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

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

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

INTRODUCTION

The canned arguments for dismissal made by Defendant The Coca Cola Company ("Coke") are at war with one another and amount to very little in any event.

Plaintiff Linda Franulovic sued Coke on behalf of herself and other New Jersey consumers alleging that its marketing of its soft drink product Enviga around "calorie-burning" claims calculated to make consumers believe it is a weight-loss product is misleading and deceptive under New Jersey's Consumer Fraud Act ("CFA").[1] Coke moved to dismiss on the grounds that (1) the Complaint failed to provide the required particularity or notice for consumer fraud claims under Fed. R. Civ. P. 9(b); (2) the misrepresentations of which Coke does not have notice are mere "puffery"; and (3) Franulovic cannot state an actionable claim under the CFA for violation of New Jersey's Food and Drug Law ("FDL").[2] None of these arguments has merit.

First, the Second Amended Class Action Complaint ("Complaint")[3] easily satisfies Rule 9(b)'s requirements for pleading consumer fraud. The Complaint lists 20 specific statements Coke has made concerning Enviga and calorie burning that Franulovic alleges are misleading and deceptive.[4] The Complaint further alleges that Franulovic read the quoted representations on the Enviga can's label in making her purchasing decisions.[5] These allegations are more than sufficient to satisfy Rule 9(b)'s purpose to "provide defendants with notice of the precise

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[1] N.J.S.A. § 56:8-1, *et seq.*

[2] N.J.S.A. § 24:1-1, *et seq.*

[3] Docket #41, filed 8/13/07.

[4] Complaint ¶¶21-23.

[5] *Id.* ¶46.

misconduct that is alleged[.]"[6] As if to prove that its Rule 9(b) notice argument is not serious, *Coke has attached the Enviga label quoted in the Complaint as an exhibit to its Motion.*[7]

Likewise, Coke's argument that its calorie-burning claims for Enviga are mere "puffery" is plainly wrong. This Court has defined puffery as "'vague and ill-defined opinions,'" as opposed to "assurances of fact."[8] Coke's promises to consumers that Enviga burns calories are statements of fact subject to verification, and thus cannot be swept aside as mere puffery.[9] In addition, unlike the "puffery" cases addressing mass-media advertising, some of Coke's calorie burning claims here were made on the label of the Enviga can itself, which (as discussed below) is governed by the Food and Drug Law's stringent prohibition against "misbranding."

Finally, Coke's argument for dismissing Franulovic's separate CFA claim based on violation of the Food and Drug Law fails as a matter of law. The FDL prohibits the sale of any food product that is "misbranded,"[10] which is defined as any label or package statement that is "false or misleading in any particular."[11] Coke argues that Franulovic's claim for violation of the

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[6] *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999).

[7] *See* Motion to Dismiss, Exhibit B.

[8] *Bubbles N' Bows, LLC v. Fey Publishing Co.*, 2007 U.S. Dist. LEXIS 60790 at *25 (D.N.J. Aug. 20, 2007) (quoting *Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 435 (D.N.J. 1998)).

[9] *See, e.g., Castrol, Inc. v. Pennzoil Quaker State Co.*, 169 F. Supp. 2d 332, 335-36 (D.N.J. 2001) ("Pennzoil went well beyond the general and made specific superiority claims that, in some instances, were linked to specific attributes of Pennzoil motor oil and, in others, were subject to verification according to accepted industry tests or standards. Such claims cannot be deemed mere puffery.").

[10] N.J.S.A. § 24:5-1.

[11] N.J.S.A. § 24:5-16.

FDL fails because the FDL does not create a private right of action and the CFA does not make it actionable. New Jersey courts, however, repeatedly have held that the CFA makes violations of other consumer protection statutes actionable and that the absence of a separate statutory remedy *supports* recognition of a claim under the CFA.[12] In light of this authority, Coke's violation of the FDL in labelling Enviga as the "calorie burner" is actionable under the CFA.

For all of these reasons, Coke's Motion to Dismiss should be denied in its entirety.

STATEMENT OF ALLEGED FACTS

Franulovic filed the Second Amended Class Action Complaint on behalf of herself and other New Jersey consumers who purchased Enviga, alleging that Coke's marketing of Enviga as a calorie-burning product is deceptive and misleading under the CFA because there is no substantiation or reasonable basis for this factual claim, which is calculated to make consumers believe that Enviga causes weight-loss.[13] Franulovic claims that she read the Enviga can label and thereafter increased her consumption of Enviga to three cans per day, believing this would help her lose weight, until she saw television news reports refuting Coke's marketing claims.[14]

Franulovic seeks class-wide relief in the form of a declaration by this Court that Coke's marketing of Enviga based on calorie-burning violates the CFA, and an order enjoining Coke from engaging in this unlawful conduct.[15] In addition, she seeks individual relief of a refund of

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[12] *See, e.g., Lemelledo v. Beneficial Mgmt. Corp. of America*, 674 A.2d 582, 588 (N.J. Super. Ct., App. Div. 1996) (violation of New Jersey Consumer Loan Act regulations actionable under CFA); *Wozniak v. Pennella*, 862 A.2d 539, 547 (N.J. Super. Ct., App. Div. 2004) (violation of city's rent-control ordinance actionable under CFA).

