IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LINDA FRANULOVIC, individually and on behalf of a class of persons,	)	CIVIL NO. 1:07-cv-00539-RMB-JS
Plaintiff,	)	CLASS ACTION
v.	)	Document Electronically Filed
THE COCA-COLA COMPANY,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 59(e) MOTION TO AMEND JUDGMENT TO ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT

McCARTER & ENGLISH, LLP
By: GITA F. ROTHSCHILD
PETER J. BOYER
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 639-5959 (telephone)
(973) 297-3833 (facsimile)

ALSTON & BIRD LLP
By: JANE THORPE (ADMITTED *PRO HAC VICE*)
SCOTT ELDER (ADMITTED *PRO HAC VICE*)
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000 (telephone)
(404) 881-7777 (facsimile)

Attorneys for Defendant
The Coca-Cola Company

Pursuant to Federal Rules of Civil Procedure 12(b)(6), 15(a), and 59(e), Defendant The Coca-Cola Company ("TCCC") respectfully requests that this Court deny as futile Plaintiff's motion to filed an amended Complaint.

INTRODUCTION

Attempting for the fourth time to establish a viable cause of action, Plaintiff proposes a Fourth Amended Complaint that is virtually identical to the previously adjudged Third Amended Complaint and that suffers from the same flaws that warranted summary judgment for TCCC. In fact, the newly proposed complaint so closely tracks the dismissed complaint that only four of its 72 paragraphs have a change to even a single word. What is more, Plaintiff's proposed complaint entirely disregards this Court's adverse adjudication of her weight loss claim – pretending as though the Court's summary judgment ruling does not exist. Rather than address any of the multiple flaws that led the Court to grant summary judgment to TCCC, Plaintiff simply proposes that she use the same totally deficient weight loss theory as her means of proving that Enviga allegedly does not burn calories. As a consequence, Plaintiff's proposed Forth Amended Complaint would be futile, and Plaintiff's Motion to Amend should be denied.

Importantly, in granting summary judgment to TCCC, the Court already determined that "the inferences that Plaintiff failed to lose weight, and that Enviga caused her failure to lose weight, are patently unreasonable."[1] Plaintiff's motion does not seek to alter or amend the Court's rulings. Rather, Plaintiff ignores the Court's decision and, remarkably, bases her amended complaint on the exact same weight loss theory. Thus, in the proposed Fourth Amended Complaint, Plaintiff now alleges that **"[b]ecause**

[1] April 16, 2009 Opinion, p. 16.

Franulovic did not lose weight while drinking Enviga, it is a reasonable inference that she did not burn calories as a result of drinking Enviga."[2] In short, Plaintiff's proposed new theory rests upon an alleged "reasonable inference" that the Court has fully considered and held to be "patently unreasonable." As this Court held in April, and based on her own sworn admissions, Plaintiff cannot prove she did not lose weight and she cannot reasonably link any alleged failure to lose weight to Enviga. As such, her alleged but unproven failure to lose weight cannot possibly constitute evidence that Enviga does not burn calories.[3]

While Plaintiff's theory cannot be reconciled with the dismissal of her weight loss claim, it is not entirely surprising given Plaintiff's prior admissions concerning calorie burning. Specifically, Plaintiff's Third Amended Complaint affirmatively alleged that Plaintiff "does not know **and cannot prove** whether she actually did not 'burn calories' as a result of drinking Enviga."[4] Plaintiff has maintained that she cannot possibly prove a lack of calorie burning.[5] As TCCC has pointed out repeatedly, that claim is simply not true. Plaintiff could – but remains unwilling to – allege that Enviga does not burn calories because its ingredients do not have the claimed calorie burning effect on people at all. Plaintiff steadfastly refuses to make that allegation; she asserts instead that

[2] Fourth Amended Complaint, ¶ 53.
[3] In this regard, this Court already has determined that Plaintiff's reasoning is "circuitous." March 24, 2008 Hearing Transcript, 11:15-19.
[4] Third Amended Complaint, ¶ 53 (emphasis added).
[5] March 24, 2008 Hearing Transcript, 8:19-23 ("As we advised the Court in our motion, **we do not believe that it is possible**, absent having put Ms. Franulovic into a closed environment at the time she was taking Enviga, **to allege, much less prove, that she failed to burn calories.**").

