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

LINDA FRANULOVIC, individually and on behalf of a class of persons, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	CIVIL NO. 1:07-cv-00539-RMB-JS CLASS ACTION Document Electronically Filed **Return date: December 7, 2007** **ORAL ARGUMENT REQUESTED**

CATHERINE M. MELFI, on behalf of herself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	CIVIL NO. 1:07-cv-00828-RMB-JS CLASS ACTION Document Electronically Filed **Return date: December 21, 2007** **ORAL ARGUMENT REQUESTED**
ADAM SIMMENS, on behalf of himself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	CIVIL NO. 1:07-cv-03855-RMB-JS CLASS ACTION Document Electronically Filed **Return date: December 21, 2007** **ORAL ARGUMENT REQUESTED**

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO AMEND COMPLAINTS

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INTRODUCTION

Pursuant to FED. R. CIV. P. 12(b)(6), 15(a), and 59(e), Defendants The Coca-Cola Company, Nestlé USA, Inc., and Beverage Partners Worldwide (North America) (collectively "Defendants") respectfully request this Court to deny as futile Plaintiffs' motions for leave to amend their Complaints,[1] because all three of the proposed Complaints[2] fail to cure the deficiencies identified in the Court's October 25, 2007, Opinion granting Defendants' motions to dismiss. Specifically, Plaintiffs still do not allege that they have suffered any ascertainable loss or other damages proximately caused by Defendants' marketing of Enviga as a drink that burns calories. Plaintiffs' failure to allege facts that would establish the required elements of causation and damages is fatal to all of Plaintiffs' claims and renders the proposed amended Complaints futile.

In its Opinion of October 25, 2007, the Court granted Defendants' motions to dismiss primarily because Plaintiffs failed to allege they did not burn calories after drinking Enviga and, therefore, failed to identify any actionable damages or an ascertainable loss caused by the Defendants' marketing of Enviga. *See* Opinion at 27 – 28 (Oct. 25, 2007) [Franulovic Docket No. 60]. On that same day, Plaintiffs filed briefs appealing Judge Schneider's order regarding Plaintiffs' medical records [Franulovic Docket No. 57], which only serve to highlight the deficiencies in Plaintiffs' allegations. In those pleadings, all three Plaintiffs make the remarkable

[1] Defendants' response briefing relates to the following three motions: Plaintiff Linda Franulovic's Rule 59(e) Motion to Amend Judgment To Allow Rule 15(a) Filing of Amended Complaint (Nov. 8, 2007) [Docket No. 62]; Plaintiff Catherine Melfi's Motion for Leave to Amend the Complaint (Nov. 16, 2007) [Docket No. 51]; and Plaintiff Adam Simmens' Motion for Leave to Amend the Complaint (Nov. 16, 2007) [Docket No. 71].

[2] For purposes of simplicity, the proposed Complaints are referred to as follows: Plaintiff Linda Franulovic's proposed Third Amended Class Action Complaint ("Franulovic Compl."), Plaintiff Catherine Melfi's proposed First Amended Class Action Complaint ("Melfi Compl."), and Plaintiff Adam Simmens' proposed First Amended Class Action Complaint ("Simmens Compl.").

assertion that whether or not they burned calories after drinking Enviga is irrelevant to their lawsuits and is not an allegation included in their original Complaints. As Plaintiffs state in their own words:

- "Whether Plaintiffs did or did not burn calories before or after drinking Enviga is not part of any claim made in these cases." Melfi Br. Intro., at 1 [Docket No. 44-2] (emphasis added); Simmens Br. Intro., at 1 [Docket No. 60-2]; *see also* Franulovic Br. Intro., at 1 [Docket No. 59] (same).

- "Plaintiffs make no allegation that they or any other class members did or did not burn calories after drinking Enviga . . ." Melfi Br. Intro., at 2 [Docket No. 44-2]; Simmens Br. Intro., at 2 [Docket No. 60-2]; *see also* Franulovic Br. Intro., at 2 [Docket No. 59] (same).

- "Nowhere in their Complaints do Plaintiffs make any allegation as to whether they did or did not burn calories before or after drinking Enviga." Melfi Br. Stmt. of Facts § A, at 4 [Docket No. 44-2]; Simmens Br. Stmt. of Facts § A, at 4 [Docket No. 60-2]; *see also* Franulovic Br. Stmt. of Facts § A, at 4 [Docket No. 59] (same).

- "Plaintiffs make no allegation as to whether they did or did not burn calories after drinking Enviga." Melfi Br. Arg. § I, at 8 [Docket No. 44-2]; Simmens Br. Arg. § I, at 8 [Docket No. 60-2]; *see also* Franulovic Br. Arg. § I, at 8 [Docket No. 59] (same).

In their proposed amended Complaints, Plaintiffs remain unwilling to challenge Enviga's calorie burning claim directly. Instead, Plaintiffs rely entirely on a non-existent and nowhere-identified alleged promise of weight loss, carefully avoiding any reference to calorie burning as the alleged promised benefit that did not occur. *See* Franulovic Compl. ¶ 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."); Melfi Compl. ¶¶ 50 ("Based upon information and belief, Class members did not experience any weight loss from drinking Enviga."), 54 ("Plaintiff was interested in losing weight, and, in reliance on Defendants' advertising, she purchased and consumed Enviga for such purpose."), 58 ("Since Plaintiff did not receive a weight loss product as advertised, Plaintiff seeks a refund of all monies spent when

purchasing Enviga"); Simmens Compl. ¶¶ 50, 54, 58 (same as Melfi). Close scrutiny, therefore, reveals that the proposed Complaints (i) still do not allege that Plaintiffs failed to burn calories as Defendants advertised; (ii) depend on an alleged lack of weight loss to attempt to plead causation and damages; but (iii) do not identify any advertisements or other statements in which Defendants promised that Plaintiffs would lose weight by drinking Enviga – because there are none.

