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
JUNE 19, 2009

B E F O R E: **THE HONORABLE RENEÉ MARIE BUMB**
UNITED STATES DISTRICT JUDGE

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

Center For Science In The Public Interest
BY: Michael Quirk, Esquire
ATTORNEYS FOR PLAINTIFF

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BY: Peter J. Boyer, Esquire

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ATTORNEYS FOR COCA-COLA COMPANY

Oral Pottinger, Esquire
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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

THE COURT: Okay, good morning. You may be seated.

We're here in Franulovic vs. Coka-Cola, 07-539. Would counsel please put their appearances on the record.

MR. QUIRK: Michael Quirk for plaintiff Linda Franulovic.

THE COURT: Okay, good morning.

MR. QUIRK: Good morning.

MR. ELDER: Good morning. Scott Elder for the Coke Company.

MR. BOYER: Peter Boyer also for the Coke.

MR. POTTINGER: Oral Pottinger for Nestle USA.

THE COURT: Good morning.

MR. POTTINGER: Good morning.

THE COURT: Okay, so keeping this case on track, last we were together I allowed the plaintiff -- I issued my ruling and afforded the plaintiff an opportunity to file a motion to amend under Rule 59, which the plaintiff has chosen to do. So, Mr. Quirk, let me hear from you because there are two things I want to address, which is the amended complaint, whether or not I should allow the complaint to be amended, number one, and number two whether or not these theories that have eked its way into the amended complaint should stay in there.

So let me hear you about that because the argument that the defendants make is the weight-loss theory is still in

there and I've already ruled on that, there is now a new theory of prior substantiation. So I want to make sure that by the time we leave today we know what we're dealing with. So, can you address those issues as well?

MR. QUIRK: I'll to my best, your Honor.

THE COURT: Okay.

MR. QUIRK: As your Honor said, we're here on the Plaintiff's motion for leave to amend and the Coke -- the arguments Coke raises in opposition are that the amendments are futile, that they don't -- they don't add up to an actionable claim; and also that even if they did, they would be mooted by some changes to the Enviga can's label that defendant has discussed. And we think that both of those arguments don't have merit and that leave should be granted.

With regard to the viability of the amended claims, we think that the amended claims do state an actionable claim for violation of New Jersey Consumer Fraud Act. The claim for a violation of the act is that the calory-burning promise on the Enviga can and in the Enviga advertising lacks adequate prior substantiation and that without that adequate substantiation it's a factual promise that's deceptive and it's that deception that violates Section 2 of the Consumer Fraud Act.

Now, with regard --

THE COURT: Well you are alleging though that it

doesn't burn calories, right?

MR. QUIRK: We're alleging both of those, your Honor.

THE COURT: Both what?

MR. QUIRK: Both that the promise lacked adequate substantiation at the time it was made and that it doesn't burn calories.

THE COURT: So I need to rule on whether or not you can move forward on your prior substantiation theory as well?

MR. QUIRK: Yes, your Honor.

THE COURT: Okay.

MR. QUIRK: And then the second element of a Consumer Fraud Act claim, the resulting ascertainable loss, the claim there is that Ms. Franulovic would not have bought the product had she known of the lack of substantiation for the calory-burning promise, and so with the violation and resulting ascertainable loss.

THE COURT: That's what I want to clear up. Are you really meshing two claims? One is she wouldn't have bought the product if she knew it didn't burn calories, one, and she wouldn't have bought the product if she knew that there was not prior substantiation for the burning of calories? Because aren't they two distinct sort of theories?

MR. QUIRK: Yes.

THE COURT: Okay. And you have them all in one count, that's what I wanted to clarify, right?

MR. QUIRK: They are both under the heading of the Consumer Fraud Act violation.

THE COURT: Okay.

MR. QUIRK: But, I mean, we are alleging as a distinct assertion of the ascertainable loss that she wouldn't have bought the product if she knew of the lack of adequate substantiation and that's --

THE COURT: But the ascertainable loss, which has never been alleged, which has always been I think a fault in the pleadings, that she has never, up until this amendment, she's never alleged a loss of monetary value.

MR. QUIRK: Well, the --

THE COURT: So your ascertainable loss that you're alleging is that she just wouldn't have wasted her money.

MR. QUIRK: That is correct. And I think that even going back to the second amended complaint there was always an allegation of a loss of money, but whether it was sufficiently tied to the violation is I guess what we've been discussing over the past -- over the past several months. So we think that the amended Paragraph 69 really takes care of that by saying that she wouldn't have bought the product if she knew that there wasn't adequate prior substantiation for that promise. And so we think that those add up to a viable claim under the Consumer Fraud Act.

