IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

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,	)	Document Electronically Filed
Defendant.	)	

BRIEF IN SUPPORT OF
THE COCA-COLA COMPANY'S MOTION FOR SUMMARY JUDGMENT

McCARTER & ENGLISH, LLP
By: GITA F. ROTHSCHILD
PETER J. BOYER
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 639-5959 (telephone)
(973) 297-3833 (facsimile)

ALSTON & BIRD LLP
By: JANE THORPE (ADMITTED *PRO HAC VICE*)
SCOTT ELDER (ADMITTED *PRO HAC VICE*)
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000 (telephone)
(404) 881-7777 (facsimile)

Attorneys for Defendant
The Coca-Cola Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Defendant The Coca-Cola Company ("TCCC"), pursuant to Federal Rule of Civil Procedure 56(c), files this brief in support of its contemporaneously filed Motion for Summary Judgment.

INTRODUCTION

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 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). The product label and marketing campaign for Enviga promotes the beverage as "The Calorie Burner," because, as stated on the back of the can, drinking three cans of Enviga per day will result in the burning of 60-100 calories.[1]

Franulovic's claim seeks individual damages and class-wide injunctive relief under the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2, *et seq.* ("CFA"). Franulovic's claim is premised entirely on her allegations that TCCC's advertising misled her and the purported class members into believing that drinking Enviga would cause weight loss, and that she (and presumably the class members) allegedly did not lose weight while drinking Enviga. *See generally* Third. Amend. Compl. (filed April 14, 2008) (Docket No. 79). TCCC is entitled to summary judgment because Franulovic cannot prove that she reasonably believed drinking Enviga would guarantee weight loss or that she did not lose weight while drinking Enviga. Thus,

[1] *See* September 30, 2008 Deposition of Linda Franulovic, Exhibit 13 (Picture of back of Enviga can labeled "TCCC-Enviga-0001740") (hereinafter "Franulovic Dep.") (A true and accurate copy of which is attached hereto in relevant part as Exhibit A).

although Franulovic's Third Amended Complaint *alleges* that she did not lose weight while drinking Enviga, *see* Third Amend. Compl., ¶ 53, in her deposition, she actually testified that: (1) she never believed that drinking Enviga would guarantee she would lose weight, (2) she did not monitor, count, or control her calories while drinking Enviga,[2] (3) she does not know how much she weighed when she started drinking Enviga, and (4) she never weighed herself while drinking Enviga. Plaintiff's sworn admissions are fatal to her claim.

First, she recognized as an average reasonable consumer that the marketing of Enviga did not include a promise of weight loss, so she has no argument that TCCC engaged in unlawful conduct. Additionally, Franulovic neither weighed herself nor counted her calories while drinking Enviga, so she cannot prove whether she lost weight while drinking Enviga and, therefore, cannot possibly prove an "ascertainable loss," which is an essential element of her claim.

Finally, Franulovic cannot prove causation because she has admitted that she did not monitor or otherwise control her caloric consumption while drinking Enviga. As a result, she cannot prove that her alleged failure to lose weight resulted from Enviga's failure to cause weight loss and not from her own consumption of calories from other foods and drinks. Accordingly, the undisputed facts demonstrate that Franulovic has not and cannot introduce any

---

[2] Deposition of Linda Franulovic, 34:14-17; 88:16-20.

Q: (By Mr. Elder) Is it fair to say that while you were drinking Inviga [sic] you don't know how many calories you were taking in on a daily basis?
A: Yes.

Q: And I believe you told me earlier that you don't know, and again were talking about in 2007, you don't know how many calories you were taking in or trying to take in on a daily basis, right?
A: Yes.

evidence from which a jury could reasonably find for Franulovic on any element of her claim under the CFA. TCCC is therefore entitled to judgment as a matter of law.

STATEMEMENT OF UNDISPUTED FACTS

I. PROCEDURAL HISTORY

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). In response, 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).