"Enviga was an ineffective product that **likely** did not cause her to burn calories or lose weight . . ."[6]

Additionally, Plaintiff's Motion to Amend should be denied because Plaintiff's proposed Fourth Amended Complaint is moot. Like her prior complaints, Plaintiff's proposed Fourth Amended Complaint seeks an injunction as the only relief on behalf of the proposed class. Specifically, Plaintiff seeks an injunction "[e]njoining Coke from its unlawful conduct."[7] The proposed injunction has been rendered moot by changes to the can label and advertising for Enviga resulting from resolutions of other actions alleging identical claims. Those changes already are being enacted, and mootness provides an additional, independent basis for denying Plaintiff's request to file her Fourth Amended Complaint.

FACTUAL BACKGROUND

I. PROCEDURAL HISTORY

The Center for Science in the Public Interest ("CSPI") originally filed this case on February 1, 2007, alleging that TCCC, Nestlé USA, Inc. and Beverage Partners Worldwide ("BPW") engaged in "illegal, fraudulent, and deceptive business practices" in the marketing of the sparkling green tea beverage, Enviga.[8]

On August 27, 2007, TCCC filed a motion to dismiss Franulovic's Second Amended Complaint for, *inter alia*, failure to state a claim under Fed. R. Civ. P.

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[6] Fourth Amended Complaint, ¶ 54 (emphasis added). *See also* Fourth Amended Complaint, ¶ 28 ("There is in fact no substantiation or reasonable basis for claiming that Enviga (or the amount of EGCG and caffeine in three cans of Enviga) has any effect on caloric balance or weight **for the majority of adults** . . .") (emphasis added).

[7] *Id*. at Prayer for Relief, ¶ 5.

[8] CSPI's Complaint (filed Feb. 1, 2007) (Docket No. 1).

12(b)(6).[9] On October 25, 2007, this Court dismissed Franulovic's Second Amended Complaint pursuant to Rule 12(b)(6) because Franulovic's Second Amended Complaint "failed to adequately plead ascertainable loss. . . ."[10]

Franulovic then filed a motion to amend the judgment to allow her to file an amended complaint because her claim had been dismissed in its entirety.[11] On March 10, 2008, this Court issued an order permitting Plaintiff to "file an amended complaint alleging a so called 'weight loss claim,'" but requiring Plaintiff to "move for leave to file an amended complaint alleging, in addition to the approved weight-loss claim, a so-called 'calorie burning' claim" if they wished to pursue such a claim against TCCC.[12] Plaintiff did not seek leave of court to pursue a calorie burning claim against TCCC. Instead, on April 14, 2008, Plaintiff filed her Third Amended Complaint alleging only a weight loss claim.[13]

A hearing on TCCC's Motion for Summary Judgment on Plaintiff's Third Amended Complaint and Plaintiff's Motion for Class Certification was held on March 20, 2009. Following that hearing, the Court on April 16, 2009 issued an Opinion granting summary judgment to TCCC and therefore dismissing as moot Plaintiff's request for class certification. As a result of Plaintiff's alleged confusion regarding the Court's prior order requiring Plaintiff to move for leave to amend to assert a calorie burning as opposed to a weight loss claim, the Court permitted Plaintiff to seek leave to

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[9] Motion to Dismiss Second Amended Complaint (filed Aug. 27, 2007) (Docket No. 43) (hereinafter "TCCC's Motion to Dismiss").
[10] Oct. 25, 2007 Opinion, p. 26 (Docket No. 60).
[11] Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint (filed Nov. 8, 2007) (Docket No. 62).
[12] March 10, 2008 Order, p. 2, Docket No. 75; *see also* March 10, 2008 Hearing Transcript, 62:21 – 63:13.
[13] Third Amended Complaint, ¶ 53.

amend her complaint to attempt to state a claim that "Enviga does not burn calories as advertised."[14]

Plaintiff thereafter filed her Notice of Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint ("Second Motion to Amend"). In her Second Motion to Amend, Plaintiff seeks permission to file a Fourth Amended Class Action Complaint.

II. PLAINTIFF'S THIRD AMENDED COMPLAINT AND PROPOSED FOURTH AMENDED COMPLAINT ARE VIRTUALLY IDENTICAL

Plaintiff's proposed Fourth Amended Complaint is virtually identical to the Third Amended Complaint recently dismissed by the Court. Notably, Plaintiff continues to fail to separate her theory that Enviga does not burn calories from her theory that Enviga does not cause weight loss. To the contrary, Plaintiff hinges her calorie-burning theory entirely on her previously-dismissed weight loss theory.

