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

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

# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Mark R. Cuker, Esquire
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002-1163
856-667-0500 (phone)
856-667-5133 (fax)

Stephen Gardner, Esquire
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
The Meadows Building
5646 Milton Street, Suite 211
Dallas, TX 75206
214-827-2774 (phone)
214-827-2787 (fax)

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES AND COURT RULES**



**MISCELLANEOUS**

## I. INTRODUCTION

### A. Background and Nature of the Case

Plaintiff Linda Franulovic, by counsel, respectfully submits this memorandum in support of her Motion for Class Certification pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, seeking certification of this action as a class action for injunctive relief.

This is a consumer class action brought by a resident of the State of New Jersey on behalf of consumers subjected to the Defendant's violations of the New Jersey Consumer Fraud Act, NJSA 56:8-1 *et seq.* ("CFA"). The CFA prohibits unconscionable commercial practices, deception, fraud, false pretense, false promise, misrepresentation, and known concealment or omission of material facts with the intent that others rely on such, in connection with the sale and advertisement of a product.[1]

This case involves the violation by Defendant The Coca-Cola Company ("Coke") of the rights of thousands consumers. Through its illegal, fraudulent, and deceptive business practices, Coke introduced and marketed Enviga, a diet green-tea soda, which claimed – and continues to claim – that it "burns calories." Coke made this claim and other claims like it without adequate prior substantiation for them.

Franulovic seeks to stop Coke's deceptive business practice. She seeks individual monetary damages as the measure of her ascertainable loss, but does not seek class-wide damages relief. Nor is she trying to get Coke to do anything affirmative. Thus, as this motion will demonstrate, this is a very basic case to certify.

As federal courts repeatedly have recognized, claims challenging fraudulent and

[1] N.J.S.A. 56:8-2.

deceptive business practices are appropriate for class action treatment under Rule 23. Franulovic's experience is typical of thousands of individuals. Franulovic and the class members are entitled to declaratory and injunctive relief for these deceptive business practices. All of their claims arise out of the same facts and circumstances and, as such, they fit Rule 23's provision of a means for many who would not otherwise come forward to address the violation of their rights because of the expense and difficulties of individual litigation.

Furthermore, Coke has not contended that Franulovic does not meet the requirements of Rule 23 for class certification, despite Franulovic's request for facts relating to its contentions as to those requirements. Franulovic served discovery requests on Coke, which included four contention interrogatories that related to class certification matters.[2] On August 31, 2007, Coke served its responses to Franulovic's discovery requests. To each of the four interrogatories related to class certification, Coke objected and responded, "Defendant has not conducted any discovery of Franulovic at this time and will timely supplement this response as required."[3] Coke deposed Franulovic on September 30, 2008. Coke did not supplement its responses to discovery requests. Franulovic's counsel requested supplementation on October 3, 2008. Again, Coke did not supplement its responses to discovery requests. Coke has blatantly ignored its discovery obligations by failing to supplement its responses to discovery requests after it conducted discovery of Franulovic. Thus, Franulovic also submits a separate Motion to Compel Defendant to Supplement its Responses to Discovery Requests. But for purposes of this Motion for Class Certification, Franulovic notes that Coke has not contended in its discovery responses

[2] These four interrogatories, and Coke's responses, are attached to the Affidavit of Mark R. Cuker in Support of Plaintiff's Motion for Class Certification ("Cuker Affidavit") as Exhibit A.

[3] *See id.* Responses 2-5.

that she does not meet Rule 23 requirements.

## B. The Class

Franulovic seeks certification of a class of all persons in the State of New Jersey who purchased Enviga manufactured and marketed by Coke from November 1, 2006, through the date of class certification ("Class Period"), excluding all officers and directors of Coke.