CSPI tacitly conceded its lack of standing to assert these claims by filing 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). 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).

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"). 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). As the Court explained, "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 ("Regardless of whether Count II should be combined with Count I, under the rubric of the CFA, because Franulovic has failed to allege an ascertainable loss, a key element of a CFA claim as discussed above, this claim will also be dismissed.").

Because Franulovic's claim was dismissed in its entirety, she 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"). Recognizing the need to plead an ascertainable loss, 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 ("Although Franulovic did not lose weight while drinking Enviga, she does not know and cannot prove whether she actually did not 'burn calories' as a result of drinking Enviga.") (emphasis added). Likewise, 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) ("Were I a betting man, your Honor, I would say she did [sic] but I would never be able to prove it. Well, that's the thing, we don't think she burnt calories. We don't believe she did, but we also don't know that she didn't.") (emphasis added).

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.[3]

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) ("Although Franulovic did not lose weight while drinking Enviga, she does not know and cannot prove whether she actually did not 'burn calories' as a result of drinking Enviga."). In the Third Amended Complaint, Franulovic 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.,* ¶¶ Accordingly, Plaintiff elected to pursue only a weight loss claim against TCCC.

---

[3] March 10, 2008 Hearing Transcript, 62:21 – 63:13.

THE COURT: Mr. Gardner, that's a fair point. But where in the complaint does it say that she used – drank Enviga as part of a weight loss management regimen or routine, whatever? Where does it say that?
MR. GARDNER: It says she drank it with the understanding that this would help her to lose weight. Your Honor, the --
THE COURT: Because I think that if -- I think with that amendment then I think everybody is sort of on the same page.
MR. GARDNER: Happy to do it, your Honor, with no contest. Instead of saying that it would help her lose weight, that she did it as part of her weight loss regimen --
THE COURT: Okay.
MR. GARDNER: -- I don't think it's a distinction. But if the Court thinks it's a distinction, your Honor, I do.
THE COURT: It certainly talks to the specificity and it certainly talks to what they now have to defend against.

II. MS. FRANULOVIC'S DEPOSITION

On September 30, 2008, TCCC deposed Ms. Franulovic. *See generally,* Sept. 30, 2008 Deposition of Linda Franulovic (hereinafter "Franulovic Dep.")(attached hereto as Exhibit A**).** During her deposition, Franulovic testified that:

(1) 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);

(2) she did not care how many calories she was consuming while she was drinking Enviga (Franulovic Dep., at 45:18-24);

(3) she did not expect to burn a particular number of calories while drinking Enviga (Franulovic Dep., at 37:2-5);

(4) 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);

(5) 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);

(6) she did not know how much she weighed when she started drinking Enviga (Franulovic Dep., at 32:13-16);

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

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

ARGUMENT AND CITATION OF AUTHORITY

I. SUMMARY JUDGMENT STANDARD.

"Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Michaels v. New Jersey*, 222 F.3d 118, 121 (3d Cir. 2000); Fed. R. Civ. P. 56. "[S]ummary judgment is particularly appropriate where … the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor." *Schoonejongen v. Curtiss-Wright Corp.,* 143 F.3d 120, 130 (3d Cir. 1998). "Although the non-moving party receives the benefit of all factual inferences in the court's consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact." *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006) (citation omitted).

Once the moving party shows that there is no genuine issue of material fact, the burden shifts to the nonmoving party, who must "go beyond the pleadings" and submit admissible evidence establishing that there is a genuine issue of material fact for trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). Additionally, where the "non-moving party has the burden of proof at trial, that party must set forth facts 'sufficient to establish the existence of an element essential to that party's case.'" *Id.* (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). Furthermore, where the evidence is "merely colorable, or is not significantly probative," summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). Accordingly, summary judgment is appropriate "unless there is sufficient

evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id. at* 249 (citations omitted).

