CENTER FOR SCIENCE IN THE PUBLIC INTEREST v. THE COCA-COLA COMPANY et al Doc. 110 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| **Linda Franulovic**, individually and on behalf of a class of persons, | § § | |
| | § | Civil Action No. 07-539 (RMB) |
| Plaintiffs, | § § | |
| v. | § | CLASS ACTION |
| | § | |
| **The Coca-Cola Company**, Defendant. | § § | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CONTINUANCE PURSUANT TO RULE 56(f) AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

Table of Authorities .......... iii

Introduction .......... 1

Facts .......... 2

Facts as to Enviga .......... 2

Facts as to Franulovic .......... 5

Disputed facts .......... 6

Argument .......... 10

I. Coke's Summary Judgment Argument Prior to *Any* Merits Discovery is Premature. .......... 10

II. In the Alternative, Coke's Motion for Summary Judgment Should Be Denied. .......... 11

A. Elements of a New Jersey Consumer Fraud Act ("CFA"). .......... 11

B. There is a genuine issue of material fact whether Coke violated the CFA as to Franulovic .......... 14

C. There is a genuine issue of material fact whether Franulovic suffered an ascertainable loss. 15

D. There is a genuine issue of material fact whether Coke's violations of the CFA are causally linked to Franulovic's loss. .......... 17

Conclusion .......... 18

# TABLE OF AUTHORITIES

## Cases

*Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 6 (N.J. 2009) .................................. 11, 14, 15

*Carlson v. Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 416 (3rd Cir. 1990). ............................ 16

*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). ........................................................................ 1

*Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007). ............................................ 10

*Hoffman v. Hampshire Labs, Inc.*, 2009 WL 211585, 5 (N.J.Super.A.D. 2009)...................... 12, 15

*Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 252-253, 872 A.2d 783, 795 (N.J. 2005). ........................................................................................................................ 16

## Statutes

N.J.S.A. § 56:8-19.......................................................................................................... 11

N.J.S.A. § 56:8-2............................................................................................................ 10

## INTRODUCTION

Having steadfastly refused to respond to many discovery requests from Franulovic, based on its assertion that it does not have to provide discovery on the merits while Franulovic's class certification motion is pending, Defendant The Coca-Cola Company ("Coke") has now moved for summary judgment ("Motion") on the merits of this case.

The Supreme Court has made clear that a defendant may seek summary judgment in either of two ways: Defendant can show (1) "the absence of a genuine issue concerning any material fact," or (2) "an absence of evidence to support the nonmoving party's case."[1]

Coke's Motion is not clear whether it is seeking summary judgment on the first basis, the second basis, or both. In essence, Coke's Motion boils down to its assertion that Franulovic cannot possibly prevail because she did not continuously weigh herself while she was using Enviga for weight loss. If this is the sole fact on which Coke bases its Motion, it has not met its own burden and thus cannot prevail on its motion, for the reasons discussed below.

However, if Coke's Motion can be read to say that there is a lack of evidence to support Franulovic's merits claim—that Enviga does not work as Coke promises because she did not lose weight nor would other class members lose weight, based on the substantiation on which Coke relies and on other factual and expert matters—then the Motion is premature because Franulovic has been denied discovery on the merits of the case, very much including the scientific merits of Coke's claim.

Thus, the Court has two choices—it can either deny the motion (without prejudice to renew after merits discovery has concluded) or it can grant a continuance to allow Franulovic to conduct merits discovery.

Because there is a pending class certification motion, Franulovic suggests that denying

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1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

without prejudice to renew after the close of merits discovery is the simpler course of action, and moves accordingly. In the alternative, Franulovic moves for a continuance of her response to the Motion until six months after the Court rules on the pending class certification motion. The latter course allows her opportunity to conclude written discovery and to take depositions after the class certification motion has been determined.

## FACTS

Although facts on the merits of Coke's claim are undeveloped due to Coke's refusal to produce responsive discovery, the facts as to Franulovic herself are well-developed. She therefore provides these facts for the Court's consideration.

