Background

1. The Respondents have developed and marketed a carbonated caffeine and green tea beverage known as Enviga, the consumption of which the Respondents claim will increase caloric expenditure in consumers. The Respondents launched Enviga regionally in New Jersey and the New York City and Philadelphia metropolitan areas in October 2006 and launched Enviga nationally in February 2007.

2. The Respondents have disseminated marketing, promotion and advertising of Enviga through various media, including but not limited to radio, print, internet website, billboards, free-standing newspaper inserts, packaging labels and inserts, brochures, circulars, mailers, coupons and point-of-sale displays.

3. In their marketing of Enviga, the Respondents use the terms "the calorie burner" and "negative calories" and/or "drink negative" to describe Enviga's purported calorie-burning properties, and represent that Enviga has been shown to increase calorie burning "by 60-100 calories per day." The Respondents further represent that Enviga will cause consumers to burn calories "one can at a time."

4. The Respondents allege that these claims are supported by reliable and competent scientific evidence, including but not limited to a study commissioned by the Respondents (the "Rudelle Study") in the journal *Obesity*. The Respondents also refer to various studies and expert opinions which they allege support the conclusion that the general public experiences similar benefits.

5. The States allege that the explicit representations set forth in Paragraph 3 are misleading and/or deceptive in violation of their respective consumer protection laws and regulation promulgated there under[1] inasmuch as they do not clearly and conspicuously disclose that Enviga has never been tested on individuals of all ages and body types, and the calorie-burning effects of Enviga have only been tested on subjects who consumed three cans of the Enviga prototype per day. Further, the States allege that there is no basis to conclude that the increased caloric expenditure of 60-100 per day, measured on the third day of the Enviga prototype use in a controlled, experimental setting, is indicative of the calorie-burning effect consumers would reliably experience in various background circumstances as with long-term consumption.

Respondents' Assurances as to Further Conduct

To address the States' aforementioned concerns regarding the beverage known as Enviga, or any beverage manufactured by the Respondents which contains the same or substantially similar constituent ingredients in the same or substantially similar formulation as Enviga, the marketing of which relies upon the results of the Rudelle study ("Enviga"), the Respondents and the States have entered into this AVC and have agreed as follows:

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[1] ALASKA – *Unfair Trade Practices and Consumer Protection Act*, AS 45.50.471 *et seq.*, ARIZONA - *Consumer Fraud Act,* A.R.S. § 44-1521, *et seq.*; ARKANSAS - Ark. Code Ann. § 4-88-101, *et seq.*; CONNECTICUT - Conn. Gen. Stat., §§ 42-110a *et seq.*; DISTRICT OF COLUMBIA - *District of Columbia Consumer Protection Procedures Act,* D.C. Code § 28-3901, *et seq.*; FLORIDA - *Deceptive and Unfair Trade Practices Act*, Fla. Stat. Ch. 501.201 *et seq.*; GEORGIA – *Georgia Fair Business Practices Act of 1975*, Ga. Code Ann. § 10-1-390, *et seq.*; IDAHO - *Consumer Protection Act,* Idaho Code Section 48-601 *et seq.*; ILLINOIS - *Consumer Fraud and Deceptive Business Practices Act,* 815 ILCS § 505/1 *et seq.* (2006 State Bar Edition); KANSAS - *Consumer Protection Act,* K.S.A. 50-623 *et seq.*; KENTUCKY – *Consumer Protection Statute,* KRS 367.110 *et seq.;* LOUISIANA – *Unfair Trade Practices and Consumer Protection Law,* LSA-R.S. 51:1401, *et seq.*; MAINE - *Unfair Trade Practices Act,* 5 M.R.S.A. § 205-A-214 *et seq.*; MARYLAND - *Consumer Protection Act,* Md. Code Ann., Com. Law § 13-101 *et seq.*; MASSACHUSETTS - *Consumer Protection Act,* M.G.L. c. 93A *et seq.*; MICHIGAN - *Michigan Consumer Protection Act,* MCL 445.901 *et seq.*; MISSISSIPPI – *Mississippi Consumer Protection Act,* §75-24-1 *et seq.* MISS CODE 1972 as amended.; MISSOURI – *Merchandising Practices Act,* Section 407.010 *et seq.,* RSMo.; MONTANA - Mont. Code Ann. § 30-14-101 *et seq.*; NEW JERSEY - *New Jersey Consumer Fraud Act,* 56:8-1 *et seq.*; NEW MEXICO – Unfair Practices Act" NMSA 1978, S 57-12-1 *et seq.;* NEVADA - *Deceptive Trade Practices Act,* Nevada Revised Statutes 598.0903 *et seq.*; NORTH CAROLINA - *Unfair and Deceptive Trade Practices Act,* N.C. Gen. Stat. § 75-1.1 *et seq.*; OHIO- *Consumer Sales Practices Act,* R.C. 1345.01, *et seq.*; OREGON - *Unlawful Trade Practices Act,* ORS 646.605 to 646.656; PENNSYLVANIA - *Unfair Trade Practices and Consumer Protection Law,* 73 P.S. § 201-1 *et seq.*; TEXAS - *Deceptive Trade Practices - Consumer Protection Act,* Tex. Bus. and Com. Code § 17.47, *et seq.*; and WASHINGTON - *Consumer Protection Act,* R.C.W. 19.86 *et seq.*

