

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
Complaint and Request for Investigation)
of PepsiCo's and Frito-Lay's Deceptive)
Practices in Marketing Doritos to)
Adolescents)

COMPLAINT AND REQUEST FOR INVESTIGATION

Submitted by

Center for Digital Democracy,

Consumer Action,

Consumer Watchdog,

and The Praxis Project

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The Center for Digital Democracy (CDD), by its attorneys, the Institute for Public Representation, joined by Consumer Action, Consumer Watchdog, and The Praxis Project, ask the Federal Trade Commission (FTC) to investigate and bring an action against PepsiCo subsidiary Frito-Lay for engaging in deceptive and unfair digital marketing practices in violation of §5 of the Federal Trade Commission Act.

I. INTRODUCTION AND SUMMARY

This complaint grows out of research conducted by Kathryn Montgomery, PhD and Jeff Chester, MSW on behalf of the National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN).¹ Their Report, *Digital Food Marketing to Children and Adolescents*,² is being released simultaneously with the filing of this Complaint. The Report identifies, analyzes, and documents a set of digital marketing practices that pose particular threats to children and youth, especially when used to promote foods that are high in fat, sugars, and salt, which are known to contribute to child and adolescent obesity.

¹ This complaint was drafted with the invaluable assistance of Georgetown Law students Todd Hale (Fall 2010), Ariel Gursky (Fall 2011), Luke McFarland (Fall 2011), and Lauren Wilson (Fall 2011) and by IPR Graduate Teaching Fellow Laura Moy.

² Kathryn Montgomery and Jeff Chester, *Digital Food Marketing to Children and Adolescents: Problematic Practices and Policy Interventions* (Oct. 2011), available at <http://case-studies.digitalads.org/ftc-complaint/>.

The Report finds that contemporary marketing practices are increasingly multidimensional. Marketers aim not simply to expose young people to ads, but rather to foster ongoing engagement by encouraging them to interact with, befriend, and integrate brands into their personal identities and social worlds. The Report finds that teens are uniquely susceptible to digital marketing that utilizes techniques such as (1) *Augmented reality, online gaming, virtual environments, and other immersive techniques* that can induce “flow,” reduce conscious attention to marketing techniques, and foster impulsive behaviors; (2) *Social media techniques* that include surveillance of users’ online behaviors without notification, as well viral brand promotion; (3) *Data collection and behavioral profiling* designed to deliver personalized marketing to individuals without sufficient user knowledge or control; (4) *Location targeting and mobile marketing*, techniques that follow young peoples’ movements and are able to link point of influence to point of purchase; and (5) *Neuromarketing*, which employs neuroscience methods to develop digital marketing techniques designed to trigger subconscious, emotional arousal.³

The Report finds that many food and beverage companies are using these techniques to market to adolescents.⁴ However, the digital marketing campaigns mounted by PepsiCo’s Frito-Lay to promote the snack food “Doritos” stood out as particularly problematic. PepsiCo has pioneered a strategy for marketing to teens that other companies are just now beginning to embrace. A recent report by Forrester Research notes that teens “live on the Internet,” and

³ *Id.* at 4–5 (describing Coca-Cola’s MyCoke Campaign). Kelloggs’ campaign “Taste of Music was a finalist for the SAMMY award in 2010 in the Best Branded Social Media Video and Social Cross-Media category. In its submission, Kelloggs explained that “In 2010, Pop-Tarts has continued its all-digital campaign with an objective of reaching a broader audience of teens. To spark even more passionate conversation among teens, we’re combining two of their favorite things: Pop-Tarts and Music. And we’re meeting them in the places they already visit online, primarily Facebook and YouTube.” available at <http://digitalads.org/detail.php?id=1729>.

⁴ *Id.* at 26–48.

recommends that to reach teens, advertisers should “[i]nstead of trying to join the conversation, influence their behavior by infiltrating your brand through their existing social relationships.”⁵

Under the alias “Snack Strong Productions,” Frito-Lay has infiltrated the lives of teens by developing covert advertising campaigns centered on things teens love—video games, music, horror, sports, contests, and social networking. Because of Frito-Lay’s innovative approaches, its campaigns have won a number of prestigious marketing awards.⁶ To enter a marketing competition, the advertiser or ad agency typically writes up a case study and produces a short video describing the marketing campaign. These case studies provide unusual insight into how and why these ad campaigns were developed. Several case studies are included in the appendices to this Complaint along with descriptions of their accompanying videos, and archived copies of the case studies may be found at <http://case-studies.digitalads.org/ftc-complaint/>.

In evaluating whether marketing practices are deceptive, the FTC considers the practices from the perspective of the intended audience. This complaint demonstrates that Frito-Lay’s intended audience is teens and that teens are uniquely vulnerable to the kinds of deceptive techniques used by Frito-Lay because of certain physiological and psychological traits associated with adolescence.

⁵ Jacqueline Anderson, Forrester Research, *Understanding The Intricate Digital Behaviors of Young Consumers* (Mar. 2011), available for purchase at http://www.forrester.com/rb/Research/understanding_intricate_digital_behaviors_of_young_consumers/q/id/58347/t/2.

⁶ See, e.g., Appendix B: 2008 Effie Award for Snack Strong Productions; Appendix I: 2011 Effie Award for Concert in a Bag; Appendix K: Doritos Unlock Xbox 2; see also *Doritos Hotel 626*, The Inspiration Room (June 22, 2009), <http://theinspirationroom.com/daily/2009/doritos-hotel-626/> (“Hotel 626 has won a bronze at the Andy Awards 2009, a bronze for consumer-targeted site at the CLIO Awards 2009, a Gold Pencil at One Show Interactive 2009, a Yellow Pencil at the D&AD Awards 2009, two Webby awards, and was honoured for microsite at the AICP Next Awards 2009.”).

The complaint alleges that Frito-Lay's digital marketing to teens is deceptive in a least three distinct ways.

- Frito-Lay disguises its marketing campaigns as entertaining video games, concerts, and other immersive forms of entertainment, thus making it more difficult for teens to recognize them as marketing and to be skeptical about the messages they present.
- Frito-Lay claims to protect teens' privacy but fails to do so. The campaigns also collect and use teens' personal information without meaningful notice and consent.
- Frito-Lay uses viral marketing in ways that violate the FTC endorsement guidelines.

Finally, the Complaint shows that these misrepresentations are material. Frito-Lay's deceptive marketing campaigns have clearly affected teens' purchasing choices. This is evident from both the increased sales of Doritos and the fact that to play the game or enjoy the concert, the consumer is often required to purchase Doritos. These campaigns are also materially deceptive because they fail to adequately disclose information needed by consumers, such as what the company does with personal information and the source of viral campaigns that use Twitter, Facebook, and YouTube. Finally, the increased consumption of Doritos, a "salty snack" high in calories, fat and sodium, contributes to the epidemic of adolescent obesity. Adolescent obesity has severe long-term health consequences and imposes enormous costs on society. Almost one-third of U.S. teens today are overweight or obese.

II. PARTIES

A. Complainants

Center for Digital Democracy (CDD) is one of the leading consumer protection and privacy organizations in the United States. Since its founding in 2001, CDD has been at the

forefront of research, public education, and advocacy on protecting consumers in the digital age. Its impact has been highly significant, fostering widespread debate, educating a spectrum of stakeholders, and creating a legacy of government and self-regulatory safeguards across a variety of Internet and digital media platforms. CDD's public education programs focus on informing consumers, policy makers, and the press about contemporary digital marketing issues, including its impact on public health, children and youth, and financial services.

Consumer Action is a nonprofit organization that has championed the rights of underrepresented consumers nationwide since 1971. Throughout its history, the organization has dedicated its resources to promoting financial literacy and advocating for consumer rights in the media and before lawmakers to promote economic justice for all.

Consumer Watchdog, established in 1985, is a nationally recognized nonpartisan nonprofit organization that represents the interests of taxpayers and consumers. Its mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting civil justice, corporate reform, and political accountability.

The Praxis Project is a national, nonprofit organization that builds partnerships with local groups to influence policymaking to address the underlying, systemic causes of community problems. Committed to closing the health gap facing communities of color, this organization forges alliances for building healthy communities.

B. PepsiCo and Frito-Lay

PepsiCo describes itself as “a world leader in convenient snacks, foods, and beverages, with revenues of \$60 billion and over 285,000 employees. PepsiCo owns some of the world's

most popular brands, including Pepsi-Cola, Mountain Dew, Diet Pepsi, Lay's, Doritos, Tropicana, Gatorade, and Quaker.”⁷ It is headquartered in Purchase, NY.⁸

Frito-Lay North America is “the \$12 billion convenient foods business unit of PepsiCo.”⁹ Headquartered in Plano, Texas, its “brands account for nearly 62% of the U.S. salty snack category.”¹⁰ In July 2011, PepsiCo reported that Frito-Lay

. . . increased volume 2 percent in the quarter reflecting especially strong performance in the convenience, dollar and drug channels, and each of the division’s five largest trademarks—Lay’s, Tostitos, Doritos, Cheetos and Ruffles—posted revenue growth driven by strong innovation. Both gross margins and operating margins expanded in the quarter reflecting the benefits of net revenue growth and productivity.¹¹

Frito-Lay introduced Doritos in 1966. By 2006, it was the “#1 tortilla chip, #2 salty snack and the third most well-known food brand in America.”¹²

III. BACKGROUND

To understand why Frito-Lay’s marketing is deceptive to its intended audience of teens, it is helpful to review recent research on the unique vulnerabilities of adolescents to the digital marketing techniques used by Frito-Lay.

⁷ *Corporate Profile*, PepsiCo, <http://www.pepsico.com/Investors/Corporate-Profile.html> (last visited Sept. 20, 2011).

⁸ *PepsiCo Corporate Fact Sheet*, PepsiCo, 1, <http://www.pepsico.com/Download/PepsiCoCorporateFactSheet.pdf> (last visited Sept. 20, 2011).

⁹ *About Us: For Investors*, Frito-Lay, <http://www.fritolay.com/about-us/for-investors.html> (last visited Sept. 20, 2011).

¹⁰ *Frito-Lay Quick Facts*, PepsiCo, http://www.pepsico.com/Download/Frito-Lay_Quick_Facts.pdf (last visited Sept. 20, 2011).

¹¹ *PepsiCo Delivers Solid Financial Results for Second Quarter 2011*, PepsiCo, <http://www.pepsico.com/PressRelease/PepsiCo-Delivers-Solid-Financial-Results-for-Second-Quarter-201107212011.html> (last visited Oct. 3 2011).

¹² Appendix B: 2008 Effie Award for Snack Strong Productions, at A-17.

A. Research Suggests That Due to Biological, Psychological and Environmental Factors, Adolescents are Uniquely Vulnerable to Digital Marketing of High-Calorie, Low-Nutrient Snack Foods

Teens avidly use the Internet to socialize with their peers, seek out information, and express themselves.¹³ While teens may be technologically savvy, they often lack good judgment when it comes to online behavior. For example, they are less likely to take the time to read a privacy statement and more likely to believe messages that purport to come from their friends. It appears that these tendencies are driven by biological, psychological and environmental factors associated with adolescence.

A recent report published by the Institute of Medicine (IOM) finds considerable evidence that the greatest threat to adolescents' health and well-being is their inclination to engage in risky and reckless behavior.¹⁴ The report specifically identifies obesity as one such "serious health concern for young people."¹⁵ The IOM report finds that adolescents' risk-taking tendencies are influenced by their brain development, the psychology of adolescence, and the influence of the environment. The availability of new technologies has allowed researchers to study changes in the brain and link those changes with behavior.¹⁶ This research shows that the "changes that take place in the adolescent brain are specific to particular regions—those that are most important for

¹³ See Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, Pew Internet & American Life Project, *Social Media & Mobile Internet Use Among Teens and Young Adults* (2010) [hereinafter *Pew Internet Study*], available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplevels.pdf; *Protecting Youths in an Online World: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 3 (2010) [hereinafter *Hearing on Protecting Youths in an Online World*] (statement of Jessica Rich, Deputy Director, Bureau of Consumer Protection, Fed. Trade Comm'n).

¹⁴ Institute of Medicine, *The Science of Adolescent Risk-Taking: Workshop Report* (2011) [hereinafter *IOM Report*], available at http://www.nap.edu/catalog.php?record_id=12961.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 35.

modulating behavioral responses to reward and affective behavior. . . . The prefrontal cortex, which undergoes significant change during adolescence, is the site of executive control functions that start emerging early in life and continue to develop into adulthood.”¹⁷

The report explains how adolescent brain development affects risk-taking behavior:

The imbalance between the gradual development of the prefrontal cortex, which, among other things, supports self-control, and the more rapidly developing limbic system, which, in turn, governs appetite and pleasure-seeking, helps to explain why adolescents are prone to seek novelty and take risks. At the same time, as young people reach puberty, they are faced with an array of social pressures as well as neuroendocrine changes that can affect their moods and focus their attention on sexuality and sensation-seeking.¹⁸

Regarding the impact of psychological factors, the IOM report notes that “the primary work of adolescence—including developing an identity, building competence, and gaining acceptance from peers—requires some degree of risk-taking. These tasks also help to explain why adolescents’ perspective on risky behavior may be very different from that of adults.”¹⁹ In addition, “adolescents process decisions related to risk quite differently from the way adults do.”²⁰

Adolescents’ perceptions of risk are also subject to environmental factors. For example, they “tend to be particularly sensitive to peer feedback as a source of understanding their own identity.”²¹ Peer pressure has been shown to increase propensity to take risks, especially among adolescents.²² The relationship between peer pressure and risk-taking is particularly troubling in

¹⁷ *Id.* at 37.

¹⁸ *Id.* at 46.

¹⁹ *Id.* at 56.

²⁰ *Id.* at 57.

²¹ *Id.* at 66.

²² Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and*

the food marketing context, because “[c]hoosing to eat healthily [is] for many young people associated with a ‘geeky,’ ‘nerdy,’ untrendy image which could attract teasing and marginalization.”²³

Media and technology also exert influence on teenagers. As the IOM Report notes, “the wide, fast-evolving array of media and technologies . . . are part of [adolescents’] lives.”²⁴ In early 2010, 93% of teens ages 12–17 were online and 73% used social networking websites.²⁵ Of teens who used the Internet daily, 80% visited a social network.²⁶ One of the major reasons teens are such avid users of social networks is that these sites enable them to present themselves to their peers and then get feedback and affirmation.²⁷

A review of neuroscience, psychology and marketing literature conducted by Pechmann *et al.* reports that “adolescents tend to be more impulsive and self-conscious than adults because of the neurobiological changes that occur during this critical developmental period. Thus, adolescents may be especially attracted to risky branded products that, in their view, provide immediate gratification, thrills, and/or social status.”²⁸ The authors find that “adolescents are

Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 *Developmental Psychol.* 625, 629, 631 (2005).

²³ Martine Stead, Laura McDermott, Anne Marie MacKintosh & Ashley Adamson, *Why Healthy Eating Is Bad for Young People’s Health: Identity, Belonging and Food*, 72 *Soc. Sci. & Med.* 1131, 1137 (2011).

