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.	)	
THE COCA-COLA COMPANY,	)	Document Electronically Filed
Defendant.	)	

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This litigation involves a carbonated green tea beverage called Enviga that is produced and sold by Beverage Partners Worldwide, a partnership between The Coca-Cola Company (TCCC) and Nestlé USA, Inc. TCCC is the only Defendant. The product label and marketing campaign for Enviga promotes the beverage as "The Calorie Burner," because, as stated on the back of the can, drinking three cans of Enviga per day will result in the burning of 60-100 calories.[1] Plaintiff contends that the product label and advertising for Enviga is deceptive under the New Jersey Consumer Fraud Act.[2] Specifically, Plaintiff alleges that she interpreted "The Calorie Burner" as an implied promise that drinking Enviga would cause her to lose weight,[3] but that after she tried the product for approximately three months, she did not lose weight.[4] Plaintiff "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."[5]

Plaintiff cannot satisfy her burden of establishing that class certification is proper under Rule 23. First, Plaintiff has failed to demonstrate that she is an adequate class representative. Her inadequacy under Rule 23 initially derives from her decision, or more properly the decision of her lawyers, to forgo the monetary relief Plaintiff seeks for herself and to seek only injunctive relief for the class, potentially prejudicing the class members' ability to recover the same

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1 *See* September 30, 2008 Deposition of Linda Franulovic, Exhibit 13 (Picture of back of Enviga can labeled "TCCC-Enviga-0001740") (hereinafter "Franulovic Dep.") (A true and accurate copy of which is attached hereto in relevant part as **Exhibit A)**.

2 Franulovic's Third Amended Complaint, ¶¶ 66-72 (filed April 14, 2008) (Docket No. 79) (hereinafter "Third Amend. Compl.")

3 *See* Third Amend. Compl. ¶ 45.

4 *See* Third Amend. Compl. ¶ 48.

5 Brief in Support at 3.

monetary damages as Plaintiff. She also fails as an adequate class representative because the record demonstrates that the Center for Science in the Public Interest (CSPI) created and continues to control the key strategic decisions in this litigation, and Plaintiff is simply following the instructions of counsel for that non-profit advocacy group, not representing the interests of the class. In addition, there are unique factual defenses resulting from Plaintiff's admissions during her deposition that will so preoccupy her with attempting to save her own case that she will be unable to prosecute this litigation on behalf of the class. These defenses arise from Ms. Franulovic's testimony that: (1) she never believed that drinking Enviga would guarantee she would lose weight;[6] (2) she did not know how much she weighed when she started drinking Enviga;[7] (3) she never weighed herself while she was drinking Enviga;[8] (4) she never attempted to count or control the number of calories she consumed while drinking Enviga;[9] and (5) she did not care how many calories she was consuming while she was drinking Enviga.[10]

Second, in addition to Ms. Franulovic's inability to represent the proposed class adequately, Plaintiff has failed to identify a proper class that both excludes individuals who have not been harmed and that can be defined without reference to the proposed class members' states of mind. Plaintiff's proposed class includes all purchasers of Enviga in New Jersey and, therefore, includes numerous individuals who do not share Plaintiff's interpretation of the Enviga label or advertising or who purchased Enviga for reasons other than weight loss. Those persons have not been harmed under Plaintiff's theory that the label and advertising creates an *implied*

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6 Franulovic Dep. at 46:18 – 47:3; 85:25 – 86:3; 92:4-8.
7 *Id.* at 31:13-16.
8 *Id.* at 32:13-16; 84:7-12.
9 *Id.* at 34:14-17; 88:16-19.
10 *Id.* at 45:18-24.

promise of weight loss. Properly understood as including only those persons who were trying to lose weight *and* who believed that Enviga promised weight loss *and* who did not in fact lose weight, Plaintiff's class fails because its definition depends on the class members' individual states of mind.

Third, for similar reasons, Plaintiff cannot meet her burden of establishing that her proposed Rule 23(b)(2) class is coherent because there are too many individual issues involved in determining whether any putative class member is capable of asserting a claim. The Court required Plaintiff – in order to state a claim and to continue with this litigation – to allege, *inter alia*, that she was drinking Enviga as part of her weight loss regimen. In other words, the Court recognized what Plaintiff admitted in her deposition, *i.e.,* a belief that drinking Enviga would cause weight loss no matter what else Plaintiff ate or drank is unreasonable on its face.[11] Accordingly, to be a proper member of Plaintiff's proposed class and proceed under Plaintiff's theory of recovery, each potential class member would have to establish, at a minimum, that he or she (i) wanted to lose weight; (ii) interpreted the label or advertising for Enviga as promising weight loss; (iii) used the product as a weight loss tool, *i.e*., consumed it regularly (iv) was following some type of weight loss regimen and not doing other things that would obviously negate any potential effect of drinking Enviga; and (v) did not, in fact, lose weight. In addition to simply ignoring these individual issues, Plaintiff offers absolutely no evidence that all consumers perceive the same implied message from the label and advertising or consume Enviga for identical reasons. As discussed in greater detail below, the only evidence in this record comes from Defendant's expert witness, Dr. Joel Steckel, and is to the contrary: "[c]onsumers

[11] *See* Hearing Transcript at 60:8 – 61:3, 63:21-24 (March 10, 2008) (Docket No. 76); *see also* Franulovic Dep. at 46:18 – 47:15.

infer a wide variety of messages about Enviga from Coke's marketing, not just that Enviga leads to weight loss. Consumers also buy Enviga for a variety of reasons, not just weight loss."[12]

Finally, Plaintiff has failed to meet her burden of establishing that the purported class is sufficiently numerous and that joinder is impracticable. She relies entirely on conclusory allegations unsupported by evidence, and mere assertions are insufficient to establish the elements of Rule 23. For these and the other reasons set forth below, Plaintiff's Motion for Class Certification should be denied.

FACTUAL BACKGROUND

CSPI originally filed this case as the sole named plaintiff on February 1, 2007 under the New Jersey Consumer Fraud Act (CFA) alleging that TCCC, Nestlé USA, Inc. and Beverage Partners Worldwide ("BPW") (collectively "Defendants") engaged in "illegal, fraudulent, and deceptive business practices" in the marketing of the sparkling green tea beverage, Enviga.[13] In response, Defendants filed a motion to dismiss because CSPI lacked standing to assert a claim under the CFA, and because CSPI's complaint failed to state a claim.[14] Rather than respond to Defendants' motion to dismiss, CSPI dismissed its original complaint and filed a Second Amended Class Action Complaint ("Second Amended Complaint") which named Linda Franulovic as an individual Plaintiff and dropped all of the defendants except for TCCC.[15] The

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[12] Declaration of Joel Steckel, Ph.D. ¶ 4.7 (Dec. 11, 2008) (hereinafter "Steckel Decl, ¶_._.") (a true and accurate copy of which is attached hereto as **Exhibit B)**.

