

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CENTER FOR SCIENCE IN THE PUBLIC
INTEREST
LINDA FRANULOVIC,

CIVIL ACTION NUMBER:

Plaintiff,

07-539(RMB-JS)

-vs-

THE COCA-COLA COMPANY, et als.,

Defendants.

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
MARCH 20, 2009

B E F O R E:

THE HONORABLE RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Certified as true and correct as
Required by Title 28, USC, Sec. 753
/S/ Theodore M. Formaroli
Theodore M. Formaroli, CSR, CRR
Official U. S. Reporter
New Jersey Cert. No. 433

*United States District Court
Camden, New Jersey*

1 THE COURT: Good morning. You may be seated. We're
2 here in the matter of Franulovic versus Coca-Cola, 07-539. May
3 I have your appearances, please. I'll start with the
4 plaintiff.

5 MR. GARDNER: Good morning. Steve Gardner for
6 Ms. Franulovic. With me is Mike Quirk, Mark Cuker and Kate
7 Campbell, who is with my office but is not on the pleadings.
8 Mr. Quirk and I will be probably sharing argument.

9 THE COURT: Okay. Good morning. Welcome.
10 For the defendant?

11 MR. ELDER: Scott Elder for the Coca-Cola Company.

12 MR. BOYER: Peter Boyer also for the Coca-Cola
13 Company.

14 MR. POTTINGER: Oral Pottinger for Nestle USA.

15 MS. THOME: Shani Thome from the Coca-Cola Company.

16 THE COURT: Okay. So, good morning. Welcome.

17 Who will be arguing on behalf of the defendants?

18 MR. ELDER: I will.

19 THE COURT: Okay, Mr. Elder.

20 Mr. Elder, can you tell me how your motion for
21 summary judgment fits in with the motion for class
22 certification? Let me tell you how I'm thinking of it. I'm
23 thinking of it in your motion for summary judgment, which goes
24 to the plaintiff as a class representative and it goes to the
25 plaintiff as an individual, that because she's not an

1 appropriate class representative, class certification should
2 be denied and because of her failure to make out a claim,
3 given her deposition testimony, her individual claims should
4 be denied and summary judgement granted. Do I have that
5 right? Is that -- yes.

6 MR. ELDER: Would you like me to --

7 THE COURT: Wherever you're comfortable. If I can't
8 hear you, I'll ask you to go over there.

9 MR. ELDER: That's right. Her individual claims fail
10 on their own merit because of her admissions about what she
11 knew about calories and so forth and how she understood the
12 advertising, so summary judgment as to her individual claims
13 is appropriate. And then also because of those admissions
14 she's not an adequate class representative for other reasons,
15 but including the fact that she'll be occupied with those
16 unique defenses and therefore she puts the class claims at
17 jeopardy through her admissions related to her own individual
18 claims.

19 THE COURT: Okay. Let me hear from -- Mr. Gardner, do
20 you want to argue the certification motion?

21 MR. GARDNER: Yes, your Honor.

22 THE COURT: All right, I'll hear from you.

23 MR. GARDNER: Your Honor, I know the Court has read
24 the motion and the other briefing, I will try to just hit on
25 the points that --

1 THE COURT: You can count on me interrupting you,
2 Mr. Gardner. I know I will. At some point I'll want you to
3 fill in some gaps. But go ahead, yes.

4 MR. GARDNER: I was kind of opening up to that
5 solicitation, your Honor. I would appreciate it. I will
6 therefore just skirt over quickly what we have to show.

7 First, under Rule 23(a) we need to show numerosity,
8 commonality, typicality and adequacy. I will touch on a few
9 points on those but we have covered them generally adequately
10 in our briefing. Assuming we meet the 23(a) standards, we then
11 move to --

12 THE COURT: Can I talk to you about a couple of those?

13 MR. GARDNER: Yes, ma'am.

14 THE COURT: I don't know that I agree with you about
15 your common sense approach of why someone would buy Enviga. I
16 can think of several different reasons why someone would buy
17 Enviga. So, how do you prove that someone bought -- that the
18 class is the same as Franulovic, that someone who bought
19 Enviga bought it for the same reasons that she did? Isn't
20 that subjective? And how you would you prove that?

21 MR. GARDNER: We could prove it, your Honor, at trial
22 using testing, opinion from experts, the same way that Coke
23 attempted to use Mr. Steckel's testimony drawing conclusions
24 from pre-marketing testing.

25 THE COURT: So that's a merits issue I shouldn't

1 reach?

2 MR. GARDNER: I would say so, your Honor, but I've got
3 what I think is a better answer, which is we've passed the
4 standing issue, Article III standing the Court has already
5 ruled on. Coke keeps come back to it, but on Article III
6 standing the Court has held that Ms. Franulovic does have it.

7 We then move to what is sometimes called standing
8 under the New Jersey Consumer Fraud Act, the CFA, and that the
9 New Jersey state courts, including the Supreme Court, have
10 repeatedly held that once you establish that the main
11 plaintiff has ascertainable loss and therefore standing to
12 bring her own action under the CFA, it is unnecessary to prove
13 what the other members of the class, what other New Jersey
14 consumers thought, did or believed, that all we need to do in
15 order to get injunctive relief is to show that she has
16 standing, both Article III and CFA standing, and at that point
17 the New Jersey courts are clear.

18 THE COURT: No, but this goes to how do you define the
19 class? In other words, how is the class being defined? Is it
20 being defined as someone who is similarly situated as
21 Franulovic who bought Enviga as a weight-loss product versus
22 someone who bought it because it had green tea in it or
23 someone who bought it because they had a coupon, or whatever
24 the reason is? But how does the class get defined? And then
25 my question is it seems to have a subjective element into it

1 and isn't that fraught with problem?

2 MR. GARDNER: Yes, it is potentially fraught with
3 problem, your Honor. There are ways around that. You can
4 have claim forms if it is certified. And if we were to win at
5 trial, at the trial of our -- what amounts to our test
6 plaintiff case, then the Court could order restitution, were
7 we seeking it, based on claim forms.

8 Here, in order to avoid that potential problem, we
9 define the class more broadly so we wouldn't have a subjective
10 test. And there is no harm in having an overbroad definition
11 so that everyone who buys Enviga, if we were to be successful,
12 would understand that it is not a guaranteed weight-loss. So
13 we could define it, your Honor, but in a more restrictive way.

14 But, in all honesty, I could not figure out a way
15 that did not run afoul of the subjective aspect that the Court
16 has raised. I don't think there is a problem in defining it
17 more broadly because we are not seeking damages and we would
18 not have preclusive effect on the class members because it is
19 injunctive only.

20 THE COURT: Your comment raises an interesting
21 question and -- maybe it's not. I mean, maybe it's not an
22 appropriate question but it does raise the question. If you
23 are only seeking injunctive relief, why is it that you need a
24 class action?

25 MR. GARDNER: We don't. In fact, your Honor, if the

1 Court were to deny the motion for summary judgment, deny class
2 certification, we would move forward with Ms. Franulovic,
3 establish her own case and seek permanent injunction. It's
4 procedurally cleaner to do it as a class action, we think, but
5 we don't under New Jersey law -- and also by doing it as a
6 class, we don't have to face the inevitable arguments from
7 Coke that we're in federal court and we can't use the CFA as a
8 form of getting relief without complying with federal
9 requirements. We believe we can. But in the same way that we
10 defined the class conservatively, we're taking a conservative
11 approach seeking the relief -- to obtain the relief that we
12 are seeking.

13 THE COURT: Okay.

14 MR. GARDNER: To go a little more into the
15 ascertainable loss type standing, your Honor, I did want to
16 address briefly, and if the Court doesn't want to hear it
17 please do interrupt, the use of Mr. or Dr. Stickle. We
18 briefed this but it arises again, the most recent I believe
19 it's in the pleading Coke filed the other day, and I know it's
20 in the sur reply.

21 Although what other class members thought, intended
22 and did is irrelevant under the Consumer Fraud Act, I want to
23 point out what Mr. -- I'll say "doctor" so I'm erring on that
24 side -- Dr. Stickle said he did. He looked at studies that
25 Coke, and I assume Nestle, had performed when they were

1 developing the product and when they were rolling out and
2 considering how to market the product. These were studies not
3 of the actual product, not of that can, not of the ads that
4 actually appeared in New Jersey or -- that's actually the new
5 can. The original can, none of that was tested. These tests
6 were on prototypes and conceptual ads. They may have been
7 identical but Dr. Stickle could not tell me at deposition
8 whether he knew that the ads that were the subject of the
9 studies, the marketing studies that Coke and Nestle had done,
10 were the same.

11 THE COURT: Were the same as the ones he reviewed, is
12 that what you mean?

13 MR. GARDNER: He reviewed -- no, ma'am, I think that's
14 what I said, but it's not what I meant.

15 THE COURT: Oh.

16 MR. GARDNER: He looked at the tests and the ads and
17 cans that were tested pre-market. He could not say that any of
18 those cans, or I think cans, I know advertising, marketing
19 efforts, were the same ads as actually appeared in New Jersey.
20 So, he was drawing conclusions as to how people would react
21 from ads that people may not have seen. He also --

22 THE COURT: How do you get around the plaintiff's
23 testimony that she didn't believe them anyway?

24 MR. GARDNER: She did believe them. What she said was
25 that she didn't think it was a guaranteed weight-loss, but she

1 did believe them. She said she bought them because she
2 thought -- based on what they said, she believed that they
3 would make her lose weight. And she candidly answered in
4 response to a very narrow question by Mr. Elder that no, she
5 did not believe that it was a guarantee, that's a hundred
6 percent certainty. She believed that she had a shot at it,
7 that's why she bought it, that's why she used it and her
8 deposition testimony is quite --

9 THE COURT: But then her next hurdle is that she
10 didn't even keep control of the calories that she was
11 consuming.

12 MR. GARDNER: She did, your Honor.

13 THE COURT: She did?

14 MR. GARDNER: She did. And I can -- she --

15 THE COURT: See, let me just put everything in a
16 nutshell. This case has had some fine tuning and originally
17 this case was being presented, as I understood it, as a case
18 where the plaintiff was alleging that the claims that Coke was
19 making were false and misleading. And the plaintiff then
20 sought to amend the complaint to add the implied weight-loss
21 aspect of the case because the question that I had had from
22 the beginning is where is the loss? So, now the plaintiff's
23 allegations seem to be that she bought this because it
24 contained an implied weight-loss provision that if she
25 bought -- that if she drank three cans of Enviga a day, she'd

1 lose weight. Okay? So, this other claim that Enviga doesn't
2 do what it says it's going to do seems to be -- I still see
3 them as distinguishable, but at the end of the day I'm not so
4 sure it matters. So, the first part is that the claim that
5 Coke is making is a false claim, they can't substantiate it.

6 MR. GARDNER: Yes.

7 THE COURT: Okay. And the plaintiff seems to say I
8 really didn't believe it anyway, and we'll get to that, I
9 didn't believe it anyway.

10 The second claim, and it sort of is a -- maybe it's a
11 nuance, but the second claim is, well, I thought I could lose
12 weight on it, it implied weight-loss and therefore I bought it
13 but I didn't lose weight. But the problem is that she didn't
14 keep track of her calories, she just -- you know, maybe she
15 was eating the way she was eating before, but how could a
16 reasonable jury conclude that -- because she didn't keep tabs
17 of her caloric intake, how could a reasonable jury conclude
18 that as a result she didn't lose weight? So that's the
19 problem I'm having, putting aside for a moment whether or not
20 she's an adequate class representative.

21 MR. GARDNER: Stepping back to the issue as to the
22 lack of prior substantiation, initially we said she didn't --
23 I think we said she didn't lose weight. If that was true, we
24 may not have, until the Court instructed us -- as I understood
25 the Court's ruling, we could not merely say that there was

1 ascertainable loss in that she bought something for which
2 there was no substantiation. We, in complete respect, differed
3 with the Court on that but decided because we agreed with the
4 Court that essentially we get to the same place --

5 THE COURT: Well, that's what I'm saying. It still
6 seems that that claim, over which there was some dispute, that
7 that claim still survives because it still seems to me that
8 the plaintiff is alleging that Enviga said if you drink three
9 cans a day, you are going to burn so many calories. And if
10 that claim is false that the plaintiff would not have bought
11 it if she knew that claim was false. Right?

12 MR. GARDNER: Yes, your Honor.

13 THE COURT: Okay.

14 MR. GARDNER: It's still in there and we would seek
15 ruling on that, that's not -- both sides have teed up the
16 weight-loss issue, but yes.

17 THE COURT: It's still in there. And so what I'm
18 saying is -- and then, of course, that gets to the other issue
19 of class representation because if she's seeking damages and
20 any other class members are not entitled to damages is she
21 really an adequate and appropriate class representative? But
22 let's hold that off for a second.

23 So, her allegation is she wouldn't have bought it if
24 she knew that the claim was false, but I still get back to her
25 deposition testimony where she says well, I really didn't

1 think it was -- I didn't really believe it. Where is the
2 language I wanted to quote to that is causing me such
3 consternation?

4 MR. GARDNER: The language I know that Coke focused on
5 was in response to a question, I believe it was Mr. Elder's
6 question, did you believe it was a guarantee of weight-loss
7 and she said no.

8 THE COURT: Okay. Well, what language do you want me
9 to look at?

10 MR. GARDNER: "Was it your under --" this is on page
11 88, line eight, I believe it's other testimony.

12 THE COURT: 88, line eight.

13 MR. GARDNER: Yes, ma'am. "Was it your understanding
14 that the calorie burning effect of drinking Enviga would be in
15 the range of 60 to 100 calories while you were drinking Enviga
16 in 2007?" She said "Yes." And she goes on to testify in other
17 places in her deposition in response to Mr. Elder's questions
18 that she did think it would make her lose weight, but she
19 wasn't fool enough to believe, as very few people believe,
20 that it's a hundred percent certainty, that a representation
21 by Coke in an advertisement or in a marketing campaign is a
22 dead certainty. That's all when she said that it wasn't a
23 guarantee, but it was rather a representation. She believed it
24 enough to drink it for weeks and weeks and stopped when she
25 learned that it was probably, or as we say, definitely not

1 going to have any effect on her weight-loss.