Of the 72 paragraphs included in Plaintiff's proposed Fourth Amended Complaint, only four differ from the Third Amended Complaint. The perfunctory revisions are most easily shown with the following table:

Paragraph	**Third Amended Complaint**	**Fourth Amended Complaint (revisions and additions in bold italics)**
53	Although Franulovic did not lose weight while drinking Enviga, she does not know and cannot prove whether she actually did not "burn calories" as a result of drinking Enviga.	***Because*** Franulovic did not lose weight while drinking Enviga, ***it is a reasonable inference that she did not burn calories as a result of drinking Enviga. Moreover, she wasted money by purchasing Enviga in reliance upon misleading advertising, because Enviga was ineffective in providing the results***

[14] *Id*. at p. 17.

		Coke promised – burning calories and losing weight.
54	Franulovic's ascertainable loss is not that she failed to "burn calories," but that she bought a product she would not have purchased but for the deceptive and misleading advertising, and that she did not receive the benefits Coke promised in its labeling and marketing of Enviga	Franulovic's ascertainable loss is ***thus that, because Enviga was an ineffective product that likely did not cause her to burn calories or lose weight, and because*** she bought a product she would not have purchased but for the deceptive and misleading advertising ***claims of weight loss and calorie burning*** and that she did not receive ***either the weight loss or calorie burning*** benefits Coke promised in its labeling and marketing of Enviga.
69	Franulovic and other consumers residing in New Jersey suffered ascertainable losses as a direct result of this wrongful conduct and Coke has obtained monies from Class Members by means of the unlawful practices alleged herein.	***Franulovic and other consumers residing in New Jersey wasted money by purchasing Enviga in reliance upon misleading advertising, because Enviga was ineffective in providing the results Coke promised – burning calories and losing weight. It is a reasonable inference that they did not burn calories as a result of drinking Enviga. Thus,*** Franulovic and other consumers residing in New Jersey suffered ascertainable losses as a direct result of this wrongful conduct ***– they bought a product that Coke marketed without adequate prior substantiation for the claims described in detail in the Facts section above and that did not provide the promised benefits of either calorie burning or weight loss.*** By means of the unlawful practices alleged herein, Coke has obtained monies from ***purchases of Enviga by Franulovic and other consumers residing in New Jersey.***
72		Franulovic and other consumers residing in New Jersey suffered ascertainable losses as a direct result

		of this wrongful conduct and Coke has obtained monies from Franulovic and other consumers residing in New Jersey by means of the unlawful practices alleged herein. (*New paragraph 72 is identical to former paragraph 69*).

Plaintiff's proposed new complaint continues to lump together calorie burning and weight loss in a manner not consistent with this Court's prior rulings. The distinct concepts of calorie burning and weight loss are now so intertwined in the Fourth Amended Complaint that Plaintiff only references them together, and an alleged lack of weight loss is now the basis for the alleged lack of calorie burning.

ARGUMENT AND AUTHORITY

I. STANDARD FOR AMENDING A COMPLAINT PURSUANT TO FED. R. CIV. P. 15

Fed. R. Civ. P. 15(a) provides that leave to amend complaints shall be freely granted when "'justice so requires.'" *Foman v. Davis,* 371 U.S. 178, 182 (1962). Such leave is inappropriate, however, and should be denied when there is "undue delay, bad faith or dilatory motive on the part of the movant, **repeated failure to cure deficiencies by amendments previously allowed**, undue prejudice to the opposing party by virtue of allowance of the amendment, **futility of amendment**, etc." *Id.* (emphasis added).

A motion to amend should be considered futile, and therefore denied, if the amended pleading could not survive summary judgment. *See, e.g., Sound of Music Co. v. Minn. Mining & Mfg. Co.*, 477 F.3d 919, 923 (7th Cir. 2007) ("If the amended claim would not survive a motion for summary judgment, the amendment is futile."); *Executive Leasing Corp. v. Banco Popular de P.R.,* 48 F.3d 66, 71 (1st Cir. 1995) (proposed amended complaint "would have been futile . . . because it could not have blocked

summary judgment"), *cert. denied*, 116 S. Ct. 171 (1995).