Now, as to the defendant's mootness argument, we

fully briefed this, but the reasons that we think the claims aren't moot are, one, that Ms. Franulovic has an individual damages claim and any change to the Enviga label doesn't change -- doesn't extinguish the damage claim and, two --

THE COURT: So what about injunctive relief claim?

MR. QUIRK: Well, in any event, these claims here, they don't fix the underlying deception, which is that there is still a large-letter calory-burning representation, and we -- so the same claim applies to the amended label as applies to the prior label. And so in that sense whatever the changes are, they don't go to the substance of this claim.

THE COURT: Well, is your claim for injunctive relief still that the label as amended still alleges that it burns calories when in fact it does not? Is that the claim?

MR. QUIRK: It alleges that it burn calories when there is not adequate substantiation for that promise and that claim applies to both the prior label and the proposed future label.

THE COURT: Okay. Let me ask this question. Is the claim that it does not burn calories -- is your claim that it doesn't burn calories and therefore you are seeking injunctive relief even with the new amendment and forget about the prior substantiation?

MR. QUIRK: The --

THE COURT: Because if I throw out your prior substantiation theory, are you still saying that the label as amended is false and misleading?

MR. QUIRK: Yes, we are. And this -- and I would emphasis, as we've said back and forth several times, that we're asserting these two distinct claims and this is --

THE COURT: Which two distinct claims, that --

MR. QUIRK: The lack of prior substantiation.

THE COURT: Right.

MR. QUIRK: And the false promise.

We've struggled with this issue because, as Mr. Elder correctly points out, we've acknowledged all along that it's exceedingly difficult -- it's probably impossible for us to reconstruct what happened in Ms. Franulovic's body when she drank Enviga and so what we're relying on is the -- essentially the sort of the state of the science, the state of the literature, but we think that that doesn't add up to a demonstration that Ms. Franulovic burned calories and so we --

THE COURT: I want to make sure that I'm clear as to what your argument is, and we're focusing on your claim for injunctive relief. Is your claim that -- and I want to focus on the new label -- is your claim that even with the new label that the representation that Enviga burns calories is false, or is your claim that Enviga burns calories is false because there is no prior substantiation? Is it one of those two or

is it both?

MR. QUIRK: It's both of those two.

THE COURT: So, your claim is still that Enviga does not burn calories.

MR. QUIRK: That's right, your Honor.

And alternatively, even if it somehow did, and we don't know how that would be demonstrated, that there was not adequate substantiation at the time that the promise was made and so that still gives rise to a claim under the act.

THE COURT: Well, wouldn't scientific evidence show whether or not this burns calories or not?

MR. QUIRK: Well --

THE COURT: And so wouldn't the issue then be -- are you saying you need discovery then to show whether or not it burns calories?

MR. QUIRK: Well, yes. And we need discovery to support our claim, so yes.

THE COURT: So at the end of the day if discovery shows and the plaintiff can't dispute it that Coka-Cola's own studies showed that this product burned calory and that can't be disputed, then -- then what?

MR. QUIRK: If it got to that point, we would still assert the prior substantiation claim based on the science at the time the promise was originally made. And I understand that that may lead to different results for the damages claim

as oppose to the injunctive claim, but I don't think we've gotten to the point where that difference has arisen, if we ever would or could.

THE COURT: Okay. So, now let me focus on the prior substantiation. Do you agree with me that -- because you seem to heavily on Judge Debevois' opinion in *GlaxoSmithKline*, do you agree with me that he was referring really to the Lanham Act and that maybe you might be optimistically reading his opinion to include the CFA?

MR. QUIRK: No, I -- I would agree that the judge spent more time talking about the Lanham Act, but at the end concluded that the conduct described violated both.

THE COURT: Do you have any other evidence to support your argument that that's such a valid theory in the Third Circuit other than that decision?

MR. QUIRK: That's -- that's our strongest. That's our strongest authority off the top of my head, although -- and it really does address the question squarely. Even if it doesn't spend as much time on the Consumer Fraud Act, it ultimately spends time on the conduct and reaches that conclusion.

THE COURT: Okay. Thank you.

MR. QUIRK: Thank you, your Honor.

THE COURT: Thank you.

Mr. Elder.

MR. ELDER: Your Honor, the number of times that we've posed the question: What is your claim in this case --

THE COURT: Well, that's why we're here pinning it down.

MR. ELDER: And --

THE COURT: I don't want to go backwards again.

