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

CENTER FOR SCIENCE IN THE PUBLIC INTEREST, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	CIVIL NO. 1:07-cv-00-00539-RMB-JS Document Electronically Filed **Return date: June 15, 2007**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

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INTRODUCTION

Pursuant to FED. R. CIV. P. 12(b)(1), 12(b)(6) and 9(b), Defendants The Coca-Cola Company, Nestlé USA, Inc. and Beverage Partners Worldwide (North America) ("Defendants") move to dismiss Plaintiff's Amended Complaint ("Complaint") for lack of standing, failure to state a claim upon which relief can be granted and failure to plead with particularity.

Plaintiff Center for Science in the Public Interest ("CSPI") alleges that Defendants have engaged in "illegal, fraudulent, and deceptive business practices" in the marketing of their new sparkling green tea beverage, Enviga. Compl ¶ 1. Enviga contains a combination of caffeine and epigallocatechin gallate ("EGCG"), an antioxidant that occurs in green tea, that has been shown in scientific studies to increase calorie burning. Compl. ¶¶ 6, 17, 21, 26, 32-33, 35, 48(c). Thus, Defendants market Enviga as "The Calorie Burner" and inform consumers that drinking three cans of Enviga per day will result in additional daily calorie burning of approximately 60-100 calories. Compl. ¶¶ 20, 24.

CSPI acknowledges that Defendants' claims are supported by a scientific study. *See* Compl. ¶ 48(c) (recognizing that Defendants' scientific "study evidence showed that Enviga had a desirable effect" on the test subjects) (emphasis added); Compl. ¶¶ 6, 21, 26, 28, 32 (acknowledging that Defendants' claims regarding Enviga are based on the results of a scientific study); Compl. ¶ 33 (acknowledging that Plaintiff does not know that Defendants' claims are false). The study to which CSPI's Complaint refers repeatedly was published in the scientific journal *Obesity*. *See* Servane Rudelle, *et al.*, *Effect of a Thermogenic Beverage on 24-Hour Energy Metabolism in Humans*, 15 OBESITY 349 (Feb. 2007) ("Enviga Study") (attached as

Exhibit A).[1] CSPI appears to concede that the Enviga Study demonstrates a calorie burning effect of a beverage containing EGCG and caffeine in the study subjects. Indeed, CSPI does not allege that the product did not perform as advertised for its members. CSPI, however, feels that the scope of the study is not broad enough to justify marketing Enviga as "The Calorie Burner" to the general population. *See* Compl. ¶ 48(c).

CSPI's suggestion that the advertising claims are "unsubstantiated" is at best a bald legal assertion entitled to no deference for purposes of a Rule 12(b)(6) motion. CSPI does nothing in its Complaint to explain away the many additional published scientific studies that demonstrate the ability of caffeine and EGCG to increase calorie burning. For example, the Enviga Study notes that "caffeine has been studied extensively . . . and it is well accepted that caffeine stimulates thermogenesis [calorie burning] and fat oxidation." Rudelle, *supra*, at 353-54. The authors also note that their results were "similar to that . . . observed by Dulloo et al. whose subjects consumed a similar amount of epigallocatechin gallate (EGCG) and one-half the amount of caffeine as those in the present study." *Id.* at 353.

Despite CSPI's acknowledgement of the Enviga Study results, CSPI brings two counts against Defendants, both grounded upon the New Jersey Consumer Fraud Act ("CFA"). CSPI's second count differs from the first only by asserting that an alleged violation of "New Jersey food and drug laws" is an additional basis for a claim under the CFA. Compl. ¶¶ 51 to 53. Thus, CSPI asserts a single cause of action – alleged violation of the CFA – as two separate counts.

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[1] In ruling on a Rule 12(b)(6) motion to dismiss, this Court may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading. *See Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *see also Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429 (7th Cir. 1993); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991).

No matter how CSPI labels its claims, CSPI fails to state a claim in this Complaint because it ***lacks standing*** to assert any claim against Defendants. CSPI purports to bring this action "on its own behalf and on behalf of its New Jersey members and subscribers who purchased Enviga." Comp. ¶ 9. Thus, CSPI asserts both individual and associational standing, but neither theory permits CSPI to maintain this action.