## II. STATEMENT OF FACTS

Plaintiff Linda Franulovic is a New Jersey consumer.[4] Defendant Coke is a Delaware corporation that markets and sells Enviga in New Jersey.[5]

Coke made claims that Enviga will "burn calories" and other similar claims, misleading customers to believe that they would lose weight if they drank Enviga.[6] 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.[7] Franulovic purchased Enviga because she thought it would help her burn calories, and thereby help with her weight-loss regimen.[8] Members of the proposed class purchased Enviga for the same reasons.[9] In fact, Coke does not have evidence to support the claim that all consumers who purchase Enviga will burn calories or lose weight.[10]

Coke claims that drinking three cans of Enviga (over a quart) every day over a lengthy

---

[4] Plaintiff's Third Amended Class Action Complaint (hereinafter "Complaint") at ¶9 (Doc. 79).

[5] Complaint at ¶10.

[6] Complaint at ¶20-2.

[7] Complaint at ¶17.

[8] Complaint at ¶45, 50.

[9] Complaint at ¶58.

[10] Complaint at ¶23.

period will cause the expenditure of far more calories than the product contains.[11] However, the truth is that Coke cannot substantiate weight-loss representations for the product (whether express or implied).[12] Coke bases its representations on the abstract of a single, small, and short-term study (the "Rudelle study")— funded by Nestle, a partner with Coke in Beverage Partners Worldwide.[13] The Rudelle study, by itself, is insufficient to substantiate Coke's claims unless larger and longer-term studies corroborate it.[14] It was a short-term study (72 hours), and completed on a small number of test subjects (31 subjects) in a tightly controlled environment.[15] There is no evidence at all that Enviga has any positive effect of any kind on free-living consumers, whose every act and every calorie consumed is *not* controlled by hired scientists.[16]

The subjects in the Rudelle study were young and lean.[17] The average age was approximately 23 years, with an age range of 18-35 years.[18] The Body Mass Index (BMI) for the test subjects averaged 22,[19] which is at the lower end of healthy weight levels.[20] Someone six feet tall with a BMI of 22 weighs 162 pounds.[21] In contrast, the great majority of American adults are overweight (BMIs of 25-30) or obese (BMIs of 30+), and approximately 37 percent of

---

[11] Complaint at ¶18.

[12] Complaint at ¶19.

[13] Complaint at ¶23. Servane Rudelle, et al., *Effect of a Thermogenic Beverage on 24-Hour Energy Metabolism in Humans,* 15 OBESITY 349-55 (2007).

[14] Complaint at ¶23.

[15] Complaint at ¶24 and 29.

[16] Complaint at ¶36.

[17] Complaint at ¶25.

[18] Complaint at ¶25.

[19] Complaint at ¶25.

[20] *See* National Heart, Lung, and Blood Institute, *Body Mass Index Table,* available at http://www.nhlbi.nih.gov/guidelines/obesity/bmi_tbl.htm (last accessed Oct. 16, 2008).

[21] *See* National Heart, Lung, and Blood Institute, *Body Mass Index Table,* available at http://www.nhlbi.nih.gov/guidelines/obesity/bmi_tbl.htm (last accessed Oct. 16, 2008).

New Jersey residents are overweight and 22 percent are obese.[22] The Rudelle study neither substantiates nor provides a 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.[23]

Enviga does not burn calories in a significant proportion of consumers.[24] The small study showed that the EGCG and caffeine in Enviga apparently had no effect on or ***even lowered*** energy expenditure in five of the 31 subjects.[25] Thus, the chemicals in Enviga would conceivably ***contribute to weight gain, not loss***, for some consumers.[26]

Coke presented its study 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.[27] NAASO took the extraordinary step of issuing its own rebuttal to the presentation.[28] NAASO concluded, "it is improper to state or imply that the results of this study support any weight loss or any statement related to this."[29]

New Jersey was one of the test markets for Enviga.[30] Coke's advertising campaign was so extensive that, in some places in early 2007, every single advertisement in a bus or train car

---

[22] Ctr. for Health Statistics, New Jersey Dep't. of Health and Senior Serv., *Health Data Fact Sheet July 2006: Obesity in New Jersey,* available at www.state.nj.us/health/chs/monthlyfactsheets/jul06_obesity.pdf (last accessed October 16, 2008). In all likelihood, these percentages have increased.

[23] Complaint at ¶27.