II. FRANULOVIC'S PROPOSED FOURTH AMENDED COMPLAINT COULD NOT SURVIVE SUMMARY JUDGMENT

As shown above, Franulovic may again amend her complaint only if it could survive summary judgment. "Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Michaels v. New Jersey*, 222 F.3d 118, 121 (3d Cir. 2000); *see also* Fed. R. Civ. P. 56. Furthermore, where the evidence is "merely colorable, or is not significantly probative," summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citation omitted). Accordingly, summary judgment is appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

Because Franulovic seeks to recover against TCCC under the CFA, she must establish "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 176 (N.J. Super. Ct. App. Div. 2003); *see also* N.J.S.A. § 56:8-19. Franulovic cannot meet her burden here, because there is no evidence from which a reasonable jury could return a verdict in her favor on any element of her CFA claim. *See Anderson*, 477 U.S. at 249.

A. Franulovic cannot establish an alleged lack of calorie burning by proving that she did not lose weight while drinking Enviga.

To establish any element of her CFA claim – unlawful conduct, an ascertainable loss, or causation – Plaintiff must prove that Enviga does not burn calories. Because

Plaintiff's Fourth Amended Complaint alleges a lack of weight loss as the means by which Plaintiff intends to prove a lack of calorie burning, the Fourth Amended Complaint cannot survive summary judgment and is futile. Plaintiff's only allegation of a lack of calorie burning is that "[b]ecause Franulovic did not lose weight while drinking Enviga, it is a reasonable inference that she did not burn calories as a result of drinking Enviga."[15] This allegation obviously reiterates, and is dependent on, Plaintiff's previously adjudicated weight loss claim. Even worse, it ignores this Court's ruling that "the inferences that Plaintiff failed to lose weight, and that Enviga caused her failure to lose weight, are patently unreasonable. Plaintiff's claims are based on conjecture and speculation."[16]

Given that this Court already has determined that Plaintiff's weight loss claim is unreasonable and cannot withstand summary judgment, she cannot now use that same failed weight loss claim as a springboard to prove that Enviga does not burn calories. In other words, no reasonable jury could conclude that Plaintiff's failure to lose weight was connected to Enviga and, as a result, no reasonable jury could find that Enviga does not burn calories based on an alleged failure to lose weight.[17]

In short, Franulovic simply cannot prove that "she did not enjoy the [alleged] advertised benefit" of Enviga (i.e., weight loss or calorie burning).[18] Nor can she provide any evidence that she suffered an "ascertainable loss." *See Thiedemann v. Mercedes-*

[15] Fourth Amended Complaint, ¶ 53; *see also* ¶ 69.
[16] April 16, 2009 Opinion, p. 16 (Docket No. 118).
[17] The flawed syllogism plaintiff seeks to exact is a classic logical fallacy known as "affirming the consequent." The erroneous assumption that the [uprovable] failure to lose weight must be due to Enviga's caloric burning shortcomings cannot serve as the underlying premise for any conclusions.
[18] Oct. 25, 2007 Opinion, p. 20 (Docket No. 60).

Benz USA, LLC, 183 N.J. 234, 252-53, 872 A.2d 783, 795 (2005) ("subjective assertions without more are insufficient to satisfy the requirement of an ascertainable loss that is expressly necessary for access to the CFA remedies"); *Roberts v. Detroit Diesel Corp.*, 2007 WL 1038986, at *7 (N.J. Super. A.D. April 9, 2007) (affirming trial court's grant of summary judgment where plaintiff failed to prove a product defect).

Plaintiff's efforts to rely on weight loss almost certainly stem from her previous admissions and her counsel's averments that she cannot prove that Enviga does not burn calories. During the March 10, 2008 hearing on Franulovic's first motion to amend the judgment, Franulovic's counsel conceded that he would never be able to prove that Franulovic did not burn calories while drinking Enviga: "[w]ere I a betting man, your Honor, I would say she did [sic] **but I would never be able to prove it**. Well, that's the thing, we don't think she burnt calories. We don't believe she did, ***but we also don't know that she didn't.***"[19] Plaintiff also has admitted in her written pleadings that she cannot prove that she did not burn calories. In Paragraph 53 of her Third Amended Complaint, she alleged the following: "[a]lthough Franulovic did not lose weight while drinking Enviga, **she does not know and cannot prove whether she actually did not 'burn calories'** as a result of drinking Enviga." Plaintiff's unwillingness to allege the absence of calorie burning is also apparent in her Fourth Amended Complaint when she

[19] Mar. 10, 2008 Hearing Transcript, 12:22-23 (emphasis added).

posited that "Enviga was an ineffective product that **likely**[20] did not cause her to burn calories or lose weight."[21] These admissions confirm Plaintiff's inability to establish a lack of calorie burning through any means other than her defective weight loss theory and further support denial of Plaintiff's motion for leave to amend.