Plaintiffs attempt to hide their failures to allege specifically that Enviga did not burn calories, and to identify any advertisement promising weight loss, by jumping back-and-forth between their "calorie burning" and "weight loss" theories and by grounding their claims' faulty proposition on the conclusory allegation that calorie burning and weight loss are identical concepts. Plaintiffs' own Complaints, however, confirm the common sense fact that burning calories from a single food or beverage is not equivalent to losing weight. For example, if burning calories and losing weight were equivalent, then Plaintiffs should be able to allege that they did not burn calories. Yet plaintiff Franulovic expressly concedes that she is relying on an alleged lack of weight loss to establish ascertainable loss, admitting that she does not know if she actually burned calories. *See* Franulovic Compl. ¶ 53. Melfi and Simmens similarly allege only that they do not believe that they burned calories, and not that calorie burning did not actually occur. *See* Melfi Compl. ¶ 57 ("Plaintiff does not believe that she experienced any calorie burning effect or weight loss from drinking Enviga."); Simmens Compl. ¶ 57 (same). These carefully worded allegations confirm what everyone already knows: reducing calories from any source – by drinking diet soda, by eating salad at lunch, or by not having dessert with dinner – is not the same thing as, and does not necessarily guarantee by itself, weight loss.[3]

[3] The fact that weight loss is a function of two factors – calories burned minus calories

In short, Plaintiffs either cannot or will not allege that they did not burn calories by drinking Enviga. Plaintiffs attempt to rely instead on a non-existent promise of weight loss allegedly contained in Defendants' advertising, and on the specious, and inconsistent, allegations that burning 60-100 calories and losing weight are by definition identical concepts. Because these allegations fail as a matter of law, Plaintiffs' requests for leave to amend should be denied as futile because the proposed amended Complaints fail to state a claim.

ARGUMENT AND AUTHORITY

Though leave to amend a Complaint "shall be freely given when justice so requires," FED. R. CIV. P. 15(a), well-established Third Circuit precedent recognizes that leave need not be granted if the amendment would be futile. *See Dunleavy v. N.J.*, No. 07-1058, 2007 WL 3024535, at *3 (3d Cir. Oct. 16, 2007); *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007); *Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000). "'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Merck*, 493 F.3d at 400 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114

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consumed – is widely recognized by federal and state public health agencies. *See, e.g.,* U.S. DEP'T OF HEALTH & HUMAN SERVICES, DIETARY GUIDELINES FOR AMERICANS 2005, ch. 3 (2005), available at http://www.health.gov/dietaryguidelines/dga2005/document/default.htm ("[C]aloric intake is only one side of the energy balance equation. Caloric expenditure needs to be in balance with caloric intake to maintain body weight and must exceed caloric intake to achieve weight loss."); U.S. Fed. Trade Comm'n, U.S. Food & Drug Admin., and Nat'l Assoc. of Attorneys Gen'l, *The Facts About Weight Loss Products and Programs*, DHHS Publication No. (FDA) 91-1189 (1992), available at http://www.cfsan.fda.gov/~dms/wgtloss.html ("The only proven way to lose weight is either to reduce the number of calories you eat or to increase the number of calories you burn off through exercise."). On a Rule 12(b)(6) motion to dismiss, this Court may take judicial notice of government records and reports, even if they are outside the pleadings. *See* FED. R. EVID. 201(b)(2); *Mills v. Giant of Md., LLC*, No 06-7148, slip op. at 2 (D.C. Cir. Nov. 16, 2007) (relying on an HHS study for the fact that "[m]illions of Americans suffer from lactose intolerance"); *Kos Pharms, Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n.5 (3d Cir. 2004) (taking judicial notice of information available on the U.S. Patent and Trademark Office website); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 754 n.15 (D.C. Cir. 1977) (taking judicial notice of an FDA study); *In re "Agent Orange" Prods. Liab. Litig.*, 689 F. Supp. 1250, 1274 (E.D.N.Y. 1988) (taking judicial notice of studies by public health agencies, including the Centers for Disease Control and Prevention).

F.3d 1410, 1434 (3d Cir. 1997); *see also Alvin*, 227 F.3d at 121 ("An amendment is futile if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted."); *Dunleavy*, 2007 WL 3024535, at *3 (same). Accordingly, courts reviewing the futility of a motion for leave to amend under Rule 15(a) will apply the standard for a motion to dismiss under FED. R. CIV. P. 12(b)(6). *See Fahs Rolston Paving Corp. v. Pennington Props. Development Corp.*, No. 03-4593, 2007 WL 2362606, at *3 (D.N.J. Aug. 14, 2007).

While it is true that courts ruling on Rule 12(b)(6) motions 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," *In re Burlington Coat Factory*, 114 F.3d at 1429, and courts "will not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cased in the form of factual allegations." *Solo v. Bed Bath & Beyond, Inc.*, No. 06-1908, 2007 WL 1237825, at *2 (D.N.J. Apr. 26, 2007). 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).

I. PLAINTIFF FRANULOVIC'S PROPOSED AMENDED COMPLAINT FAILS TO STATE A CLAIM.

In her proposed Complaint, Franulovic brings a claim only against The Coca-Cola Company ("TCCC"), alleging violations of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8-1 *et seq.* as her sole cause of action. *See* Franulovic Compl. ¶¶ 66 – 72. As this Court has already held, Franulovic must plead an ascertainable loss caused by the alleged violation in order to state a claim under the CFA. *See* Opinion at 26 (Oct. 25, 2007) [Franulovic Docket No. 60]; *see also N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 176 (N.J.