1. In any promotion and marketing of the beverage known as Enviga to consumers by the Respondents, including any promotion and marketing in any electronic medium (e.g. – television, radio and/or internet), that uses the terms: (a) "the calorie burner;" (b) "negative calories;" (c) "drink negative;" (d) or makes a representation, either explicitly or by implication, that consumers will achieve a calorie-burning effect by drinking Enviga; or (e) makes a representation, either explicitly or by implication, that consumers will burn an additional 60-100 calories by drinking Enviga, the Respondents shall include a clear and conspicuous disclosure in close proximity that conveys that drinking Enviga does not produce weight loss in the absence of dieting and exercise. Such a disclosure shall be presented in plain English, meaning that Respondents shall use definite, concrete, everyday words in the active voice, and shall avoid multiple negatives and technical or scientific terminology; provided, however, that where the above disclosure is not practical, the respondents shall include the phrase "See Back of Can for Details" (or a comparable statement) in a clear and conspicuous manner and shall set forth such disclosure as provide herein on the back of said can. For any disclosure required by this AVC in radio promotion and marketing, such disclosure shall be presented in a clear voice and in a cadence so as to be easily understood.

2. In its promotion and marketing of Enviga to consumers, the Respondents shall not claim that consumers will lose weight solely by drinking Enviga.

3. It is understood and agreed that the Respondents shall make such disclosures in revised packaging to be phased in following use of existing inventory.

4. The parties reserve the right to discuss the viability of any or all of these provisions as they are implemented, having due regard for changes in laws and regulations. Any modification to this Assurance shall be by written agreement of the parties.

Respondents' Payment to the States

The Respondents shall make a payment in the amount of $650,000 to the States by February 24, 2009, for attorneys' fees and other reasonable costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, consumer education, litigation or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, or for any other uses permitted by state law including future public protection purposes, at the sole discretion of each Signatory Attorney General. Payment of the state's share by Respondents, in the amount determine by the States, shall be made payable to "State of Michigan."

General Terms of Assurance

1. Respondents are entering into this AVC solely for purposes of settlement. This AVC shall not be considered an admission of liability or a violation of state law or as evidence supporting any of the allegations raised by the States. The changes in Respondents' advertising and marketing required by this AVC shall not be considered evidence of or an admission by

Respondents of wrongdoing or failure to comply with any state or federal statute, regulation or the common law.

2. The Respondents agree that the States shall have the authority to enforce or seek sanctions for violations of the provisions of the AVC in the duly constituted courts of the States, and evidence of a violation of this AVC shall constitute prima facie evidence of an act or practice in violation of the consumer protection laws of the States.

3. The parties agree that this AVC shall become binding and effective when executed by all parties.

4. The Respondents have read and understand this AVC and enter into it voluntarily, having been advised by its undersigned counsel of the meaning and effect of each provision of this AVC.

5. Nothing contained herein shall be construed to waive any individual right of action by any consumer, nor will it be construed as a waiver by the Respondents of any legal right in connection with any action brought by any person or entity not a signatory to this Agreement.

Release

This Assurance shall constitute a release from liability and a resolution of all civil claims, causes of action, damages, fines, costs or penalties that were asserted or could have been asserted at any time up to and including the effective date of this Assurance by the State of Michigan for, alleged violations of its consumer protection laws or regulations cited in footnote 1 based upon Respondents' manufacturing, selling and offering for sale of Enviga to consumers, including the use of existing packaging and advertising.

Notwithstanding the foregoing, the State may institute an action or proceeding to enforce the terms and provisions of this Assurance. Prior to seeking enforcement of this Assurance, its Attorney General shall contact the Respondents and provide a written notification of the alleged violations and shall provide the Respondents reasonable opportunity to attempt to resolve the State's concerns. If a mutually acceptable resolution is not reached, the Attorney General agrees to provide the Respondents thirty (30) days advance written notice prior to instituting any proceedings alleging a violation of this Assurance. Such notification shall be transmitted by facsimile or electronic mail and by overnight mail to counsel for the Respondents, Charles T. Lee, Esq., McCarter & English, LLP, Financial Centre, Suite 304A, 695 East Main Street, Stamford, CT 06901-2138, Fax (203) 399-5831, electronic mail: clee@mccarter.com.

Signatures and Acceptance by Respondent Parties

The undersigned has the authority to consent and sign on behalf of **The Coca-Cola Company** in this matter, and does consent to form and content of this Assurance of Voluntary Compliance / Assurance of Discontinuance and to its entry:

The Coca-Cola Company

By: _____ Date: 2-6-09

Brian Kelley
President and General Manager, Still Beverages

Signatures and Acceptance by Respondent Parties

The undersigned has the authority to consent and sign on behalf of **Beverage Partners Worldwide (North America)** in this matter, and does consent to form and content of this Assurance of Voluntary Compliance / Assurance of Discontinuance and to its entry:

Beverage Partners Worldwide (North America)

By: _____

Name: David Pemberton

Title: Area Director

Date: 2/2/09

By: _____

Name: Jorge Perez

Title: Finance Director

Date: 2/2/09

Signatures and Acceptance by Respondent Parties

The undersigned has the authority to consent and sign on behalf of **Nestle USA Inc.** in this matter, and does consent to form and content of this Assurance of Voluntary Compliance / Assurance of Discontinuance and to its entry:

Nestle USA Inc.

By: _____ Date: 2-19-09

Authorization of the Michigan Attorney General

The undersigned has the authority to consent and sign on behalf of the State of Michigan in this matter, as hereby accepts and approves this Assurance of Discontinuance:

Accepted and approved this 24th day of February, 2009.

MIKE COX
Attorney General

By: Suzanne Hassan

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