CSPI lacks individual standing because it has not alleged any "ascertainable loss" under the CFA or other injury distinct from any alleged injury to its members. Nor is it plausible that CSPI could ever suffer any such injury – an organization does not consume beverages, burn calories, or fail to burn calories as a result of consuming Enviga.

Likewise, CSPI lacks associational standing because it seeks money damages from Defendants, and a claim for damages cannot proceed by the association in the absence of CSPI's individual members. New Jersey law, moreover, plainly prohibits an association from pursuing a claim under the CFA solely for injunctive relief.

As a separate and independent ground for dismissal, CSPI has failed to plead its CFA claims with particularity as required by FED. R. CIV. P. 9(b). It is well-established that Rule 9(b) applies to claims under the CFA and, in the context of this case, requires specific allegations as to the individual actions of each defendant giving rise to the claim, specific details relating to alleged product purchases, specific acts demonstrating reliance, and specific facts showing Plaintiff's own ascertainable losses. Plaintiff's Complaint is devoid of these particulars and should be dismissed in accordance with abundant precedent in this District and Circuit.

Finally, CSPI fails to state a claim for alleged violations of the New Jersey Food and Drug laws because there is no private right of action. Those laws are not among the specific set of regulations which, if violated, give rise to a claim under the CFA.

ARGUMENT AND AUTHORITY

While it is true that courts ruling on motions under FED. R. CIV. P. 12(b)(6) must accept well-pleaded allegations in the Complaint as true, it is equally clear that courts are not required to credit improperly alleged "bald assertions" and "legal conclusions." *See, e.g., In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429 (3d Cir. 1997). Similarly, "legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness." *Trans Hudson Express, Inc. v. Nova Bus Co.,* No. 06-4092, 2007 WL 1101444, at *1 (D.N.J. Apr. 11, 2007). Of particular significance in this case, a party asserting standing must "clearly [] allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation marks omitted) (ruling modified on other grounds in *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004)). Failure to do so removes the dispute from the subject matter jurisdiction of the court, and mandates dismissal of the party's claim. *See Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 992 F. Supp. 709, 716 (D.N.J. 1998) (dismissing the plaintiff's CFA claim where he lacked standing to bring a claim under the CFA) *aff'd*, 165 F.3d 221 (3d. Cir 1998); *see also Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 264 (D.N.J. 2000) *aff'd*, 273 F.3d 536 (3d Cir. 2001). Applying these well-established principles, as is more fully detailed below, courts have repeatedly dismissed CFA claims having deficiencies similar to those presented by Plaintiff's Complaint. The same result is warranted here.

I. CPSI'S COMPLAINT SHOULD BE DISMISSED BECAUSE CSPI LACKS STANDING TO BRING A CLAIM AGAINST THE DEFENDANTS.

Standing under Article III of the United States Constitution is a threshold issue. *Joint Stock Soc'y v. UDV N. Am., Inc*., 266 F.3d 164, 175 (3d Cir. 2001). At the pleadings stage, Plaintiff must set forth "specific facts that indicate that the party has been injured in fact or that

injury is imminent, that the challenged action is causally connected to the actual or imminent injury, and that the injury may be redressed by the cause of action." *Anjelino v. N.Y. Times, Co.,* 200 F.3d 73, 88 (3d Cir. 1999). Accordingly, on a motion to dismiss, it is "proper for [a trial court] to require the [plaintiff] to go beyond … general allegations in the complaint and allege particularized facts supportive of its standing." *Newark Branch NAACP v. Town of Harrison, N.J.,* 907 F.2d 1408, 1415 & n.10 (3d Cir. 1990) (citing *Warth v. Seldin,* 422 U.S. 490, 501-02 (1975); *Doherty v. Rutgers School of Law – Newark,* 651 F.2d 893, 898 (3d Cir. 1981)).

