

**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 REPLY BRIEF IN SUPPORT OF
RULE 59(e) MOTION TO AMEND JUDGMENT TO
ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT**

Mark R. Cuker, Esquire
WILLIAMS CUKER BEREZOFSKY
 Woodland Falls Corporate Center
 210 Lake Shore Drive East, Suite 101
 Cherry Hill, NJ 08002-1163
 Telephone: (856) 667-0500
 Facsimile: (856) 667-5133

Stephen Gardner, Esquire
**CENTER FOR SCIENCE IN THE PUBLIC
 INTEREST**
 The Meadows Building
 5646 Milton Street, Suite 211
 Dallas, TX 75206
 Telephone: (214) 827-2774
 Facsimile: (214) 827-2787
 Admitted *pro hac vice*

*Attorneys for Plaintiff Linda Franulovic
and the Class*

INTRODUCTION

Plaintiff Linda Franulovic's motion for leave to file a Fourth Amended Complaint should be granted. Defendant The Coca-Cola Company ("Coke") raises two principal arguments in opposition, neither of which has merit. First, Coke contends that the motion is futile because Franulovic's proposed amendments challenging Coke's calorie-burning promises for its soft drink product Enviga are allegedly dependent upon her "weight-loss" claims on which the Court has granted summary judgment. Coke is wrong because the proposed amendments challenge Coke's calorie-burning claims *in addition to*, not as a part of, the challenges to the implied weight-loss claims. Moreover, Franulovic's deposition testimony supports these amendments by amply demonstrating her expectation in buying Enviga that it would help her burn calories. Second, Coke also contends that leave to amend should be denied because its planned changes to Enviga's label render Franulovic's claims moot. This argument likewise fails both because Coke's proposed labeling changes do not cure the deception of the unsubstantiated calorie-burning claim that Franulovic is challenging and because, even if Coke did cure this deception, Franulovic's claim for damages under the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 *et seq.*, based on Coke's prior deception would survive. For all of these reasons, Coke's opposition fails and Franulovic's motion for leave to amend should be granted.

ARGUMENT

I. The Proposed Amendments State an Actionable Consumer Fraud Act Claim.

The proposed amendments in Franulovic's proposed Fourth Amended Complaint state an actionable CFA claim based on Coke's unsubstantiated calorie-burning promises and Plaintiff's purchase of Enviga in reliance on these promises. Coke erroneously contends that Franulovic's proposed amendments fail under the Court's summary judgment ruling because they allegedly

rely on the implied weight-loss claims that the Court rejected. Coke is wrong. To be sure, Franulovic has not given up on her implied weight-loss claim in the event of an eventual appeal. But her proposed amendments do not rely on this claim. For example, amended paragraph 53 states as follows:

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 Coke promised-burning calories and losing weight.***

Fourth Am. Compl. (Certif. of Mark R. Cuker in Support of Motion, Exh. A) ¶53 (emphasis added); *see also id.* ¶54 (ascertainable loss is that “she bought a product that 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.”) (emphasis added). Thus, although Franulovic does not abandon her implied weight-loss claims, her amendment clarifies that she also relied to a significant degree on Coke’s calorie-burning promise in and of itself in purchasing Enviga and thus asserts this as a distinct and independent basis for her claim of a CFA violation. Since she alleges that Coke’s calorie-burning promise was deceptive and that she bought Enviga based on this promise, she asserts an actionable CFA claim based on a deception and resulting ascertainable loss separate and apart from her claim challenging the implied weight-loss promise.

Coke further errs in contending (Brief at 11) that Franulovic “cannot prove she purchased Enviga for its [alleged] calorie burning benefits.” She can, and already has done so. Under questioning from Coke’s lawyer, Franulovic testified that:

- (1) “I believed on the advertisements I saw in magazines and on billboards that drinking the drink would help you to burn calories . . .” See Exh. A hereto (Deposition of Linda Franulovic, 9/30/08) at 23:11-13;
- (2) “But your product claims to burn calories just by sitting there.” *Id.* at 26:14-15.
- (3) “Then at some point, I don’t remember how long, maybe a month, I started to drink three [cans] a day because I read it on the can.” *Id.* at 36:20-22;
- (4) “Q. During this time period when you were drinking [E]nviga did you believe that [E]nviga would make you lose weight?
A. I believed it would burn calories.” *Id.* at 40:10-13;
- (5) “Q. And so I go back to my question, did you believe that drinking [E]nviga would make you lose weight?
A. Yes.
Q. Why?
A. Because it burns calories. *Id.* at 40:22-41:1.