II. TCCC IS ENTITLED TO SUMMARY JUDGMENT.

Franulovic's sole claim against TCCC is that it violated the CFA by marketing, advertising and selling Enviga as the "the Calorie Burner." *See* Third Amend. Compl., ¶¶ 66-72. Because Franulovic seeks to recover against TCCC under the CFA, to prove this claim she must establish "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 176 (N.J. Super. Ct. App. Div. 2003); *see also* N.J.S.A. § 56:8-19.

Franulovic cannot meet her burden here, because there is no evidence from which a reasonable jury could return a verdict in Franulovic's favor. *See Anderson*, 477 U.S. at 249. In fact, TCCC is entitled to summary judgment on three separate and independent grounds: Franulovic's own deposition testimony demonstrates that she cannot prove that TCCC engaged in any unlawful conduct; she cannot prove an ascertainable loss; and she cannot prove a causal relationship between TCCC 's allegedly unlawful conduct and any ascertainable loss. Each independent ground is discussed in more detail below.

A. Franulovic cannot prove that TCCC committed any unlawful conduct.

As noted above, Franulovic's claim can only survive if she can prove unlawful conduct on the part of TCCC. *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 176 (N.J. Super. Ct. App. Div. 2003); *see also* N.J.S.A. § 56:8-19. "In an action under the Consumer

Fraud Act, the test is whether an advertisement has the capacity to mislead the average consumer." *Union Ink Co. v. AT&T Corp*., 352 N.J.Super. 617, 644, 801 A.2d 361, 379 (2002).

Franulovic's concession that "she does not know and cannot prove whether she actually did not burn calories while drinking Enviga" is especially significant. As a consequence of her concession, Franulovic is **not** challenging the notion that Enviga causes calorie burning as advertised. Instead, to establish unlawful conduct by TCCC based on the allegations of her complaint, Franulovic must prove that the advertising for Enviga misled the average consumer into believing that Enviga would cause them to **lose weight**. Franulovic's own testimony, however, establishes that contrary to the allegations in her complaint, even she was not misled by the advertising of Enviga into believing that consuming Enviga would necessarily cause her to lose weight. She cannot therefore allege that such advertising misled the average consumer and her claim should therefore be dismissed.

Here, the alleged unlawful conduct is that the marketing for Enviga misleads consumers into believing that drinking Enviga will cause weight loss. Franulovic contends that "[t]o the average reasonable consumer, in New Jersey and elsewhere in the United States, burning calories or reducing caloric consumption results in losing weight, or at least off-setting weight gained from other calories." Third Amend. Compl., ¶ 17. She claims in her complaint that she personally purchased Enviga because she understood that it would cause her to lose weight (Third Amend. Compl., ¶¶ 45, 47, 48, 50), but that she did not actually lose weight during the time she consumed Enviga. Third Amend. Compl., ¶¶ 48, 53. The import of these allegations is that Ms. Franulovic considers herself to be an "average reasonable consumer" who purchased Enviga only because she believed it would cause her to lose weight.

However, Franulovic testified during her deposition that she understood that drinking Enviga did not guarantee weight loss:

> Q: Ok. Was it your interpretation of the Inviga [sic] advertising that you could eat or drink whatever you wanted and as long as you were also drinking Inviga [sic], you would lose weight?
>
> A: No.
>
> Q: Why not?
>
> A: Because that doesn't make sense. You're saying I can drink a milkshake and Inviga [sic] and still lose weight, right, that's what you're trying to say?
>
> Q: Right.
>
> A: That's wrong.

Franulovic Dep., at 46:18 - 47:3. She further acknowledged that the advertising for Enviga did not mislead her into believing that she was guaranteed to lose weight by drinking Enviga:

> Q: By the same token, you would agree that you never thought that drinking Inviga [sic] was a guarantee of weight loss; is that fair?
>
> A: Yes.

Franulovic Dep., at 85:25 - 86:3. This understanding was repeatedly confirmed throughout her deposition:

> Q: It goes on to say, That's why Inviga [sic] isn't designed to be a magic bullet. What does that mean to you?
>
> A: Exactly what it says, that you can't just drink Inviga [sic] and drop weight.