A. CSPI cannot establish direct standing "on its own behalf."

In part, CSPI, a non-profit organization, "brings this action [against Defendants] on its own behalf …." Compl. ¶¶ 1, 9. To establish constitutional standing "on its own behalf," CSPI must establish three essential elements: (1) the plaintiff must have suffered injury in fact; (2) there must be a causal nexus between that injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *see also Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 296 (3d Cir. 2003). An "injury in fact" must be a "concrete and demonstrable injury" which consists of more than "a setback to the organization's abstract social interests." *Ctr. for Law & Educ. v. United States Dep't of Educ.,* 315 F. Supp. 2d 15, 22 (D.D.C. 2004) (citing *Nat'l Taxpayers Union, Inc. v. United States,* 68 F.3d 1428, 1433 (D.C. Cir. 1995)); *see also Miller v. Nissan Motor Acceptance Corp.,* 362 F.3d 209, 221 (3d Cir. 2004) (holding that an "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"). In other words, to establish standing "on its own behalf," CSPI must allege that it has suffered an actual injury distinct from the injury of its members, such that CSPI has an independent stake in the outcome of the litigation.

Under the CFA, CSPI's alleged injury must be an "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of any method, act or practice declared unlawful under this act . . . ." N.J. Stat. Ann. 56:8-19; *see also Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 791 (N.J. 2005) (holding that under the CFA, a plaintiff must demonstrate a loss attributable to a defendant's unlawful conduct). CSPI's Complaint is entirely devoid of any factual allegations demonstrating an "ascertainable loss" or other injury sufficient to establish constitutional standing to sue on its own behalf. Instead, CSPI relies on vague legal conclusions that its rights were violated and that it "suffered an ascertainable loss[] as a direct result of [Defendants'] wrongful conduct." Compl. ¶¶ 49, 50, 53. But CSPI fails to allege any facts demonstrating how the organization, as opposed to the individual members, could even possibly suffer the type of ascertainable loss actionable under the CFA. Thus, CSPI's conclusory allegations fail to "clearly allege facts demonstrating that [CSPI] is a proper party to invoke judicial resolution of the dispute" and are insufficient as a matter of law to establish standing, even at the pleadings stage of litigation. *FW/PBS, Inc.*, 493 U.S. at 231 (emphasis added); *see also Anjelino*, 200 F.3d at 87.

In reality, CSPI's allegations rest entirely on alleged misrepresentations and injuries to its members, and CSPI's only interest in this litigation is its abstract ideological interest to "improve the nation's health by advocating for better nutrition and safer food." Compl. ¶ 9. In this respect, CSPI's claims are similar to the plaintiff-organization's claims in *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003). In *Clark*, an individual and an organization, ADA Access Today ("ADAAT"), sued as joint plaintiffs – each on their own behalf – alleging that Burger King violated the Americans with Disabilities Act. *Id.* at 344 . Like CSPI, ADAAT failed to allege that it, as opposed to its members, had suffered a cognizable injury under the ADA as a

result of Burger King's alleged ADA violations. *Id.* at 344-45 . Significantly, the court rejected ADAAT's argument that the organization's "ideological interest in preventing disability based discrimination" alone was sufficient to support individual standing for ADAAT. According to the court, "[a]lthough ADAAT may have an ideological interest in preventing disability based discrimination, such a purely ideological injury is insufficient to support standing to sue in its own right." *Id.* at 344 (citing *Kessler Inst. for Rehab., Inc. v. Mayor and Council of Essex Fells,* 876 F. Supp. 641, 656 (D.N.J. 1995)); *see also Valley Forge Christian College v. Ams United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (holding that the "psychological consequence presumably produced by observation of conduct with which one disagrees … is not an injury sufficient to confer standing under Art. III …"). Thus, because CSPI alleges only an ideological interest in this litigation, it lacks standing and its claims must be dismissed.

B. CSPI cannot establish "associational standing" "on behalf of its Members and subscribers residing in New Jersey."

CSPI alleges associational standing "on behalf of its Members and subscribers residing in New Jersey." Compl. ¶ 9. To establish "associational standing," an organization must establish that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977); *see also Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005). CSPI cannot demonstrate associational standing because CSPI's claim for money damages requires the participation of its individual members in this action. As a corollary principle, New Jersey law prohibits CSPI from pursuing a claim for injunctive relief in the absence of a claim for monetary damages, thereby eliminating any potential basis for associational standing.