Linda Franulovic is a New Jersey consumer.[2] Defendant Coke is a Delaware corporation that markets and sells Enviga in New Jersey.[3]

**Known Facts as to Marketing of Enviga**

Coke made claims that Enviga will "burn calories" and other claims like it, misleading customers to believe that they would lose weight if they drank Enviga.[4] To 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 offsetting weight gained from other calories.[5] Franulovic purchased Enviga because she thought it would help her burn calories, and help with her weight-loss regimen.[6] Members of the proposed class purchased Enviga because they thought it would help them burn calories.[7] In fact, Coke does not have evidence to support the claim that all consumers who purchase Enviga will burn calories or lose weight.[8]

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2 Plaintiff's Third Amended Class Action Complaint (hereinafter "Complaint") at ¶9 (Doc. 79).
3 Complaint at ¶10.
4 Complaint at ¶20-2.
5 Complaint at ¶17.
6 Complaint at ¶45, 50.
7 Complaint at ¶58.
8 Complaint at ¶23.

Coke claims that drinking three cans of Enviga (more than a quart) every day over a lengthy period will cause the expenditure of far more calories than the product contains.[9] However, the truth is that Coke cannot substantiate weight-loss representations for the product (whether express or implied).[10] Coke bases its representations on the abstract of a single, small, and short-term study (the "Rudelle study")— funded by Nestle, a partner with Coke in Beverage Partners Worldwide.[11] The Rudelle study, by itself, is insufficient to substantiate Coke's claims unless larger and longer-term studies corroborate it.[12] It was a short-term study (72 hours), and completed on a small number of test subjects (31 subjects) in a tightly controlled environment.[13] There is no evidence at all that Enviga has any positive effect of any kind on free-living consumers, whose every act and every calorie consumed is *not* controlled by hired scientists.[14]

The subjects in the Rudelle study were young and lean.[15] The average age was approximately 23 years, with an age range of 18-35 years.[16] The Body Mass Index (BMI) for the test subjects averaged 22,[17] which is at the lower end of healthy weight levels.[18] Someone six feet tall with a BMI of 22 weighs 162 pounds.[19] In contrast, the great majority of American adults are overweight (BMIs of 25-30) or obese (BMIs of 30+), and approximately 37 percent of New Jersey residents are overweight and 22 percent are obese.[20] The Rudelle study neither

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9 Complaint at ¶18.
10 Complaint at ¶19.
11 Complaint at ¶23, *citing* Servane Rudelle, et al., *Effect of a Thermogenic Beverage on 24-Hour Energy Metabolism in Humans,* 15 OBESITY 349-55 (2007).
12 Complaint at ¶23.
13 Complaint at ¶24 and 29.
14 Complaint at ¶36.
15 Complaint at ¶25.
16 Complaint at ¶25.
17 Complaint at ¶25.
18 *See* National Heart, Lung, and Blood Institute, *Body Mass Index Table,* available at http://www.nhlbi.nih.gov/guidelines/obesity/bmi_tbl.htm (last accessed Oct. 16, 2008).
19 *See* National Heart, Lung, and Blood Institute, *Body Mass Index Table,* available at http://www.nhlbi.nih.gov/guidelines/obesity/bmi_tbl.htm (last accessed Oct. 16, 2008).
20 Ctr. for Health Statistics, New Jersey Dep't. of Health and Senior Serv., *Health Data Fact Sheet July 2006: Obesity in New Jersey,* available at www.state.nj.us/health/chs/monthlyfactsheets/jul06_obesity.pdf (last accessed

substantiates nor provides a reasonable basis for claiming that Enviga (or the amounts of EGCG and caffeine in three cans of Enviga) has any effect on caloric balance or weight for the majority of adults, who are not young, healthy, and thin.[21]

Enviga does not burn calories in a significant proportion of consumers.[22] The small study showed that the EGCG and caffeine in Enviga apparently had no effect on or ***even lowered*** energy expenditure in five of the 31 subjects.[23] Thus, the chemicals in Enviga would conceivably ***contribute to weight gain, not loss***, for some consumers.[24]

