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Attorneys for Plaintiff Linda Franulovic and the Class

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

Linda Franulovic, individually and on
 behalf of a class of persons,

Plaintiff,

v.

The Coca-Cola Company,
 Defendant.

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Civil Action No. 1:07-cv-00539-RMB-JS

**NOTICE OF RULE 59(e) MOTION TO AMEND JUDGMENT
 TO ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT**

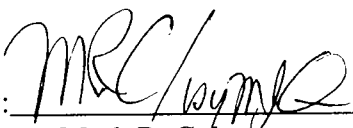
TO: Gita F. Rothschild, Esquire
 Peter J. Boyer, Esquire
 McCarter & English, LLP
 Four Gateway Center
 100 Mulberry Street
 P.O. Box 652
 Newark, NJ 07102-0652

PLEASE TAKE NOTICE that on December 7, 2007, the undersigned, Mark R. Cuker, Esquire, of the law firm of WILLIAMS CUKER BEREZOFSKY, co-counsel for Plaintiff Linda Franulovic and the Class, shall make application before the United States District Court for the District of New Jersey pursuant to Federal Rules of Civil Procedure 59(e) and 15(a) for an Order amending the Court's October 25, 2007 Order granting Defendant's Motion to Dismiss, and granting Plaintiff leave to amend her Complaint. In support of this Motion, the undersigned shall rely upon the attached Affidavit submitted by Mark R. Cuker and appended exhibit, and the attached Memorandum of Law. A proposed form of Order is attached.

PLEASE TAKE FURTHER NOTICE that the within application is made upon the papers, and unless counsel for Defendant otherwise object, no oral argument is requested.

WILLIAMS CUKER BEREZOFSKY

Counsel for Plaintiff Linda Franulovic and the Class


By: 
Mark R. Cuker

Dated: November 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint and all papers submitted in support thereof have been served upon Defendant via ECF upon the following counsel:

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



Mark R. Cuker

Dated: November 8, 2007

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FOR THE DISTRICT OF NEW JERSEY**

Linda Franulovic, individually and on
behalf of a class of persons,

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Civil Action No. 1:07-cv-00539-RMB-JS

**ORDER AMENDING JUDGMENT TO ALLOW
FILING OF AMENDED COMPLAINT**

THIS MATTER having come before the Court on the motion of Mark R. Cuker,
Counsel for Plaintiff Linda Franulovic, and the Court having considered the motion papers and
supporting Memorandum of Law, and the Court having found for good cause shown.

IT IS on this _____ day of _____, 200_;

ORDERED that the Court's Order of October 25, 2007 granting Defendant's motion to
dismiss Plaintiff's complaint is hereby amended pursuant to Federal Rule of Civil Procedure
59(e), and Plaintiff is hereby granted leave pursuant to Federal Rule of Civil Procedure 15(a) to
file a Third Amended Class Action Complaint within ten days of this Order.

U.S.D.C.J.

() Opposed

() Unopposed

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

Linda Franulovic, individually and on
behalf of a class of persons,

Plaintiff,

v.

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Civil Action No. 1:07-cv-00539-RMB-JS

**AFFIDAVIT OF MARK R. CUKER IN SUPPORT OF
RULE 59(e) MOTION TO AMEND JUDGMENT TO
ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT**

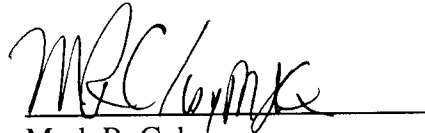
MARK R. CUKER, ESQUIRE, in lieu of oath or affidavit, hereby certifies and says:

1. I am a partner at the law firm of Williams Cuker Berezofsky, attorneys for Plaintiffs Linda Franulovic and the Class in the above captioned matter. I submit this Certification in support of Plaintiff's Rule 59(e) Motion to Amend Judgment to Allow Rule

15(a) Filing of Amended Complaint. I am personally familiar with the facts set forth herein and in the accompanying Memorandum of Law.

2. Attached as **Exhibit A** in support of the within Motion is Plaintiff's proposed Third Amended Class Action Complaint.