[13] Complaint ¶¶2, 6-7, 18-44.

[14] *Id.* ¶46.

[15] *Id.*, Prayer for Relief ¶¶2-3.

all monies she paid for Enviga under N.J.S.A. § 56:8-2.11, and/or triple damages under N.J.S.A. § 56:8-19.[16] She also seeks an award of attorneys' fees and costs of suit, pre-judgment interest, and such other relief as the Court deems necessary, just, and proper.[17]

APPLICABLE LEGAL STANDARD

When the Court decides a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "all facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true."[18] As the Supreme Court recently explained, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true[.]"[19] The Court must view all allegations and reasonable inferences "in the light most favourable to the non-moving party."[20] Thus, the question presented on a Rule 12(b)(6) motion is "whether the claimant can prove any set of facts consistent with his or her allegations that will entitle him or her to relief, whether or not that person will ultimately prevail."[21]

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[16] Complaint, Prayer for Relief ¶4.

[17] *Id.* ¶¶5-7.

[18] *Digiacomo v. Teamsters Pension Trust Fund of Phila. and Vicinity*, 420 F.3d 220, 222 (3d Cir. 2005).

[19] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (citation omitted).

[20] *Kelly v. Edison Township*, 377 F. Supp. 2d 478, 481 (D.N.J. 2005).

[21] *Id.*

ARGUMENTS AND AUTHORITY

I. The Complaint More Than Satisfies Rule 9(b)'s Requirements.

Federal Rule 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[22] The purpose of this requirement is to "provide defendants with notice of the precise misconduct that is alleged and to protect defendants' reputations by safeguarding them against spurious allegations of immoral and fraudulent behaviour."[23] The Third Circuit repeatedly has found that plaintiffs may satisfy Rule9(b)'s requirement "by pleading the 'date, place or time' of the fraud, *or through 'alternative means of injecting precision and some measure of substantiation* into their allegations of fraud.'"[24]

Here, Franulovic's Complaint quotes 20 different statements made by Coke concerning calorie-burning on the label and in other advertisements of Enviga that she claims are deceptive or misleading.[25] Moreover, the Complaint specifies that Franulovic read the Enviga can label's misrepresentations concerning calorie-burning when making her purchasing decisions.[26] Thus, the Complaint does not merely identify the circumstances of the fraud, as Rule 9(b) requires, but instead *reproduces the actual fraud verbatim.* The fact that Coke has attached as an exhibit to its

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[22] Fed. R. Civ. P. 9(b).

[23] *Naporano*, 79 F. Supp. 2d at 511.

[24] *Lum v. Bank of America*, 361 F.3d 217, 224 (3d Cir. 2004) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)) (emphasis added).

[25] *See* Complaint ¶¶21-23.

[26] *Id.* ¶46.

Motion the Enviga can label quoted in the Complaint proves that the Complaint gives Coke more than abundant notice of the basis for Franulovic's consumer fraud claims.

In light of the foregoing, Coke's arguments for dismissal under Rule 9(b) resoundingly fail. First, Coke misstates Rule 9(b)'s requirement by claiming that Franulovic must "allege the date, place or time of the fraud, *and* must plead who said what to whom,"[27] when the Third Circuit repeatedly has accepted *any* "'alternative means of injecting precision and some measure of substantiation into [the] allegations of fraud.'"[28] Second, Coke is flat-out wrong in asserting that "Franulovic has failed to plead any specifics regarding her purchases."[29] The Complaint specifies that "[a]fter Franulovic read the can label's representations about calorie burning [which are quoted at Complaint ¶22], she increased her consumption to three cans per day with the understanding that this would help her to lose weight."[30] The fact that the Complaint does not state the exact store locations and dates when Franulovic bought Enviga, or how much she paid, is immaterial to Rule 9(b)'s purpose to give a defendant notice as to what of its own conduct is alleged to constitute fraud.[31]

Since the Complaint more than satisfies the requirements of Rule 9(b), Coke's canned argument for dismissal under this Rule should be rejected.

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[27] Brief at 5 (emphasis added).

[28] *Lum*, 361 F.3d at 223-24 (quoting *Seville*, 742 F.2d at 791); *see also Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 172 n.10 (3d Cir. 2002) (same); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (same).