MR. ELDER: I appreciate that and I would submit that we haven't pinned it down. And to the extent that the plaintiffs now allege that they have pled a calory-burning claim, we have another disconnect between what they are saying here and what's written in their complaint.

THE COURT: Okay.

MR. ELDER: So --

THE COURT: By the way, this graph was very helpful, Mr. Elder.

MR. ELDER: I'm glad it was.

THE COURT: And Mr. Boyer.

MR. ELDER: I think that focusing on that graph, our chart on pages five and six of our brief shows that that calory-burning claim is not in this complaint. Every time they talk about calory-burning, they talk about weight-loss. So that's one reason. So we can't tell because they write a sentence and they say, you know, she didn't get -- or the class members didn't enjoy the benefits promised, calory-burning or weight-loss. Well, which one is it?

THE COURT: Okay. Well, let me ask you this question. If I were to strike from the complaint claims of weight-loss so it would read as misleading advertisement, misleading -- for example in Paragraph 54, misleading advertising claims of calory-burning and that she did not receive the calory-burning benefits, would that cure the problem? Because I have been quite clear that weight-loss is not in this case.

MR. ELDER: I agree that you've been quite clear. It would not cure the problem.

THE COURT: Okay.

MR. ELDER: For these reasons. If you take out "weight-loss" from this complaint, we are back where we started in October of 2007 when you dismissed these complaints because Franulovic has not alleged that she or members of the class failed to burn more calories or lose more weight. The only thing that they've alleged here to connect Franulovic and to say that there wasn't calory-burning in Ms. Franulovic is Paragraph 54 where they say that because -- I believe it's 54. No, I'm sorry, it's 53, which is on the prior page on our chart, where they say because she didn't lose weight, it is a reasonable inference that she did not burn calories. That's the only allegation in this complaint that alleges Ms. Franulovic did not burn calories.

So even with your modifications to the complaint, you would -- your modifications would eliminate that allegation

because you have already held that it is patently unreasonable to link her alleged lack of weight-loss to Enviga, and so --

THE COURT: But they could still, the plaintiff could still allege that she believes that she did not burn calories. That would be okay, wouldn't it?

MR. ELDER: No. Plaintiff's belief that she didn't burn calories would not suffice to state a claim under -- under any -- they would have to allege she did not burn calories.

THE COURT: Right, okay.

MR. ELDER: And which I believe --

THE COURT: And discovery may bear out that they can't prove it, but bearing in mind that we're at a pre-discovery phase --

MR. ELDER: I understand. But the first point is that they haven't alleged that, it is not in this complaint, and as modified it would eliminate their only causal link, so we would be back to a complaint that doesn't allege that Ms. Franulovic failed to burn calories.

THE COURT: Wait, okay. How about if the allegation were as follows. This isn't what it is, but I just want to hear your position. If the allegation were as follows: Enviga does not cause calory-burning, therefore she wasted her money in buying it because she thought it did. That would be okay, right?

MR. ELDER: Your Honor, it gets much closer. I might modify that. It depends on --

THE COURT: Let me just -- see, the problem here is that it's readily apparent to me why the plaintiff doesn't want to be pinned down because the plaintiff wants to keep these implied weight-loss themes in the case and they're not there, I've thrown those out. And so what I want to make clear going forward is that if this case goes forward -- and that's why it becomes very important, Mr. Quirk, for me to pin you down, is is your claim that Enviga didn't burn calories, because it didn't burn calories, she wasted her money because she thought it burned calories? That is the only claim that I see that can survive. But I think to somehow weave in and implied weight-loss it becomes a problem because that claim isn't in anymore.

But that's your concern Mr. Elder, which is these theories seem to have a way of working themselves back into the case.

MR. ELDER: They not only work themselves back in and they become central and in this pleading, they are in fact central to her claim. It is a reasonable inference that because she did not lose weight, she did not burn calories. They allege the same thing as to the proposed class members. It is a reasonable inference that they did not burn calories presumably because they did not lose weight. How they would

have to basis to allege that, I don't know, but that's the only connection here.

THE COURT: But aren't you just setting up their good faith basis to believe why Enviga -- let's just step in the plaintiff's shoes for a moment. The plaintiff doesn't have the benefit of the scientific evidence, for example, so the plaintiff believes she doesn't burn calories because she didn't lose weight. Isn't that just a good faith basis to say why Enviga didn't burn calories?

