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.	)	

DEFENDANT'S SUR-REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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

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INTRODUCTION

The Coca-Cola Company ("TCCC") offers this sur-reply in further opposition to plaintiff's motion for class certification for three reasons: (1) Plaintiff mistakenly suggests in her reply brief that New Jersey state law governs the class certification analysis in this case; (2) Plaintiff failed to address the Third Circuit's recent decision *In re Hydrogen Peroxide Antitrust Litigation*, 2008 WL 5411562, No. 07-1689 (3d Cir. Jan. 16, 2009) ("*In re Hydrogen Peroxide*"), while also offering her own new authority to which TCCC has not been able to respond; and (3) Plaintiff misrepresented the deposition testimony of Joel Steckel, Ph.D., TCCC's expert witness and the only expert to address the class certification issues.

I. ARGUMENTS AND CITATION TO AUTHORITY

A. Plaintiff mistakenly suggests in her reply brief that New Jersey law should direct this Court in favor of class certification

Plaintiff dedicates a substantial portion of her brief to the proposition that "[t]o obtain Rule 23(b)(2) certification of a consumer class seeking a class-wide injunction under the CFA,[1] 'only the putative class representative is required to satisfy any applicable standing requirement.'"[2] As support for this proposition, Plaintiff cites to *Laufer v. U.S. Life Ins. Co*., 385 N.J. Super. 172, 186, 896 A.2d 1101 (App. Div. 2006). However, the *Laufer* decision is inapplicable because it is a New Jersey state court decision. In this case, federal law governs the issue of standing, and Federal Rule of Civil Procedure 23 ("Rule 23") governs class certification.[3] [4]

[1] New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1 to -20.
[2] Reply Memorandum of Points and Authorities in Support of Plaintiff's Motion for Class Certification (hereinafter "Reply Brief"), p. 9.
[3] *See, e.g. Rowe v. E.I. du Pont de Nemours & Co*., Civil No. 06-1810(RMB), 2008 WL 5412912, at *3, (D.N.J. Dec. 23, 2008) ("Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure.").

While New Jersey law may be relevant on some issues, New Jersey state courts cannot alter federal standing requirements. In fact, just last year, a court in this District rejected the very argument Plaintiff advances here. In *Maniscalco v. Brother International Corp*., Civil No. 06-CV-4907(FLW), 2008 WL 2559365 (D.N.J. June 26, 2008) plaintiffs sought certification of a class under the CFA centered on allegations related to an allegedly improper conditional warranty for an "all-in-one" printing device. The claims of all but one plaintiff, Rafferty, were dismissed because they lacked standing -- they could not adequately allege that the warranty at issue applied to their devices. The court then held, in response to class allegations in plaintiff's opposition brief, that plaintiff Rafferty could ***not*** pursue injunctive relief on behalf of the class:

> Plaintiffs [] contend that the [Second Amended Complaint's] allegations of injury with respect to plaintiff Rafferty are sufficient ***to permit Rafferty to pursue injunctive relief on behalf of the proposed class who might have standing to pursue such relief.*** For reasons explained above, supra § IV.A., since the [Second Amended Complaint] fails to adequately allege that members of the proposed class were subject to the conditional warranty referenced in the [Second Amended Complaint] at the time the lawsuit was filed***, this argument is unavailable to Plaintiffs.***[5]

The court foreclosed the possibility that plaintiffs could resurrect their federal class action by relying on *Laufer*, stating that "*Laufer* relied on the New Jersey Supreme Court's directive that 'the class action rule should be construed liberally in a case involving allegations of consumer fraud,' *In re Cadillac*, 93 N.J. 412, 435, 461 A.2d 736 (1983), which may not be compatible with

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[4] Plaintiff also mistakenly suggests that this "Court may use its discretion to provide the same notice and chance to opt out as in a (b)(3) case in order to eliminate any due process concerns. *See Robinson v. Metro-North Commuter R.R. Co*., 267 F.3d 147, 166 (2d Cir. 2001)." Reply Brief at n. 17. However, as this Court previously has held, "'a (b)(2) class may require more cohesiveness than a (b)(3) class . . . because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out.'" *Rowe,* 2008 WL 5412912, at *10 (*citing Barnes v. Am. Tobacco Co*., 161 F.3d 127, 142 (3d Cir. 1998)).

