SUPREME COURT OF NEW JERSEY

DOCKET NO. 64,808

MELISSA LEE, On behalf of herself and all others similarly situated, Plaintiff-Appellant, v. CARTER-REED COMPANY, L.L.C., a/k/a THE CARTER-REED COMPANY, BASIC RESEARCH, L.L.C., DG ENTERPRISES, INC., ALPHAGENBO TECH, L.L.C., BODY FORUM, L.L.C. BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., COVAXIL LABORATORIES, L.L.C., BYDEX MANAGEMENT, L.L.C., WESTERN HOLDINGS, L.L.C., DENNIS W. GAY, and NATHALIE CHEVREAU, Defendants-Respondents.	) CIVIL ACTION) ON APPEAL FROM) ORDER OF THE) SUPERIOR COURT OF) NEW JERSEY,) APPELLATE DIVISION

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, INC., CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Appellate Division's refusal to certify a class of purchasers of the dietary supplement Relacore rested on two faulty premises. ***First***, the lower court denied certification because it could not ascertain "whether putative class members even saw the print or Internet advertisements or whether they purchased the product due to a recommendation from a friend or family member." Apart from describing a false choice, the court's statement highlights its misinterpretation of the statutory causal-nexus requirement, neglects plaintiff's allegations that the false representations about Relacore appear on the product label itself, and fundamentally misunderstands the nature of a product like Relacore, the benefits of which cannot be known or anticipated without information from the manufacturer.

Contrary to the court's assumption, proof that each class member directly viewed a Relacore advertisement is *not* required under the New Jersey Consumer Fraud Act. A claim under that Act has three elements: (1) an unlawful act by the defendant that has (2) a causal nexus to (3) the plaintiff's ascertainable loss. The unlawful acts here are defendant Carter-Reed's false claims about Relacore's purported benefits. To show that Carter-Reed's false claims are a cause of the ascertainable loss, the class must establish exposure to the false claims, not viewing of the ads. That exposure can take numerous forms: One might

hear the false claims in an advertisement, see them on the product label, or hear about them from a friend. The message, not the medium, is what matters.

Second, the Appellate Division's analysis rested heavily on the supposedly multi-faceted nature of Carter-Reed's advertising of Relacore. As the court put it, "[i]n some ads, [Relacore] is touted as a belly fat retardant; in others, a mood elevator; in others, a stress reducer. We have no idea the reason any putative class members purchased the product[.]" But every one of those claims about Relacore is alleged in the complaint to be false. Carter-Reed should not escape scrutiny because of the multiplicity of its duplicity.

The chain of common-sense propositions set forth below demonstrates that every class member must have been exposed to a false claim about Relacore and that the claim must have been a cause of the purchase decision. Put differently, these propositions show that this case does not present an individual issue with respect to the Consumer Fraud Act's causal-nexus requirement.

(1) All class members purchased Relacore.

(2) No one purchases a product without knowing or believing *something* about it. Because class members purchased Relacore, they must have believed *something* about it.

(3) Relacore is a pill. It is a classic example of what economists call a "credence good," a product whose qualities cannot be assessed by the consumer through normal use. Purchasers must rely on claims made by the manufacturer to know what the product is or what it claims to do. Purchasers of Relacore thus must have been exposed to and relied on claims made by the manufacturer, regardless of the form in which the claims were conveyed. Indeed, every claim about Relacore that conceivably could have been a cause of the decision to purchase it appeared on the product label.

Amici curiae file this brief to explain this common-sense analytical approach and to demonstrate why class treatment is appropriate in this case and cases like it. We do so because the Appellate Division's flawed analysis seriously undermines the historic role of New Jersey's courts in protecting consumers from fraud. Because widespread fraud cannot realistically be redressed through individual suits, affirmance of the decision below would be a green light to snake oil salesmen in New Jersey.

INTEREST OF *AMICI CURIAE*

Amici curiae are non-profit advocacy organizations concerned that the decision below denying class certification effectively denies New Jersey consumers protection against

multiple fraudulent claims made about consumer products such as dietary supplements.

Public Citizen is a national, non-profit consumer advocacy organization that was founded in 1971. Public Citizen fights for the rights of consumers to seek redress in the courts; for safe, effective, and affordable prescription drugs and health care; and for strong health, safety, and environmental protections. Public Citizen has long been concerned about fraudulent claims made by makers of dietary supplements such as Relacore, which are underregulated and frequently marketed through unsubstantiated claims of efficacy. Public Citizen publishes *Worst Pills, Best Pills*, a newsletter that provides in-depth information about the safety and efficacy of more than 500 top-selling drugs and dietary supplements.

The Center for Science in the Public Interest (CSPI) is an independent non-profit organization supported by more than 750,000 individual members as well as charitable donations and foundation grants. CSPI accepts no funding from industry or government agencies. As part of its advocacy efforts, CSPI publishes an award-winning *Nutrition Action Healthletter* to inform its members about health topics of interest. *Nutrition Action* has published articles about the safe and appropriate use of supplements.

The National Association of Consumer Advocates (NACA) is an association of over 1,500 consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with consumer transactions. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Some of NACA's members represent consumers who are victims of supplement fraud, similar to the practices alleged as to Relacore.

The National Consumer Law Center (NCLC) is a non-profit research and advocacy organization focusing on the legal needs of consumers, especially low-income and elderly consumers. For over forty years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support.