²⁴ *IOM Report*, *supra* note 14 at 81.

²⁵ *Pew Internet Study*, *supra* note 13, at 4, 2.

²⁶ *Pew Internet Study*, *supra* note 13, at 17.

²⁷ Amanda Lenhart & Mary Madden, Pew Internet & American Life Project, *Teens, Privacy & Online Social Networks* at 13–14 (2007), available at http://pewinternet.org/~media/Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.

²⁸ Cornelia Pechmann, Linda Levine, Sandra Loughlin, & Francis Leslie, *Impulsive and Self-Conscious: Adolescents’ Vulnerability to Advertising and Promotion*, 24 *J. Pub. Pol’y & Marketing* 202, 202 (2005).

particularly likely to act impulsively when they are in negative mood states and that adolescents tend to experience negative mood states more frequently and intensely than either children or adults.”²⁹

Another study shows that adolescents score high in psychologists’ “sensation seeking” tests, which measure desire for stimulating, exciting, and novel kinds of experiences.³⁰ Teenage males may be especially attracted to gory movies and other thrills because the “pleasure center in the teen boy brain is nearly numb compared with this area in adults and children,” which may cause teen males to become avid thrill seekers as they pursue sensations they experienced as children.³¹

A report by Leslie *et al.* addresses the implications of the research on adolescent psychological and neurobiological development for adolescents’ response to digital marketing. It suggests that “adolescents are more prone to making poor decisions when emotionally aroused. Since digital marketing purposefully evokes high emotional arousal and urges adolescents to make consumption decisions under high arousal, it exacerbates this problem.”³²

Harris *et al.* have reviewed psychological models to better understand how food marketing affects children and adolescents.³³ They find that social cognitive theories “predict

²⁹ *Id.* at 212.

³⁰ Marvin Zuckerman, Sybil Eysenck & H. J. Eysenck, *Sensation Seeking in England and America: Cross-Cultural, Age, and Sex Comparisons*, 46 *J. Consulting & Clinical Psychol.* 139, 143 (1978) (In a study of individuals ranging in age from 16 to 70, sensation seeking scores declined steadily as age increased).

³¹ Louann Brizendine, *The Male Brain* 37 (2010) (citing numbing of the brain’s pleasure center during the adolescent years as the reason teen boys enjoy especially gory movies).

³² Frances M. Leslie, Linda J. Levine, Sandra E. Loughlin & Cornelia Pechmann, *Adolescents’ Psychological & Neurobiological Development: Implications for Digital Marketing* 6 (2009), available at http://digitalads.org/documents/Leslie_et_al_NPLAN_BMSG_memo.pdf.

³³ Jennifer L. Harris, Kelly D. Brownell, & John A. Barch, *The Food Marketing Defense Model: Integrating Psychological Research to Protect Youth and Inform Public Policies*, 3 *Soc. Issues & Pol’y Rev.* 211 (2009).

that adolescents . . . are susceptible to food marketing effects, and that these effects can occur without conscious perception of the marketing stimulus.”³⁴ They note that marketing practices such as “viral marketing (messages and advertising content transmitted from peer to peer), social media marketing, celebrity endorsements, and product placement appear to appeal to the unique developmental needs of older children and adolescents to establish their own identity, and hence may be more powerful and dangerous compared to other forms of marketing.”³⁵

In recent testimony, the FTC recognized that “teens tend to be more impulsive than adults.”³⁶ The Supreme Court has also observed that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”³⁷ As a result, “juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.”³⁸

These characteristics make teens extremely vulnerable to marketing of high-calorie, low-nutrient snack foods because “[r]esisting advertisements for the highly tempting products commonly promoted . . . requires the ability to weigh long-term health consequences of consumption against short-term rewards, an ability that is not fully developed until the early

³⁴ *Id.* at 217.

³⁵ *Id.*

³⁶ *Hearing on Protecting Youths in an Online World, supra* note 13, at 5 (prepared statement of Jessica Rich, Deputy Director, Bureau Consumer Prot., Fed. Trade Comm’n); *see also Google/DoubleClick*, F.T.C. File No. 071-0170 at 2 (Comm’r Jon Leibowitz, Chairman, Fed. Trade Comm’n, concurring) (teens and young people are “vulnerable individuals” and deserve heightened privacy protection in some situations), *available at* <http://www.ftc.gov/os/caselist/0710170/071220leib.pdf>.

³⁷ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

³⁸ *Graham*, 130 S. Ct. at 2026 (citing *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)) (internal quotations omitted).

20s.”³⁹ One consequence of the habitual consumption of such unhealthy snacks is obesity, which leads to a wide array of severe health complications.⁴⁰

B. Frito-Lay Uses Digital Marketing to Sell Doritos to Teens

Teens and young adults are Doritos’ heaviest consumers.⁴¹ However, the *Wall Street Journal* has reported that consumers seemed to lose interest around 2003, and U.S. unit sales for all Doritos products had slipped 8.2% by 2005.⁴² Moreover, healthier, nutritional snacks were seen as “a looming threat to Doritos’ profits in the future.”⁴³

Thus, in early 2006, Frito-Lay brought in the advertising agency Goodby, Silverstein & Partners (“Goodby”) to help develop a new marketing strategy. Goodby has explained its strategy in submissions for various advertising competitions. “Doritos growth had slowed dramatically with . . . young adults aged 16–24.”⁴⁴ The “youth audience had changed.”⁴⁵ Teens today “are much more tech-savvy than we were,” and “[k]eeping up with their lifestyles, preferences and challenges—such as the social media tools they use to communicate and the economic downturn they face today—is key to the brand’s success.”⁴⁶

³⁹ Jennifer L. Harris & Samantha K. Graff, *Protecting Children From Harmful Food Marketing: Options for Local Government to Make A Difference*, Preventing Chronic Disease: Pub. Health Res., Prac., & Pol’y, Sept. 2011, A92, at 3, available at http://www.cdc.gov/PCD/issues/2011/sep/pdf/10_0272.pdf.

⁴⁰ See Section IV(C)(3), *infra* p. 59.

⁴¹ Betsey McKay, *Super Bowl is Crunch Time for Doritos’ Risky Youth Strategy*, Wall St. J., Feb. 1, 2008, at B1.

⁴² *Id.* (citing market-research firm Information Resources, Inc.).

⁴³ Appendix L: Contagious Case Study, at A-63.

⁴⁴ Appendix B: 2008 Effie Award for Snack Strong Productions, at A-17.

⁴⁵ *Id.*

⁴⁶ *Doritos Stays On-Target with Millennials*, Frito-Lay Snack Chat (Sept. 18, 2009), http://www.snacks.com/good_fun_fritolay/2009/09/new-flavor-of-doritos-collisions-now-in-market.html.

A recent report by Forrester Research on marketing to 12- to 17-year-olds observes that teens “live on the Internet.” The Forrester report thus recommends that marketers use social media to market to teens by “[i]nstead of trying to join the conversation, influence their behavior by infiltrating your brand through their existing social relationships.”⁴⁷

Frito-Lay and Goodby are pioneers of this technique. To recapture teenagers, Goodby “needed to connect the brand to what this audience was interested in.”⁴⁸ Thus, “Doritos decided to stop talking to moms and start talking to the people that actually ate their product, teenagers.”⁴⁹ Goodby realized that “[n]o one craves advertising, especially teens. But they do seek out entertainment.”⁵⁰ So “to make [Frito-Lay’s] marketing more relevant to kids who couldn’t care less,”⁵¹ Goodby and Frito-Lay developed a campaign that “treated Doritos less like a chip company and more like an entertainment company.”⁵²

1. Frito-Lay Created “Snack Strong Productions” to Disguise Doritos Ads as Entertainment

Goodby designed Snack Strong Productions (“SSP”) as the vehicle to carry out its vision of transforming Doritos into an entertainment company. An “online entertainment company,” SSP was modeled after a “Hollywood studio lot, complete with a soundstage for each Snack Strong Production.”⁵³ A visit to the Doritos website, www.doritos.com, takes the visitor directly

⁴⁷ Anderson, *supra* note 5, at 2, 3.

⁴⁸ Appendix B: 2008 Effie Award for Snack Strong Productions, at A-18.

⁴⁹ Appendix A4: Goodby and B-Reel Enter the Asylum for the Sequel to Doritos Hotel 626, at A-6.

⁵⁰ Appendix A1: Snack Strong Productions Campaign Overview Video, at A-2.

⁵¹ *Doritos: Snack Strong Productions Landing Page*, Goodby, Silverstein & Partners, http://www.goodbysilverstein.com/#/case_studies/case_study_doritos (last visited Sept. 21, 2011).

⁵² *2008 Gold: Snack Strong Productions*, Effie Worldwide, <http://www.effie.org/winners/showcase/2008/2772> (last visited Oct. 18, 2011).

⁵³ Appendix B: 2008 Effie Award for Snack Strong Productions, at A-19.

to the Snack Strong Productions virtual studio lot, which showcases various Doritos promotions, including several discussed in this Complaint.



Figure 1

Snack Strong Productions Landing Page

The SSP campaigns have reached large numbers of adolescents and resulted in increased sales. Goodby claimed in 2008 that it was “successful in reconnecting the brand to its core

audience, getting them talking about Doritos again, and of course, buying more bags.”⁵⁴ A case study of Doritos’ new marketing strategy in a trade publication attributed Snack Strong Production’s success to its ability to make “[c]onsumers see the Dorito’s brand as a fun indulgence.”⁵⁵ This same case study quotes Euromonitor International U.S. analyst Elizabeth Higgins as saying it is quite a feat that Doritos has “managed to maintain its leading market share position despite the trend towards eating more nutritious snacks.”⁵⁶

2. Frito-Lay’s Snack Strong Productions Invites Teens to “Come Play with Us”

SSP’s first major campaign was “Crash the Super Bowl.”⁵⁷ Goodby explained that it chose the Super Bowl because “we knew we had to pretty much blow them away to capture their initial interest.”⁵⁸ The campaign invited consumers to make their own Doritos commercial, and promised to air the best one on TV during the Super Bowl. Frito-Lay reaped tremendous publicity for this; “viewers by the millions came out to support [the winning] commercial.”⁵⁹ In addition, online video tools such as YouTube facilitated the viral distribution of non-winning contest entries through social networks. Not only did the campaign publicize the product, but it also “announced to [Frito-Lay’s] core consumers, ‘hey, you’re invited to come play with us’ with a megaphone.”⁶⁰ Crash the Super Bowl was so successful that Frito-Lay has continued to run the competition every year since its initial launch.

⁵⁴ *Id.* at A-20.

⁵⁵ Appendix L: Contagious Case Study, at A-63.

⁵⁶ *Id.*

⁵⁷ Mark Pytlik, *This Bowl’s for ‘You’*, Board Magazine (Feb. 1, 2007), <http://www.boardsmag.com/articles/magazine/20070201/doritos.html>; *see also* Appendix B: 2008 Effie Award for Snack Strong Productions.

⁵⁸ Appendix B: 2008 Effie Award for Snack Strong Productions, at A-19.

⁵⁹ *Id.*

⁶⁰ *Id.*

In a continuation of the “come play with us” theme, the next SSP campaign, “X-13D,” let teens participate in a “flavor experiment.”⁶¹ Frito-Lay released a new flavor:

. . . in mysterious black “test bags” . . . and we asked consumers to name the mystery flavor by submitting their ideas by text (SMS) or online They could even add their own voiceover to virally-placed online commercials.⁶²

The X-13D “mystery” flavor campaign helped sell more than 7 million bags of the chips and “outsold every other in-and-out flavor in Doritos sales history.”⁶³

3. Frito-Lay Partners with Xbox to Deliver Advertisements in the Form of Video Games

In 2008 Frito-Lay launched “Unlock Xbox,” which gave consumers the “chance to use Doritos in their design of the first ever consumer-generated video game.”⁶⁴ Consumers submitted game ideas, and the winning concept was developed into a game and released on Xbox Live.⁶⁵ Frito-Lay has explained that “Xbox . . . is about big, bold, intense, immersive experiences. So it was a natural fit for us.”⁶⁶

Frito-Lay publicly described the target audience for Unlock Xbox as “16–24 year old consumers.”⁶⁷ However, it is likely to have reached younger players as well. A 2008 Nielsen study found that the vast majority of teens—86%—play games on a console like the Xbox,

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Appendix K: Doritos Unlock Xbox 2, at A-56.

⁶⁶ Appendix C: Doritos and Xbox Put Fans in Control, at A-24.

⁶⁷ *Id.*

PlayStation, or Wii.⁶⁸ The primary users of the Xbox 360 are teenagers aged 12–17.⁶⁹ In addition, Nielsen found that “[t]he most active gamers” tend to be males in this age range.⁷⁰

In addition to releasing Doritos brand games for the Xbox, PepsiCo has also partnered with other video game producers to reward gamers for purchasing Doritos. In August 2011, PepsiCo announced that it will be joining with game producer Activision to deliver a new promotion called “Rank Up Your Game with Double XP” to players of “Call of Duty: Modern Warfare 3.”⁷¹ During the promotion period, players who purchase specially marked packages of Mountain Dew and Doritos will be able to double the rate at which they earn XP (experience points) in the game.⁷² Single-serving bags do not contain the code; it is only available on 2.125 oz and 3.375 oz bags.⁷³

⁶⁸ Amanda Lenhart, Joseph Kahne, Ellen Middaugh, Alexandra Rankin Macgill, Chris Evans, & Jessica Vitak, Pew Internet & American Life Project, *Teens, Video Games, and Civics* i (2008) [hereinafter *Teens, Video Games, and Civics*], http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Teens_Games_and_Civics_Report_FINAL.pdf

⁶⁹ In contrast, the primary users of Wii are kids aged 6–11 adults age 25–34 are the primary users of PlayStation 3. *The State of the Video Gamer*, Nielsen Company, 3 (2009), http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/04/stateofvgamer_040609_fnl1.pdf.