Franulovic Dep., at 92:4-8.

Franulovic's admission that she, as an average reasonable consumer, did not believe drinking Enviga was, by itself, enough to guarantee weight loss was corroborated by the fact that she did not expect to lose a given amount of weight from drinking Enviga:

> Q: Is there any particular amount of weight that you believed you were going to lose by drinking Enviga?
>
> A: No.

Franulovic Dep., at 42:1-3. She had the same lack of expectation as to how many calories she expected to burn:

> Q: When you say you don't know, did you mean that while you were drinking Inviga [sic] in 2007 you didn't know how many calories you thought it would burn?
>
> A: Yes.

Franulovic Dep., at 37:2-5.

Thus, Franulovic understood that drinking Enviga was not a guarantee of weight loss, and she understood an average reasonable consumer would have to count calories from all foods and beverages in order to lose weight. Franulovic Dep., at 33:25-34:5; 44:22-25; 47:7-15. But Franulovic freely admitted that she made no effort to count or control the number of calories she consumed while consuming Enviga. Franulovic Dep., at 34:14-17; 88:16-19. In fact, she admitted that calories did not even matter to her. Franulovic Dep., at 45:23-46:3.

In short, Franulovic, who claims to be an average reasonable consumer, was not misled by the advertising for Enviga. She understood that Enviga is only one means of burning calories, but that whether a person loses weight depends on his or her overall diet. Nothing in the Enviga advertising makes any suggestion to the contrary, and Franulovic's demonstrated understanding

of these facts defeats her allegation that TCCC engaged in "illegal, fraudulent, and deceptive business practices" in the marketing of Enviga. *See* Third Amend. Compl., ¶ 1 (Docket No. 79).

B. Franulovic cannot establish that she suffered an ascertainable loss.

As this Court recognized in dismissing Franulovic's Second Amended Complaint, an ascertainable loss is "a key element of a CFA claim…." Order, at 27 (Oct. 25, 2007) (Docket No. 60). Indeed, the reason for this Court's dismissal of Franulovic's Second Amended Complaint was that by not alleging that she "failed to burn more calories or lose weight," Franulovic "failed to adequately plead an ascertainable loss and her claim is subject to dismissal pursuant to rule 12(b)(6)." *Id.* at 26 (*citing Wolfe v. Nobel Learning Communities, Inc.,* No. 06-3921, 2006 U.S. Dist. LEXIS 93055 at *4 (D.N.J. Dec. 26, 2006)).

Recognizing the need to allege that she did not lose weight in order to state a "cognizable and calculable claim of loss due to the alleged CFA violation" (*see* Order, at 26 (Oct. 25, 2007) (*quoting Thiedemann v. Mercedes-Benz USA,* 183 N.J. 234, 249 (2005)), Franulovic filed her Third Amended Complaint, this time alleging that she did not lose weight while drinking Enviga. *See* Third Amend. Compl., ¶ 54 ("Although Franulovic did not lose weight while drinking Enviga, she does not know and cannot prove whether she actually did not 'burn calories' as a result of drinking Enviga.").

Although this allegation may have been sufficient to state a claim, Franulovic's testimony has revealed that she has no evidence from which a reasonable jury could conclude that she did not lose weight while drinking Enviga. *See, e.g., Ellis v. Siemens Enterprise Network, Inc.*, 2008 WL 724278 (D.N.J. Mar. 17, 2008) ("in order to survive summary judgment, the nonmovant may not simply rely on the allegations of negligence and causation in the pleadings, but must

come forward with evidence sufficient for a jury to return a verdict in his favor."); *Carlson v. Arnot-Ogden Memorial Hosp*., 918 F.2d 411, 416 (3d Cir. 1990) (noting that a "purely subjective impression without any factual support amounts to nothing of legal significance and is insufficient to defeat a motion for summary judgment."). Here, Franulovic's allegation is based entirely on her own speculation about her weight and is not supported by a single objective fact.

