

**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. 1:07-cv-00539-
RMB-JS

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

Mark Cuker, Esquire
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Shore Drive East, Suite 101
Cherry Hill NJ 08002-1163
856-667-0500
Fax: 856-667-5133

Stephen Gardner, Esquire
Director of Litigation
**CENTER FOR SCIENCE IN THE
PUBLIC INTEREST**
5646 Milton Street, Suite 211
Dallas, Texas 75206
214-827-2774
Fax: 214-827-2787
Admitted pro hac vice

*Attorneys for Plaintiff Linda Franulovic
and the Class*

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INTRODUCTION

In its Opposition to Plaintiff's Motion, Defendant The Coca-Cola Company ("Coke") fails to demonstrate any basis for the extraordinary measure of denying leave to file an amended complaint. Coke asserts that leave should be denied as futile because Plaintiff's proposed Third Amended Complaint allegedly "fail[s] to cure the deficiencies identified in the Court's October 25, 2007 Opinion."¹ But Coke is wrong. In its Opinion dismissing Plaintiff's Second Amended Complaint, the Court held in relevant part that: "Franulovic has failed to adequately plead an ascertainable loss . . . Franulovic has not alleged that she or members of the class failed to burn more calories or lose weight."² The proposed Third Amended Complaint does precisely this by alleging that Plaintiff Linda Franulovic in fact did not lose any weight during the period when she used Enviga as prescribed by Coke.³ In light of this new allegation, Coke's opposition arguments fail under the very Opinion of this Court upon which they are predicated. Accordingly, Plaintiff's Motion for leave to amend should be granted.

¹ Coke Brief at 1.

² Opinion at 26.

³ Third Amended Complaint ¶48.

APPLICABLE LEGAL STANDARD

Franulovic agrees with Coke's position⁴ that the standard for review of a "futility" response to a motion to amend is the same as that for a Rule 12(b)(6) motion to dismiss. The Court summarized the standard for such a motion to dismiss in its Opinion. Several points made by the Court apply specifically to Coke's attempt to avoid reaching the merits of this dispute:

- A court must accept all well-pleaded allegations in the complaint as true.
- A court must view these allegations in the light most favorable to the plaintiff.
- The defendant bears the burden of showing that no claim has been presented.
- The court must only consider the facts alleged in the pleadings, the documents attached thereto as exhibits, and matters of judicial notice.⁵

FACTS ALLEGED IN THE THIRD AMENDED COMPLAINT

In her proposed Third Amended Complaint, Franulovic makes the following allegations of fact relevant to Coke's "futility" argument:

- Paragraph 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.

⁴ Coke Brief at 5.

⁵ Opinion at 7-8.

- Paragraph 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.**
- Paragraph 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.**
- Paragraph 50: Franulovic bought Enviga because of its **weight loss and calorie burning claims.** She would not have purchased three cans a day had she known the **lack of reasonable support** for Coke’s claims about Enviga.
- Paragraph 51: She certainly **never would have chosen to drink Enviga simply as a refreshing beverage** because Enviga was expensive (approximately \$1.50 per can).
- Paragraph 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.**
- Paragraph 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.**

ARGUMENT AND AUTHORITIES

Franulovic amended her complaint to plead exactly what the Court says she should have pleaded: “that she or members of the class failed to burn more calories or lose weight.”⁶ She alleged that she failed to lose weight.⁷ She said that she bought Enviga because of the calorie burning

⁶ Opinion at 26.

⁷ Third Amended Complaint at ¶ 48.

claims, which she understood to be equivalent to a promise of weight loss.⁸ She said that neither she nor members of the class would have bought Enviga had they known that Coke did not have prior substantiation for its calorie burning claims.⁹ She said that she suffered an ascertainable loss (which she estimated to be \$405.00) because Coke's claims persuaded her to buy a product she would never otherwise have bought.¹⁰

She did not, and cannot, allege that she did not burn calories as a result of Enviga, because that is impossible for her to know or prove. Indeed, the heart of her complaint is that **Coke itself had no adequate prior substantiation for its own claims that Enviga burns calories.**

The Court did not hold that Franulovic had to allege **BOTH** that she failed to burn more calories **AND** that she did not lose weight. Franulovic followed the Court's instructions and amended to plead the facts that she could in good faith allege. These facts address the Court's concerns and more than meet the standard for pleading consumer fraud and a resulting ascertainable loss.