⁷⁰ *Id.*

⁷¹ *PepsiCo, Mountain Dew and Call of Duty Announce Return of Mountain Dew Game Fuel and Unveil Groundbreaking “Rank Up Your Game with Double XP” Promotion for Modern Warfare 3 Fans*, PepsiCo, <http://www.pepsico.com/PressRelease/Mountain-Dew-and-Call-of-Duty-Announce-Return-of-Mtn-Dew-Game-Fuel-and-Unveil-Gr08242011.html>. The fact that Modern Warfare 3 is rated M (Mature) does not mean that teens under 17 are not playing it. The Pew Internet & American Life Project found that that almost one-third of all the teens surveyed play at least one game rated M or AO and that 50% of teen boys named a game with an M or AO [Adults Only] rating as one of their current top three favorites. *Teens, Video Games, and Civics*, *supra* note 68, at 25, iii. Moreover, “12- to 14-year-olds are equally likely to play M- or AO-rated games as their 15- to 17-year-old counterparts.” *Id.*

⁷² *PepsiCo, Mountain Dew and Call of Duty Announce Return of Mountain Dew Game Fuel and Unveil Groundbreaking “Rank Up Your Game with Double XP” Promotion for Modern Warfare 3 Fans*, *supra* note 71; see also Stuart Elliott, *Dude, This Video Game Promotion Is Sweet*, N.Y. Times Media Decoder Blog (Aug. 24, 2011, 1:00 PM),

Forbes contributor Paul Tassi has charged this promotion with “step[ping] over the line.” He explains that by “buying certain Pepsi products, namely Mountain Dew and Doritos, players can redeem codes in the packaging for Double XP time in *Modern Warfare 3*. A 20 oz gets you 15 minutes, a 12 pack gets you 45, and so on.” This is unfair because “XP is currency in these games, and whoever has more of it first is at a distinct advantage. . . . there’s no telling if those at higher levels have been playing twice as long and hard as you, or if they simply bought a ton of Mountain Dew and Doritos.”⁷⁴ Tassi adds that “kids are now being bribed with more XP (in a game that keeps them sedentary for long hours) to get them to buy completely unhealthy junk food.”⁷⁵

4. Horror Video Games *Hotel 626* and *Asylum 626* Were Designed to “Scare the Crap out of Teenagers” while Selling Doritos

After Unlock Xbox, Frito-Lay launched its next SSP campaign for marketing Doritos to teens: *Hotel 626*. Goodby explains that Doritos “asked us for an online experience, targeted to teens, that was just as intense. We knew teenagers loved getting scared, so we decided to create a website with one goal, to scare the crap out of them.”⁷⁶

Hotel 626 has ten levels of play, “each of which involves its own creepy, unique task or puzzle.”⁷⁷ The player explores these tasks, set in a hotel, from a first-person view accompanied

<http://mediadecoder.blogs.nytimes.com/2011/08/24/dude-this-video-game-promotion-is-sweet/>.

⁷³ Rank Up Your Game, <http://www.rankupxp.com/Teaser> (click on the “official rules” link).

⁷⁴ Paul Tassi, *Modern Warfare 3’s Pepsi Cross Promotion Steps Over the Line*, *Forbes Insert Coin Blog* (Sept. 28, 2011, 11:03 AM), <http://www.forbes.com/sites/insertcoin/2011/09/28/modern-warfare-3s-pepsi-cross-promotion-steps-over-the-line/>.

⁷⁵ *Id.*

⁷⁶ Appendix A2: *Hotel 626: Site Overview Video*, at A-3.

⁷⁷ *Hotel 626: The Online Haunted House*, Facebook, <http://www.facebook.com/pages/Hotel-626-The-Online-Haunted-House/179823455397906?sk=info> (last visited Sept. 21, 2011).

by full motion 3D graphics similar to play in “first-person shooter” games. The site encourages players to allow the game access to their webcams, microphones, and mobile phones. Hotel 626 uses your webcam to take a picture of you when you least expect it and shows it to you later in the serial killer’s lair.”⁷⁸ Ultimately, “[y]our one salvation is a phone call on your actual cell phone that gives you directions on how to get out and knows your every move in real time.”⁷⁹



Figure 2

The Player’s Photo in the Serial Killer’s Lair

With its emphasis on heart-pounding fear, Hotel 626 capitalized on teenagers’ neurobiological vulnerability to thrills and intense sensations. “[I]t’s pretty immersive,” said Goodby’s principal, Jeff Goodby.⁸⁰ The agency found “that teenagers love getting scared, even

⁷⁸ Appendix A2. Hotel 626: Site Overview Video, at A-3.

⁷⁹ *Id.* at A-4.

⁸⁰ Appendix A6: The BuzzBubble Interviews Jeff Goodby.

more than we expected.”⁸¹ It claims the campaign was “the most visited digital content property of 2008.”⁸²

Goodby brags that “the chips vanished off the shelves” even though there was “close to zero media investment.”⁸³ To drive visitors to Hotel 626, Goodby posted a fake documentary on YouTube.⁸⁴ The “documentary” begins with the voice over: “Around Halloween 2008, Doritos brought back two flavors from the grave. In honor of their return they created an immersive website based on fear, Hotel626.com. To find out how frightening the site really was, Doritos commissioned the Royal Swedish Institute of Behavioral Studies to test the site.” The fake documentary shows teens being exposed to various stimuli that simulate game play and they react with obvious fear, banging on glass walls in an attempt to escape the laboratory, and fainting and falling to the floor.⁸⁵ This video has been viewed over 100,000 times. YouTube also has many videos that appear to have been made by teens and even young children playing Hotel 626 or its successor Asylum 626.⁸⁶ For example, one video with over 40,000 views features two girls playing the game and was posted with the following description:

⁸¹ Appendix A2: Hotel 626: Site Overview Video, at A-4.

⁸² *Frito-Lay: Doritos Case Study*, Goodby, Silverstein & Partners, <http://www.goodbysilverstein.com/work/pdfs/Frito-Lay-Doritos-GSP-Case-Study.pdf>. With numbers still increasing, more than 12 million people in 188 countries have played Hotel 626, with an average stay of 13 minutes. Damian Ryan & Calvin Jones, *The Best Digital Marketing Campaigns in the World: Mastering the Art of Customer Engagement* 40 (2011).

⁸³ *Frito-Lay: Doritos Case Study*, Goodby, Silverstein & Partners, <http://www.goodbysilverstein.com/work/pdfs/Frito-Lay-Doritos-GSP-Case-Study.pdf>.

⁸⁴ SnackStrongPresents, *Hotel 626 Experiments*, YouTube (Feb. 29, 2009), <http://www.youtube.com/watch?v=5ijhVlgHR0w>.

⁸⁵ *Id.*

⁸⁶ *E.g.*, fillintheblank, *Hotel 626 (asylum 626)*, YouTube (Nov. 14, 2009), <http://www.youtube.com/watch?v=-0jbl4QJ2aY> (two young girls getting scared while playing the game); supermario467, *HOTEL 626 REACTION FUNNY*, YouTube (July 22, 2010), <http://www.youtube.com/watch?v=mlBJHAZpMPM> (six boys playing the game); TheMaddyOlivia, *Hotel 626 Reaction Video*, YouTube (Dec. 25, 2010),

me and my cousin allyson playing the hotel 626 game. it was our first time playing. obviously we're really scared... XD
i'm holding a spongebob pillow :] ⁸⁷

Without showing a single corn chip or naming Doritos beyond the first screen, Hotel 626 has had a significant impact on sales. Goodby claims that the re-launched flavors sold out, with over two million bags sold in just three weeks.⁸⁸ In fact, the Hotel 626 campaign was so successful that it spawned an even more elaborate and terrifying sequel the following year, called “Asylum 626.”⁸⁹

Goodby explained that “Hotel 626 was a runaway success for Doritos last Halloween. But . . . [o]nce you’ve scared the crap out of 6 million teenagers, how do you do it again?”⁹⁰ The answer was to make “the scare personal.”⁹¹ Doritos made the scare personal by utilizing the game players’ photograph and Twitter and Facebook accounts.

The more access a person gave us into their digital lives, the scarier the experience. By using webcam technology, FaceBook [sic] Connect, Twitter and real-time video capture, we blur the line between virtual and real-world experience.⁹²

As Goodby explains, “you basically have to go, ‘yes, it’s okay if you take my picture; yes, it’s okay if you use my Facebook page,’ and so . . . you see a reflection of your face in some water, and the murderer’s behind you, and it’s you that’s about to be murdered.”⁹³ Visitors to

http://www.youtube.com/watch?v=z9sbBsc_tFo (teen girls playing the game and explaining how to get into the site before 6:00 PM).

⁸⁷ oohjennaaaa, *hotel 626 reaction*, YouTube (May 17, 2009), <http://www.youtube.com/watch?v=eappQEwizNQ>.

⁸⁸ Appendix A3: Hotel 626: Awards Case Study Video, at A-5.

⁸⁹ Appendix E: Goodby and B-Reel Enter the Asylum, at A-30.

⁹⁰ *Asylum 626*, <http://myawardshows.com/2010/cannes/asylum626/> (last visited Oct. 18, 2011); Appendix A5: Asylum 626 Case Study Video, at A-7.

⁹¹ Appendix A5: Asylum 626 Case Study Video, at A-7.

⁹² *Id.*

⁹³ Appendix A6: The BuzzBubble Interviews Jeff Goodby, at A-9.

Asylum 626 “awaken to find themselves strapped to a bed in an insane asylum, held hostage at the mercy of a mad doctor.”⁹⁴ The player’s webcam is used to project him or her into the game. The player has to “dodge lobotomy tools, electroshock therapy and crazed patients” in the struggle to escape from the asylum.⁹⁵ The game employs head-tracking technology so that the player must literally move to avoid an attack.



Figure 3

The Chainsaw-Wielding Maniac

The website also invites the player’s entire social network on Facebook to “save” the player by screaming into their microphones or hitting as many keys on their keyboards as

⁹⁴ Kevin Ritchie, *Doritos Continues Interactive Horror Franchise with Asylum 626*, Boards Magazine (Sept. 22, 2009), <http://www.boardsmag.com/articles/online/20090922/asylum626.html>.

⁹⁵ *Doritos / Hotel 626*, Contagious, http://www.contagiousmagazine.com/2009/09/doritos_5.php (last visited Oct. 18, 2011).

possible to distract the assailant.⁹⁶ At one point, the game presents the player with photos of two Facebook friends and forces him/her to “sacrifice one of these people to the murderer.”⁹⁷ Goodby’s group creative director Hunter Hindman explains, “We leave it to the imagination what happens There’s some fairly gruesome sound design and some leading things to indicate that the friend you do not save is not doing so well.”⁹⁸ *Asylum 626* also sends “updates” to the player’s friends on Facebook “to let the world know your choice.”⁹⁹

Jeff Goodby boasts that *Asylum 626* “does things like that to you that are surprising, for sure.”¹⁰⁰ Another “surprise” is that the game generates tweets and Facebook posts designed to appear as if they come directly from the player, asking the player’s friends to participate.¹⁰¹

As the game reaches its climactic final scene, it abruptly stops. Before the player can access the ending, he/she must buy a bag of Doritos Black Pepper Jack or Smoking Cheddar BBQ (the two flavors “brought back from the dead”) and use the infrared marker imprinted on the back to unlock the ending.¹⁰² Players who do not make the purchase are unable to complete the game. Goodby’s Hindman explains, “[a]ny player could experience about 85% of the site without the bag, but anyone with a bag with a code on it could unlock the finale and close the loop on the story.”¹⁰³

⁹⁶ Ritchie, *supra* note 94.

⁹⁷ Appendix A6: The BuzzBubble Interviews Jeff Goodby, at A-9.

⁹⁸ Ritchie, *supra* note 94.

⁹⁹ Appendix A5: *Asylum 626* Case Study Video, at A-7.

¹⁰⁰ Appendix A6: The BuzzBubble Interviews Jeff Goodby, at A-9.

¹⁰¹ See Figures 14 and 15, *infra*, for screen captures taken from actual Facebook and Twitter feeds.

¹⁰² Ritchie, *supra* note 94; *What Do We Do?*, Total Immersion, <http://www.t-immersion.com/en,what-do-we-do,8.html> (last visited Oct. 18, 2011); *Doritos / Asylum 626*, *supra* note 95. For a 2010 example of Doritos’ use of augmented reality (AR), see Siobhan O’Flynn, *Doritos Lovers—Augmented Reality*, Narrative Now (Mar. 4, 2010), <http://narrativenow.blogspot.com/2010/03/doritos-lovers-augmented-reality.html>.

¹⁰³ Appendix E: Goodby and B-Reel Enter the *Asylum*, at A-31.



Figure 4

The Doritos Bag Unlocks the Asylum 626 Finale



Figure 5

The Player Administers Shock Therapy

In the final stage the player is forced to administer electroshock therapy to the figure that the game has surreptitiously placed his/her image on just minutes earlier. When the player holds down the mouse button, his/her body is shown writhing on an examination table. After this treatment, the player is transformed into the mad doctor himself.

Goodby claims that in the first four months alone, Frito-Lay had 850,000 visitors to the Asylum website, garnered 18,000 Twitter mentions, and sold nearly 5 million bags of Doritos.¹⁰⁴

5. Doritos Late Night Delivers a Concert-Like Experience to Compete for Teens' Entertainment Dollars

Frito-Lay next ventured into music entertainment after it “looked at how teenagers were spending their money and realized that for the price of a 99-cent bag of Doritos they could just as easily buy an iTunes download, smart phone app, or an Xbox upgrade.”¹⁰⁵ Hoping to compete for teens’ entertainment spending, Frito-Lay launched “a new platform designed to sustain many flavors in subsequent years.”¹⁰⁶ For Doritos, the goal was to become “hot, new and popular,” characteristics the brand identified as “critically important” to its target audience.¹⁰⁷

Frito-Lay explained, “[b]ecause our new chips were inspired by late-night foods we honed in on one of our target’s favorite late-night activities—bands and concerts.”¹⁰⁸ “To ensure relevancy, we partnered with blink-182 Then, we brought in Big Boi (half of the famed Outkast duo) to cover the hip-hop and pop genres (also popular among our target).”¹⁰⁹

¹⁰⁴ Appendix A5: Asylum 626 Case Study Video, at A-7.

¹⁰⁵ Appendix A7: Rihanna: Webby Awards Submission Video, at A-10.

¹⁰⁶ Appendix I: 2011 Effie Award for Concert in a Bag (emphasis omitted), at A-47.

¹⁰⁷ *Id.* at A-48.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at A-49.

Aware that young people would be turned off by anything perceived as advertising, Frito-Lay “set out to promote the Doritos Late Night music experience just like a regular concert.”¹¹⁰ They “wanted [the] communication to feel less like advertising . . . and more like insider information.”¹¹¹

The Late Night music experience utilized “augmented reality,” an immersive marketing technique featuring a vivid interactive experience that can be personalized for individual users.¹¹² Bags of Doritos Late Night chips were printed with a special symbol to serve as a “ticket” for the concert. Flashing that symbol at their webcams would create the appearance of the stage popping out of the bag of chips.¹¹³

Frito-Lay also used social media to promote the Late Night music experience. Blink-182 teed up interest in the “concert” by tweeting (posting messages on social network Twitter) about the promotion prior to its launch.¹¹⁴ As a result of the campaign, “Doritos Late Night became the top-selling product innovation among the nearly thirty launched in 2009 in the salty-snacks category,” and the combined sales of both Late Night flavors surpassed \$50 million.¹¹⁵

The campaign’s success prompted Frito-Lay to use the Late Night platform to increase sales again in 2010. Frito-Lay’s second Late Night campaign was an “entertainment experience” featuring pop-icon Rihanna performing the world premiere video of her new track “Who’s That Chick?” Doritos Late Night created “two opposing personalities” for Rihanna. Visitors to the website needed a bag of Doritos to “unlock the darker, hotter, late night side of Rihanna.” These

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Appendix H: Blink-182 Rocks ‘Augmented Reality’ Show in Doritos Bag, at A-43.