Coke presented its study at a conference sponsored by The Obesity Society (also known as "NAASO," North American Association for the Study of Obesity), a professional organization of obesity researchers.[25] NAASO took the extraordinary step of issuing its own rebuttal to the presentation.[26] NAASO concluded, "it is improper to state or imply that the results of this study support any weight loss or any statement related to this."[27]

New Jersey was one of the test markets for Enviga.[28] Coke's advertising campaign was so extensive that, in some places in early 2007, every single advertisement in a bus or train car consisted of Enviga ads.[29] Billboards containing extravagant Enviga claims were ubiquitous.[30] Coke chose to market this product to all New Jersey consumers as having a calorie-burning effect, without qualification.[31]

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October 16, 2008). In all likelihood, these percentages have increased.

21 Complaint at ¶27.

22 *See*, e.g., 70(6) AM J CLIN NUTR. 1040 (Dec. 1999); 131(11) J NUTR. 2848 (Nov. 2001).

23 Complaint at ¶24.

24 Complaint at ¶24.

25 Complaint at ¶34.

26 Complaint at ¶34.

27 NAASO Statement on the Poster: NAASSO Poster P303.

28 Complaint at ¶16.

29 Complaint at ¶16.

30 Complaint at ¶16.

31 Complaint at ¶25.

**Facts as to Franulovic**

Franulovic saw Coke's advertisements for Enviga and, because of the representations about calorie burning made therein, began drinking a can per day while performing her work as a hairdresser in Cherry Hill.[32] After Franulovic read the representations on the Enviga can about calorie burning, she increased her consumption to three cans per day with the understanding that this would help her weight-loss regimen.[33] She also began buying cans of Enviga in bulk.[34] Franulovic did not otherwise alter her food consumption or physical activities during the period she used Enviga, and she was eating healthfully and exercising.[35] When she saw Coke's advertisements for Enviga, she assumed that Coke had a reasonable basis and adequate substantiation for its claims and for marketing Enviga to her, as well as everyone else in New Jersey.[36] Over the period of approximately 90 days that Franulovic used Enviga as prescribed by Coke, *i.e.*, drinking three cans of it per day, she did not lose any weight and thus did not get the weight-loss benefits promised by Coke.[37]

Franulovic bought Enviga because of Coke's weight-loss and calorie-burning claims.[38] She would not have purchased three cans per day had she known the lack of reasonable support for Coke's claims about Enviga.[39] She certainly never would have chosen to drink Enviga simply as a refreshing beverage because Enviga was expensive (approximately $1.50 per can).[40] Franulovic's ascertainable loss is that she bought a product she would not have purchased but for

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[32] Complaint at ¶44; Deposition of Linda Franulovic (hereinafter "Deposition of Franulovic"), 35:8-9 and 36:19-24 (Sep. 30, 2008). Excerpts from the deposition are Exhibit A to the Certification of Mark Cuker ("Cuker cert.").
[33] Complaint at ¶45; Deposition of Franulovic at 36:19-24 and 38:19-39:5.
[34] Complaint at ¶45; Deposition of Franulovic at 39:6-23.
[35] Complaint at ¶45; Deposition of Franulovic at 27:3-33:17.
[36] Complaint at ¶46.
[37] Complaint at ¶48; Deposition of Franulovic at 32:17-22.
[38] Complaint at ¶50.
[39] Complaint at ¶50.
[40] Complaint at ¶51.

the deceptive and misleading advertising, and that she received less benefits than Coke promised in its labeling and marketing of Enviga.[41] It is the same loss suffered by all other class members.[42]

**Disputed facts**

Coke filed with the Court a number of what it claims are "Material Facts Not in Dispute."[43] While Franulovic certainly does not dispute all of them, Coke misrepresents to the Court that some of these facts are not disputed.

Coke wrote that "[d]uring her deposition, Franulovic testified that she understood that in order to lose weight she had to reduce her caloric consumption.[44] The testimony Coke cites actually reads:

> 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?[45]
>
> * * *
>
> Q. You understand and understood in February of 2007 that one thing people do to lose weight is reduce caloric consumption?
>
> A. Yes.[46]
>
> * * *
>
> Q. You understood that was wrong the entire time you were drinking [E]nviga?
>
> A. Yes.