I hereby certify that all of the foregoing statements are true and accurate. I further certify that I am aware that if any of the statements made by me herein are willfully false, I am subject to punishment.



Mark R. Cuker

Dated: November 8, 2007

EXHIBIT A

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Admitted *pro hac vice*

Attorneys for Plaintiffs

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

Linda Franulovic, individually and on behalf of a class of persons,

Plaintiffs,

v.

The Coca-Cola Company,
Defendant.

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Civil Action No. 07-539 (RMB)

THIRD AMENDED CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff Linda Franulovic (“Franulovic”) brings this action on her own behalf and on behalf of all New Jersey residents who bought Enviga. Defendant The Coca-Cola Company

(“Coke”) has repeatedly engaged in illegal, fraudulent, and deceptive business practices that harm New Jersey consumers.

2. Coke conspired with Nestlé USA, Inc. and Beverage Partners Worldwide to introduce a drink called Enviga in New Jersey.

3. Enviga is a carbonated beverage, with a proprietary blend of caffeine and epigallocatechin gallate (EGCG), an antioxidant that occurs in green tea.

4. If Coke simply marketed Enviga as a soft drink, it would be perfectly legal.

5. However, the marketing for Enviga (which includes all forms of advertising and labeling) claims that it actually burns more calories than it provides, resulting in “negative calories.” Coke claims that the combination of EGCG and caffeine speeds up metabolism and increase energy use, that there is a “calorie burning effect from a single can,” that using Enviga is “much smarter than fads, quick-fixes, and crash diets,” and that Enviga keeps “those extra calories from building up.”

6. Coke made these claims without adequate prior substantiation for them. In fact, Coke made these claims knowing that, at best, a discrete segment of New Jersey residents — healthy young people with normal body weight — might see at most a minor benefit from prolonged and frequent use of Enviga, but that there was no evidence that anyone else would benefit at all.

7. Coke initially chose New Jersey as a test market for Enviga during the latter months of 2006, but then began selling the drink nationally in early 2007.

8. Franulovic seeks injunctive relief, declaratory relief, restitution or disgorgement, attorneys’ fees, and costs against Coke.

PARTIES

9. Franulovic is a New Jersey resident who resides at 39 West Chestnut Street, Merchantville, New Jersey 08109. She purchased Enviga for her own consumption and has consumed it regularly.

10. The Coca-Cola Company (Coke) is a Delaware corporation, which has made appearance in this lawsuit.

11. The events complained of occurred in the State of New Jersey.

JURISDICTION AND VENUE

12. Jurisdiction of this Court arises under 28 U.S.C. § 1332, because plaintiff and defendant are citizens of different states and the amount in controversy excess the sum of value of \$75,000, exclusive of interest and costs.

13. Venue in this Court is proper in that defendant transacted business in this county and the conduct complained of occurred there, as well as elsewhere in the District of New Jersey.

CONDITIONS PRECEDENT

14. All conditions precedent have been performed or have occurred.

FACTS

15. Coke jointly conspired with others to market a new product called "Enviga," which is a canned soft drink containing a proprietary combination of caffeine and an extract of green tea called "epigallocatechin gallate" or "EGCG."

16. New Jersey was one of the test markets for Enviga. Coke's advertising campaign was so extensive that, in some places in early 2007, every single advertisement in a bus or train car consisted of Enviga ads. Billboards containing extravagant Enviga claims were ubiquitous.

17. To the average reasonable consumer, in New Jersey and elsewhere in the United States, burning calories or reducing caloric consumption results in losing weight, or at least offsetting weight gained from other calories.

18. Coke markets Enviga as a weight-loss or weight-control product, based on a novel claim that drinking three cans of Enviga (over a quart) every day over a lengthy period of time will actually cause the expenditure of far more calories than the product contains.

19. However, the truth is that weight-loss representations for the product (whether express or implied) cannot be substantiated because the small number of studies that exist are conflicting and inadequate to substantiate the representations.

20. One press release for Enviga, dated October 11, 2006, reflects Coke's marketing plan:

"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," said Nestlé researcher Dr. Hilary Green.