¹¹³ *Id.* at A-44.

¹¹⁴ *Id.*

¹¹⁵ Appendix I: 2011 Effie Award for Concert in a Bag, at A-50.

visitors could use the augmented reality infrared marker on back of the Doritos bags to control the camera angles in the Rihanna video as well as the videos of five opening bands.¹¹⁶

The award submission for this campaign boasts that a Google search for “Who’s That Chick?” yields 77 million results, “but the only way to see the video is with a bag of Doritos late night flavored Doritos chips.”¹¹⁷ The website had nearly 100,000 visitors in the first week, with an average visit length of more than 4.5 minutes.¹¹⁸

6. Frito-Lay’s NFL Campaigns “Hit [Teens] in the Sweet Spot: At the Intersection of the Sports and Video Game Worlds”

In 2010, Frito-Lay partnered with several companies to promote Doritos in connection with video game Madden NFL ’11. The video case study for this campaign explains why: “[W]e knew that our target of teen males craved the excitement that comes with sports and the competition inherent in gaming. So we hit them in the sweet spot: at the intersection of the sports and video game worlds, with a filter of a uniquely Doritos intensity.”¹¹⁹

To integrate the brand into the game, Frito-Lay used many of the same techniques that were successful in the prior ventures as well as some new ones. Frito-Lay “started by taking over Madden’s most well-known asset: the cover.”¹²⁰ It let fans “choose their favorite athlete to grace the front of Madden NFL ’11.”¹²¹ Doritos then created two Madden-inspired flavors—Stadium Nacho and Tailgater BBQ—and persuaded major retailers to place them in electronics aisles next to the game.

¹¹⁶ Appendix A7: Rihanna: Webby Awards Submission Video, at A-10.

¹¹⁷ *Id.* at A-11.

¹¹⁸ *Id.*

¹¹⁹ Appendix A10: Changing the Game Case Study Video, at A-14.

¹²⁰ *Id.*

¹²¹ *Id.*

Frito-Lay also worked with video game company Electronic Arts to create “a first-of-its-kind 3D mode in Madden NFL ’11, letting gamers play in a whole new way.” But the “3D mode could only be unlocked with a code found on bags of Doritos chips.”¹²² Frito-Lay promoted the game by partnering with ESPN to distribute Doritos 3D glasses in ESPN the magazine. Frito-Lay also created “the first ever 3D homepage takeover of ESPN.com.”¹²³

As a result of this campaign, Doritos obtained “over 200,000 votes and redemptions on our site, over 400 million PR impressions, and over 700,000 ‘likes’ on Facebook. Not to mention two sold out flavors.”¹²⁴ It was so successful in selling chips that Frito-Lay is currently doing another promotion with Madden for NFL ’12.¹²⁵

IV. FRITO-LAY ENGAGED IN DECEPTIVE AND UNFAIR MARKETING PRACTICES IN VIOLATION OF §5

When evaluated from the perspective of teenagers—the target audience for Doritos promotions—Frito-Lay’s marketing practices are deceptive.¹²⁶ Section 5 of the FTC Act

¹²² *Id.*

¹²³ Appendix A10: Changing the Game Case Study Video, at A-15.

¹²⁴ *Id.*

¹²⁵ *EA Sports Madden NFL 12 in Doritos 3D*, Facebook, <http://www.facebook.com/pages/EA-Sports-Madden-NFL-12-in-Doritos-3D/173877025960745> (last visited Oct. 14, 2011).

¹²⁶ This complaint does not rest on the assumption that speech to teens is entitled to less protection under the First Amendment. Indeed, as the Supreme Court recently stated in finding unconstitutional a California statute prohibiting the sale of violent video games to minors, “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2735–36, (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)). Rather, this complaint contends that Frito-Lay’s marketing practices are deceptive when evaluated from the perspective of teenagers. It is well established that the government has the authority to prohibit deceptive commercial speech. *See, e.g., In re R.M.J.*, 455 U.S. 191, 200 (1982) (“False, deceptive, or misleading advertising remains subject to restraint”); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976). The most recent Supreme Court

prohibits deceptive acts and practices in advertising.¹²⁷ There are three elements to a deception case. First, there must be a representation, omission, or practice that is likely to mislead the consumer. Second, the act or practice must be evaluated from the perspective of a reasonable consumer. Third, the representation, omission, or practice must be material.¹²⁸ Frito-Lay's marketing of Doritos meets all three prongs. This complaint first addresses the second prong by identifying the target audience, and then explains how Frito-Lay's practices are misleading to teens in a material way.

A. Frito-Lay's Practices Should Be Evaluated from the Perspective of the Intended Audience, Teenagers

When a company targets a particular audience, the FTC must determine whether the act or practice would be considered deceptive from the perspective of that audience. The FTC "has recognized that teens and children are more vulnerable to marketing messages than adults."¹²⁹ When a communication targets children or teens, the FTC "consider[s] consumer expectations from the standpoint of an ordinary child or teenager."¹³⁰ In recent testimony before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance, the FTC emphasized that it was "committed to protecting teens as they navigate digital technologies and applications."¹³¹

decision regarding commercial speech did not involve a claim that the speech at issue was false or misleading or that the law was needed to prevent false or misleading speech. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672, (2011).

¹²⁷ 15 U.S.C. §45.

¹²⁸ *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 170–71 (1984).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Protecting Youths in an Online World: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. (July 15, 2010) (prepared statement of the FTC), available at <http://www.ftc.gov/os/testimony/100715toopatestimony.pdf>.

As discussed in Background Section B *supra*,¹³² Frito-Lay created Snack Strong Productions for the express purpose of marketing Doritos to teens. Explicit statements from Goodby, the advertising agency hired to market Doritos, demonstrate that every campaign described above was intended for teens.¹³³ For example, Doritos Late Night was developed to get teens to buy bags of Doritos instead of downloading songs from iTunes.¹³⁴ Similarly, Goodby created Hotel 626 as “an online experience targeted to teens.”¹³⁵

In addition to targeting teens, these Doritos campaigns presumably reach a number of younger children. As an ABC News piece discussing Hotel 626 pointed out in November 2009, “it’s not hard for, say, even a 9-year-old to fool around on the site. All the child has to do is lie about his or her age—and he or she is in.”¹³⁶ Frito-Lay responded to the ABC report with a statement that the “Doritos target consumer is young adults, and Hotel 626 was developed as an entertainment experience specifically for consumers age 18 and older.”¹³⁷ However, the numerous statements from Goodby regarding Hotel 626 directly contradict this claim. Moreover, many teens and even younger children have posted YouTube videos of themselves playing the 626 games.¹³⁸

¹³² See Background Section B “Frito-Lay Uses Digital Marketing to Sell Doritos to Teens,” *supra* p. III.B.

¹³³ See *id.*

¹³⁴ Appendix A7: Rihanna: Webby Awards Submission Video, at A-10.

¹³⁵ Appendix A2: Hotel 626: Site Overview Video, at A-3.

¹³⁶ Dan Harris, Suzanne Yeo, Christine Brouwer & Joel Siegel, *Vigilant Parents Say They Are Often Unaware of Marketing Techniques that Draw Teens, Kids*, ABC News (Nov. 1 2009). http://abcnews.go.com/WN/w_ParentingResource/vigilant-parents-unaware-marketing-techniques-draw-teens-kids/story?id=8969255.

¹³⁷ *Statement from the Frito-Lay Company*, ABC World News (Nov. 1, 2009), <http://abcnews.go.com/WN/statement-frito-lay-company/story?id=8969970>.

¹³⁸ See, e.g., YouTube videos cited in *supra* note 86.

The intent to target teens is also evident from the content of the campaigns. Video games, music, and sports are very popular with teens. In fact, “fully 97% of teens ages 12–17 play computer, web, portable, or console games,” 50% of teens surveyed indicated they had played games “yesterday,”¹³⁹ and the primary users of Xbox 360—the console Frito-Lay selected—are teenagers in the 12–17 age range.¹⁴⁰ Blink-182 was chosen as a partner because they were “wildly popular with our young male target.”¹⁴¹ Thus, it is clear that the deceptiveness of these practices should be evaluated from the perspective of a reasonable teen.

B. Frito-Lay’s Marketing Campaigns Are Likely to Deceive Reasonable Teens.

Frito-Lay’s SSP campaigns meet the FTC’s test for deception because they are likely to mislead teens in at least three different ways. First, they appear to be a contest, video game or concert performance rather than an advertisement for Doritos. Second, they collect personal information from teens used for marketing to them and their friends without meaningful notice or opportunity to consent. Third, they violate the FTC’s *Guides Concerning the Use of Endorsements and Testimonials in Advertising*.

1. The Formats of Doritos Campaigns Are Deceptive Because They Appear To Be Entertainment Rather than Advertising

The FTC has long recognized that marketing communications that appear to be something else may be deceptive. In *Trans World Accounts, Inc.*, the Commission found that debtor letters made to look like Western Union Telegrams or Mailgrams were deceptive because of their format.¹⁴² In making the letter look as though it were a telegram, the sender

¹³⁹ *Teens, Video Games, and Civics*, *supra* note 68.

¹⁴⁰ *The State of the Video Gamer*, *supra* note 69 at 3.

¹⁴¹ Appendix I: 2011 Effie Award for Concert in a Bag, at A-49.

¹⁴² *Trans World Accounts, Inc.*, 90 F.T.C. 350, at *33 (1977).

misrepresented the nature of the communication.¹⁴³ This misrepresentation caused the debtor letter to have a “greater impact” on the recipient than it would have had if its true nature had been disclosed.¹⁴⁴ Similarly, in *JS&A Group, Inc.* the FTC alleged that a program-length infomercial was deceptive when presented so as to appear to be an investigative news program with “reporters.”¹⁴⁵ Indeed, just a few months ago a firm agreed to pay \$250,000 to settle charges that it used misleading online “consumer” and “independent” reviews.¹⁴⁶ And in another recent case, the FTC took action against “fake news websites” used to advertise a weight loss remedy.¹⁴⁷

¹⁴³ *Id.* at 56.

¹⁴⁴ *Id.* at 34-35.

¹⁴⁵ *JS&A Group, Inc.*, 111 F.T.C. 522, 524 (1989).

¹⁴⁶ *Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews*, U.S. Fed. Trade Comm’n (Mar. 15, 2011), <http://www.ftc.gov/opa/2011/03/legacy.shtm> (A company selling a series of guitar-lesson DVDs agreed to pay \$250,000 to settle charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers).

¹⁴⁷ *FTC Cracks Down on Fake News Websites Used to Advertise Acai Berry Weight-Loss Pills*, U.S. Fed. Trade Comm’n (Apr. 18, 2011), <http://www.ftc.gov/opa/2011/04/acaiad.shtm> (last visited Oct. 3, 2011). The FTC’s press release noted that “millions of consumers are being lured to websites that imitate those of reputable news organizations. The ‘reporters’ on these sites supposedly have done independent evaluations of acai berry supplements, and claim that the products cause major weight loss in a short period of time with no diet or exercise. In reality the websites are deceptive advertisements placed by third-party or ‘affiliate’ marketers. *See also Vital Basics, Inc.*, No. C-4107, 2004 FTC LEXIS 52, at 28 (F.T.C. Apr. 26, 2004) (alleging that representing, directly or by implication, that advertisements were independent radio programs and not paid commercial advertising constituted unfair or deceptive acts or practices under the FTA); *Mega Sys. Int’l, Inc.*, 125 F.T.C. 973, 986 (1998) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television and radio programs); *Synchronal Corp.*, 116 F.T.C. 1189, 1202 (1993) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television programs); *Michael S. Levey*, 116 F.T.C. 885, 900 (1993) (finding representations false and misleading where respondents portrayed paid commercial advertising as independent television programs) *TV Inc.*, 113 F.T.C. 677; *Mega Sys. Int’l*, 125 F.T.C. at 986; *Twin Star Productions, Inc.*, 133 F.T.C. 847 (1990); *JS&A Group*, 111 F.T.C. at 524; *Accelerated Systems, Inc.*, 1990 WL 606398 (F.T.C. 1990); *see also F.T.C. v. Direct Marketing Concepts, Inc.*, 624

Statements by Frito-Lay and by its advertising agency clearly indicate the company's intent to disguise advertising as entertainment because they know teens do not like advertising. As one of Goodby's video case studies points out: "[n]o one craves advertising, especially teens. But they do seek out entertainment."¹⁴⁸ Another Goodby case study for Doritos posits that brands need to stop advertising and become content that teens will seek out:

Q: How can Doritos continue to evolve its cutting-edge marketing, and break through to teens and young adults in a world saturated by CPG, entertainment and gaming brands vying for their attention?

A1: First, break a bunch of advertising and marketing rules. Stop trying to break through with advertising and instead become the content this audience actively seeks out.

A2: Second, break the rest of the rules.¹⁴⁹

In a similar vein, Ann Mukherjee, a vice president of marketing for Frito-Lay, told the *Wall Street Journal*: "Doritos is about breaking the rules." The article notes that "[s]o far, most young consumers don't appear to be too suspicious."¹⁵⁰

F.3d 1, 9 (1st Cir. 2010) (alleging a deceptive format where paid commercial advertising was presented as a talk show); Letter from Heather Hipsley, Acting Associate Director, Division of Advertising Practices, to Search Engine Companies (June 27, 2002) (advising search engines that use paid placements to "clearly delineate them" in order to avoid misleading consumers to believe that the search results were based solely on relevance); CITE (publishing house representing an advertisement as an independent review or article).

¹⁴⁸ Appendix A1: Snack Strong Productions Campaign Overview Video, at A-2.

¹⁴⁹ *Frito-Lay: Doritos Case Study*, *supra* note 83.

¹⁵⁰ Betsey McKay, *Super Bowl is Crunch Time for Doritos' Risky Youth Strategy*, *Wall Street J.*, Feb. 1, 2008, at B1.



NO ONE CRAVES ADVERTISING,
ESPECIALLY TEENS.
BUT THEY DO SEEK OUT ENTERTAINMENT.

Figure 6

Frito-Lay Knows Teens Dislike Advertising¹⁵¹

Frito-Lay uses a variety of techniques to make its marketing seem like entertainment. These include little or no branding, immersive techniques, the use of legitimate and fake media to promote the campaign, and viral marketing. As explained above, Frito-Lay deliberately disguises its advertisements as entertainment because it knows this will make teenagers more likely to purchase Doritos.

a. The limited branding in the Doritos campaigns contributes to the perception that they are entertainment instead of advertising

One way that Frito-Lay disguises its marketing is by limiting its use of branded content. For example, Hotel 626 was designed to contain no apparent advertising content, but to

¹⁵¹ Appendix A1: Snack Strong Productions Campaign Overview Video, at A-2.

nonetheless function as an ad.¹⁵² Goodby’s Chief Digital Officer Mike Geiger told *Creativity Online* that Hotel 626 “had very little branding from Doritos, which helped it to be taken more seriously.”¹⁵³ The campaign was conducted “[a]ll without the appearance of a single corn chip.”¹⁵⁴ Yet, the ultimate goal was still to boost sales among teens. As Goodby’s creative director put it, “We are selling chips at the end of the day.”¹⁵⁵



Figure 7

Hotel 626 Sold Over 2 Million Bags of Doritos in Three Weeks¹⁵⁶

b. The Doritos campaigns use immersive techniques, making it more difficult for teens to recognize them as advertising

Frito-Lay’s ability to disguise its marketing efforts is further enhanced by the use of “immersive” techniques. Immersive marketing is designed to foster subjective feelings of being inside the action, a mental state that is frequently accompanied by “intense focus, loss of self,

¹⁵² The only mention of the Doritos brand is at the beginning of the game, after the player’s personal information is entered. The game runs movie-like credits that say “Doritos presents.”