[13] *See generally* CSPI's Complaint (filed Feb. 1, 2007) (Docket No. 1) (hereinafter "Original Complaint"). Although CSPI amended this complaint shortly thereafter, its First Amended Complaint did not substantively change the Complaint. *Compare* CSPI's Complaint (filed Feb. 1, 2007) *with* CSPI's First Amended Complaint (filed April 17, 2007).

[14] *See generally* Joint Motion to Dismiss (filed May 15, 2007) (Docket No. 13).

[15] *See generally* Second Amended Class Action Complaint (filed Aug. 13, 2007) (Docket No. 41) (hereinafter "Second Amended Complaint")

next day, CSPI voluntarily dismissed itself from the lawsuit, leaving Franulovic as the only plaintiff and TCCC as the only defendant.[16]

On August 27, 2007, TCCC filed a motion to dismiss Franulovic's Second Amended Complaint for, *inter alia,* failure to state a claim under Fed. R. Civ. P. 12(b)(6).[17] On October 25, 2007, the Court granted TCCC's motion pursuant to Rule 12(b)(6) because Franulovic's Second Amended Complaint "failed to adequately plead ascertainable loss…."[18] As the Court explained, "Franulovic has not alleged that she or members of the class failed to burn more calories or lose weight…. It is, therefore, unclear what, if any 'cognizable and calculable claim of loss due to the alleged CFA violation' Franulovic suffered."[19]

Because her Second Amended Complaint was dismissed in its entirety, Plaintiff filed a motion to amend the judgment to allow her to file an amended complaint and attached copy of a proposed complaint as an exhibit to the motion.[20] In the proposed complaint, Franulovic alleged that she did not lose weight while consuming Enviga (although she also admitted that she did not know and could not prove whether or not she burned calories while drinking Enviga).[21] TCCC opposed Franulovic's motion to amend the judgment as futile because her proposed complaint

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16 *See generally* Notice of Voluntary Dismissal (filed Aug. 14, 2007) (Docket No. 42).

17 *See* Motion to Dismiss Second Amended Complaint (filed Aug. 27, 2007) (Docket No. 43) (hereinafter "TCCC's Motion to Dismiss").

18 *See generally* Opinion at 26 (Oct. 25, 2007) (Docket No. 60).

19 *Id.* (citing *Thiedemann v. Mercedes-Benz USA*, *LLC,* 183 N.J. 234, 249 (2005)); *see also* Opinion at 29 ("Regardless of whether Count II should be combined with Count I, under the rubric of the CFA, because Franulovic has failed to allege an ascertainable loss, a key element of a CFA claim as discussed above**,** this claim will also be dismissed.").

20 *See generally* Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint (filed Nov. 8, 2007) (Docket No. 62) (hereinafter "Motion to Amend Judgment").

21 *See* Motion to Amend Judgment, Exhibit A, ¶ 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.").

failed to state a claim upon which relief could be granted.[22] During the motion hearing, the Court noted the difference between a claim alleging that Enviga does not cause calorie burning at all (which Franulovic admits she cannot prove)[23] and a claim based on an implied "weight loss" message from the "Calorie Burner" label.[24]

The Court held that in order to proceed under a "weight loss" theory, Franulovic would have to plead individual facts as to her own behavior, including that she "used [Enviga] as a weight reduction plan, she … did all the math … and she didn't lose [weight]."[25] Ultimately, the Court ruled that if Franulovic wanted to proceed under a "weight loss" theory, she could do so without seeking leave of Court.[26] If, however, Franulovic elected to pursue a "calorie burning" claim, she would have to seek leave of Court before doing so.[27]

Franulovic elected to pursue her claims only under a "weight loss" theory, as evidenced by the fact that she did not seek leave of court prior to filing her Third Amended Complaint and that she plead certain individual facts as to her own conduct in order to state a claim.

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22 *See generally* Defendants' Joint Response in Opposition to Plaintiffs' Motion for Leave to Amend Complaints (filed Nov. 30, 2007) (Docket No. 67).

23 During the March 10, 2008 hearing before the Court on Franulovic's motion to amend the judgment, Franulovic's counsel conceded that he "would never be able to prove" that Franulovic did not burn calories while drinking Enviga. *See* Hearing Transcript at 12:22-23 (March 10, 2008) ("Were I a betting man, your Honor, I would say she did [sic] **but I would never be able to prove it**. Well, that's the thing, we don't think she burnt calories. We don't believe she did, **but we also don't know that she didn't.**") (emphasis added).

24 *See id.* at 95:25 – 96:4 ("I know, Mr. Fantini, but what has become very clear to me is that there are really two avenues here that you are alleging. Once is it's either black and white, it burns calories or it doesn't, and the other one is that you could lose weight. And so I see them as separate….").

25 *See id.* at 60:8 – 61:3; *see also id.* at 63:21-24 ("But where in the complaint does it say that she used – drank Enviga as part of a weight loss management regimen or routine, whatever? Where does it say that?").

26 *See* Order at 2 (March 10, 2008) (Docket No. 75); Hearing Transcript at 127:17 – 128:5.

27 *Id.*

Specifically, Franulovic revised her complaint to allege that Enviga was part of her "weight loss regimen" and that she did not "otherwise alter her food consumption or physical activities" while drinking Enviga.[28] This weight loss theory cannot support class certification.

Plaintiff claims that she purchased Enviga in order to lose weight or to help with her weight-loss regimen and that "members of the proposed class purchased Enviga for the same reasons."[29] Plaintiff offers no evidentiary support for her allegation that every single consumer who purchased Enviga did so for the exact same reasons as Plaintiff. The only evidence regarding consumer's views of the label and advertising for Enviga comes from TCCC's expert witness, Dr. Joel Steckel, a Professor of Marketing at the Stern School of Business, New York University. Dr. Steckel reviewed the Enviga can label and advertising, consumer research conducted prior to the launch of Enviga and Ms. Franulovic's deposition, as well as the plaintiffs' depositions in the related cases of *Melfi*[30] and *Simmens*.[31] As set out in Dr. Steckel's declaration, consumers react to the calorie burner message differently. They "do not all interpret Enviga's marketing as promising weight loss," and they "purchase Enviga for a variety of

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[28] *Compare* Third Amend. Compl. ¶ 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 weight loss regimen. She also began buying cans of Enviga in bulk. Franulovic did not otherwise alter her food consumption or physical activities during the period she used Enviga.") *with* Proposed Third Amend. Compl. ¶ 45 (attached to Motion to Amend Judgment as Exhibit A) ("After Franulovic read the representations on the Enviga can about calorie burning, she increased her consumption to three cans per day with the understanding that this would help her to lose weight. She also began buying cans of Enviga in bulk.").