[5] *Id*. at *10 (emphasis added).

the standing requirements that Article III imposes on federal courts."[6] In short, the *Maniscalco* court determined that a plaintiff with standing could not bring CFA claims on behalf of purported class members who lacked standing and who may not have been injured.

The *Maniscalco* reasoning is fatal to Plaintiff's contention that New Jersey law establishes that members of the purported class need not show ascertainable loss. In addition, the United States Supreme Court has issued a ruling directly contradicting Franulovic's core assertion: an identifiable class does not exist if the class includes individuals who were not harmed.[7] Plaintiff cannot meet her burden of establishing an identifiable class or demonstrating that the alleged class is sufficiently cohesive -- otherwise there would be no need to argue that her own individual standing is sufficient to satisfy class action requirements. She has not shown that all members of her proposed class were controlling their calories and did not lose weight, so she necessarily cannot demonstrate, as is her burden, that she represents a class of individuals who were harmed by Enviga advertising.[8]

In addition, New Jersey law regarding the requirements for proposed class members is not nearly as simple as Franulovic might suggest. For example, in *Fink v. Ricoh Corp*., 365 N.J. Super. 520, 839 A.2d 942 (N.J. Super Ct. Law Div. 2003), , the Superior Court of New Jersey

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[6] *Id*.

[7] *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("As this Court has repeatedly held, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.") (internal citations omitted); see also *R.C. ex rel. Ala. Disabilities Advocacy Program v. Nachman*, 969 F.Supp. 682, 695 (M.D. Ala. 1997) ("A properly defined class includes only those persons who have standing to bring suit in their own right.").

[8] This Court also has tacitly suggested, in supporting its granting of TCCC's motion to dismiss, that members of her purported class must show ascertainable loss. *See* October 25, 2007 Order at 26 ("Franulovic has not alleged that she or members of the class failed to burn more calories or lose weight."); *see also Id*. at 20 ("Melfi's conclusory statement that she and other consumers have suffered an 'ascertainable loss' is insufficient. Her claims only focus on Defendants' conduct, and she does not allege that she, or others, actually purchased and consumed Enviga in order to obtain the advertised benefit. . . ."); *Id*. at 22 ("Melfi also does not allege that other consumers actually purchased the beverage because of Defendants' advertising, or that they did not get the advertised results.").

noted in denying class certification that "[w]hile plaintiffs have presented proof that they were influenced by Ricoh's allegedly false representations and concealments to purchase the camera, no such proofs have been tendered by or on behalf any of the proposed class members."[9] The *Ricoh* court continued: "plaintiffs must nevertheless demonstrate that each class member read one or more of the advertisements upon which plaintiffs rely and that one or more of the false advertising and material factual concealments which they allege were contained therein constituted a proximate cause of 'an ascertainable loss' of money or property."[10] When plaintiffs were unable to meet that burden, the court held that "proofs [were] insufficient for the court to find or estimate that there is an adequate number of purchasers who read Ricoh's promotional literature and were caused by the allegedly fraudulent content of such promotional literature to purchase a model RDC-1 digital camera and that a sufficient number of those purchasers suffered an actual economic loss, thereby satisfying the numerosity requirement of *R*.4:32-1(a)."[11] Given the decisions in *Maniscalco* and *Ricoh*, Plaintiff's claim that only she must have suffered an ascertainable loss is not saved by her reference to *Laufer* and, accordingly, her motion for class certification should be denied on this basis.