[24] *See*, e.g., 70(6) AM J CLIN NUTR. 1040 (Dec. 1999); 131(11) J NUTR. 2848 (Nov. 2001).

[25] Complaint at ¶24.

[26] Complaint at ¶24.

[27] Complaint at ¶34.

[28] Complaint at ¶34.

[29] NAASO Statement on the Poster: NAASSO Poster P303.

[30] Complaint at ¶16.

consisted of Enviga ads.[31] Billboards containing extravagant Enviga claims were ubiquitous.[32] Coke chose to market this product to all New Jersey consumers as having a calorie-burning effect, without qualification.[33]

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.[34] 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 weight-loss regimen.[35] She also began buying cans of Enviga in bulk.[36] Franulovic did not otherwise alter her food consumption or physical activities during the period she used Enviga.[37] 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.[38] 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 and thus did not get the weight-loss benefits promised by Coke.[39]

Franulovic bought Enviga because of Coke's weight-loss and calorie-burning claims.[40] She would not have purchased three cans per day had she known the lack of reasonable support

---

[31] Complaint at ¶16.

[32] Complaint at ¶16.

[33] Complaint at ¶25.

[34] Complaint at ¶44.

[35] Complaint at ¶45.

[36] Complaint at ¶45.

[37] Complaint at ¶45.

[38] Complaint at ¶46.

[39] Complaint at ¶48.

[40] Complaint at ¶50.

for Coke's claims about Enviga.[41] She certainly never would have chosen to drink Enviga simply as a refreshing beverage because Enviga was expensive (approximately $1.50 per can).[42] Franulovic's ascertainable loss is that she bought a product she would not have purchased but for the deceptive and misleading advertising, and that she received less benefits than Coke promised in its labeling and marketing of Enviga.[43] It is the same loss suffered by all other class members.[44]

In short, Franulovic has put forth substantial evidence supporting her claim that there are numerous New Jersey consumers – the proposed class herein – that were subject to Coke's unfair and deceptive marketing practices.

## III. ARGUMENT

### A. General Legal Standards Governing Class Certification

The Supreme Court has recognized that "[c]lass actions serve an important function in our system of civil justice."[45] "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests."[46] To maintain a suit as a class action under Rule 23, Plaintiff must allege facts establishing each of the four threshold requirements of subsection (a),[47] i.e., that:

---

[41] Complaint at ¶50.

[42] Complaint at ¶51.

[43] Complaint at ¶54.

[44] Complaint at ¶58, 62.

[45] *Gulf Oil Co. v. Barnard*, 452 U.S. 89, 99 (1981).

[46] *In re Prudential Insurance Company America Sales Practice Litigation*, 148 F.3d 283, 308 (3d. Cir. 1998) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 799 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995)).

[47] *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs seeking injunctive relief must also satisfy Rule 23(b)(2) by demonstrating that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Plaintiff bears the initial burden of advancing reasons why a putative class action meets the requirements of Rule 23. Once a plaintiff has demonstrated a preliminary legal showing that the requirements of Rule 23 have been met, the burden of proof is upon the defendant to demonstrate otherwise.[48] The Third Circuit has long recognized and adopted a liberal construction of Rule 23.[49]

The determinations required by Rule 23 are questions addressed to the sound discretion of the district court.[50] In determining whether to maintain an action as a class action, a court is not to conduct an exploration of the merits when deciding upon certification of a class.[51] Moreover, because a court makes class determination at the pleading stage of the action, the court accepts substantive allegations in the complaint as true for purposes of the class motion.[52]

---

[48] 2 H. Newberg, *Newberg on Class Actions* (4th ed. 2002) ("Newberg") §7.22 at 72.

[49] *See Kahan v. Rosenstiel*, 424 F.2d 161,169 (3d Cir. 1970) *cert. denied*, 90 S. Ct. 1870 (1970) ("The interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing the class action."); *Spark v. MBNA Corporation*, 178 F.R.D. 431, 434-5 (D. Del. 1998).

[50] *Gulf Oil Co.*, 452 U.S. at 100.