MR. ELDER: It's not for a couple of reasons. First, they have pled and have said in open court here they cannot prove and cannot even allege that Enviga does not burn calories. And, your Honor, you alluded to the reason that they don't want to get pinned down here, they want to keep weight-loss in. There is another very important reason they don't want to get pinned down. We have said all along they don't allege and won't allege that Enviga does not burn calories at all, period, in any one. What they want to do is they want to play the prior substantiation game and say I'm not going to show it's false, I'm going to show there is not enough evidence, I don't like your evidence, you know, it just doesn't -- we're not happy with it.

THE COURT: Hold on one second.

Do you agree with what he just said?

MR. QUIRK: I obviously don't agree that prior

substantiation is a game, we think that that's a viable claim.

THE COURT: Okay. And I'm going to rule on that today, so let's put prior substantiation aside for a second. Is the complaint as you've amended it, does it allege that Enviga doesn't burn calories? Yes or no?

MR. QUIRK: Yes, we -- yes.

THE COURT: So, you are alleging Enviga doesn't burn calories?

MR. QUIRK: I mean, that's -- we're alleging what's in those paragraphs and it alleges both and we understand that.

THE COURT: So your discovery will go forward and you will prove that Enviga does not burn calories? That's what you want, you want discovery to prove that Enviga doesn't burn calories even though I know -- I don't think it was you, Mr. Quirk, but your co-counsel has indicated that you don't believe that you are going to be able to back that up, but I suppose that's for discovery, right?

MR. QUIRK: That's right, your Honor.

THE COURT: Yes. I'm referring to the March 2008 transcript.

Sorry, Mr. Elder, I interrupted you but --

MR. ELDER: Quite all right, your Honor.

To respond to what Mr. Quirk said, they give an answer that that's what their complaint alleges but then they

refer to those paragraphs, and again it sort of retreating to the more than ambiguous language in the complaint. This complaint, the fourth amended complaint that we have here, does not allege that. It says it's likely she didn't burn calories, it says the studies don't apply to enough people. And even if the studies turn out to be true, you know, we argue about the weight-loss. It does not say that this product does not burn calories and it doesn't say Ms. Franulovic did not burn calories.

THE COURT: Well, but Mr. Quirk said that he thinks it does and that's what he's willing to move forward on. And I think that a complaint that alleges that Enviga doesn't burn calories can go forward because -- and because it doesn't burn calories, she wasted her money, I think that's a viable CFA claim. I don't think the prior substantiation theory is a claim, and I'll rule on that, I don't think that that's a recognized claim.

So, from my way of thinking the only thing that survives is the claim that Enviga didn't burn calories and because it didn't burn calories, had she known that, she wouldn't have wasted her money. That is the only claim that's left.

MR. ELDER: What we would point out, your Honor, is how in the third amended complaint a plaintiff can allege "plaintiff does not know and cannot prove whether she actually

did not burn calories as a result of drinking Enviga" and then turn around in what would now be the fifth amended complaint and allege just the opposite is not something we believe they can accomplish.

THE COURT: No, because Mr. Quirk is going to show me right now how as the complaint is drafted, these words of weight-loss and substantiation and all that, can be excised out so that the only claim that I said survives is there because I don't want to be arguing about a fifth amended complaint. So, I understand your point, Mr. Elder, which is they can't put their money where their mouth is at the end of the day, but we're here on a motion to amend and if they think discovery will prove it, okay, they can have their discovery; but if they're allegation is that Enviga doesn't burn calories and had she known that Enviga didn't burn calories she wouldn't have wasted her money I think that states a viable claim, it states a claim of all of the various elements of the CFA. Let's go through them. I mean, your first argument, Mr. Elder, is that she can't prove her new allegation and you might be right, but they may be able to present scientific evidence that Enviga doesn't burn calories.

MR. ELDER: But what I'm concerned about, your Honor, is in this complaint and throughout this litigation they have pled Enviga burns calories in some people. They haven't argued that the clinical trial that was conducted didn't show

calory-burning. And I would -- they have pled to the contrary, and they just don't like the scope of the clinical trial. They have referred in their complaint to the other science about the ingredients in Enviga because it's publicly available. The notion that they can't plead these things because they don't know isn't true, and that's why they said in this Court that they can't plead it because the science is available to them. And in fact, Mr. Gardner said at the hearing when he said that, he said the scientists back at the Center for Science in the Public Interest wouldn't let him say that. That was the reason that he said he couldn't allege that because he could only go so far based on what's known. So that's our concern with trying to --

THE COURT: So it sounds like it's a judicial estoppel argument, which is prior to this they had pled that they know that it burns calories in some people?