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41 Complaint at ¶54.
42 Complaint at ¶58, 62.
43 Doc. 105-2, Defendant's Statement of Material Facts Not in Dispute.
44 Coke's Statement of Material Facts Not in Dispute, No. 18 (Citing Deposition of Franulovic at 33:25-34:5; 44:22-25; and 47:7-47:15).
45 Deposition of Franulovic at 33:25-34:5.
46 Deposition of Franulovic at 44:22-25 (emphasis added).

Q. And the reason that's wrong is because you understood that even while you were drinking [E]nviga, 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.[47]

Franulovic did ***not*** understand that "to lose weight she had to reduce her caloric consumption," as if that is the only way in which she would lose weight. In fact, Franulovic testified:

Q. To your understanding, you know, in your mind, to your knowledge, ***is there a difference between burning calories and reducing caloric consumption?***

A. ***Yes.***

Q. What's the difference?

A. When you burn calories, when I burn calories I should say, I'm working out, and if you're working out, specifically weight training, it helps you burn calories even while standing still, so that [E]nviga was supposed to increase that, ***if you're just reducing calories you could put yourself in a state of starvation, which actually reduces your metabolism, which you could gain weight and not lose weight at all.***[48]

Instead, Franulovic's testimony shows that she knows the basic tenet of weight loss: one must burn more calories than one consumes. That is exactly why she consumed Enviga – to help her burn calories.

Coke also wrote that "[d]uring her deposition, Franulovic testified that she never attempted to count or control the number of calories she consumed while drinking Enviga."[49] Franulovic testified that she does not count calories, but it is untrue that she did not control the calories she consumed. During her deposition, Franulovic only testified the following:

Q. (By Mr. Elder) Is it fair to say that while you were drinking [E]nviga you

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[47] Deposition of Franulovic at 47:7-47:15.

[48] Deposition of Franulovic at 44:4-16 (emphasis added).

[49] Coke's Statement of Material Facts Not in Dispute, No. 21 (citing Deposition of Franulovic at 34:14-17 and 88:16-19).

don't know how many calories you were taking in on a daily basis?

A. Yes.[50]

* * *

Q. And I believe you told me earlier that you don't know, and again we're 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. Right.[51]

Again, Coke converts Franulovic's actual deposition answers into "facts" that suit its argument. Franulovic did ***not*** testify that she never attempted to control the number of calories she consumed while drinking Enviga. In fact, she very much testified the opposite. During her deposition, Coke asked her about her diet at the time she consumed Enviga:

***Q. And at that time were you trying to lose weight?***

***A. Yes.***

***Q. What things were you doing to try to lose weight?***

***A. Exercise, removing a few things from my daily diet.***[52]

Coke also asked her:

***Q. When you were trying to lose weight were you keeping up with how many calories you were taking in?***

***A. Yes.***

***Q. And how were you keeping up with that?***

***A. Mental, just knowing.***[53]

Franulovic did not count every calorie she consumed. However, Coke writes that

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50 Deposition of Franulovic at 34:14-17.
51 Deposition of Franulovic at 88:16-19.
52 Deposition of Franulovic at 24:21-25:1.
53 Deposition of Franulovic at 25:9-13.

Franulovic did not control the number of calories she consumed. This is entirely untrue, and Coke knows that.

Coke also knows Franulovic testified that she reduced the calories she consumed at the time she drank Enviga:

> ***Q. . . . Were you doing things in February of 2007 to reduce the number of calories you were consuming?***
>
> ***A. Yes.***[54]

Franulovic answered several questions that described in great detail everything that she ate, the times of day she ate, and her exercise regimen during the time she consumed Enviga.[55] Her testimony clearly supports that she did control the number of calories she consumed, even if she did not count them. Moreover, ***Coke agreed during her deposition*** that Linda watched what she ate:

> ***Q. From your description of your diet, to me it sounds to me like you pay a fair amount of attention to what you [ate], would that be a fair characterization?***
>
> ***A. Yes.***[56]

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54 Deposition of Franulovic at 26:16-20.