In light of this testimony, Franulovic can and already has established causation between Coke’s deceptive promise of calorie burning and her ascertainable loss of money spent on purchasing additional cans of Enviga as a result of this promise.

Finally, Coke also is wrong in arguing that Franulovic does not state a CFA violation based on Coke’s lack of prior substantiation for its calorie-burning promises. Franulovic alleges in her proposed amendments that:

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.

Fourth Am. Compl. ¶69 (emphasis added). Coke contends that making factual promises of calorie burning without substantiation for this claim is not a deceptive practice under the CFA. This Court has held otherwise, and was affirmed by the Third Circuit. In *Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharma. Corp.*, 2005 U.S. Dist. LEXIS 30198, 2005-2 Trade Cas. (CCH) P74,983 (D.N.J. Sept. 13, 2005), *aff'd*, 197 Fed. Appx. 120, 2006 U.S. App. LEXIS 16377, 2006-2 Trade Cas. (CCH) P75,351 (3d Cir. June 29, 2006), this Court granted a preliminary injunction barring Merix from advertising that its cold medicine, RELEEV, was a one-day cold sore treatment. *Id.* at *5. The injunction was based on Glaxo's claim that Merix's promises violated both the federal Lanham Act, 15 U.S.C. § 1125(a), and the New Jersey Consumer Fraud Act. 2005 U.S. Dist. LEXIS 30198 at *1. In granting relief on both claims, the Court found that:

Where, as in the present case, a claim is completely unsubstantiated a plaintiff need not offer affirmative evidence in support of its contention that a challenged claim is false.

Id. at 22 (citing *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 590 (3d Cir. 2002); *Sandoz Pharma. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228 n.7 (3d Cir. 1990)). Although the cited authority primarily discussed lack of prior substantiation allegations under the Lanham Act, this Court concluded that the analysis was the same for finding violation of the CFA:

Glaxo has established that it is likely to succeed on the merits of its federal Lanham Act cause of action, ***and by the same token it is likely to succeed on its New Jersey Consumer Fraud Act cause of action.***

2005 U.S. Dist. LEXIS 30198 at *24-25 (emphasis added). The Third Circuit affirmed this ruling. 197 Fed. Appx. 120, 121, 2006 U.S. App. LEXIS 16377 at *1-2 ("Glaxo sought the preliminary injunction incident to its lawsuit against Merix for false advertising under § 43(a) of

the Lanham Act, 15 U.S.C. § 1125(a), and the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-

2. The District Court granted the injunction, and for the reasons set forth herein, we will affirm.”).

Coke’s remarkable contention that the New Jersey Consumer Fraud Act allows it to market Enviga based on unsubstantiated promises of calorie-burning thus flies in the face of this Court’s and the Third Circuit’s interpretation of the Act. Like its other arguments, this one too should be rejected.

II. Coke’s Proposed Labeling Changes for Enviga Do Not Moot Plaintiff’s Claims.

There are at least four deficiencies to Coke’s mootness argument, each of which renders this a non-starter for denying Franulovic leave to amend. The first, and principal, problem with this argument is that Coke’s voluntary actions in changing some aspects of Enviga’s label do not address the principal source of Franulovic’s claims, i.e., that its “Calorie Burner” promise is deceptive. *See, e.g.*, Third, and proposed Fourth Amended Complaints ¶¶5-8. Coke’s proposed labeling changes, attached to the Declaration of Tik The in support of its Opposition, keep in place the Enviga can label’s large-lettered “THE CALORIE BURNER” promise. *See* The Decl. Exh. 2. The planned label changes thus do not render moot Franulovic’s claim for a class-wide relief enjoining Coke from:

1. Advertising Enviga without having prior substantiation for all advertised claims.
2. Advertising Enviga as effective by itself – e.g., “the calorie burner” for weight control;
3. Advertising Enviga to all consumers as “the calorie burner” when Coke knew that the minimal study evidence at best showed that it had this effect on only a discrete segment of the population;

4. Failing to disclose the material fact that it would be necessary to spend weeks drinking three cans of Enviga per day – at least 100 cans at an approximate cost of \$150.00 – just to enjoy a possible loss of one pound under the best interpretation of the minimal study evidence.