MR. ELDER: That's right. They can't plead both things. We can't just erase their prior pleadings in this case about what the governing facts of the case are. And they can't -- and my concern with trying to focus on a given paragraph, 54 or 54, and strip out some language that if you just read that paragraph it might sound like they can state this calory-burning claim that they've been unwilling to state because it doesn't account for the prior pleadings and we believe that there would be estoppel and it doesn't account

for the -- it doesn't account for the -- not only the prior pleadings but the inconsistent allegations in this complaint.

So that would be our concern. And again, those aren't things that we've addressed on this complaint because this complaint doesn't say any of that. On this complaint what we said was you've just alleged the same thing, it's reasonable because of your weight-loss that you didn't burn calories, she clearly can't do that. So again, we have, you know, those concerns about not seeing -- you know, that's why you've sort of said if they plead this, that or the other do they state a claim? Well, what we've learned here is their entire pleading is important and we need to look at the whole thing.

THE COURT: Well, that's why we're here.

MR. ELDER: So --

THE COURT: All right.

Mr. Quirk, I want you to address that, but let me tell you that, I think I've already stated it, I don't think that the prior substantiation theory is justified here. I don't think that when Judge Debevois issued his opinion in *GlaxoSmithKline* I don't think that he was really making a meaningful distinction between both causes of action between the Lanham Act and the CFA.

MR. ELDER: Your Honor, on that point I would also point you to the District of New Jersey's opinion in *OMS Investments vs. Terracycle*, which 2007 West Law 2362597.

THE COURT: What is it?

MR. ELDER: West Law 2362597. And in *Terracycle* the Court said what all of the Third Circuit cases have said, is that even in a Lanham Act case prior substantiation is not a claim. The only narrow exception to that is a complete lack of any substantiation for your claims, like existed in *GlaxoSmithKline.* That clearly doesn't exist here when our evidence for these claims runs throughout their complaint.

Thank you.

THE COURT: Okay. Well, I am holding that prior substantiation is not an element of a CFA claim. So, that will not be in the case.

So what that leaves us with then is whether or not -- so, Mr. Quirk, what do you have to say to what Mr. Elder said, which is now you are saying something that contradicts what you said before? And what you said before was well, no, it does burn calories in some individuals, but now you want to say it doesn't burn calories at all. So, this case has a way of transforming itself.

MR. QUIRK: Well --

THE COURT: What do you have to say?

MR. QUIRK: Well, the concern all along has been not to say with certainty what happened inside the plaintiff's body just because we can't go back and reconstruct that.

THE COURT: That's true. You can't say one way or

another whether or not you believe Enviga burns calories.

MR. QUIRK: Right. And we've -- I'm not aware of where we have ever conceded that Enviga does burn calories. We've cited to studies that purport to show that, we have never embraced their validity as fact.

In terms of what's alleged in the paragraphs to the amended complaint. What I would -- I mean, I think that we can assert a claim out of what's in the amend complaint. Some may need to be struck. And if what's left at the end of the day is found to be inconsistent with something that we've previously said, I don't think it will be, but if it is, then it is, and --

THE COURT: It is and then what?

MR. QUIRK: Well, I mean, if your Honor finds that something that plaintiffs said during the course of the case estops this argument, then -- I mean then that is what it is. We don't think we have ever conceded that Enviga burns calories.

THE COURT: Well, here's what I'm going to do. I am going to allow the claim to go forward that Enviga doesn't burn calories and had plaintiff known that she wouldn't have wasted her money. That's the sole claim that's left in this case. If it turns out that the defendants have a solid basis for a judicial estoppel argument, for example, then I'll reconsider it. But before you folks leave today, I want you

to sit and I want you to strike out in the proposed amended complaint, and I want Mr. Elder and Mr. Boyer to look at it and everybody's got to be on the same page that that complaint is what it says it is because I don't want you leaving today then I'm back again on an another draft of the complaint. But that's the only claim that I see that survives.

MR. QUIRK: Okay. Yes, I understand that, your Honor, and we'll -- we'll attempt to do that.

I would point out though that in its opposition to this amended complaint what Mr. Elder said was that nothing that's in here adds up to a viable claim. And so I think that what we can -- we can preserve from here by striking the new references to weight-loss and come away with a viable claim.

Mr. Elder did not isolate out the calory-burning parts of our new allegations and argue as a grounds for dismissal of this complaint that we're estopped from making them. They argued that they didn't add up to a viable claim and they're moot. We think both of those arguments are wrong.