In response, Coke seizes on the Court's language about Franulovic needing to plead *either* calorie burning or weight loss, but ignores the fact

⁸ Third Amended Complaint at ¶¶ 44-45.

⁹ Third Amended Complaint at ¶¶ 50 & 58.

¹⁰ Third Amended Complaint at ¶¶ 52 & 54.

that it was stated in the disjunctive. Franulovic pleaded that she did not lose weight, because that is a demonstrable fact, but Coke treats calorie burning as the *sine qua non* of the complaint. Coke is simply incorrect on this point.

A. Coke Deceived by Making Representations Without Prior Substantiation.

Perhaps because it recognized the futility of its attempt to fuse calorie burning with weight loss, Coke next argues that it never actually said that drinking Enviga would result in weight loss.¹¹

In this argument, Coke sidesteps the primary point of Franulovic’s complaint — that Coke did not have substantiation for its calorie burning claims, which is itself a deceptive practice, and that she would not have bought the product had she known that Coke had no evidence at all that a person such as she would burn calories.

This is a basic right of consumers — under the New Jersey Consumer Fraud Act, NJSA 56:8-2 et seq. (“CFA”), when a company makes express claims, it is incumbent on the company to have substantiation for that claim at the time it is made. Failure to have that proof is itself a deceptive practice, as this Court has recognized: “Where, as in the present case, a claim is com-

¹¹ Brief at 6-7.

pletely unsubstantiated a plaintiff need not offer affirmative evidence in support of its contention that a challenged claim is false.”¹²

As this Court previously has explained in applying the CFA:

The CFA is intended to protect the public even when a merchant acts in good faith. “Given that ‘[t]he fertility of [human] invention in devising new schemes of fraud is so great ...,’ the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations.” Oral misrepresentations are equally actionable under the CFA.

The “capacity to mislead” is at the heart of the definition of an “unlawful practice.” **A practice can be unlawful “even if no person was in fact misled or deceived thereby.”** Miller, 284 N.J. Super. at 74, 663 A.2d 643 (citing Cox, 138 N.J. at 17, 647 A.2d 454); see also Barry, 100 N.J. at 69, 494 A.2d 804 (observing the test of whether sales material violates the CFA is whether it is “misleading to the average consumer”).¹³

¹² *Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharmaceutical Corp.*, 2005-2 Trade Cas. (CCH) P74,983, 2005 U.S. Dist. LEXIS 30198 at *22 (D.N.J. Sept. 13, 2005). “Glaxo has established that it is likely to succeed on the merits of its federal Lanham Act cause of action, and by the same token it is likely to succeed on its New Jersey Consumer Fraud Act cause of action.” *Id.* at *24-25. *Cf. Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 590 (3d Cir. 2002) (applying Lanham Act: “We hold that, although the plaintiff normally has the burden to demonstrate that the defendant’s advertising claim is false, a court may find that a completely unsubstantiated advertising claim by the defendant is per se false without additional evidence from the plaintiff to that effect.”).

¹³ *In re National Credit Management Group, L.L.C.*, 21 F.Supp.2d 424, 449 (D.N.J. 1998) (some internal citations omitted; emphasis added). Although this case involved public enforcement by the Federal Trade Commission and the State of New Jersey, the court made it clear that “[p]rivate plaintiffs may also commence suits under the CFA. See Miller, 284 N.J. Super. at 76, 663 A.2d 643. An additional showing of ascertainable loss

Thus, Franulovic alleges all she is required to allege — or prove — as to her claim for lack of prior substantiation of the calorie burning promises.¹⁴

B. Coke Also Deceived by Making Implied Weight-Loss Claims.

Franulovic *also* alleges that Coke’s calorie burning claim is an implied claim of weight loss. Coke attacks these allegations, saying that “Franulovic’s conclusory allegations that advertising calorie burning is the equivalent of an express promise of weight loss fail as a matter of law.”¹⁵

Coke attempts to mislead the Court as to what Franulovic alleges — she never alleges that Coke “*expressly promised*” weight loss, but rather that Coke’s claims were *implicit* representations that Enviga would cause weight loss for Franulovic.