2 THE COURT: Then how do you prove that she didn't burn
3 60 to a hundred calories when she was drinking it? She wasn't
4 wearing a --

5 MR. GARDNER: Your Honor --

6 THE COURT: I mean, how do you --

7 MR. GARDNER: -- we can't. We have said that prior.

8 THE COURT: Right.

9 MR. GARDNER: But we don't need to for two reasons.

10 THE COURT: Why?

11 MR. GARDNER: One is we can show we believe that they
12 didn't have adequate substantiation for that claim and the
13 burden on Coke is to have it before making the claim. So once
14 we show -- we can dispute the study, we do dispute the study.
15 As far as we know, that is the only study, the people they
16 locked up.

17 But secondly, the effect of that, your Honor, is to
18 say that unless you put yourself in a closed environment with
19 constantly monitored calorimetry and completely controlled
20 diet, you should not expect this stuff to work. What it says
21 is the calorie burner -- I don't know if you can see it from
22 there, I can hand it up -- but it is representing that the
23 calorie burner -- on the back of the new cans it discusses the
24 possibility of weight-loss. The representation is not the
25 calorie burner for people who monitor their calories on an

1 ongoing basis or in a locked room and have a perfectly
2 controlled diet, the representation to the public at large is
3 if you drink this it will burn more calories than it
4 contributes. The implicit representation is: Thereby, you
5 will lose weight. So we think we can prove that.

6 I hope that answered your question.

7 THE COURT: Well, I'm just having trouble. Are there
8 two claims that you are asserting and they look like one? Is
9 the one claim that she wouldn't have bought it if she knew
10 that it didn't do what it said it was going to do, which was
11 it wasn't going to burn 60 to a hundred calories while she was
12 drinking it, and therefore she wouldn't have paid the \$3 per
13 can, or whatever it is; or is it she wouldn't have bought it
14 if she thought she couldn't lose weight, the implied
15 weight-loss? I mean, what is this case all about, I guess?
16 It's not that clear to me. It seems like the plaintiff keeps
17 wanting to mesh the two together and I'm having a hard time.
18 Tell me, just set me straight.

19 MR. GARDNER: What the case is about is that Coke
20 misrepresented the effects of this product. It said it was a
21 -burner. The evidence they have does not substantiate that
22 claim. It was as to most people false, as to many other people
23 'deceptive or misleading. That's what the case is about, is
24 that what Coke told the public, including Ms. Franulovic, was
25 not true, that Coke misled about the effects of Enviga.

1 THE COURT: And therefore she wouldn't have bought the
2 can?

3 MR. GARDNER: That was initially how we pled it. The
4 Court indicated some problem with our being able to show
5 ascertainable loss under that pleading and we therefore
6 acceded to the Court's suggestion that we amend to say that
7 she would not have lost weight, that she did not lose weight.
8 She, in fact, gained five pounds over the course of treatment
9 with Enviga.

10 The second one is essentially a subset of the first.
11 Either way, had she known the truth, she wouldn't have bought
12 it. She didn't know the truth either globally or that she
13 would not lose weight. She bought it for that effect and she
14 didn't get it.

15 THE COURT: I'm just wondering how the *Hoffman* case
16 changes the analyses since my earlier ruling. Does it?

17 MR. GARDNER: Your Honor, I'm going to confess I'm
18 drawing a blank on what that case -- I know the name. Just a
19 moment.

20 (Short Pause).

21 MR. GARDNER: I now remember it.

22 THE COURT: Hold on one second.

23 (Short Pause)

24 THE COURT: So, okay, you remember the *Hoffman* case
25 now? I'm just wondering, it's a case that the plaintiffs have

1 asked me to pay a lot of attention to, does it change --

2 MR. GARDNER: No, your Honor. In that one, as I
3 recall it -- we were citing to it for a different reason, but
4 as I recall it the plaintiff there said he bought these
5 alleged erectile dysfunction drugs but he also said he had no
6 reason -- he did not think they would work at the time he
7 bought them. He was -- from what I can read into it --

8 THE COURT: He never used them.

9 MR. GARDNER: Yeah, he never used them. He was a test
10 plaintiff and I think this is one of those -- not just bad
11 cases makes bad law, but badly brought cases make for
12 unfortunate decisions. This is a case that reading from it, I
13 don't know the details, your Honor, but it looks to be one
14 where some people were trying to bring it as -- with a test
15 plaintiff as a test case, he merely bought it in order to be a
16 plaintiff. Whether this was his idea going in or it was
17 something after he consulted counsel, I have no idea. But
18 that's the narrow point on which the Court was ruling.

19 What we cited to is the statement that a private
20 party need not allege that he used a product in order to state
21 a claim under the CFA.

22 THE COURT: And I was confused why you wanted me to
23 rely on that because it's not an issue in our case because she
24 used it and I was having a hard time understanding why you
25 wanted me to rely on *Hoffman*.

1 MR. GARDNER: That would be a failure to explicate on
2 our part, for which I apologize. The reason we used it, your
3 Honor, is we have more -- we are way past that burden. Under
4 the substantive law of the CFA, if they buy it it's clear that
5 the right to bring a claim is vested. Our point was that's all
6 Ms. Franulovic needed to say, she does not need to prove that
7 she used it or on the back end that it didn't work, all she
8 needs to prove is that she bought it based on representations
9 that violate the CFA.

10 THE COURT: See, there is where I disagree with you on
11 the back end because I also have a pending motion for summary
12 judgment and that's why I asked counsel my very first
13 question, how do these two motions interplay. So if she can't
14 meet the back end, then how can she be an appropriate class
15 representative?

16 I agree, we're all past the 12(b)(6) motion stage,
17 now we're looking to summary judgment. I know you want further
18 discovery, and we're going to get to that, I don't know how
19 further discovery is going to help you.

20 MR. GARDNER: May I address that now or --

21 THE COURT: No, I want to stick to --

22 MR. GARDNER: Okay. To answer the same question you
23 asked Mr. Elder, if the Court grants summary judgment this
24 case is finished at this level and it will go up on appeal,
25 but it will be done at this point because if she -- if there

1 is summary judgment against her, absent our seeking permission
2 to go find a new plaintiff, it's done.

3 But the reason there is a difference here is although
4 we say Coke was premature in bringing the motion for summary
5 judgment, that is an appropriate way to resolve those fact
6 issues as to Ms. Franulovic and if the Court rules against us
7 there, the case at this level for the time being is dead.
8 Plus, we don't have to prove it and that's the difference. We
9 allege we show facts --

10 THE COURT: Right. But the motion for summary
11 judgment addresses her adequacy as a class representative. So
12 if I were to grant summary judgment on that grounds, are you
13 then left with looking for a new class representative?

14 MR. GARDNER: We would appeal, your Honor. In complete
15 candor, we could, we could seek Court permission to
16 substitute, but there is no better plaintiff. I have done a
17 lot of class actions, I've been, you know, a consultant, an
18 expert witness on many more, I studied, I've never seen, this
19 is just personal, I've never seen --

20 THE COURT: A better --

21 MR. GARDNER: -- a plaintiff who is more involved,
22 more knowledgeable. She is a great plaintiff. And if the
23 Court believes that because she wasn't --

24 THE COURT: In terms of her testimony she's a great
25 plaintiff?

1 MR. GARDNER: In terms of her -- if you read the
2 entire deposition, yes. In the cherry-picking by Coke, they
3 can pull out stuff where she gave honest answers, but she was
4 on top of it.

5 THE COURT: No, I mean, honest is what we're striving
6 for. What do you mean by that, they could pull out honest
7 answers?

8 MR. GARDNER: No, they can say did you think it was a
9 guarantee? And she says no. But, what Coke was not
10 emphasizing is that she did think it would work. She thought
11 the odds were enough, she was betting that it would work. She
12 bet her money, Coke won the bet. She did not think that it was
13 a -- you know, this is not a Bernie Matoff situation where she
14 thought she would absolutely win. She knew she was taking a
15 chance, but she was willing to take the chance because she
16 believed that the representations were probably true. It
17 doesn't go to her adequacy. It does, your Honor, but the
18 basic point is if she cannot bring this case, the case is
19 done. It's not just adequacy, it's finished.

20 THE COURT: Well, all right.

21 Well, let's talk about whether or not she's an
22 adequate class representative since we keep coming back to
23 that issue. You talked about the numerosity, and I think the
24 problem's inherent in that and perhaps that may have to wait
25 for another today, which is the class is defined as someone

1 who bought this drug -- drug -- product with the understanding
2 that it would burn calories if they drank three cans a day and
3 that they would lose weight from it, and that's how the class
4 would be defined. And I guess through questionnaires you
5 would develop your class.

6 Now, let's just go to whether or not Ms. Franulovic
7 will fairly and adequately protect the interests of the class,
8 let's talk about that. Isn't it a problem that she's not
9 seeking damages for the class?

10 MR. GARDNER: Your Honor, I would --

11 THE COURT: Particularly if that other claim is still
12 in there, which is she wouldn't have bought the product but
13 for the misrepresentation. Isn't that a problem?

14 MR. GARDNER: No, your Honor. We briefed this. The
15 claim-splitting cases are -- basically they are the minority
16 of cases, there are just a few of them scattered around the
17 country and they go against the great weight of cases which
18 says that in a (b)(2) case you can bring an action for damages
19 and even in an employment situation you can leave it up to
20 individual class members to bring their own back wages or
21 damages cases later on.

22 The reason we didn't is because under class action
23 jurisprudence as it now stands, you notice Coke said we should
24 have, they didn't say we could have. We would lose on that
25 issue on every probability. We believe that we should be able

1 to get that, but the case law now on that precise issue tends
2 to say that it's not a superior means of resolving the problem
3 because there are all these issues, it will be hard to manage
4 because you'll have to prove up in many trials everybody's
5 claims. It is not necessary, it would -- if Coke stipulated
6 that we could in fact bring that case, we would seek leave to
7 amend. I doubt Mr. Elder will tell you he thinks we would
8 succeed on that claim. They criticize us for not bringing it,
9 but they also know the difficulties of bringing it. If we had,
10 you would have a whole lot of briefing on why this case cannot
11 be certified as a damages class. And since the prime desire
12 of Ms. Franulovic was to stop the ongoing practice and because
13 of the inherent difficulties in getting a small retail
14 purchase damages class certified because of proof of the
15 individual damages, we elected to bring it as an injunctive
16 class. The cases are just inapposite. Judge Shineland's
17 opinion out of -- I think she's Southern District New York, it
18 details that this is an exception. She gives good reasons for
19 why in that particular case it could be because of potential
20 issues preclusion, but that doesn't exist here. So it just --
21 it does not create a problem and if we had pled it as such our
22 odds of succeeding would be very, very small because of the
23 state of case law right now. It was a -- that was an informed
24 decision by class counsel in consulting with her.

25 THE COURT: Can you elaborate on that?

1 MR. GARDNER: I'm sorry, ma'am?

2 THE COURT: Can you elaborate on that?

3 MR. GARDNER: What I was saying, that the -- most
4 cases now say when you have -- when you can't prove damages on
5 paper, it says that a (b)(3) class, which has standards
6 different from a (b)(2) class, that it's not superior to other
7 methods, to individual cases, or that it becomes an
8 unmanageable case because of the need to develop facts and
9 damages for each retail purchase.

10 THE COURT: Okay.

11 MR. GARDNER: And we'd love to do it, but the case law
12 doesn't support our doing it. I think, in complete candor, I
13 think that Rule 23 does support it. I think courts have gone
14 a little off the rails on saying that it can't be brought, but
15 that is the reality. I'm not going to argue with where courts
16 are because I know I'm going to lose.

17 THE COURT: Okay.

18 (Short Pause)

19 MR. GARDNER: And the Court has asked me every
20 question I wanted to cover, your Honor. So unless the Court
21 has more, I will step down.

22 THE COURT: Let me hear from Mr. Elder.

23 MR. GARDNER: Thank you, ma'am.

24 THE COURT: Mr. Elder, do you agree with me that when
25 the plaintiffs amended the complaint -- because when we were

1 last together one of the concerns I had was that the
2 plaintiffs really hadn't raised an ascertainable injury. And
3 it sounds like in the third amended complaint, or it doesn't
4 sound like but it appears in the third amended complaint that
5 it appears to be two injuries that they are alleging. One is
6 that she wouldn't have bought it if she had known; and
7 secondly, that she didn't lose weight and it was an implied
8 weight-loss product. Do you agree with that? And it seems
9 that these two different theories, if you will, seem to keep
10 getting mixed together. Am I right?

11 MR. ELDER: I believe you are right as to the second
12 question, Judge, which is these two theories keep getting
13 mixed together.

14 As to the first question, I think the problem here is
15 that there has been a shifting of what's been pled versus then
16 what's discussed in the papers and in argument.

17 THE COURT: And I think that it's been caused, if my
18 memory is serving me correctly, is that when we were last
19 together I didn't see anywhere in the complaint where
20 plaintiff was alleging an injury. And the conversation back
21 then, and I reviewed the transcript from last December or when
22 we were here, I read through that transcript yesterday and it
23 seemed that the conversation flowed into a weight-loss
24 misrepresentation. But, as I was reviewing the last amended
25 complaint, the third amended complaint, it seems that, and I'm

1 looking at Paragraph 50 for example, the allegation is that
2 she would not have purchased three cans a day if she had known
3 the lack of reasonable support for Coke's claims. And then the
4 other claim deals with the implied weight-loss.

5 So, it seems like while a lot of focus is on the
6 implied weight-loss, it still seems as if there really are two
7 separate theories, but everybody seems to be talking about
8 them as one and that's why it's getting so -- I just want to
9 get this fleshed out. So, go ahead.