[29] *See* Franulovic's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Class Certification at 3 (filed Oct. 21, 2008) (Docket No. 95-3) (citing Third Amend. Compl, ¶ 58) (hereinafter "Plaintiff's Brief in Support").

[30] *See generally Melfi v. The Coca-Cola Company,* No. 7-828(RMB) (D.N.J. Nov. 11, 2008) (dismissing without prejudice).

[31] *See generally Simmens v. The Coca-Cola Company,* No. 3855(RMB) (D.N.J. Nov. 13, 2008) (dismissing without prejudice).

reasons, not simply because of weight loss, or even 'calorie burning.'"[32] Moreover, contrary to Plaintiff's unsupported allegation, consumer research demonstrates that "[c]onsumers do not perceive equivalence between the concepts of 'burn calories/fat' and 'weight loss/diet.'"[33] Dr. Steckel notes that Ms. Franulovic's own testimony confirms that consumers do not automatically equate burning calories with weight loss. Thus, Ms. Franulovic testified, "***I don't care about calories***, I care more about fat and protein."[34] She also responded "yes" when asked the question, "[s]o in your personal diet, the way you believe you either lose weight or don't gain weight is to control the amount of fat and protein you take in?"[35] Dr. Steckel also noted that plaintiffs Melfi and Simmens acknowledged they purchased Enviga for a variety of reasons, including taste and because Enviga contains green tea, which is often associated with health benefits because of its antioxidant properties.[36] In summary, Defendant offers the *only* evidence on the issue of consumer perception of the advertising, and the evidence demonstrates that class certification is not appropriate.

ARGUMENT AND CITATION OF AUTHORITIES

I. Plaintiff has the burden of establishing all Rule 23 requirements.

A class action may not be certified until the district court first determines, "after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied."[37] Additionally, "actual, not presumed, conformance with Rule 23[] remains . . . indispensable."[38] Plaintiff bears

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[32] Steckel Decl. ¶ 4.3.
[33] *Id*. at ¶ 4.4.4.
[34] Steckel Decl. ¶ 4.4.5; Franulovic Dep. at 45:23-4 (emphasis added).
[35] Steckel Decl. ¶ 4.4.5; Franulovic Dep. at 45:25-46:3.
[36] Steckel Decl. ¶ 4.5.3.
[37] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).
[38] *Id*. at 160.

the burden of establishing each of the Rule 23 requirements.[39]

Ignoring this burden of proof, Plaintiff fails to offer any factual support for her arguments in favor of class certification. To justify the lack of support for her motion, Plaintiff cites to *Eisen v. Carlisle & Jacquelin*[40] and contends that the Court should limit its analysis to the pleadings.[41] However, the U.S. Supreme Court's post-*Eisen* cases as well as similar decisions from courts around the country stress the obligation to "probe behind the pleadings" to determine whether plaintiff has satisfied each of the Rule 23 prerequisites.[42] Additionally, "the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met."[43]

Before reaching the Rule 23 requirements, the Court must determine whether Plaintiff has defined an identifiable class with reference to objective criteria that does not include persons

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[39] Plaintiff's assertion in her brief that the burden "shifts" to Defendant once Plaintiff files her brief is contrary to well-established law in this Circuit. *See New Directions Treatment Servs. v. City of Reading*, 490 F. 3d 293, 313 (3d Cir. 2007) ("The named plaintiffs bear the burden of showing class eligibility…."); *Georgine v. Amchem Prods, Inc.*, 83 F.3d 610, 624 (3d Cir. 1996) ("To obtain class certification, **plaintiffs** must satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b)."") (emphasis added); *Cullen v. Whitman Med. Corp.,* 188 F.R.D. 226, 229 (E.D. Pa. 1999).

[40] 417 U.S. 156 (1974).

[41] Plaintiff's Brief in Support at 8.

[42] See Falcon, 457 U.S. at 160 ("[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (emphasized in original); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) (quoting Falcon, 457 U.S. at 160); see also Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 284 (D.N.J. 1997).

[43] *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *see also Newton*, 259 F.3d at 167 (providing a string cite in support of this proposition).

who were not harmed.[44] Once an identifiable class is defined, certification may be granted only if Plaintiff satisfies each of the pre-requisites set forth in rule 23(a) and then at least one of the requirements of 23(b). The four elements of Rule 23(a) are: (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.[45] Plaintiff must additionally satisfy one of the subsections of Rule 23(b). Rule 23(b)(2), under which Plaintiff seeks to proceed, states that a class action is maintainable only where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[46] Additionally, under controlling Third Circuit authority, the plaintiff must show that the proposed Rule 23(b)(2) class is cohesive, which requires the Court to assess whether the proposed class "implicates individual issues."[47]

II. Plaintiff is neither an adequate nor a typical class representative.

Rule 23 requires that a representative party fairly and adequately protect the interests of the proposed class.[48] "This prerequisite is essential to due process, because a final judgment in a class action is binding on all class members."[49] Additionally, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they

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44 *See, e.g., Zapka v. The Coca-Cola Company,* No. 99-CV-8238, 2000 WL 1644539, *2 (N.D. Ill. Oct. 27, 2000).
45 Fed. R. Civ. P. 23(a).
46 Fed. R. Civ. P. 23(b)(2).
47 *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998).
48 Fed. R. Civ. P. 23(a).
49 *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1083 (6th Cir. 1996) (citing *Hansberry v. Lee,* 311 U.S. 32 (1940)).

seek to represent."[50]

A. Plaintiff is an inadequate class representative because she fails to seek monetary relief for the proposed class, but she seeks such relief individually.

On behalf of the absent class members she purports to represent, Plaintiff seeks merely injunctive relief.[51] On behalf of herself, however, she seeks the additional recovery of monetary damages.[52] Accordingly, Plaintiff's interests diverge dramatically from the interests of absent class members because she has abandoned a potentially viable claim of those absent members, while keeping the same claim for herself. Such an abandonment of a claim is known as claim splitting, and "courts agree that the existence of claim splitting constitutes a compelling reason to deny class certification."[53]

The Honorable Shira A. Scheindlin of the Southern District of New York recently confirmed this proposition when she deemed named plaintiffs to be inadequate class representatives because they attempted to split their claims.[54] Plaintiffs pursued an injunction against alleged contamination of well water with Methyl Tertiary Butyl Ether (MTBE), but stated that they wished to preserve the individual damages claims of unnamed class members for

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50 *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003).