STATEMENT

Defendant Carter-Reed manufactures and markets Relacore, an over-the-counter pill that promises to regulate cortisol production and thereby shrink belly fat. Carter-Reed disseminates this message across print, television, and online media, and includes it on all Relacore packaging and labeling.

Carter-Reed, also known as "Basic Research, L.L.C." and by a variety of other names, has a long history of marketing weight-loss and fat-loss products.[1] In 2004, the Federal Trade Commission ("FTC") filed an administrative complaint against Carter-Reed and its affiliates alleging that representations about various Carter-Reed weight-loss products were false, misleading, and unsubstantiated. Complaint, *Basic Research, L.L.C.*, Docket No. 9318 (F.T.C. June 16, 2004).[2] As part of a settlement agreement reached nearly two years later, Carter-Reed agreed to pay $3 million to the FTC. Carter-Reed also consented to the terms of an FTC order that specifically prohibited the company from making unsubstantiated representations about weight-loss and fat-loss products. Consent Order, *Basic Research L.L.C.*, Docket No. 9318 (F.T.C. May 11, 2006).[3] The FTC subsequently sued Carter-Reed for violating the terms of that order, alleging that its representations about Relacore are unsubstantiated. *See* Complaint, *United States v. Basic Research, L.L.C.*,

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[1] For an excellent overview of the unregulated dietary-supplements industry, including "Basic Research, L.L.C," see Michael Specter, *Miracle in a Bottle*, The New Yorker, Feb. 2, 2004, at 64, *available at* http://www.michaelspecter.com/wp-content/uploads/miracle.pdf ("Basic puts out scores of products, which are marketed under the names of nearly a dozen companies.").

[2] http://www.ftc.gov/os/adjpro/d9318/0023300part3cmp040616.pdf.

[3] http://www.ftc.gov/os/adjpro/d9318/DocketNo9318BasicResearchAgreementText.pdf.

Civil Action No. 09-cv-972, at ¶¶ 11, 16 (D. Utah).[4] At the time that the suit was filed, the FTC's Bureau of Consumer Protection stated that "[t]he Federal Trade Commission ordered the defendants to stop making baseless and bogus advertising claims. We wouldn't put our orders in writing if we weren't going to enforce them." Press Release, *FTC Charges Marketers with Making Baseless Weight-Loss Claims Despite Order to Stop*, Nov. 2, 2009.[5]

Consumers, too, have sued Carter-Reed. Here, plaintiff Melissa Lee, on behalf of herself and others who purchased Relacore since 2002, brought an action against Carter-Reed and its affiliates under New Jersey's Consumer Fraud Act, alleging that the company made false, misleading, and unsubstantiated claims about the pill's purported benefits and efficacy. Specifically, she alleges that Carter-Reed's claims about Relacore's ability to regulate cortisol production and thereby shrink belly fat are false, misleading, and unsubstantiated.

After several years of discovery, the trial court refused to certify the proposed class, holding that under Rule 4:32-1(b)(3), questions of law or fact common to the class did not predominate over questions affecting only individual members, and that a class action was not superior to other methods of

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[4] http://www.ftc.gov/os/caselist/0023300/091102basiccmpt.pdf.

[5] http://www.ftc.gov/opa/2009/11/basicresearch.shtm.

adjudication. *Lee v. Carter-Reed Co.*, No. UNN-L-3969-04, slip op. at 8-11, 14 (N.J. Super. Law Div. Apr. 18, 2008).

Accepting Carter-Reed's narrow characterization of this case as a "mass media false advertising" case, the Appellate Division affirmed. *Lee v. Carter-Reed Co.*, 2009 WL 2475314 (N.J. Super. App. Div. Aug. 14, 2009) (per curiam). The court concluded that the statutory fraud claims would require individual evidentiary hearings to demonstrate whether each class member directly viewed a mass-media advertisement for Relacore. The court suggested that viewing false claims on the product's packaging or learning of them from another source would not suffice.

The Appellate Division also concluded that individual hearings would be required to show whether class members bought Relacore because they were exposed to a particular claim about the pill. Absent such hearings, the court said that it would have "no idea the reason any putative class members purchased the product, assuming they heard or saw any advertising." *Id.* at *5. The court's analysis turned squarely on the question of predominance: The court held that common questions would not predominate over questions affecting only individual members. In other words, the court concluded that the question of whether Carter-Reed's false, misleading, and unsubstantiated claims about Relacore were a cause of each class member's decision to

purchase the pill is too complicated and individualized an inquiry on these facts to certify a class.

ARGUMENT

New Jersey's Consumer Fraud Act guards against "sharp practices and dealings in the marketing of merchandise ... whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271 (1978). Enacted to compensate victims, punish wrongdoers, and attract competent counsel, *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999), the Act is construed "liberally in favor of consumers." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994); *see Lee v. First Union Nat'l Bank*, 199 N.J. 251, 257 (2009). The "history of the [Consumer Fraud Act] is one of constant expansion of consumer protection." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604 (1997).

For nearly forty years, New Jersey trial courts have been instructed "to liberally allow class actions involving allegations of consumer fraud." *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 44 (App. Div. 2000). The "overarching principle of equity to consider in the application of the class certification rule" is that "class actions should be liberally allowed where consumers are attempting to redress a common

grievance under circumstances that would make individual actions uneconomical to pursue." *Id.* at 45.