The Supreme Court has made clear that, under analogous federal law addressing advertisements to consumers, implicit claims are as relevant as express statements, if not more so: “Advertisements as a whole may be

as a result of the illegal conduct must be established by a private plaintiff though. See *id.* (quoting *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 473, 541 A.2d 1063 (1988)).” *Id.*, at 449 fn 3).

¹⁴ Coke also claims that its claims were just non-actionable puffery. Coke Brief at 20-24. It is absurd for Coke to tell the Court that, when it claimed that Enviga would burn calories, it was not making a specific representation of Enviga’s characteristics, and that argument merits no further discussion.

¹⁵ Coke Brief at 7.

completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.”¹⁶

The Third Circuit agrees: “The impression created by the advertising, not its literal truth or falsity, is the desideratum....”¹⁷

C. Franulovic’s Belief That Calorie Burning Meant Weight Loss Was Reasonable.

Coke’s next sidestep is to suggest that the Court write off the decades of case law on implicit advertising claims, because Franulovic’s interpretation of Coke’s claim is “contrary to fact or otherwise unreasonable” because *no one in their right mind* would believe that the calorie burning effect claimed for Enviga would actually have any effect on the body.¹⁸

“That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a factfinding tribunal.

¹⁶ *Donaldson v. Read Magazine*, 333 U.S. 178, 189 (1948).

¹⁷ *American Home Products Corp. v. F.T.C.*, 695 F.2d 681, 687 (3rd Cir. 1982).

¹⁸ Coke Brief at 9-11.

Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.”¹⁹

It is Coke’s burden at this stage to establish its assertion that Franulovic’s claim is factually unsupportable.²⁰ Coke says that equating a calorie burning promise with weight loss is something no reasonable consumer would do: “Franulovic’s weight loss theory fails as a matter of law because the average, reasonable consumer understands the relationship between burning extra calories and actually losing weight.”²¹

Coke thus asks the Court to become a focus group of one, by accepting as true its assertion that it was not reasonable for Franulovic to think that calorie burning would lead to weight loss. After discovery is concluded and experts have had the opportunity to review Coke’s evidence — both as to efficacy and as to the interpretation a reasonable consumer would give to Coke’s claims that Enviga would burn calories — then this question would be ripe for consideration. But at this stage of proceedings, there simply is no basis for the Court to reject Franulovic’s allegations of consumer fraud and resulting ascertainable loss.

¹⁹ *Donaldson v. Read Magazine*, 333 U.S. 178, 188-189 (1948); followed by *Miller v. American Family Publishers*, 284 N.J. Super. 67, 85-86, 663 A.2d 643, 652-653 (N.J. Super. Ch. 1995).

²⁰ Opinion at 8, citing *Hedges v. U.S.*, 404 F.3d 744, 750 (3rd Cir. 2005).

²¹ Coke Brief at 9.

D. Calorie-Burning is in Fact Widely Linked to Weight-Loss.

Coke's arguments also fly in the face of reality. The leading authorities equate calorie burning (or expenditure) with weight loss.

Food and Drug Administration: "Although experts may have different theories on how and why people become overweight, they generally agree that the key to *losing weight* is a simple message: Eat less and move more. Your body needs to *burn more calories* than you take in."²²

National Heart, Lung, and Blood Institute of the National Institutes of Health: "People who are inactive are more likely to *gain weight* because they don't *burn up the calories* that they take in from food and drinks."²³

Centers for Disease Control and Prevention: "A good way to *burn off extra calories and prevent weight gain* is to engage in regular physical activity beyond routine activities."²⁴

²² <http://www.cfsan.fda.gov/~dms/fdweigh3.html> (last accessed January 1, 2008) (emphases added).

²³ http://www.nhlbi.nih.gov/health/dci/Diseases/obe/obe_causes.html (last accessed January 1, 2008) (emphases added).

²⁴ <http://www.cdc.gov/nccdphp/dnpa/obesity/faq.htm> (last accessed January 1, 2008) (emphases added).