[51] *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974); *Kahan*, 424 F.2d at 169; *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 433 (E.D. Pa. 1998); *Spark*, 178 F.R.D. at 435.

[52] *In Re Prudential Ins. Co. of America Sales Practices Litigation*, 962 F. Supp. 450, 468 n. 6 (D.N.J. 1997); *see,*

## B. The Proposed Class Satisfies the Requirements of Rule 23(a)

### 1. The Class is so Numerous that Joinder of All Members is Impracticable

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable — when the procedure would be "inefficient, costly, time-consuming, and probably confusing."[53] Franulovic is not required to come before the Court and detail the exact size of the class or to demonstrate that joinder of all class members is impossible. "Impracticability does not mean impossibility."[54] Instead, Franulovic need only provide the Court with an estimate as to the size of the class.[55] "In fact, difficulty in immediately identifying all class members makes joinder more impracticable and certification more desirable."[56] This Court may make "a common sense determination" to support the finding of numerosity.[57] "Precise enumeration of the members of a class is not necessary for the action to proceed as a class action."[58] In applying this rule, courts consistently hold that joinder is impracticable where the class is composed of hundreds of potential claimants; indeed, courts often find impracticability of joinder where the class is composed of fewer than 100 members.[59]

---

*e.g., Williams*, 183 F.R.D. at 439; *Eisen,* 417 U.S. at 177; *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 193 (E.D. Pa. 1998).

[53] *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 111 (E.D. Pa. 1992).

[54] *See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993) ("The number of potential class members is not, in itself, determinative of this analysis."); *see, e.g., Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990) ("Precise enumeration of the members of a class is not necessary for the action to proceed as a class action.").

[55] *See Zinberg,* 138 F.R.D. at 405; *see, e.g., In Re ORFA Securities Litigation,* 654 F. Supp. 1449 (D.N.J. 1987).

[56] *Haywood v. Barnes,* 109 F.R.D. 568, 575 (E.D.N.C. 1986).

[57] *Maldonado v. Houstoun*, 177 F.R.D. 311, 319 (E.D. Pa. 1997).

[58] *Zinberg,* 138 F.R.D. at 405; *see Anderson v. Department of Public Welfare*, 1 F. Supp.2d 456, 461 (E.D. Pa. 1998) (quoting *Metts v. Houstoun*, 1997 WL 688804, at *2 (E.D. Pa. Oct. 24, 1997) ("[t]here is no precise number necessary for class certification.").

[59] *See e.g., Eisenberg v, Gagnon*, 766 F.2d 770, 785-86 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 342 (1985) (90 class members meets numerosity requirement); *Weiss v. York Hospital*, 745 F.2d 786, 808 (3d Cir. 1984), *cert. denied*,

Numerosity is indisputable here. During the Class Period, Coke mounted an advertising campaign all over New Jersey, and used New Jersey as its test market. The class consists of thousands of individuals who were subjected to Coke's deceptive marketing. Thus, numerosity is not at issue.

### 2. There are Questions of Law and Fact Common to the Class

A common question is "one which arises from a 'common nucleus of operative facts' regardless of whether 'the underlying facts fluctuate over the class period and vary as to individual claimants.'"[60] Not all class members need to share identical claims; "factual differences among the claims of the putative class members do not defeat certification."[61] Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2).[62]

Courts have typically found a common nucleus of operative facts where, as in the present action, the defendant engaged in standardized conduct toward putative class members.[63]

Franulovic meets the commonality requirement if her grievances share a common question of law or of fact with class members. Franulovic is not required to show that all class members' claims are identical to each other as long as there are common questions at the heart of

---

105 S. Ct. 1777 (1985) (92 class members meets numerosity requirement); *Zeffiro v. First Pennsylvania Banking & Trust Co.*, 96 F.R.D. 567, 569 (E.D. Pa. 1983) (51 class members sufficient); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (certification of class with 25 members). Professor Newberg maintains that at 40 members, a presumption of numerosity should arise, without regard to other considerations. *Newberg*, § 3:05 at 3-25 (3d ed. 1995).

