



February 2, 2011

David Vladeck, Director  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Ave. N.W.  
Washington, DC 20580

Re: Deceptive Advertising of “vitaminwater”

Dear David:

The National Consumers League (NCL)<sup>1</sup> urges the Federal Trade Commission (“FTC” or the “Commission,”) to promptly halt unfair and deceptive advertising by Glacéau, a subsidiary of the Coca-Cola Company, for its “vitaminwater nutrient enhanced water beverage” (“vitaminwater”).

Advertising for vitaminwater deceptively claims that the beverage can reduce the chance of contracting the flu and/or the common cold. Such claims are unsubstantiated, and thus should be considered “unfair or deceptive” trade practices in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), 5 U.S.C. § 45. NCL also urges the FTC to halt the claim “vitamins + water = all you need” and the claim “nutrient enhanced water beverage” found on vitaminwater labels and promotional materials. Those statements deceptively imply that vitaminwater consists solely of vitamins and water when in fact the beverage contains substantial amounts of added sugar.

1) A point-of-sale (“POS”) poster advertisement for vitaminwater states:

vitaminwater. flu shots are so last year.

The poster pictures three varieties of vitaminwater, “essential,” “revive,” and “multi-v.” The claims “more vitamin c, more immunity, less snotty tissues” appear respectively under a picture

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<sup>1</sup> The National Consumers League is a non-profit consumer advocacy organization. NCL is the nation’s oldest consumer organization, and provides government, businesses, and other organizations with the consumer’s perspective on various matters, including health-related claims for foods. NCL has a long history of filing complaints over such matters with government agencies.

of each variety. See Attachment A. The net impression of this POS advertisement is that vitaminwater can strengthen one's immune system to the point that administration of the flu vaccine becomes unnecessary. Such claims are unsubstantiated, and hence unfair and deceptive under the FTC Act. *Thompson Medical Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir 1986) ("in general, an advertisement is considered deceptive if the advertiser lacks a 'reasonable basis' to support the claims made in it"); *Daniel Chapter One v. FTC*, No. 10-1064, *slip op.* at 2 (D.C. Cir. Dec. 10, 2010) (denying a petition for review of an FTC Order requiring that health claims be supported by clinical trials with human subjects); *FTC v. Airborne Health*, CV 08 – 05300 *slip op.* at 6 (C.D. Cal. Aug. 13, 2008) (no credible evidence that Airborne will reduce the severity or duration of colds); *The Dannon Company*, FTC File No. 082 3158, (Dec. 15, 2010) (Dannon's ads for Dan Active deceptively conveyed to consumers that the product reduces the likelihood of getting a cold or flu); *Kellogg Company*, FTC File No. 082 3145, (June 3, 2010) (Kellogg misleadingly claimed that Rice Krispies cereal, fortified with vitamins, "now helps support your child's immunity").

The Commission should immediately take enforcement action to halt such claims because such misinformation constitutes an imminent public health hazard. Discouraging members of the public from getting a flu shot as recommended by government health authorities is not only deceptive, but dangerous. The Centers for Disease Control and Prevention (CDC), and other public health agencies, have recommended that many Americans get a vaccination to protect them from contracting the flu. *E.g.*, <http://www.cdc.gov/flu/>. Advertising that discourages consumers from following that advice can create substantial consumer injury, interferes with established public policy and violates the FTC Act, 15 U.S.C. § 45 (a)(1), (n).

- 2) A television ad for vitaminwater makes a similarly deceptive claim. The TV ad tells the story of a woman who is using a sick day to take off from work when she is perfectly healthy. The reason she has available unused sick days to do this, according to the ad, is that she drinks vitaminwater, which supports her immune system, thereby reducing her need to use sick days for legitimate reasons, and permits her to use her employer's sick leave policy to stay home with her boyfriend, watch movies, and "play hooky." The ad states:

I love skipping work, especially when I'm feeling great. Layin' in my pj's searching Netflix for a guilty pleasure marathon. And since its Friday, I've got a nice little three-day staycation package. One of my secrets? vitaminwater power-c. It's got vitamin C and zinc to help support a healthy immune system. So I can stay home with my boyfriend – who's also playing hooky. What a coincidence.