B. Plaintiff's complaint is futile for the additional reason that she cannot prove she purchased Enviga for its calorie burning benefits.

Plaintiff's proposed amended complaint is futile if Plaintiff cannot prove causation. Even assuming Plaintiff had a viable theory for demonstrating the absence of calorie burning, Plaintiff's deposition demonstrated that she did not purchase Enviga for its calorie burning benefits. As a result, she cannot establish causation under the CFA, and her motion should be denied.[22]

Plaintiff specifically denied being a person who counts calories. In fact, Plaintiff testified that she does not care about calories in the foods she purchases:

> Q: Were you trying to eat foods that you believed had a lower caloric content than alternative foods, than foods you weren't eating?
>
> A: No. It –

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[20] For this reason alone, Plaintiff's claim is not actionable. "It is a given, however, that regardless of the type of evidence relied upon - whether direct or circumstantial - a finding of causation cannot rely on pure speculation. According to the Restatement (Second) of Torts, a plaintiff 'must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" *Luben v. Atlantic City Showboat, Inc*., 85 Fed. Appx. 842, 844 (3d Cir. 2004).

[21] Fourth Amended Complaint, ¶ 54. (emphasis added).

[22] Oct. 25, 2007 Order, p. 21 (Docket No. 60) ("In order to maintain a claim under the CFA, a plaintiff 'must show a causal relationship between the unlawful practice and the 'ascertainable loss'"); *see also N.J. Citizen Action*, 842 at 178 (recognizing the propriety of dismissing a case if a plaintiff fails to "plead and prove a causal nexus between the alleged act of consumer fraud and the damages sustained").

Q: Go ahead.

A: **I don't care about calories**, I care more about fat and protein.

Franulovic Dep., at 45:18-24 (emphasis added). She had the same lack of interest as to how many calories she expected to burn:

Q: When you say you don't know, did you mean that while you were drinking [E]nviga in 2007 you didn't know how many calories you thought it would burn?

A: Yes.

Franulovic Dep., at 37:2-5. Plaintiff, therefore, cannot now allege that she suffered an ascertainable loss caused by Enviga claiming it burned calories because she readily admitted she neither cared about nor tried to count calories. *See, e.g.*, *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007) (affirming dismissal of plaintiff's complaint when plaintiff failed to properly plead his own conduct based on alleged fraud).

Nor is it sufficient for Plaintiff to claim that purchasing Enviga for its alleged weight loss benefit[23] is the same thing as purchasing it for its calorie burning benefit. Franulovic unquestionably understands the difference between calorie burning and weight loss:

Q: Okay. Would you agree that in February of 2007 you understood, you knew, that whether or not your weight went up or down, you gained or lost weight, was a function of how many calories you took in versus how many calories you used up?

A: Yes.

Franulovic Dep., at 33:25 – 34:5. Thus, Plaintiff understood when she purchased Enviga that weight loss is a function of, among other things, overall diet and whether a particular

[23] TCCC denies that the label, advertising or marketing for Enviga has ever represented that drinking Enviga will cause weight loss.

reduction in calories will lead to weight loss depends on many variables. *See Id.* at 44:22-25 (acknowledging that she knows one thing people do to lose weight is reduce caloric consumption). Thus, Plaintiff's testimony demonstrates that the phrase "calorie burning" is not equivalent to weight loss, and Plaintiff cannot prove that she purchased Enviga for its calorie burning benefits because she "did not care" about calories.