1. CSPI's claim for money damages requires the participation of individual members.

In its Complaint, CSPI makes claims for both injunctive relief and damages in the form of a refund of "all monies obtained by means of [Defendants'] violations of" the CFA. *See* Compl., *Prayer for Relief* ¶ 3; *see also* Compl. ¶ 8. As the Third Circuit has held, "damages claims usually require significant individual participation, which fatally undercuts a request for associational standing."[2] *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002); *see also United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (holding that "[individual] participation would be required in an action for damages to an association's members"); *Telecomm. Research & Action Ctr. ex rel. Checkhoff v. Allnet Commc'n Servs, Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) ("lower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members").

As the decisions above make clear, a claim for money damages requires the participation of the association's individual members because without such participation, it would be impossible to determine whether the members are actually entitled to damages and, if so, the amount of the damages claimed. Thus, absent participation of CSPI's individual members, it would be impossible to determine, for example, whether the Defendants' alleged conduct caused

[2] There is one immaterial exception to this rule, which applies if the legislature has expressly authorized an organization to assert damages claims of its members. *See United Food*, 517 U.S. at 558 (holding that Congress could abrogate the requirement that the claims and relief do not require participation of the individual members, because this rule is "judicially fashioned and prudentially imposed"). So, for example, a union may assert a claim for damages on behalf of its workers where Congress expressly provided for that remedy by statute. *See id.* But there is no express legislative authorization applicable here and certainly none is alleged in the Complaint.

any member to purchase Enviga or whether it was purchased for some other reason, such as simply liking green tea. It would also be impossible to determine how many of CSPI's members purchased Enviga, how much each member purchased, or how much each member paid for Enviga. Accordingly, because CSPI's claim for money damages would require extensive participation by its individual members, CSPI lacks associational standing to bring such a claim "on behalf of its Members." *Pa. Psychiatric Soc'y,* 280 F.3d at 284 ("[h]ad the Society continued to press its claims for damages on appeal, dismissal under Rule 12(b)(6) would be entirely appropriate").

The potential for a double recovery and other practical considerations also counsel against associational standing to pursue damages on behalf of individual members. What if an individual member wished to sue in his or her own right? If CSPI recovered damages on behalf of its members, how would they be apportioned, if at all? The better approach, as well-supported by Third Circuit precedent, is to avoid such issues by confining standing only to directly injured parties.

2. CSPI cannot bring a Consumer Fraud Act claim on behalf of its members seeking only injunctive relief.

Because CSPI cannot pursue a claim for monetary damages on behalf of its members, injunctive relief is the only remaining basis upon which CSPI might attempt to establish associational standing. Any argument, however, that CSPI has standing to forgo a damages claim and seek only injunctive relief on behalf of its members is equally and fatally flawed. New Jersey law is clear that a private party may not bring a claim for injunctive relief under the CFA unless that party can also demonstrate a viable claim for damages based on an alleged "ascertainable loss." *See Weinberg v. Sprint Corp.*, 801 A.2d 281 (N.J. 2002); *Thiedemann*, 872

A.2d 783. Only the New Jersey Attorney General, not a private party such as CSPI, has standing to pursue a claim under the CFA that seeks only injunctive relief. *Id*.

CSPI, therefore, cannot establish associational standing to pursue a claim for either money damages or for injunctive relief. It lacks associational standing to pursue money damages because that claim requires the presence of the individual members who allegedly have been damaged. And it lacks standing to pursue only injunctive relief because only the New Jersey Attorney General has standing to pursue such a claim. Accordingly, CSPI's entire Complaint should be dismissed.

II. CSPI FAILS TO STATE A CLAIM FOR ALLEGED VIOLATIONS OF THE CFA.

In addition to the fundamental defect of a lack of standing, CSPI fails to state a claim under the CFA for other independent reasons. First, because claims under the CFA sound in fraud, a claim asserted under the CFA must be pled with particularity as required by FED. R. CIV. P. 9(b), and CSPI's Complaint fails to include any of the specific facts necessary to state a claim. Second, CSPI bases its claim on a number of statements of opinion or "puffery" typically found in all types of advertisements which are not actionable under the CFA as a matter of law. Finally, CSPI fails to state a claim under the CFA for alleged (albeit unspecified) violations of the New Jersey Food and Drug Laws because the food and drug laws are not among the limited class of regulations promulgated pursuant to the CFA which, if violated, also result in a per se violation of the CFA.