10 MR. ELDER: Let me take a stab at it. When you
11 dismissed their claim, your Honor, you did so because they
12 failed to plead, and they've conceded, and they conceded it
13 again here today, they cannot prove whether or not she burned
14 calories. This is not about whether or not Enviga burns
15 calories, period, in any one. That is not the claim in this
16 case. That claim was dismissed and you told -- your Honor told
17 both the Melfi and Simmens plaintiffs and Ms. Franulovic that
18 if they wanted to proceed with a weight-loss claim on their
19 theory that this advertising contains an implied message of
20 weight-loss and that she didn't lose weight, they can proceed
21 with that without filing a motion for leave to amend. If they
22 wanted to pursue the calory-burning claim, they needed to file
23 a motion for leave to amend. Melphy and Simmens filed a
24 motion, Ms. Franulovic filed a third amended complaint
25 abandoning her calory-burning claim pursuant to your Honor's

1 order.

2 THE COURT: Well, see, therein do you agree with that,
3 that you abandoned your calory-burning claim? And that's what
4 I'm wondering and I think this is -- did you?

5 MR. GARDNER: I don't think so, your Honor. We
6 shifted for proving her individual damages to make the
7 ascertainable loss proof. What the Court said we needed to
8 prove, we included that. But as the Court noted in Paragraph
9 50, it's still there.

10 THE COURT: I know, but they didn't -- see, I don't
11 know if this -- I don't know if everybody's talking -- you
12 see, they think you abandoned that claim and you say you don't
13 think so, so I think that's critical to figure this out.

14 MR. GARDNER: Well --

15 THE COURT: Because that's what I'm saying, I still
16 think there is confusion that is still in my mind, there seems
17 to be two theories going here and they seem to be talked about
18 as one. And so I see the one as sort of a contractual
19 problem/allegation, there was this implied weight-loss
20 promise, and I see the other one is sort of a false
21 advertising/misrepresentation and that's you said it was going
22 to burn calories and it didn't. And it sounds like you are
23 talking about them as if it's just one and I don't think it
24 is. Is it?

25 MR. GARDNER: I can hear Mr. Elder trying to talk,

1 since he's standing. Did you want to hear my response or --

2 THE COURT: Well, did you abandon that claim?

3 MR. GARDNER: No, ma'am. You read Paragraph 50, it's
4 there.

5 THE COURT: I know, but I've read these briefs, you
6 know, ten times each and I don't see anybody making this
7 distinction.

8 Let me hear from Mr. Elder, I keep interrupting.

9 MR. ELDER: Your Honor, I think it's important to go
10 back, and I'm going back to the March 10, 2008 order that I
11 believe governs this issue. Your order permitted the
12 plaintiffs to file an amended complaint alleging a so-called
13 weight-loss claim but instructed them to move for leave to
14 file an amended complaint alleging in addition to the approved
15 weight-loss claim, a so-called calory-burning claim if they
16 wished to pursue that claim. They did not move for leave to
17 amend. And the reason -- your Honor, this language did not
18 get lost on the parties here because two parties, Ms. Melfi
19 and Ms. Simmens, filed such a motion. So, that's why we
20 believe it's been abandoned. And let me just address the
21 fundamentals whether -- I'm sorry.

22 THE COURT: Can you print out that order? What's the
23 docket entry?

24 MR. ELDER: That, your Honor, is -- I'm sorry, I don't
25 have the docket entry.

1 THE COURT: What's the date of it?

2 MR. ELDER: It's March 10, 2008.

3 THE COURT: Thank you.

4 MR. ELDER: But to back up a little bit, Judge, we
5 believe that the reason that that was appropriate is because
6 nowhere in the original -- do you want me to keep going?

7 THE COURT: No, now it's making sense to me because my
8 concern -- and now this is why it's making sense to me, but I
9 had forgotten the part that you just reminded me of, which was
10 both claims were being discussed and because I allowed them to
11 amend as to the weight-loss did not necessarily mean that they
12 could not move to amend to state a calory-burning/false
13 advertising claim, whatever it is, that they wanted to allege,
14 I didn't preclude that. But they didn't do that and now what I
15 have is a second amended complaint that seems to have both in
16 there, but the parties seem to be talking about only the
17 weight-loss, which is the source of my confusion. And now
18 it's all clicked. Okay.

19 MR. ELDER: And the operative complaint, your Honor,
20 is the third amended complaint.

21 THE COURT: The third amended, yes.

22 MR. ELDER: And, your Honor, let me just sort of
23 address the --

24 THE COURT: And which explains why defendants didn't
25 really parse out this calory-burning/false advertising claim

1 because you were of the view, right, that it's not in?

2 MR. ELDER: We're not only of the view that it's not
3 in but it's not in because of their concession that they
4 cannot prove whether or not Ms. Franulovic burned calories.

5 And I think it's important to also note --

6 THE COURT: But that's -- wait a minute. What about
7 the allegation that she wouldn't have bought it if she knew
8 that allegation was false? Let's take the *Hoffman* case. He
9 alleged that he would not have bought this sex enhancing
10 product if he knew that it was false and therefore he's out
11 the money. Okay. So that's a little bit of a different claim,
12 right? So if here she was alleging that she wouldn't have
13 bought the Enviga if she didn't think it didn't burn calories,
14 doesn't matter whether or not they can't prove whether she
15 didn't actually burn the calories. But if the studies show
16 that it didn't do what the label said it did, then isn't that
17 an appropriate claim?

18 MR. ELDER: It's not and the reason is causation.
19 So -- and I will address -- I want to get back to *Hoffman*,
20 but, your Honor, Ms. Franulovic individually unquestionably
21 has to show an ascertainable loss and she can't meet that
22 showing if -- so, they're saying their ascertainable loss is
23 the purchase price of the product. Well, if they can't prove
24 that she did not burn calories, then the purchase price of the
25 product is not a loss. So you have to have that causation,

1 that causal link between the alleged misrepresentation and the
2 loss, and that's the calory-burning. And the reason -- and I
3 think -- are you going to ask why they can't use the studies
4 in general?

5 THE COURT: Um-hum.

6 MR. ELDER: The reason they can't do that is because
7 they said they couldn't do that. And here's what I mean, your
8 Honor. They were not willing to come in and say we know that
9 Ms. Franulovic didn't burn calories because this product
10 doesn't work at all. They could have moved in response to your
11 order and made that allegation explicitly and said we're going
12 to come in and we're going to prove that, but they don't say
13 that.

14 And let me direct the Court to their complaint. At
15 paragraphs 28 and 33 they say there's in fact no
16 substantiation or reasonable basis for claiming that Enviga --
17 I'm skipping some language -- has any effect on calory balance
18 or weight for the majority of adults who are not young,
19 healthy and thin.

20 They say in another paragraph in fact, Enviga does
21 not burn calories in a significant proportion of consumers.
22 And it's this loose language, your Honor. That doesn't say
23 Enviga doesn't work, that says we don't think it works in some
24 proportion of people that remains undefined that they've
25 offered no evidence of in support of their class motion and

1 they failed to respond to your direction that they seek leave
2 to amend and properly allege this calory-burning claim.

3 THE COURT: As I recall, the last time we were here I
4 do recall the conversation dealt with, well, if the allegation
5 is that the studies don't substantiate that claim, then I
6 remember someone from your side of the table, her name escapes
7 me, but saying that simply can't -- then we want to see the
8 evidence because there is simply no evidence. And I did think
9 I got a concession on that.

10 MR. ELDER: I believe the concession that you
11 received, Judge, was we cannot prove that she didn't burn
12 calories. That's not just an individual statement. If the way
13 you intend to prove that is by proving that the product
14 doesn't work, then you can't prove it; and if you've conceded
15 that you can't, then you've conceded that you can't through
16 any method of proof.

17 THE COURT: Was there a concession that the claim was
18 not unsubstantiated?

19 MR. ELDER: Your Honor, we believe that there was. I'm
20 not -- I'm not telling you I can point you to the transcript
21 where they said we concede that it burns calories, they said
22 they can't prove that it doesn't. And our point at that
23 hearing was they haven't alleged it doesn't work in any one,
24 they haven't alleged here it doesn't work at all. What they
25 continue to try to allege, your Honor, is that it's Coke's

1 burden to prove that it does work.

2 We don't believe there is any showing that that's the
3 law here. Under the Consumer Fraud Act, they have to
4 establish an unlawful practice, an ascertainable loss and
5 causation, and so this effort to shift the burden to us to
6 some -- to prove the product, that the science -- there is
7 science that's discussed, you know, in their motion to the
8 fact that they disagree with it, but they're not willing to
9 say that it simply doesn't work and it didn't work in her.
10 And, you know, we -- we were here before --

11 THE COURT: That's the missing link, isn't it, that
12 the plaintiffs are not alleging -- let's take the *Hoffman*
13 example, okay? There the allegation was that the product said
14 that it would do something but in actuality that was a false
15 promise because it was just made up of vitamins, I don't know
16 what it was, but let's just say that. Okay? Let's see. That
17 plaintiff alleged that the product did not produce the results
18 promised, advertised -- well, no, that's a bad example. But,
19 in that case, the plaintiff bought the product because he
20 thought that it would do what it said it would do but then
21 when he looked at the ingredients he said, you know, it's just
22 made up of, you know, vitamins and it's not going to do what
23 it says, therefore it's false advertising. But the plaintiffs
24 here are not saying or have never said that the claims by
25 Enviga that drinking three cans a day would help in burning 60

1 to 100 calories was false because there is no studies to
2 substantiate that.

3 MR. ELDER: I think that's right, your Honor. And to
4 address *Hoffman* for a second, *Hoffman* first --

5 THE COURT: Because, like if they were saying Coke is
6 making this representation that drinking three cans a day
7 results in calory-burning and the plaintiff were alleging --
8 and that is false because actually the studies show that when
9 you drink it you consume a thousand calories more -- you know,
10 I'm just giving a hypothetical -- that would be similar to
11 what the *Hoffman* case was, right?

12 MR. ELDER: It would be -- it would be more similar.
13 But to address *Hoffman*, your Honor, *Hoffman* is a pleading case
14 first and foremost, it's not a motion for a summary
15 judgment --

16 THE COURT: Right.

17 MR. ELDER: -- like we have here. But *Hoffman* --
18 actually, the plaintiff cites *Hoffman* for the proposition that
19 it doesn't matter whether Ms. Franulovic even drank Enviga,
20 she can allege whatever she wants and all that other stuff
21 doesn't matter. Well, the first answer to that is that's
22 absolutely incorrect because she has to show causation. And
23 there are --

24 THE COURT: No, but -- Mr. Elder, I'm sorry to keep
25 interrupting. That's why this has been so confusing is

1 because it sounds like what are we talking about? If we're
2 talking about the implied weight-loss claim? Absolutely. Are
3 we talking about this other claim that appears not to be there
4 but the plaintiffs think is there, the false representation
5 claim, then her causation is she wouldn't have bought it,
6 right, she wouldn't have spent the money because it doesn't
7 work?

8 MR. ELDER: If they're going to prove she didn't burn
9 calories --

10 THE COURT: Right.

11 MR. ELDER: -- because it doesn't work at all, which
12 they've said they're not going to.

13 And to return to *Hoffman*, the plaintiff in *Hoffman*,
14 the Court -- *Hoffman* actually -- they cite *Hoffman* for this
15 proposition where the Court said -- used the language that,
16 well, you don't have to have used the product in order to make
17 your allegations, but it's important to understand the context
18 of *Hoffman*.

19 The Court pointed out in dismissing *Hoffman's*
20 complaint -- *Hoffman's* complaint was dismissed. The Court
21 pointed out: Plaintiff, you don't even allege that you used
22 the product. And the plaintiff responded by saying: Your
23 Honor, it's dangerous, I shouldn't have to allege that I used
24 a dangerous product. And it was in that context that the Court
25 responded and said: Well, you really wouldn't even have to

1 use the product in order to allege in your complaint that it
2 doesn't work at all in its entirety. And so I think that's the
3 consistency you are getting with *Hoffman*, but *Hoffman*
4 certainly doesn't stand for the proposition that the
5 plaintiff's experience with the product and whether or not in
6 our case she burned calories or lost weight doesn't matter.

7 In fact, it's quite the opposite, that the Court's
8 concern in *Hoffman* was you haven't alleged your experience
9 with the product, and then the Court said I'm not going to let
10 you get out of that by saying it's dangerous and you didn't
11 want to use it before you made your allegations.

12 But again, it goes back to the issue here of in the
13 paragraphs of their complaint and in their concessions here
14 and in response to your prior order they have not said we are
15 simply going to prove that *Enviga* does not work at all.

16 THE COURT: Right. That is not before me.

17 MR. ELDER: Yes, correct.

18 THE COURT: And therefore, because the can doesn't do
19 what it says it would do, she wouldn't have bought it, that
20 claim is not viable in front of me.

21 MR. ELDER: Correct.

22 THE COURT: Okay.

23 MR. ELDER: Right. And, your Honor, to address some of
24 the other questions that came up on -- and I want to back up a
25 little bit and make sure that your question about the

1 interplay between the summary judgment motion and the class
2 certification motion was answered adequately. I think
3 Mr. Gardner was accurate when he said if you grant summary
4 judgment, this case is over and so you need not reach the
5 class certification issues if you are inclined to grant
6 summary judgment. So I just wanted to make sure that any
7 questions on that issue had been answered.

8 Also --

9 THE COURT: Well, I think -- but the whole source of
10 my confusion, I guess it's apparent by my questioning, has
11 been clarified because what I really am dealing with is the
12 implied weight-loss claim and I'm having a difficult time
13 seeing how she meets that burden because she herself says she
14 didn't really keep track of her calories and related matters.
15 And so I don't know how a reasonable jury could find that
16 Enviga didn't do what it said it would do if she thought it
17 was a weight-loss program and she didn't even do anything to
18 that end. The fact that there is no claim in the case that
19 Enviga didn't do what the product said it would do, that is a
20 false advertising/representation claim, and, therefore,
21 Franulovic sustained a loss, i.e., the purchase of the can, is
22 not in the case because of my prior ruling and there was no
23 subsequent motion filed I think answers the concerns that I
24 had and I don't have to really look at: Well, did she believe
25 it or not because it's not really that relevant to the implied

1 weight-loss claim. Right?

