

**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

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT
OF RULE 59(e) MOTION TO AMEND JUDGMENT TO
ALLOW RULE 15(a) FILING OF AMENDED COMPLAINT**

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

Stephen Gardner
CENTER FOR SCIENCE IN THE PUBLIC
INTEREST
5646 Milton Street, Suite 211
Dallas, TX 75206
(214) 827-2774

*Counsel for Plaintiff Linda Franulovic
and the Class*

INTRODUCTION

The Court should grant this motion to amend its judgment to allow the filing of an amended complaint pursuant to Federal Rules of Civil Procedure 59(e) and 15(a). Leave to amend under Rule 59(e) is subject to the same standard as under Rule 15(a) itself; *i.e.*, it shall be “freely given when justice so requires.” *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir. 2007) (quoting Fed. R. Civ. P. 15(a)). This means that “amendment should be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay.” *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984). Here, there is no plausible allegation of delay, bad faith, or prejudice. To the contrary, Plaintiff submits her proposed amended complaint clarifying her claim of “ascertainable loss” under New Jersey’s Consumer Fraud Act at the earliest possible time in response to the Court’s October 25, 2007 Opinion dismissing her claims on this basis, *which was never raised in Defendant’s Motion to Dismiss*. Since there was no delay or bad faith on Plaintiff’s part in seeking leave to amend, and no resulting prejudice to Defendant, the Court should grant this motion.

STATEMENT OF FACTS

Plaintiff Linda Franulovic filed this action alleging that Defendant The Coca-Cola Company (“Coke”) deceptively marketed and branded Enviga as a weight-loss product when it had no substantiation for its advertising and labeling claims that Enviga causes calorie-burning. She alleged that Coke extensively advertised that Enviga burns calories, even though there were and are no scientifically valid studies providing a reasonable basis for these factual claims. Second Amended Class Action Complaint (Docket #41) ¶¶16-44. She claimed that Coke’s

deceptive marketing and labeling of Enviga violates New Jersey's Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq.*, and Food and Drug Law, N.J.S.A. 24:17-1, *et seq.*

Franulovic further alleged that she saw these advertisements for Enviga, began purchasing and drinking a can per day, then read the specific representations about calorie-burning on the Enviga can's label and increased her consumption to three cans per day with the understanding that this would help her to lose weight. Second Amended Complaint ¶¶45-46. She thus alleged that she suffered ascertainable losses as a direct result of this wrongful conduct based on the monies she paid for Enviga, which Coke obtained from her by means of its unlawful practices. *Id.* ¶¶61, 64. Based on these claims, Plaintiff sought class-wide declaratory and injunctive relief under the CFA to prohibit Coke from continuing its deceptive marketing of Enviga, individual monetary relief to satisfy the CFA's standing requirement, plus attorney fees, costs, and such other relief as the Court deemed appropriate. *Id.* at 14-15 (Prayer for Relief).

Coke filed its Motion to Dismiss and supporting Memorandum of Law on August 27, 2007. Coke raised three arguments for full or partial dismissal of Franulovic's claims. First, Coke contended that Franulovic failed to plead her CFA claim with sufficient particularity under Fed. R. Civ. P. 9(b) because she allegedly failed to specify which advertisements she saw and failed to state when or where she purchased Enviga. Coke Mem. of Law (Docket #43) at 4-6. Second, Coke asserted that many of the statements quoted in the Complaint were "mere puffery" that could not form the basis of a consumer fraud claim. *Id.* at 6-10. Finally, Coke argued that Franulovic could not assert a claim based on New Jersey's Food and Drug Law because violation of this statute, which does not itself create a private right of action, is not actionable under the CFA. *Id.* at 10-12.

Franulovic filed her opposition brief (Docket #51) on September 20, 2007, arguing that each of Coke's arguments was legally baseless or insufficient to merit dismissal.