And, I mean, I understand and am not fighting in any way your Honor's ruling from the bench on the prior substantiation claim. I would like some guidance on -- we don't want to be deemed to have waived that claim in the event of an eventual appeal and so if we end up putting in a different amended complaint from this one, I want to make sure that whatever we do we're not deemed to have given that up.

THE COURT: Okay. And you've indicated that the reason you put the implied weight-loss back into this amended complaint is because you want to preserve it for appeal, which really frankly doesn't make a lot of sense to me. I have granted summary judgment on the implied weight-loss, that's preserved for appeal, you can argue it to the Third Circuit that I was wrong. I have rejected your claim of any prior substantiation. I don't think that it's recognized, I don't think that it's a claim under the CFA, so I've rejected your argument and now you've preserved it and you can argue to the Circuit that I was wrong.

MR. QUIRK: Thank you, your Honor.

THE COURT: I don't think it needs to be the amended complaint and it shouldn't be. It doesn't belong in there.

We haven't gotten into the issue of the injunctive relief yet.

Yes, Mr. Elder.

MR. ELDER: If I could, I'm concerned about the proposed process. I can't -- I can certainly --

THE COURT: Well, you can stick around and see what he comes up with and then we can argue over it again, I'm not suggest that maybe -- if you thought I was suggesting that you folks work it out, you know, that would be nice, but unrealistic.

MR. ELDER: I think that's unlikely.

THE COURT: Well, unless you want to come back. I know what's going to happen. You folks are going to be back here arguing about the striking-outs, I know what's going to happen. I just want to move this case along, it's been dragging along. So to my way of thinking I thought if Mr. Quirk could just show me all of his strike-outs maybe I'll rule on them and then you can come up with a clean copy. You want to hang out while he does that or do you want to come back if it's not acceptable to you? Because my ruling is I think at this juncture he should be permitted to allow that claim to go forward. That's my ruling, so....

MR. ELDER: If they believe that they can state a claim by altering the language in this complaint, I mean, we are of course happy to take a look at that. I would like the opportunity to assert all of our arguments that might apply to what is in essence a fifth amended complaint. I mean --

THE COURT: All right.

MR. ELDER: -- we've got to take the complaint as we see it. You know, that can be done -- we can take a stab at it today. But I guess what I'm saying is today, you know, there might be grounds, so I wouldn't want to not be able -- I wouldn't want to be prevented from later on filing a motion in opposition to that --

THE COURT: All right. Okay.

MR. ELDER: -- to that complaint.

THE COURT: Well, that comes under the category that sometimes haste makes waste, so we don't need to do it that way.

How much time do you need to re-amend or propose what will now be a fifth amended complaint to comport with my ruling?

MR. QUIRK: I don't think we need much time at all. I think going through the paragraphs I have a sense right here of what it is we would do that would satisfy your Honor's concerns. I would be happy --

THE COURT: All right. Can you do it by the end of Monday?

MR. QUIRK: Yes.

THE COURT: Two days?

MR. QUIRK: Yes, your Honor.

THE COURT: All right. And then I guess you would -- go ahead.

MR. QUIRK: Well, I mean, I'm sorry, I may have cut you off from answering my question. The question was going to be what is the matter of proceeding, filing another motion or filing --

THE COURT: Yeah, that's where I was starting to think about it as well. I have ruled that the amended complaint, your motion to amend the pleadings is granted in part, which is I'm allowing you to go forward on the amended pleading, but

it has to conform with my ruling. So, you'll need to resubmit a fifth amended complaint. If the defendants believe that it does not conform with my ruling, I'll have to rule on it. At the same time if the defendants believe they have additional arguments, then file that in terms of a motion, Mr. Elder. So a motion for the Court not to accept the proposed amendment because I think with that it keeps it cleaner.

MR. ELDER: Ten days from the amendment?

THE COURT: Yes. Let's look at the calendar. But I haven't gotten to the injunctive relief yet, which I want to get to.

(Short Pause)

THE COURT: Do you need more time, Mr. Quirk? Can you file it by the 21st or do you --

MR. QUIRK: If we could have a week, your Honor, sometimes as you probably wouldn't be surprised, our communications aren't always as fast as they could be.

THE COURT: How about until June 26th?

MR. QUIRK: Yes. Thank you, your Honor.

THE COURT: And then defendants can respond either yea or nay. And if it's a nay, it will be in the form of a motion, okay, by July 10th.

MR. ELDER: That's fine. Thank you.

THE COURT: Because of the holiday. So I'll extend the time. Yes, it's about 10 days, July 10th. And then you'll

have a week to respond, July 17th. And then either I'll have your folks back and/or I'll rule on the paper.

