



Defendant The Coca-Cola Company (“TCCC”) respectfully submits this Statement of Material Facts Not in Dispute pursuant to Federal Rule of Civil Procedure 56 and District of New Jersey Local Rule 56.1 in support of its Motion for Summary Judgment:

1.

Plaintiff, Ms. Linda Franulovic (hereinafter “Plaintiff” or “Franulovic”) filed an action on her own behalf and on behalf of all New Jersey residents who purchased Enviga against The Coca-Cola Company (“TCCC”) for its alleged “illegal, fraudulent, and deceptive business practices” in the marketing of its sparkling green tea beverage, Enviga. *See* Third Amended Class Action Complaint (hereinafter “Third Amend. Compl.”), ¶ 1 (Docket No. 79).

2.

Her claim seeks damages and injunctive relief under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2, *et seq.* (“CFA”). Third Amend. Compl. ¶¶ 66-72.

3.

Ms. Franulovic’s complaint alleges that because of Enviga’s calorie burning claim, she purchased and consumed Enviga with the understanding it would help her lose weight. Third Amend. Compl., ¶¶ 45, 47, 48, 50.

4.

The Center for Science in the Public Interest (“CSPI”) originally filed this case on February 1, 2007, alleging that TCCC, Nestlé USA, Inc. and Beverage Partners Worldwide (“BPW”) (collectively “Defendants”) engaged in “illegal, fraudulent, and

deceptive business practices” in the marketing of the sparkling green tea beverage, Enviga. *See* CSPI’s Complaint (filed Feb. 1, 2007) (Docket No. 1).

5.

Defendants filed a motion to dismiss because of CSPI’s lack of standing and failure to state a claim. *See* Joint Motion to Dismiss (filed May 15, 2007) (Docket No. 13).

6.

CSPI filed a Second Amended Class Action Complaint (hereinafter “Second Amended Complaint”) naming an individual, Linda Franulovic, and dropping all defendants except for TCCC. *See* Second Amend Complaint (filed Aug. 13, 2007) (Docket No. 41).

7.

The next day, CSPI voluntarily dismissed itself from the litigation, leaving Franulovic as the only plaintiff and TCCC as the only defendant. *See* Notice of Voluntary Dismissal (filed Aug. 14, 2007) (Docket No. 42).

8.

On August 27, 2007, TCCC filed a motion to dismiss Franulovic’s Second Amended Complaint for, *inter alia*, failure to state a claim under Fed. R. Civ. P. 12(b)(6). *See* Motion to Dismiss Second Amended Complaint (filed Aug. 27, 2007) (Docket No. 43) (hereinafter “TCCC’s Motion to Dismiss”).

9.

On October 25, 2007, this Court dismissed Franulovic’s Second Amended Complaint pursuant to Rule 12(b)(6) because Franulovic’s Second Amended Complaint

“failed to adequately plead ascertainable loss....” *See* Opinion at 26 (Oct. 25, 2007) (Docket No. 60).

10.

In its order dismissing Franulovic’s Second Amended Complaint, the Court stated that “Franulovic has not alleged that she or members of the class failed to burn more calories or lose weight.... It is, therefore, unclear what, if any ‘cognizable and calculable claim of loss due to the alleged CFA violation’ Franulovic suffered.” *Id.* (citing *Thiedemann v. Mercedes-Benz USA*, 183 N.J. 234, 249 (2005)); *see also* Opinion at 29.

11.

Franulovic subsequently filed a motion to amend the judgment to allow her to file an amended complaint. *See* Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint (filed Nov. 8, 2007) (Docket No. 62) (hereinafter “Motion to Amend Judgment”).

12.

In the proposed amended complaint attached to her motion to amend the judgment, Franulovic alleged that she did not lose weight while consuming Enviga, although she also admitted that she did not know and could not prove whether or not she burned calories while drinking Enviga. *See* Motion to Amend Judgment, Exhibit A, ¶ 53

13.

At oral argument on Franulovic’s motion, her counsel confirmed that he “would never be able to prove” that Franulovic did not burn calories while drinking Enviga. *See* Hearing Transcript, at 12:22-23 (Docket No. 76).

14.

On March 10, 2008, this Court issued an order permitting Plaintiff to “file an amended complaint alleging a so called ‘weight loss claim’”, but requiring Plaintiff’s to “move for leave to file an amended complaint alleging, in addition to the approved weight-loss claim, a so-called ‘calorie burning’ claim” if they wished to pursue such a claim against TCCC. *See* Order at 2, Docket No. 75 (March 10, 2008); *see also* March 10, 2008 Hearing Transcript, 62:21 – 63:13.

15.

Plaintiff did not seek leave of court to pursue a calorie burning claim against TCCC. Instead, On April 14, 2008, Plaintiff elected to file her Third Amended Complaint alleging only a weight loss claim. *See* Third Amend. Compl., ¶ 53 (filed April 14, 2008) (Docket No. 79).

16.

In the Third Amended Complaint, Plaintiff also alleged that she believed that drinking Enviga would “help her weight loss regimen,” and in a conclusory fashion, without any particulars, she also alleged that she “did not otherwise alter her food consumption or physical activities during the period she used Enviga.” *Id.*, ¶¶

17.

On September 30, 2008, TCCC deposed Ms. Franulovic. *See generally*, Sept. 30, 2008 Deposition of Linda Franulovic (hereinafter “Franulovic Dep.”)

18.

During her deposition, Franulovic testified that she understood that in order to lose weight she had to reduce her caloric consumption (Franulovic Dep., at 33:25 – 34:5;

44:22-25; 47:7 – 47:15).

19.

During her deposition, Franulovic testified that she did not care how many calories she was consuming while she was drinking Enviga (Franulovic Dep., at 45:18-24).

20.

During her deposition, Franulovic testified that she did not expect to burn a particular number of calories while drinking Enviga (Franulovic Dep., at 37:2-5).

21.

During her deposition, Franulovic testified that she never attempted to count or control the number of calories she consumed while drinking Enviga (Franulovic Dep., at 34:14-17; 88:16-19).

22.

During her deposition, Franulovic testified that she never believed that drinking Enviga would guarantee she would lose weight (Franulovic Dep., at 46:18 – 47:3; 85:25 – 86:3; 92:4-8).

23.

During her deposition, Franulovic testified that she did not know how much she weighed when she started drinking Enviga (Franulovic Dep., at 32:13-16).

24.

During her deposition, Franulovic testified that she never weighed herself while she was drinking Enviga (Franulovic Dep., at 32:13-16; 84:7-12).

During her deposition, Franulovic testified that she did not expect to lose a particular amount of weight while drinking Enviga (Franulovic Dep., at 42:1-3).

Dated: January 30, 2009

/s/ Peter Boyer \_\_\_\_\_  
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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

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LINDA FRANULOVIC, individually and on behalf of a class of persons,	)	CIVIL NO. 1:07-cv-00539-RMB-JS
	)	
Plaintiff,	)	CLASS ACTION
	)	
v.	)	
	)	
THE COCA-COLA COMPANY,	)	
	)	
Defendant.	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served a copy of Defendant’s Statement of Material Facts Not in Dispute by the Court’s CM/ECF system this 30<sup>th</sup> day of January 2009, upon Plaintiffs’ counsel of record:

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