Super. Ct. App. Div. 2003); *see also Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 793 (N.J. 2005). In her original Complaint, Franulovic failed to plead an ascertainable loss because she did not allege "whether or not Enviga failed to live up to its promise as to her . . ." Opinion at 24 – 25 (Oct. 25, 2007) [Franulovic Docket No. 60] (emphasis added). Because Franulovic's proposed amended Complaint does nothing to correct this flaw, the proposed amendment is futile.

A. Franulovic fails to allege that drinking Enviga did not cause her to burn calories.

Far from correcting the fundamental deficiency identified in the Court's Opinion dismissing her Complaint, Franulovic actually expressly disclaims any challenge to TCCC's "calorie burning" advertisements: "Franulovic's ascertainable loss is not that she failed to 'burn calories.'" Franulovic Compl. ¶ 54. In fact, she admits that she cannot prove any falsity of TCCC's statements that Enviga burns more calories than it contains: "[Franulovic] does not know and cannot prove whether she actually did not 'burn calories' as a result of drinking Enviga." Franulovic Compl. ¶ 53. Of course, Franulovic could have alleged that drinking Enviga does not cause anyone to burn calories and, therefore, did not result in calorie burning when she drank it. She has carefully omitted any such allegation, however, despite her other allegations attacking the scientific support for Defendants' advertising. Thus, Franulovic's Complaint does not even attempt to state a claim based on alleged harm from Defendants' advertising Enviga as a product that burns calories, as opposed to a product that allegedly promises weight loss.

B. Franulovic does not identify any advertisements for Enviga that promise weight loss.

Having abandoned any attempt to challenge the "calorie burning" advertising directly, Franulovic alleges that TCCC markets Enviga as a weight loss product and that "she did not lose any weight" after drinking Enviga for approximately 90 days. Franulovic Compl. ¶ 48; *see also*

¶¶ 17, 18, 45, 47. These allegations do not provide the required ascertainable loss necessary to state a claim, because Franulovic's weight loss allegations are purely conclusory statements of her interpretation of Defendants' advertising and lack any factual support. *See Solo v. Bed Bath & Beyond*, 2007 WL 1237825, at *2 (holding that courts "will not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cased in the form of factual allegations").

In other words, Franulovic still does not allege that she "did not enjoy the advertised effects" of Enviga as noted in this Court's Opinion, because weight loss is not an advertised effect. Thus, Franulovic does not, because she cannot, identify any advertisements in which TCCC promised weight loss from drinking Enviga. *See* Franulovic Compl. ¶¶ 21, 22. The lack of any promises of weight loss explains why she also does not allege how much weight loss was promised, over what period of time any weight loss was promised, the amount of Enviga a person should consume to lose weight, or any other facts relevant to such claims. Indeed, other than the conclusory (and inconsistent) statement that "to the average consumer . . . burning calories or reducing caloric consumption results in losing weight, or at least off-setting weight gained from other calories," Franulovic nowhere identifies the specific advertising language that allegedly promises weight loss. Franulovic Compl. ¶ 17.

C. Franulovic's conclusory allegations that advertising calorie burning is the equivalent of an express promise of weight loss fail as a matter of law.

Although a false advertising claim can be based in some circumstances on an advertisement's alleged implied messages, the Court is not required to accept, even at the pleadings stage, a Plaintiff's interpretation that is contrary to fact or otherwise unreasonable. *See Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 501 (D.N.J. 2006) (to state a claim under the CFA, an advertisement must have "the capacity to mislead the average consumer").

Similarly, whether an advertisement has the capacity to mislead the average consumer is in some cases a question of fact for the jury, but the Court unquestionably has the authority to dismiss such claims as a matter of law where the allegedly misleading impression is plainly contrary to the Defendants' advertising or inconsistent with commonly understood facts. *See Adamson*, 463 F. Supp. 2d at 502 (rejecting the plaintiff's interpretations of a defendants' advertising because the advertising was not misleading as a matter of law); *see also Williams v. Gerber Prods. Co.*, 439 F. Supp. 2d 1112, 1116-17 (S.D. Cal. 2006) (rejecting, on a motion to dismiss, a plaintiff's subjective interpretations of statements from a defendant's packaging and labeling).

Here, Franulovic's own pleadings contradict her conclusory allegations that the words "calorie burning" or "burns calories" are equivalent to an express promise that a consumer will lose weight by drinking Enviga. As noted above, for example, if calorie burning and weight loss were equivalent, then Franulovic should be able to allege that she did not burn calories. Yet Franulovic affirmatively alleges that she does not know whether she burned calories, despite claiming that she does know that she did not lose weight. *See* Franulovic Compl. ¶ 53. The reason for Franulovic's distinction is plain – it is well known that burning or reducing calories from a single source might not lead to weight loss in any given individual, depending on that person's overall diet and exercise.

The unreasonableness of Franulovic's position is also evident from paragraph 17 of her Complaint quoted above in section 2. There, Franulovic acknowledges that calorie burning has the same effect as "reducing caloric consumption." *See* Franulovic Compl. ¶ 17 (referring to "burning calories or reducing caloric consumption"). Thus, under Franulovic's theory, any product that promises a reduction in calories – a diet soda, for example – also promises weight loss.

Both common sense and Franulovic's Complaint demonstrate why Plaintiff's position is untenable: reducing calories from any source is only one part of a person's overall caloric intake and expenditure. Thus, in the same paragraph, Franulovic acknowledges that a reduction in calories might result in weight loss or "at least off-setting weight gained from other calories." Franulovic Compl. ¶ 17. In other words, reducing calories from one food or drink could lead to weight loss, or a person's weight could stay exactly the same if her overall caloric intake from all sources is not reduced. And left unsaid but equally implicit in Plaintiff's allegation is the fact that a person's weight could increase if she is still consuming too many calories from other sources despite reducing them from one. Indeed, it is common knowledge that even running miles per week might not cause weight loss if those calories burned while running are made up by eating chocolate sundaes.