[60] *Kromnick v. Stat Farm Ins. Co.*, 112 F.R.D. 124, 128 (E.D. Pa. 1986) (quoting *In Re Asbestos Litigation,* 104 F.R.D. 422, 429 (E.D. Pa. 1984), *aff'd in relevant part*, 789 F.2d 996 (3d Cir. 1986)).

[61] *Baby Neal by and for Kanter v. Casey*, 43 F.3d 48, 56 (3d. Cir. 1994); *see Eisenberg,* 766 F.2d 770.

[62] *Prudential,* 148 F.3d at 310 (quoting *Baby Neal,* 43 F.3d at 56).

[63] *Prudential*, 148 F.3d at 310 (Prudential's orchestrated sales presentations, the plaintiffs' common legal theories, Prudential's common defenses, and other common issues undoubtedly satisfy the commonality and predominance requirements); *Sanneman v. Chrysler Corporation*, 191 F.R.D. 441, 446-7 (E.D. Pa. 2000), relying upon *Califano v. Yamasaki*, 442 U.S. 682 (1979) ("Commonality exists where proposed class members challenge the same conduct of the defendants.").

the case.

The heart of Franulovic's claims against Coke is that she and all members of the proposed class were enticed to buy Enviga products because of Coke's deceptive business practices. The common nucleus of operative facts are: 1) Coke made, and continues to make, claims that its product, Enviga, will "burn calories"; 2) the average reasonable consumer in New Jersey believes that burning calorie results in losing weight, or offsetting weight gained from other calories; 3) Franulovic and members of the proposed class purchased Enviga because they were misled to believe it would help them lose weight; and 4) Franulovic and members of the proposed class would not have purchased Enviga if they had known Coke did not and does not have the evidence to support its claim that all consumers who purchase Enviga will burn calories or lose weight. Franulovic has satisfied the commonality requirement.

Moreover, Franulovic's and the class's satisfaction of Rule 23(a)(2)'s commonality requirement is not undermined by any questions pertaining to "ascertainable loss" under the CFA. First, ascertainable loss is not a class-wide issue in a CFA action for injunctive relief. This is because a colorable allegation of ascertainable loss is a standing requirement under the CFA,[64] and, in a class action, "only the putative class representative is required to satisfy any applicable standing requirement."[65] Thus, in a class action for injunctive relief, "only the named plaintiff . . . is required to satisfy the threshold standing requirement of a claim of ascertainable loss that can survive a motion for summary judgment."[66] Second, even if ascertainable loss were

---

[64] *See Weinberg v. Sprint Corp.*, 173 N.J. 233, 251, 801 A.2d 281 (2002).

[65] *Laufer v. United States Life Ins. Co.*, 385 N.J. Super. 172, 186, 896 A.2d 1101, 1110 (App. Div. 2006).

[66] *Id.* (citation omitted); *but see Maniscalco v. Brother Int'l Corp.*, 2008 U.S. Dist. LEXIS 50122 at *28-29 (D.N.J. June 26, 2008) (dicta questioning *Laufer*'s holding that named plaintiff could seek injunctive relief for class *that she herself was not seeking*, an issue not presented in the instant case).

a class-wide issue and even if it did raise individual questions, the foregoing common questions of law and fact still would satisfy Rule 23 in this action for injunctive relief because common issues need only exist, they need not predominate for certification under Rule 23(b)(2).[67] Accordingly, questions concerning ascertainable loss notwithstanding, Franulovic satisfies all applicable commonality requirements.

### 3. The Claims of the Representative Party are Typical of the Claims of the Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." Rule 23(a)(3) and the adequacy of representation requirement set forth in subsection (a)(4) are designed to assure that the interests of unnamed class members will be adequately protected by the named class representatives.[68] "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals."[69]

The threshold for establishing typicality is easily met in this case. "Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be *common* to the class . . ."[70] The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and a legal perspective, are such that in litigating her personal claims

---

[67] *See Baby Neal, supra*, 43 F.3d at 61 ("The complaint prays for declaratory and injunctive relief. Factual differences among the situations of the plaintiffs will thus not preclude the district court from determining whether the class claims are meritorious, or from ordering the appropriate relief in the event that they are.").