[29] Brief at 5.

[30] Complaint ¶46.

[31] In any event, Franulovic's responses to Coke's discovery have answered some of these questions.

II. Coke's Calorie-Burning Promises Are Misrepresentations of Material Fact.

Coke's argument for dismissal on the grounds that its calorie-burning claims are mere "puffery" likewise fails. This Court very recently defined puffery as "'vague and ill-defined opinions' [that] are not assurances of fact, and cannot be construed as misrepresentation."[32] The New Jersey Appellate Division similarly has defined puffery in contradistinction to actionable misrepresentations of fact: "This and similar statements in Schering's DTC 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."[33] New Jersey courts thus have recognized that vague assertions of opinion such as "you're in good hands with Allstate" are not actionable misrepresentations of material fact under the CFA.[34] Under this line of "puffery" cases, Franulovic could not have sued Coke for its debatable claim that Enviga is "delicious and refreshing."

But Coke's separate and far more widely repeated statements that Enviga is "THE CALORIE BURNER," and that its ingredients "invigorate your metabolism to burn calories" and "enhance the calorie burning process,"[35] are actionable misrepresentations of fact. This Court has delineated between puffery and verifiable statements of fact giving rise to fraud claims as follows:

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[32] *Bubbles N' Bows*, 2007 U.S. Dist. LEXIS 60790 at *23 (quoting *Alexander*, 991 F. Supp. at 435).

[33] *New Jersey Citizen Action v. Schering Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct., App. Div. 2003).

[34] *Rodio v. Smith*, 587 A.2d 621, 624 (N.J. 1991).

[35] Complaint ¶22.

> [I]f Pennzoil had made merely generalized claims of superiority, they would not be actionable under the Lanham Act.
>
> Pennzoil went well beyond the general and made specific superiority claims that, in some instances, were linked to specific attributes of Pennzoil motor oil and, in others, were subject to verification according to accepted industry tests or standards. Such claims cannot be deemed mere puffery.[36]

Here, Coke likewise has made specific factual claims about calorie burning based on alleged attributes of Enviga's ingredients that are subject to measurement or verification. These calorie burning claims thus are actionable statements of material fact under the CFA.

In light of the foregoing, the following statements quoted in the Complaint from the Enviga label and Coke's other marketing materials for Enviga are actionable misrepresentations of material fact:

- "The accumulated body of scientific research shows the ability of green tea's powerful antioxidant EGCG (epigallocatechin gallate) to speed up metabolism and increase energy use, especially when combined with caffeine." (Complaint ¶21) (quoting Nestle Researcher Dr. Hillary Green);
- "Enviga is a great tasting beverage *that invigorates your metabolism to gently burn calories.*" (Complaint ¶21) (emphasis added);
- Enviga "increases your metabolism to gently increase calorie burning" (Complaint ¶22);
- The caffeine and EGCG in Enviga "invigorate your metabolism to burn calories." (*id.*);
- The caffeine alone "stimulates your body to enhance the calorie burning process." (*id.*);
- "Enviga is a precise balance of ingredients that have been proven to invigorate your metabolism helping you burn more calories." (Complaint ¶23);
- Each can of Enviga causes a consumer to "end up burning more [calories] than you consume ? so for the first time you can actually 'drink negative.'" (*id.*);

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[36] *Castrol*, 169 F. Supp. 2d at 335-36 (citation omitted).

- Enviga is "another way to keep those extra calories from building up." (*id.*);
- "Enviga results in negative calories, because you burn more calories than you consume." (*id.*);
- "Enviga actually provides a negative calorie effect that's never before been proven in a ready-to-drink green tea." (*id.*);
- "There is a calorie burning effect from a single can." (*id.*);
- "Enviga is expected to have a comparable effect on individuals over 35." (*id.*);
- "Consuming the equivalent of three cans of Enviga beverage over the course of the day helped participants increase calorie burning by an average of 106 calories." (*id.*);
- "everyday you do your bit to cut out or burn a few extra calories, Enviga is there doing its little bit to help." (*id.*);
- "The calorie burner" (*id.*);
- "*Burning calories* is now officially delicious." (*id.*) (emphasis added);
- "Invigorate your metabolism." (*id.*).