¹⁵³ Appendix D: Mike Geiger on Hotel 626, at A-28.

¹⁵⁴ Appendix A3: Hotel 626 Awards Case Study Video, at A-5.

¹⁵⁵ Ritchie, *supra* note 94.

¹⁵⁶ *Id.*

distorted time sense, effortless action.”¹⁵⁷ Immersive environments can also induce a state of “flow,” causing individuals to lose any sense of the passage of time.¹⁵⁸ Immersive environments use augmented reality techniques to deliberately blur the lines between the real world and the virtual world, making the experience even more compelling, intense, and realistic.¹⁵⁹ In such an emotional environment, a teen is even less likely to recognize that the game or concert event is marketing for the reasons discussed above.

Frito-Lay specializes in creating such immersive environments. As the developer of Hotel 626 and Asylum 626 put it, “[w]e really blurred that line between the virtual experience and the real-world experience.”¹⁶⁰ Jeff Goodby agrees that the game is “pretty immersive.”¹⁶¹

The games are intended to simulate the experience of being in a haunted hotel or asylum.¹⁶² The player explores the hotel with a full range of motion just like in first-person

¹⁵⁷ Allen Vamey, *Immersion Unexplained*, *The Escapist* (Aug. 8, 2006), http://www.escapistmagazine.com/articles/view/issues/issue_57/341-Immersion-Unexplained. See also Montgomery & Chester, *supra* note 2, at 11.

¹⁵⁸ Ben Cowley, Darryl Charles, Michaela Black, & Ray Hickey, *Toward an Understanding of Flow in Video Games*, 6 *Computers in Entertainment* 2 (July 2008).

¹⁵⁹ Donna L. Hoffman and Thomas P. Novak, *Marketing in Hypermedia Computer-Mediated Environments: Conceptual Foundations*, 60 *The Journal of Marketing* 50 (July 1996). Digital marketers have perfected software for tracking consumer behavior in video games as well as other interactive platforms. *Sites—Overview*, Dart Motif, <http://www.dartmotif.com/sites/sites.asp> (last visited Mar. 30, 2007).

¹⁶⁰ See Ritchie, *supra* note 94 (quoting Hunter Hindman group creative director at Goodby); Appendix E: Goodby and B-Reel Enter the Asylum (executives from Goodby Silverstein, the ad agency working with Doritos, describe the game as more immersive than its predecessor), at A-30.

¹⁶¹ Appendix A6: The BuzzBubble Interviews Jeff Goodby, at A-9.

¹⁶² See *Hotel 626 Landing Page*, Hotel 626, <http://www.hotel626.com> (last visited Sept. 23, 2011); *B-Reel Landing Page*, B-Reel, <http://www.b-reel.com/> (last visited Oct. 1, 2010) (game design company describes Hotel 626 as “a truly frightening Halloween campaign set in a Haunted Hotel” and Asylum 626 as a game where the player is “trapped inside an asylum, tormented by nightmares” and that “immerses the viewer in a true first person perspective from start to finish”).

shooter games.¹⁶³ The immersive nature of gameplay is heightened by the fact that the game is only available after dark. The player is asked to turn out the lights to eliminate distractions from the real world.¹⁶⁴ The player is further invited to put on headphones, allowing the game to surround the player with “dynamic room reverberation” and effects that emulate multi-directional sound in a 3D environment.¹⁶⁵

Similarly, Doritos Late Night uses augmented reality to “unleash an interactive 3D concert that users could control.”¹⁶⁶ Teens can use a specially-marked Doritos bag like a controller to pick songs, select camera angles, and “virtually stage manage” the concert.

¹⁶³ See *Doritos Hotel 626 Site Overview*, Goodby Silverstein & Partners, <http://www.goodbysilverstein.com/#/work/frito-lay-doritos-hotel626-tv> (“You explore the Hotel with a full range of motion similar to first person shooter games.”) (last visited Aug. 8, 2011).

¹⁶⁴ See *Hotel 626 Landing Page*, Hotel 626, <http://www.hotel626.com> (last visited Sept. 23, 2011).

¹⁶⁵ See *Doritos Hotel 626*, Dinahmoe, <http://www.dinahmoe.com/?projects=hotel-626> (last visited Oct. 18, 2011) (The sound production company that worked on Hotel 626 describes it as “[a] site that will raise the bar for audio on the web.”).

¹⁶⁶ Appendix I: 2011 Effie Award for Concert in a Bag, at A-49.



Figure 8

The Doritos Bag Lets Teens Control the Concert

c. Frito-Lay uses legitimate media to promote its campaigns and to make it seem like entertainment rather than advertising

Frito-Lay uses legitimate media or creates its own fake media to promote its advertising campaigns. This technique contributes to the perception that these campaigns are legitimate entertainment, enabling Frito-Lay to capture the interest of adolescents who want nothing to do with advertising.

In launching Doritos Late Night, for example, Frito-Lay's communication strategy was to "promote the bag like a concert ticket."¹⁶⁷ Frito-Lay explains how they made it seem real:

¹⁶⁷ Appendix I: 2011 Effie Award for Concert in a Bag, at A-49.

[W]e teamed up with some of the biggest names in online music, weaving our message into the fabric of their sites instead of just running banners.

We worked with Pollstar, one of the leading live music sites, to incorporate the Late Night concert into their scrolling ticket ticker (a real-time feed of concert ticket prices featured prominently on their home page). The price of a ticket? Just \$3.99 (or the average price of a large bag of Doritos). We also integrated Doritos Late Night information into the Music Tours & News content on Pitchfork, one of the larger indie music blogs that resonates with the “hyperlifer” audience.

....

To top it all off, we partnered with Ticketmaster, the biggest live music ticket distributor, to offer free “tickets” to the upcoming blink-182 show. The first 500 registrants received a bag of Doritos Late Night shipped directly to their door. To promote the giveaway, Ticketmaster featured the show on their home page in real estate typically reserved for live gigs (also a first). To round it all out, Ticketmaster activated the Late Night experience at concerts and festivals and provided “tickets” (a.k.a. bags) on-site for users to interact with on the spot.¹⁶⁸

Frito-Lay was even able to convince news outlets to discuss the promotion as though it were an actual concert. *Rolling Stone*, NPR, *Wired* and other national media ran stories about the campaign. More than 600 radio stations discussed it on air.¹⁶⁹ MTV and other music outlets “covered the festivities through news features.” To promote the next Doritos Late Night campaign, the Rihanna video, Frito-Lay simply “leak[ed] the story and let it spread itself.”¹⁷⁰ It was covered on “MTV, USA Today, Access Hollywood, Entertainment Tonight, and hundreds of music blogs around the Internet.”¹⁷¹

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Appendix A7: Rihanna: Webby Awards Submission Video, at A-11.

¹⁷¹ Similarly, Frito-Lay garnered “intense buzz” for the Madden related flavors by obtaining coverage in over 120 articles among top gaming sites and media properties.” *Changing the*

Frito-Lay marketed the launch of Asylum 626 “like a horror film.”¹⁷² The creators made “movie posters that ran on the horror film circuit” (see Figure 9) and “produced a cinema trailer that premiered at 4,000 theatres across the country.”¹⁷³ They described the promotion as “[a] scare too personal for cinema.”¹⁷⁴

Game / Doritos, Cannes Lions International Advertising Festival,
<http://www.canneslions.com/work/media/entry.cfm?entryid=6339>, *archived at*
<http://digitalads.org/detail.php?id=1906>.

¹⁷² Appendix A5: Asylum 626 Case Study Video, at A-8.

¹⁷³ *Id.* The “movie trailers” for Asylum 626 were also placed on YouTube. *See* SnackStrongPresents, *Asylum 626 Official Trailer*, YouTube (Sept. 15, 2009), <http://www.youtube.com/watch?v=Ens3AKuUeTE>.

¹⁷⁴ *Asylum 626 Official Trailer*, *supra* note 173.

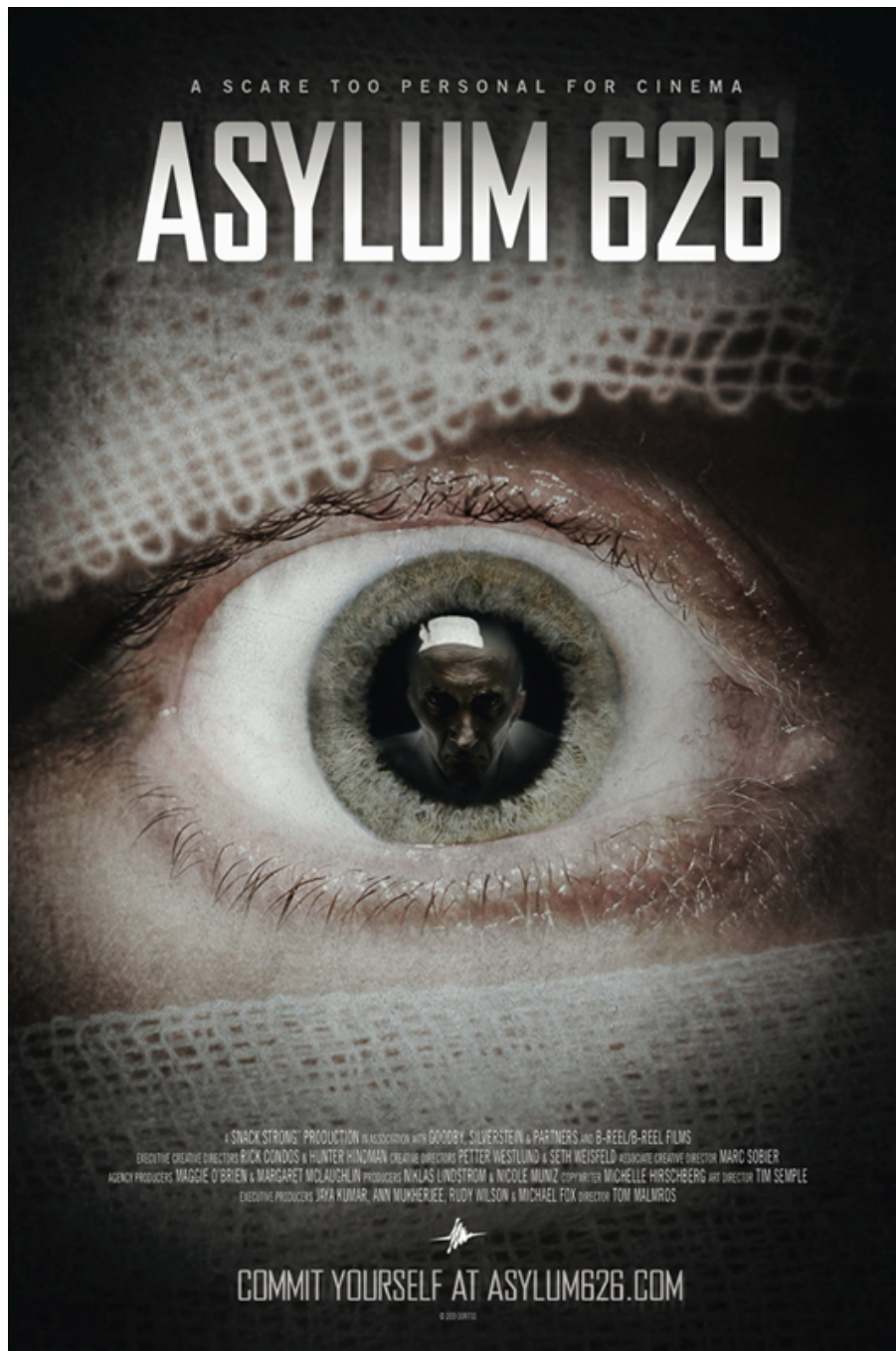


Figure 9

A Movie-Style Poster for Asylum 626 Ran on the Horror Film Circuit¹⁷⁵

d. Frito-Lay uses viral marketing to make it appear the games and concerts are being recommended by friends rather than an advertiser

As discussed above, teens are highly susceptible to peer pressure and very tuned in to peer activities through social networks. These characteristics make them prime targets for viral marketing techniques, of which Frito-Lay has made extensive use.

YouTube, which is extremely popular among teens, makes it easy for them to circulate videos. Searching YouTube for “Hotel 626” results in 1670 hits, some of which have been viewed more than 75,000 times. In fact, the 626 games were designed to encourage teens to tell their friends about the game. As Goodby explained, “[I]ive Twitter feeds enabled users to share their experiences in real time, and they were encouraged to post and share photos of themselves as they participated. A custom Facebook app prompted teens to “send a scare” to friends in their social networks.”¹⁷⁶

Frito-Lay also used social networks to promote the Doritos Late Night concerts. It “partnered with iLike to reach blink-182 fans, sending them direct message notifications that appeared in their social networking streams (e.g., Facebook) and also incorporated concert announcements into iLike’s proprietary iTunes sidebar.”¹⁷⁷

In sum, Frito-Lay is well aware that teens are uninterested in advertising and therefore chooses to disguise its marketing as a more appealing format by employing minimal branding, immersive techniques, legitimate media, and viral marketing designed to make teens believe that they are playing a video game or watching a concert rather than viewing advertisements. As in

¹⁷⁵ *Asylum 626 Movie-Style Poster*, http://www.myawardshows.com/2010/oneshow_interactive/asylum626_integrated360/images/asylum626_poster.html.

¹⁷⁶ *Hotel 626*, MediaPost Publications (Sept. 24, 2009), <http://www.mediapost.com/events/?/showID/CreativeMediaAwards.09.NYC/type/AwardFinalist/itemID/943/CreativeMediaAwards-Finalists.html>, *archived at* <http://digitalads.org/detail.php?id=1227>.

¹⁷⁷ Appendix I: 2011 Effie Award for Concert in a Bag, at A-49.

Trans World Accounts and the other cases cited above, Frito-Lay's concealment of the nature of its marketing to increase the likelihood that the consumer will take the desired action, is a deceptive practice under Section 5.