[68] *See, e.g., General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977).

[69] *Prudential*, 148 F.3d at 311.

[70] *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (emphasis in original).

she can reasonably be expected to advance the interests of absent class members.[71] Under a frequently employed formulation, typicality is demonstrated where the plaintiff can "show that the issues of law or fact he or she shares in common with the class occupy the same degree of centrality to his or her claims as to those of unnamed class members."[72]

Where, as here, the Plaintiff alleges a common pattern of wrongdoing, and will present the same evidence (based on the same legal theories) to support both her claims and the claims of the Class members, courts have held the typicality requirement to be satisfied, notwithstanding factual variances in the position of each class member. The Third Circuit's formulation is that where the named plaintiffs, and all members of the proposed class, have overarching claims arising from the same fraudulent scheme, the typicality requirement is satisfied regardless of whether different facts underlie each class member's claim.[73]

Franulovic is a typical victim of Coke's deceptive marketing practices. Franulovic's claims arise out of the same course of conduct, *i.e.*, the use of misleading advertising, and Franulovic bases her claims on the same legal theories as those of the class members. The essence of each putative class member's claim is precisely the same. Accordingly, the common issues necessarily share "the same degree of centrality,"[74] and Franulovic would have to make the same arguments to prosecute her claims, as members of the proposed class would have to make to prosecute their claims. Franulovic will advance the interests of all class members toward a favorable determination with respect to each such issue. Franulovic's claims are typical

---

[71] *See Weiss*, 745 F.2d at 809-10, n. 36.

[72] *Weiss*, 745 F.2d at 810, n. 36 (discussing *Donaldson v. Pillsbury*, 554 F.2d 825 (8th Cir. 1977)).

[73] *See Prudential,* 148 F.3d at 311-312. *See also, Hanrahan v. Britt*, 174 F.R.D. 356, 363 (E.D. Pa. 1997) (typicality established where claims of all class members are based on the same systematic conduct and legal theories).

[74] *Weiss*, 745 F.2d at 810.

of the claims of the class.

Franulovic's claims are not only typical of those of the class she seeks to represent, they are *identical*. She resided in New Jersey during the Class Period. She saw Coke's advertisements for Enviga in New Jersey. She read and heard from Coke's advertisements that Enviga is a "calorie burner." Franulovic decided to purchase Enviga based on those advertisements. She thought Enviga would help her lose weight. She was disappointed and angered to learn that Coke did not have sufficient evidence to make its claims. The members of the proposed class have the identical claims to Franulovic. Furthermore, Coke has not contended that Franulovic's claims are not typical of the claims of the other members of the class.[75] Thus, because Franulovic and all members of the proposed class have the same claims, the typicality requirement is satisfied.

### 4. The Plaintiff and Her Counsel Will Fairly and Adequately Represent the Class

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class."[76] This case easily meets both prerequisites of adequacy of representation. First, Franulovic has retained counsel highly experienced in class action litigation to prosecute her claims and those of the Class. Second, there is nothing to suggest that Franulovic has any interest antagonistic to the vigorous pursuit of the Class claims against Coke. The existence of the elements of adequate

---

[75] Ex. A.

[76] *Wetzel, supra,* 508 F.2d at 247; *accord Weiss,* F.2d at 811; *see also Prudential*, 148 F.3d at 312.

representation is presumed and the burden is on the defendant to demonstrate that the representation will be inadequate.[77] Coke has not demonstrated any facts to meet that burden, and indeed has not disputed adequacy.

Here, Franulovic wants to end deceptive advertising by Coke, both for herself and for the members of the proposed class. Franulovic shares with the Class an interest in establishing that Coke's deceptive practices violate the law. Accordingly, Franulovic adequately represents the interests of the Class.