51 Third Amended Complaint, Prayer for Relief No. 3 "Enjoining Coke from its unlawful conduct." *See also* Plaintiff's Brief in Support at 18 ("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. . .Because they only desire injunctive relief, and not damages, Franulovic seeks to certify this case under Rule 23(b)(2)."

52 Third Amended Complaint, Prayer for Relief No. 4 "Ordering Coke to refund to Franulovic all monies obtained from her by means of its violations of the New Jersey Consumer Fraud Act pursuant to N.J.S.A. 56:8-2.11; and/or awarding her triple damages pursuant to N.J.S.A. 56:8-19" and Prayer for Relief No. 6 "Awarding Franulovic pre-judgment interest, compounded daily."

53 *Krueger v. Wyeth, Inc.*, No. 03cv2496, 2008 WL 481956, at *3 (S.D. Cal. Feb. 19, 2008)

54 *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 340 (S.D.N.Y. 2002).

separate adjudication.[55] The court recognized that it "could not ensure" that *res judicata* would not bar absent class members from later seeking individual damages claims "[b]ecause only subsequent courts will determine the *res judicata* effect of any judgment."[56] Additionally, even if *res judicata* would not operate as a *per se* bar on individual claims for damages, the factual determinations in a class-wide trial may nonetheless have an issue-preclusive effect on future individual claims of absent class members.[57] In this case, Plaintiff places the absent class members at similar risk by seeking only injunctive relief for the class.

In another recent proposed class action, the Western District of Texas commented that "[c]ourts have repeatedly held the failure to seek full recovery by splitting out personal injury and property damage claims creates a significant conflict of interest destroying adequacy of representation."[58] In that action, the named plaintiffs alleged that chromated copper arsenate, which had been used to treat wood products against deterioration, had leached from the wood and caused personal injury and property damage. Seeking to avoid the individual issues associated with proving personal injuries, however, the named plaintiffs had expressly "disavow[ed] and waive[d] all personal injury claims."[59] Noting the possibility that *res judicata* may forever foreclose the abandoned personal injury claims of the absent class members, the court found the class representatives to be inadequate and denied class certification.[60]

Courts across the country have consistently refused to certify classes when the class representatives split the available class claims. As an another example, earlier this year, in a

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55 *Id.*
56 *Id.*
57 *Id.*
58 *Martin v. Home Depot U.S.A., Inc.*, 225 F.R.D. 198, 203 (W.D. Tex. 2004).
59 *Id.* at 203.
60 *Id.*

proposed class action dealing with hormone replacement therapy drugs, a California federal court refused to certify a class that attempted to split personal injury claims from claims for statutory damages.[61] In the same way, named plaintiffs in tobacco litigation who attempted to split out the class's personal injury claims were deemed to be inadequate representatives because the "possible prejudice to class members" from future *res judicata* "is simply too great … to conclude that the named Plaintiffs' interests are aligned with those of the class."[62] And another court rejected a proposed class dealing with allegedly defective tires, because "a serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from breach of an implied warranty."[63]

In the instant case, Plaintiff's claim splitting is even more inconsistent with class certification, because Plaintiff has elected to split the claims of the proposed members, while preserving her own individual damages claim, thus creating a potential conflict between Plaintiff and the purported class she seeks to represent. The conflict arises because Plaintiff is not

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61 *Krueger*, 2008 WL 481956, at *3-4.

62 *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 551 (D. Minn. 1999).

63 Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982). Numerous other courts also have denied class certification on the basis of claim-splitting. See, e.g., W. States Wholesale, Inc. v. Synthetic Indus., Inc., 206 F.R.D. 271, 277 (C.D. Cal. 2002) (denying class certification because "[a] class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class"); Clark v. Experian Info. Solutions, Inc., No. Civ.A.8:00-1217-24, 2001 WL 1946329, at *4 (D.S.C. Mar. 19, 2001) (holding that class representatives' splitting of individual damages claims "defeats adequate representation since it places absent class members at the risk of having other claims forever barred by res judicata"); Pearl v. Allied Corp., 102 F.R.D. 921, 923 (E.D. Pa. 1984) (refusing to certify a class that split claims for personal injury, diminution in property value, and express warranty, because "plaintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives").

similarly risking losing any future monetary recovery and, therefore, may face incentives to resolve the claims of the proposed class on terms favorable to her but unfavorable to the class. Moreover, as discussed in the next section, Plaintiff has no real understanding of her decision to split the class claims and is simply following the instructions of CSPI, the non-profit group whose litigation she is fronting. Thus, her decision to abandon the class members' potential damages claims cannot be defended as a strategic decision in the best interests of the proposed class.

B. Plaintiff is an inadequate class representative because she is merely following the direction of the Center for Science in the Public Interest.

Due process concerns require a finding of inadequate class representation when a named plaintiff demonstrates insufficient knowledge of the case such that the purported representative is unable to protect the class interests from the possibly competing interests of class counsel.[64] In this case, Plaintiff has insufficient knowledge of the relief she is requesting on behalf the class; she is following the direction of proposed class counsel Mr. Gardner, who is acting in the interests of Mr. Gardner's employer, CSPI. Because Plaintiff cannot protect the class from the possibly competing interests of CSPI, she is not an adequate class representative.

Plaintiff's testimony regarding the relief requested on behalf of the class confirms that CSPI, through Mr. Gardner, is calling the shots in this litigation. Thus, Plaintiff initially confirmed that, in her personal opinion, the absent class members should receive money damages for the same reasons that she is seeking such damages:

> Q: And do you believe that Coke has obtained monies from class members by means of the unlawful practices alleged herein, meaning in this complaint?

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[64] *Larry James Oldsmobile-Pontiac-GMC Truck Co. v. Gen. Motors Corp.*, 175 F.R.D. 234 (N.D. Miss. 1997).