The narrow class certification issue in this consumer-product-misrepresentation case is predominance. Class certification is appropriate under Rule 4:32-1(b)(3) if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and the Court finds "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The predominance inquiry "tests whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 108 (2007) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Predominance requires a common nucleus of operative facts, *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 431 (1983), but not all issues must be identical among class members and not all class members must be affected in precisely the same manner. *Iliadis*, 191 N.J. at 108-09. Taking all the substantive allegations of the complaint as true, *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co, Inc.*, 192 N.J. 372, 376 (2007), courts look to the legal elements of a party's claim and determine what questions of law and fact are common and whether those questions predominate. *Id.* at 389-90.

To succeed on a claim under New Jersey's Consumer Fraud Act, a party need only demonstrate "a causal nexus between the 'method, act, or practice declared unlawful' and the consumer's ascertainable loss." *Varacallo*, 332 N.J. Super. at 48-49 (quoting N.J.S.A. § 56:8-19). The causal nexus requirement "is a significant distinction from the requirement of reliance in a common law fraud claim." *Id.* at 49. The Act "does not require that the allegedly unlawful conduct serve as the *lone* cause of Plaintiffs' loss, but merely that it be *a* cause." *Arcand v. Brother Int'l Corp.*, --- F. Supp. 2d ---, 2009 WL 4261085, at *15 (D.N.J. 2009) (citing *Varacallo*, 332 N.J. Super. at 48) (emphasis added). Where the alleged unlawful act is a false representation, "[a] plaintiff need not hear the misrepresentation from the defendant directly for there to be actionable fraud." *Port Liberte Homeowners Ass'n, Inc. v. Sordoni Constr. Co.*, 393 N.J. Super. 492, 507 (App. Div. 2007). Consumer fraud "requires no contact between the parties." *Matera v. M.G.C.C. Group, Inc.*, 402 N.J. Super. 30, 41 (Law Div. 2007). Here, to establish a causal nexus, plaintiff Lee simply needs to demonstrate that she and her fellow class members were exposed to a misrepresentation and that the misrepresentation was *a cause*, not the *sole* cause, of their purchases.

I. Every Class Member Was Exposed to a False and Unsubstantiated Claim About Relacore.

The Appellate Division concluded that common questions would not predominate at trial because of uncertainty about "whether putative class members even saw the print or Internet advertisements or whether they purchased the product due to a recommendation from a friend or family member." *Lee v. Carter-Reed Co.*, 2009 WL 2475314, at *5 (N.J. Super. App. Div. Aug. 14, 2009). As explained below, that conclusion (1) wrongly interprets the causal-nexus requirement of the New Jersey Consumer Fraud Act; (2) overlooks the fact that *all* of Relacore's claimed benefits are alleged to be false and that *all* of those false claims appear on the product label itself; and (3) fundamentally misunderstands the nature of a product like Relacore.

First, even assuming that some class members learned about Relacore only from a friend or family member, "[a] plaintiff need not hear the misrepresentation from the defendant directly for there to be actionable fraud." *Porte Liberte*, 393 N.J. Super. at 507. Under the statute, a plaintiff need only show a causal link between the alleged unlawful act (here, the misrepresentation) and the ascertainable loss (here, the purchase of a product that was other than described). Because this case is not limited to "mass media false advertising," as the Appellate Division put it, but rather is about the content of Carter-

Reed's misrepresentations, whether or not class members in fact directly viewed advertisements is a red herring. Under the Act, it is the false message, and not the medium through which it is conveyed, that is unlawful.[6] *See* N.J.S.A. § 56:8-2 ("The act ... by any person of any ... misrepresentation ... in connection with the sale or advertisement of any merchandise ... whether or not any person has in fact been misled, deceived or damaged thereby ... is declared to be an unlawful practice.").

What matters, then, is not whether all class members directly viewed an advertisement, but whether all class members were exposed in some way to Carter-Reed's false representations about Relacore. They were. No purchaser of Relacore would have had any reason to buy the product had he or she not been exposed to a message about what Relacore is or does in supposedly controlling cortisol and thereby reducing belly fat. Relacore is not a dual or multiple-use product. This pill has no self-evident use that might have caused a consumer to purchase it without exposure to a Carter-Reed representation.

Second, even assuming that some class members did not see any mass-media advertisements, it is impossible for any class member to have bought Relacore without having been exposed to

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[6] Fraud is fraud whether perpetrated in-person, over-the-phone, or on-air. Here, contrary to Marshall McLuhan's famous aphorism, the medium is *not* the message. *Cf.* Marshall McLuhan, *Understanding Media* (1964).

the claims made on Relacore packaging and labeling. *See* Second Am. Compl. ¶36 ("Relacore's labeling and packaging reiterate defendants' false, misleading, and unsubstantiated claims about the product."). Thus, even those class members who did not see any mass-media advertisements were exposed to false claims about the product.

Third, class members would not purchase Relacore for any reason other than its false claims. Relacore is a product whose purported benefits are known to consumers only because the manufacturer has claimed those benefits. Without exposure to such claims, no consumer has any conceivable reason to purchase this tasteless, odorless product.

This logic, of course, cannot be applied to every product or service. There are numerous reasons why consumers might purchase satellite television service (for example, variety of programming, customer service) without ever having been exposed to allegedly false claims about its technical specifications. *Cf. Cohen v. DirecTV, Inc.*, 101 Cal. Rptr. 3d 37, 47 (Cal. Ct. App. 2009). There are numerous reasons why consumers might purchase linen goods (for example, prestigious designer, appealing color or patterns) without ever having been exposed to allegedly false claims about their thread count. *Cf. Zebersky v. Bed Bath & Beyond, Inc.*, 2006 WL 3454993, at *3-4 (D.N.J. Nov. 29, 2006). And there are numerous reasons why consumers might

purchase a digital camera (for example, a high-capacity memory, lightweight design) without ever having been exposed to allegedly false claims about its ability to record full-motion video. *Cf. Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 532, 573 (Law Div. 2003). In cases involving goods and services like those at issue in *Cohen*, *Zebersky*, and *Fink*, a court might reasonably find that legitimate individual questions exist regarding the statutorily required showing of a causal nexus.

