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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Before the
FEDERAL TRADE COMMISSION
Washington, DC 20554

In the Matter of

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Practices in Marketing Doritos to Adolescents


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.

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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.
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

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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](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.”

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. 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.

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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 at 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.” It is headquartered in Purchase, NY.

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

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.”

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.

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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.\(^\text{13}\) 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.\(^\text{14}\) The report specifically identifies obesity as one such “serious health concern for young people.”\(^\text{15}\) 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.\(^\text{16}\) This research shows that the “changes that take place in the adolescent brain are specific to particular regions—those that are most important for


\(^{15}\) 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.”

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

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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.”

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.” In early 2010, 93% of teens ages 12–17 were online and 73% used social networking websites. Of teens who used the Internet daily, 80% visited a social network. 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.

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.” The authors find that “adolescents are

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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.
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.”

Another study shows that adolescents score high in psychologists’ “sensation seeking” tests, which measure desire for stimulating, exciting, and novel kinds of experiences. 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.

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.”

Harris et al. have reviewed psychological models to better understand how food marketing affects children and adolescents. 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).
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.
38 Graham, 130 S. Ct. at 2026 (citing Roper v. Simmons, 543 U.S. 551, 569-70 (2005)) (internal quotations omitted).
20s.”  

One consequence of the habitual consumption of such unhealthful snacks is obesity, which leads to a wide array of severe health complications.

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

Teens and young adults are Doritos’ heaviest consumers. 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. Moreover, healthier, nutritional snacks were seen as “a looming threat to Doritos’ profits in the future.”

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.” The “youth audience had changed.” 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.”

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


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.*

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.”

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.” Thus, “Doritos decided to stop talking to moms and start talking to the people that actually ate their product, teenagers.” Goodby realized that “[n]o one craves advertising, especially teens. But they do seek out entertainment.” So “to make [Frito-Lay’s] marketing more relevant to kids who couldn’t care less,” Goodby and Frito-Lay developed a campaign that “treated Doritos less like a chip company and more like an entertainment company.”

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.” A visit to the Doritos website, www.doritos.com, takes the visitor directly

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47 Anderson, supra note 5, at 2, 3.
49 Appendix A4: Goodby and B-Reel Enter the Asylum for the Sequel to Doritos Hotel 626, at A-6.
to the Snack Strong Productions virtual studio lot, which showcases various Doritos promotions, including several discussed in this Complaint.

![Figure 1](image)

**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.”

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.” 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.”

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

SSP’s first major campaign was “Crash the Super Bowl.” Goodby explained that it chose the Super Bowl because “we knew we had to pretty much blow them away to capture their initial interest.” 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.” 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.” Crash the Super Bowl was so successful that Frito-Lay has continued to run the competition every year since its initial launch.

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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.
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.” 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.

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.”

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.” Consumers submitted game ideas, and the winning concept was developed into a game and released on Xbox Live. Frito-Lay has explained that “Xbox . . . is about big, bold, intense, immersive experiences. So it was a natural fit for us.”

Frito-Lay publicly described the target audience for Unlock Xbox as “16–24 year old consumers.” 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.

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61 Id.
62 Id.
63 Id.
64 Id.
65 Appendix K: Doritos Unlock Xbox 2, at A-56.
67 Id.
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

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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 “stepping 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.” 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.”

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.”

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

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75 Id.
76 Appendix A2: Hotel 626: Site Overview Video, at A-3.
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.”

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.”

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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. The agency found “that teenagers love getting scared, even

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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.
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 :]

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. 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.”

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?” The answer was to make “the scare personal.” 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.

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.” 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.
89 Appendix E: Goodby and B-Reel Enter the Asylum, at A-30.
91 Appendix A5: Asylum 626 Case Study Video, at A-7.
92 Id.
Asylum 626 “awaken to find themselves strapped to a bed in an insane asylum, held hostage at the mercy of a mad doctor.” 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. The game employs head-tracking technology so that the player must literally move to avoid an attack.

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

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possible to distract the assailant. 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.”

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.” Asylum 626 also sends “updates” to the player’s friends on Facebook “to let the world know your choice.”

Jeff Goodby boasts that Asylum 626 “does things like that to you that are surprising, for sure.” 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.

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. 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.”