B. Plaintiff failed to address the relevant language of the Third Circuit's decision in *In re Hydrogen Peroxide*

TCCC filed with the Court a copy of the Third Circuit Court of Appeals' decision in *In re Hydrogen Peroxide* on January 28, 2009 to provide counsel for Franulovic notice of this important decision and an opportunity to address its implications. However, Plaintiff's counsel dismissed this case with a footnote describing the introduction as "puzzling" because it involved

[9] *Id*. at 563, 839 A.2d at 964.
[10] *Id*. at 543, 839 A.2d at 958.
[11] *Id*. at 557-58, 839 A.2d at 966.

Federal Rule of Procedure 23(b)(3) whereas Plaintiff seeks class certification pursuant to Rule 23(b)(2).[12] A full reading of the opinion, however, reveals that it offers guidance as to how courts should evaluate *all* of Rule 23's requirements.

The Third Circuit stated that "[t]he evidence and arguments a district court considers in the class certification decision calls for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements in insufficient."[13] The decision continues, noting:

> Class certification requires a finding that each of the requirements of Rule 23 have been met. *See Unger*, 401 F.3d at 321[14] ('The plain text of Rule 23 requires the court to "find," not merely assume, the facts favoring class certification.'). . . Factual determinations necessary to make Rule 23 findings must be by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23."[15]

Plaintiff cannot meet this heightened burden on any, much less all, of the Rule 23 requirements.[16] As an example, Plaintiff cannot prove it is "more likely than not" that she is an adequate representative of her purported class. She attempts to explain away one aspect of her inadequacy by claiming that she defers to her counsel on legal issues. However, her lack of knowledge regarding the facts and the law involved in this case mirrors the lack of involvement

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[12] Reply Brief at n. 6.
[13] *In re Hydrogen Peroxide*, 552 F.3d at 318.
[14] Case cited in the original is *Unger v. Amedisys*, 401 F.3d 316, 321 (5th Cir. 2005).
[15] *Id*. at 320.
[16] Early commentators of *In re Hydrogen Peroxide* have remarked that the case has raised the bar for class certification in the Third Circuit. *See* Elai Katz, *Circuit Court Applies Rigorous Class-Certification Standards*, N.Y.L.J., Jan. 22, 2009, at 1 ("The U.S. Court of Appeals for the Third Circuit ruled that a district court applied too lenient a standard in certifying a class in a chemical price-fixing case, joining other circuit courts in setting forth demanding class certification requirements"); Carl W. Hittinger and Jarod M. Bona, *Court Adds Teeth to 'Rigorous Analysis' Requirement for Class Certification*, The Legal Intelligencer, Vol. 239:40, March 2, 2009 ("The 3rd Circuit in Hydrogen Peroxide confirmed and decided that the 'rigorous analysis' should, indeed, be rigorous, even if that analysis overlaps with the merits").

that has caused numerous plaintiffs to be denied standing to serve as a class representative.[17]

As another example of *In re Hydrogen Peroxide*'s current applicability, she seeks to avoid her inadequacy as a class representative (which she must prove by a preponderance of the evidence) brought about by her claim splitting by now suggesting that this was a reasoned calculation not to "obtain damages for tens of thousands of retail purchases of a small amount."[18] However, this new allegation directly contradicts her assertion in her Third Amended Complaint that: "Franulovic's claims are typical of the claims of other members of the class because Franulovic's and all of the Class members' damages arise from and were caused by having purchased and/or consumed the Enviga beverage and having expended substantial sums on the purchase of the Enviga beverage."[19] Additionally, her new assertion also directly contradicts her deposition testimony stating her own belief that all class members should be compensated.[20]

As further example, Plaintiff, even in her reply brief, leaves this Court with only plans as to how she might meet the requirements of Rule 23. Plaintiff suggests it is common sense that the numerosity requirement of Rule 23 will be met.[21] However, as shown in Section A above, her reading of the applicable law was misdirected. To satisfy Rule 23, Plaintiff must have ***proven by a preponderance of the evidence*** that a sufficient number of people misunderstood the Enviga advertising and therefore suffered an ascertainable loss because they were controlling their calories and did not lose weight. She tried to rehabilitate her lack of supporting evidence by attaching, for the first time, exhibits to her reply brief. She did this despite having had the