See Third/proposed Fourth Am. Compl. ¶67 (CFA violations sought to be enjoined). The Third Circuit has clearly held that mootness does not apply if a party changes its practices to a certain degree and those changes do not satisfy the injunctive relief sought. See *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 262-63 (3d Cir. 2002). This conclusion is particularly apt here because Coke’s proposed label changes are entirely voluntary, inasmuch as Coke has failed to produce any court order or binding agreement requiring these changes.

Second, in arguing mootness, Coke asks the Court to make a merits determination – whether its changes will have any effect on informed purchasing or consumer deception – which is not possible at this point since (1) no merits discovery has been permitted; and (2) deciding whether or not the new label, website claims, and other marketing efforts are not deceptive requires fact-based determinations about these advertising claims.

Third, Coke has not even implemented all of the alleged labeling and advertising changes yet, but merely plans to do so in the future. See The Decl. ¶5.

Finally, mootness does not apply in any event because Franulovic seeks individual damages in addition to class-wide injunctive relief, and it is beyond serious dispute that “the availability of damages or other monetary relief almost always avoids mootness.” *Jersey Cent. Power & Light Co. v. State of N.J.*, 772 F.2d 35, 41 (3d Cir. 1985). Accordingly, and for each of these independent reasons, Coke’s mootness argument fails as a basis for denying Franulovic leave to amend.

CONCLUSION

For all of the reasons set forth herein, the Court should grant Plaintiff's Motion for Leave to Amend.

Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY

/s/ Mark R. Cuker

Mark R. Cuker, Esquire
Woodland Falls Corporate Center
210 Lake Shore Drive East, Suite 101
Cherry Hill, NJ 08002-1163
Telephone: (856) 667-0500
Facsimile: (856) 667-5133

CENTER FOR SCIENCE IN THE PUBLIC
INTEREST

Stephen Gardner, Esquire
5646 Milton Street, Suite 211
Dallas, TX 75206
Telephone: (214) 827-2774
Facsimile: (214) 827-2787
Admitted *pro hac vice*

*Attorneys for Plaintiff Linda Franulovic and the
Class*

Dated: June 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief in Support of Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint has been served upon Defendant via ECF upon the following counsel:

Gita F. Rothschild, Esquire
Peter J. Boyer, Esquire
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, NJ 07102-0652

/s/ Mark R. Cuker
Mark R. Cuker

Dated: June 8, 2009

EXHIBIT

A

Copy of Transcript

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

LINDA FRANULOVIC, individually and
on behalf of a class of persons,

Plaintiff,

vs.

THE COCA-COLA COMPANY,

Defendant.

CIVIL NO:

1:07-cv-00539-RMB-JS

CLASS ACTION

DEPOSITION OF

LINDA FRANULOVIC

TAKEN ON BEHALF OF THE DEFENDANT

September 30, 2008
9:05 a.m.

1100 Southeast 17th Street
Room 1120
Fort Lauderdale, Florida

Terri J. Flicek, Shorthand Reporter

BROWN & GALLO
LLC

COURT REPORTING | VIDEO SERVICES | TRIAL PRESENTATION

www.browngallo.com

Telephone: 954.522.6401
Toll Free: 877.495.0777
Facsimile: 954.987.7780

888 Southeast 3rd Avenue
Suite 500A
Fort Lauderdale, FL 33316

BROWN & GALLO
LLC

Case: LINDA FRANULOVIC, et al. vs. THE COCA-COLA COMPANY, et al.
Date: 09/30/2008
Witnesses: FRANKOVIC, LINDA

1 cans, on TV it just says to drink it, then it says three
2 cans, then I come to find out that it's 17 cans.

3 Q. Tell me what you mean by you came to find out
4 that it's 17 cans?

5 A. I saw it on one of the television shows, one of
6 the news TV shows.

7 Q. And it's 17 cans to do what?

8 A. To burn calories.

9 Q. Your understanding, you believe from a television
10 show that to burn -- Tell me, to burn how many calories?

11 A. I believed on the advertisements that I saw in
12 magazines and on billboards that drinking the drink would
13 help you to burn calories, then I read on the can that it
14 was three cans a day, then after that had gone on for a
15 couple months I heard on TV that they were saying that it
16 was not true, that's when I started to believe that they
17 were lying, and then I started to ask questions.

18 Q. And tell me about this 17 can issue again.

19 A. Well, you could probably go on Channel 3 and find
20 out what newscast they were broadcasting at the time,
21 because I always have CBS on in New Jersey. And I was
22 listening to the TV, I wasn't actually watching it, and I
23 heard them make claims that there was something going on
24 with the product.

