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 RESPONSE TO PLAINTIFF'S MOTION FOR CONTINUANCE AND REPLY IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Linda Franulovic's response in opposition to Defendant The Coca-Cola Company's Motion for Summary Judgment fails to raise any genuine issue of material fact with respect to her claim for an alleged violation of New Jersey's Consumer Fraud Act ("CFA").[1] Instead, Franulovic's response seeks to obfuscate her actual claims before this Court and the requirements for surviving TCCC's motion for summary judgment. Franulovic's rhetoric cannot change the fact that TCCC is entitled to summary judgment as she cannot prove one, much less all, of the elements needed to support her CFA claim.

Plaintiff repeatedly asserts throughout her briefing that she was deceived by TCCC's calorie burning claims and implied weight loss claims related to Enviga.[2] She glosses over her actual claim, which was limited to the allegation that Enviga's advertising impliedly consists of an improper promise of weight loss.[3] Plaintiff also seeks to modify the requirements for surviving summary judgment, despite the fact that, as noted in TCCC's Brief in Support of Summary Judgment, once it is shown that there is no genuine issue of material fact, 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.'"[4] Furthermore, where the evidence is "merely colorable, or is not significantly probative," summary judgment is appropriate.[5] In other words, "there must be evidence on which the jury could reasonably find

[1] N.J.S.A. 56:8-1 to -20.
[2] 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 pp. 2, 5, 7, and 17 (Docket No. 110) (hereinafter "Response Brief").
[3] Third Amended Complaint ¶ 53 (filed April 14, 2008) (Docket No. 79) (hereinafter "Complaint").
[4] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

for the plaintiff. The Court's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."[6]

Plaintiff also seeks a continuation of discovery. She seeks this despite not meeting the requirements for such a request and despite the fact that TCCC is entitled to summary judgment based solely on her perceptions and conduct – no act or omission by TCCC need be explored to determine that her claim is subject to summary judgment.

I. ARGUMENTS AND CITATION TO AUTHORITY

Franulovic seeks to recover against TCCC under the CFA, so 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."[7] TCCC is entitled to summary judgment because Plaintiff's response only further confirms her inability to establish a genuine issue of material fact as to any element of her claim.

A. Franulovic cannot prove that TCCC engaged in deceptive conduct.

The first element required for Franulovic to prove her CFA claim is that TCCC engaged in deceptive conduct.[8] Franulovic alleges that TCCC engaged in deceptive conduct by promising her that drinking Enviga would cause her to lose weight.[9]

Plaintiff cannot prove her theory of deceptive conduct, because she testified that she never believed that drinking Enviga would guarantee weight loss.[10] She further testified that

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[6] *Id*. at 252.
[7] *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.
[8] *Id*.
[9] Complaint ¶ 48 ("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.").
[10] Deposition of Linda Franulovic at 85:25-86:3; 92:4-8 (hereinafter "Franulovic Dep.").

while drinking Enviga, she knew that she would still gain weight if she took in too many calories over the course of a day.[11]

In her response brief, Plaintiff attempts to undo these fatal admissions by arguing that although she knew drinking Enviga did not "guarantee" weight loss, she "was not foolish enough to take Coke's claims as immutable truth."[12] Plaintiff's rhetoric about "immutable truths" does not draw any lines that have either factual or legal significance, and Plaintiff's response brief does not even suggest otherwise. The facts remain undisputed: Plaintiff understood that drinking Enviga would not necessarily cause weight loss due to the daily variation in calories that people consume.[13] In the face of that evidence, Plaintiff's claim fails.

As support for her argument, Plaintiff relies primarily on the decision in *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 963 A.2d 849 (2009), and on the out-of-context language in *Hoffman* that a party "need not allege that he used a product in order to state a claim that the product was advertised and sold" in violation of the CFA.[14] Plaintiff repeatedly suggests, in both her opposition to TCCC's summary judgment motion and in support of her class certification motion, that *Hoffman* indicates Plaintiff's actual experience with the product is irrelevant.