96 Ritchie, supra note 94.
98 Ritchie, supra note 94.
99 Appendix A5: Asylum 626 Case Study Video, at A-7.
101 See Figures 14 and 15, infra, for screen captures taken from actual Facebook and Twitter feeds.
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.04

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.”05 Hoping to compete for teens’ entertainment spending, Frito-Lay launched “a new platform designed to sustain many flavors in subsequent years.”06 For Doritos, the goal was to become “hot, new and popular,” characteristics the brand identified as “critically important” to its target audience.07

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.”08 “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).”09

104 Appendix A5: Asylum 626 Case Study Video, at A-7.
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.”\footnote{Id.} They “wanted [the] communication to feel less like advertising . . . and more like insider information.”\footnote{Id.}

The Late Night music experience utilized “augmented reality,” an immersive marketing technique featuring a vivid interactive experience that can be personalized for individual users.\footnote{Appendix H: Blink-182 Rocks ‘Augmented Reality’ Show in Doritos Bag, at A-43.} 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.\footnote{Id. at A-44.}

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.\footnote{Id.} 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.\footnote{Appendix I: 2011 Effie Award for Concert in a Bag, at A-50.}

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

\begin{footnotes}
\item[110] Id.
\item[111] Id.
\item[112] Appendix H: Blink-182 Rocks ‘Augmented Reality’ Show in Doritos Bag, at A-43.
\item[113] Id. at A-44.
\item[114] Id.
\item[115] Appendix I: 2011 Effie Award for Concert in a Bag, at A-50.
\end{footnotes}
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.\textsuperscript{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.”\textsuperscript{117} The website had nearly 100,000 visitors in the first week, with an average visit length of more than 4.5 minutes.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{120} It let fans “choose their favorite athlete to grace the front of Madden NFL ’11.”\textsuperscript{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.

\textsuperscript{116} Appendix A7: Rihanna: Webby Awards Submission Video, at A-10.  
\textsuperscript{117} Id. at A-11.  
\textsuperscript{118} Id.  
\textsuperscript{119} Appendix A10: Changing the Game Case Study Video, at A-14.  
\textsuperscript{120} Id.  
\textsuperscript{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.” 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.”

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.” It was so successful in selling chips that Frito-Lay is currently doing another promotion with Madden for NFL ’12.

**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. Section 5 of the FTC Act

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122 Id.
123 Appendix A10: Changing the Game Case Study Video, at A-15.
124 Id.
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. 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. 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.” When a communication targets children or teens, the FTC “consider[s] consumer expectations from the standpoint of an ordinary child or teenager.” 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.”

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129 Id.
130 Id.
As discussed in Background Section B supra, 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. For example, Doritos Late Night was developed to get teens to buy bags of Doritos instead of downloading songs from iTunes. Similarly, Goodby created Hotel 626 as “an online experience targeted to teens.”

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.” 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.” 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.

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132 See Background Section B “Frito-Lay Uses Digital Marketing to Sell Doritos to Teens,” supra p. III.B.  
133 See id.  
135 Appendix A2: Hotel 626: Site Overview Video, at A-3.  
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.
misrepresented the nature of the communication. 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. 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.” 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. And in another recent case, the FTC took action against “fake news websites” used to advertise a weight loss remedy.

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143 Id. at 56.
144 Id. at 34-35.
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).
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.” 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.

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.”

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F.3d 1, 9 (1st Cir. 2010) (alleging a deceptive format where paid commercial advertising was presented as a talk show); Letter from Heather Hippsley, 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).

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

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nonetheless function as an ad.\textsuperscript{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.”\textsuperscript{153} The campaign was conducted “[a]ll without the appearance of a single corn chip.”\textsuperscript{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.”\textsuperscript{155}

Figure 7

Hotel 626 Sold Over 2 Million Bags of Doritos in Three Weeks\textsuperscript{156}

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,

\textsuperscript{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.”

\textsuperscript{153} Appendix D: Mike Geiger on Hotel 626, at A-28.

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

\textsuperscript{155} Ritchie, supra note 94.

\textsuperscript{156} Id.
distorted time sense, effortless action.” Immersive environments can also induce a state of “flow,” causing individuals to lose any sense of the passage of time. 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.\textsuperscript{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.”\textsuperscript{160} Jeff Goodby agrees that the game is “pretty immersive.”\textsuperscript{161}

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

\textsuperscript{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.
\textsuperscript{161} Appendix A6: The BuzzBubble Interviews Jeff Goodby, at A-9.
\textsuperscript{162} See \textit{Hotel 626 Landing Page}, Hotel 626, http://www.hotel626.com (last visited Sept. 23, 2011); \textit{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. 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. The player is further invited to put on headphones, allowing the game to surround the player with “dynamic room reverberation” and effects that emulate multidirectional sound in a 3D environment.