2. Frito-Lay is Engaging in Deceptive Practices in its Collection and Use of Teens' Personal Information.

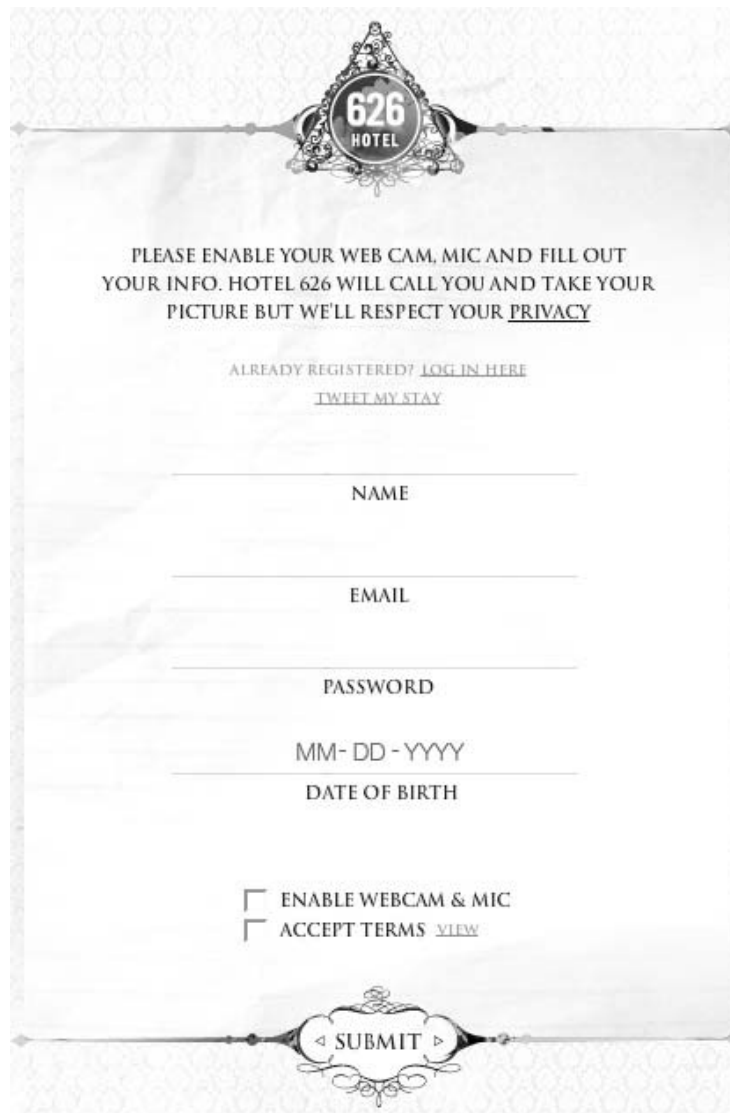
The manner in which Frito-Lay collects and uses personal information also violates Section 5 of the FTC Act in two ways. First, Frito-Lay deceives teens by making representations that it will protect teens' personal information and then acting inconsistently with that policy. Second, Frito-Lay deceives teens by collecting personal data without adequately disclosing the extent or purpose of that data collection.

a. Frito-Lay's actions are inconsistent with its privacy representations

The FTC has found violations of Section 5 when a company acts inconsistently with its privacy representations. For example, the FTC concluded that Google used deceptive tactics and violated its own privacy promises to consumers when it launched its social network, Google Buzz.¹⁷⁸ According to the FTC complaint, Google launched its Buzz social network through its Gmail web-based email product. Although Google led Gmail users to believe that they could choose whether or not they wanted to join the network, the options for declining or leaving the social network were ineffective.

Here, Frito-Lay, like Google, is acting inconsistently with its own privacy policy. Frito-Lay explicitly claims on the Hotel 626 site that it will protect the game player's privacy. When a teen opens up Hotel 626, this screen appears:

¹⁷⁸ *Google Inc.*, 2011 WL 1321658, (F.T.C. Mar. 30, 2011), available at <http://www.ftc.gov/os/caselist/1023136/index.shtm>.



The registration form features a decorative header with the '626 HOTEL' logo. Below the logo, a message asks users to enable their web cam and mic, and to fill out their information. The form includes fields for NAME, EMAIL, PASSWORD, and DATE OF BIRTH (MM-DD-YYYY). There are also checkboxes for 'ENABLE WEBCAM & MIC' and 'ACCEPT TERMS', with a 'VIEW' link next to the terms. A 'SUBMIT' button is located at the bottom of the form.

626
HOTEL

PLEASE ENABLE YOUR WEB CAM, MIC AND FILL OUT
YOUR INFO. HOTEL 626 WILL CALL YOU AND TAKE YOUR
PICTURE BUT WE'LL RESPECT YOUR PRIVACY

ALREADY REGISTERED? [LOG IN HERE](#)
[TWEET MY STAY](#)

NAME

EMAIL

PASSWORD

MM- DD - YYYY
DATE OF BIRTH

ENABLE WEBCAM & MIC
 ACCEPT TERMS [VIEW](#)

◁ SUBMIT ▷

Figure 11

Hotel 626 Registration Form¹⁷⁹

¹⁷⁹ *Hotel 626 Account Creation Page*, Hotel 626, <http://www.hotel626.com/hotel.html> (last visited Sept. 23, 2011).

The headline reads: “PLEASE ENABLE YOUR WEB CAM, MIC AND FILL OUT YOUR INFO. HOTEL 626 WILL CALL YOU AND TAKE YOUR PICTURE BUT WE’LL RESPECT YOUR PRIVACY.” This screen collects the visitor’s name and email address, which are personal information.¹⁸⁰ A reasonable teen would likely think the information collected would be used to create a login to save game progress and return to save points at a later time. However, none of this information is necessary to play the game. Players could be given the option to create their own user name, and the collection of the email address is not necessary because there is no password retrieval mechanism if a returning player cannot remember his/her password.

In fact, rather than respecting the visitor’s privacy, the website allows for extremely broad use of personal information. The Privacy Policy states:

Frito-Lay uses information submitted by visitors . . . to keep track of visitors’ participation in our promotions and programs, to respond to comments or questions, to notify a visitor if he or she is the potential winner of a promotion, to send special messages regarding our sites, products, programs or promotions, to provide visitors with access to special areas or features of our site(s), and for internal and business purposes.¹⁸¹

The Privacy Policy subsequently reveals that personal information may also be shared with any company “within the PepsiCo family of companies.”¹⁸²

¹⁸⁰ *Hotel 626 Account Creation Page*, Hotel 626, <http://www.hotel626.com/hotel.html> (last visited Sept. 23, 2011). Frito-Lay asks the user to enable his/her web cam because the site later collects the player’s image. This could also constitute personal information. See Children’s Online Privacy Protection Rule, Proposed Rule, 76 Fed. Reg. 59804-59833, 59813 (Sep. 15, 2011) (to be codified at 16 C.F.R. pt.321), *available at* <http://ftc.gov/os/2011/09/110915coppa.pdf> (stating view that a online photograph constitutes of a child is personally identifiable information).

¹⁸¹ Appendix G: Hotel 626 Privacy Policies, at A-38.

¹⁸² *Id.* The Privacy Policy does not disclose the names of these companies, which include Pepsi, Frito Lay, Tropicana, Quaker, and Gatorade. *PepsiCo Brands*, PepsiCo, <http://www.pepsico.com/Brands.html> (last visited Aug. 8, 2011).

The version of the Privacy Policy that was in place for almost two years after the launch of Hotel 626 said nothing about the site's use of social media connections.¹⁸³ In June 2010, the following language was added to the privacy policy:

This site may contain links to social media platforms, and you may be given the choice of connecting to one or more social media platforms from this site and/or integrating your social media experience with a program or promotion on this site. If you choose to do so, depending on your social media privacy settings, the personal information that you post, transmit or otherwise make available on the social media platform may be viewed and/or used by others.¹⁸⁴

This language does not disclose that Frito-Lay will send messages on Twitter and Facebook to the player's friends that appear to come from the player.

Finally, the Privacy Statement disavows any responsibility for how personal information may be used by social media platforms linked to the website:

Frito-Lay does not control and is not responsible for any use of your personal information by or through the social media platform. By linking to a social media platform, you assume the risk that the personal information you provide on that platform may be viewed and/or used by third parties for any purposes.¹⁸⁵

Thus, contrary to the headline on the registration page that "We'll respect your privacy," Frito-Lay is actually collecting information unnecessary to the game and sharing that information with all of the PepsiCo subsidiaries as well as with social media platforms. While the text of the privacy statement is neither clear nor accurate, even if it were, the FTC has long recognized that even "accurate information in the text may not remedy a false headline because reasonable

¹⁸³ *Id.* at A-40.

¹⁸⁴ *Id.* at A-40–A-41.

¹⁸⁵ *Id.* In addition, the Privacy Policy states that it can be modified by Frito-Lay at any time without notice simply by updating the website.

consumers may glance only at the headline.”¹⁸⁶ Thus, Frito-Lay deceives the consumer by taking actions inconsistent with its promise to respect privacy.

b. Frito-Lay deceives teens by collecting personal data without adequately disclosing the extent or purpose of that data collection

The FTC has also found a deceptive practice when a company did not adequately disclose how it planned to use personal information. For example, in *Sears Holding Management Corp.*, Sears represented to consumers that software it was placing on their computers would track their “online browsing.”¹⁸⁷ The FTC charged, however, that the software also monitored consumers’ online activities and collected consumers’ personal information transmitted in those sessions. Only in a lengthy user license agreement, available to consumers at the end of a multi-step registration process, did Sears disclose the full extent of the information the software tracked. The complaint charged that Sears’s failure to adequately disclose the scope of the tracking software’s data collection was deceptive and violated the FTC Act.

Similarly, Hotel 626 and Asylum 626 collect data without adequately disclosing the extent or purpose of data collection. When teens visit the website, www.hotel626.com, they see the following screen asking them to “check in” to the Hotel or “commit” themselves to the Asylum.

¹⁸⁶ *Cliffdale Associates*, 103 F.T.C. at 175.

¹⁸⁷ *Sears Holdings Mgmt. Corp.*, File No. 082 3099 (Fed. Trade Comm’n June 4, 2009), available at <http://www.ftc.gov/os/caselist/0823099/090604searscomplaint.pdf>.

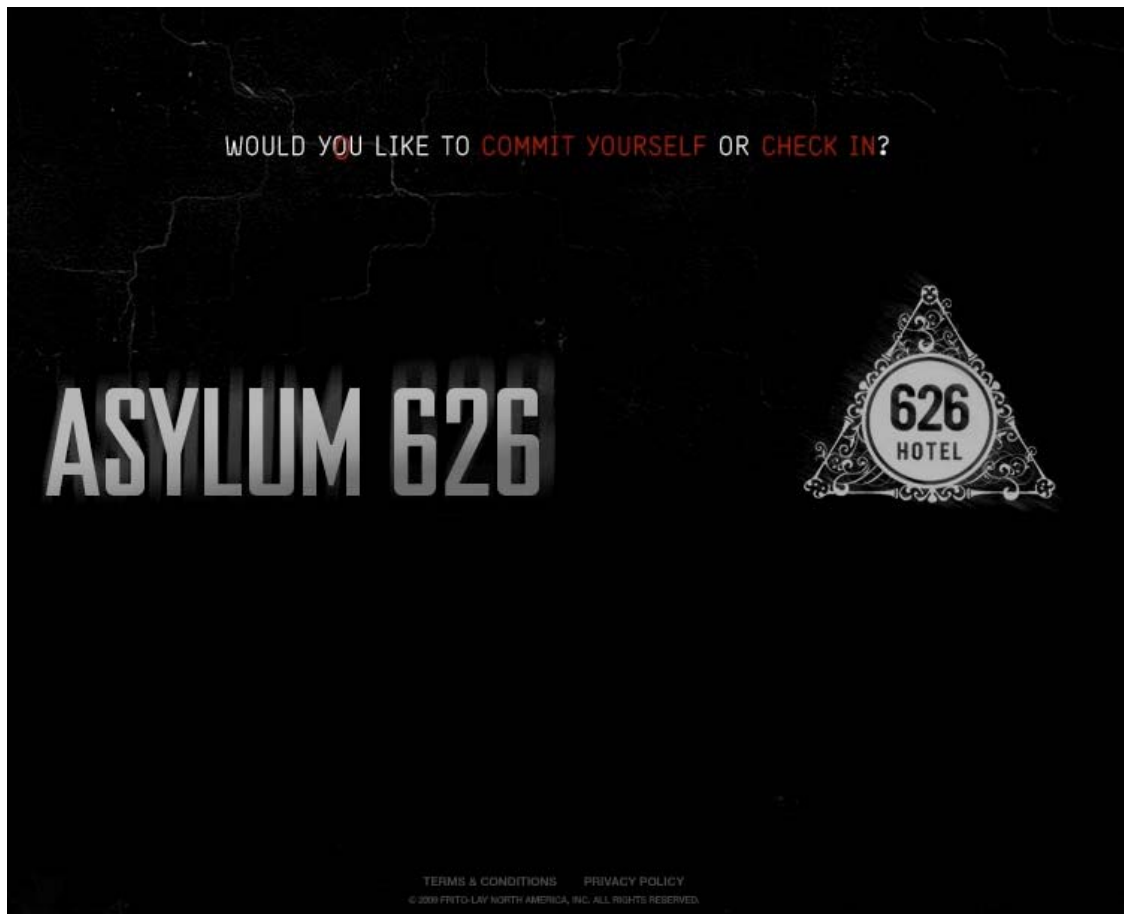


Figure 12

Hotel 626 Landing Page¹⁸⁸

Few game players are likely to click on the links in tiny print at the bottom of the screen to the Terms of Service and Privacy Policy. As FTC Chairman Jon Leibowitz has observed, “consumers don’t read privacy policies.”¹⁸⁹ Owing to their impulsive nature, teens are

¹⁸⁸ *Hotel 626 Landing Page*, Hotel 626, <http://www.hotel626.com> (last visited Sept. 23, 2011).

¹⁸⁹ U.S. Fed. Trade Comm’n, *Introductory Remarks of FTC Chairman Jon Leibowitz at FTC Privacy Roundtable 3* (2009), available at <http://www.ftc.gov/speeches/leibowitz/091207privacyremarks.pdf>.

particularly unlikely to click on these links and read the privacy statement.¹⁹⁰ Research shows that while teens are concerned about their privacy, they tend not to actively seek out privacy information.¹⁹¹ The FTC has recognized that “teens tend to be more impulsive than adults . . . and may not think as clearly . . . about the consequences of what they do. As a result, they may voluntarily disclose more information online than they should.”¹⁹²

Teens who opt to check in to Hotel 626 are required to enter their name, email address, and date of birth, and encouraged to enable their webcam and microphone (see Figure 11). They must also check a box to accept the Terms of Service. Unless they have actually read the Terms of Service, they will not know that by simply enabling the use of their webcam, they agree to allow Frito-Lay to “automatically take one or more photographs of you at any time during such visit without warning. You hereby grant us a perpetual license to use, republish, copy, post, and distribute these photographs online as part of the Hotel 626 experience without payment or compensation to you and without seeking any further approval from you.”¹⁹³

¹⁹⁰ Those who click on the Privacy Policy will see Frito-Lay’s general Privacy Policy. Although the Privacy Policy is relatively short (two pages single spaced) it is very vague. We checked the “readability” of the privacy policy, and found that it reads at the level of someone with about 14 years of education. *Check Text Readability*, Added Bites, <http://www.addedbytes.com/code/readability-score/> (last visited Aug. 8, 2011). The average American reads between the 6th and 8th grade level. *Comprehension and Reading Level*, The Informatics Review, <http://www.informatics-review.com/FAQ/reading.html> (last visited Aug. 8, 2011).