Plaintiff misreads *Hoffman* considerably. First, *Hoffman* addresses the *allegations* necessary to state a claim, it does not deal with the *evidence* necessary to overcome summary judgment. Second, the actual holding in *Hoffman* is the opposite, *i.e.*, the court granted a motion

[11] *Id*. at 46:18-47:3.
[12] Response Brief at 17.
[13] Franulovic Dep. at 33:25-34:5; 44:22-25; 46:18 - 47:3; 47:7-15; 92:4-8.
[14] *Hoffman*, 405 N.J. Super at 115, 963 A.2d at 854.

to dismiss because the plaintiff failed to plead deceptive conduct or an ascertainable loss.[15] Thus, the court held, *inter alia*, that "Plaintiff has not alleged that he used the product and it failed," and therefore did not allege an ascertainable loss.[16] The court then responded to plaintiff's argument that he should not be required to use a harmful product before bringing a claim under the CFA. In that context, after noting that plaintiff never alleged that the product is harmful, the court noted:

> In any event, 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.***[17]

In this case, the Court already recognized – fully consistent with and in fact supported by *Hoffman* – that in the context of a claim that the Enviga advertising contains an implied promise of weight loss, Franulovic must, at a minimum, allege that she did not lose weight in order to state a claim. Plaintiff simply continues to ignore this Court's ruling, and she also continues to ignore the fact that Franulovic's *allegations* are no longer the issue, because her *admissions* demonstrate that she cannot succeed on any aspect of her claim. *Hoffman* does not resurrect a case, such as the instant case, where a plaintiff admitted she understood the allegedly false advertising and cannot prove that she did not lose weight.

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[15] *Id*.
[16] *Id*.
[17] *Id*.

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

The second element required for Franulovic to prove her CFA claim is that she suffered an ascertainable loss.[18] Franulovic's only support for her contention that she failed to lose weight while drinking Enviga, which is the basis for her only alleged ascertainable loss, is a subjective assertion that her clothes were tight.[19]

Plaintiff seeks to remedy her inability to prove this element by suggesting that "'[t]he 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."'"[20] However, New Jersey courts define an "ascertainable loss" as occurring "when a consumer receives less than what was promised."[21] Here, Plaintiff alleges she was promised weight loss, but claims she did not receive the benefit of losing weight.

Plaintiff's pleadings assert that consumers believe that "burning calories or reducing caloric consumption results in losing weight, **or at least offsetting weight gained from other calories**."[22] (emphasis added). By alleging that drinking Enviga might "[offset] weight gained from other calories," Plaintiff recognizes that if an individual is taking in too many calories, then regardless of whether that individual burns calories from Enviga, he or she may remain at the same weight. Plaintiff recognized this unassailable fact in her deposition.[23] Plaintiff alleges that her weight remained the same during the time she drank Enviga.[24] Even accepting that her

[18] *N.J. Citizen Action,* 842 A.2d at 176; *see also* N.J.S.A. § 56:8-19.
[19] Response Brief at 12.
[20] Response Brief at 15 (*quoting Bosland v. Warnock Dodge, Inc*., No. A-97 Sept. Term 2007, 2009 WL 414336, at *8 (N.J. Feb. 19, 2009)).
[21] *Union Ink Co. v. AT&T Corp*., 352 N.J. Super. 617, 646 (App. Div. 2002).
[22] Complaint at ¶ 17.
[23] Franulovic Dep. at 46:18 – 47:1.
[24] *Id*. at ¶ 48.

weight remained the same, Plaintiff cannot prove that she did not get any benefit from Enviga, because she could have been taking in too many calories overall.[25] If Plaintiff had altered her diet then she would have lost weight regardless of whether she consumed Enviga. The fact that she did not lose weight reveals that she cannot prove that she did not get the allegedly implied weight loss benefit of Enviga.