Similarly, Doritos Late Night uses augmented reality to “unleash an interactive 3D concert that users could control.” 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).
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.
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.
We 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.
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

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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 Circuit"
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, “[l]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.”

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.”

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

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175 *Asylum 626 Movie-Style Poster*,

176 *Hotel 626*, MediaPost Publications (Sept. 24, 2009),

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:

Figure 11
Hotel 626 Registration Form

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. 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.

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

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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. 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.

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.

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.”\textsuperscript{186} Thus, Frito-Lay deceives the consumer by taking actions inconsistent with its promise to respect privacy.

\textbf{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 \textit{Sears Holding Management Corp.}, Sears represented to consumers that software it was placing on their computers would track their “online browsing.”\textsuperscript{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.

\textsuperscript{186} \textit{Cliffdale Associates}, 103 F.T.C. at 175.
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.”\textsuperscript{189} Owing to their impulsive nature, teens are

particularly unlikely to click on these links and read the privacy statement.\textsuperscript{190} Research shows that while teens are concerned about their privacy, they tend not to actively seek out privacy information.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{193}

\textsuperscript{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).


\textsuperscript{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.

\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{195} As described below, the site uses this information to send messages that appear to

\textsuperscript{194} Appendix E: Goodby and B-Reel Enter the Asylum, at A-31.
\textsuperscript{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. 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.” It requires that endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.”

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

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

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.

![Hotel 626 Player’s Sample Facebook Wall](image)

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

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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.

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

\textsuperscript{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.\(^\text{207}\) 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.\(^\text{208}\) The second chart illustrates how specific campaigns helped to boost sales of Doritos during that period.\(^\text{209}\)

\(^{206}\) 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 Productions\textsuperscript{210}

\textsuperscript{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.\textsuperscript{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.\textsuperscript{212} The first Doritos Late Night concert resulted in more than $50 million in sales.\textsuperscript{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 of 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.”\textsuperscript{214} Without a specially marked bag, visitors to Doritos Late Night couldn’t “unlock the darker, hotter, late night side of Rihanna.”\textsuperscript{215} Similarly, teens had to purchase of bag of Doritos to play Madden NFL ’11 in “Doritos 3D mode.”\textsuperscript{216} After playing 85 percent of Asylum 626, teens are...

\textsuperscript{211} Appendix A3: Hotel 626: Awards Case Study Video, at A-5.
\textsuperscript{212} Appendix A5: Asylum 626 Case Study Video, at A-7.
\textsuperscript{213} Appendix A7: Rihanna: Webby Awards Submission Video, at A-11.
\textsuperscript{214} Id. at A-10.
\textsuperscript{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, \textit{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).
told they must purchase a bag of Doritos to complete the experience. Hunter Hindman of Goodby explains that this interaction was designed “to make sure we move bags of Doritos.”

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.” It is well known that consumers put greater faith in communications from friends rather than commercial messages. 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.

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217 Appendix A5: Asylum 626 Case Study Video, at A-7.
218 Id.
219 Cliffdale Associates, 103 F.T.C. at 110.
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

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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.
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. Further, it finds that children are moving toward a consumption

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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.\textsuperscript{229} The study also finds a drastic increase in “salty snack” consumption.\textsuperscript{230} This study suggests that “high-calorie snacking” is “a major cause of childhood obesity.”\textsuperscript{231}

Marketers are aware of and are taking advantage of the trend toward increased snacking. A recent market research publication, \textit{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 \textit{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.”\textsuperscript{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.”\textsuperscript{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’

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\begin{itemize}
  \item \textsuperscript{229} Piernas & Polkin, \textit{supra} note 228, at 403.
  \item \textsuperscript{230} \textit{Id.} at 398.
  \item \textsuperscript{231} Sonia Caprio, \textit{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, \textit{supra} note 228).
  \item \textsuperscript{233} \textit{Id.}
\end{itemize}
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.” Nooyi also recognizes that “[t]eaching children sensible eating habits at an early age plays a critical role in their future health.” 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. Today, almost one-third of American 10- to 17-year-olds are overweight or obese. 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. 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.

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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.”).
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

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


\(^{247}\) *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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