¹⁹¹ Seounmi Youn, *Teenagers’ Perception of Online Privacy and Coping Behaviors: A Risk-Benefit Appraisal Approach*, 49 *J. Broadcasting & Electronic Media* 86 (2005).

¹⁹² *Hearing on Protecting Youths in an Online World*, *supra* note 13 at 5 (prepared statement of the FTC); *see also Google/DoubleClick*, F.T.C. File No. 071-0170 at 2 (Comm’r Jon Leibowitz, Chairman, Fed. Trade Comm’n, concurring) (teens and young people are “vulnerable individuals” and deserve heightened privacy protection in some situations), *available at* <http://www.ftc.gov/os/caselist/0710170/071220leib.pdf>.

¹⁹³ Appendix F: Hotel 626 Site Terms, at A-34.

Teens who opt to enter Asylum 626 are urged to allow access to their Facebook and Twitter accounts. Allowing access causes the “Fear Meter” on the right side of the screen to go up. In this way, Frito-Lay induces teens who play Asylum 626 to give “more access and information” by “telling them upfront that the more they gave us, the scarier the experience.”¹⁹⁴

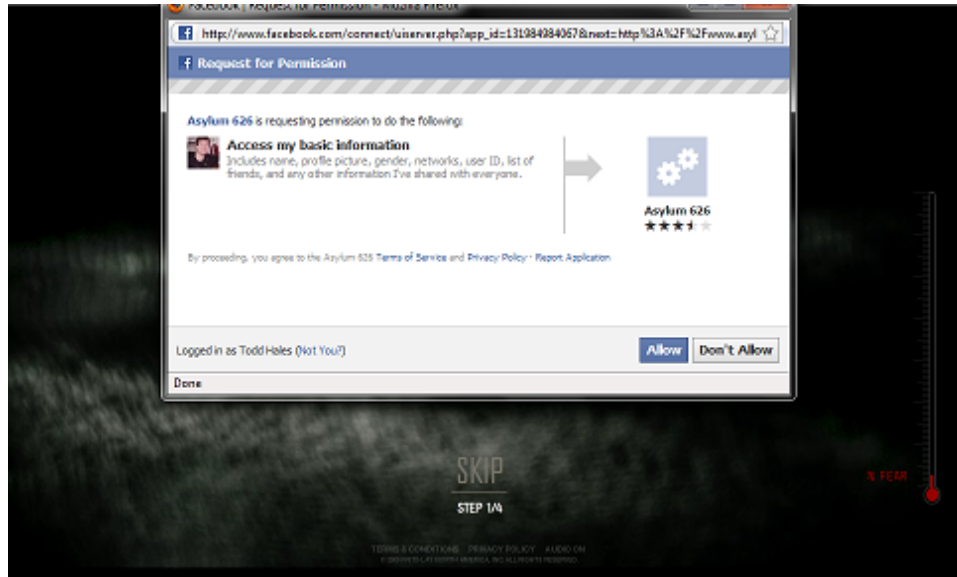


Figure 13

Granting Access to Facebook Escalates the “Fear Meter”

While teens think that providing their Facebook link enables them to experience a more exciting game, they are actually consenting to PepsiCo’s use of their “name, profile picture, gender, networks, User ID, list of friends and any other information I have shared with everyone.”¹⁹⁵ As described below, the site uses this information to send messages that appear to

¹⁹⁴ Appendix E: Goodby and B-Reel Enter the Asylum, at A-31.

¹⁹⁵ *Facebook Privacy Policy*, Facebook, <http://www.facebook.com/policy.php> (last visited Aug. 8, 2011). Information that can be shared with everyone includes “statuses, photos, and posts, bios and favorite quotations, family and relationships, photos and videos [one is] tagged in, religious and political views, birthdays, places [one] check[s] in to and contact information.”

be from the player to the player's friends without explicit consent.¹⁹⁶ In other words, not only does Asylum 626 fail to disclose what it does with a teen's information, but it also uses that information to engage in viral marketing that appears to be from the teen when it is not.

In sum, just as in the *Sears* case, Frito-Lay's disclosure about collection and use of personal information was neither sufficiently detailed nor presented in such a manner that reasonable teens would be likely to see and read it.

3. Frito-Lay's Actions Violate the Endorsement Guidelines because They Do Not Reflect the Honest Opinions of the Endorser

In addition to being unexpected and inadequately disclosed, Frito-Lay's use of personal information to generate Facebook and Twitter endorsements from teens playing its games violates the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* ("Endorsement Guide").

The Endorsement Guide defines an endorsement as "any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."¹⁹⁷ It requires that endorsements "reflect the honest opinions, findings, beliefs, or experience of the endorser."¹⁹⁸

The SSP campaigns take advantage of viral marketing. Hotel 626, for example, makes use of a Facebook application that allows players to scare their friends by sending them videos of

Facebook *Privacy Settings Page*, Facebook, <http://www.facebook.com/policy.php#!/settings/?tab=privacy> (last visited Aug. 8, 2011).

¹⁹⁶ See examples below.

¹⁹⁷ FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2009).

¹⁹⁸ *Id.* § 255.1(a).

horrifying scenes.¹⁹⁹ One video, “Hotel 626 Phone Call,” shows scenes from the game featuring the madman, demon baby, and a psychotic maid.²⁰⁰ The text below the video dares players to visit the site and contains a link to the game.²⁰¹

Friends of a player receiving the messages that Hotel 626 and Asylum 626 post on the player’s Facebook and Twitter feeds are likely to believe that these are communications from a friend, that is, “a party other than the sponsoring advertiser.” After all, teens routinely tweet or write messages on Facebook for their friends to read. Here, the Facebook messages even appear in a box of text with the player’s picture next to it. Moreover, the posts are designed to read as if they were written by the player.

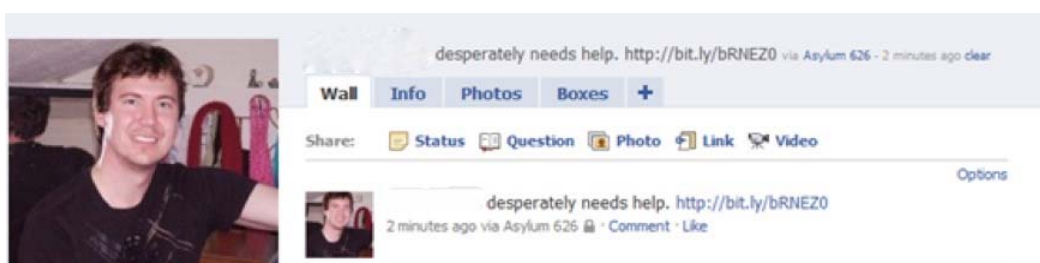


Figure 14

Hotel 626 Player’s Sample Facebook Wall²⁰²

On close examination, the Facebook posts contain the words “via Asylum 626” in small grey letters under the post.²⁰³ But this would not alert reasonable consumers that the messages

¹⁹⁹ Appendix A6: The BuzzBubble Interviews Jeff Goodby (showing footage of the game), at A-9.

²⁰⁰ SnackStrongPresents, *Hotel 626 Phone Call*, YouTube (Oct. 1, 2008), <http://www.youtube.com/watch?v=pgGEbFXb0Cg>.

²⁰¹ *Id.*

²⁰² These screen captures were taken from an actual Facebook page.

²⁰³ *Id.*

are from Frito-Lay. Even reading the faint text, “via Asylum 626,” does not disclose the actual sender of the message to the potential consumer.

These games also make use of Twitter, a social networking site that allows users to write short posts of up to 140 characters. Users can follow other users, subscribing to their tweets so that they are updated as others post.²⁰⁴ Teens using Twitter might encounter messages tracking a friend’s progress through the Hotel 626 game, including messages like those depicted below.

²⁰⁴ See *Twitter Landing Page*, Twitter, <http://www.twitter.com> (last visited Nov. 30, 2010); *Twitter*, Wikipedia <http://en.wikipedia.org/wiki/Twitter> (last visited Aug. 11, 2011).

is freaking out. #626

8:19 PM Jul 23rd via API

is facing dark fears. #626

8:18 PM Jul 23rd via API

thinks you should face your darkest fears. www.hotel626.com #626

8:15 PM Jul 23rd via API

just checked out of Hotel 626. #626

8:14 PM Jul 23rd via API

is on the run. #626

8:13 PM Jul 23rd via API

didn't make it out of the psychopath's shrine. #626

8:11 PM Jul 23rd via API

is trapped in a psychopath's shrine. #626

8:10 PM Jul 23rd via API

just woke up in a room with a madman. #626

8:08 PM Jul 23rd via API

is being dragged down a hallway. #626

8:08 PM Jul 23rd via API

is trying not to wake a baby of darkness. #626

8:08 PM Jul 23rd via API

Figure 15

Hotel 626 Player's Sample Twitter Stream²⁰⁵

Like the Facebook updates, the Twitter posts give no indication that their source is not the teen who owns the Twitter account.²⁰⁶

²⁰⁵ These are screen captures taken from an actual Twitter page.

Not only are these messages generated by Frito-Lay, but the players do not know that messages are being transmitted from their accounts, let alone what they say. Postings made without the explicit knowledge or consent of “sender” by definition do not honestly reflect the views of the game player. Thus, these actions violate the guidance in §255.1(a).

C. The Misrepresentations and Omissions in Frito-Lay’s Marketing Are Material

Frito-Lay’s advertising practices meet the materiality prong of the deception test in at least three ways. First, the Doritos campaigns have increased sales to their target audience of teens. Second, Frito-Lay omits material information with the intent to mislead. Third, the marketing implicates serious health concerns, as the consumption of high caloric, high sodium snacks such as Doritos contribute to teenage obesity and obesity-related public health concerns.

1. Frito-Lay’s Marketing Practices Are Material Because They Are Likely to Affect a Consumer’s Choice Regarding Doritos

An act or practice is material if it is likely to affect a consumer’s choice of or conduct regarding a product.²⁰⁷ Doritos advertising campaigns disguised as entertainment have proved highly effective in promoting and selling Doritos. As the first chart below shows, sales of Doritos fell from 2003 to 2006 but in 2007 increased 13% from the previous year.²⁰⁸ The second chart illustrates how specific campaigns helped to boost sales of Doritos during that period.²⁰⁹

²⁰⁶ *Id.* The inclusion of “via API” gives no indication as to the origin of the message, but only indicates that a third party application has generated the tweet. It does not tell the viewer that someone other than the teen composed the endorsement.

²⁰⁷ *Cliffdale Associates*, 103 F.T.C. at 175.

²⁰⁸ Appendix B: 2008 Effie Award for Snack Strong Productions, at A-21.

²⁰⁹ *Id.*

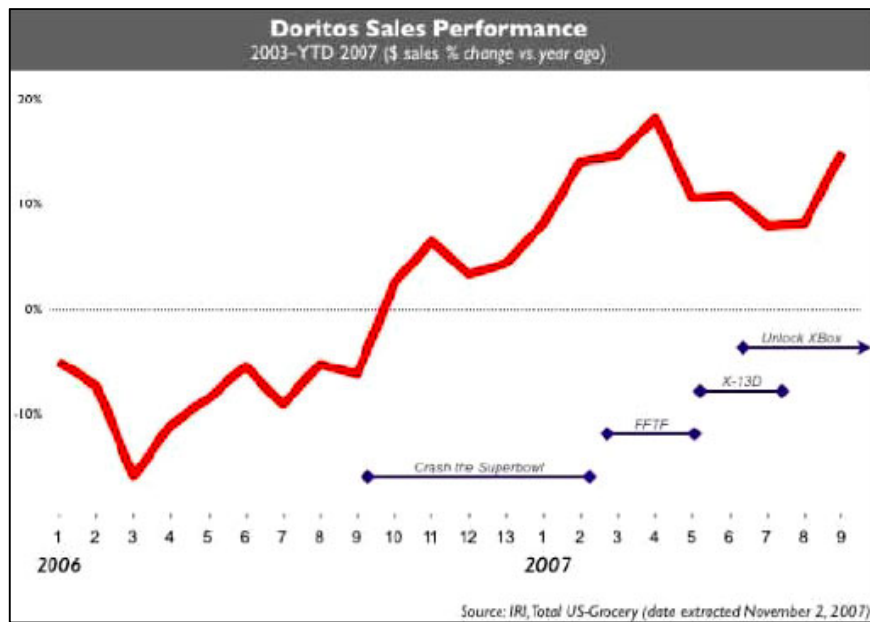
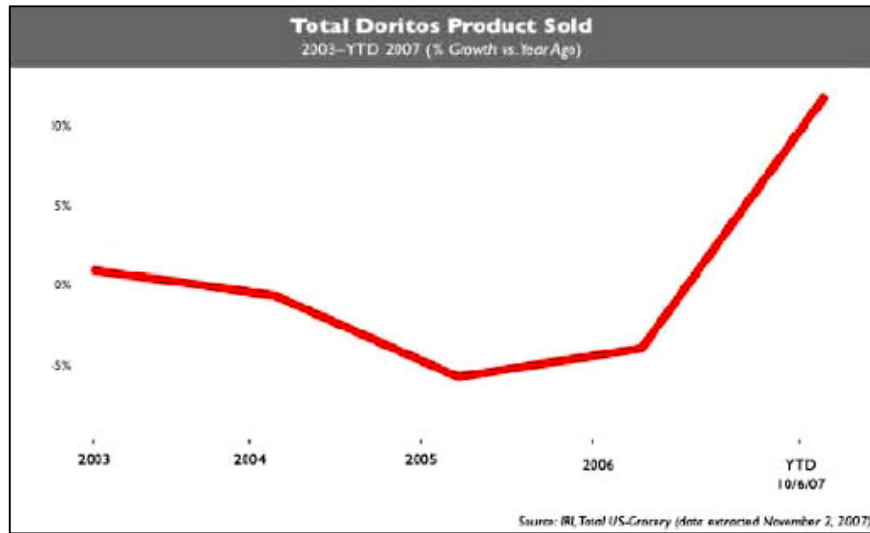


Figure 16

Charts Illustrating the Effectiveness of Snack Strong Productions²¹⁰

²¹⁰ *Id.*

In 2008, Hotel 626 was credited with selling out the flavors associated with the game, with over two million bags sold in just three weeks.²¹¹ Asylum 626 garnered 850,000 visitors and 18,000 during the first four months alone and was credited for selling nearly 5 million bags of Doritos.²¹² The first Doritos Late Night concert resulted in more than \$50 million in sales.²¹³ These numbers, provided by Frito-Lay and Goodby to prove the success of Doritos campaigns, demonstrate that marketing significantly affects teenagers' food purchases.