That same release also says, "Enviga is a great tasting beverage that invigorates your metabolism to gently burn calories."

21. The Enviga can itself makes multiple representations. The Principal Display Panel touts Enviga as "The Calorie Burner," and the side panel contains many other claims:

- Enviga "increases your metabolism to gently increase calorie burning."
- Enviga gives "your body a little extra boost."
- The caffeine and EGCG in Enviga "invigorate your metabolism to burn calories."
- The caffeine alone "stimulates your body to enhance the calorie burning process."

22. The product website, www.enviga.com, makes similar claims, including that:

- “Enviga is a precise balance of ingredients that have been proven to invigorate your metabolism helping you burn more calories.”¹
- Enviga contains the “powerful EGCG.”²
- Including Enviga in the diet is “much smarter than following fads, quick-fixes, and crash diets.”³
- 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.’”⁴
- Enviga provides “another way to keep those extra calories from building up.”⁵
- “Enviga results in negative calories, because you burn more calories than you consume.”⁶
- “Enviga actually provides a negative calorie effect that’s never before been proven in a ready-to-drink green tea.”⁷
- “There is a calorie burning effect from a single can.”⁸
- “Enviga is expected to have a comparable effect on individuals over 35.”⁹
- “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.”¹⁰
- “Enviga is the perfect refresher for you: everyday you do your bit to cut out or burn a few extra calories, Enviga is there doing its little bit to help.”¹¹

Outdoor advertising makes even plainer statements:

- “The calorie burner.”
- “Burning calories is now officially delicious.”
- “Be positive. Drink negative.”
- “Invigorate your metabolism.”

1 www.enviga.com/#Benefits (accessed November 27, 2006).
2 www.enviga.com/#Benefits (accessed November 27, 2006).
3 www.enviga.com/#Benefits (accessed November 27, 2006).
4 www.enviga.com/#Benefits (accessed November 27, 2006).
5 www.enviga.com/#Benefits (accessed November 27, 2006).
6 www.enviga.com/#FAQs (accessed November 27, 2006).
7 www.enviga.com/#CalorieBurning (accessed January 25, 2007).
8 www.enviga.com/#FAQs (accessed November 27, 2006).
9 www.enviga.com/#FAQs (accessed November 27, 2006).
10 www.enviga.com/#FAQs (accessed November 27, 2006).
11 www.enviga.com/#BePositiveFeelGreat (accessed November 27, 2006).

23. All of these claims are based on the abstract of a single, small, and short-term study — funded by Coke and/or Nestlé. This single study is, by itself, meaningless unless it is corroborated by larger and longer-term studies.

24. The small study itself showed that the EGCG and caffeine apparently actually *lowered* energy expenditure in some of the 31 subjects. Thus, the chemicals in Enviga would conceivably *contribute to weight gain, not loss*, for some consumers.

25. Coke chose to market this product to all New Jersey consumers, without qualification. However, the subjects in this study were young and lean. The average age was approximately 23, with a range of 18-35. The Body Mass Index (BMI) for the test subjects averaged 22, which is well within healthy weight levels. Someone six feet tall with a BMI of 22 weighs 160 pounds. In contrast, the great majority of American adults are overweight (BMIs of 25-30) or obese (BMIs of 30+).

26. In contrast, approximately 37 percent of New Jersey residents are overweight and 22 percent are obese.¹²

27. This study neither substantiates nor provides a reasonable basis for the claims made by Coke regarding Enviga.

28. There is in fact no substantiation or reasonable basis for claiming that Enviga (or the amounts of EGCG and caffeine in three cans of Enviga) has any effect on caloric balance or weight for the majority of adults, who are not young, healthy, and thin.

29. In addition, this study was a short-term (72-hour) study of a small number of test subjects in a tightly controlled environment. There is no evidence at all that Enviga has any posi-

tive effect of any kind on free-living consumers, whose every act and every calorie consumed is *not* controlled by Coke's hired scientists.

30. Even if Coke's one study is eventually shown by subsequent studies to apply to actual weight loss for consumers of *all* ages, shapes, and weights (the audience targeted by Coke's marketing efforts), the effect would be minimal and it would be necessary (and unrealistic) to drink several cans of Enviga every day over many months just to obtain the minimal effect.