As shown above, Plaintiff cannot prove that she did not lose weight while drinking Enviga so she cannot establish that she suffered an ascertainable loss.[26] In short, Franulovic cannot prove that "she did not enjoy the [alleged] advertised benefit" of Enviga (i.e., weight loss).[27]

C. Franulovic has not proved that TCCC's allegedly deceptive conduct caused her to suffer the alleged injury.

The third element required to prove a CFA claim is establishing that allegedly deceptive conduct caused an ascertainable loss.[28] Plaintiff here could only do this by showing that she purchased Enviga because of the alleged claim that burning calories would cause weight loss, that she properly controlled her diet so that Enviga's calorie burning effect could cause weight loess, and that she did not actually lose weight. In fact, Plaintiff said exactly this at her deposition:

> Q: On any given day that you drank [E]nviga, how would you know that you didn't eat or drink something that otherwise put you, for the day, for the total day, in a situation where you weren't reducing your overall calories?
> A: I don't know.[29]

[25] Franulovic Dep. at 101:18-25.
[26] Nor can she prove, as demonstrated in the prior section, that she was promised weight loss.
[27] *See* Order at p. 20 (Oct. 25, 2007) (Docket No. 60).
[28] *N.J. Citizen Action,* 842 A.2d at 176; *see also* N.J.S.A. § 56:8-19.
[29] Franulovic Dep. at 91:9-14.

Plaintiff's inability to establish causation is repeatedly revealed through her deposition testimony because she did not count the calories she consumed while drinking Enviga, nor did she even care about those calories.[30] The best deposition testimony that Plaintiff could muster in support of proving causation is that she kept up with the calories she was taking in by "just knowing."[31] This is not a fact that can support her burden of proof; rather, it is another subjective assertion (and an imprecise one at that) that cannot be used to survive a motion for summary judgment.

Furthermore, her deposition testimony repeatedly revealed that her diet was not nearly as precisely calculated and measured as her response brief suggests. The specific facts revealed by her deposition testimony belie the vague generalities she seeks to use to support her claim:

- She sometimes bought her lunch at a grocery store;[32]
- She sometimes would eat a Power Bar during the day, but does not know how many calories are in a Power Bar;[33]
- She ate at a restaurant;[34]
- She ate Mike and Ike's candy;[35] and
- She would eat homemade snacks when her mother or grandmother made them.[36]

Even more, she revealed during her deposition that she did not care about calories.[37] She cannot allege that Enviga's "calorie burning" advertising mislead her into believing the product

[30] Deposition of Linda Franulovic, 34:14-17; 45:18-24; 88:16-20.
[31] Response Brief 8.
[32] Franulovic Dep. at 29:23-30:1.
[33] *Id*. at 31:13-18
[34] *Id*. at 33:18-19.
[35] *Id*. at 27:3-12.
[36] *Id*. at 33:1-17.
[37] Franulovic Dep. at 45:18-24.

was a weight loss guarantee while simultaneously acknowledging that she did not care about calories. Not to mention the fact that she expressly testified that she never believed that drinking Enviga would guarantee weight loss.[38]

Accordingly, even if Franulovic somehow establishes that she did not lose weight while drinking Enviga, which she cannot, TCCC is still entitled to summary judgment because she cannot prove that her alleged loss was caused by TCCC's conduct. Such a causal connection is essential to her claim.[39]

D. All of the facts needed to resolve summary judgment are presently before the Court.

Recognizing the deficiencies in her complaint, Plaintiff's response attempts to shift the focus of this motion to TCCC's alleged conduct and, in particular, the science surrounding Enviga's calorie-burning claims. But TCCC's motion is based entirely on Plaintiff's admissions; it has nothing to do with the science or with TCCC's conduct, and no amount of discovery will change Plaintiff's deposition testimony. What is currently at issue is whether: (1) Plaintiff was deceived by TCCC's conduct, (2) Plaintiff suffered an ascertainable loss, and (3) Plaintiff can prove a causal link between that hypothetical loss and TCCC's conduct. Accordingly, all of the facts necessary to determine whether her claim can survive summary judgment are entirely dependent on her understanding and her behavior.