[17] *See* Defendant's Brief in Opposition to Plaintiff's Motion for Class Certification (hereinafter "Response Brief") at pp. 17-19.
[18] Reply Brief at p. 2.
[19] Third Amended Complaint at ¶ 62.
[20] September 23, 2008 Deposition of Linda Franulovic at 57:16-21.
[21] Reply Brief at pp. 14-15.

exhibits prior to her seeking class certification and despite a prohibition against plaintiffs submitting new evidence and affidavits in a reply brief.[22]

Given the lack evidence she has produced in support of class certification, there is simply no way of knowing the number of people in her purported class. Moreover, Dr. Steckel's unrebutted opinions, which are discussed more fully below, further reveal that her unsupported assertion of numerosity is wrong because people purchase Enviga for a number of reasons besides its alleged implied promise of weight loss and, therefore, would have no claim under the CFA. Since she has no expert testimony on the issue, she cannot prove that it is "more likely than not" that she has established numerosity.[23]

Not only did Plaintiff fail to address the holding from *In re Hydrogen Peroxide*, she also filed a notice of new authority alerting the Court to a decision published before Plaintiff filed her brief, *Bosland v. Warnock Dodge, Inc*., No. A-97 Sept. Term 2007, 2009 WL 414336 (N.J. Feb. 19, 2009). What Plaintiff cites *Bosland* for in her response in opposition to summary judgment, and why she apparently sought to have it introduced here, is that it recites existing language regarding the CFA, so offers nothing new for her in support of her quest for class certification. In reality, the New Jersey Supreme Court described its role in *Bosland* as considering the issue of "whether the CFA includes, either explicitly or implicitly, a requirement that a consumer first demand a refund of an overcharged sum from a merchant prior to instituting litigation."[24] This issue has not been raised in this litigation and the decision is therefore irrelevant to the consideration of Plaintiff's motion for class certification. Accordingly, Plaintiff failed to address

[22] *Silverman v. Local 78, Asbestos, Lead & Hazardous Waste Laborers*, 958 F. Supp. 129, 131 n.1 (S.D.N.Y. 1996).
[23] *See* Response Brief at pp. 27-29.
[24] *Id*. at *4.

governing supplemental authority addressing her burden of proof for class certification, and *Bosland* does not address any issue relevant to this litigation.

C. Plaintiff misrepresented the deposition testimony of Joel Steckel, Ph.D.

On January 8, 2009, counsel for Franulovic deposed Joel Steckel, Ph.D., who signed a declaration in support of TCCC's brief in opposition to class certification. Dr. Steckel is the only expert who has offered an opinion in this matter. Plaintiff, therefore, has no expert to suggest that Dr. Steckel's reasoning is flawed, and Plaintiff's counsel's non-expert opinions provide no basis for challenging the validity of Dr. Steckel's testimony or methodology.[25] In fact, the Northern District of Illinois has declined to accept the opinions espoused by CSPI, counsel for Franulovic, regarding expected consumer behavior in light of expert testimony to the contrary.[26]

Plaintiff mischaracterized Dr. Steckel's deposition testimony in her reply brief in several material aspects. First, Plaintiff alleges his opinions are flawed because he was unsure whether the exact ads he studied were used in the marketplace. With this contention, she seems to generally suggest that Dr. Steckel's opinions should not carry weight with the Court. However, Dr. Steckel considered Plaintiff's Third Amended Complaint and Brief in Support of Class Certification when rendering his opinion in this litigation and thus was familiar with all of the allegedly misleading advertising that Franulovic herself has introduced into the record. [27] Even

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[25] Fed. Jud. Ctr. *Reference Manual on Scientific Evidence* ("Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing, and statistics. In some cases, professional experience in conducting and publishing survey research may provide the requisite background. In all cases, the expert must demonstrate an understanding of survey methodology, including sampling, instrument design (questionnaire and interview construction), and statistical analysis."), 238 (2nd Ed. 2000).