Moreover, Franulovic's Complaint expressly acknowledges the possibility that calories burned might be replaced from other sources:

- "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." Franulovic Compl. ¶ 36 (underlining emphasis added).

- "Thus, it would take 35 days of constant consumption of Enviga . . . 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." Franulovic Compl. ¶ 31 (emphasis added).

This fact does not render TCCC's advertising misleading, because TCCC did not promise that drinking Enviga would control appetite or otherwise prevent the consumption of calories from other sources. This allegation does, however, demonstrate that Franulovic's weight loss theory fails as matter of law because the average, reasonable consumer understands the relationship between burning extra calories and actually losing weight. *See*, *e.g.*, *Adamson*, 463 F. Supp.2d at

504; *Williams v. Gerber Products Co.,* 439 F. Supp. 2d at 1116 (dismissing a plaintiff's consumer fraud case with prejudice and without leave to amend because "no reasonable consumer upon review of the package as a whole would conclude that Snacks contains the juice from the actual and fruit-like substances displayed on the packaging") (emphasis added); *Weinberg v. Sprint Corp.*, 801 A.2d 281, 288 (N.J. 2002) (affirming trial court's grant of summary judgment because, *inter alia*, "no reasonable consumer would have been deceived into believing that he or she was being billed by the second"); *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886-87 (7th Cir. 2000) (reversing district court's decision to issue a preliminary injunction under the Lanham Act because "interpreting 'misleading' to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing statements that will help many of them find superior products"); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1401 (E.D. Cal. 1994) (dismissing plaintiff's claim that defendant's mass mailing misled him into believing he had won $10 million because "[n]o reasonable recipient could view this mass mailing as an announcement that the recipient in fact had been selected as the winner").

The simple fact is that Franulovic's allegations demonstrate only that an alleged lack of weight loss is not a surrogate for determining whether drinking three cans of Enviga in a day resulted in a reduction of 60 to 100 calories as stated on the can. Plaintiff understood that burning 100 calories will not necessarily lead to weight loss and, therefore, cannot reasonably claim to have been misled. In that way, this case is similar to *Williams v. Gerber Products*, in which the plaintiffs filed a purported class action alleging that Gerber's labeling of its Gerber Graduates for Toddlers Fruit Juice Snacks ("Snacks") violated California's consumer protection

statute. *See* 439 F. Supp. 2d at 1112. Plaintiffs contended that the Snacks label was deceptive in that:

> (1) the principal display panel features the words "Fruit Juice" and images of [several fruits] but the juice only contains "white grape juice from concentrate" and no juice from the fruits and berries displayed on the label; (2) the side panel features the words "made with real fruit juice and other all natural ingredients" but the product is mostly corn syrup and sugar; (3) the side panel states that Snacks is "one of a variety of nutritious Gerber Graduates foods and juices" but the product is not nutritious food or juice; [and] (4) the principal display panel describes the product as "Fruit Juice Snacks" but the product is mostly corn syrup and sugar and therefore candy….

Id. at 1114.

In addressing the plaintiffs' complaint about Gerber's use of the phrase "Fruit Juice," the court determined that "no reasonable consumer upon review of the package as a whole would conclude that Snacks contains the juice from the actual and fruit-like substances displayed on the packaging particularly where the ingredients are specifically identified." *Id.* at 1116. Likewise, in addressing the plaintiffs' complaint that Gerber's use of the phrase "made with real fruit Juice and other all natural ingredients" was deceptive because Snacks was mostly corn syrup and sugar, the court held that the statement was "truthful in the sense that Snacks contains grape juice and other natural flavors." The court then dismissed the plaintiffs' entire claim, with prejudice and without leave to amend, because "Plaintiffs fail to identify a statement which, when taken in context, would cause a reasonable consumer to likely be deceived by the statement." *Id.* at 1117.

Here, in addition to being contrary to common knowledge about calories, Franulovic's allegations actually contain the facts that render her claims of promises of weight loss unreasonable. Because, as Franulovic points out, if calories burned by drinking Enviga are offset by calories consumed from other sources, then no weight loss would be expected, by either Franulovic or the average consumer.

In addition, Defendants' advertising must be considered in its entirety, not as selectively represented in Franulovic's complaint. *See Miller v. Am. Family Publishers*, 663 A.2d 643, 653 (N.J. Super. Ct. Ch. Div. 1995) ("To determine whether an advertisement or solicitation makes a false or misleading representation, the court must consider the effect that the advertisement, taken as a whole . . ."); *Williams*, 439 F. Supp. 2d at 1116 ("[N]o reasonable consumer upon review of the package as a whole would conclude that Snacks contains the juice from the actual and fruit-like substances displayed on the packaging"). For example, Franulovic alleges that according to the Enviga website, "[i]ncluding Enviga in the diet is 'much smarter than following fads, quick-fixes, and crash diets.'" Franulovic Compl. ¶ 22. In reality, the website says:

> It's a fact that incorporating balanced nutrition and more activity into your lifestyle is the best way to stay healthy – and much smarter than following fads, quick-fixes and crash diets. That's why Enviga isn't designed to be a magic bullet – it's one more simple, positive choice you can make to maintain a healthy balance, day after day.

See http://www.enviga.com/#Benefits (last viewed Nov. 30, 2007) (attached as Exhibit A).[4] No reasonable consumer could interpret this language as promising weight loss merely from drinking the product. The same is true of the "Calorie Burning" portion of the Enviga website, which states in part:

> There are two ways to correct an energy imbalance: by reducing your calorie consumption, or by burning more of them – otherwise known as 'diet and exercise'. The good news is that Enviga can help on both sides of the energy equation:

[4] Melfi and Simmens also base their proposed Complaints in part on the Enviga website. *See* Melfi Compl. ¶¶ 7, 27, 53; Simmens Compl. ¶¶ 7, 27. 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); *Adamson*, 463 F. Supp. 2d at 500-01; *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); *Haskell*, 857 F. Supp. at 1396-98 (collecting cases).