Competent and experienced counsel who have invested considerable time and resources into the prosecution of this action also represent the class.[78] Counsel in this action have served as class counsel in other deceptive practices class actions.[79] Counsel also have been found to be adequate counsel by various courts in many certified class actions.[80]

Furthermore, Coke has not contended that Franulovic will not fairly and adequately protect the interests of the members of the class, that Franulovic has any interests that are contrary to or in conflict with those of the class she seeks to represent, or that Franulovic has not retained competent counsel experienced in class action litigation.[81] Franulovic is an adequate representative and has retained experienced class counsel who have aggressively litigated this action. She has satisfied this requirement for certification.

---

[77] *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982).

[78] *See* Cuker Affidavit Exhibits B and C (Declaration and Biography Statements of Counsel Stephen Gardner, Mark R. Cuker, and Michael J. Quirk).

[79] *See id.* Exhibit B ¶¶9, 11; Exhibit C at 2-3, 5

[80] *See id.* Cuker A Exhibit B ¶11; Exhibit C at 2-3, 5.

[81] *See id.* Exhibit A Responses 3-5.

## C. The Plaintiff Has Satisfied the Requirements for a Class under Rule 23(b)(2)

In addition to meeting the prerequisites of Rule 23(a), an action must satisfy at least one of the three conditions of subdivision (b) of Rule 23. Franulovic proceeds here under Rule 23(b)(2), which provides in pertinent part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

This action qualifies as a class action under Rule 23(b)(2) because Coke's deceptive marketing of Enviga is an action of general applicability to all members of the Class. Moreover, this action qualifies as a class action under Rule 23(b)(2) because Franulovic and the class she seeks to represent are not seeking damages, but solely injunctive relief.

### 1. The Plaintiff Shows Coke Acted on Grounds Generally Applicable to the Class, Making Appropriate Final Injunctive Relief to the Class as a Whole.

First, Franulovic's deceptive advertising claims are claims for injunctive relief under the CFA.[82] Accordingly, Franulovic's claims to force Coke to stop making false and misleading advertising statements here are claims that fall within Rule 23(b)(2).

Second, Franulovic satisfies the requirement of section (b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class." In applying Rule 23(b)(2), the Third Circuit has held that:

> To meet this requirement, the putative class must demonstrate that the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the

[82] *See* N.J.S.A. 56:8-19.

subsequent application of principles of *res judicata.*[83]

The Third Circuit subsequently clarified that this requirement "is almost automatically satisfied in actions primarily seeking injunctive relief" because "[w]hat is important is that the relief sought by the named plaintiffs should benefit the entire class."[84] Here, Franulovic easily satisfies the requirements of section (b)(2) because: (1) she seeks injunctive relief from Coke's calorie-burning and weight-loss claims for the entire class, (2) based on its members' common right to truthful and non-deceptive advertising under the CFA, (3) which is violated by Coke's deceptive practice of marketing Enviga as a product that will help class members lose weight. In short, Coke oversold and misrepresented its claims that Enviga burns calories and, therefore, causes weight loss to thousands of New Jersey consumers. This violation of the CFA is enough to satisfy the requirements of Rule 23(b)(2); the only thing Franulovic desires is for Coke to stop this violation of the rights of the proposed class. Thus, this is a classic case for (b)(2) certification.

### 2. The Plaintiff's Proposed Class Action Seeking Certification under Rule 23(b)(2)is Affirmatively Different from a Class Seeking Certification under Rule 23(b)(3).

The primary difference between class actions seeking certification under Rule 23(b)(2) and class actions seeking certification under Rule 23(b)(3) is the relief sought. Rule 23(b)(2) class actions seek declaratory and injunctive relief. Rule 23(b)(3) class actions seek damages. Additionally, a (b)(2) action only requires that the party opposing the class acts the same toward the class and that some class members seek final injunctive relief. A (b)(3) action must meet additional elements of predominance and superiority. Thus, lack of the elements of

---

[83] *Hassine, supra,* 846 F.2d at 179.

[84] *Baby Neal, supra,* 43 F.3d at 58-59.

predominance and superiority for (b)(2) actions means that a court should grant class certification *even if* common issues do not predominate and *even if* the class action mechanism is not the superior method to resolve the dispute.