[26] *In re Mexico Money Transfer Lit. (W. Union & Valuta)*, 164 F.Supp.2d 1002 (N.D. Ill. 2000) (affirmed by *In re Mexico Money Transfer Lit.,* 267 F.3d 743 (7th Cir. 2001)).

[27] Declaration of Joel H. Steckel, Ph.D. ("Steckel Decl.") at 3.1 (previously attached to Response Brief as Exhibit B); Deposition of Joel H. Steckel, Ph.D. ("Steckel Dep.") at 82:9-83:11.

more, Dr. Steckel testified that the only way his opinions would change is if any language differences between the studied ads and the final ads were meaningful, *i.e.*, on the order of magnitude of changing the word "kill" to "cure."[28] Dr. Steckel also testified that his analysis remained the same because of the consistency in the results from diverse studies.[29] Plaintiff's argument is again lacking any factual support; there is no evidence that the language in the tested ads differed from the language in the ads used in the marketplace. Therefore, there is certainly no evidence that any language was meaningfully different.

Second, Plaintiff criticizes Dr. Steckel for not studying the responses of any actual Enviga consumers, a step Plaintiff's counsel apparently believes Dr. Steckel should have taken. However, Dr. Steckel testified that *in his expert opinion* it is preferable not to study the effects of advertising on actual consumers, because the consumers' interaction with a product impacts their perception of its advertising.[30] Plaintiff's counsel's unqualified second-guessing of Dr. Steckel's expert opinion on this issue has no bearing on Plaintiff's motion for class certification.

Third, Plaintiff makes a contrived allegation that Dr. Steckel believes that weight management was the single most common reason why consumers purchased Enviga.[31] This assertion is meaningless for Rule 23 purposes because it fails to account for the fact that a majority of consumers purchase Enviga for reasons other than "weight management."[32] Even if "weight management" was offered as the "most common" reason for a given group, that group did not even make up a majority of consumers. The allegation is additionally irrelevant because, in Dr. Steckel's expert declaration filed in opposition to Plaintiff's motion for class certification,

[28] Steckel Dep. at 55:21-56:5.
[29] *Id*. at 56:2-8.
[30] *Id*. at 62:3-63:9.
[31] Reply Brief at n. 45.
[32] Steckel Dep. at 106:6-107:20 and Exhibit 9.

he noted that "[c]onsumers purchase Enviga for a variety of reasons, not simply because of weight loss, or even 'calorie burning.'"[33] Further, as noted above, Plaintiff has failed to provide an expert witness to testify as to what significance, if any, her allegation may have to proving the necessary elements to support her class certification claim.

In summary, Plaintiff's counsel's unsubstantiated attacks on Dr. Steckel's deposition testimony do nothing to refute his ultimate expert conclusion: "Consumers infer a wide variety of messages about Enviga from Coke's marketing, not just that Enviga leads to weight loss. Consumers also buy Enviga for a number of reasons, not just weight loss."[34] This evidence remains the only evidence of consumer perception of Enviga in this record, and Plaintiff has failed to carry her burden of establishing that class certification under Rule 23.

CONCLUSION

TCCC respectfully requests that the Court consider the appropriate class certification jurisprudence, the Third Circuit's opinion in *In re Hydrogen Peroxide*, and the totality of Dr. Steckel's deposition testimony, in addition to the reasons previously set forth in TCCC's response brief, and deny Plaintiff's motion for class certification.

Dated: March 11th, 2009

/s/ Peter J. Boyer
Gita F. Rothschild
Peter J. Boyer
McCARTER & ENGLISH LLP

Jane F. Thorpe [*pro hac vice*]
Scott A. Elder [*pro hac vice*]
ALSTON & BIRD, LLP

Attorneys for Defendant, The Coca-Cola Company

[33] Steckel Decl. at 4.3.
[34] Steckel Decl. at 4.7.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Defendant's Sur-Reply Brief in Opposition to Plaintiff's Motion for Class Certification by the Court's CM/ECF system this 11th day of March 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

BY: /s/ Peter J. Boyer
Peter J. Boyer