> *First, it is very low in calories compared to other drinks like soda, regular iced tea and juice – so it refreshes you while keeping your caloric intake down.
>
> *Second, and most important, it gently enhances your metabolism, naturally increasing your body's ability to burn calories.

See http://www.enviga.com/#CalorieBurning (last viewed Nov. 30, 2007) (attached as Exhibit B). Thus, examining Defendants' website in any reasonable detail demonstrates that it informs consumers that drinking three cans of Enviga per day will result in a modest reduction of calories and can assist consumers in managing caloric intake. The fact that Franulovic, with the assistance of a public interest organization that failed to state its own claim against Defendants, now contends that these statements constitute unequivocal promises of weight loss is not sufficient to state a claim.

II. THE PROPOSED AMENDED COMPLAINTS OF PLAINTIFFS MELFI AND SIMMENS ALSO FAIL TO STATE A CLAIM.

Melfi and Simmens bring claims against The Coca-Cola Company, Nestlé USA, Inc., and Beverage Partners Worldwide (North America) alleging the following causes of action: (i) violations of the New Jersey CFA;[5] (ii) violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S.A. § 201-2 *et seq.*;[6] (iii) breach of express warranty under the New Jersey and Pennsylvania Uniform Commercial Codes;[7] and (iv) breach of the implied warranty of merchantability under the New Jersey and Pennsylvania Uniform Commercial Codes.[8]

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5 S*ee* Melfi Compl. ¶¶ 89 – 95.

6 *See* Simmens Compl. ¶¶ 89 – 95.

7 *See* Melfi Compl. ¶¶ 70 – 77; Simmens Compl. ¶¶ 70 – 77.

8 *See* Melfi Compl. ¶¶ 78 – 88; Simmens Compl. ¶¶ 78 – 88.

It is well settled law that Plaintiffs must plead and prove the elements of causation and damages under all of their causes of action. As discussed above and in the Court's Opinion of October 25, 2007, the New Jersey CFA allows a private cause of action only for a "person who suffers any 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.S.A. § 56:8-19; *see also N.J. Citizen Action*, 842 A.2d at 176; *Thiedemann,* 872 A.2d at 793. The Pennsylvania Supreme Court similarly has held that the UTPCPL "clearly requires, in a private action, that a plaintiff suffer an ascertainable loss as a result of the defendant's prohibited action." *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001) (emphasis in original).[9]

Likewise, under both New Jersey and Pennsylvania law, claims for breach of express and implied warranty must allege that the plaintiff suffered damages as a result of the defendant's breach. *See Yost v. General Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) (dismissing warranty claims because "[d]amage is a necessary element of . . . breach of warranty"); *Hollinger v. Shoppers Paradise of N.J., Inc.*, 340 A.2d 687, 692 (N.J. Super. Ct. L. Div. 1975) ("Liability is established if the evidence shows that the product was not reasonably fit for the ordinary purposes for which it was sold and such defect proximately caused injury to the ultimate consumer."); *Price v. Chevrolet Motor Div. of GMC*, 765 A.2d 800, 809 (Pa. Super. Ct.

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[9] Moreover, even without this express declaration, Pennsylvania law only allows a private cause of action under the UTPCPL if a plaintiff pleads all of the essential elements of common law fraud. *See Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 136 (3d Cir. 2005) (citing *Weinberg v. Sun*, 777 A.2d at 446); *Connolly v. Reliastar Life Ins. Co.*, No. 03-5444, 2006 WL 3355184 (E.D. Pa. Nov. 13, 2006); *Fass v. State Farm Fire & Cas. Co.*, No. 06-02398, 2006 WL 2129098, at *2 (E.D. Pa. July 26, 2006). One of these requisite elements is "injury proximately caused by the reliance" on the defendant's representations. *See Santana Prods.*, 401 F.3d at 136; *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392, 412 (E.D. Pa. 2006).

2000) ("To prevail on a claim for breach of warranty under the Pennsylvania Uniform Commercial Code, a plaintiff must establish that a breach of warranty occurred and that the breach was the proximate cause of the specific damages sustained.").

In its prior Opinion, this Court held that Melfi failed to allege an ascertainable loss, specifically noting that she did not allege that Enviga failed to burn calories when she drank it or, in fact, that she even drank the recommended three cans of Enviga per day. Opinion at 20 (Oct. 25, 2007) [Melfi Docket No. 46]. Although the Simmens' Complaint was not before the Court at that time, the Court's analysis applies equally to Simmens. And as discussed below, neither Melfi nor Simmens pleads an ascertainable loss caused by Defendants' advertising in the proposed amended Complaints. Plaintiffs' failure to plead damages or an ascertainable loss caused by the Defendants is fatal to all of the claims asserted, and Plaintiffs' amended Complaints in Melfi and Simmens are futile in their entirety.