So now let's talk about the motion for injunctive relief -- or about the injunctive relief. So what about the new label?

MR. QUIRK: The new label still promises calory-burning and so the -- and both iterations of the claims that describe the one that your Honor has accepted and one that your Honor has rejected would still apply to the amended label.

THE COURT: All right. So your claim is that it doesn't burn calories and discovery will bear out whether it burns calories or not, it seems. And maybe somehow we should get into expedited discovery about that, shouldn't we, maybe? What do you think about that idea?

MR. ELDER: Your Honor, that was our proposal at the first scheduling conference in this case, was expedited discovery on the science. We don't believe that this complaint is going to survive, but if it does, we would agree with a schedule that would focus on the issue here.

THE COURT: Yes, that's really the crux of the case, either it burns calories or it doesn't.

MR. ELDER: We agree.

THE COURT: And it seems to be prudent to expedite discovery on that issue because, you know, now that I rejected

the prior substantiation theory, really that becomes the crux of the case, doesn't it?

MR. QUIRK: In terms of timing, the class certification motion was deemed moot in light of the summary judgment ruling. In time-line, class certification typically would come before summary judgment. Our position is that for purposes of discovery there really -- it's more a distinction without a difference anyway and that we had previously operated under a discovery order that was focused singly on class consideration and gave rise to some questions about whether something was class certification-based or merits based -- that if we do go forward on an expedited schedule, I would propose that that distinction be erased so that all of the discovery that's relevant to the merits that we would have for the renewed class certification as well.

MR. ELDER: Well --

THE COURT: But why does it matter?

MR. ELDER: Well, it matters because what I believe is that your Honor is proposing is an expedited schedule to get to the heart of the matter. We agree with that and we would say that limited discovery focused on those issues goes along with that. I believe what Mr. Quirk is saying is let's just remove all of the limits on discovery. Those were different limits because it was a different issue, class versus merits. So, it's not so much that I'm disagreeing with what Mr. Quirk

is saying except to the extent he's saying well, we now need discovery on everything because how people interpret these claims, those types of things, you know, survey evidence, lots of the company documents. You know, the discovery that would be relevant would focus on does it burn calories, what is the science here, what does the scientific evidence say, what is an expert?

Really, your Honor, what we need is we need an expert report from the plaintiffs that complies with Rule 26. We need to be able to challenge that expert report and we need to submit our own reports in response and get to the heart of the matter. We don't need full-blown discovery in order to accomplish that, we can accomplish that with narrowly defined discovery that's appropriate for moving quickly.

MR. QUIRK: Your Honor, what seems to be on the table is whatever claim we have and our ability to prove it and our ability to obtain class certification on it and in that sense the only limits would be the limits that are relevant to our claim. When Mr. Elder says that we don't need full-blown discovery, I don't understand what he's proposing that's any less than what we're ordinarily entitled to under the rules.

THE COURT: Well, but I can see the wreck coming down the train -- or the train coming -- whatever. I can see it happening, which is the parties are now going to be in dispute about well we should be entitled to take the depositions of

all these individuals who when they read the label they thought....and defendants are going to come back and say well, can't we just first resolve the issue of whether it burns calories or not because if it burns calories then there is nothing misleading or nothing false. And they have a very valid point.

Why should the parties have to go to the expense of all that other discovery if the plaintiff cannot prove that that is a false and misleading claim, which, based on this record, has some -- I'm inclined to agree with the defendants because this record, there has been a lot of suggestion by plaintiff's counsel that they're not so sure that they can support that claim. So, it's all getting me to say well, why don't we get to the crux of the case: Does it burn calories or not? Let's resolve that issue. And if there is a dispute of fact, it either burns or it doesn't or it can't be determined and a jury will have to decide it, or a fact finder will have to decide it, okay, then maybe discovery should then go further. It seems to me to be a much more prudent way of managing the case. And I've open to suggestions, but I don't see why we should do all this other discovery. You are not persuading me why we shouldn't just focus on the real crux of the case.

MR. QUIRK: Well, it may well be that we have just a different sense of what the crux of the case is, and it's only

different in this regard. Your Honor decides the crux is whether or not it burns calories and the only thing we would add to that is the elements of Rule 23, which are also we think part of -- 23 (b)(2) are also part of the crux of the case, and so in that sense the -- I don't understand -- I don't see why we should limit ourselves going forward.

THE COURT: Because if there is no claim, then there is no class.