The same cannot be said about a product like Relacore. Relacore is a pill. Consumers cannot possibly know what Relacore does, let alone have any predilections for it, unless and until they are exposed to messages about its properties or benefits. And those messages—all alleged to be false in the complaint—*necessarily originate with the defendants*. Similarly, as discussed below, because of the nature of the product—specifically, that consumers must rely on Carter-Reed's representations to know what Relacore is or what it purports to do—the false claims about Relacore must have been a cause of the purchase decision and, therefore, of every class member's ascertainable loss.

II. No Matter the False and Unsubstantiated Claims About Relacore to Which Class Members Were Exposed, Those Claims Must Have Been a Cause of the Purchase Decision.

The Appellate Division's analysis also rested heavily on the supposedly multi-faceted nature of Carter-Reed's advertising

of Relacore. As the court put it, "[i]n some ads, [Relacore] is touted as a belly fat retardant; in others, a mood elevator; others, a stress reducer. We have no idea the reason any putative class members purchased the product[.]" *Lee v. Carter-Reed Co.*, 2009 WL 2475314, at *5 (N.J. Super. App. Div. Aug. 14, 2009). The court concluded that demonstrating a causal nexus under the New Jersey Consumer Fraud Act would require individual evidentiary hearings to determine whether each class member was exposed to a particular claim about Relacore and whether such exposure caused the purchase decision. The court seemed to be concerned about the scenario in which one class member purchased Relacore because of a stand-alone claim to reduce belly fat while another class member purchased Relacore because of a stand-alone claim to reduce stress, and so forth. The court's concern was misplaced.

As plaintiff points out in her brief (at 14, 21-22), Carter-Reed's representations are all linked to the false and unsubstantiated claim that Relacore provides a benefit by regulating cortisol production. No matter which benefit sparked the consumer's interest, every class member thus purchased Relacore as a result of exposure to that single message about Relacore.

Moreover, class certification is appropriate even assuming, as defendants do, that Carter-Reed's claims about Relacore are

not commonly rooted in a claim about cortisol production, but are instead stand-alone claims about belly fat, mood, or stress. Lee's complaint alleges that *all* of Relacore's supposedly stand-alone claims are false, misleading, and unsubstantiated. Thus, no matter a class member's motivation for purchasing Relacore, be it to reduce belly fat, improve mood, or reduce stress, he or she necessarily will have made the purchase as a result of exposure to a false, misleading, and unsubstantiated claim made by Carter-Reed. By purchasing Relacore, the class member necessarily will have received less than was promised, and thus will have suffered an ascertainable loss. Carter-Reed's false, misleading, and unsubstantiated claim necessarily will have been a cause of that loss.

As alluded to above, Relacore is a good whose qualities cannot be assessed by the consumer through normal use: It is what economists call a "credence good." *See In re Diet Drug Litig.*, 384 N.J. Super. 525, 535 (Law Div. 2005). When purchasing credence goods or services (such as securities, insurance, medical services, prescription drugs, or dietary supplements like Relacore), a consumer has no choice but to rely on representations made by a manufacturer or service provider. *See* William A. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 284 (1987); Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & Econ. 67, 68-69

(1973). Unlike "search goods," such as clothing, which consumers can evaluate before making a purchase, the properties and benefits of credence goods are only knowable to consumers because of manufacturer representations. As the Third Circuit observed in another case involving pills, "[b]ecause consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise." *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 698 (3d Cir. 1983). Still, for all the complexities of consumer purchasing decisions, at a minimum no consumer buys a product unless and until he or she at least knows (or believes to be true) *something* about the product's properties or benefits. For this reason, credence goods place consumers at a disadvantage: If a "consumer cannot personally evaluate" goods or services, he or she will be "more vulnerable to fraud or deception." Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm*, 51 Wm. & Mary L. Rev. 345, 378 (2009).

That Relacore has no benefits other than those claimed by defendants makes it different from many other products and services, such as the satellite television, linen goods, and digital cameras discussed earlier. There can be no doubt that the properties and benefits of Relacore represented by defendants motivated consumer purchases because the *only* properties

and benefits known to consumers are those represented by defendants.

Along the same lines, this case is fundamentally different from two lower-court cases on which defendants rely, *Folbaum v. Rexall Sundown, Inc.*, 2004 WL 3574116 (N.J. Super. App. Div. May 4, 2004), and *Gross v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 303 N.J. Super. 336 (Law Div. 1997). Although *amici curiae* do not endorse the reasoning in either decision, both cases are, in any event, materially different from this one.

In *Gross*, the named plaintiff "couldn't say if [one of the allegedly misleading statements at issue] would have made a difference in his purchasing Pepcid," an over-the-counter antacid. *Gross*, 303 N.J. Super. at 346. The statements were not about the drug's overall efficacy; they were very specific claims about the number of doctors that preferred Pepcid, the number of hours it could control acid, and whether it was the "only" drug that prevents heartburn and indigestion. Here, by contrast, there can be no question that false claims about Relacore "made a difference" in every purchasing decision because every claimed benefit of Relacore is alleged to be false, misleading, and unsubstantiated. Class members had no reason to purchase Relacore *other* than the allegedly false representations.