A: Yes.[65]

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Q: So it is your belief that the class members should receive money damages?
A: Yes.[66]

Consistent with her personal opinion, Plaintiff *did not even know* that her complaint does not seek money damages on behalf of the class:

Q: So before you came to your deposition today you believed that in your lawsuit you were seeking money damages for the class members just like you're seeking money damages for yourself?
A: Yes.[67]

Ultimately, Plaintiff's testimony revealed that CSPI dictated the decision to abandon the class claims for money damages even though CSPI is no longer a party to this lawsuit. Indeed, Ms. Franulovic testified that CSPI's status as a non-profit entity required her to choose either injunctive relief or money damages for the class because "[CSPI] is a non-profit law firm, so they don't seek money damages":

Q. (By Mr. Elder) Ms. Franulovic, I will repeat my question because I want to make sure that it is clear on the record, and what I would like to know is your understanding and your rationale for not seeking money damages from Coke that you refer to in Paragraph 61 of Exhibit 2 for the absent class members in this lawsuit?
MR. GARDNER: Object, form.
A. Because the lawsuit is about stopping Coke from making false accusations, and if I have to choose between the two I would choose not to get the money and have them stop doing what they're doing.
Q. Why do you believe you have to choose between the two?
MR. GARDNER: Again, I will instruct Linda to answer as fully as she can without using discussions with Counsel as part of her answer.
A. From what I understand this is a non-profit law firm, so they don't seek money damages, they just they seek for things to be done properly as far as what people

[65] Franulovic Dep. at 59:7-10.
[66] *Id.* at 57:16-21.
[67] *Id.* at 52:8-12.

consume.[68]

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Q. When you were referring earlier to a non-profit law firm, I think is what you called it, were you referring to the Center For Science In The Public Interest?
A. Yes.[69]

When asked to explain why she felt it was appropriate to seek monetary damages solely for her own benefit, Plaintiff could offer only the explanation that she is participating in the litigation but the class members are not:

Q. Yes. Can you tell me why you believe it's fair that you are seeking and intend to receive if you prevail, money damages in this lawsuit, but you are not seeking those damages on behalf of the absent class members who you are representing? MR. GARDNER: And the same instruction as to the prior question.
A. **Because I'm here and they're not.**[70]

Plainly, CSPI's status as a non-profit entity and its goals in this litigation governed the calculus surrounding the appropriate relief to seek on behalf of the absent class members. Even more importantly, CSPI's non-profit mission potentially conflicts with the best interests of the absent class. As a result, Ms. Franulovic is not an adequate class representative, and Mr. Gardner is not an adequate class counsel.[71] The continued influence of CSPI and Mr. Gardner's advancement

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[68] *Id.* at 60:25 – 61:8.
[69] *Id.* at 62:15-19.
[70] *Id*. at 55:18-25 (emphasis added).
[71] *See, e.g., Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 302 (S.D. Tex. 2000) ("Griffin and Farrell were solicited for this lawsuit and have taken little or no supervisory role over lead counsel. They do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed. Although it is clear that both Griffin and Farrell would like to recover their investment, it is equally clear that they are lending their names to a purported class action solely at the suggestion of lead counsel. '[T]here is substantial question that plaintiffs themselves understand much more than that they were involved in a bad business deal.' *See Kelley v. Mid-America Racing Stables, Inc.,* 139 F.R.D. 405, 410 (W.D. Okla.1990). Plaintiffs bear the burden of proof on the adequacy of representation of the proposed class. *Id.* Plaintiffs have failed to carry their burden.").

of CSPI's interests instead of the interests of the proposed class is also revealed by the following exchange between Mr. Gardner and this Court at a time when CSPI was no longer a party to this action:

> MR. GARDNER: Part of the -- my burden is -- **my boss is a scientist**, I work for a nutrition and advocacy group that is run by scientists. A scientist won't let me make a belief allegation. We get fairly strict and we will not make allegations that we don't know we can prove to a certainty virtually. So we didn't. But I don't –
>
> THE COURT: Are you saying a scientist won't let you make-believe allegations? What?
>
> MR. GARDNER: I get pushback, Your Honor, yes. So we did not do that in this case.[72]

Under established standards requiring that the class representative and class counsel represent the best interests of the class, neither Ms. Franulovic nor Mr. Gardner can properly fulfill those roles.

C. Plaintiff is an inadequate class representative because she lacks sufficient knowledge to represent the class.

An adequate class representative must demonstrate the requisite knowledge to be a vigorous representative of the class.[73] Ms. Franulovic cannot meet this requirement. Not only did she erroneously believe that she was seeking monetary damages on behalf of the class, but she was unsure whether it is permissible for her to seek such damages:

> Q. Why not seek both injunctive relief and money damages for the class members in this lawsuit?
> MR. GARDNER: And again, I will ask her not to base her answer on discussions with counsel, but otherwise no problem.
>
> A. Why not? I don't know, I guess I didn't think it was possible. Maybe it's not

[72] Hearing Transcript at 12:2-11 (March 10, 2008) (emphasis added).

[73] *In re Teletronics Pacing Sys., Inc*., 168 F.R.D. 203, 218 (S.D. Ohio 1996) ("In order to be a class representative who will vigorously prosecute a class action, the representative must have more knowledge than a lay person about the class action.").

possible, maybe it is, I don't know.

Q. You're not even sure whether or not that's possible?
A. To ask for them, no. I don't know if I'm supposed to ask for them. I think I'm allowed to ask for me, but not -- I can ask for what I spent, right? Because it's in here.[74]

Q. Okay. Is it fair to say that you don't know whether or not you're even able to ask for damages for the other class members?
A. Yes.[75]

Her lack of understanding regarding the most fundamental component of her lawsuit confirms that it is CSPI who decided what relief to seek, not Ms. Franulovic. Ms. Franulovic's testimony as to the other aspects of her case confirms the perfunctory involvement she has had in this litigation:

Q. Other than the complaints in this case, have you reviewed any other pleadings, things that we call briefs that are written arguments?
A. No.[76]

Q. Linda, going back to the class members that we've been talking about, do you know how that class is defined in your complaint?
A. No.[77]

Q. Did you help decide what the class would be?
A. No.[78]

Q. Did you help decide who would be named as a defendant in this lawsuit?
A. No.[79]

Q. Do you know how any of the costs in this lawsuit are paid?
A. No.[80]

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[74] Franulovic Dep. at 67:23-68:13.
[75] *Id*. at 69:3-6.
[76] *Id.* at 99:22-25.
[77] *Id.* at 98:24 – 99:2.
[78] *Id.* at 99:3-4.
[79] *Id.* at 99:5-7.
[80] *Id.* at 99:9-11.

