

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

Linda Franulovic , individually and on behalf of a class of persons,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 1:07-cv-00539-RMB-JS
	§	
The Coca-Cola Company ,	§	
	§	
Defendant.	§	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT
OF RULE 59(e) MOTION TO AMEND JUDGMENT TO
ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT**

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 59(e) and 15(a), Plaintiff Linda Franulovic moves for an order amending the judgment and allowing her to file her fourth amended complaint. Leave to amend under Rule 59(e) is subject to the same standard as under Rule 15(a) itself; i.e., it shall be “freely given when justice so requires.”¹ This means that “amendment should be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay.”² Here, there is no delay or bad faith on Plaintiff’s part in seeking leave to amend, no resulting prejudice to Defendant, and the Court invited Plaintiff to make this Motion.

PROCEDURAL HISTORY RELEVANT TO THIS MOTION

Franulovic filed this action alleging that Defendant The Coca-Cola Company (“Coke”) deceptively marketed and branded Enviga as a weight-loss product when it had no substantiation for its advertising and labeling claims that Enviga causes calorie-burning (i.e., weight loss). She alleged that Coke extensively advertised that Enviga burns calories, even though there are no scientifically valid studies providing a reasonable basis for these factual claims.³ She claimed that Coke’s deceptive marketing and labeling of Enviga violates New Jersey’s Consumer Fraud Act (“CFA”),⁴ and Food and Drug Law.⁵

Franulovic further alleged that she saw these advertisements for Enviga, began purchasing and drinking one can a day. She then saw Coke’s specific representations about calorie-burning on the Enviga can label and increased her consumption to three cans a day with

¹ *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir. 2007) (quoting Fed. R. Civ. P. 15(a)).

² *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984).

³ Doc. 79, Third Amended Class Action Complaint ¶¶ 16-43.

⁴ N.J.S.A. 56:8-1, *et seq.*

⁵ N.J.S.A. 24:17-1, *et seq.*

the understanding that this would help her to lose weight.⁶ She alleged that she suffered ascertainable losses as a direct result of Coke's wrongful conduct.⁷ Franulovic sought class-wide declaratory and injunctive relief under the CFA to prohibit Coke from continuing its deceptive marketing of Enviga, individual monetary relief to satisfy the CFA's standing requirement, plus attorney fees, costs, and such other relief as the Court deemed appropriate.⁸

Coke filed a Motion for Summary Judgment in January 2009,⁹ and Franulovic responded to that motion.¹⁰

The Court issued its Opinion and Order¹¹ granting Coke's Motion for Summary Judgment and dismissing Franulovic's Complaint without prejudice on April 16, 2009. The Court's Opinion¹² stated, "the only claim remaining in this case is premised upon Plaintiff's allegation that she failed to lose weight while drinking Enviga, despite Defendant's implied promise that drinking Enviga would facilitate weight-loss."¹³ The Court's Opinion further clarified, "the only 'ascertainable loss' now before the Court is Plaintiff's failure to lose weight after consuming Enviga in the advertised quantities."¹⁴ The Court granted summary judgment.

In addition, the Court stated that it would allow Franulovic to move to alter the judgment pursuant to Federal Rule of Civil Procedure 59(e) or 60(b), and to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a).¹⁵

⁶ Doc. 79, Third Amended Class Action Complaint at ¶ 45.

⁷ *Id.* at ¶ 62.

⁸ *Id.* at pp. 15-16 (Prayer for Relief).

⁹ Doc. 105.

¹⁰ Doc. 110.

¹¹ Docs. 118 and 119.

¹² Doc. 118.

¹³ Doc. 118 at 9.

¹⁴ Doc. 118 at 10-11.

¹⁵ Doc. 118 at 18.

ARGUMENT

Franulovic satisfies the liberal requirements for granting post-judgment leave to amend. The standard for granting leave under Rule 59(e) is the same as that under Rule 15(a).¹⁶ The Court should grant leave absent undue delay or bad faith by a plaintiff or prejudice to the defendant.¹⁷ Here, there is no plausible allegation of undue delay, bad faith, or prejudice.

First, Franulovic does not move to amend with undue delay. She files this Motion within the ten-day period allowed under Rule 59(e) for post-judgment relief. Second, Franulovic does not move to amend in bad faith. Franulovic contends that she had appropriately filed the Third Amended Class Action Complaint, pleading her ascertainable loss claim both as to her failure to lose weight and as to her loss of monies from purchases of an ineffective product. However, Franulovic understands that the Court disagrees.¹⁸ Third, Franulovic's Motion to Amend would not result in prejudice to Coke. As Coke suggested at the March 20, 2009 oral argument, it might not oppose this motion.¹⁹

In her proposed amendments, Franulovic seeks to respond promptly and directly to the Court's stated concerns over ascertainable loss. In her proposed Fourth Amended Class Action Complaint,²⁰ Franulovic revised allegations specific to her claim of ascertainable loss. The proposed Fourth Amended Complaint has substantive revisions to Paragraphs 53, 54, and 69 in the Third Amended Complaint on file with the Court.²¹ These revisions are:

¹⁶ *Fletcher-Harlee Corp.*, 482 F.3d at 253.

¹⁷ *Adams v. Gould, Inc.*, 739 F.2d at 868.

¹⁸ Doc. 118 at 17.

¹⁹ Doc. 118 at 17, footnote 6.

²⁰ The Fourth Amended Class Complaint is attached as Exhibit A to the Affidavit of Mark R. Cuker in Support of the Motion.

²¹ Paragraph 50 from the Third Amended Complaint remains in this proposed amendment. In addition, Paragraph 72 in the Third Amended Complaint has been deleted because it is repetitious of allegations in revised Paragraph 69.

- Franulovic wasted money by purchasing Enviga in reliance on misleading advertising, because Enviga was ineffective in providing the results (burning calories and losing weight) that Coke promised.²²
- Franulovic bought a product that was ineffective—it did not cause her to lose weight and it is likely that it did not cause her to burn calories. Franulovic would not have purchased Enviga but for the deceptive and misleading advertising claims of weight loss and calorie burning.²³
- Franulovic and other consumers residing in New Jersey wasted money by purchasing Enviga in reliance on misleading advertising, because Enviga was ineffective in providing the results Coke promised—burning calories and losing weight.²⁴
- Franulovic and other consumers residing in New Jersey bought a product that Coke marketed without adequate prior substantiation for its calorie-burning claims, and that did not provide the promised benefits of either calorie burning or weight loss.²⁵
- Coke wrongfully obtained monies from purchases of Enviga by Franulovic and other consumers residing in New Jersey.²⁶

Thus, Franulovic alleges that she suffered an ascertainable monetary loss because she bought a product that she would not have paid for but for Coke’s deceptive and misleading advertisement and branding of it.²⁷

²² Fourth Amended Class Action Complaint, ¶ 53.

²³ *Id.* at ¶ 54.

²⁴ *Id.* at ¶ 69.

²⁵ *Id.* at ¶ 69.

²⁶ *Id.* at ¶ 69.

²⁷ *Id.* at ¶ 54.

CONCLUSION

For the reasons set forth herein, the Court should grant Plaintiff's Motion.

Respectfully submitted,

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Dated: April 30, 2009