Folbaum is even further afield. There, the named plaintiff complained that the front label of a pill bottle said "Calcium '900'," which she thought meant that each pill had 900 milligrams of calcium. The back panel on the bottle, however, clearly stated that the recommended dosage was three pills daily, which delivered 900 milligrams of calcium. In this way, the product label contained both a true statement and an allegedly confusing statement. The court concluded that consumers who read and relied on the true statement had no fraud claim: "Not every consumer received defective merchandise or was subject to a misleading practice that reduced the value of the merchandise." *Folbaum*, 2004 WL 3574116, at *3. Indeed, Ms. Folbaum "conceded that when she read the instructions on the back label she understood them." *Id.* at *1. Here, by contrast, every class member received less than what was advertised because, according to the complaint, Relacore does not do what it claims, pure and simple.

III. The Remote Possibility of Individual Issues Does Not Justify the Denial of Class Certification.

As explained above, this case does not present individual issues with respect to the Consumer Fraud Act's causal-nexus requirement: Because all claims about what Relacore purports to do are alleged to be false, at least one of Carter-Reed's false claims about Relacore must have been a cause of every decision

to purchase it. The Appellate Division, however, seized on the possibility that a class member could have purchased Relacore on the "recommendation of a friend or family member," concluded that individual issues of "causation" would therefore predominate at trial, and accordingly denied certification. That chain of logic contravenes established New Jersey class-action jurisprudence and defies common sense. In any consumer class action, it is possible to imagine a potential individual issue, but the mere ability of a court to conjure up such an issue does not justify denial of class certification.

Here, if a friend or family member recommended Relacore to a class member, the recommendation is necessarily traceable to Carter-Reed's claims. The original false message remains a cause of the purchase: Had Carter-Reed not falsely claimed that Relacore reduces belly fat or reduces stress, no one would have had any reason to think that it does. And no one would ever buy it, let alone recommend it.[7]

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[7] In referring to the "recommendation from a friend" the Appellate Division may also have had in mind a hypothetical scenario in which a friend ingests Relacore, experiences the product's claimed benefits, and recommends it to a class member. That hypothetical, however, is premised on the assumption that, contrary to the allegations in the complaint, Relacore actually delivers on its claimed benefits. But courts in this state are required to presume the *truth* of the allegations in the complaint when deciding class certification. *Merck*, 192 N.J. at 376. To the extent that it presumed that Relacore had its advertised effect on "a friend or family member," who in turn might have recommended it, the Appellate Division turned the

A creative jurist intent on denying class certification could easily come up with outlandish hypothetical reasons that someone might have bought Relacore. Imagine a reclusive pill collector who scours the market for new dietary supplements and purchases every type of pill he can get his hands on—not because of what the pill claims to do, but simply to add to his collection. Or a member of a cult whose leader, on account of divine revelation, has commanded that his followers purchase Relacore because ingesting it will lead to self-actualization. Or a curious chemist interested in observing firsthand the pill's molecular structure. Assuming that these hypothetical people had purchased Relacore, they might have done so for reasons other than Carter-Reed's false representations.

But listing these and other equally remote possibilities makes plain just how bizarre it is to deny certification in this case on predominance grounds. If a few class members did purchase Relacore for reasons other than Carter-Reed's false representations, they are outliers. If predominance is defeated by this sort of fanciful conjecture, no court would ever certify a consumer fraud class action. That cannot be the rule. Such a rule would dishonor the New Jersey courts' liberal interpretation of the Consumer Fraud Act and Rule 4:32-1, and undermine

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presumption on its head, in effect presuming that the allegations in the complaint are *false*.

the importance of the class action device to redress common grievances under circumstances that make individual actions uneconomical to pursue. *See Varacallo*, 332 N.J. Super. at 44-45. That one could always posit incredible possibilities at best shows that there could be some individual issues, but it is a far cry from showing that they *predominate*.

Moreover, as the Third, Fifth, and Seventh Circuits have held, class certification is not defeated simply because of the possibility or even inevitability that some class members might not have suffered injury. *See Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298, 307-08 (5th Cir. 2009); *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, C.J.); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 314-15 (3d Cir. 1998). Carter-Reed appears to resist class certification partly because it finds objectionable the possibility that it might have to compensate class members who were not injured by its false claims about Relacore. As we have argued, the class members *did* suffer injury. They purchased Relacore after being exposed in one form or another to Carter-Reed's messages, all of which are alleged to be false. Every Relacore purchaser thus received something less than what he or she was promised.

But even if a small percentage of the class was not injured by Carter-Reed's false representations, that possibility alone

does not justify denying certification. Some individual issues frequently arise in class actions. When they do, claims-management procedures have been developed to address them. For example, during the remedy phase of a class action, the issue of individual damages often arises. That issue can be addressed through a claims process handled by an experienced class-action administration company, without taxing the resources of the court. If that well-established solution does not suffice for some reason, a trial court has other options. It may (1) bifurcate liability and damages trials with the same or different juries, (2) appoint a special master to preside over individual damages proceedings, (3) obtain damages information from class members by simple standardized methods such as questionnaires or interrogatories, (4) create subclasses, or (5) alter or amend the class. *See Carnegie*, 376 F.3d at 661. Trial courts are expected to have the "resourcefulness, creativity, and administrative abilities" to "manage[e] such complex litigation." *Iliadis*, 191 N.J. at 118-19. There is no reason why trial courts' resourcefulness, creativity, and administrative abilities could not be brought to bear in this and other consumer fraud class actions.