C. Plaintiff's allegation regarding "prior substantiation" does not save Plaintiff's complaint.

In what appears to be an attempt to shift her burden of proof to TCCC, Plaintiff alleges that TCCC is liable under the Consumer Fraud Act because it lacked adequate prior substantiation for its calorie burning claim.[24] Plaintiff, however, cites no authority for the proposition that an alleged lack of "prior substantiation" is actionable under the CFA. She is unable to do so because prior substantiation is simply not an element of a claim under the CFA. *See N.J. Citizen Action*, 842 A.2d at 176 (identifying the elements of a CFA claim as "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss."); *see also* N.J.S.A. § 56:8-19. In the context of alleged false advertising, a Plaintiff asserting a claim under the CFA must prove a statement of fact that is false or misleading. *See N.J. Citizen Action v. Schering-Plough Corp.*, No. L-7838-01, 2002 WL 32344594, at*3 (N.J. Super Ct. Law Div. May 12, 2002) (hereinafter "*N.J. Citizen Action I*") ("In the context of [direct to consumer] advertising, the unlawful act requirement of the CFA has two prongs: 1) a statement of fact; 2) such statement of fact is *false or misleading*.") (emphasis added); *see also Wendling v. Pfizer, Inc.*, 2008 WL 833549, at *3 (N.J. Super Ct. App. Div. Mar. 31,

[24] *See* Fourth Amended Complaint ¶¶ 6, 19, 28, 37, 39, 43, 50, 60(c), and 67(a).

2008).

In alleging that TCCC did not have adequate prior substantiation for its claims, Plaintiff appears to rely on the Lanham Act's "prior substantiation" doctrine to attempt to establish a CFA violation. Plaintiff, however, did not – nor could she – bring a Lanham Act claim against TCCC, and her reliance on the "prior substantiation" doctrine is misplaced. If anything, it is a tacit admission that plaintiff cannot allege the requisite CFA elements. Furthermore, even if Plaintiff could establish a violation of the CFA by proving a violation of the Lanham Act (which she cannot), the Act's "prior substantiation" doctrine is inapplicable under the facts as pled by Plaintiff.

The Lanham Act is a federal statute designed to prohibit certain activities, including trademark infringement, trademark dilution, and false advertising that could potentially injure a business.[25] The Lanham Act does not encompass individual claims by consumers and, therefore, has no application to Plaintiff's complaint. *See Serbin v. Ziebart Intern. Corp., Inc.*, 11 F.3d 1163, 1178-79 (3d Cir. 1993). Even if it applied, to succeed under the Lanham Act, a plaintiff must do more than "show only that the defendant's advertising claims of its [product's] effectiveness are inadequately substantiated … ; ***the plaintiff must also show that the claims are literally false or misleading to the public.***" *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 130 (3d Cir. 1994) (emphasis added). Accordingly, Plaintiff's burden of proving a violation under the CFA would be no different if the Lanham Act applied. *Compare id. with N.J. Citizen Action I,* 2002 WL

[25] 15 U.S.C. 1051 *et seq.*

32344594, at*3 (holding that a Plaintiff alleging false advertising under the CFA must prove that "such statement of fact is false or misleading").

The Third Circuit, however, has created a narrow exception to the general rule under the Lanham Act and held that "a court may find that a **completely unsubstantiated** advertising claim by the [Lanham Act] defendant is *per se* false without additional evidence from the plaintiff to that effect." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms., Co.*, 290 F.3d 578, 590 (3d Cir. 2002) (emphasis added). It is this exception that Plaintiff appears to be relying on in attempting to shift her burden of proof to TCCC. As Plaintiff's Fourth Amended Complaint makes clear, however, this limited exception, even assuming the Lanham Act somehow applied, is irrelevant here because Plaintiff's complaint establishes that TCCC's calorie burning claim is not "completely unsubstantiated."

As Plaintiff acknowledges, not only did TCCC conduct a study to substantiate its "calorie burning" claim, but other studies of the active ingredients in Enviga also exist that substantiate TCCC's "calorie burning" claim.[26] Plaintiff, therefore, does not allege a complete lack of substantiation as contemplated by the Third Circuit in *Novartis*; she relies on her criticisms of the studies that do exist.[27] Even Plaintiff concedes that her

[26] Fourth Amended Complaint ¶¶ 23-24 (recognizing that TCCC conducted a study to substantiate its "calorie burning" claims); 19 (recognizing the other studies that exist to support TCCC's calorie burning claim).