A. Melfi and Simmens fail to allege that drinking Enviga did not cause them to burn calories.

Melfi's and Simmens' proposed Complaints are almost identical. Although Melfi and Simmens do not simply concede that their ascertainable loss is not the failure to burn calories as Franulovic does, their carefully worded allegations have the same effect. Melfi and Simmens creatively attempt to side-step the Court's prior decision by alleging that he or she "does not believe that [he or] she experienced any calorie burning effect or weight loss from drinking Enviga." Melfi Compl. ¶ 57; Simmens Compl. ¶ 59 (emphasis added); *see also* Melfi Compl. ¶ 13 ("but she believes that she did not realize any calorie burning or weight loss from it") (emphasis added); Simmens Compl. ¶ 13 (same). Of course, whether Plaintiffs believe they experienced any calorie burning effect is entirely irrelevant and is not a fact that supports Plaintiffs' claims. *See, e.g.*, *Dubois v. Abode*, No. 02-3397, 2004 U.S. Dist. LEXIS 28328, at

*31-32 (D.N.J. June 28, 2004) ("Plaintiff's subjective belief that Abode generally interfered with and withheld outgoing legal mail is insufficient to raise a genuine issue of material fact for trial."); *Vanartsdalen v. Township of Evesham*, No. 05-1508, 2007 WL 2219447, *5 (D.N.J. Aug. 2, 2007) ("Plaintiff's subjective belief that these circumstances were too onerous to bear is insufficient to establish constructive discharge under the objective standard.").

Moreover, any mention of calorie burning is conspicuously absent from the paragraph that attempts to allege an ascertainable loss: "Since Plaintiff did not receive a weight loss product as advertised, Plaintiff seeks a refund of all monies spent when purchasing Enviga." Melfi Compl. ¶ 58 (emphasis added); Simmens Compl. ¶ 58 (same); *see also* Melfi Compl. ¶ 50 ("Based upon information and belief, Class members did not experience any weight loss from drinking Enviga.") (emphasis added); Simmens Compl. ¶ 50 (same). Thus, although Plaintiffs' Complaints include numerous criticisms of the Enviga Study that create the appearance of challenging Enviga's calorie burning claims, Plaintiffs purposefully avoid alleging causation or damages related to Defendants' advertising Enviga as a product that burns calories, as opposed to a product that allegedly promises weight loss. Indeed, it bears repeating that none of the Plaintiffs simply alleges that Enviga does not work and, therefore, they did not burn additional calories after drinking it.[10]

[10] As discussed previously, the record in this case is clear that following Magistrate Judge Schneider's discovery Order directing Plaintiffs to submit medical authorizations, all Plaintiffs made a concerted effort to disavow any allegations that Enviga does not cause calorie burning as advertised. *See* Pl. Catherine Melfi's Mem. of Law in Support of Appeal from Mag. Judge's Discovery Order (Oct. 25, 2007) [Docket No. 44-2]; Pl. Adam Simmens' Mem. of Law in Support of Appeal from Mag. Judge's Discovery Order (Oct. 25, 2007) [Docket No. 60-2]; Pl. Linda Franulovic's Mem. of Law in Support of Appeal from Mag. Judge's Discovery Order (Oct. 25, 2007) [Docket No. 59]. Plaintiffs' attempt to gerrymander their allegations in order to improve their position on the medical authorization issue makes clear that they are not claiming "calorie burning" damages, and thereby definitively undermines all of their claims.

B. Melfi and Simmens do not identify any advertisements for Enviga that promise weight loss.

Just like Franulovic, Melfi and Simmens allege that Defendants' advertisements promise weight loss without pointing to any specific advertisements that do so, relying instead on the same flawed allegation that "to the average reasonable consumer . . . burning calories or reducing caloric consumption results in losing weight, or at least offsets weight gained from other calories." Melfi Compl. ¶ 22; Simmens Compl. ¶ 22. Thus, Melfi and Simmens also fail to identify any particular language that promises weight loss, the amount of weight loss promised, the time period over which this promised weight loss is supposed to occur or the amount of Enviga necessary to achieve the unspecified weight loss.

C. Melfi's and Simmens' conclusory allegations that calorie burning is the equivalent of an express promise of weight loss fail as a matter of law.

Again as in Franulovic, Melfi's and Simmens' allegations demonstrate the basic fact that weight loss is a function of total calories burned minus total calories consumed and does not necessarily follow from drinking a beverage that burns 100 additional calories. In fact, their proposed Complaints also demonstrate the difference between burning calories from a particular product and achieving an overall reduction in caloric intake that is sufficient to achieve weight loss:

- "[B]urning calories or reducing caloric consumption results in losing weight, or at least offsets weight gained from the consumption of other calories." Melfi Compl. ¶ 22; Simmens Compl. ¶ 22 (emphasis added).

- "There is no evidence that Enviga has any positive effect regarding weight control or weight reduction of any kind on free-living consumers, whose every act and every calorie consumed are not controlled by Defendants' hired scientists." Melfi Compl. ¶ 37; Simmens Compl. ¶ 37 (emphasis added). [11]

[11] These statements are consistent with Melfi's and Simmens' current Complaints, which allege:

As discussed above, the common sense fact underlying these allegations – that reducing 100 calories from a single source might not lead to weight loss if those calories are made up from other sources – is the very fact that renders Plaintiffs' allegations regarding implied promises of weight loss untenable. In addition, Melfi and Simmens also rely extensively on the same out of context statements from the Defendants' website, and those allegations should be disregarded for the same reasons discussed above – viewed as a whole and in context, the website simply does not promise or imply weight loss.

D. By relying entirely on the lack of weight loss as the alleged ascertainable loss, Melfi and Simmens have conceded the lack of an express warranty claim.