Dietary Guidelines for Americans (2005): “To maintain body *weight* in a healthy range, balance calories from foods and beverages with *calories expended*.”²⁵

Coke’s scoffing at Franulovic for linking calorie burning to weight loss is belied as well by consumer studies produced by Coke in discovery. These studies were designated by Coke as confidential pursuant to protective order, and Coke refuses to permit their public filing, so Franulovic will separately file these confidential documents by motion pursuant to Local Civil Rule 5.3 and will not discuss them in this brief. Franulovic does not present these documents as evidentiary matters, but only to demonstrate the fundamental insincerity of Coke’s claims.

Although it is also not evidentiary, Franulovic performed a Google search using the terms “calorie burning weight loss.”²⁶ These are the top six results, all of which discuss calorie burning in the context of weight loss.

1. Welcome to *Calories per Hour*, the web's premier resource for information and peer support for healthy and sustainable weight loss.²⁷

²⁵ Downloadable at <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf> (last accessed January 1, 2008) (emphases added).

²⁶ http://www.google.com/search?q=calorie+burning+weight+loss&sourceid=navclient-ff&ie=UTF-8&rlz=1B3GGGL_enUS232US232 (search performed January 1, 2008) (emphases added).

2. How Many *Calories* Are You Using -- & Other *Burning* Questions.²⁸
3. You can make *weight loss* quicker and easier by increasing your metabolic rate and *burning more calories* – here’s how.²⁹
4. Metabolism and *weight loss*: How you *burn calories*. Find out how metabolism *burns calories*, how it affects your weight and ways you can *burn more calories for greater weight loss*.³⁰
5. How Many *Calories Have You Burned* Today?³¹
6. If your goal is *permanent fat loss*, you need to *burn enough calories* to make a significant impact. Here's why: In order to *lose a pound in one week*, you need to create a 3,500-calorie deficit; in other words, you need to *burn off 3,500 more calories* than you eat.³²

It is therefore abundantly clear that it was reasonable for Franulovic to equate Coke’s calorie burning promises with weight loss (just as Coke intended she would).

²⁷ <http://www.caloriesperhour.com/> (last accessed January 1, 2008) (emphases added).

²⁸ <http://yourtotalhealth.ivillage.com/how-many-calories-are-you-using--other-burning-questions.html> (last accessed January 1, 2008) (emphases added).

²⁹ http://www.weightlossresources.co.uk/calories/burning_calories/burn_more_calories.htm (last accessed January 1, 2008) (emphases added).

³⁰ <http://www.mayoclinic.com/health/metabolism/WT00006> (last accessed January 1, 2008) (emphases added).

³¹ http://www.1is2fat.com/calorie_calculator.htm (last accessed January 1, 2008) (emphases added).

³² <http://www.dummies.com/WileyCDA/DummiesArticle/id-2994.html> (emphases added).

E. Coke Inverts the Rule that Advertisements Must Be Considered as a Whole.

Coke also urges the Court to consider its advertising “in its entirety,” by referring the Court to portions of its website on which there is no evidence that Franulovic relied. Aside from the fact that Coke is improperly attempting to introduce new evidence at the motion to dismiss stage, Coke’s legal argument is fundamentally flawed.

It is quite correct that a court should review an advertisement as a whole, to determine all express and implied messages. This is because a truth buried in the fine print of an advertisement will not excuse an overall deceptive message.

“[T]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context”³³

Coke attempts to turn this doctrine on its head — asking the Court to decide whether or not Franulovic’s interpretation of its advertising is reasonable by reviewing other promotional materials that Franulovic didn’t see.

The Court should reject Coke’s invitation to rewrite decades of advertising law in this Circuit.

³³ *American Home Products Corp. v. F.T.C.*, 695 F.2d 681, 687 (3d Cir. 1982), quoting *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

CONCLUSION

For the reasons set forth herein and in the principal brief, the Court should grant Plaintiff's motion and direct the clerk to file the Third Amended Complaint.

Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY



Mark R. Cuker
Woodland Falls Corporate Center
210 Lake Shore Drive East
Suite 101
Cherry Hill NJ 08002-1163
856-667-0500
Fax: 856-667-5133

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 Linda Franulovic and the Class

Dated: January 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum in Support of Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint has 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: January 4, 2008