2 MR. ELDER: I think whether she believed it or not is
3 actually fatal to both claims, whether it's the claim --

4 THE COURT: Well, doesn't she lose on causation now?

5 MR. ELDER: She does. And the import of her
6 admissions, your Honor, she has admitted that she understood
7 the calory-burning process, she understood how this worked,
8 she understood the relationship between calories and weight,
9 and she particularly understood that Enviga was not a
10 guarantee of weight-loss. Now plaintiffs want to draw some
11 kind of distinction that I'm still not clear on between a
12 guarantee and a promise, or whatever it is they're saying,
13 they're saying that we told consumers, we promised consumers
14 that weight-loss in fact would happen. That's the claim here,
15 there would be weight-loss.

16 THE COURT: No. Here what I'm saying is her testimony
17 that, well, I didn't really believe it or I really didn't
18 believe it was a guarantee when I purchased it, do I even need
19 to have to decide that interpretation of the testimony because
20 the defendants put one spin on it and the plaintiff has put
21 their spin on it if the evidence is uncontroverted that she
22 didn't keep track of her weight-loss and no reasonable jury
23 would conclude that the implied representation was the
24 causation?

25 MR. ELDER: Exactly. And, I'm sorry, I was lumping her

1 admissions in together. But, you're correct, her admission
2 that she didn't care about calories, she didn't count
3 calories, she didn't weight herself, you know, she doesn't
4 know -- she simply just admitted frankly, I don't know about
5 weight-loss because I didn't weigh myself.

6 Now, the only response to that that the plaintiffs
7 have offered is this notion that she knew it because her pants
8 didn't fit any differently. And I think, as your Honor has
9 already pointed out, the threshold is not a scintilla of
10 evidence or something you can possibly think of, it's evidence
11 that would allow a reasonable jury to find in your favor. They
12 haven't met that threshold here, they can't meet it in the
13 light of those admissions, so whether it's that she can't
14 prove causation or that she can't prove that there was even an
15 implied weight-loss claim, either one, warrants summary
16 judgment.

17 Your Honor, to move to some of the class issues that
18 were addressed, and as we've said we believe that the
19 undisputed evidence here -- and I should point out, your
20 Honor, that our statement of undisputed material facts went
21 un-responded to in the papers, so I think that's important.
22 But on the facts here, we believe summary judgment is
23 warranted.

24 But even if the Court were to find that summary
25 judgment wasn't warranted, these admissions, even without

1 summary judgment, render Ms. Franulovic an inadequate class
2 representative. And this is in my mind, I think, most pointed
3 up by the issue of are there defenses unique to her? And the
4 reason that that doctrine exists is because if the plaintiff
5 is subject to unique defenses that put the class claims at
6 risk, then that plaintiff is not adequate. And whether or not
7 summary judgment is ultimately granted, her admissions
8 certainly put her claim at risk. And these admissions are
9 unique to her. Other people might not have the same answers to
10 the questions that were asked of Ms. Franulovic. And so just
11 by virtue of the fact that she has made these concessions that
12 really go to the heart of the issues in this case, she's not
13 an adequate class representative and she is certainly not
14 adequate if the Court grants summary judgment.

15 On that issue, your Honor, you asked Mr. Gardner about
16 wouldn't there be individual issues in this case because it is
17 a claim of an implied representation that nowhere on that can
18 does it say you are going to lose weight, this is
19 Ms. Franulovic's -- and Mr. Gardner answered that he believed
20 that he could prove that through class wide proof in the form
21 of an expert or some other way. And while he might be able to
22 introduce that type of testimony, it doesn't answer the
23 question because the other side of that coin is the defenses
24 that Coke can assert. And, your Honor, I'll refer you to the
25 Third Circuit's decision in *Newton versus Merrill Lynch*, which

1 is at 259 F.3d 154, and the Third Circuit recognized in *Newton*
2 that defenses can raise individual issues that prevent class
3 certification.

4 THE COURT: So what are you saying then that Coke
5 would then have to say to each class member is that really why
6 you bought it?

7 MR. ELDER: Well, we would have to pose the same
8 questions that were posed to Ms. Franulovic, or at least to a
9 substantial number of class members, because, as we've seen
10 here, the answers matter, they impact the theory that there is
11 an implied weight-loss claim here. So although you can call
12 an expert and you can offer class wide proof, it doesn't mean
13 that's the only proof in the case.

14 THE COURT: But what if the class were defined as
15 anyone who bought it believing it to imply a weight-loss and
16 that's how the class is defined, wouldn't a questionnaire to
17 each class member, putative class member, "why did you buy
18 it?", then they have different reasons to check-off, wouldn't
19 that be sufficient, or no?

20 MR. ELDER: I don't believe so. You have a number of
21 issues there. First of all, if you defined your class as the
22 people who believed they would lose weight, you've defined
23 your class entirely through a subjective state of mind which I
24 don't believe comports with Rule 23. They're trying to get
25 around that by defining the class too broadly and defining the

1 class as all purchasers who consumed Enviga, but of course
2 that class includes -- on this record that class potentially
3 includes everyone who purchased Enviga other than
4 Ms. Franulovic because they've made no showing at the class
5 certification stage, as is their burden to prove, the element
6 of Rule 23 that anyone else interprets this messaging the same
7 way Ms. Franulovic does. And I think that's important here
8 because we set a schedule in this case to address the class
9 certification issues, that schedule included provisions for
10 expert discovery if people needed -- wanted to introduce
11 experts. We introduced an expert. They have quibbled with what
12 that expert said, but their quibbling with that is not
13 evidence. His testimony is the only evidence in the case.

14 So we have on this record two sources of evidence
15 regarding what people thought about the Enviga claims.
16 Ms. Franulovic, and she's clear there wasn't an implied
17 weight-loss message, and Dr. Stickle, and he's clear that
18 people bought Enviga for all kinds of reasons. So for the
19 additional reason, your Honor, that they just haven't met
20 their burden of the Rule 23 elements, class certification is
21 not appropriate.

22 THE COURT: In a case such as this can there ever be
23 class certification then under your argument when you have
24 these -- and that's the point that your adversary was making,
25 which is when you have these subjective issues, it's better to

1 define it broadly than narrowly and that's what I think his
2 argument is. Can you address that?

3 MR. ELDER: Could you ever have class certification in
4 an alleged false advertising case? I believe the answer is
5 yes. I think it's much more likely when you are not dealing
6 with an implied claim. There are express advertising, you
7 know, claims and there are implied claims. When you are
8 dealing with an implied claim, it's obviously much more
9 difficult because it's a much more subjective test and the
10 plaintiff has to adequately address the problems with
11 certifying that type of a class. And so is it possible to
12 certify an implied class? It might be possible. On this
13 record, it's woefully inadequate.

14 So, you know, we're not taking a position that that's
15 simply an impossibility depending on what your class is,
16 depending on what the implied messaging is and depending on
17 what your class representative has said about that implied
18 messaging and depending on what proof you offer in support of
19 your certification motion.

20 THE COURT: Can I give any weight to -- or should,
21 should this factor have any weight in my consideration, that
22 Ms. Franulovic could get through her own individual
23 proceeding, through the doctrine of *res judicata* it would
24 apply to any putative other class members anyway and therefore
25 why certify the class? Should that have any bearing on my

1 decision?

2 MR. ELDER: I'm not following the question, I'm sorry.

3 THE COURT: Okay, it was a bad question. It was a
4 question I asked counsel before, which is why does
5 Ms. Franulovic have to bring a class action if she's only
6 seeking injunctive relief on behalf of the class? Wouldn't
7 she just bring it individually and after the doctrine of *res*
8 *judicata* or claim preclusion anybody else who -- then if Coke
9 is enjoined, then the public is benefited, any putative class
10 members benefited. My question is does that play a role in my
11 decision at all, that fact, or should it?

12 MR. ELDER: Your Honor, I'm not sure that it should. I
13 think here that summary judgment is appropriate separate and
14 apart from that fact, denial of class certification is
15 appropriate separate and apart from that fact. But to address
16 the question, I believe that while Ms. Franulovic could pursue
17 injunctive relief only on her own behalf, I believe she runs
18 into some standing problems there. And because standing to
19 seek equitable relief is different from standing to seek
20 monetary relief, and so --

21 THE COURT: But that's what she's doing here, she's
22 seeking injunctive relief.

23 MR. ELDER: On behalf of a class.

24 THE COURT: Oh, I see.

25 MR. ELDER: And so there is a different -- and the

1 reason it's different -- and, your Honor, it bring me to an
2 issue that I'd like to discuss at the appropriate time, which
3 is that we believe there is a larger issue of mootness in this
4 case as a result of the settlements that have been reached to
5 date, and so I just want to flag that issue and I'd like to
6 discuss it with the Court at the appropriate time.

7 But, the standing to seek equitable relief, there has
8 to be a risk of future harm. And if you are pursuing that
9 claim individually, it's difficult to show that harm because
10 you're aware -- if you accept your claims, you're aware of the
11 alleged false advertising, you are not going to buy Enviga
12 anymore, and you can be compensated with money damages. So if
13 you don't bring the broader group in --

14 THE COURT: No, but if there is a finding that it is
15 false advertising and there has been a final finding and Coke
16 is enjoined from marketing the product with that
17 advertising --

18 MR. ELDER: And I guess what I'm saying is I'm not --
19 whether or not that injunction would be proper in an
20 individual case --

21 THE COURT: Yes.

22 MR. ELDER: -- I think is a question of some doubt.

23 THE COURT: Okay.

24 MR. ELDER: Would you like me to address the issue
25 that we think there is a global mootness issue here?

1 THE COURT: Yes, you've intrigued me.

2 MR. ELDER: Can I approach?

3 THE COURT: You may.

4 MR. GARDNER: Your Honor, may I respond to the
5 arguments -- may we respond to the arguments to --

6 THE COURT: Oh, absolutely.

7 MR. GARDNER -- class certification and motion for
8 summary judgment before we get into this new issue freshly
9 brought to the Court today?

10 THE COURT: All right, that's fair.

11 MR. GARDNER: Thank you, your Honor. I'll do it from
12 here.

13 I want to harken back to what claims are live. For
14 ascertainable loss for Ms. Franulovic, the Court said we need
15 to plead either/or, one or the other or both, that she did not
16 burn calories or that she did not lose weight.

17 THE COURT: And that she wouldn't have bought the
18 product if she had known that the claims were false, that they
19 didn't burn calories.

20 MR. GARDNER: That claim is still in there, that was
21 not -- the Court's instructions was that for the -- we needed
22 to -- the Court wanted us to amend if we chose to to plead
23 burning -- that it did not burn calories and that she -- or
24 that she did not lose weight. But the --

25 THE COURT: I don't --

1 MR. GARDNER: If I may, your Honor?

2 THE COURT: Yes.

3 MR. GARDNER: Step back to look at the prior
4 substantiation doctrine, which was originally a Federal Trade
5 Commission doctrine, and it's not actually false advertising,
6 your Honor, it's unfair or deceptive under the FTC
7 formulation, which is not the same as false.

8 THE COURT: I know, I was just using it generically.

9 MR. GARDNER: But it's an important distinction here.

10 THE COURT: But that --

11 MR. GARDNER: The Federal Trade Commission -- I
12 didn't mean to interrupt, your Honor.

13 THE COURT: But that claim's not in here in this case.

14 MR. GARDNER: It's in Paragraph 50, your Honor, you
15 read it. And it's not -- the fact that Coke didn't move for
16 summary judgment on it does not mean it's not alive. We
17 focused on what the Court wanted us to focus on, an
18 ascertainable loss.

19 THE COURT: Can we take a ten-minute break? I want to
20 read my ruling from the last time we were here in March. Or,
21 was it March?

22 MR. ELDER: I believe the Court --

23 THE COURT: Yes, I want to read through this. I need
24 to resolve this because I really need to resolve this. Okay,
25 let's take a ten-minute break. Can we do that?

1 THE DEPUTY CLERK: All rise.

2 (Short recess).

3 THE COURT: I'm sorry, counsel, but I literally read
4 from beginning to end the transcript of the March hearing and
5 I feel like it was *déjà vu* all over again. I feel like what I
6 was saying this morning was what I was saying in March. And it
7 was very clear to me then, as it is now, that the problem I
8 had was that there seemed to be these two theories going on
9 and I allowed the parties to amend the complaint to more
10 specifically state what I had called the weight-loss claim.
11 And the problem I had with the Franulovic complaint was that
12 nowhere in there did she allege an ascertainable loss. She
13 didn't allege that as a result of the -- that the
14 representations were false and she didn't burn any calories,
15 or that based upon all the studies she believed she didn't
16 burn calories. She didn't allege any of that.

17 Coke argued, Ms. Thorpe argued, well, we would be
18 very surprised to see any of those studies because I don't
19 think that they can allege that. And that is why I then said
20 well then file a motion to amend if you want to pursue that
21 claim, and Franulovic didn't do that. So I think what remains
22 in the case is the weight-loss claim only because, I mean, I
23 can cite to various portions throughout the transcript where
24 Ms. Thorpe -- page 25. "Your Honor, what's really significant
25 as well is the plaintiffs is not plead that Enviga did not

1 burn calories in anybody, which would be another way -- I
2 mean, in saying that Enviga does not burn calories in anybody,
3 the science isn't there to support this claim. Then they can
4 make that broader allegation and then that would cover the
5 individual plaintiffs, but they haven't made that allegation
6 either." And there are -- see, the problem was back then
7 that -- and I found this interesting when Ms. Thorpe said:
8 "This is a case in which they have to prove actual
9 ascertainable loss and they do that by going to hire an expert
10 witness who looks at the science, the substantiation of
11 Enviga, and says Enviga does not burn calories in anyone and
12 they have not done that. And there is a reason, your Honor,
13 they have not done that and they are very -- this complaint
14 is -- you know, they have done everything they can coming up
15 against that, you know, they won't say that and they don't
16 want to plead that it happens in this plaintiff and the reason
17 they want to avoid this, Mr. Gardner said it very explicitly,
18 this issue will come back to bite them at the class
19 certification stage."