55 Deposition of Franulovic at 27:3-33:17.

56 Deposition of Franulovic at 47:16-19.

## ARGUMENT

### I. Coke's Summary Judgment Argument Prior to *Any* Merits Discovery is Premature.

As discussed, the parties have conducted no merits discovery to date. Nor has the Court ordered such discovery. In fact, the Court indicated that it will not allow "open-ended discovery on merits issues."[57] Coke has repeatedly resisted Plaintiff's requests for discovery pertaining to class certification on the grounds that the requests pertained to the merits, and therefore were outside the scope of the Court's discovery orders.[58]

That being the case, Franulovic is entitled to a continuance until she has had the opportunity to conclude merits discovery. As the Third Circuit recently held in reversing a summary judgment, "District courts usually grant properly filed Rule 56(f) motions as a matter of course. This is particularly so when there are discovery requests outstanding or relevant facts are under the control of the moving party."[59]

Here, since Coke has repeatedly and steadfastly resisted any discovery it contended was related to the merits of Franulovic's claims, it cannot reverse course now and seek judgment on the grounds of Franulovic's alleged failure to produce evidence in support of her claims.

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[57] October 5, 2007 Letter Order, ¶ 2 (Doc. 57), Cuker Cert. Exhibit B.

[58] *See* Cuker Cert. ¶¶4-5 and Exhibits C-D thereto.

[59] *Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007) (internal quotation marks and citations omitted).

## II. In the Alternative, Coke's Motion for Summary Judgment Should Be Denied.

### A. Elements of a New Jersey Consumer Fraud Act ("CFA").

It is relatively simple to establish a claim under the New Jersey Consumer Fraud Act ("CFA"). Section 2 of the Act prohibits merchants from engaging in deceptive and unconscionable practices:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise . . ., ***whether or not any person has in fact been misled, deceived or damaged thereby***, is declared to be an unlawful practice . . .[60]

Section 19 of the Act then provides in relevant part that:

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefore in any court of competent jurisdiction.[61]

The New Jersey Supreme Court has very recently affirmed the need "to be faithful to the Act's broad remedial purposes" in discussing the elements of proof under the CFA, holding that:

> [A] private party seeking to recover must demonstrate that he or she has suffered an "ascertainable loss." In addition, the CFA requires a consumer to prove that the loss is attributable to the conduct that the CFA seeks to punish by including a limitation expressed as a causal link.[62]

The court also noted that the "history of the [CFA] is one of constant expansion of consumer protection."[63] Thus, Franulovic must prove at trial that (1) Coke engaged in acts that violate the CFA, (2) she suffered an ascertainable loss, and (3) her loss is causally linked to the violations of the CFA.[64]

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60 N.J.S.A. § 56:8-2 (emphasis added).

61 N.J.S.A. § 56:8-19.

62 *Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 6 (N.J. 2009) (internal citations omitted).

63 *Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 6 (N.J. 2009).

64 Coke agrees that these are the three elements. Doc. 105-3, Brief in Support of The Coca-Cola Company's Motion for Summary Judgment ("Brief") at 8.

> In considering these requirements, ***we have been careful to interpret the CFA***, and its prima facie proof requirements, ***so as to be faithful to the Act's broad remedial purposes***. In particular, we have recognized that "[t]he history of the [CFA] is one of ***constant expansion of consumer protection***." Similarly, our Appellate Division has noted that we "construe the [CFA] broadly, not in a crabbed fashion."[65]

As the Appellate Division recently clarified, "a private party need not allege that he used a product in order to state a claim that the product was advertised and sold based on false promises in violation of the CFA."[66]

Coke relies on one theory — that Franulovic cannot possible prevail because she did not continuously weigh herself while she was using Enviga for weight loss.

Franulovic testified that she did not lose weight while she was taking Enviga in the doses recommended by Coke. She candidly said that she did not weigh herself, but testified that she could determine whether or not she gained or lost weight based on the common-sense method of whether or not her clothes were tight.[67] Aside from deriding this method, Coke has failed to point to a "lack of any evidence" to support Franulovic's testimony that she did not lose weight, and thus the motion must be denied.