One reason these campaigns are so effective at selling Doritos is that they often require consumers to purchase a bag of Doritos to take full advantage of the entertainment. For example, teens must purchase a limited edition bag of Doritos printed with a special interactive symbol to select music videos and control camera angles in the Doritos Late Night "concerts."²¹⁴ Without a specially marked bag, visitors to Doritos Late Night couldn't "unlock the darker, hotter, late night side of Rihanna."²¹⁵ Similarly, teens had to purchase a bag of Doritos to play Madden NFL '11 in "Doritos 3D mode."²¹⁶ After playing 85 percent of Asylum 626, teens are

²¹¹ Appendix A3: Hotel 626: Awards Case Study Video, at A-5.

²¹² Appendix A5: Asylum 626 Case Study Video, at A-7.

²¹³ Appendix A7: Rihanna: Webby Awards Submission Video, at A-11.

²¹⁴ *Id.* at A-10.

²¹⁵ Doritos also employed the strategy of interactive packaging for other concerts on its online music site, Doritoslatenight.com. In one instance, users had to point their webcams to a special symbol printed on the bags of "Tacos at Midnight" and "Last Call Jalapeno Pepper" flavors to view a concert in 3D featuring the musicians Blink-182 and Big Boi. Aden Hepburn, *Doritos Late Night Chips: Augmented Reality In a Bag!*, Digital Buzz Blog (July 11, 2009), <http://www.digitalbuzzblog.com/doritos-late-night-chips-augmented-reality-with-blink-182-in-a-bag/> (last visited Oct. 3, 2011).

²¹⁶ *Doritos Presents SnackStrong Productions*, Doritos, <http://www.doritos.com/#/madden> (last visited Aug. 4, 2011).

told they must purchase a bag of Doritos to complete the experience.²¹⁷ Hunter Hindman of Goodby explains that this interaction was designed “to make sure we move bags of Doritos.”²¹⁸

Thus, because Frito-Lay’s campaigns were intended to and did increase sales of Doritos, they meet the test for materiality on this ground alone.

2. Frito-Lay Omits Material Information with the Intent to Mislead

The FTC also presumes that an omission is material where “the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, . . . because the manufacturer intended the information or omission to have an effect.”²¹⁹ It is well known that consumers put greater faith in communications from friends rather than commercial messages.²²⁰ Frito-Lay’s failure to identify the games and concerts as advertising for Doritos, as well as the use of tweets and Facebook postings that appear to be from “friends” rather than Frito-Lay, constitute omissions that would affect a teen’s decision about whether to participate in the promotion. Similarly, Frito-Lay’s failure to adequately disclose what it is doing with personal information constitutes a material omission.²²¹

²¹⁷ Appendix A5: Asylum 626 Case Study Video, at A-7.

²¹⁸ *Id.*

²¹⁹ *Cliffdale Associates*, 103 F.T.C. at 110.

²²⁰ See Rebecca Tushnet, *Attention Must Be Paid*, 58 Buff. L. Rev. 721, 749 (2010).

²²¹ FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009). See also *Reverb Communications, Inc.*, 2010 WL 4897037 (F.T.C. Nov. 22, 2010) (finding that a video game company violated the FTC Act’s prohibition against deceptive advertising by failing to disclose that online reviews of its products had been written by its employees), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

3. Frito-Lay's Practices Are Material Because Consumption of Doritos Harms Teens' Health

Finally, Frito-Lay's deceptive practices are also material because increased consumption of Doritos is detrimental to the health of teens. The FTC has found marketing claims material if they significantly involve health, safety, or other areas of concern to a reasonable consumer.²²²

Nutritionist Marion Nestle calls Doritos "the classic, prototypical junk food."²²³ Doritos is a snack food high in calories and low in nutritional value. A single 99-cent bag of 3rd Degree Burn Scorchin' Habanero Doritos packs a staggering 390 calories—approximately the same number as in half a stick of butter.²²⁴ It also contains more than one-third of the recommended fat limit and one-quarter of the recommended sodium limit for an entire day.²²⁵ Although Doritos is marketed as a "snack" food, this bag contains more calories and fat than in an entire 10-ounce pork and mashed potatoes frozen meal made by a popular frozen food company.²²⁶

²²² *Cliffdale Associates*, 103 F.T.C. at 190–191.

²²³ Monica Hesse, *Munch Ado About Doritos, One Man's Iconic Snack*, *Washington Post*, Sept. 26, 2011, available at http://www.washingtonpost.com/lifestyle/style/munch-ado-about-doritos-one-mans-iconic-snack/2011/09/26/gIQAFuHH0K_story.html. Nestle also said of Doritos, "No fiber, a little protein . . . buttermilk solids, monosodium glutamate, onion powder, partially hydrogenated — WHAT? Are they kidding me?" *Id.*

²²⁴ *Salted Butter Nutrition Facts*, Land O'Lakes, <http://www.landolakes.com/product/15136/salted-butter> (last visited Sept. 21, 2011) (100 calories in each tablespoon of butter).

²²⁵ A "single" one ounce serving (about 11 chips) has 140 calories, of which 70 are from fat. Other flavors contain even more calories and sodium. A 99-cent "Hungry Grab" bag contains almost three servings.

²²⁶ *Stouffer's Pork & Mashed Potatoes Nutrition Panel*, Stouffer's, <http://www.stouffers.com/products/nutrition/208/Pork-and-Mashed-Potatoes.aspx> (last visited Sept. 23, 2011) (One 10-ounce container contains 370 calories and 21 grams of fat.).



While many factors contribute to child and adolescent obesity, a recent study indicates that snacking on unhealthful foods is a major contributor. This study finds that snacking has grown significantly over the past three decades, constituting up to 27 percent of children's daily caloric intake as of 2006.²²⁸ Further, it finds that children are moving toward a consumption

²²⁷ Doritos 3rd Degree Burn Scorchin' Habanero Nutrition Panel, Frito-Lay, <http://www.fritolay.com/assets/images/bigVault/doritos-3rd-degree-burn.jpg> (last visited Sept. 21, 2011).

²²⁸ Carmen Piernas & Barry M. Polkin, *Trends In Snacking Among U.S. Children*, 29 Health Affairs 398, 400 (2010).

pattern of three meals plus three snacks per day.²²⁹ The study also finds a drastic increase in “salty snack” consumption.²³⁰ This study suggests that “high-calorie snacking” is “a major cause of childhood obesity.”²³¹

Marketers are aware of and are taking advantage of the trend toward increased snacking. A recent market research publication, *Packaged Foods: Snack Foods in the U.S.*, 4th Ed., finds that “Americans are snacking more than ever with retail sales of packaged snacks ringing up \$64 billion in 2010, up from \$56 billion in 2006.” By 2015, sales are expected to reach \$77 billion. David Sprinkle, the publisher of *Packaged Facts*, notes that the “boundaries between meals and snacks are growing ever blurrier, creating consumer consumption habits that will resonate for generations. The children of today, comfortable with replacing entire meals with snacks, will pass these lifestyle traits on to their children, ensuring that snacking will remain a big part of American life.”²³² Other factors driving the increase in snack sales include “less frequent restaurant dining, hurried lifestyles that encourage on-the-go eating, a growing tendency to replace meals with several smaller snacks, and marketer efforts to combat the obesity epidemic by developing healthier snack foods that still taste appealing.”²³³

PepsiCo does market “better-for-you” snacks such as Baked! Lay’s, which contains 14% fewer calories, 75% less fat, and nearly 40% less sodium than Third Degree Burn Scorchin’

²²⁹ Piernas & Polkin, *supra* note 228, at 403.

²³⁰ *Id.* at 398.

²³¹ Sonia Caprio, *Study Finds Snacking is a Major Cause of Child Obesity*, Yale Medical Group News (April 28, 2010), http://www.yalemedicalgroup.org/caprio_042810 (summarizing Piernas & Polkin, *supra* note 228).

²³² *Snack Food Sales Soar to \$77 Billion by 2015*, Food Product Design (June 10, 2011), <http://www.foodproductdesign.com/news/2011/06/snack-food-sales-soar-to-77-billion-by-2015.aspx>.

²³³ *Id.*

Habanero.²³⁴ PepsiCo CEO Indra Nooyi sees great opportunity in marketing healthier snack foods, noting that “It’s not a question of selling less”; rather, “It’s a question of selling the right stuff.”²³⁵ Nooyi also recognizes that “[t]eaching children sensible eating habits at an early age plays a critical role in their future health.”²³⁶ Nonetheless, as shown above, PepsiCo’s Frito-Lay continues to aggressively market Doritos—one of its most unhealthful lines—to teenagers.

Adolescent obesity presents an enormous public health problem. The level of obesity among U.S. adolescents aged 12–19 has nearly quadrupled over the past four decades, going from 4.6 percent in the mid-sixties to 18.1 percent by 2007–2008.²³⁷ Today, almost one-third of American 10- to 17-year-olds are overweight or obese.²³⁸ This trend is especially alarming given that 80 percent of all young people who are obese on their 18th birthday are likely to remain so throughout their lives.²³⁹ Moreover, there is a large and consistent body of evidence that overweight and obesity in childhood and adolescence have substantial adverse consequences for long-term physical health.²⁴⁰

²³⁴ See *Baked! Lay’s Nutrition Panel*, Frito-Lay, <http://www.fritolay.com/assets/images/bigVault/lays-baked-original.jpg> (last visited Sept. 21, 2011).

²³⁵ John Seabrook, *Snacks for a Fat Planet: PepsiCo Takes Stock of the Obesity Epidemic*, *New Yorker* 54, May 16, 2011 (Nooyi told Seabrook that “with everyone’s focus on health, products that are nutritiously good, or nutritionally better than anything else out there, are a huge opportunity. These categories are growing several times faster than anything else.”).

²³⁶ *Responsible Marketing & Advertising*, PepsiCo, <http://www.pepsico.com/Purpose/Human-Sustainability/Responsible-Marketing.html> (last visited Sept. 21, 2011).

²³⁷ Cynthia Ogden & Margaret Carroll, Centers for Disease Control & Prevention, Nat’l Ctr. for Health Stat., *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2007-2008* 5 (2008), available at http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf.

²³⁸ Weight Status, BMI-for-Age, 3 Categories, Age 10–17, Data from 2007 National Survey of Children’s Health, Data Resource Center for Child & Adolescent Health, <http://childhealthdata.org/browse/survey/results?q=218&r=1>.

²³⁹ *IOM Science of Adolescent Risk-Taking*, *supra* note 32, at 8.

²⁴⁰ J.J. Reilly & J. Kelly, *Long-Term Impact of Overweight and Obesity in Childhood and*

Nor are the negative health consequences of adolescent obesity limited to its association with adult obesity. Even obese teens who do not become overweight adults may suffer severe lifelong consequences. Dr. William H. Dietz, currently the Director of the Division of Nutrition, Physical Activity, and Obesity at the Centers for Disease Control, has found that adolescence “appears to represent a critical period for the entrainment of obesity-associated morbidity,” with data “suggesting that the morbidity and mortality effects resulted from adolescent obesity directly, rather than from the effects of adolescent obesity on adult weight.”²⁴¹ In particular, rates of diabetes, coronary heart disease, atherosclerosis, hip fracture and gout are increased in both men and women who were overweight as adolescents.²⁴² Dietz’s finding was merely one of the earliest in a number of reports attributing “[i]ncreased morbidity and mortality seen in adulthood . . . to adolescent obesity directly, rather than the effects of adolescent obesity on adult weight.”²⁴³ This year, Scottish researchers Reilly and Kelly systematically reviewed several studies from the last eight years on the long-term health consequences of child and adolescent obesity.²⁴⁴ Reilly and Kelly found “a good deal of evidence that obesity in childhood and adolescence represents an insult to the cardiovascular system, which results in increased risk of later cardiovascular morbidity and mortality.”²⁴⁵

Adolescence on Morbidity and Premature Mortality in Adulthood: Systematic Review, 35 Int’l J. Obesity 891, 896 (2011).

²⁴¹ William H. Dietz, *Critical Periods in Childhood for the Development of Obesity*, 59 Am. J. Clinical Nutrition 955, 957 (1994).

²⁴² William H. Dietz, *Childhood Weight Affects Adult Morbidity and Mortality*, 128 J. Nutrition 411S, 411S (1998).

²⁴³ T. Lobstein, L. Baur, & R. Uauy, IASO International Obesity TaskForce, *Obesity in Children and Young People: A Crisis in Public Health*, Obesity Rev. May 2004 Supplement 1, Vol. 5, 37 (2004) (citing Aviva Must, Paul F. Jacques, Gerard E. Dallel, Carl J. Bajema, & William H. Dietz, *Long-Term Morbidity and Mortality of Overweight Adolescents: A Follow-Up of the Harvard Growth Study of 1922 to 1935*, 327 New Engl. J. Med. 1350 (1992)).

²⁴⁴ J.J. Reilly & J. Kelly, *supra* note 240.

²⁴⁵ *Id.* at 895.

Controlling obesity is important not only for public health reasons, but also because obesity imposes enormous costs on society. According to public health economists, “the annual medical burden of obesity has risen to almost 10 percent of all medical spending.”²⁴⁶ In 2008, obesity-related medical spending in the U.S. totaled an estimated \$147 billion.²⁴⁷ Scholars warned that “without a strong and sustained reduction in obesity prevalence, obesity will continue to impose major costs on the health system for the foreseeable future.”²⁴⁸

Thus, PepsiCo’s aggressive and deceptive marketing of Doritos to adolescents is material because it contributes to the growing epidemic of adolescent obesity, which will have lifelong negative consequences for health and will lead to significant increases in health care costs.

V. CONCLUSION

Frito-Lay has infiltrated the lives of teens by developing covert advertising campaigns centered on things teens love—video games, music, horror, sports, contests, and social networking. Teens are particularly susceptible to these kinds of campaigns because of certain physiological and psychological traits associated with adolescence that make them likely to take risks, act impulsively, and be unduly influenced by peers. Frito-Lay takes advantage of teens’ vulnerabilities by disguising its marketing campaigns as entertaining videogames, concerts, and other immersive forms of entertainment. Frito-Lay also deceives teens by claiming to protect their privacy but failing to do so, collecting and using teens’ personal information without meaningful notice and consent, and violating the FTC endorsement guidelines. These deceptive practices are material because they influence teens to purchase Doritos, a “salty snack” high in

²⁴⁶ Eric A. Finkelstein, Justin G. Trogdon, Joel W. Cohen & William Dietz, *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 *Health Affairs* w822, w822 (2009).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at w831.

calories and fat, often by requiring the purchase of Doritos to enjoy the entertainment. Further, the increased consumption of Doritos contributes to a serious public health problem—the growing epidemic of adolescent obesity. Thus, CDD *et al.* urge the FTC to promptly begin an investigation of Frito-Lay’s marketing to teen and to take action to stop these practices.

Respectfully submitted,

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