The Court issued its Order and Opinion dismissing Franulovic's claims on October 25, 2007. The Court's Opinion (Docket #60) addressed the CFA claims asserted in this case and in *Melfi v. Coca-Cola Co.*, Civil No. 07-828, a later-filed case involving substantively identical allegations. In dismissing Melfi's CFA claim, the Court favorably cited authority granting dismissal where a "Plaintiff fails to specifically allege that what he did receive was of lesser value than what was promised, i.e., that the sheets he received were worth an amount of money less than the sheets he was promised, or that he experienced a measurable out-of-pocket loss because of his purchase." Opinion at 19 (quoting *Solo v. Bed Bath & Beyond, Inc.*, Civ. A. No. 06-1908, 2007 WL 1237825 at *3 (D.N.J. April 26, 2007)). Applying this standard to Melfi, the Court dismissed for failure to plead ascertainable loss under the CFA with the needed specificity:

Melfi has not alleged that (1) she drank three cans of Enviga for several weeks and did not lose one pound; (2) that when she drank Enviga, it did not burn calories; or (3) that she was not part of the discreet segment of the population that could have benefitted from the prescribed use of Enviga. Melfi actually received a beverage for her money, and she has not alleged how the purchase of that beverage constituted a specific loss.

Op. at 20.

In addressing Franulovic's claims in this case, the Court stated that "the result is the same for many of the reasons discussed above." *Id.* at 24. The Court found that Franulovic "makes no allegations whatsoever regarding whether or not Enviga failed to live up to its promises as to her i.e., that despite drinking the product for the reasons advertised she did not lose weight or burn calories." The Court noted that, unlike in *Melfi*, Franulovic *did* specifically aver that she read the Enviga can's calorie burning representations "'and increased her consumption to three cans

per day with the understanding that this would help her lose weight.” *Id.* at 25-26 (quoting Compl. ¶46). But the Court still held that Franulovic failed to adequately plead an ascertainable loss. The Court explained that:

Franulovic has not alleged that she or members of the class failed to burn more calories or lose weight. Instead, she merely avers that she stopped drinking Enviga after viewing a television news story. It is, therefore, unclear what, if any, ‘cognizable and calculable claim of loss due to the alleged CFA violation’ Franulovic suffered.

Op. at 26 (quoting *Thiedemann v. Mercedes-Benz USA*, 183 N.J. 234, 249 (2005)). On this basis, the Court dismissed Franulovic’s claims. Op. at 26.

ARGUMENT

Franulovic satisfies the liberal requirements for granting post-judgment leave to amend. As discussed, the standard for granting leave under Rule 59(e) is the same as that under Rule 15(a). *Fletcher-Harlee Corp.*, 482 F.3d at 253. Thus, leave should be granted absent undue delay or bad faith by a plaintiff and resulting prejudice to the defendant. *Adams v. Gould, Inc.*, 739 F.2d at 868. Here, there is no plausible allegation of undue delay, bad faith, or prejudice. This Motion is being filed within the ten-day period allowed under Rule 59(e) for post-judgment relief. Moreover, this is the soonest Franulovic could possibly have submitted the proposed Complaint amendments because the Court’s dismissal Opinion was based largely on arguments Coke did not raise against her. Coke’s only mention of ascertainable loss in its arguments for dismissal focused on Franulovic’s alleged failure to identify *which advertisements* she saw before purchasing Enviga. Coke Mem. at 5.¹ The Court, by contrast, dismissed Franulovic’s

¹ This argument was easily refuted because, as the Court recognized (Op. at 25), Franulovic specifically pled that she read the calorie-burning claims on the Enviga label itself.

claims on the grounds that her allegations of ascertainable loss *themselves* lacked sufficient specificity. This Motion thus is the first opportunity Franulovic has had to amend her Complaint in light of this concern. She therefore should not be found to have caused undue delay or to have acted in bad faith.