* * *

In sum, consumers do not know what Relacore is or what it does—and thus have *no* reason to purchase it—unless and until

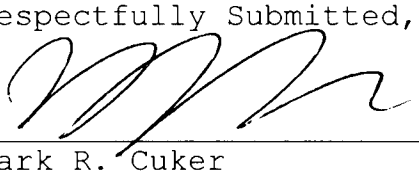
Carter-Reed disseminates information about the pill. And because the information that Carter-Reed disseminates about Relacore's properties and benefits is false, misleading, and unsubstantiated, a false representation about Relacore must have been a cause of every class member's purchase decision. Holding to the contrary would allow the damage caused by fraudulent representations to go without redress. This Court should remand for certification of the class to ensure that the makers of Relacore and other peddlers of snake oil are not given free reign to make false, misleading, and unsubstantiated claims about their products.

CONCLUSION

The Court should reverse and remand for entry of an order certifying the class.

Dated: March 9, 2010

Respectfully Submitted,



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Public Citizen, Inc., Center for Science in the Public Interest, National Association of Consumer Advocates, and National Consumer Law Center

MELISSA LEE, On behalf of herself and all others similarly situated, Plaintiff-Appellant, v. CARTER-REED COMPANY, L.L.C., a/k/a THE CARTER-REED COMPANY, BASIC RESEARCH, L.L.C., DG ENTERPRISES, INC., ALPHAGENBO TECH, L.L.C., BODY FORUM, L.L.C. BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., COVAXIL LABORATORIES, L.L.C., BYDEX MANAGEMENT, L.L.C., WESTERN HOLDINGS, L.L.C., DENNIS W. GAY, and NATHALIE CHEVREAU, Defendants-Respondents.	SUPREME COURT OF NEW JERSEY Docket No. 64,808 Civil Action **CERTIFICATION OF UNPUBLISHED OPINIONS CITED IN BRIEF**

I, Mark R. Cuker, hereby certify as follows:

1. I am an Attorney-at-Law of the State of New Jersey and a partner of the firm of Williams Cuker Berezofsky, LLC, attorneys for *Amici Curiae* Public Citizen, Inc.; Center

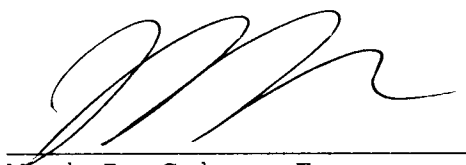
for Science in the Public Interest; National Association of Consumer Advocates; and National Consumer Law Center.

2. Attached as Exhibit A is a true and correct copy of *Zebersky v. Bed Bath & Beyond, Inc.*, No. CIVA 06-CV-1735 PGS (D.N.J. Nov. 29, 2006).

3. Attached as Exhibit B is a true and correct copy of *Folbaum v. Rexall Sundown, Inc.*, No. A-244-02T1, 2004 WL 3574116 (N.J. Super. App. Div. May 4, 2004).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 9, 2010



Mark R. Cuker, Esq.

Exhibit A

Not Reported in F.Supp.2d, 2006 WL 3454993 (D.N.J.)
(Cite as: 2006 WL 3454993 (D.N.J.))

United States District Court,
D. New Jersey.
Laura ZEBERSKY, Individually, and on behalf of all others similarly situated, Plaintiff,
v.
BED BATH & BEYOND, INC., a New York Corporation; Synergy, Inc., A New Jersey Corporation; and John Doe corporations (1-10), Defendants.
No. CIVA 06-CV-1735 PGS.

Nov. 29, 2006.

Jamie L. Sheller, Scott A. George, Sheller, Ludwig & Sheller, PC, Marlton, NJ, for Plaintiff.

Robert Alan White, Morgan, Lewis & Bockius, LLP, Princeton, NJ, Scott A. Resnik, Katten Muchin Rosenman LLP, New York, NY, for Defendants.

OPINION

PETER G. SHERIDAN, J.

*1 Defendants move to dismiss plaintiff's Class Action Complaint based on lack of standing (Fed.R.Civ.P. 12(b)(1)), failure to state a claim (Fed.R.Civ.P. 12(b)(6)), and failure to plead fraud with particularity (Fed.R.Civ.P. 9(b)).[FN1]

FN1. In this motion, defendants do not raise any objections with regard to class issues. Fed.R.Civ.P. 23.

I.

This Class Action Complaint alleges affirmative misrepresentations on labels of bed linens and bed sheets sold and distributed by Defendant, Bed Bath & Beyond, and manufactured by Defendant Synergy. The Complaint specifically points to a "600 Thread Count Hotel Fine Linens Collection" and Bed Bath & Beyond's private label collection line identified as being "1000 Thread Count." Both products are allegedly manufactured, distributed, and sold by the defendants. Plaintiff maintains that "customers pay higher prices for higher thread count sheets and linens." In discussing the standard for thread counting, plaintiff provides that the "consensus among other organizations like ASTM International and the National Textile Association [is] that the proper definition and method for determining thread count is to count the number of threads in the warp and filling directions in one square inch of fabric, regardless of the ply of the yard (single or multiple plied components)." It is alleged that the defendants engaged in deceptive, unfair, misleading and otherwise unlawful conduct by "representing to customers and clients that the afore described bed linen products contained and contain a certain thread count ... when in fact the thread counts were and are a fraction of the advertised and promoted amount." Plaintiff identifies the class as those consumers who purchased the bed linens and bed sheets and identifies herself as a member of that class.