In Defendants' original motion to dismiss, Defendants did not move to dismiss Plaintiffs' claim for breach of express warranty. However, in the proposed amended Complaints, it is now clear that Plaintiffs do not allege any damages or ascertainable loss caused by Defendants' advertising Enviga as a beverage that burns calories. Rather, Plaintiffs now rely entirely on allegations of a lack of weight loss based on an alleged implied message in Defendants' advertising. An implied message (or in this case, more properly an inferred message) cannot give rise to a breach of express warranty. *See* N.J.S.A. § 12A:2-313 (express warranty requires an "affirmation of fact or promise made by the seller"); 13 Pa. C.S. § 2313 (same). Because Plaintiffs do not, and cannot, allege the existence of any express promise by the Defendants that

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- "[I]t would take 35 days of constant consumption of Enviga . . . to possibly see even one pound of possible weight loss – assuming of course that the consumers would not consume 100 additional calories somewhere else." Melfi Corrected Class Action Compl. ¶ 38 [Docket No. 13]; Simmens Class Action Compl. ¶ 38 [Docket No. 37-3] (emphasis added).
- "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 these expended calories by consuming a few extra bites of food or drinking portions of other beverages." Melfi Corrected Class Action Compl. ¶ 43 [Docket No. 13]; Simmens Class Action Compl. ¶ 43 [Docket No. 37-3] (underline emphasis added).

drinking Enviga would cause weight loss, Plaintiffs' proposed amended Complaints fail to state a claim for breach of express warranty.

E. Melfi and Simmens fail to allege that they consumed Enviga in the requisite quantities.

Melfi's and Simmens' Complaints fail to state a claim for the additional and independent reason that neither of them alleges that they consumed Enviga in the recommended quantities. The fact that the Enviga can label discloses that the calorie burning benefits are experienced after drinking three cans per day is not disputed. *See* Melfi Compl. ¶ 26; Simmens Compl. ¶ 26. Moreover, in determining that Melfi failed to adequately plead an ascertainable loss, this Court noted that she failed to allege that she drank three cans of Enviga per day. Opinion at 20 (Oct. 25, 2007) [Melfi Docket No. 46].

Thus, as this Court recognized, Plaintiffs cannot allege an ascertainable loss, whether they rely on burning calories or losing weight, if they did not consume the three cans per day shown in Defendants' study to burn calories. But neither Melfi nor Simmens alleges consumption anywhere near that level. To the contrary, Melfi only "purchased and consumed about 3 to 4 cans of Enviga per week, during the approximate time frame of November 2006 through February 2007," Melfi Compl. ¶ 59, and Simmens only "purchased and consumed about 40 to 60 cans of Enviga total, during the approximate time frame of November 2006 to February 2007." Simmens Compl. ¶ 59. Plaintiffs, therefore, cannot now complain that they did not receive the advertised benefit of Enviga. Because Plaintiffs' Complaints fail to correct this deficiency, leave to amend should be denied.

III. MANY OF THE ALLEGEDLY MISLEADING STATEMENTS IDENTIFIED BY FRANULOVIC, MELFI, AND SIMMENS ARE NON-ACTIONABLE PUFFERY AND THEREFORE CANNOT FORM THE BASIS OF A CAUSE OF ACTION.

In their original motions to dismiss, Defendants argued that many of the allegedly misleading advertisements for Enviga were non-actionable because they constituted mere "puffery" or salesmanship.[12] The Court recognized Defendants' argument in its Opinion granting Defendants' motions, but did not address the issue in its rulings because the Court dismissed Plaintiffs' entire causes of action instead. [Franulovic Docket No. 60]. Now, in their present proposed Complaints, Plaintiffs have pleaded that Defendants are liable for the same statements. Accordingly, should the Court grant Plaintiffs leave to amend their Complaints, all of Plaintiffs' causes of action should be dismissed to the extent they are predicated on any allegedly misleading statements that constitute mere "puffery" or salesmanship. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) ("District courts often resolve whether a statement is puffery when considering a motion to dismiss … and we can think of no sound reason why they should not do so.").

"Puffery is an exaggeration or overstatement in broad, vague, and commendatory language." *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993). Under both New Jersey and Pennsylvania law, Plaintiffs' proposed causes of action authorize recovery only for false statements of fact – not mere statements of opinion or "puffery" typically found in advertisements. *See, e.g., N.J. Citizen Action*, 842 A.2d at 177 ("[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*, 587 A.2d 621 (N.J. 1991)); *New Hope Books, Inc. v. Datavision Prologix, Inc.*, No.

[12] *See* Mem. of Law in Support of Defs' Mot. to Dismiss § I(B) [Franulovic Docket No. 43-4]; Mem. of Law in Support of Def's Mot. to Dismiss § II(B) [Melfi Docket No. 11; Simmens Docket No. 64].

01741, 2003 WL 21672991, at *6 (Pa. CCP June 24, 2003) (holding that "puffing is not actionable in fraud"); *see also Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 903 (Pa. 1975) ("Misrepresentation must be distinguished from mere 'puffing.' We find these statements do not constitute misrepresentations of material fact.").

Accordingly, New Jersey and Pennsylvania courts have held – as a matter of law – that advertising claims constituted non-actionable puffery, where they did not make specific representations of a product's characteristics. For example, the plaintiffs in *New Jersey Citizen Action* brought a class action against the manufacturer of the allergy medication Claritin. 842 A.2d at 174. The plaintiffs had alleged that 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. at 176. *See also Rodio*, 587 A.2d at 624 (advertising that "You're in good hands with Allstate" was mere puffery); *Bubbles N' Bows, LLC v. Fey Publ'g Co.*, No. 06-5391, 2007 WL 2406980, at *9 (D.N.J. Aug. 20, 2007) (advertising that "the success of this business always has

and always will rely on the satisfaction of our clients" and that "if the customer isn't smiling, fix it" was puffery).[13]

In addition to allowing for "puffery," New Jersey and Pennsylvania law do not impose liability upon an advertiser for failure to perform basic calculations which any reasonable person could perform. *See, e.g., 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) ("The CFA does not require [] salesmanship to be accompanied by statistics about the product's effectiveness in order to avoid liability for false advertisement."); *Sunquest Info. Sys. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) ("It is axiomatic . . . that silence cannot amount to fraud in the absence of a duty to speak."); *Smith v. Renaut*, 564 A.2d 188, 192 (Pa. Super. Ct. 1989) (same).