See Attachments B and C. The implications of the ad are clear. The net impression of this advertisement is not only that the vitamin C and zinc in vitaminwater power-c help support a healthy immune system, but actually reduce the risk of contracting illnesses. The FTC Act prohibits deceptive claims, both express and implied. *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382,386 (7<sup>th</sup> Cir. 1953), *judgment modified on other grounds*, 348 U.S. 940, 75 S. Ct. 361 (1955); see Pridgen, D. *Consumer Protection and the Law*, §10.12 (2010). Here, the clear

implication of the ad is that vitaminwater can reduce the risk of illness. Such claims are unsubstantiated and deceptive.

3) Most, if not all, varieties of vitaminwater state on the label:

“Nutritionally enhanced water beverage” and/or “vitamins + water = all you need.”

See Attachment D. These statements deceptively imply that vitaminwater consists solely of vitamins and water when the product actually contains substantial amounts of added sugar. Most varieties of vitaminwater (except vitaminwater 0, which is sugar free) contain 125 calories per bottle. The FDA has recognized that such product names and statements may mislead consumers. FDA regulations state:

The labeling of a food which contain two or more ingredients may be misleading by reason of . . . a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling.

21 C. F. R. § 101.18(b). The FTC has issued an enforcement policy statement indicating that it will generally follow FDA regulatory policy regarding health-related claims for food products. Enforcement Policy Statement on Food Advertising (May 1994) (available at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm>).

The fact that the actual sugar content of vitaminwater is accurately stated in an FDA-mandated nutrition label on the product does not eliminate the possibility that reasonable consumers may be misled. [Ackerman v. The Coca-Cola Company](#), No. CV-09-0395 (JG) (RML), Slip op. (E.D.N.Y. July 21, 2010) at 33-34, citing *Williams v. Gerber Products Co.* 552 F.3d 934, 939-40 (9<sup>th</sup> Cir. 2008) (“[w]e do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception”).

The deceptive implication that vitaminwater consists only of vitamins and water is especially objectionable given the current obesity crisis in the United States. According to the CDC, about two-thirds of Americans are obese or overweight, and more than 15 percent of children are obese or overweight, *See Childhood Overweight and Obesity* (available at <http://www.cdc.gov/obesity/childhood>). Beverages like vitaminwater that imply they contain only vitamins and water, but in fact pack 125 calories per bottle, needlessly contribute unwelcome calories to consumers’ diets. A consumer who wishes to take vitamins can take a vitamin pill and a consumer who wishes to hydrate can drink water. Neither consumer needs to, or should, consume unnecessary calories in the process.

The product labels of vitaminwater are reproduced in the form of POS display advertisements. See Attachment D. The FTC has halted deceptive health-related claims on food labels as part of its efforts to prevent unfair and deceptive trade practices. *Nestlé HealthCare Nutrition*, FTC File No. 092 3087, Complaint at page 3; Agreement Containing Consent Order

at page 3 (“respondent . . . in connection with the manufacturing, *labeling*, advertising, promotion . . . or distribution of any covered product . . . shall not represent, in any manner, expressly or by implication . . . that such product prevents or reduces the risk of . . . cold or flu viruses” [emphasis added]).

### CONCLUSION

For the reasons stated in this complaint, we urge the FTC to move quickly and halt deceptive advertising and labeling of vitaminwater. Such steps are not only necessary to protect consumers from deception, but are a public health necessity. Promotional claims that 1) dissuade consumers from getting flu shots, as recommend by U.S. public health authorities, 2) deceptively imply that vitaminwater will strengthen the immune system and protect consumers from contracting illnesses, and 3) misrepresent the sugar content of the beverage and hence contribute to the ongoing obesity crisis in America should be stopped by the Commission. The NCL further requests that the FTC require The Coca-Cola Company to run corrective advertising to dispel any lingering deceptions caused by this misleading and reckless advertising campaign.

Sincerely,

A handwritten signature in black ink, appearing to read "Sally Greenberg". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sally Greenberg  
Executive Director  
National Consumers League