During her deposition, Franulovic made it clear that she did not know whether she lost weight while drinking Enviga. As Franulovic admitted, she did not even know how much she weighed when she started drinking Enviga:

> Q: Okay. And how much did you weigh in February of 2007?
>
> A: I don't know, approximately, I don't weigh myself.

Franulovic Dep., at 32:13-16. Nor does Franulovic know how much she weighed after she had been drinking Enviga for approximately two and-a-half months because she never weighed herself:

> Q: For how long did you drink three cans of Inviga [sic] per day?
>
> A: Maybe two and-a-half months.
>
> Q: How many times did you weigh yourself during that time period?
>
> A: Zero.

Id. at 84:7-12. In short, Franulovic simply cannot prove that "she did not enjoy the [alleged] advertised benefit" of Enviga (i.e., weight loss). *See* Order, at 20 (Oct. 25, 2007) (Docket No. 60). Nor can she provide any evidence that she suffered an "ascertainable loss." *See Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 252-53, 872 A.2d 783, 795 (2005) ("subjective assertions without more are insufficient to satisfy the requirement of an

ascertainable loss that is expressly necessary for access to the CFA remedies"); *Roberts v. Detroit Diesel Corp.*, 2007 WL 1038986, at *7 (N.J. Super. A.D. April 9, 2007) (affirming trial court's grant of summary judgment where plaintiff failed to prove a product defect).

C. Franulovic cannot prove that TCCC's allegedly unlawful conduct caused her hypothetical ascertainable loss.

Even if Franulovic somehow could establish that she did not lose weight while drinking Enviga, which she cannot, TCCC is still entitled to judgment as a matter of law because Franulovic cannot prove her alleged loss was caused by TCCC's conduct. Such a causal connection is essential to her claim. *See* Order, at 21 (Oct. 25, 2007) (Docket No. 60) ("In order to maintain a claim under the CFA, a plaintiff 'must show a causal relationship between the unlawful practice and the 'ascertainable loss'"); *see also N.J. Citizen Action v. Schering-Plough Corp*., 367 N. J. Super. 8, 15, 842 A.2d 174, 178 (2003) (recognizing the propriety of dismissing a case if a plaintiff fails to "plead and prove a causal nexus between the alleged act of consumer fraud and the damages sustained.").

First, Franulovic understood that drinking Enviga was not a guarantee of weight loss:

> Q: Ok. Was it your interpretation of the Inviga [sic] advertising that you could eat or drink whatever you wanted and as long as you were also drinking Inviga [sic], you would lose weight?
>
> A: No.
>
> Q: Why not?
>
> A: Because that doesn't make sense**.** You're saying I can drink a milkshake and Inviga [sic] and still lose weight, right, that's what you're trying to say?
>
> Q: Right.
>
> A: That's wrong.

Franulovic Dep., at 46:18 – 47:3.[4] Indeed, Franulovic acknowledged that the reason drinking Enviga does not guarantee weight loss is because no one other than an individual can control the number of calories consumed by the individual:

> Q: You understood that was wrong the entire time you were drinking Inviga [sic].[5]
>
> A: Yes.
>
> Q: And the reason that's wrong is because you understood that even while you were drinking Inviga [sic], if the other calories you were taking in put you in this state of taking in too many calories over the whole day, you would still gain weight?
>
> A: Yes.

Id. at 47:7 – 47:15. Franulovic also understood at the time she purchased Enviga that in order to lose weight, she had to burn more calories than she consumed:

> Q: Okay. Would you agree that in February of 2007 you understood, you knew, that whether or not your weight went up or down, you gained or lost weight, was a function of how many calories you took in versus how many calories you used up?
>
> A: Yes.

Franulovic Dep., at 33:25 – 34:5; *see also id.* at 44:22-25 (acknowledging that she knows one thing people do to lose weight is reduce caloric consumption).