[27] Fourth Amended Complaint ¶¶ 28 (criticizing TCCC's study because it did not include individuals "who are not young, healthy, and thin"); 29 (criticizing TCCC's study because it was "short-term").

criticisms of the existing literature do not lead to the conclusion that Enviga's "calorie burning"[28] claim is simply false.[29]

Criticism of existing studies falls well short of alleging that a claim is "completely unsubstantiated." *See OMS Invs., Inc. v. Terracycle, Inc*., No. 07-1064, 2007 WL 2362597, at *4 (D.N.J. Aug. 15, 2007) (holding that Plaintiff's reliance on the "prior substantiation" doctrine is misplaced because "TerraCycle does not allege that Plaintiffs' claims are 'completely unsubstantiated.'"). On the contrary, Plaintiff's acknowledgement of the existing literature establishes exactly the opposite – that TCCC's "calorie burning" claim is not "completely unsubstantiated." Accordingly, Plaintiff's allegations of a lack of substantiation do not alter Plaintiff's burden of proving that Enviga does not burn calories and do not save Plaintiff's futile Forth Amended Complaint.

III. FRANULOVIC'S CLAIM FOR INJUNCTIVE RELIEF IS MOOT, AND SEEKING SUCH RELIEF IS THEREFORE FUTILE

In Plaintiff's Fourth Amended Complaint, she seeks injunctive relief in the nature of "[e]njoining Coke from its unlawful conduct."[30] This injunctive relief is the only relief she seeks on behalf of her proposed class – she has requested monetary relief only for herself.[31] The purported purpose of Plaintiff seeking injunctive relief related to TCCC's labeling and advertising for Enviga is because "members of the Class will continue to

[28] *Id.* at ¶¶ 30 ("Even if Coke's one study is eventually shown by subsequent studies to apply to actual weight loss for consumers of *all* ages, shapes and weights …"); 31-32 (alleging that the advertised calorie burning benefit of Enviga is "minimal").

[29] Plaintiff also argues that TCCC's claims are unsubstantiated because the existing studies do not demonstrate a calorie burning benefit from Enviga in all potential consumers. *Id.* at ¶ 33. An advertising claim, however, is neither false nor misleading because the product allegedly is not 100% effective. *See N.J. Citizen Action*, 2002 WL 32344594 (dismissing Plaintiff's CFA claim despite the fact that Defendant's own testing demonstrated it to be effective in less that 50% of potential consumers), *aff'd* 367 N.J. Super. 8, 842 A.2d 174.

[30] Fourth Amended Complaint, Prayer for Relief ¶ 3.

[31] *Id*. at ¶¶ 4 and 6.

suffer losses, thereby allowing these violations of law to proceed without remedy, and allowing Coke to retain the proceeds of its ill-gotten gains."[32] Such concern has been rendered moot, however, because in February 2009, TCCC entered into an Assurance of Voluntary Compliance / Assurance of Discontinuance ("AVC") with the attorneys general from 26 states, including New Jersey.[33]

As part of the AVC, TCCC agreed that it would include in the labeling and advertising for Enviga a revised statement further explaining Enviga's effect on calorie burning and weight loss.[34] The Enviga label, advertising, and website are now incorporating the following explanatory language:

> (1) Three cans per day of Enviga have been shown to increase calorie burning by 60-100 calories in healthy normal weight 18-35 year olds;
>
> (2) Enviga burns calories but is not by itself a guaranteed weight loss solution; and
>
> (3) Remember, weight loss requires a reduced calorie diet and regular exercise. Individual results may vary. Drinking more than three cans per day will not have an additional effect.[35]

Under the current production schedule, the new can label with the above-identified language is being phased into production beginning in June 2009, and all new can labels produced in July 2009 will contain the new label.[36] The above-identified language has

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[32] Fourth Amended Complaint, ¶ 65.
[33] *See N.J. Joins Multi-State Settlement with Coke, Nestle Over Calorie-Burning, Weight Loss Claims for Green Tea Beverage, available at* www.nj.gov/oag/newsreleases09/pr20090226a.html.
[34] Declaration of Tik The.
[35] *Id.*
[36] *Id.*

appeared on the Enviga website (www.enviga.com) at least since May 12, 2009.[37] All new advertising for Enviga also includes that same language, subject to certain space limitations in which the advertising refers customers to the same information on the back of the can.[38] These revisions render Plaintiff's request for injunctive relief moot. *See Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1052 (2d Cir. 1983) ("In any event, [defendant] already has changed the commercial. The question, at least with respect to preliminary injunctive relief, is moot."); *Am. Express Travel Related Servs. Co. v. MasterCard Int'l Inc.*, 776 F. Supp. 787, 791 (S.D.N.Y. 1991) ("When a defendant revises an allegedly infringing commercial and represents that the original commercial will not be broadcast in the future, the need for injunctive relief as to the original commercial is moot.").