20 So the problem was is when I listened to the parties
21 back in March it was not clear to me that Franulovic had
22 alleged an ascertainable loss with respect to the
23 calory-burning, she hadn't said, you know, that it was false,
24 the advertising was false because it doesn't burn calories and
25 I wouldn't have bought the product because it was false. And I

1 didn't see that in the complaint. And so because there was --
2 and I was very clear throughout that I wanted the parties to
3 be clear what claims they were pursuing so that the defendants
4 knew what they were defending.

5 And so, Mr. Gardner, it seems like the plaintiff
6 failed to amend to add that. Am I wrong?

7 MR. GARDNER: Pretty much, your Honor. May I? The
8 reason we didn't fail to amend to add the -- we didn't -- I'm
9 sorry.

10 THE COURT: Show me.

11 MR. GARDNER: As to whether she failed to burn
12 calories, I may have misunderstood the question, that's
13 absolutely true. We said then, we say now with hindsight it's
14 just impossible to go back and put her into a new locked room
15 and test her, which is the only way to determine
16 calory-burning.

17 THE COURT: No. But you could have alleged that based
18 upon all of these studies that show it doesn't do what it says
19 it does she believed she was harmed and therefore she wouldn't
20 have bought it, but I don't see that in the complaint
21 anywhere.

22 MR. GARDNER: The Paragraph 50 the Court read earlier
23 today --

24 THE COURT: Yeah.

25 MR. GARDNER: -- goes to that, that's the

1 ascertainable -- I'm sorry, that's the --

2 THE COURT: I know, but the defendant's beef with that
3 is that you didn't proceed the way I wanted you to proceed,
4 which is you need to get permission because if the amendment
5 had been futile, I wouldn't have permitted it.

6 MR. GARDNER: It was already in there and that was
7 not --

8 THE COURT: No, it wasn't, that's what I'm saying.

9 MR. GARDNER: Paragraph 50 is new? I didn't think so,
10 your Honor. It may be --

11 THE COURT: I sat down and did a word by word
12 comparison and if it was in the second amended complaint, then
13 my bad, I'm not aware of that.

14 MR. GARDNER: But we were not -- may I go ahead and
15 get into the prior substantiation doctrine which is what the
16 Paragraph 50 is based on?

17 THE COURT: No.

18 MR. GARDNER: Okay.

19 THE COURT: No, no, no, I because I need to know
20 whether or not that's in the case and it seems to me it's not
21 because it wasn't in -- show me in the second amended
22 complaint where it was.

23 MR. GARDNER: We can try to find it. I'm sorry, your
24 Honor, I didn't bring the second with us. But if we have it --

25 THE DEPUTY CLERK: I can print it.

1 MR. GARDNER: What we were allowed, we were allowed to
2 include one of the two things --

3 THE COURT: Or both.

4 MR. GARDNER: -- but because we -- yes. Because we
5 could not within good conscience say that as to her she didn't
6 burn calories, I don't believe that we would statistically
7 prove that. I know that about ten people in this country did
8 pursuant calories because I believe that --

9 THE COURT: But you could have alleged, not
10 specifically as to her, but based upon information and belief
11 because the allegations were such that you believed that she
12 didn't burn calories because the representations were false
13 and misleading.

14 MR. GARDNER: We could have, your Honor, and just --
15 that was not the way we heard the Court's direction, we
16 believed we had to say she did not burn calories.

17 THE COURT: She believed she did not burn calories?
18 What's her loss?

19 MR. GARDNER: Well, if she believed it -- her loss is
20 that she bought a product that didn't work as to her own
21 weight-loss and that she bought a product based on a
22 representation for which there was no substantiation. If Coke
23 without -- just as to posit a hypothetical, if Coke had
24 introduced this and called it the cancer cure and had no
25 studies for it and she bought it, she wouldn't have to prove

1 that she didn't get cancer or that she did get cancer. It
2 would violate the prior substantiation doctrine not because it
3 was false, which it would have been, but because they didn't
4 have substantiation for that claim. She bought based on
5 calory-burning and the implicit weight-loss claim. We pled,
6 as the Court offered for us to amend if we chose, that she did
7 not lose weight, but with all respect to the Court we did not
8 ever believe we needed to because we pled that they made a
9 claim for which they did not have substantiation, that under
10 New Jersey law establishes it. If you buy something -- it's
11 akin to bait and switch, your Honor. If you tell somebody you
12 got something that will do a given thing and you have no
13 reason to know that, they buy it, that is the ascertainable
14 loss. The fact that they got it based on a false pretense
15 or --

16 THE COURT: I think the problem herein lies is that I
17 directed the parties to more specifically lay out what their
18 claims were because back in March it was clear to me that
19 these claims were getting entwined, and I used that word a
20 couple of times, and so I told Franulovic to go back and amend
21 and to add the implied weight-loss but with respect to the
22 calory-burning claim to, you know, file your motion. I said --

23 MR. GARDNER: Well, your Honor, if we misunderstood,
24 my apologies, but we understood that you were saying if we
25 wanted to say it did not burn calories in her we needed to

1 file a motion just the same way that you gave us leave without
2 motion to file to say it she did not lose weight because of
3 the Court's concerns about ascertainable loss. We believed
4 that under New Jersey law we met the ascertainable loss test
5 by pleading that she wouldn't have bought it had she known
6 they didn't have the proof.

7 THE COURT: So I don't think that was in your second
8 amended complaint.

9 MR. GARDNER: And we are looking, your Honor. If
10 not --

11 THE COURT: I think in the Simmens and Malfi, if I I'm
12 recalling it correctly, it was, but that's not in front of me.

13 MR. GARDNER: They did amend to bring in the calory --

14 THE COURT: Sometimes I feel like we go backwards.
15 It's terrible, isn't it?

16 MR. GARDNER: Yes.

17 THE COURT: Well, can you tell me if that was in the
18 second amended complaint, that she wouldn't have bought it?

19 (Short Pause).

20 MR. GARDNER: In paragraph 20 we said, "Weight-loss
21 representations for the product, whether express or implied,
22 cannot be substantiated because the small number of studies
23 that exist are conflicting and inadequate."

24 THE COURT: Yeah, and that was the whole colloquy
25 about is this calory-burning or weight-loss.

1 MR. GARDNER: And we said that "after she read the
2 representations about calory-burning she increased her
3 consumption to three cans per today with the understanding
4 this would help her lose weight."

5 THE COURT: That goes to weight-loss. I don't see
6 that --

7 MR. GARDNER: There is -- I beg your pardon, your
8 Honor.

9 THE COURT: See, in the second amended complaint there
10 was no allegation that it was false representation and if she
11 had known it was false she wouldn't have bought it and
12 therefore she's out the purchase price of the can. I don't
13 remember seeing that. It's now in Paragraph 50 in the third
14 amended complaint, it was kind of like squished in there. So
15 the question is how do I deal with it because I see those to
16 be two separate claims.

17 Don't you, Mr. Elder?

18 MR. ELDER: We do see those as two separate claims.
19 And for us, your Honor, there are two key things here. First
20 of all, even in Paragraph 50 of this complaint that they're
21 pointing to they conflate weight-loss and calory-burning and
22 they say it was the weight-loss and the calory-burning. This
23 complaint was filed in response to a court order saying if you
24 want to go with weight-loss, just file your complaint; if you
25 want to do something different, file a motion. So, you know,

1 we --

2 THE COURT: Right. I mean, because I just spent the
3 last half hour, Mr. Gardner, reviewing this transcript and it
4 was very clear that there was this mass confusion about is
5 this a weight-loss, is this a misleading false representation
6 claim? Coke and Nestle have to know what they're defending
7 against and, you know, I feel like a year has passed by and
8 they thought they were defending against something and now it
9 seems like the plaintiff is saying no, that's really not our
10 case, which all explains my confusion when I took the bench
11 about what is the claim here.

12 So, it's very clear the weight-loss claimed survives,
13 is in the third complaint, and I'm inclined to grant summary
14 judgment because I don't think that this plaintiff makes out a
15 case. The question is what do I do with this other claim that
16 you think you have that I don't think is in?

17 MR. GARDNER: Your Honor, if they've moved for summary
18 judgment and the Court grants it --

19 THE COURT: No, no, no, but I've got to know what I'm
20 granting.

21 MR. GARDNER: Well --

22 THE COURT: I mean, I don't want you to just say we're
23 going to appeal you and we'll deal with another court, I want
24 to be -- you know, I mean, I've got to know what I'm granting.
25 If it's the weight-loss claim but you thought you had another

1 claim, I mean, I'm going to have to deal with that because if
2 I don't deal with it you know what the Circuit's going say,
3 they're going to sent it back and say well, what are you
4 dealing with? So that's the question.

5 MR. GARDNER: I would like to ask Mr. Quirk to address
6 the weight-loss claim, and if the Court would consider
7 argument on that. I hear the Court's inclination.

8 THE COURT: Yeah, I mean, I'm telling what my
9 inclination is.

10 MR. GARDNER: Also while he's talking, I will look
11 through these to see. I don't want to try to speed read and
12 tell you exactly what the second one versus third said, but I
13 will try to give you an answer after Mr. Quirk, if I may, your
14 Honor, or if not we'll ask to supplement.

15 THE COURT: See, when I looked at my March order, I
16 called it the weight-loss claim and the calory-burning claim
17 and I equate that with the implied weight-loss versus the
18 misrepresentation about it burning calories. And so now here
19 we are today and Coke has filed summary judgment on the only
20 claim they believe survives, which is the weight-loss, and I
21 think they're right, but you think that both claims are still
22 in the case.

23 MR. GARDNER: Not the claim as to Ms. Franulovic not
24 losing calories, that clearly is not. The
25 wouldn't-have-bought-if-she-had-known-the-truth we think is --

1 THE COURT: And that's news to Mr. Elder, right?

2 MR. ELDER: Absolutely.

3 MR. GARDNER: That would suggest that -- I'm sorry,
4 no, I don't have a response to that. If it's in the complaint
5 it should not be news to Mr. Elder.

6 THE COURT: But it wasn't, see, that's the -- well --

7 MR. GARDNER: And I do want to look at it, your Honor,
8 and if -- because when we amended, we did not include the
9 calory-burning claim as to her, thereby did not seek leave to
10 amend as the Court had instructed us we must do.

11 THE COURT: But you snuck 50 in.

12 MR. GARDNER: We either clarified the pleading or
13 snuck it in, your Honor. I don't think we snuck it in and
14 it's been there and that's the --

15 THE COURT: No, no, no, no, no, don't say it's been
16 there. It wasn't there.

17 MR. GARDNER: It has been there since we filed it and
18 Coke cannot say --

19 THE COURT: Oh, yes.

20 MR. GARDNER: -- that it was something that was filed
21 in April 14th of last year, that it was a surprise to it that
22 it is in that complaint.

23 MR. ELDER: Your Honor, if I may, I'm a little unclear
24 on the "it" that's supposed to be in the complaint.

25 THE COURT: Paragraph 50.

1 MR. ELDER: Okay.

2 THE COURT: And what he's saying Paragraph 50 is is
3 the -- instead of calling it calory-burning, let's call it
4 misleading claim.

5 MR. ELDER: Well, I think that's the problem because,
6 your Honor, the basis of the dismissal, and this is in the
7 October 25th opinion, Franulovic has not alleged that she or
8 members of the class failed to burn more calories or lose
9 weight, and it goes on. So --

10 THE COURT: And he says that that's what that does.

11 MR. ELDER: And this is the problem: Saying I
12 wouldn't have bought it had I known this, that or the other
13 doesn't cure the flaw that the Court identified and that we
14 discussed at length, which was you haven't alleged that
15 Ms. Franulovic failed to burn calories.

16 THE COURT: Right. And that was the problem I had
17 because they could have said either she didn't burn calories
18 and we know that because we put a thing on her arm, or based
19 upon all of the studies that we reviewed of Coke's we believe
20 she didn't burn calories because, for whatever reason, and
21 discovery would bear that out. That was the missing piece and
22 that's why I wanted the -- I call it the calory-burning claim,
23 let's call it the false representation claim/misleading claim,
24 that's why I wanted that fleshed out.

25 MR. ELDER: And, your Honor, in the operative

1 complaint, the third amended complaint, Paragraph 53,
2 "Although Franulovic did not lose weight while drinking
3 Enviga, she does not know and cannot prove whether she
4 actually did not burn calories as a result of drinking
5 Enviga." That's in the operative complaint.

6 THE COURT: And what could have been alleged is that
7 she doesn't know but based upon information and belief she
8 believes that she and other members probably didn't because
9 the studies showed X, and that's not in there.

10 MR. ELDER: And I would add to that it's not only not
11 in there but in the paragraphs that deal with the studies,
12 they certainly say we don't like your studies, we don't like
13 your science, but they also say they didn't show it in a
14 significant portion of consumers, they didn't show it in
15 everyone. You know, this language, it's this continued hedge,
16 and it doesn't say it doesn't work, it didn't work in her, and
17 that could have been alleged and we would be in a different
18 standpoint, but there was --

19 THE COURT: Yeah, or based upon information and
20 believe we don't believe it worked in her because --

21 MR. ELDER: And from --

22 THE COURT: -- the studies were flawed or, you know,
23 bogus, whatever. That was the missing piece, that
24 ascertainable loss piece that was missing.

25 MR. GARDNER: I will completely agree with your Honor.

1 I did not understand that we could have brought an information
2 and belief. We understood that the Court wanted us to say
3 flatly whether or not she did or did not or failed to burn
4 calories, just as whether or not she did not lose weight. So
5 we kept very strict to what the Court said there.