31. To lose one pound, a person must burn 3,500 calories. Coke's study showed that, *at best*, a healthy, active, average-weight person *might* see a 100-calorie drop every day he or she drank three cans of Enviga. Thus, it would take 35 days of constant consumption of Enviga — 105 cans at a cost of about \$146 (at \$1.39 per can) — to see even one pound of possible weight loss — and that assumes that the consumers would not eat 100 extra calories worth of other foods.

32. And this is the best case from the study. The low end of effect claimed by Coke is 60 calories per day. At this rate, it would take this consumer almost 60 days —nearly 180 cans and \$250 — to see a one-pound drop. Maybe. After almost two months.

33. In fact, Enviga has no effect or possibly even the opposite effect on a significant proportion of consumers.¹³ Enviga in theory might then cause some consumers to burn fewer — not more — calories. Thus, if Coke's theory about the long-term action of Enviga turns out to be substantiated when adequate long-term studies are completed, a significant number of Enviga users might *actually gain — not lose — weight*.

¹² www.state.nj.us/health/chs/monthlyfactsheets/jul06_obesity.pdf (accessed January 24, 2007). In all likelihood, these percentages have increased since these statistics were collected.

¹³ See, e.g., Am J Clin Nutr. 1999 Dec;70(6):1040-5; J Nutr. 2001 Nov;131(11):2848-52.

34. Coke's study was presented at a conference sponsored by The Obesity Society (also known as "NAASO," North American Association for the Study of Obesity), a professional organization of obesity researchers. NAASO took the extraordinary step of issuing its own rebuttal to the presentation, which said, in pertinent part, that the statement in Coke's study that "when consumed regularly as part of a healthy diet and exercise regime such a beverage may provide added benefits to help in weight control" was "not a statement that the FDA or FTC or others would sanction [on the basis of] this study." NAASO concluded that "it is improper to state or imply that the results of this study support any weight loss or any statement related to this."

35. There are a few other published studies on the calorie-burning or weight-loss efficacy of EGCG in combination with caffeine. The evidence from these studies does not support the claim that taking a combination of EGCG and caffeine regularly over weeks or months will increase energy expenditure or affect body weight.

36. All these studies were done under the artificial conditions of a laboratory where the subjects' diets were strictly controlled. There is no evidence that *free-living* consumers in the real world who expended more calories due to EGCG and/or caffeine would not simply make up for these calories by eating a few extra bites of food.

37. There is no evidence that drinking one or two cans of Enviga daily would have any effect on calorie balance or body weight. Until shortly before this lawsuit was filed, Coke acknowledged on its web site that drinking one can of Enviga would not have a significant effect.

38. However, Coke revised that language, so that the website now tells prospective customers that they can in fact see the calorie burning benefit from drinking just one can of Enviga.¹⁴

39. No long-term studies substantiate or provide a reasonable basis for the claims made by Coke regarding Enviga.

40. The combination of EGCG and caffeine did not increase energy expenditure any more than a placebo on day 28 of an 83-day study of weight loss in 46 overweight women. Nor did it produce greater weight loss than a placebo by the end of the trial.¹⁵

41. The combination of EGCG and caffeine did not increase energy expenditure or affect body weight any more than a placebo in a 13-week study of weight-loss maintenance in 51 overweight men and women.¹⁶

42. In a follow-up study of weight-loss maintenance in 38 overweight men and women, a combination of EGCG and caffeine did not affect energy expenditure or weight loss more than a placebo, except in a subset of habitual "low-caffeine" consumers, who averaged about 150 mg of caffeine daily.¹⁷

43. Thus, at the present time, there are no studies that substantiate or provide a reasonable basis for the claims made by Coke regarding Enviga.

¹⁴ "While Nestle's study was performed on three cans per day, prior scientific literature indicates that *a single can would slightly increase your metabolism*. The size of this effect has not been quantified and would vary from person to person." www.enviga.com/#FAQs (accessed January 26, 2007) (emphases added).