In her lawsuit, Franulovic accuses TCCC of failing to disclose that she would have to burn approximately 3500 calories – and therefore drink at least 100 cans of Enviga at a cost of approximately $150 – to lose one pound. *See* Franulovic Compl. ¶¶ 31-32. This allegation, however, is simply not based on <u>any</u> misrepresentation of fact contained in any advertisements for Enviga, because: (i) the fact that losing one pound entails burning an additional 3500 calories is a fact knowable to anyone and not contained in any Enviga advertising; (ii) the price of a can of Enviga is obviously disclosed at the time of sale; and (iii) Franulovic read the Enviga can's label, which states: "Three cans per day of Enviga have been shown to increase calorie burning

[13] *See also Berkebile*, 337 A.2d at 903 (advertising that a toy helicopter was "easy to operate" did "not constitute misrepresentations of material fact"); *Zaborowski v. Hospitality Care Ctr. of Hermitage Inc.*, 60 Pa. D.&C. 4th 474, 487 (Pa. CCP 2002) (dismissing a UTPCPL claim because advertising that "our priority is to provide quality care and to provide a safe and comfortable environment for our residents" was puffery).

by 60 – 100 calories in healthy normal weight 18 – 35 year olds. Individual results may vary."[14] *See* Franulovic Compl. ¶¶ 45 ("After Franulovic read the Enviga can label's representations about calorie burning, she increased her consumption to three cans per day . . .").

In addition, Plaintiffs' proposed Complaints fail to state a claim under any cause of action to the extent their claims rely on any allegations which do not make characterizations of "specific product attributes." Accordingly, the Complaints should be dismissed to the extent they rely on any of the following non-actionable statements:

- Drinking Enviga is "much smarter than following fads, quick-fixes, and crash diets." Franulovic Compl. ¶ 22; Melfi Compl. ¶ 27; Simmens Compl. ¶ 27 (puffery).[15]
- Enviga provides "another way to keep those extra calories from building up." Franulovic Compl. ¶ 22; Melfi Compl. ¶ 27; Simmens Compl. ¶ 27 (puffery).
- Enviga "gives your body a little extra boost." Franulovic Compl. ¶ 21; Melfi Compl. ¶ 26; Simmens Compl. ¶ 26 (puffery).
- Enviga contains the "powerful EGCG." Fanulovic Compl. ¶ 22; Melfi Compl. ¶ 27; Simmens Compl. ¶ 27 (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." Melfi Compl. ¶ 22; Melfi Compl. ¶ 27; Simmens Compl. ¶ 27 (puffery).
- "Be positive. Drink negative." Melfi Compl. ¶ 22; Melfi Compl. ¶ 28; Simmens Compl. ¶ 28 (puffery).
- "Invigorate your metabolism." Melfi Compl. ¶ 22; Melfi Compl. ¶ 28; Simmens Compl. ¶ 28 (puffery).

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[14] A copy of the text of the Enviga can label is attached hereto as Exhibit C, and the Court may properly consider this text on a Rule 12(b)(6) motion to dismiss. *See supra* footnote 4.

[15] Though Defendants have pointed out in all of their prior briefing that this alleged statement is misquoted, Plaintiffs have persisted in citing it in their proposed Complaints as "evidence" of Defendants' misleading advertisements. As noted above, the full sentence from the website actually reads: "It's a fact that incorporating balanced nutrition and more activity into your lifestyle is the best way to stay healthy – and much smarter than following fads, quick-fixes and crash diets."

- Failing to disclose that "minimal study evidence showed that Enviga had a desirable effect only on a discreet and minor segment of the population." Franulovic Compl. ¶ 67(c) (failure to disclose data).

- Failing to disclose that "one would have to drink three cans daily for as long as the person wanted to have whatever effect might occur." Franulovic Compl. ¶ 67(d) (failure to disclose data).

- "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." Franulovic Compl. ¶ 67(e) (failure to disclose data).

CONCLUSION

Boiled down to their essence, Plaintiffs' proposed Complaints allege that Enviga is too expensive in relation to the benefits it offers consumers because, according to Plaintiffs, reducing 100 calories per day is not a sufficient benefit. Though Plaintiffs as participants in the free market are entitled to their own opinions of Enviga's value, their remedy is the same as for any product – they can choose not to purchase it. Their subjective belief of a bad value does not, however, give rise to claims for consumer fraud or breach of warranty, because Defendants disclosed to them the price charged for Enviga and its potential benefits. Moreover, in the end, Plaintiffs remain unwilling to challenge the existence of Enviga's benefits by alleging that they did not burn calories after drinking Enviga or that Enviga does not burn calories in anyone who drinks it. Accordingly, their requests to amend their Complaints are futile, and Defendants respectfully request this Court to deny leave to amend.

Dated: November 30, 2007.

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

LINDA FRANULOVIC, individually and on behalf of a class of persons,	)	CIVIL NO. 1:07-cv-00539-RMB-JS
Plaintiff,	)	CLASS ACTION
v.	)	Document Electronically Filed
THE COCA-COLA COMPANY,	)	
Defendant.	)	**Return date: December 7, 2007**

CATHERINE M. MELFI, on behalf of herself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	CIVIL NO. 1:07-cv-00828-RMB-JS CLASS ACTION Document Electronically Filed
ADAM SIMMENS, on behalf of himself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	CIVIL NO. 1:07-cv-03855-RMB-JS CLASS ACTION Document Electronically Filed

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed with the Court the foregoing **DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO AMEND** COMPLAINTS, which was served upon all counsel of record as listed on the docket of this Court via CM/ECF, and served upon all the following parties via United States mail, postage prepaid:

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