Coke uses this single claim — that it is allegedly impossible for Franulovic to prove that she lost weight — as its sole factual basis for asserting that Franulovic cannot possibly prove ***any*** of the three elements of her cause of action: (1) Coke engaged in acts that violate the CFA, (2) Franulovic suffered an ascertainable loss, and (3) her loss is causally linked to the violations of

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[65] *Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 6 (N.J. 2009) (internal citations omitted, emphases added). The court continued:

> In 1971, the Legislature amended the CFA, expanding it significantly to include a private right of action through the enactment of L. 1971, c. 247, § 7, the provision subsequently codified at N.J.S.A. 56:8-19. . . . [I]t is clear that the intention was to greatly expand protections for New Jersey consumers. The sponsor of the amendments, then-Assemblyman Thomas H. Kean, was quoted at the time as saying that "the amendments represent an enlightened approach to provide greater protection for the consumer against fraud." . . . Echoing that sentiment, Governor William Cahill described these amendments to the CFA as being intended to "give New Jersey one of the strongest consumer protection laws in the nation."

*Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 5-6 (N.J. 2009) (internal citations omitted).

[66] *Hoffman v. Hampshire Labs, Inc.*, 2009 WL 211585, 5 (N.J.Super.A.D. 2009).

[67] Deposition of Franulovic at 32:23-25.

the CFA. Because Coke has chosen to argue against all three elements based on the one asserted factual proof failure, Franulovic will address all three elements. However, at the heart of the matter, Coke's entire motion is based on its unsupported assertion that the ***sole way possible to prove weight loss*** is a scale.

This is willful ignorance of the way many consumers approach weight loss, which is to do exactly what Franulovic did — monitor weight by how their clothes fit.

Diet books, fitness magazines, health-related websites, and even the food industry all peddle diets that claim to help consumers "drop a size."[68] This common weight-loss promise has less to do with numbers on a scale than it has to do with fitting into clothing. For example, a Kellogg's Special K diet advertisement emphasizes a reduction in the customer's waist circumference.[69]

For all we know, Coke is quite aware that this is a common method. However, Coke refused to answer discovery requests relating to weight loss, taking the position that "such documents are not relevant to class certification."[70]

Regardless what Coke knows, or what it may be hiding, it is a simple truth that Franulovic is not alone in using clothing to determine weight loss and gain. Thus, there is at least a genuine issue of material fact as to whether or not Franulovic did not lose weight while following the Enviga regimen prescribed by Coke.

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68 *See* Kristine Napier and Michele Stanten, *Drop a Size in 4-Weeks Plan*, PREVENTION http://www.prevention.com/cda/article/drop-a-size-in-4-weeks-plan/b4a868f271903110VgnVCM10000013281eac____/weight.loss/diets/other.popular.diets/low.calorie.diets/0/1, (last visited Feb. 26, 2009); Joanna Hall, *Drop a Size in Two Weeks Flat!,* Thorsons (January 6, 2003);, Anna Penniceard, *Drop a Dress Size in Five Days*, GOOD TO KNOW, http://www.goodtoknow.co.uk/diet/132640/Drop-A-Dress-Size-In-Five-Days (last visited Feb. 26, 2009); Dawn Jackson Blatner, *Drop a Jeans Size Diet*, FITNESS MAGAZINE (Sep. 2007), *available at* http://www.fitnessmagazine.com/weight-loss/plans/diets/the-drop-a-jeans-size-diet/; Kristyn Kusek, *Drop a Dress Size in 6 Weeks*, GOOD HOUSEKEEPING, http://www.goodhousekeeping.com/health/fitness/fitness-plan-six-weeks-aug01 (last visited Feb. 26, 2009); Women's Day Staff, *Drop-a-Dress-Size Dinners,* WOMEN'S DAY, http://www.womansday.com/Articles/Food/Recipes/Drop-a-Dress-Size-Dinners.html (Aug. 18, 2008).

69 ,*See* Cuker Cert. Exh. E ("The Special K Challenge" Print Advertisement (Shape, Oct. 2008)).