¹⁵ *Br J Nutr.* 2005 Dec;94(6):1026-34.

¹⁶ *Br J Nutr.* 2004 Mar;91(3):431-7.

¹⁷ *Obes Res.* 2005 Jul;13(7):1195-204.

FACTS AS TO FRANULOVIC

44. Franulovic saw Coke's advertisements for Enviga and, because of the representations about calorie burning made therein, began drinking a can per day while performing her work as a hairdresser in Cherry Hill.

45. After Franulovic read the representations on the Enviga can about calorie burning, she increased her consumption to three cans per day with the understanding that this would help her to lose weight. She also began buying cans of Enviga in bulk.

46. When she saw Coke's advertisements for Enviga, she assumed that Coke had a reasonable basis and adequate substantiation for its claims and for marketing Enviga to her, as well as everyone else in New Jersey, without regard to age.

47. After seeing a television news story that refuted Coke's claim that drinking three cans of Enviga per day would help people lose weight, Franulovic reduced her consumption of Enviga, and eventually stopped drinking it altogether.

48. Over the period of approximately 90 days that Franulovic used Enviga as prescribed by Coke, *i.e.*, drinking three cans of it per day, she did not lose any weight.

49. Franulovic is 41 years old, and thus is not and was not during the entire time that Enviga has been on the market a part of the discreet segment of the population (age 18-35) that arguably could have benefited from the use of Enviga prescribed by Coke.

50. Franulovic bought Enviga because of its weight loss and calorie burning claims. She would not have purchased three cans per day had she known the lack of reasonable support for Coke's claims about Enviga.

51. She certainly never would have chosen to drink Enviga simply as a refreshing beverage because Enviga was expensive (approximately \$1.50 per can).

52. As such, the Enviga was of no value to her. Having consumed approximately 270 cans of Enviga, she suffered an estimated out of pocket loss of approximately \$405.00.

53. Although Franulovic did not lose weight while drinking Enviga, she does not know and cannot prove whether she actually did not “burn calories” as a result of drinking Enviga.

54. Franulovic’s ascertainable loss is not that she failed to “burn calories,” but that she bought a product she would not have purchased but for the deceptive and misleading advertising.

CLASS ACTION ALLEGATIONS

55. Franulovic brings this action on her own behalf and on behalf of all other persons similarly situated.

56. The class that Franulovic seeks to represent is composed of all persons in the State of New Jersey who purchased Enviga manufactured, distributed, marketed and sold by Coke during the Class Period.

57. The class is composed of thousands of persons, the joinder of whom is not practicable. The disposition of their claims in a class action will benefit both the parties and the Court.

58. Given the wide variety of far-cheaper no-calorie and low-calorie soft drinks available, the only reason for any class member to purchase Enviga was Coke’s misleading and deceptive advertising claim of calorie burning. Had class members known that Coke did not have a reasonable basis for this claim, they would not have purchased Enviga.

59. Coke has sold and continues to sell hundreds of thousands or millions of cans of the beverage Enviga in New Jersey and throughout the United States beginning in 2006, and thus the class is sufficiently numerous to make joinder impracticable, if not impossible.

60. There are questions of fact and law that are common to all members of the class, including:

- a. Whether Coke's marketing materials and advertisements included claims that were false and/or misleading;
- b. Whether Coke violated New Jersey food and drug law by misbranding Enviga;
- c. Whether Coke had a reasonable basis or substantiation for its advertising claims that Enviga burns calories; and
- d. Whether the class has been damaged and, if so, the appropriate measure of damages including the nature of the equitable relief to which the class is entitled.

61. These common issues of fact and law predominate over any arguable individualized issues.

62. Franulovic's claims are typical of the claims of the other members of the class because Franulovic's and all of the Class members' damages arise from and were caused by having purchased and/or consumed the Enviga beverage and having expended substantial sums on the purchase of the Enviga beverage. As a result, the evidence and the legal theories regarding Coke's alleged wrongful conduct are identical for Franulovic and all of the Class members.