25 Q. And specifically tell me what you remember about

A. If you eat too many calories you gain weight.

do you

Q. And how many calories do you have to eat to gain weight?

A. I think it's, everybody is different.

Q. By the same token, you understand that if you take in fewer calories you might lose weight?

A. Yes, but you have to burn 3,200 calories to lose one pound.

you

Q. And do you understand that if you take in the same number of calories that you are expending, using up, that your weight will stay the same?

in?

A. Yes.

Q. And did you understand that in February of 2007?

A. Yes. But your product claims to burn calories just by sitting there.

ke in on

Q. Tell me what things you were doing in February of 2007 to -- Well, let me back up. Were you doing things in February of 2007 to reduce the number of calories you were consuming?

he

A. Yes.

me and

Q. And were you attempting to reduce the number of calories by any certain amount?

A. No.

ories an

Q. And you don't know how many calories you were taking in or trying to take in on a daily basis in

da Franulovic

Q. Do you recall which parts of it -- Well, when you say not the whole can, do you mean that you read part of it?

A. Yes.

Q. And do you recall which parts of it you read?

A. The contents.

Q. The ingredients?

A. Yes.

Q. Other than the ingredients when we're talking about this first can of Inviga you purchased, do you recall whether you read any other parts of the can itself?

A. I did not.

Q. You don't recall or you didn't read anything else?

A. I did not read anything else.

Q. All right. So after that first can, tell me about your purchase history and, you know, when did you drink Inviga next?

A. I drank it every day, and I worked five days a week. Then at some point, I don't remember how long, maybe a month, I started to drink three a day because I read it on the can.

Q. What did you understand or think Inviga would do?

A. Burn calories.

Q. How many calories?

BROWN & GALLO

LLC

REPORTING | VIDEO SERVICES | TRIAL PRESENTATION

www.browngallo.com

Telephone: 954.522.6401
Toll Free: 877.495.0777
Facsimile: 954.987.7780

888 Southeast 3rd Avenue
Suite 500A
Fort Lauderdale, FL 33316

954.522
877.495
954.987

ast 3rd A
Suite
dale, FL

A. Yes.

Q. And what times?

A. In the morning, and then two at work, I don't know, in the afternoon, evening, you know, whenever I felt like it.

Q. So did you keep some at home --

A. Yes.

Q. -- and keep some at work?

A. And in my car.

Q. During this time period when you were drinking Inviga did you believe that Inviga would make you lose weight?

A. I believed it would burn calories.

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

A. They can be.

Q. Okay. They can be but they don't have to be?

A. For me they are.

Q. Okay. You believe that they are the same thing?

A. Yes.

Q. And so I go back to my question, did you believe that drinking Inviga would make you lose weight?

A. Yes.

Q. Why?

BROWN & GALLO
LLC

REPORTING | VIDEO SERVICES | TRIAL PRESENTATION

www.browngallo.com

Telephone: 954.522.6401
Toll Free: 877.495.0777
Facsimile: 954.987.7780

888 Southeast 3rd Avenue
Suite 500A
Fort Lauderdale, FL 33316

1 A. Because it burns calories.

2 Q. And tell me what you understand burning calories
3 to mean.

4 A. Well, when your metabolism is increased you can
5 burn calories even though you're not working out, burn
6 calories constantly, so if your metabolism goes up you're
7 going to burn calories. So that's what I believed the can
8 would do is increase my metabolism.

9 Q. By how much?

10 A. I don't know.

11 Q. When did you, over what period of time did you
12 think Inviga would cause you to lose weight?

13 A. I don't know.

14 Q. How much weight did you expect to lose drinking
15 Inviga?

16 A. I wanted to lose five pounds.

17 Q. And you wanted to lose five pounds just
18 generally, does that -- What I'm asking is, does that five
19 pound number have a relationship to Inviga?

20 A. I don't understand your question.

21 Q. Is there anything about the Inviga, is there any
22 portion of what you remember about the Inviga advertising
23 that you believe told you it would make you lose five
24 pounds, specifically that number, five?

25 A. No.

BROWN & GALLO

LLC

COURT REPORTING | VIDEO SERVICES | TRIAL PRESENTATION

www.browngallo.com

Telephone: 954.522.6401
Toll Free: 877.495.0777
Facsimile: 954.987.7780

888 Southeast 3rd Avenue
Suite 500A
Fort Lauderdale, FL 33316