Plaintiff's suggestion that Federal Rule of Civil Procedure 56(f) ("Rule 56(f)") provides for a continuance until she has the opportunity to conclude merits discovery is incorrect.[40] "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will

[38] Franulovic Dep. at 46:18-47:3; 85:25-86:3; 92:4-8.
[39] *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'").
[40] Response Brief at 10.

properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted."[41] Her request therefore should be denied because there are no outstanding facts that might affect the outcome of this case -- the only facts that are necessary to resolve TCCC's motion for summary judgment are already before the Court.

Furthermore, Plaintiff's request fails to comply with the requirement of Rule 56(f) that if "a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken."[42] Plaintiff comes nowhere close to offering specific reasons as to why she needs a discovery extension. Rather, she just claims that she seeks to embark on "merits discovery,"[43] without any indication as to what specific facts she would seek or how those facts are necessary for her ability to respond to TCCC's motion for summary judgment.

In summary, Plaintiff's request for an extension appears to be a recognition that her claim fails to deserve to survive summary judgment. She apparently seeks to prolong this litigation so as to cause TCCC to incur additional expenses in the defense of this matter and to embark on an unwarranted fishing expedition, in contravention of the Court's existing discovery rulings,[44] in the unpromising hope that she might find something to support her claim, whatever that might be.

[41] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986).
[42] Rule 56(f)(1) (emphasis added).
[43] Affidavit of Mark R. Cuker at ¶ 7.
[44] October 5, 2007 Letter Order (attached as Exhibit B to Affidavit of Mark R. Cuker).

E. TCCC's facts should be deemed admitted and Franulovic's facts should not be considered by the Court.

Plaintiff failed to comply with New Jersey Local Rule 56.1 ("LR 56.1") when she failed to file a responsive statement of material facts. LR 56.1 provides, in relevant part, as follows:

> The opponent of summary judgment shall furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant's statement, indicating agreement or disagreement and, if not agreed, stating each material fact in dispute and citing to the affidavits and other documents submitted in connection with the motion; any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion.

Her failure to comply with LR 56.1 results in the fact that all of the facts identified in TCCC's properly filed Statement of Material Facts Not in Dispute are deemed admitted.[45]

Even if the "fact" section she inserted into her response brief were to somehow constitute a responsive statement of material facts, she only objected to two of the facts set forth in the Statement of Material Facts Not in Dispute, so all the remaining facts are not in dispute and are deemed admitted.[46] Her attempt to dispute these two facts fails because the deposition testimony she cites does not address the deposition testimony she seeks to challenge. First, she contests that it is undisputed that "Franulovic testified that she understood that in order to lose weight she

[45] *Feacher v. Intercontinental Hotels Group*, 563 F. Supp. 2d 389 (N.D.N.Y. 2008) (Allegations in defendants' statement of material facts were deemed admitted for purposes of summary judgment motion, where plaintiffs failed to submit responsive statement mirroring allegations in defendants' statement, as required by local rules); *Akines v. Shelby County Government*, 512 F.Supp.2d 1138 (W.D. Tenn. 2007) (Defendant's statement of undisputed material facts would be treated as admitted on motion for summary judgment where plaintiffs did not respond as provided by local rules).

[46] *Nevius v. N.J. State Police*, Civil No. 07-3180 (JAP), 2009 WL 137340 (D.N.J. Jan. 20, 2009) ("Under Local Civil Rule 56.1, where the non-movant fails to respond to an allegation contained in the movant's statement of undisputed material facts (the '56.1 Statement'), such allegations are deemed admitted by the non-movant.").

had to reduce her caloric consumption."[47] This language tracks virtually word-for-word her own deposition testimony:

> Q: You understand and understood in February of 2007 that one thing people do to lose weight is reduce caloric consumption?
> A: Yes.[48]

Accordingly, her attempt to confuse the discrete fact presented in Paragraph 18 with other testimony is inappropriate and irrelevant and this fact should therefore be considered undisputed during the Court's evaluation of TCCC's motion for summary.

Second, she alleges it is disputed that "Franulovic testified that she never attempted to count or control the number of calories she consumed while drinking Enviga."[49] The undisputed nature of this fact is revealed by Plaintiff's briefing, where she asserts "Franulovic did not count every calorie she consumed." It is impossible to argue Plaintiff counted or controlled her calories while at the same time admitting that Plaintiff did not count her calories, which is required for her to control her calories because she could not control them if she was unaware of the calories she was consuming.