MR. QUIRK: Either that or there is a *Feld* claim on I mean -- a *Feld* claim on behalf of a class. Not all class claims win and the typical -- you know, typically the motion for class certification comes first at, you know, at a practicable time after the pleadings are closed. And so I don't -- I would just request that we not undertake a discovery track that precludes us from renewing our motion for class certification.

MR. ELDER: What I was going to add, your Honor, is the class certification motions were filed because discovery on that issue was complete. I mean, that's what we did. We did the exercise of what do they need to know to allege that a class is appropriate here? We briefed it, we submitted it to the Court. So, that has been done. So the first thing would be unless there is something different now, there wouldn't be any need to do any more discovery on that issue, it was done, it was submitted. We are going to have a different claim but I

think that that claim is only much narrower than was submitted before and there wouldn't be any additional discovery. And as your Honor points out, the crux of the matter is does it burn calories if they can plead complaint that survives our motion and it's more than proper under multiple cases to reach that issue before reaching any other issue in the case.

THE COURT: Yes, because it really is an issue of mootness, isn't it? Because if it does burn calories and there is no evidence that it doesn't, then the controversy no longer becomes a justiciable controversy.

MR. QUIRK: That's an outcome-based analysis that if there is evidence to the contrary and it becomes a jury question, is the jury hearing it -- a claim on behalf of one person or on behalf of a class of New Jersey consumers?

THE COURT: No. Well, that's down the road, though. I think it is prudent to really focus on the issues that might resolve themselves sooner than later. I say that because, you know, Mr. Quirk, you and your -- not necessarily you, but your co-counsel has indicated to me they are not confident that they're going to be able to prove that this doesn't burn calories, so why shouldn't the parties focus on that issue first? Why should particularly the defendant have to go to all this added expense of litigating all the other issues relating to Rule 23 when this really is the critical issue?

So that's what I'm going to do. So the question is

how to we accomplish that. So I'm open to suggestions. Or you want me to just send you to -- who is it, Judge Donio?

MR. ELDER: Judge Schneider was --

THE COURT: Judge Schneider.

MR. ELDER: Is the Magistrate.

THE COURT: You want me to send you to him and you folks figure it out? I know what you are going to say: Judge, can you first rule on the motion to amend.

MR. ELDER: Well, I think that would be appropriate. But what I was going to say was we had previously submitted a proposed schedule, and we're happy to do so again, setting out --

THE COURT: To me?

MR. ELDER: We submitted it to Judge Schneider.

THE COURT: Oh.

MR. ELDER: Originally.

THE COURT: Well, should I look at it now? Would it save the parties time?

MR. ELDER: I think maybe we -- we'll see where we get and maybe -- because we might be able to work out some type of schedule.

THE COURT: If you can't, then go before Judge Schneider and tell him that I want expedited discovery on this issue of whether it burns calories or not, that's to be taken care of first. And I'll speak with him as well so that he

knows.

So how should we leave it? Do you folks want to attempt to work out a scheduling order or do you want me to send you to Judge Schneider or to you want to just wait and see what I do with the newly amended complaint?

MR. QUIRK: Mr. Elder suggested that last -- seeing what your Honor does with the newly amended complaint and it doesn't happen too often, but I would agree with that. And then assuming that an amended complaint survives, I think we'd like the chance to try to work something out, and then if we can't go to Judge Schneider to resolve any differences.

THE COURT: All right. So I will get your submissions, I will attempt to rule expeditiously. That then takes us to July. If the complaint survives, then you folks will work something out. And hopefully by August, if the complaint survives, you'll be in the throws of discovery relating to this issue burning calories. Okay?

MR. QUIRK: May I ask one final question as a matter of procedure?

THE COURT: Yes.

MR. QUIRK: I think this is asking the question I already asked and was answered, but in the amended complaint that we next submit Paragraph 69 addressing the prior substantiation, your Honor is saying that's out of the case, don't put that in?

THE COURT: Right.

MR. QUIRK: And we're deemed to have preserved that issue without putting it in again?

THE COURT: Right.

MR. QUIRK: Thank you, your Honor.

THE COURT: Um-hum. Okay, this keeps the case on track. And if I need to have you folks back in on the next submission, I will because sometimes I find it's just more effective, unless you've worked it out. Okay. Enjoy your day.

MR. ELDER: Thank you.

MR. QUIRK: Thank you, your Honor.

MR. POTTINGER: Thank you, your Honor.

MR. ELDER: Thank you, your Honor.

THE DEPUTY CLERK: All rise.

(Proceeding then ended).