70 The pertinent portions of these responses are included as Cuker Cert. Exh. C and D.

### B. There is a genuine issue of material fact whether Coke violated the CFA as to Franulovic.

Coke says that she can't prove that Coke violated the CFA because she can't prove that "the advertising for Enviga ***misled the average consumer into believing*** that Enviga would cause them to lose weight."[71] As discussed above, if Coke is asserting anything more than this, Franulovic needs the opportunity to conduct discovery on the merits. Oddly, Coke does not take the position that Enviga ***actually worked*** for Franulovic or any other New Jersey victim of Coke's practices — it does not aver that Franulovic or anyone else who actually bought Enviga in New Jersey ***actually burned calories or actually lost weight***. Instead, it twists Franulovic's burden on summary judgment into a broader requirement that she prove up her class action on the merits. Thus, at this stage, Coke misstates Franulovic's burden — this case is not yet certified as a class, so all Franulovic need prove is that it misled ***her***.

Franulovic first purchased Enviga after she saw advertisements in a magazine for it. She drank it every day for about two weeks. Then, she increased her consumption to three cans every day because the marketing on the can instructed her to do so. Franulovic stated that purchased Enviga because she thought it would burn calories and make her lose weight.[72]

Coke goes further off the rails when it claims, without any evidence at all, that "Franulovic considers herself to be an 'average reasonable consumer'."[73] This is a complete red herring — whether or not Franulovic considers herself to be average and reasonable is irrelevant to the point that Coke purports to address here — whether or not Coke deceived Franulovic — and only her — in violation of New Jersey's CFA. "We discern in the CFA a clear expression of the Legislature's intent to empower consumers who seek to secure relief for themselves and for

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71 Brief at 9 (emphasis added).

72 Deposition of Franulovic at 34:25-41:1. Coke says that Franulovic did not think that "drinking [E]nviga was a guarantee of weight loss." Brief at 11. All this shows is that she knew that Coke might possibly be lying.

73 Brief at 9.

others who may not be aware that they have been victimized."[74]

Coke's arguments in this section are smokescreens designed to distract the Court from the standard Franulovic must meet — she must show that Enviga did not have the benefits that Coke promised. In fact, under New Jersey law, that's all she needs to show — that she bought the product based on deceptive promises by Coke, and not even that she actually consumed it (much less that it did not work for her). As the New Jersey Appellate Division noted last month, "a private ***party need not allege that he used a product in order to state a claim*** that the product was advertised and sold based on false promises in violation of the CFA. In fact, one person's experience with a product would not necessarily show that claims made about a product are false. Nevertheless, a plaintiff asserting such a claim ***must plead sufficient facts that, if proven, would establish the seller's promises about the product are false***."[75]

Franulovic has properly pleaded these facts. Coke has not rebutted them, and has not shown that Franulovic will not be able to prove them.

**C. There is a genuine issue of material fact whether Franulovic suffered an ascertainable loss.**

Heading at the same destination from a different direction, Coke next says that Franulovic can't establish that she suffered an ascertainable loss, once again because it says she will not be able to prove did not lose weight while taking Enviga.[76] As discussed above, this argument is not supported factually by Coke, and thus it fails as to this element as well. "The CFA does not demand that a plaintiff necessarily point to an actually suffered loss or to an incurred loss, but only to one that is 'ascertainable.'"[77]

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[74] *Bosland v. Warnock Dodge, I*nc., 2009 WL 414336, 9 (N.J. 2009).

[75] *Hoffman v. Hampshire Labs, Inc.*, 2009 WL 211585 (N.J.Super.A.D. 2009) (emphases added).

[76] Brief at 12.

[77] *Bosland v. Warnock Dodge, Inc.*, 2009 WL 414336, 8 (N.J. 2009).

Coke next advances the theory that Franulovic's loss is simply a "subjective one,"[78] putting forward three cases that are wholly inapposite to Franulovic's claims.

The first case involved a contract for a doctor's services to a hospital. Without any written evidence, the plaintiff doctor testified that it was "his own impression . . . that the contract was for a term of one year," but he was not able to point to any statement by the hospital to support his own impression.[79] This was indeed a "purely subjective impression without any factual support" but in this case, Franulovic formed her belief as to Enviga's efficacy based on Coke's very specific and express statements in its advertising.