To the contrary, Franulovic through her proposed Complaint amendments is attempting to respond promptly and directly to the Court's stated concerns over ascertainable loss in dismissing her CFA claims and those in *Melfi*. In her proposed Third Amended Class Action Complaint (**Exhibit A** to Affidavit of Mark R. Cuker in Support of Motion), Franulovic has added allegations specific to her claim of ascertainable loss, including averments that she:

- drank three cans per day of Enviga, as Coke prescribes, for a period of approximately 90 days, but did not lose weight (Third Amended Class Action Complaint ¶48);
- is 41 years old, and thus is not part of the population segment that allegedly has been shown to burn calories from drinking Enviga in bulk (*id.* ¶49);
- bought Enviga because of Coke's weight loss and calorie burning claims, and would not have bought it had she known of the lack of substantiation for these claims (*id.* ¶50);
- would not have chosen to drink Enviga over other beverage products because it was expensive, costing approximately \$1.50 per can (*id.* ¶51);
- consumed approximately 270 cans of Enviga over the course of several months when she thought drinking three cans per day would cause her to lose weight, thus incurring an estimated out-of-pocket loss of approximately \$405.00 (*id.* ¶52).

In light of these averments, Franulovic alleges that she suffered an ascertainable monetary loss because she bought a product that she would not have paid for but for Coke's deceptive and misleading advertisement and branding of it. *Id.* ¶54.

Under the part of this Court's Opinion discussing the *Melfi* claims and Judge Chesler's opinion in *Solo v. Bed Bath & Beyond, supra* (Op. at 19-22), these amended allegations by

Franulovic are sufficient to state a claim of ascertainable loss under the Consumer Fraud Act. In dismissing Franulovic's own claims, however, the Court also noted her failure to allege whether she "failed to burn more calories or lose weight." Op. at 26. As discussed, Franulovic now alleges (§48) that she did not lose weight while drinking Enviga. However, she also states that she "does not know *and cannot prove whether she actually did not 'burn calories'* as a result of drinking Enviga." *Id.* §53 (emphasis added). This is because it is impossible for her to prove whether she or any other consumer who drinks Enviga in their day-to-day living, *and not in a controlled testing environment*, has actually burned or not burned calories as a result of drinking Enviga. If this is what the CFA required for a claim of ascertainable loss, then it would be impossible for any consumer ever to challenge a seller's fraudulent marketing of weight-loss products based on claims of calorie-burning that are wholly without basis in fact. The CFA should not be so narrowly construed.

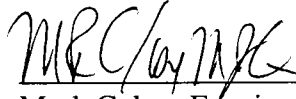
Franulovic thus submits the proposed amended complaint seeking clarification as to the Court's precise holding with regard to her claims. If the indicia of ascertainable loss that the Court discussed with regard to the *Melfi* claims are sufficient, which they appear to be under Judge Chesler's *Solo* opinion, then Franulovic's claims of ascertainable loss here likewise are sufficient and her Motion for leave to amend should be granted.

CONCLUSION

For all of the reasons set forth herein, Plaintiff's Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint should be granted.

Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY

Handwritten signature of Mark Cuker in black ink, appearing as 'MRC/ajm' with a flourish.

Mark Cuker, Esquire
Woodland Falls Corporate Center
210 Lake Shore Drive East, Suite 101
Cherry Hill NJ 08002-1163
856-667-0500 (voice)
856-667-5133 (fax)

CENTER FOR SCIENCE IN THE PUBLIC INTEREST

Stephen Gardner, Esquire
Director of Litigation
5646 Milton Street, Suite 211
Dallas, Texas 75206
214-827-2774 (voice)
214-827-2787 (fax)
Admitted *pro hac vice*

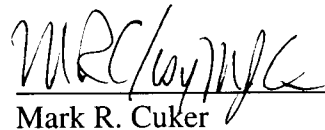
Attorneys for Plaintiff and the Class

Dated: November 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law in Support 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