A. <u>CSPI failed to plead its CFA claim with sufficient particularity.</u>

It is well established that CFA claims are "subject to the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure." *FDIC v. Bathgate*, No. 91-2779, 1993 WL 661961, at *2 (D.N.J. July 19, 1993) (dismissing CFA claim for failure to plead with

particularity), *aff'd*, 27 F.3d 850 (3d Cir. 1994); *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 494 (D.N.J. 1999) (same); *see also Monarch Life Ins. Co. v. Senior*, No. 06-559, 2006 WL 3825138, at *7 n.5 (D.N.J. Dec. 22, 2006) (noting that "the pleading requirements of Rule 9(b) apply to both NJCFA and common law fraud claims"); *Zebersky v. Bed Bath & Beyond, Inc.*, No. CIVA 06-CV-1735 PGS, 2006 WL 3454993, at *4 (D.N.J. Nov. 29, 2006) ("Like a claim of common law fraud, a claim under the NJCFA must satisfy the specificity requirement of FED. R. CIV. P. 9(b).").

To satisfy the particularity requirements of Rule 9(b), a plaintiff must, at a minimum, allege the date, place, or time of the fraud, and must plead who said what to whom as well as the general content of the communication. *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004). Pleadings containing mere "collectivized allegations against 'defendants' do not suffice." *Naporano*, 79 F. Supp. 2d at 511. Instead, "[a] plaintiff must plead fraud with particularity with respect to <u>each defendant</u>, thereby informing each defendant of the nature of its alleged participation in the fraud." *Id*. (emphasis added). CSPI's Complaint falls far short of the particularity requirement of Rule 9(b).

Contrary to the most basic rules of pleading a CFA Claim, CSPI's Complaint makes only generalized allegations against the Defendants collectively. *See, e.g.,* Compl. ¶ 6 ("<u>Defendants</u> made these claims"); Compl. ¶ 20 ("<u>Defendants</u> market Enviga as a weight-loss or weight-control product"); Compl. ¶ 28 ("<u>Defendants</u> market this product to all New Jersey consumers") (emphasis added). Such "collectivized allegations," however, do not sufficiently notify each Defendant of its allegedly misleading statements. *Naporano*, 79 F. Supp. 2d at 511 ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to

'defendants.' A plaintiff must plead fraud with particularity with respect to each defendant . . .") (citations omitted).

CSPI's Complaint alleges a list of claims regarding Enviga that CSPI baldly asserts is either "unsubstantiated" or "uncorroborated." *See* Compl. ¶¶ 6, 21, 26, 30-32, 39, 42, 46, 48(a). CSPI, however, fails to specify which claims it alleges are "unsubstantiated" or "uncorroborated." Nor is it clear how a claim that is "unsubstantiated" or "uncorroborated" necessarily violates the CFA, which requires falsity.

CSPI also never identifies which of Defendants' allegedly "unsubstantiated" claims its members relied upon in purchasing Enviga. In fact, CSPI fails to identify even one actual purchase of Enviga at all, much less an "ascertainable loss" as a result of Defendants' allegedly unlawful conduct. Rather, the Complaint very generally alleges that "CSPI and its Members suffered ascertainable losses as a direct result of [Defendants'] wrongful conduct and Defendants have obtained monies from CSPI's Members by means of the unlawful practices alleged herein." Compl. ¶¶ 50, 53.

Likewise, CSPI fails to allege when its members purchased Enviga, where they purchased Enviga, the quantity of Enviga purchased by each member, or its members collectively, or how much its members paid for their Enviga. In fact, CSPI has failed to plead any specifics whatsoever regarding any single members' transaction. These shortcomings are pervasive and fatal. As this Court recently held, a plaintiff must plead the particulars of its own transaction to state a claim under the CFA. *See Zebersky*, 2006 WL 3454993, at *4 (granting defendant's motion to dismiss the plaintiff's CFA claim because "[p]laintiff fails to allege any specifics regarding her own transaction …"); *see also Naporano*, 79 F. Supp. 2d at 511 (holding that plaintiff's "generalized pleadings resemble vague pleadings that the Third Circuit has