In the second case, the loss was not simply subjective, but almost theoretical. This case involved an allegation of an automotive defect that the court concluded had been adequately addressed by warranty: "The defects that arise and are addressed by warranty, at no cost to the consumer, do not provide the predicate 'loss' that the CFA expressly requires for a private claim . . . ."[80] More pertinent to Franulovic's lawsuit, in that opinion, the New Jersey Supreme Court approved of a prior case that was more closely related to Franulovic's claims:

> We do not suggest that a benefit-of-the-bargain claim cannot support an ascertainable loss sufficient to allow a CFA claim to proceed to the factfinder; rather, it is the quality of the proofs that will determine a claim's viability. Sufficient proof of an ascertainable loss in respect of the "lost bargain" was present, for example, in . . . *Miller v. American Family Publishers, supra*, 284 N.J.Super. at 88-90, 663 A.2d 643 (finding sufficient demonstration of ascertainable loss based on loss of bargain where plaintiffs were deceived into believing they were purchasing both magazine subscription and participation in defendant's sweepstakes with enhanced likelihood of winning, but purchases were unrelated to sweepstakes).[81]

In that instance, as with Franulovic, the plaintiff bought something based on a deceptive representation as to the benefits of the product. There is nothing "subjective" about Franulovic's

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[78] Brief at 13-14.

[79] *Carlson v. Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 416 (3rd Cir. 1990).

[80] *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 252-253, 872 A.2d 783, 795 (N.J. 2005).

[81] *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 252-253, 872 A.2d 783, 795 fn. 8 (N.J. 2005).

loss.

The third case involved a claim of a broad product defect in diesel engines used in yachts, which that court rejected because plaintiff did not prove that there was a defect in all such engines, although he did prove that problem with his own yacht engine. The issue there was not the problem with plaintiff's yacht, but whether plaintiff proved a broad-scale defect that should have been disclosed prior to sale, and thus be actionable as a pre-sale claim. *Roberts v. Detroit Diesel Corp.*, 2007 WL 1038986, 7 (N.J.Super.A.D. 2007).

There is no question here that Coke's representations to Franulovic — and the rest of the class — were made prior to sale.

There is also no question that this is not a product defect case — Enviga is not defective; it's just worthless to Franulovic and others because it does not work.

**D. There is a genuine issue of material fact whether Coke's violations of the CFA are causally linked to Franulovic's loss.**

Coke's final use of its no-scales-no-proof theory is to support its claim that Franulovic can't "prove her alleged loss was caused" by Coke's conduct, based on the theory that — although Franulovic undeniably bought and consumed Enviga because she believed Coke's calorie-burning/weight-loss claim[82] — she knew it was possible that Coke might be lying and thus was not foolish enough to take Coke's claims as immutable truth.[83]

The causal link is quite simple — Franulovic bought Enviga because she thought it would work for her.[84]

In a final effort to escape responsibility for its dishonest marketing practices, Coke tells the Court that "Franulovic freely admitted that she made no effort to count or control the number

82 Deposition of Franulovic at 34:25-41:1.
83 Brief at 14-15.
84 Deposition of Franulovic at 40:10-41:1.

of calories she consumed while consuming Enviga."[85] This is false. Franulovic testified in detail about her daily diet — she ate the same foods in the same amounts at the same time each day.[86] Thus, she clearly controlled the amount of food she consumed (and thus the "number of calories she consumed while consuming Enviga"). Her diet was the same before the time she started to use Enviga, as it was during the time she used Enviga.[87] The only variable was her use of Enviga, and her clothes were tighter at the end of the Enviga regimen than they were at the outset.[88] This is strong evidence that Enviga did not work as promised for her.

## CONCLUSION

For these reasons, the motion for summary judgment should be denied, or continued as set forth above.

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Respectfully submitted,

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85 Brief at 11.
86 Deposition of Franulovic at 27:3-31:16.
87 Deposition of Franulovic at 32:8-12 and 101:23-102:6.
88 Deposition of Franulovic at 32:17-25.

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