Q. Have you reviewed any of the documents that Coke has produced in this case?
A. No.[81]

Q. Have you ever been to the Inviga (sic) website?
A. No.[82]

Q. Have you ever been to the Coke website?
A. No.[83]

Ms. Franulovic's lack of involvement in this case mirrors that of another plaintiff whose case was dismissed for lack of an adequate class representative. In *Ogden v. AmeriCredit Corp.*, the court ruled that a class representative was inadequate because: (1) she could not identify who would be included within the putative class; (2) she showed a low level of familiarity with the complaint; and (3) she had failed to monitor counsel or take an active role in the case.[84] As shown above, Ms. Franulovic suffers from the same failings in her attempt to serve as a class representative, and the Court should reach the same result by denying her purported class.[85]

D. Plaintiff is not a typical or an adequate class representative because she will be preoccupied with unique defenses.

"The Supreme Court has noted the typicality and adequacy inquiries often 'tend[ ] to merge' because both look to potential conflicts and to 'whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' Because of the similarity of these two inquiries, certain

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81 *Id.* at 96:3-5.
82 *Id.* at 86:10-11.
83 *Id.* at 109:2-3.
84 225 F.R.D. 529 (N.D. Tex. 2005).
85 Ms. Franulovic's ability to serve as an adequate class representative is further diminished by the fact that she has moved to Florida since filing her complaint, whereas this action remains pending in the District of New Jersey. In *Pashek v. Arizona Board of Regents*, the court held that a plaintiff being out of the state in which a class action is pursued makes active participation in the case difficult. 82 F.R.D. 62 (D. Ariz. 1979).

questions - like whether a unique defense should defeat class certification - are relevant under both."[86] The *Beck* court then continued: "regardless of whether the issue is framed in terms of the typicality of the representative's claims … or the adequacy of its representation … there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it."[87]

If Ms. Franulovic is allowed to proceed as a class representative, then TCCC's unique defenses as to her will so preoccupy her ability to pursue her claim that she will prejudice absent class members' likelihood for success. Ms. Franulovic alleges that she bought Enviga believing that it would cause her to lose weight but that she did not lose weight over the three months in which she drank the product.[88] TCCC has a number of defenses that are unique to Ms. Franulovic, including for example: (1) she didn't monitor her caloric intake while drinking Enviga;[89] (2) she never weighed herself to determine whether she lost weight while drinking Enviga;[90] and (3) she denies she even believed that drinking Enviga was a guarantee of weight loss.[91] She therefore has no evidence to support a claim that she was impliedly promised but did not receive a product that would result in guaranteed weight loss:

> Q. Tell me when you first purchased Inviga [sic]?
> A. February.

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86 *Beck v. Maximus, Inc*., 457 F.3d 291, 296 (3d Cir. 2006) (citations omitted).

87 *Id.*; *see also Ross v. Bank S., N.A*., 837 F.2d 980, 990-91 (11th Cir. 1988) (Typicality is not satisfied where "unique defenses would be applicable" and a "major focus of the litigation will be on an arguable defense unique to the named plaintiff…."), *vacated and reh'g granted on other grounds*, 885 F.2d 723 (11th Cir. 1989).

88 Although her Third Amended Complaint relates to the label and numerous different ads for Enviga as well as the Enviga website, Plaintiff could identify only "a few" ads from magazines that she saw prior to purchasing Enviga. *See* Franulovic Dep. at 73:11 – 84:6.

89 *Id.* at 34:14-17; 88:16-19.

90 *Id.* at 32:13-16; 84:7-12.

91 *Id.* at 85:25 – 86:3.

Q. February of 2007?
A. Yes.[92]

Q. And you don't know how many calories you were taking in or trying to take in on a daily basis in February of 2007?
A. Right.[93]

Q. Is it fair to say that while you were drinking Inviga [sic] you don't know how many calories you were taking in on a daily basis.
A. Yes.[94]

While this admission alone would subject her to unique defenses, her testimony revealed additional problems with her ability to substantiate her individual claims:

Q. Okay. And how much did you weigh in February of 2007?
A. I don't know, approximately, I don't weigh myself.[95]

Accordingly, despite the fact that a weight loss claim is central to her recovery, there is no basis for Ms. Franulovic to establish that she did not lose weight, even if she could establish that the can label and marketing for Enviga makes such an implied claim. As if this were not enough to provide unique defenses to TCCC against Ms. Franulovic, one final admission sinks any "weight loss" claim she may have had against TCCC:

Q. Okay. Was it your interpretation of the Inviga [sic] advertising that you could eat or drink whatever you wanted and as long as you were also drinking Inviga [sic] you would lose weight?
A. No.
Q. Why not?
A. Because that doesn't make sense. You're saying I can drink a milkshake and Inviga and still lose weight, right, that's what you're trying to say?
Q. Right.
A. That's wrong.[96]
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[92] *Id.* at 24:17-20.
[93] *Id*. at 26:24-27:2.
[94] *Id*. at 34:14-17.
[95] *Id*. at 32:13-16.
[96] *Id.* at 46:18-47:3.

Q. By the same token, you would agree that you never thought that advertising Enviga was a guarantee of weight loss; is that fair?
A. Yes.[97]

She flatly denies the very "weight loss" claim that CSPI has been trying to make on her behalf. Ms. Franulovic's testimony, therefore, reveals that she has not met her burden of establishing either adequacy or typicality because she will be preoccupied with defenses unique to her.

In summary, Ms. Franulovic is merely a straw class representative who CSPI inserted into this litigation to allow it, through Mr. Gardner, to continue to pursue its own agenda after CSPI dismissed its claims in recognition that it lacked standing. Her lack of knowledge and understanding regarding the relief sought on behalf of the purported class, which is the single most important aspect of her lawsuit, precludes her from satisfying the requirements of Rule 23(a)(4). She is essentially uninvolved in the prosecution of this litigation and is subject to numerous unique factual defenses undermining her claims. Accordingly, her motion for class certification should be denied.

III. Class certification is inappropriate because Plaintiff cannot properly define an identifiable class.

Although not in Rule 23 itself, courts have imposed a requirement that plaintiff define an identifiable class.[98] The requirement of an identifiable class "insures that those individuals

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[97] *Id.* at 85:25 – 86:3.