---

[4] S*ee also id.* at 85:25 - 86:3; *Id*. at 92:4-8.

> **Q:** By the same token, you would agree that you never thought that drinking Inviga [sic] was a guarantee of weight loss; is that fair?
> **A:** Yes.
>
> **Q:** It goes on to say, That's why Inviga [sic] isn't designed to be a magic bullet. What does that mean to you?
> **A:** Exactly what it says, that you can't just drink Inviga [sic] and drop weight.

[5] The "that" referenced in the question is whether Franulovic interpreted from "the Inviga [sic] advertising that [she] could eat or drink whatever [she] wanted and as long as [she] was drinking Inviga [sic] [she] would lose weight." Franulovic Dep., at 46:18 - 47:15.

Yet despite understanding that she had to consume fewer calories than she burned in order to lose weight (*see* Franulovic Dep., at 33:25 – 24:5), and understanding that drinking Enviga did not guarantee she would lose weight (*see* Franulovic Dep., at 46:18 – 47:3; 92:4-8), Franulovic made no effort to control her caloric consumption while drinking Enviga:

> Q: Were you trying to eat foods that you believed had a lower caloric content than alternative foods, than foods you weren't eating?
>
> A: No. It –
>
> Q: Go ahead.
>
> A: **I don't care about calories**, I care more about fat and protein.

Franulovic Dep., at 45:18-24 (emphasis added). Perhaps because she did not care about calories, Franulovic made no effort to control the number of calories she consumed while drinking Enviga (Franulovic Dep., at 34:14-17; 88:16-19), nor does she know whether or not she consumed additional food that simply offset the potential calorie burning benefit from Enviga. Franulovic Dep., at 91:9-14.

Franulovic was aware that in order to lose weight she needed to control her caloric intake, but made no effort to do so – or even to count the number of calories she consumed while drinking Enviga – so she has no way of proving that her alleged failure to lose weight was caused by TCCC's conduct rather than her failure to monitor and control her own caloric intake. Franulovic's failure to monitor her body weight and her calorie intake is analogous to the fatal shortcoming recently found in *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007). In *Home Depot*, the plaintiff alleged that the store's late return policy for rented vehicles was false and misleading. However, because plaintiff had not specified the time when she actually

returned the rented vehicle, the Third Circuit concluded that there was no way to distinguish whether the late return policy caused the alleged ascertainable loss or whether it was due to plaintiff's own conduct. Consequently, the Third Circuit affirmed judgment in favor of the defendant on causation (and other) grounds. The same result is warranted here.

CONCLUSION

Because Franulovic's own testimony establishes that she cannot prove any unlawful conduct by TCCC, that she suffered an ascertainable loss, or that her hypothetical ascertainable loss was caused by TCCC's allegedly deceptive conduct rather than her own failure to control her caloric consumption, TCCC is entitled to judgment as a matter of law.

Dated: January 30, 2009

/s/ Peter Boyer
Gita F. Rothschild
Peter J. Boyer
McCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 639-5959 – Telephone
(973) 297-3833 – Facsimile
Email: grothschild@mccarter.com

Jane F. Thorpe
Scott A. Elder
ALSTON & BIRD, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000 – Telephone
(404) 881-7777 – Facsimile
Email: jane.thorpe@alston.com

Attorneys for Defendant
The Coca-Cola Company

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

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.	)	

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Brief in Support of The Coca-Cola Company's Motion for Summary Judgment by the Court's CM/ECF system this 30th day of January 2009, upon Plaintiffs' counsel of record:

Mark R. Cuker
Williams Cuker Berezofsky
Woodland Falls Corporate Center
210 Lake Shore Drive East
Suite 101
Cherry Hill, New Jersey 08002-1163

Stephen Gardner
Director of Litigation
Center for Science in the Public Interest
5646 Milton Street
Suite 211
Dallas, Texas 75206

Attorneys for Plaintiff

BY: /s/ Peter Boyer
Peter Boyer