rejected"); *Wolfe v. Noble Learning Comtys., Inc.*, No. 06-3921, 2006 WL 3825137, at *2 (D.N.J. Dec. 26, 2006) (requiring plaintiffs to replead and "specify what 'ascertainable loss' Plaintiffs suffered" and "more clearly refer to the allegedly fraudulent statements on which they relied to their detriment") (emphasis added); *Kirtley v. Wadekar*, No. 05-5383, 2006 WL 2482939, at *3 (D.N.J. Aug. 25, 2006) (granting defendant's motion to dismiss because "[p]laintiffs do not allege with particularity … exactly who bought exactly what product when, relying on what false representations made by whom"); *Pacholec v. Home Depot USA, Inc.*, No. 06-CV-827, 2006 WL 2792788, at *2 (D.N.J. Sept. 26, 2006) (same). The same principles should be applied once again here, and CSPI's Complaint should be dismissed.

B. Many of the statements identified by CSPI are either opinions or mere puffery and therefore cannot form the basis of CSPI's CFA claim.

The CFA allows recovery only for false statements of fact – not mere statements of opinion or "puffery" typically found in advertisements. Because many of the statements identified in CSPI's Complaint represent opinion or "puffery" advertising, they cannot form the basis of a CFA claim. *See N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) ("[O]ur Supreme Court has also recognized there is indeed a distinction between misrepresentations of fact actionable under the CFA and mere puffing about a product or a company that will not support relief") (citing *Rodio v. Smith*, 123 N.J. 345, 352, 587 A.2d 621 (1991).

In *New Jersey Citizen Action*, the plaintiffs brought a class action against the manufacturer of the non-prescription allergy medication, Claritin. 842 A.2d 174. In their complaint, the plaintiffs had argued that the defendant's advertising statements such as "you . . . can lead a normal nearly symptom-free life again" constituted a false promise guaranteeing total and universal effectiveness of the product. *Id.* at 177. Though the defendant's own scientific

studies demonstrated that Claritin was only effective in approximately 50% of consumers, the court affirmed the dismissal of the plaintiff's CFA claim as "meritless." In so holding, the court stated:

> This and similar statements in [the defendant's] advertising for these products are, simply put, not statements of fact, but are merely expressions in the nature of puffery and thus are not actionable. These statements, merely by the use of the word "you" and by the failure to include a disclaimer along the lines of "results may vary" are not transformed into a guarantee of universal and complete effectiveness and thus are not statements of fact actionable under the CFA.

Id.

In addition to allowing for "puffery," "[t]he CFA does not require such salesmanship to be accompanied by statistics about the product's effectiveness in order to avoid liability for false advertisement." *N.J. Citizen Action v. Schering-Plough Corp.*, No. L-7838-01, 2002 WL 32344594, at *3 (N.J. Super. Ct. L. Div. May 12, 2002), *aff'd*, 842 A.2d 174 (N.J. Super. Ct. App. Div. 2003). Thus, as in *New Jersey Citizen Action*, this Court should disregard CSPI's allegations implying that Defendants concealed information regarding the scope of the Enviga Study. Finally, Defendants are not required to perform basic calculations for CSPI or its members, because the price of Enviga is obviously readily available to anyone who purchases it.

Accordingly, this Court should dismiss CSPI's CFA claim to the extent it relies on any of the following allegations:

- Enviga is "much smarter than fads, quick-fixes, and crash diets." Compl. ¶¶ 5, 24 (puffery).
- Enviga "gives your body a little extra boost." Compl. ¶ 23 (puffery).
- "Enviga is the perfect refresher for you: everyday you do your bit to cut out or burn a few extra calories, Enviga is doing its little bit to help." Compl. ¶ 24 (puffery).
- "Be positive. Drink negative." Compl. ¶ 25 (puffery).

- "Invigorate your metabolism." Compl. ¶ 25 (puffery).

- Defendants "advertis[ed] Enviga without having prior substantiation for all advertising claims." Compl. ¶ 48(a) (failure to disclose statistics).

- Defendants advertised Enviga without disclosing "that the minimal study evidence showed that Enviga had a desirable effect only on a discreet and minor segment of the population." Compl. ¶ 48(c) (failure to disclose statistics).

- Defendants "advertis[ed] Enviga without the material fact that one would have to drink three cans daily (at a cost of over $4.00)." Compl. ¶ 48(d) (basic calculations).