Plaintiff additionally failed to comply with LR 56.1 because she failed to file a statement of disputed facts. LR 56.1 provides that:

> the opponent [to a motion for summary judgment] may also furnish a supplemental statement of disputed facts, in separately number paragraphs citing to the affidavits and other documents submitted with the motion, if necessary to substantiate the factual basis for the opposition. The movant shall respond to any such supplemental statement of disputed material facts as above, with its reply papers.

[47] Statement of Material Undisputed Facts ¶ 18(emphasis added); Response Brief at 6-7.
[48] Franulovic Dep. at 44:22-25 (emphasis added).
[49] Statement of Material Undisputed Facts ¶ 21; Response Brief at 7-9.

Despite this clear instruction, Plaintiff has failed to provide a supplemental statement of disputed facts, much less one with paragraph numbers, for any of the factual or legal assertions she made in her response brief. Her failure to comply with the local rules requiring a distinct statement of facts should result in such alleged "facts" not being considered by the Court when evaluating summary judgment.[50]

TCCC also objects to those "facts" for which the sole support is reference to Plaintiff's complaint – not the "affidavits and other documents" envisioned by LR56.1. Plaintiff appears to be treating her response as one to a motion to dismiss, rather than as a response to a motion for summary judgment.[51] TCCC has introduced evidence to support summary judgment, so Plaintiff can no longer merely rely on her unsupported assertions to survive this stage of the litigation. Any assertions made by Plaintiff that are unsupported by evidence fail to meet her burden and therefore should not be considered by this Court.[52]

Additionally, TCCC objects to those "facts" into which Plaintiff has asserted argument or legal conclusions, which is improper pursuant to LR 56.1. In *N.J. Auto. Ins. Plan v. Sciarra*, 103 F. Supp. 2d 388, 395 (D.N.J. 1998), this District noted that there is a problem in determining the weight to be given a submission when a "fact" is merely a conclusion or opinion.

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[50] Midwest Imports, Ltd. v. Coval, 71 F.3d 1311 (7th Cir. 1995) ("[Plaintiff] also failed to comply with [the local rule] by not submitting a separate statement of additional facts that required denial of summary judgment. [Plaintiff] simply set forth its additional facts in its memorandum. Due to this deficiency, the district court found the additional facts were not properly before it and should not be considered. As will be discussed infra in section II.A., we find this was an appropriate decision.").

[51] *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (Once the party moving for summary judgment 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).

[52] *Merrill Lynch Business Financial, Inc. v. Kupperman***,** Civil Action No. 06-cv-4802 (DMC), 2007 WL 4287684 (D.N.J. 2007) ("Since Browne has submitted no affidavits to support his response to Chase's statement of undisputed material facts, his argument fails to meet the required burden and therefore summary judgment is appropriate.").

In summary, LR 56.1 was put into effect because it is improper for a party to not merely throw facts into a brief and hope that they will be considered by a court evaluating the brief. The result of such briefing is to gloss over the facts so as to obfuscate the difference between those facts that are truly undisputed and material from those that are disputed, immaterial, inappropriate, and unsupported. For the reasons set forth in this section, TCCC requests that this Court accept that the facts set forth in its Statement of Material Facts Not in Dispute are admitted and that Plaintiff's "facts" are not considered in an evaluation of the record.

CONCLUSION

Plaintiff is not entitled to a discovery continuance because such a continuance is not needed to resolve TCCC's motion for summary judgment and she has shown no need for such discovery. Additionally, Franulovic's own testimony and pleadings establish that she was not the subject of unlawful conduct by TCCC, she did not suffer an ascertainable loss, and that there is no causal link between her hypothetical ascertainable loss and TCCC's allegedly deceptive conduct (as opposed to her own failure to control her caloric consumption). TCCC therefore is entitled to judgment as a matter of law.

Dated: March 18, 2009

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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 18th day of March 2009, upon Plaintiffs' counsel of record:

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