63. Franulovic will fairly and adequately protect the interests of the members of the Class, and Franulovic has no interests that are contrary to or in conflict with those of the Class

she seeks to represent. Franulovic has retained competent counsel experienced in class action litigation to further ensure such protection and to prosecute this action vigorously.

64. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class and would lead to repetitious trials of the numerous common questions of facts and law.

65. Franulovic does not believe that any difficulty will be encountered in the management of this litigation that would preclude its maintenance as a class action. Franulovic believes and therefore avers that claims are small in relation to the costs of an individual suit, and a class action is the only proceeding in which Class members can, as a practical matter, recover. As a result a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Proper and sufficient notice of this action may be provided to the Class members through notice published in appropriate publications. Franulovic and the members of the Class have suffered irreparable harm and damages as a result of the Coke' wrongful conduct as alleged herein. Absent representative action, Franulovic and the members of the Class will continue to suffer losses, thereby allowing these violations of law to proceed without remedy, and allowing Coke to retain the proceeds of its ill-gotten gains.

COUNT

Violations of the New Jersey Consumer Fraud Act NJSA 56:8-2 et seq.

66. As set forth above, Coke engaged in unconscionable commercial practices, deception, fraud, false pretence, false promise, misrepresentation, and know concealment or omission

of material facts with the intent that others rely on such, in connection with the sale and advertisement of Enviga, in violation of the laws of New Jersey.

67. These acts in violation of the laws of New Jersey include, but are not limited to:
 - a. Advertising Enviga without having prior substantiation for all advertised claims.
 - b. Advertising Enviga as effective by itself — e.g., “the calorie burner” — for weight control.
 - c. Advertising Enviga to all consumers, when Coke knew that the minimal study evidence showed that Enviga had a desirable effect only on a discrete and minor segment of the population.
 - d. Advertising Enviga without the material fact that one would have to drink three cans daily for as long as the person wanted to have whatever effect might occur.
 - e. Failing to disclose that it would be necessary to spend weeks drinking three cans of Enviga a day — at least 100 cans at an approximate cost of \$150 — just to enjoy a possible loss of one pound. One pound loss of weight over an extended period of time — in the unlikely event it did occur — is too minimal and conjectural to be meaningful.

68. This conduct violated the rights of Franulovic and other consumers residing in New Jersey, as set forth under New Jersey Law, i.e., the New Jersey Consumer Fraud Act.

69. Franulovic and other consumers residing in New Jersey suffered ascertainable losses as a direct result of this wrongful conduct and Coke has obtained monies from Class Members by means of the unlawful practices alleged herein.

70. Throughout the period set forth in the complaint and for the reasons set out above, Coke violated New Jersey food and drug law by misbranding Enviga.

71. This conduct violated the rights of Franulovic and other consumers residing in New Jersey, as set forth under New Jersey Law, i.e., the New Jersey Consumer Fraud Act.

72. Franulovic and other consumers residing in New Jersey suffered ascertainable losses as a direct result of this wrongful conduct and Coke has obtained monies from Franulovic and other consumers residing in New Jersey by means of the unlawful practices alleged herein.

JURY DEMAND

Plaintiffs hereby request a trial by jury on all issues triable by right before a jury.

PRAYER FOR RELIEF

THEREFORE, Franulovic prays for judgment as follows:

1. As soon as practicable, certifying this case as a class action.
2. Finding that Coke's conduct violates the New Jersey Consumer Fraud Act;
3. Enjoining Coke from its unlawful conduct;
4. Ordering Coke to refund to Franulovic all monies obtained from her by means of its violations of the New Jersey Consumer Fraud Act pursuant to N.J.S.A. 56:8-2.11; and/or awarding her triple damages pursuant to N.J.S.A. 56:8-19;
5. Awarding attorneys' fees, expenses and costs of this suit;
6. Awarding Franulovic pre-judgment interest, compounded daily; and
7. Granting such other, further, and different relief that the Court deems necessary, just, and proper.

Respectfully submitted,

CENTER FOR SCIENCE IN THE PUBLIC INTEREST

Stephen Gardner, Esquire

Director of Litigation

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Attorneys for Linda Franulovic

By: _____
Mark Cuker, Esquire