- Defendants "[f]ail[ed] to disclose that it would be necessary to spend weeks drinking three cans of Enviga daily – at least 100 cans at an approximate cost of $150 – just to enjoy a possible loss of one pound." Compl. ¶ 48(e) (basic calculations).

C. CSPI fails to state a claim under the CFA for alleged violations of the New Jersey Food and Drug Laws.

In Count II, Plaintiff attempts to assert a novel claim under the CFA by alleging unspecified violations of the "New Jersey Food and Drug Laws," a completely separate statutory scheme from the CFA. *Compare* N.J. Stat. Ann. 24:17-1 *et seq*. (Food and Drug) *with* N.J. Stat. Ann. 56:8-1 *et seq.* CSPI appears to claim that an alleged violation of the New Jersey Food and Drug Laws is a *per se* violation of the CFA.

Whatever CSPI intended to plead, CSPI fails to state any viable claim in Count II for three reasons. First, Count II is a claim under the CFA and, as discussed above, it should be dismissed for failure to plead with particularity as required by Rule 9(b). Regarding the Defendants' alleged conduct, CSPI alleges only that "for the reasons set out above, defendants violated the New Jersey food and drug law by misbranding Enviga." Compl. ¶ 51. CSPI does not specify which particular portions of the food and drug laws or regulations allegedly have been violated or the specific conduct that results in the alleged violation. Nor does CSPI explain

how this alleged violation resulted in an ascertainable loss to CSPI or anyone else. Rule 9(b), therefore, warrants the dismissal of Count II.

Second, the CFA does not provide a remedy for conduct that might be unlawful under the New Jersey Food and Drug Laws. *See* N.J. Stat. Ann. 56:8-2 *et seq.* The CFA provides a remedy for a private plaintiff that "suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act…." N.J. Stat. Ann. 56:8-19 (emphasis added). CSPI appears to allege that a violation of the New Jersey Food and Drug Laws is a *per se* violation of the CFA. This claim has no basis in New Jersey law, because only a violation of the specific regulations *promulgated under the CFA* results in a *per se* violation of the CFA. *See Monogram Credit Card Bank v. Tennesen*, 914 A.2d 847, 853 (N.J. Super. App. Div. 2007) ("The third category of unlawful acts consists of violations of *specific regulations promulgated under the [CFA]*. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations.") (emphasis added) (quoting *Cox v. Sears Roebuck & Co*., 647 A.2d 454 (N.J. 1994)). The New Jersey Food and Drug Laws do not fall into this limited category of regulations promulgated under the CFA, and CSPI, therefore, fails to state a claim.

Third, the New Jersey Food and Drug Laws do not provide CSPI with a private right of action. Rather, under the statute's plain language, civil actions for violations of the New Jersey Food and Drug Laws must be brought by either the State Department of Health or by a local health board. N.J. Stat. Ann. 24:17-5 ("any and all penalties prescribed by any provision of this subtitle shall be sued for and recovered in a civil action by and in the name of the State Department of Health, or by and in the name of the local board of health …") (emphasis added). Perhaps in recognition of this fact, Plaintiff has attempted to bootstrap the requirements of the

New Jersey Food and Drug Laws into the Consumer Fraud Act without any authority or precedent for doing so. For the reasons stated above, such an attempt must fail, and Count II of CSPI's Complaint should be dismissed.

CONCLUSION

CSPI cannot satisfy the basic constitutional prerequisite of standing. CSPI cannot bring a claim under the CFA individually, because CSPI does not allege an "ascertainable loss" of any type. Additionally, CSPI lacks standing to bring an action against Defendants "on behalf of its Members" because the members' participation is required as a result of CSPI's claim for money damages. There is not, in fact, any case or controversy between CSPI and the Defendants that is legally distinct from any potential claim by CSPI's members. CSPI's Complaint also fails to satisfy the heightened pleading requirements imposed by FED. R. CIV. P. 9(b), because it fails to identify, among other necessary facts, the date, place, or time of the alleged fraud, and who said what to whom. Finally, alleged violations of the New Jersey Food and Drug Law cannot form the basis of a CFA claim, because the food and drug laws are not among the specific regulations promulgated pursuant to the CFA. Accordingly, Defendants respectfully request dismissal of CSPI's First Amended Complaint in its entirety.

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