6 But we did -- Coke can't pretend surprise in an
7 effort to make clear what we saying about Ms. Franulovic. We
8 went from 3 to 11 paragraphs that just gave more factual
9 detail but did not add in the calory-burning claim. 50 says
10 she would not have purchased three cans had she known there is
11 a lack of reasonable support, would not have chose it to drink
12 as a beverage because of the cost. 52, it was of no value to
13 her. 53, although, and I will be real honest with the Court,
14 although she says she didn't lose weight, she can't say she
15 didn't burn it. Would I recon, given that she gained five
16 pounds, did she have a net calory gain over that time?
17 Probably not. But it's guesswork and we thought the Court
18 wanted us to plead specificity as to whether or not she did.
19 We may have been in error there, but that's -- we couldn't
20 plead what we thought the Court said.

21 THE COURT: Well, I just wanted specificity as to what
22 the claim was. And if the claim was one of false advertising,
23 there was no allegation that it was, at least as I saw the
24 second amended complaint, that the representations were false,
25 that they don't believe that she burned calories, or others

1 similarly situated burned calories and therefore she wouldn't
2 have bought it and she wasted her money and she's out the
3 money. I didn't see that in the second amended complaint,
4 unless I'm --

5 MR. GARDNER: You know, your Honor, absent sitting
6 down when I have quiet time, I believe the Court is quite
7 right.

8 THE COURT: Right. And that's why I said if you want
9 to amend, amend --

10 MR. GARDNER: We amended -- I'm sorry.

11 THE COURT: -- and flesh that out. Because what was
12 clear, you know, through that whole proceeding was it just
13 wasn't clear what you were alleging. And I remember that the
14 complaint, the Franulovic complaint did vary from the Melfi
15 and Simmens complaints, if I recall correctly.

16 MR. GARDNER: The amended one certainly did because
17 they were -- the initial complaints were copied verbatim from
18 ours, in large part were identical. Whether they did on that
19 or not, I don't know. I recall that they did amend to allege
20 that they didn't burn calories. So at least in the amended
21 one they did allege that.

22 THE COURT: No, but in the -- but in the --

23 MR. GARDNER: Initial.

24 THE COURT: In the initial there was no allegation
25 that she would not have bought it if she had known about the

1 misrepresentation, so you didn't even have that in there.

2 MR. GARDNER: It is in there now.

3 THE COURT: I know.

4 MR. GARDNER: And I don't believe that was -- we pled
5 more facts to be more detailed about the claim, we wanted to
6 be quite clear that we were to not making a calory-burning
7 claim but a misrepresentation claim that she would not have
8 bought it but for the deceptive and misleading advertising
9 which, as we detailed earlier on the page 11 of the third
10 amended was, in significant part, that they didn't have prior
11 substantiation. We're not -- we did as the Court instructed
12 and said that she did not lose weight because it was true, she
13 didn't, she gained weight.

14 THE COURT: Where is it they didn't have prior
15 substantiation and the misleading claim and she wouldn't have
16 bought it?

17 MR. GARDNER: May I approach? I can just hand you
18 this.

19 THE COURT: Which complaint are you looking at?

20 MR. GARDNER: Oh, it's the third amended, it's the
21 second sentence of Paragraph 50.

22 THE COURT: Right, but that -- and we're talking in
23 circles.

24 MR. GARDNER: Oh.

25 THE COURT: But that came about -- you snuck in the

1 weight-loss and calory burning in the same sentence, that's
2 the problem, I wanted them fleshed out.

3 MR. ELDER: Your Honor, if I could. There was a
4 comment that they were -- that there might have been some
5 ambiguity about how to go about this calory-burning claim and
6 I would submit that that wasn't the case because we had this
7 same lengthy discussion --

8 THE COURT: I know.

9 MR. ELDER: -- in this courtroom about how to do it.
10 And I believe earlier when you came back in you quoted
11 Ms. Thorpe's argument they're not saying it doesn't work in
12 anyone, here's how you do this. And so there wasn't any
13 ambiguity about what we have been saying is not in there,
14 there is no ambiguity about what the import of that was for
15 their claims through your order and they didn't comply with
16 the court order.

17 And finally, I would point out Paragraph 48 of the
18 third amended complaint says "Over the period of approximately
19 90 days that Franulovic used Enviga as prescribed by Coke,
20 i.e. drinking three cans of it per day, she did not lose any
21 weight and thus did not get the weight-loss benefits promised
22 by Coke." We believe, your Honor, that is the case that they
23 have plead, that they chose to plead in response to your order
24 and this other claim, however it is defined, is not in this
25 case.

1 THE COURT: Do you agree, Mr. Elder, that if the claim
2 is that the representation on the claim was false, we can
3 prove that it was false, that calories aren't burned and if
4 she knew it was a false claim she wouldn't have bought it and
5 she's out the money, that that's sufficient?

6 MR. ELDER: I would agree that that would get a lot
7 closer. I'd want to see a drafted complaint before I agreed
8 that they stated a claim.

9 THE COURT: Yes, which is where I was back in March.

10 MR. ELDER: And when we received an amended complaint
11 and no motion, we went forward with this case on a weight-loss
12 theory, we moved for summary judgment on a weight-loss theory,
13 we questioned Ms. Franulovic on a weight-loss theory, and at
14 least that theory, I think it's clear, has failed. Whether
15 they could state a claim or succeed on a claim that Enviga
16 just doesn't burn calories in anyone under any circumstances,
17 it's water, you know, it has the same effect, you don't know.
18 But, I'd like to see that complaint, it's not the one I have
19 in front of me.

20 THE COURT: Right, I agree.

21 And that's the claim you think is in front of me,
22 right?

23 MR. GRANGER: Yes, your Honor. But I will not whip
24 the horse further, unless the Court wants it whipped more.

25 THE COURT: I've never been called a horse before.

1 MR. GARDNER: And let the record reflect that you are
2 not being called one now. I was referring to the third
3 amended complaint, the second amended would have been a pony.
4 We think it is in there and I've reiterated why we think it is
5 in there, but we don't want to argue that with the Court.

6 THE COURT: All right. Well, you know, we've gone
7 forward to some degree because I think the weight-loss claim
8 has been sufficiently fleshed out.

9 So now let me hear you, Mr. Elder, on this --

10 MR. QUIRK: We haven't responded to their summary
11 judgment argument, your Honor.

12 THE COURT: Oh, yes. Okay, go ahead.

13 MR. QUIRK: Good afternoon, your Honor.

14 THE COURT: Yes. Do you folks need to take a break?
15 Are you okay? You want to take a lunch break for half hour or
16 no? You all right?

17 MR. ELDER: I think I'm fine to proceed, if you all
18 prefer.

19 MR. QUIRK: Prefer to proceed.

20 THE COURT: If I see you start falling over --

21 MR. QUIRK: Steve will catch me.

22 As to the weight-loss claim, we believe that the
23 record shows that summary judgment is not appropriate, that
24 Ms. Franulovic's deposition transcript shows that whatever
25 other claims she may or may not have that she has provided

1 sufficient evidence as to the weight-loss claim.

2 THE COURT: But how do you get around the fact that
3 she wasn't keeping tract, she wasn't, you know, monitoring her
4 intake? How could a reasonable jury ever find -- the fact
5 that her pants were loose and she thought the pants were
6 loose, I mean even though the non-moving party gets all the
7 reasonable inferences in their favor, they have to be
8 reasonable inferences. And there is no evidence that she even
9 attempted to incorporate this into a weight-loss regiment. So
10 how could a reasonable jury find that the -- find in her
11 favor?

12 MR. QUIRK: If Ms. Franulovic were to testify as she
13 did in pages 27 through 32 of her deposition, we think that
14 this does show a weight maintenance, at the very least,
15 regimen. Starting on page 27 at deposition Mr. Elder asked her
16 about what she ate and she goes into great description. She
17 talks about her daily diet of one cup of soy milk, one cup of
18 Go Lean cereal, lunch probably a banana, chicken and then
19 chicken again. She was very aware of what it was she was
20 eating during the time and what she was eating was consistent
21 with somebody who is trying to lose weight.

22 What she didn't have were exact numbers. She didn't
23 have the -- she didn't have an exact calory count, but she was
24 very careful about her diet. And at the end of this period of
25 having followed this diet she said that her pants were tighter

1 and that she gained weight and there is no evidence that's
2 contrary to that. That's the sum total of the evidence that's
3 in the record as to her dietary practices and her weight, and
4 we think that --

5 THE COURT: But that's all -- isn't that all
6 speculation?

7 MR. QUIRK: No, it's testimony as to what happened in
8 her life. She's not speculating as to what she ate and what
9 kind of diet she maintained. And as to the -- she is not
10 speculating as to how her clothes fit. I mean --

11 THE COURT: Okay, but she testified she doesn't even
12 weigh herself.

13 MR. QUIRK: Right, but her belief that she gained
14 weight is not speculation, it's informed by the fact that at
15 the end of the period her clothes were tighter.

16 THE COURT: Yes, but if she's not -- if there is no
17 evidence that she ate more, ate less, she says, well, I sort
18 of ate the same throughout, and she wasn't keeping track of
19 what she was eating, whether or not she was exercising more or
20 exercising less, how can I then make the -- I think it's a
21 theoretical conclusion that she gained weight. I just think
22 it's all hypotheticals and speculation.

23 MR. QUIRK: I don't think it's hypothetical at all.
24 What it shows is that she ate the same throughout, that she
25 wasn't taking in more or doing something that would offset

1 Coke's alleged calory-burning benefit, that she maintained a
2 constant, she added in Enviga and at the end of the time she
3 was bigger, not smaller. That's what she knows happened to
4 herself.

5 THE COURT: Well, her pants were tighter. It doesn't
6 mean she was bigger, it could just mean her weight shifted.

7 MR. QUIRK: Well, I mean, her --

8 THE COURT: She never weighed herself, how can you
9 tell me that she was bigger?

10 MR. QUIRK: Well, she said that she believed she
11 gained weight because her clothes were tighter. Now that's --
12 she's in the best position to know, and there is no evidence
13 to the contrary and we think that that's enough to create a
14 genuine issue of fact as to whether she received the implied
15 weight-loss benefit from Enviga.

16 THE COURT: Okay.

17 MR. QUIRK: And that's really it.

18 Mr. Elder raised a separate argument that I'd at
19 least like to address, and if possible amend. He said that in
20 filing our opposition to summary judgment that we didn't
21 follow the correct form under Local Rule 56.1. As to that, if
22 the Court would permit, what we've prepared is a supplemental
23 statement of -- or response to their statement of undisputed
24 facts essentially saying what we said in the brief but doing
25 it in numbered paragraphs and saying which allegations we

1 disagree with, which allegations we agree with and providing
2 the deposition citations, all of which were appended to our
3 opposition, if the Court would permit.

4 THE COURT: Well, you know the law in this district is
5 that a failure to file that can be an automatic basis for the
6 admission of the statement, a failure to comply with 56.1.

7 MR. QUIRK: Well, our feeling is their statement of
8 undisputed facts in their brief was not entirely numbered
9 paragraphs. It are started with essentially a prose section,
10 had a heading called "Franulovic's deposition," which was then
11 set apart by numbers, and then jumped straight to the legal
12 argument. We feel like we responded largely in the form that
13 they filed it, but if the form has created any problems, we
14 would like to fix that because it's not a problem as to
15 substance, it's a problem as to form. And we're not adding
16 new information, we're just putting it in the way that they
17 say that we failed to in a brief that was filed nine days
18 after its deadline. Their reply on summary judgment was due
19 on March 9th and they filed it two nights ago, and that's
20 where this argument was raised and we're trying to address it
21 simply by putting the same information into numbered
22 paragraphs, if the Court will permit.

23 THE COURT: I'm not going to hold you to the rule.
24 Although I have discretion, I'm not going to enforce the rule.
25 I mean, from this point forward you know what the local rules

1 require.

2 MR. QUIRK: Well, if it would help, we can put it in
3 anyway simply as a matter of -- if it helps the Court with
4 understanding where are the points of agreement and where are
5 the points of disagreement better than our original, then we
6 would submit it, if the Court would permit.

7 THE COURT: Let me think about it.

8 MR. QUIRK: Okay.

9 And just finally, I mean, in addition to
10 Ms. Franulovic's dietary practices and her -- you know, what
11 happened to her weight, Coke also has raised issues as to what
12 her actual expectations were as to what Enviga would do and I
13 just want to address the relevant deposition points there.

14 On page 40 Mr. Elder asked Ms. Franulovic, "Did you
15 during --" this is starting at line ten. "During this time
16 period when you were drinking Enviga, did you believe that
17 Enviga would make you lose weight?"

18 Her answer was: "I believed it would burn calories."

19 "And by your answer do I understand that burning
20 calories and losing weight aren't necessarily the same thing?"

21 Her answer is, "They can be.

22 "Okay, they can be but they don't have to be?"

23 "For me they are."

24 So she believed that this would help her both burn
25 calories and lose weight. That was her belief as to their

1 advertisements.

2 And again, I mean, even more clearly on page 88 of
3 her deposition Mr. Elder asked her, "Was it your understanding
4 that the calory-burning affect of drinking Enviga would be in
5 the range of 60 to 100 calories while you are drinking Enviga
6 in 2007?"

7 Her answer is "Yes."

8 The record is clear that she expected a
9 calory-burning and a weight-loss benefit from Enviga.

10 Mr. Elder is right on the separate point. She
11 understands that it's not a magic bullet. The discussion we
12 had a year ago, that if she had a can of Enviga in one hand
13 and six Big Macs in the other, she gets that. What she did
14 understand though was that if she did what she was doing all
15 along, which was not six Big Macs, it was a highly regulated
16 diet as set out on page 27 of her deposition, if she
17 maintained what she was doing and added Enviga, it would help
18 her and it didn't. That is her weight-loss claim and we think
19 there is enough in this transcript to -- in her deposition to
20 survive summary judgment.