Since all of these marketing claims are factual statements about Enviga's alleged calorie-burning effect on consumers, Coke's "puffery" argument does not even come close to warranting dismissal of Franulovic's claims under the Consumer Fraud Act.[37]

Finally, unlike in the puffery cases, Coke made the deceptive and misleading statements about calorie burning quoted in paragraph 22 of the Complaint on the *label* of the Enviga can. These statements thus are governed not just by the CFA, but also by the Food and Drug Law's stringent prohibition against "misbranding," which is defined as any statement or design on a

[37] Coke's arguments relying on an industry-funded study purporting to show the accuracy of these statements (Brief at 1-2, 8 n.3) are not grounds for dismissal under Rule 12(b)(6), where "all facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true." *Digiacomo*, 420 F.3d at 222.

package or label that is "false or misleading in any particular."[38] The FDL's misbranding prohibition thus further undercuts Coke's argument for dismissal on the grounds of "puffery." The Enviga label is misleading and deceptive under both the CFA and the Food and Drug Law.

III. Coke's Food and Drug Law Violations are Actionable Under the CFA.

Franulovic states an actionable claim under the CFA for Coke's violation of New Jersey's Food and Drug Law in misbranding Enviga with misleading calorie burning claims on the can's label. As discussed, the FDL prohibits manufacturers from selling food products that are "misbranded,"[39] which is defined to include any statement or image on a food label that is "false or misleading in any particular."[40] Coke is correct that the FDL itself does not create a private enforcement right.[41] But Coke is wrong in asserting that a violation of the PDL, particularly its "misbranding" prohibition, cannot support a claim under the CFA.

The CFA prohibits any "use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation[.]"[42] The CFA further provides that the "rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy ***or prohibition*** accorded by the common law or statutes of this State . . .."[43] Based on these

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[38] N.J.S.A. § 24:5-16; N.J.S.A. § 24:5-17(a).

[39] N.J.S.A. § 24:5-1.

[40] N.J.S.A. §§ 24:5-16; 24:5-17(a).

[41] *See* N.J.S.A. § 24:17-5 (vesting exclusive enforcement authority in the State Department of Health).

[42] N.J.S.A. § 56:8-2.

[43] N.J.S.A. § 56:8-2.13 (emphasis added).

provisions, the New Jersey Appellate Division has held that a lender's violation of New Jersey's Consumer Loan Act, which created a private rescission remedy but no damages action, could serve as the basis for a consumer's unconscionable practices claim under the CFA.[44] In light of this holding, the Court should hold that Coke's violation of the Food and Drug Law's misbranding provision likewise supports a consumer's claim under the CFA.

Coke's arguments against this claim have no merit. Coke contends that (1) the CFA only allows claims for violation of its own provisions or of regulations promulgated under the CFA itself; and (2) the Food and Drug Law's omission of a private enforcement action precludes recognition of such an action under the CFA. In *Wozniak*, *supra*, the New Jersey Appellate Division rejected both of these arguments as they applied to a municipal rent-control ordinance and the CFA. First, *Wozniak* rejected an argument identical to Coke's first argument here in holding that "Defendant's conduct is not insulated from the CFA simply because the CFA does not specifically provide that violations of a rent control ordinance may constitute a violation of its provisions."[45] The Appellate Division proceeded to hold that the municipal ordinance's lack of a private enforcement mechanism *supported* recognition of a claim under the CFA:

> Most significantly, plaintiffs did not receive double recovery since the Board did not have authority to order a monetary award for the rent overcharges. *Indeed, the CFA complements the Clifton Rent Control Ordinance by providing a legal means of redress against a violator. The CFA acts as an enforcement mechanism*

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[44] *Lemelledo*, 674 A.2d at 588 ("Violation of a statute or regulation can serve as evidence of unconscionable practices under the Consumer Fraud Act.").

[45] *Wozniak*, 862 A.2d at 547; *see also Morgan v. Air Brook Limousine, Inc.*, 510 A.2d 1197, 1206-07 (N.J. Super., Law Div. 1986) ("Air Brook's failure to comply with the [Federal Trade Commission] Rule's requirements in the sale of the franchise to Morgan constitutes a *per se* deceptive or unconscionable commercial act or practice in violation of § 2 of the [CFA].").

for the ordinance and should serve to bring landlords into compliance with the ordinance or be subject to the treble damages and attorney fees sanctions of the CFA. The laudatory purpose of the CFA of protecting consumers is thereby enhanced.[46]

The same conclusions should apply here. Coke's violation of the Food and Drug Law's misbranding prohibition constitutes a deceptive and/or unconscionable practice under the CFA.

CONCLUSION

For all of the reasons set forth herein, the Court should deny the Motion to Dismiss in its entirety.

Respectfully submitted,

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Dated: September 20, 2007

[46] *Wozniak*, 862 A.2d at 547 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss has been served via ECF upon the following counsel for Defendant:

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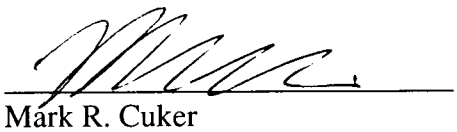

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