II.

Defendants' claim is that this court lacks subject matter jurisdiction because plaintiff does not have standing to sue defendants. Article III of the Constitution restricts the "judicial power" of the United States to the resolution of cases and controversies. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Subsumed within this restriction is the requirement that a litigant have standing to challenge the action sought to be adjudicated in the lawsuit. *Id.* Standing has constitutional and prudential components, both

of which must be satisfied before a litigant may seek redress in the federal courts. *Id.; Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir.1994). Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed. *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir.2003).

"The three elements necessary to satisfy the irreducible constitutional minimum of standing are: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Taliaferro v. Darby Tp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir.2006)(citing *United States v. Hays*, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)).

***2** Defendants contend that plaintiff has failed to plead injury in fact or a causal connection between the injury and conduct complained of. Although the pleadings should be more specific, plaintiff identifies the class as purchasers of the bed linen and bed sheets, and alleges that she is a member of that class, as well as the fact that the goods purchased were of inferior quality to what was represented by defendants. In light of the broad interpretation courts afford the standing requirement, it would appear that plaintiff has alleged an injury in fact sufficient to withstand the motion. *See,* Robert E. Bartkus, *New Jersey Federal Civil Procedure*, § 1:1 -2; *Reynold v. Wagner*, 128 F.3d 166, 173 (3d Cir.1997).

III.

Plaintiff's Complaint relies substantially on the New Jersey Consumer Fraud Act (NJCFA). The NJCFA states: "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction." N.J.S.A.56:8-19. "To state a claim under the NJCFA, a plaintiff must allege each of three elements (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *N.J. Citizen Action v. Schering-Plough Corp.*, 367 N.J.Super. 8, 12-13, 842 A.2d 174 (App.Div.2003) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 24, 647 A.2d 454 (1994)). It is obvious that plaintiff has adequately stated what the unlawful practice is; but whether plaintiff has adequately identified the ascertainable loss and the causal nexus is questionable.

Under the NJCFA, a plaintiff must allege that the defendants' unlawful conduct caused her to suffer an ascertainable loss. *Dabush v. Mercedes Benz USA, LLC*, 378 N.J.Super. 105, 114, 874 A.2d 1110 (App.Div.2005). This requirement has been broadly defined to embrace more than a monetary loss. *Union Ink Co. v. AT & T Corp.*, 352 N.J.Super. 617, 646, 801 A.2d 361 (App.Div.2002). In fact, "[a]n ascertainable loss occurs when a consumer receives less than what was promised." *Id.;* see also *Miller v. American Family Publishers*, 284 N.J.Super. 67, 89-91, 663 A.2d 643 (Ch.Div.1995) ("For their money, they received something less than and different from what they reasonably expected in view of defendant's presentations. This is all that is required to establish ascertainable loss ..."). Thus, if plaintiff was promised a bed sheet containing a certain thread count and received a lower thread count of lesser value, an ascertainable loss may be realized. However, plaintiff's Complaint merely assert that "Defendants have unfairly and unjustly profited from their conduct described herein." The profit to the defendants is wholly distinct from the loss incurred by the plaintiff. Other than the claim

that "Plaintiff and the Class have suffered damages, and have suffered an ascertainable loss," plaintiff fails to plead an ascertainable loss, and further, fails to define the ascertainable loss.

*3 Even if the Court were to accept that plaintiff had properly pled an ascertainable loss, the plaintiff must also prove a causal relationship between the alleged unlawful conduct and the ascertainable loss. In responding to defendants causal relationship argument, Plaintiff mistakenly equates reliance (an element of common law fraud) to casual relationship (an element under NJCFA). New Jersey courts have distinguished these concepts. While common law fraud "requires proof of reliance[,] consumer fraud requires only proof of a causal nexus between the [misrepresentation or] concealment of the material fact [by a defendant] and the loss," suffered by "any person." *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J.Super. 31, 43, 752 A.2d 807 (App.Div.2000); N.J.S.A. 56:8-2; see also *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607-08, 691 A.2d 350 (1997). Hence, NJCFA requires plaintiff to "prove a causal nexus between the alleged [misrepresentation]" and his or her damages. *Schering-Plough*, 367 N.J.Super. at 15, 842 A.2d 174; *Varacallo*, 332 N.J.Super. at 43, 752 A.2d 807. Plaintiff must prove only that its ascertainable loss was "attributable to conduct made unlawful by the [Act]." *Thiedemann v. Mercedes Benz USA, LLC*, 183 N.J. 234, 246, 872 A.2d 783 (2005)(citing *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-73, 541 A.2d 1063 (1988)(citing *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271, 390 A.2d 566 (1978)).

Although plaintiff states in each count that the plaintiff and the class suffered "an ascertainable loss attributable to the conduct made unlawful by the NJCFA," nowhere in the Complaint does the plaintiff explain how the ascertainable loss is attributable to the unlawful conduct. Plaintiff in her opposition brief merely provides the following:

> Plaintiff need only show a causal nexus between the offending conduct and her ascertainable loss. Clearly, Plaintiff has made the allegation by showing the Court the industry standard that consumers have come to apply; Defendant's use of the magic words "thread count" which are part of that standard; Defendants [sic] misapplication of the standard case by using the accepted nomenclature while applying a different (and quite misleading) methodology for counting threads; and the higher price she paid for these misrepresented sheets.