21 THE COURT: I just want to look at page 27 and see
22 what you are referring to.

23 MR. QUIRK: She starts on line seven of page 27 and
24 the discussion of her diet actually -- and the discussion of
25 her diet actually goes on for several pages. They spent quite

1 a bit of time talking about what she ate and what she was
2 eating during this time was a healthy person's diet. And
3 the -- okay.

4 (Short Pause)

5 THE COURT: See, I think that what you want me to do,
6 Mr. Cuker, is that you want me to conclude that because she
7 pretty much had the same routine that she had before she
8 started drinking Enviga and the fact that her pants were
9 tighter, that therefore the weight-loss claim -- that she
10 survives the weight-loss claim and it becomes a jury question.
11 The problem is that to get to that conclusion I have to do a
12 lot of speculating, it seems to me. I have to speculate that
13 without much uncertainty she ate the same things, the same
14 quantities and the same caloric intake that she did pre-Enviga
15 and all she speaks to are generalities, and so I have to make
16 that leap which I don't think is permissible.

17 MR. QUIRK: She says that she ate the same things.

18 THE COURT: Same things.

19 MR. QUIRK: Mr. Elder certainly had the opportunity to
20 ask her did you eat any more. He didn't.

21 THE COURT: But she couldn't -- I mean, the thing is
22 she was very non-specific about what she ate because she
23 wasn't keeping track, she wasn't keeping track of her caloric
24 intake, and she wasn't keeping track of -- let's see. And she
25 just spoke in terms of typicality, she wasn't speaking in

1 terms of specifics. So because she was speaking in terms of
2 generalities, it kind of begs me then to speak in terms of
3 generalities: Well, then, since her pants were tighter, then
4 she must not have lost weight. And that all seems very
5 speculative to me.

6 You see what I'm saying?

7 MR. QUIRK: I see what you are saying. I don't think
8 it's speculative. The two things she describes are living life
9 as she always had and at the end of the day her clothes being
10 tighter, and while those may not be the only types of evidence
11 that would support a non-weight loss claim, the support the --
12 they support -- they support it. She talks about maintaining
13 her lifestyle and at the end of the period believing she
14 gained five pounds based on the way that her clothes fit.
15 It's not clear what more she could do, she or any ordinary
16 living person who is expecting to receive this benefit from
17 the product could do.

18 THE COURT: I don't think anyone will dispute that she
19 could have done a lot more. I mean, anyone who is on a serious
20 weight-loss regimen keeps track of their caloric intake. You
21 go in any of the Weight Watcher programs, for example,
22 etcetera, etcetera, I mean, that's what they all do and she
23 didn't do that here and so she is speaking in generalities and
24 she wants me to conclude in generalities that she must not
25 have lost weight and, therefore, the weight-loss claim must be

1 false and misleading.

2 MR. QUIRK: Well, those are the arguments that we
3 have, your Honor.

4 THE COURT: Okay. I'll read through the deposition
5 again.

6 Did you want respond to what he said?

7 MR. ELDER: Just briefly, your Honor. First of all, I
8 think the vagueness here belies the claim that there is an
9 implied weight-loss message in this advertising, and there
10 doesn't have to be that message, and Ms. Franulovic's
11 testimony has demonstrated that it's not there.

12 And these discussions about her diet, first of all,
13 just to address her diet quickly, you're absolutely right, she
14 talked in vague generalities but she also -- the consistency
15 that they're saying was there, it was just absolutely
16 consistent, isn't there. On page 31 of her deposition she was
17 asked about basically what she would eat for lunch and, you
18 know, said "What would that be?"

19 And she said "Besides the chicken and the
20 vegetables?"

21 "Right."

22 "Fruit, yogurt, power bars. Sometimes I would bring
23 the Crunch --" that was some cereal, "the Go Lean Crunch as a
24 snack. I'm always eating healthy."

25 "So, sometimes you eat fruit, sometimes you eat

1 yogurt, sometimes you eat a power bar, you eat chicken, you
2 eat vegetables?"

3 I mean, just like anyone else, your Honor. The
4 import of this testimony is while her diet was somewhat
5 consistent, possibly even more consistent than, you know, the
6 average person, it was varied, she ate different things at
7 different times. She said she ate Mike and Ike's candies. So
8 the idea that she had --

9 THE COURT: But sometimes she didn't.

10 MR. ELDER: Sometimes she didn't. Sometimes she ate
11 those, sometimes she didn't. So, like anyone else, her diet
12 varied and she doesn't have a basis for saying -- for allowing
13 a jury to conclude that she was at this caloric balance that
14 you would have to be at, and that's part of the issue. She
15 understood it was a hundred calories we're talking about. A
16 hundred calories, to lose weight you'd have to be at a pretty
17 tight caloric balance. She understood it was a hundred
18 calories, she understood there was no guarantee of weight-loss
19 and she understood why there was no guarantee of weight-loss,
20 and I think that's important as well.

21 THE COURT: What was the claim, if you drank three
22 cans you could burn up to 60 to a hundred calories?

23 MR. ELDER: 60 to a hundred calories, three cans. And
24 she testified that she had read that and she was aware of it.
25 And I think Mr. Quirk pointed it out, she said she thought it

1 was a hundred calories.

2 And, your Honor, to -- her testimony about whether
3 she gained or lost weight is equally speculative. At her
4 deposition on page 32 she's asked the question:

5 "Between November of 2006 and May of 2007, how did
6 your weight change, if at all?"

7 "I gained five pounds.

8 "Is there a particular reason that you remember that?"

9 "Because I was trying to lose five pounds.

10 "But you don't know what you weighed in February of
11 '07?"

12 "No, I just know my clothes were tight."

13 Your Honor, she doesn't even have -- her basis for
14 saying that she gained five pounds, "I know I was trying to
15 lose it," the testimony doesn't have factual significance, it
16 is her speculation about what she thinks happened to her and
17 she can't support it.

18 Finally, your Honor, just briefly on the procedural
19 issues.

20 THE COURT: Can you just remind me, counsel, why is
21 the questioning between November of 2006 and May 2007, is that
22 when she alleges she bought it?

23 MR. ELDER: That's when she alleges she was using it,
24 correct.

25 THE COURT: I'm sorry. Go ahead.

1 MR. ELDER: Just to briefly touch on the procedural
2 issues. Your Honor, the reason that we filed our reply brief
3 when we did is because plaintiffs didn't just respond to our
4 motion for summary judgment, they moved for affirmative relief
5 in their own motion seeking under Rule 56(f) for more time.
6 So, we combined our -- as they did, they moved in a motion and
7 then tacked on to the second part of that their reply brief,
8 so we responded to that motion and added our reply as well.
9 That's why it was filed and it was timely.

10 And just briefly on the statement of undisputed
11 material facts, I'm not sure to what Mr. Quirk was referring
12 but it's Docket Number 105-2 and, your Honor, it's a list of
13 paragraphs beginning with paragraph one, it's a separate
14 pleading and going through the end so --

15 THE COURT: No, I think it complies.

16 MR. ELDER: Okay. Unless there are any other
17 questions, that's all I have.

18 THE COURT: Thank you.

19 Mr. Gardner, or whoever is going to argue it, talk to
20 me about your motion for the further discovery.

21 MR. GARDNER: Your Honor, we don't know what Coke
22 knows about how people measure weight-loss because Coke
23 steadfastly refused to produce many, many documents, I forget,
24 but a couple of dozen objections, because it was a merits
25 based question. They are in control of things that went to

1 this issue, as what does happen, talk to us about weight gain.

2 THE COURT: How would any of that matter?

3 MR. GARDNER: Well, it would matter if as --

4 THE COURT: How does it matter how they measure weight
5 gain versus how Ms. Franulovic does?

6 MR. GARDNER: If they know that it is a standard way
7 of people who are monitoring their weight that they can --
8 that people can tell, the same way people can tell that a car
9 is speeding is -- they don't have a radar gun, they can just
10 tell. People can tell when they have gotten bigger. We
11 presented evidence that many diet plans are based on losing
12 inches about your weight. The entire issue on weight gain as a
13 rule is -- not the entire but a big issue about weight gain is
14 appearance, and appearance means when you lose weight you get
15 smaller. This is how people do things.

16 THE COURT: What does it have to do with discovery?

17 MR. GARDNER: We would like -- I suspect Coke has
18 information knowing -- saying they know full well that people
19 use tight pants, things like that, as an indicator of weight
20 gain. We'd like to know what they know about it. All we know
21 is what they're criticized Ms. Franulovic --

22 THE COURT: I'm sorry, I'm not following this.

23 MR. GARDNER: We would like to know what information
24 they have on the merits as to how consumers behave when
25 judging weight gain. It's pure speculation, your Honor.

1 THE COURT: What's speculation?

2 MR. GARDNER: On my part that we would have that. But
3 absent the discovery, I can only speculate, I don't know. We
4 are faced with addressing an issue that goes on merits.

5 THE COURT: Right. And so if you need further
6 discovery to really adequately respond to the motion, that's
7 something I need to consider, but I'm having a hard time
8 seeing what more you need in connection with this motion for
9 summary judgment with respect to Franulovic because you've got
10 her deposition, you know what she ate, you know what she
11 drank, you know whether she gained weight or not. Why do you
12 need discovery from Coke and Nestle about how they think
13 people should be measured when they gain weight? Why does it
14 matter if their evidence shows you should step on a scale or
15 you should look in the mirror? Why is that relevant?

16 MR. GARDNER: Because their entire premise of
17 attacking Ms. Franulovic is that no sane person would judge
18 weight gain by whether or not your pants got tight. Our
19 position is that many sane people would and we have reason to
20 believe that Coke knows that as well. So, what Coke has
21 done --

22 THE COURT: Okay, let's just assume that you are
23 right, let's assume that Coke has in its files somewhere that
24 we know that people measure their weight gain by how their
25 pants fit. Let's just assume they have that. I don't

1 understand why that's even relevant to the motion. So let's
2 just assume that she gained five pounds.

3 MR. GARDNER: If we assume that, in all candor, your
4 Honor, we don't need further discovery, we need it to address
5 that stuff, not --

6 THE COURT: Okay.

7 MR. GARDNER: -- not what she should have done.

8 I would want to point out that you can lose weight in
9 two ways -- several ways, but one way is to find a way to burn
10 calories, and there are drugs that do that. When I was with
11 the Attorney General's Office we brought suit against a doc
12 who had an extremely effective but also sometimes fatal
13 calory-burning pill. Ms. Franulovic, her testimony shows that
14 her intake, she doesn't have raw calory numbers, but her
15 intake stayed the same before, during and after her treatment
16 with Enviga, stayed the same.

17 THE COURT: Well, that's your spin.

18 MR. GARDNER: Well, she says that -- well, in
19 response, she ate the same stuff all along. It may have been
20 that on Tuesday she ate different than Wednesday, but, again,
21 so does everyone else they're advertising to. It's our spin
22 and it's also I think something that's completely supported by
23 the facts. There might be a fact dispute, but it is at best
24 that. It stays flat. If the one thing she changes over that
25 time is drinking this stuff and if it does in fact burn those

1 calories and will have an effect over time, then she should
2 have lost about a pound a month. A hundred calory loss over
3 30 days is 3,000, and I believe that's what you need to lose
4 about a pound. So, her expectation over that period was to
5 lose five, it was a reasonable expectation because she should
6 have if this stuff actually over time resulted in a reduced
7 net calories.

8 The other problem with these claims is that small
9 drops in calories, and this also gets to merits issues, your
10 Honor, that we have not fleshed out, but the science is clear
11 that a short-term caloric drop does not mean that there will
12 even be a caloric drop a week later. The body is a fantastic
13 and miraculous mechanism that can adjust to small drops in
14 caloric intake by doing other things or doing less in other
15 things. But if you accept that she did flat, and that is her
16 testimony, she didn't keep a log, your Honor, because she
17 didn't assume Coke was lying to her. She was a human, this is
18 not a test case, this is someone who read and ad, believed it
19 and added it as the -- added it to her diet believing that it
20 would work. She did not -- you know, if we can go back and
21 reinvent her and say, you know, Linda, we want you to keep
22 track of everything you eat, the calories, do not vary it, in
23 other words, behave over that multi month period as though you
24 were in a locked chamber -- well, I wouldn't do it because I
25 wouldn't ask anyone to do that, but that's what Coke is saying

1 you must do in order to state a claim for deception on
2 weight-loss. The only -- no one can do that whether they
3 weighed themselves constantly or --

4 THE COURT: I don't know that they're saying that. I
5 think they're saying you have to do it with much more
6 specificity and less speculation.

7 MR. GARDNER: That is goes to the quality of the
8 evidence and that again is a question for a trier of fact. It
9 may not be that -- whether it's the Court or a jury, they
10 might not buy it.

11 THE COURT: I think it goes to whether or not on a
12 motion for summary judgement I deal with conclusory
13 allegations or I deal with facts. And if those facts are very
14 conclusory, then are they really speculative versus concrete
15 facts? And that's, I think, the question I'm being call upon
16 to decide.

17 MR. GARDNER: There is sauce for both the geese and
18 the ganders for that, your Honor. It is Coke's initial burden
19 to set up a fact issue. It's using the same testimony that it
20 is now criticizing as being vague and ambiguous to say that
21 she didn't -- that she can't prove it. It relies on the same
22 things we are relying on. If it's unreliable as to us, it has
23 to be unreliable as to them and the initial burden is theirs.
24 If we can't -- if our using it and the way we think it works
25 does not work because of the variability, it can't work for

1 them to prove the contrary. It is sauce for both of us.