[98] *See Zapka,* 2000 WL 1644539 at *2; *see also Folbaum v. Rexall Sundown, Inc.,* No. A-244-02T1, 2004 WL 3574116, at *2 (N.J. Super. Ct. App. Div. May 4, 2004) (*citing Simer v. Rios,* 661 F.2d 655, 670 (7th Cir. 1981)); *De Bremaecker v. Short,* 433 F.2d 733, 734 (5th Cir. 1970); *Schmidt v. U.S. Dep't. of Veterans Affairs,* 218 F.R.D. 619, 638 (E.D. Wis. 2003); *Schwartz v. Upper Deck Co.,* 183 F.R.D. 672, 679-680 (S.D. Cal. 1999); *Elliott v. ITT Corp.,* 150 F.R.D. 569, 574 (N.D. Ill. 1992); *Gomez v. Ill. State Bd. of Educ.,* 117 F.R.D. 394, 397 (N.D. Ill. 1987); *Chaffee v. Johnson,* 229 F. Supp. 445, 448 (S.D. Miss. 1964) *aff'd,* 352 F.2d 514 (5th Cir. 1965); 5 James W. Moore et al., *Moore's Federal Practice,* ¶ 23.21[4][b] (3d

actually harmed by a defendant's wrongful conduct will be recipients of the relief eventually provided."[99] "An identifiable class exists if its members can be ascertained by reference to objective criteria."[100] "An identifiable class does not exist if membership in the class is contingent on the state of mind of the prospective members,"[101] or if the class includes individuals who were not harmed.[102]

Applying these standards to the instant case demonstrates that class certification is inappropriate. Plaintiff 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."[103] Plaintiff's proposed class is improper because it includes an unspecified number of individuals who were not harmed under Plaintiff's theory of recovery. Plaintiff's claim is that she purchased Enviga to assist her in losing weight and used it as part of her weight loss regimen. By definition, therefore, anyone who purchased Enviga for any other reason has not been harmed and is not a proper class member. Thus, Plaintiff's proposed class definition does not account for New Jersey residents who purchased Enviga but: (i) were not on a weight loss regimen; (ii) did not need to lose weight and were not trying to do so; (iii) purchased Enviga only a few times

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ed.1997); 7A Charles Allen Wright, *et al.*, *Federal Practice and Procedure,* § 1760 (2d ed.1986)).

99 *Zapka,* 2000 WL 1644539, at *2.

100 *Id.* at *3.

101 *Id.*

102 *Id.; see also Owen v. Regence Bluecross Blueshield,* 388 F. Supp. 2d 1318, 1334 (D. Utah 2005) ("[T]he proposed definition of the class is overbroad because many of the proposed class members have suffered no damages."); *Canady v. Allstate Ins. Co.,* 1997 WL 33384270 (W.D. Mo. June 19, 1997) ("Because the court cannot accept plaintiffs' blanket contention that every member of the proposed broad class has allegedly suffered harm as a result of the defendants' wrongdoing, the court must find that the class definition is overbroad.").

103 Plaintiff's Brief in Support at 3.

and, therefore, were not using it for weight loss; (iv) purchased Enviga because it contains green tea or caffeine or for any other reason besides weight loss; (v) lost weight while drinking Enviga; or (vi) did not interpret the label or other advertising as a promise of weight loss.

In other words, under Plaintiff's implied weight loss theory of recovery, her proposed class should include only those persons who could also allege the facts necessary for Plaintiff to state a claim, *i.e*., who purchased Enviga believing that it would cause weight loss, were following a weight loss regimen; and did not lose weight.[104] Because this accurate class definition depends entirely on the state of mind of the individual purchasing Enviga, class certification should be denied. Moreover, although common sense dictates that not all consumers purchased Enviga for the same reasons, the only evidence in this case further confirms that fact. Thus, Dr. Steckel's declaration establishes that not all consumers take away the same message from the "Calorie Burner" label and advertising.[105]

The Northern District of Illinois' analysis of similar claims against TCCC in *Zapka v. The Coca-Cola Company*,[106] is instructive here. In *Zapka*, the plaintiff alleged that TCCC had misrepresented the sweetener content of Diet Coke purchased from fountain drink machines. Plaintiff sought to certify a proposed class of "all [persons] who purchased or consumed fountain Diet Coke after November 30, 1984" under Rule 23(b)(2).[107] Denying class certification, the court held that "the proposed class includes individuals that consumed or purchased fountain Diet Coke but were not deceived by any advertisement or marketing and, therefore, improperly

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[104] *See, e.g.,* Opinion, at 26 (Oct. 25, 2007); Hearing Transcript, at 60:8 – 61:3, 63:21-24; Third Amend. Compl., ¶ 45 (alleging Ms. Franulovic was following a "weight loss regimen").
[105] *See* Steckel Decl. ¶ 4.7.
[106] 2000 WL 1644539.
[107] *Id.* at *2.

includes individuals who were not harmed."[108] The same reasoning applies here. Plaintiff's proposed class includes persons who do not share Plaintiff's interpretation of the Enviga advertising or her experience with the product; she has not identified a proper class under Rule 23.[109]

IV. Plaintiff cannot meet her burden of demonstrating a cohesive class under Rule 23(b)(2).

Although Rule 23(b)(2) does not contain the same predominance or superiority requirements as class actions under rule (b)(3), a rule (b)(2) class must be cohesive.[110] As the Third Circuit explained in *Barnes v. American Tobacco Co.*, "a (b)(2) class may require more cohesiveness than a (b)(3) class … because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out."[111] Thus, the court "must determine whether a proposed (b)(2) class implicates individual issues,"[112] and "the District Court has the 'discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.'"[113] The Third Circuit also noted that "[t]he court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representative's claims present different individual issues than the claims of the absent members present."[114] In *Barnes*, the plaintiff asserted a claim for medical monitoring against a tobacco company on behalf of a proposed class

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[108] *Id.* at *3.
[109] *See also Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575 (N.D. Ill. 2005), *aff'd,* 472 F.3d 506 (7th Cir. 2006).
[110] *See Barnes,* 161 F.3d at 142.
[111] *Id*. at 142-43.
[112] *Id*. at 143.
[113] *Id*. (quoting *Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1205-06 (3d Cir. 1983).
[114] *Id*. (quoting *Santiago v. City of Phila.*, 72 F.R.D. 619, 628 (E.D. Pa. 1976)).

of smokers, and the court upheld the denial of class certification, noting that individual issues regarding causation and defenses unique to each plaintiff prevented certification under Rule (b)(2).

Plaintiff similarly cannot establish the cohesiveness essential to a Rule 23(b)(2) class in this case because, as discussed above, Plaintiff's claim is based on an implied weight loss message from the Enviga label and advertising that depends entirely on numerous individual issues. Moreover, Plaintiff offers no evidence that consumers generally interpret the label or the advertising for Enviga the same way she does. Rather, as noted above, Dr. Steckel's declaration establishes that individuals purchase Enviga for numerous different reasons, negating any claim that "all purchasers of Enviga" in New Jersey can be considered a cohesive group for purposes of Rule 23(b)(2).[115]

In addition, as demonstrated above, Defendant has a number of individual defenses to Plaintiff's claim that would apply equally to any proposed class member: (i) did the individual drink sufficient quantities of the product to support a claim that she expected weight loss from drinking Enviga or drink it only sporadically; (ii) did the individual do other things (poor diet, medications, etc.) to negate the potential effect of any reduction in calories and explain a lack of weight loss; (iii) did the individual track his or her weight while allegedly drinking Enviga to try to lose weight or, like Ms. Franulovic, fail to weigh herself at any time; and (iv) did the individual, like Ms. Franulovic, admit that her weight loss claim "doesn't make sense." In short, there is nothing cohesive about Ms. Franulovic's theory of recovery or her proposed class.