In determining whether to certify a case as a (b)(2) class action, courts often look to whether a class is "cohesive."[85] The representative plaintiff and all class members must have a uniform interest in the determination of the liability issue, and the representative plaintiff's claims cannot have any unique factual or legal characteristics.[86] The standard inquiry in a (b)(3) action focuses on the effect of the wrongful conduct on each class member. In contrast, in a (b)(2) case, the conduct of the defendant is the overreaching issue. Individual facts about the plaintiff and class members are irrelevant to whether the defendant acted on grounds generally applicable to the class. Thus, a court should not rely upon differences in class members' claims when focusing its inquiry under a rule that provides for certification of a class seeking injunctive relief wherever defendants have "acted or refused to act on grounds generally applicable to the class."

In seeking certification under Rule 23(b)(2), Franulovic does not seek class-wide damages. Instead, she seeks to enjoin Coke's unlawful practices in New Jersey. Franulovic and all potential class members have a uniform interest in achieving declaratory and injunctive relief from Coke's deceptive marketing of Enviga. Franulovic's claims are the same as those of all other class members: they bought a product, Enviga, they would not have purchased but for the deceptive and misleading advertising, and they received less benefit than Coke promised in its

---

[85] *Barnes v. American Tobacco Co.*, 161 F.3d 127, 142-3 (3d Cir. 1998); *e.g., Wetzel,* 508 F.2d at 248-9.

[86] *See Barnes,* 161 F.3d at 142-3*; Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997); *Geraghty v. U.S. Parole Commission,* 719 F.2d 1199, 1205-06 (3d Cir. 1983); *In re St. Jude Med., Inc.,* 425 F.3d 1116, 1121 (8th Cir. 2005); *McManus v. Fleetwood Enters., Inc.,* 320 F.3d 545, 553 (5th Cir. 2003).

labeling and marketing of Enviga. Franulovic and the proposed class are "sufficiently cohesive to warrant adjudication by representation."[87] Thus, Coke acted on grounds generally applicable to the class, and the Court may justly certify this class under Rule 23(b)(2).

All Franulovic and the proposed class seek is to end Coke's deceptive advertising of Enviga. Because they only desire injunctive relief, and not damages, Franulovic seeks to certify this case under Rule 23(b)(2).

## D. Partial Certification is Appropriate Should the Court Deny Plaintiff's Motion for Full Certification

Should the Court conclude that full certification under Rule 23(b)(2) is not appropriate, Franulovic submits that the Court should grant partial certification under Rule 23(c)(4)(A). The commonality of liability issues would make any subsequent individual litigation illogical. As one leading recent decision has recognized:

> If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.[88]

Federal district courts under Fed. R. Civ. P. 23(c)(4)(A) are instructed that they should take full advantage of this provision to certify separate issues to "reduce the range of disputed issues in complex litigation and achieve judicial efficiencies."[89] Specifically, Franulovic requests that this Court certify this action to allow for a class-wide determination of Coke's liability for deceptively marketing Enviga.

---

[87] *Barnes,* 161 F.3d at 142-3 (quoting *Amchem Products, Inc.,* 521 U.S. 591, 623 (1997)).

[88] *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003); *see also Laufer, supra*, 385 N.J. Super. at 181.

[89] *Robinson v. Metro-North Commuter Railroad Co.,* 267 F.3d 147, 167 (2d Cir. 2001).

## IV. CONCLUSION

For the foregoing reasons, Franulovic respectfully requests that this Court grant this motion for an order certifying this action as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the proposed Class of individuals defined herein, appointing Franulovic as a representative of the Class, and appointing her counsel as class counsel.

Dated: October 21, 2008

Respectfully submitted,

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 (phone)
856-667-5133 (fax)

Stephen Gardner, Esquire
Center for Science in the Public Interest
The Meadows Building
5646 Milton Street, Suite 211
Dallas, Texas 75206
214-827-2774 (phone)
214-827-2787 (fax)

*ATTORNEYS FOR PLAINTIFF AND PROPOSED CLASS*