2 THE COURT: Okay.

3 MR. GARDNER: Thank you, your Honor.

4 Mr. Quirk wants to get it right, if we could.

5 MR. QUIRK: I probably won't, but I'll speak anyway.

6 On the point about --

7 THE COURT: Mr. Quirk, I think I called you Mr. Cuker
8 before. I'm sorry. Go ahead.

9 MR. QUIRK: I'm honored by the association.

10 On the point about the need for discovery, part of
11 this was a protective measure because Coke goes back and forth
12 in its motion and its briefing as to the basis on which its
13 seeking summary judgment. At times it looks like what its
14 arguing is that it's seeking summary judgment on the narrow
15 grounds relating to Franulovic's ascertainable loss, but Coke
16 says in its brief on page eight that plaintiff cannot prove
17 that Coke engaged in any unlawful conduct. Well, that's a
18 very different question because unlawful conduct under the
19 Consumer Fraud Act is any deception or misrepresentation,
20 regardless of whether anybody was deceived. And what they're
21 saying is that Franulovic aside, that we can't prove that they
22 made deceptive and misrepresentative statements.

23 THE COURT: Well, they believe you conceded the point,
24 that's the problem, they believe you conceded --

25 MR. QUIRK: What they say here is that we can't prove,

1 and our position is that --

2 THE COURT: Because of your concession by not bringing
3 it forward, isn't that what you meant, I assume?

4 MR. QUIRK: Well, even as to the implied weight-loss
5 claim, remember the implied weight-loss --

6 THE COURT: Counsel, I have a conference call. It's
7 not going to take me too long. I don't want to keep the
8 parties waiting, they've been waiting on hold. Can we just
9 take a five-minute break and then we'll get back and let you
10 finish up this point, then I want to move to the last point.

11 MR. QUIRK: Sure.

12 THE COURT: Okay? Let's just take a five-minute break.

13 THE DEPUTY CLERK: All rise.

14 (Short recess)

15 THE COURT: Let's just finish this last issue. I
16 think, Mr. Quirk, were you addressing me?

17 MR. QUIRK: Yes, your Honor. Just on the point about
18 discovery that as to the deception element of her implied
19 weight-loss claim Coke made the assertion that we cannot prove
20 that claim and the relevant evidence for that claim is all of
21 the testing and everything that they've done with the product,
22 and they've consistently told us when we sought discovery that
23 now is not the time for merits discovery and as part of their
24 motion for summary judgment they're now asking for judgment on
25 that basis as well as the others. And at times their argument

1 seems to be focused narrowly on the Franulovic-specific
2 ascertainable loss issues, but they say a lot more than that
3 and as to the broader statements we think to the discovery
4 that we've sought and has been denied is relevant to whether
5 the calory-burning representation is a deceptive practice,
6 ascertainable loss aside, because they've asked your Honor to
7 grant them judgment on that claim as well.

8 THE COURT: Okay. Thank you.

9 MR. QUIRK: Thank you.

10 THE COURT: Did you want to respond, Mr. Elder?

11 MR. ELDER: Sure. We've gone back to calory-burning is
12 the response. We pled in our brief and we said in our brief
13 they cannot prove an unlawful practice as to Ms. Franulovic
14 because her claim is that: You promised me I would lose
15 weight. And she said in her deposition she understood no such
16 promise was made and she knew why and so this motion doesn't
17 tee up the issue of does this product burn calories, it tees
18 up the issue of did Ms. Franulovic understand what she was
19 buying, and we believe we've shown that she did, and they
20 haven't articulated anything that they could possibly discover
21 that would change her admissions.

22 And I would add, your Honor, that we didn't just
23 decide not to produce documents to them, this was litigated in
24 front of Judge Schneider and he made rulings and required us
25 to produce certain documents and not others. And so, you

1 know, this wasn't just Coke objecting, this was setting the
2 bounds of discovery to address the issues that need to be
3 addressed in front of the Magistrate and they had a full
4 opportunity to make their case to him if they needed anything.
5 So, we're talking about what Ms. Franulovic has conceded and
6 that's the basis for our motion.

7 MR. QUIRK: Your Honor, a one sentence response? What
8 we litigated in front of Judge Schneider was the appropriate
9 discovery for class certification. What we're talking about
10 here is discovery relating to summary judgment, that was never
11 in front of Judge Schneider because Judge Schneider's order
12 ordered discovery pertaining to class certification, the
13 summary judgment motion came later and that's why these
14 questions were not raised in front of Judge Schneider.

15 THE COURT: Well, except that they're intertwined I
16 guess is the issue. All right, we don't need to reargue that.

17 Okay, let me hear -- you handed me a document you
18 wanted me to look at, Mr. Elder.

19 MR. ELDER: I did.

20 THE COURT: Here it is.

21 MR. ELDER: And we wanted to make the Court --

22 THE COURT: I'm sorry, one other question for
23 plaintiff's counsel. Do you agree that if I were to grant
24 summary judgment as to the weight-loss claim that the motion
25 for class certification as to that claim falls as well?

1 MR. GARDNER: I believe so, your Honor. I may not be
2 tracking it, but --

3 THE COURT: You may not be understanding me?

4 MR. GARDNER: I may not be thinking -- I understand
5 the question, I'd kind of want to think of the ramifications,
6 but an immediate and honest answer is I believe the Court is
7 absolutely right.

8 THE COURT: Okay.

9 MR. GARDNER: And if I am persuaded how absolutely
10 wrong I was, we will advise the Court later.

11 THE COURT: All right.

12 MR. GARDNER: But, yeah, if you say she loses, it's
13 not an adequacy issue, she's gone, the claim is gone from the
14 case. Therefore, absent substitution, there is no one there
15 that can raise it.

16 THE COURT: All right.

17 Go ahead, Mr. Elder.

18 MR. ELDER: Your Honor, the plaintiffs have eluded
19 some to their pleadings and it's been in the press, I don't
20 know if you were aware, there was an General Attorney
21 investigation of the Enviga advertising and the result of that
22 investigation is what I've handed you, which is the claims on
23 the label will be modified as per the language they have in
24 front of you. And the language that's important for our
25 purposes, your Honor, has the stars by it. On the left hand

1 side of your page there is three bullets there. One says --
2 begins "three cans." The middle bullet says "Enviga burns
3 calories but it's not by itself a guaranteed weight-loss
4 solution." That is new language. And then the third bullet
5 says "remember, weight-loss requires a reduced calory diet and
6 regular exercise." That's new language as well. The other
7 language that makes up those bullets has just been moved from
8 different places on the can.

9 THE COURT: Is this in effect now?

10 MR. ELDER: It is being rolled into effect as
11 inventory is used up, and we believe that that will be used up
12 by September, so it's on a rolling basis per the agreement.

13 And the reason we believe this is important, your
14 Honor, is because we have a class here that's seeking only
15 injunctive relief. To have injunctive relief there has to be a
16 risk of future harm. We believe that changing the label
17 eliminates any potential for future harm and moots the claims
18 of the class.

19 THE COURT: Except if the cans are still on the
20 shelves though, right?

21 MR. ELDER: But by the time this issue comes to a
22 head, the cans will not still be on the shelves. So it's
23 happening and it will be complete in a matter of months, you
24 know, we believe around September but it depends on the rate
25 at which the cans turn over and stores replace existing

1 inventory.

2 THE COURT: Is this something I need to address now?

3 MR. ELDER: It is not something we need address now,
4 but we wanted to bring it to the Court's attention because we
5 believe if you are going to have a class seeking only
6 injunctive relief and what you want is a change to the label
7 and the label has been changed, then you've got a mootness
8 issue. And I'm certain that the plaintiffs will contend that
9 this label is also inadequate, but that's an issue that needs
10 to be litigated and discussed before we move forward here.

11 MR. GARDNER: I think not, your Honor. You know, early
12 on in the case we served discovery on Coke asking if there
13 were governmental investigations. They refused to answer. We
14 moved to compel. Judge Schneider said they did not need to
15 answer. At that time Coke said the governmental
16 investigations, including this one, were moot -- or did not
17 matter for this lawsuit. Now that they've gotten the
18 settlement from the AG, they blind-side us by coming in today
19 saying we're fixing to change and when we do, that will moot
20 it, therefore think about it now. I think that's completely
21 inappropriate, your Honor.

22 We were aware of the settlement, but not from Coke.
23 This is the first mention -- this is the first contact we've
24 had from Coke about the settlement, is as we are in the
25 courtroom today. But, yes.

1 One thing, your Honor. (Indicating) This is what
2 consumers see when they buy it, they don't see the little
3 print on the back.

4 THE COURT: What? That's what your whole case is
5 about.

6 MR. GARDNER: This is what our whole case is about, is
7 the calorie burner. But if we look at the print on the back,
8 we believe that a copy test will show that this may well
9 racket up deception and it certainly doesn't cure it because
10 now for the first time they do tell -- make claims about
11 weight-loss, so it may not work for you, but that also mean it
12 may work for you.

13 So, these are not good enough to resolve the lawsuit,
14 anyway, but it is completely speculative as to what will in
15 fact happen in September. It's just as likely that Enviga
16 will be completely off the shelves. This is not a product
17 succeeding in the marketplace, it has been withdrawn from
18 distribution in some areas of the country, according to
19 Mr. Elder. So, this is -- it's an unripe thing, Mr. Elder's
20 trying to bias you into thinking well, it's moot, so why
21 shouldn't I throw a few bones his way, it's an inappropriate
22 thing.

23 THE COURT: No, no, no, I'm not throwing any bones any
24 way. If it's moot, it's moot, it's a jurisdictional issue.

25 MR. GARDNER: Then bring a motion on that and show why

1 this does not deceive. We believe it still will, your Honor.

2 THE COURT: Well, no, don't you have a whole other
3 host of problems, a jurisdictional problem, because your class
4 plaintiff says that she bought it on an old label and if you
5 are going to seek to enjoin them from this label, that's a
6 whole other case?

7 MR. GARDNER: No, your Honor, we would seek to enjoin
8 Coke from future representations regarding the efficacy of
9 these products, not "don't say that." But, we're not trying
10 to rewrite their label. An injunction would not be, at least
11 in my mind, a mandatory injunction but prohibitory: Do not
12 represent, as we've told Coke repeatedly, that this is a
13 calory-burning product because based on the evidence you have,
14 that's not true for most people, you have no adequate
15 substantiation to make that claim. That's the injunction we
16 seek.

17 THE COURT: I thought you said earlier in your
18 pleadings that there -- see, oh, boy, here we go again. But I
19 thought for sure you said that Coke has studies that show that
20 it burns calories in people and then your big beef at the time
21 was but that was only in a group of people and they didn't
22 tell -- the label didn't tell Ms. Franulovic that and
23 therefore she was deceived. Now they do exactly what you say
24 they're studies showed. And so, so what?

25 MR. GARDNER: The study -- *the* study, unless Coke has

1 more that it has not produced to us, there is one study of
2 Enviga, it was 20 to 30 below average body mass index, BMI,
3 active young people that were put in the box and whose
4 calories --

5 THE COURT: Healthy, normal weight 18 to 35-year olds,
6 perhaps?

7 MR. GARDNER: I need to look at the numbers again.
8 But, your Honor, that statement does not say to others that it
9 won't work for a 36-year-old, they're just putting that in as
10 a qualifier. It is still -- this is deceptive, your Honor, the
11 big print. The tiny print on the back is -- again, a basic
12 tenet of consumer protection law is that putting something in
13 a footnote or an explanation telling the truth in the fine
14 type does not amount to curing a deception in the big print.

15 THE COURT: I know, but I thought that you said -- I
16 thought that you said their studies showed that it does burn
17 calories.

18 MR. GARDNER: It -- well --

19 THE COURT: So --

20 MR. GARDNER -- they're studies. And what it also
21 showed is that for some people in that study, it made them --
22 they burned less calories, so in theory they gained weight.
23 Not everyone in that study burned calories, even in that small
24 boxed up group of people. There is no evidence that it will
25 burn calories past the three days even for those people. If

1 they'd been tested longitudinally over time, there is no
2 evidence. They might have a case, but there is no evidence at
3 all that it worked other than in a closed room environment.
4 Nothing.

5 THE COURT: Well, I guess I'll just have to deal with
6 it at the time, right now it's not before me. But it seems to
7 me that there is a whole host of jurisdictional hurdles that
8 will surface and I guess I'll address them at the time.

9 MR. GARDNER: If it cures the problem, your Honor, it
10 is moot; if it doesn't cure the problem, it's not.

11 THE COURT: Well, if I hear what you are saying, that
12 just if they're having the calory burner on there, that's
13 problematic, well, okay, but what's coming to my mind, and
14 again it's not before me, is what does that have to do with
15 Franulovic because now we're talking about a different product
16 in September --

17 MR. GARDNER: Different label, same product, as far as
18 I know.

19 THE COURT: Yeah, but she -- different what?

20 MR. GARDNER: The labeling, the label is changed, or
21 will be change in the future.

22 THE COURT: Yes. So how can she be a class
23 representative of this label? Well, you know what? We're
24 just --

25 MR. GARDNER: Okay, your Honor.

1 THE COURT: We don't need to go there.

2 MR. GARDNER: Thank you, your Honor.

3 THE COURT: I think it was a -- I think it's going to
4 be problematic, I think it's going to be problematic, but I'll
5 deal with it when I need to.

6 Okay, anything else? I'm going take the matter under
7 advisement. I thank counsel for their presentation. I didn't
8 mean to leave you folks out. You're happy just to sit there
9 and let Mr. Elder do all the --

10 MR. BOYER: I enjoyed hearing the arguments very much,
11 your Honor, I have nothing to add.

12 THE COURT: Mr. Pottinger?

13 MR. POTTINGER: Nothing to add on my part, your Honor.

14 MR. GARDNER: For clarity, Judge, Nestle's not a party
15 to this case, so....

16 THE COURT: Oh, they're not, that's right.

17 MR. GARDNER: He's just a friendly interloper.

18 THE COURT: It's always nice to have friends in the
19 courtroom.

20 All right, counsel, thank you.

21 MR. GARDNER: Thank you nor your time, Judge.

22 THE DEPUTY CLERK: All rise.

23 (Proceeding ended at 1:56 PM)

24

25

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