Although not involving a proposed 23(b)(2) class, the recent case of *Fink v. Ricoh*

[115] Steckel Decl. ¶¶ 4.5, 4.7.

Corp.[116] demonstrates the flaw in Plaintiff's position that all consumers interpret the Enviga label and advertising in the same manner. In *Fink*, plaintiffs' claims involved the defendant's allegedly misleading advertising campaign for digital cameras.[117] The court, however, denied class certification in part because it was reasonable for the court to infer that many of the proposed class members did not purchase the product as a result of the defendant's alleged false representations.[118] The court noted that to presume every class member purchased the product for the same common reason went against common sense: "[I]t is reasonable to conclude that many of the purchasers of the [product] based their purchase on other factors such as recommendations . . . appearance . . .or upon its price."[119] Dr. Steckel's affidavit confirms the common sense holding in *Fink* that individuals purchase Enviga for different reasons.[120]

V. Plaintiff failed to meet her burden of establishing numerosity.

Rule 23(a)(1) requires Plaintiff to prove that the class she proposes is "so numerous that joinder of all members is impracticable." Plaintiff attempts to meet this standard with the conclusory statement that "[t]he class consists of thousands of individuals who were subjected to Coke's deceptive marketing."[121] Such an assertion, unsupported by evidence, is merely speculation, and this allegation does not satisfy Plaintiff's burden of establishing numerosity.[122]

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116 839 A.2d 942 (N.J. Super Ct. Law Div. 2003).

117 *Id.* at 949. Plaintiffs asserted that many of the product's features described in several advertisements put out by the defendant were misrepresented.

118 *See id.*

119 *Id.* at 968-69.

120 *See McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 225 (2nd Cir 2008) ("each plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool.'").

121 Plaintiff's Brief in Support at 10.

122 *Weissman v. ABC Fin. Servs., Inc*., 203 F.R.D. 81, 84 (E.D.N.Y. 2001) ("Where the plaintiff's assertion of numerosity is pure speculation or bare allegations, the motion for class certification fails."); *see also Demarco*

The court's discussion of the numerosity requirement in *Fink* is also applicable here. In *Fink*, evidence in the case indicated that 4,450 such cameras were sold.[123] Nevertheless, the court found a fundamental failing in plaintiffs' ability to establish numerosity because plaintiffs failed to

> provide[] any evidence as to how many purchasers of the RDC-1 camera can satisfy the requirements of proximate cause and an ascertainable loss of moneys or property since plaintiffs have provided no proof as to how many purchasers read the advertisements prior to their purchase of the camera and were thereby caused to make the purchase because of the alleged misrepresentations and material omissions.[124]

Plaintiff here has an even weaker numerosity argument than that rejected in *Fink*. The plaintiff in *Fink* was at least able to point to the evidence that 4,450 of the cameras at issue had been sold. Plaintiff here has failed to offer even that much evidence – she merely proffers the random and unsubstantiated allegation that "thousands" of individuals may be included in her class. As noted above, throughout her brief she fails to take into account the numerous individualized determinations (such as different reasons for purchasing Enviga, different exposure to Enviga advertising, and different personal behavior during the time that Enviga was consumed) that must be considered in determining whether any individual who purchased Enviga is a proper class member.

Additionally, federal courts routinely deny class certification where, as here, a plaintiff fails to introduce any evidence that there are other putative class members who fall within the

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v. Edens, 390 F.2d 836, 845 (2d Cir. 1968) (disapproving of maintenance of class action where assertions of numerosity and impracticability are "pure speculation").

[123] *Fink*, 839 A.2d at 965.

[124] *Id*.

proposed class definition. For example, in *Lewis v. National Financial Systems, Inc.*,[125] the plaintiff argued that the purported class was sufficiently numerous although the precise number of putative class members (specifically, debt collectors) was unknown and the defendant was in possession of the actual number.[126] The court rejected plaintiff's argument, finding that the plaintiffs had the burden of introducing actual evidence that there were other debt collectors that fell within the class definition, and plaintiffs' failure to produce such evidence precluded class certification.[127]

Furthermore, Ms. Franulovic here makes only a passing and conclusory assertion that "courts often find impracticability of joinder where the class is composed of fewer than 100 members."[128] This court, however, has made clear that such a bald assertion is insufficient to support the certification of a class. In *United States ex rel. Haskins v. Omega Institute, Inc.*,[129] the court declined to grant class certification when "plaintiffs nowhere discuss or allege – neither in their memoranda nor in their Complaint – what onerous efforts they would have to undertake in order to accomplish joinder …." This is exactly what has happened here – Plaintiff failed to introduce any evidence regarding the number of potential class members or to discuss, even in passing, what onerous effort she would have to undertake to accomplish joinder. Accordingly, she fails to satisfy the requirement of Rule 23(a)(1), and her request for class certification should be denied.

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[125] No. 06-1308, 2007 WL 2455130 (E.D.N.Y. Aug. 23, 2007).
[126] *Id*. at *8.
[127] *Id.* ("Plaintiffs bear the burden of submitting evidence of numerosity . . . Here, Plaintiffs have submitted no evidence of numerosity.").
[128] Plaintiff's Brief in Support at 9.
[129] No. 95-265 (SSB), 1997 U.S. Dist. LEXIS 23004, at *13 (D.N.J. Nov. 24, 1997).

CONCLUSION

Plaintiff cannot demonstrate any of the required elements necessary for class certification under Rule 23. Her testimony demonstrates that this litigation is being controlled by CSPI in the best interest of that organization, and Plaintiff demonstrated no ability to protect the absent class members. Plaintiff's implied weight loss claim necessitates a subjective class that is riddled with individual issues. Because Plaintiff's efforts at glossing over the Rule 23 requirements do not meet her burden, Defendant respectfully requests the denial of Plaintiff's motion.

Dated: December 11, 2008

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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.	)	
THE COCA-COLA COMPANY,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Defendant's Brief in Opposition to Plaintiff's Motion for Class Certification by the Court's CM/ECF system this 11th day of December 2008, upon Plaintiffs' counsel of record:

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