A federal court cannot address a plaintiff's claims unless the plaintiff meets the "case and controversy" requirement of Article III of the U.S. Constitution and has standing to sue under the relevant state law. *See Wolfe v. Gilmour Mfg. Co.*, 143 F.3d 1122, 1126 (8th Cir. 1998); U.S. Const. art III, § 2. The "case or controversy" requirement "demands that a cause of action before a federal court present a 'justiciable' controversy, and 'no justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments. . . ." *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992) (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

Further, where the plaintiff asserts both monetary and equitable relief and the class only asserts claims for equitable relief, if the claims for equitable relief are moot then the court is required to dismiss the claim for lack of standing, regardless of the

[37] *Id.*
[38] *Id.*

plaintiff's live claim for money damages. *See Tucker v. Phyfer*, 819 F.2d 1030, 1035 (11th Cir. 1987). Accordingly, Plaintiff's request should be denied because the changes to Enviga's marketing and labeling have mooted the need to provide injunctive relief to protect class members from allegedly deceptive advertising.

Moreover, to the extent Plaintiff is seeking injunctive relief individually in her amended complaint, such request is futile because she already knows about the alleged deception in the labeling and advertising of Enviga and, therefore, an injunction is unnecessary to protect her from a future injury. *See Maniscalco v. Brother Int'l Corp. (USA)*, No. 06-CV-4907(FLW), 2008 WL 2559365 (D.N.J. June 26, 2008). ("The Supreme Court has made clear that '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' *Lyons,* 461 U.S. at 102"); *see also Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir.1990) ("The Third Circuit has made clear that 'in an action for injunctive relief, a plaintiff must show that he or she is likely to suffer *future injury* from defendant's threatened illegal conduct.'") (citing *Lyons,* 461 U.S. at 105) (emphasis added [in the original]); *see also Zimmerman*, 2008 WL 682491 at *4 ('where injunctive relief is sought, a plaintiff must demonstrate that he is likely to suffer future injury') (citing *Roe,* 919 F.2d at 864)."

The injunctive relief sought on behalf of the proposed class has been rendered moot by changes to the labeling and advertising for Enviga. Accordingly, Plaintiff's requests for class certification and injunctive relief are futile. Mootness, therefore, provides another basis for denying Plaintiff's request to file another amended complaint.

CONCLUSION

Because Franulovic's own testimony establishes that it would be futile for her to attempt to prove (1) any unlawful conduct by TCCC, (2) that she suffered an ascertainable loss, or (3) that her hypothetical ascertainable loss was caused by TCCC's allegedly deceptive conduct rather than her own failure to control her caloric consumption, this Court should not grant her leave to amend her complaint. There is an additional reason to deny her request to amend her complaint as futile because the primary relief she seeks from this Court is moot.

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/s/ Peter Boyer
Gita F. Rothschild
Peter J. Boyer
McCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 639-5959 – Telephone
(973) 297-3833 – Facsimile
Email: grothschild@mccarter.com

Jane F. Thorpe
Scott A. Elder
ALSTON & BIRD, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000 – Telephone
(404) 881-7777 – Facsimile
Email: jane.thorpe@alston.com

Attorneys for Defendant
The Coca-Cola Company

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LINDA FRANULOVIC, individually and on behalf of a class of persons,	)	CIVIL NO. 1:07-cv-00539-RMB-JS
Plaintiff,	)	CLASS ACTION
v.	)	
THE COCA-COLA COMPANY,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Brief in Opposition to Plaintiff's Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint by the Court's CM/ECF system this 1st day of June 2009, upon Plaintiff's counsel of record:

Mark R. Cuker
Williams Cuker Berezofsky
Woodland Falls Corporate Center
210 Lake Shore Drive East
Suite 101
Cherry Hill, New Jersey 08002-1163

Stephen Gardner
Director of Litigation
Center for Science in the Public Interest
5646 Milton Street
Suite 211
Dallas, Texas 75206

Attorneys for Plaintiff

BY: /s/ Peter Boyer
Peter Boyer