However, the aforementioned statement merely alleges unlawful conduct and a possible ascertainable loss. At no point does plaintiff link the elements with the required causal nexus.

The causal nexus requirement stems from the portion of the statute requiring a private plaintiff to show that he or she suffered an "ascertainable loss ... *as a result of* the use or employment [ ] of any method, act, or practice declared unlawful under this act." (emphasis added). "Thus, the 'causal nexus' requirement requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service." *Fink v. Ricoh Corp.*, 365 N.J.Super. 520, 574, 839 A.2d 942 (Law Div.2003) (citing *Chattin v. Cape May Green*, 216 N.J.Super. 618, 641, 524 A.2d 841 (App.Div.) certif. den. 107 N.J. 148, 526 A.2d 209 (1987)).

*4 Plaintiff, however, repeatedly asserts in her opposition that the NJCFA "provides relief even where no consumer has actually been misled or deceived by wrongful conduct." N.J.S.A. 56:8-2. Plaintiff misreads the statutory scheme. To recover in a private right of action, N.J.S.A. 56:8-2 must be read in pari materia with N.J.S.A. 56:8-19 which requires that a causal connection be shown.

It is noteworthy that the appellate courts of New Jersey have not substantively analyzed the "causal nexus" in a consumer fraud context. As stated above, a well-cited Law Division case held that the statute "requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded

the plaintiff." *Fink*, 365 N.J.Super. at 574, 839 A.2d 942; see also *Carton v. Choice Point*, 2006 WL 2623228 (D.N.J.2006)(Facts did not support, nor did plaintiff alleged, that the alleged deception "induced" plaintiffs to sustain an ascertainable loss). However, it is not necessary that the wrongful conduct be the sole cause of the loss, but merely that it be *a* cause. *Varacallo*, 332 N.J.Super. at 48, 752 A.2d 807 (emphasis added). What is required is that the unlawful conduct, in some way, caused the plaintiff to sustain an ascertainable loss.

Plaintiff has failed to make this connection and, thus, has failed to properly allege consumer fraud. Without the necessary causal nexus between the misrepresentation and the ascertainable loss, plaintiff cannot maintain an action for consumer fraud.

III.

Like a claim of common law fraud, a claim under the NJCFA must satisfy the specificity requirement of Fed.R.Civ.P. 9(b). See *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp.2d 494, 510 (D.N.J.2000) (finding that plaintiff's claim under the NJCFA was subject to Rule 9(b)'s particularity requirement); see also, *FDIC v. Bathgate*, 1993 WL 661961, at 2 (D.N.J. July 19, 1993) aff'd, 27 F.3d 850 (3d Cir.1994). With respect to class action claims, such as the case here, "less specificity is required when the complaint presents the claims of a [proposed] class and individual identification of the circumstances of the fraud as to each class member would require voluminous pleadings." *In re the Prudential Ins. Co.*, 975 F.Supp. at 596-97 (quoting *Alfaro v. E.F. Hutton & Co., Inc.*, 606 F.Supp. 1100, 1108 (E.D.Pa.1985)). However, an individually named plaintiff must satisfy Rule 9(b) independently. *Id.* at 597. The Complaint should therefore contain "sufficient detail as to [a named plaintiff's] claims to apprise [a defendant] of that plaintiff's exact grounds for relief and the specific conduct that plaintiff charges." *Id.*; See *Szczubelek*, 2001 WL 34875217 (D.N.J.2001).

To satisfy the specificity requirement of Fed.R.Civ.P. 9(b) the pleadings must state what the misrepresentation was, what was purchased, when the conduct complained of occurred, by whom the misrepresentation was made, and how the conduct led plaintiff to sustain an ascertainable loss. From the Court's review of the Complaint, plaintiff fails to satisfy this requirement. Plaintiff fails to allege any specifics regarding her own transaction including what product plaintiff purchased, when the product was purchased, where the product was purchased, and how the misrepresentation led plaintiff to sustain an ascertainable loss. Because Ms. Zebersky must satisfy Rule 9(b) independently, the pleadings here fail to satisfy the basic requirements of a Complaint based in fraud. Fraud claims must specify " 'the who, what, when, where, and how: the first paragraph of any newspaper story." ' *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir.1999) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990)). In this case, plaintiff does not meet this standard. The pleadings lack the required specificity pursuant to Fed.R.Civ.P. 9(b).

***5** In summary, the Court rules as follows:

Defendants' motion to dismiss for lack of subject matter jurisdiction due to lack of standing is denied.

Defendants' motion to dismiss for failure to state a claim upon which relief may be granted is granted with leave to amend said Complaint within 20 days of the Order accompanying this opinion.

Defendants' motion to dismiss for failure to plead with particularity pursuant to R. 9(b) is granted with leave to amend as set forth above.

D.N.J.,2006.
Zebersky v. Bed Bath & Beyond, Inc.
Not Reported in F.Supp.2d, 2006 WL 3454993 (D.N.J.)

END OF DOCUMENT

Exhibit B

Not Reported in A.2d, 2004 WL 3574116 (N.J.Super.A.D.)
(Cite as: 2004 WL 3574116 (N.J.Super.A.D.))

C

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.
Ilene FOLBAUM, on behalf of herself and all others similarly situated, Plaintiff-Respondent/Cross-Appellant,
v.
REXALL SUNDOWN, INC. and Sundown, Inc., Defendants-Appellants/Cross-Respondents.
No. A-244-02T1.

May 4, 2004.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, L-8625-98.
Michael J. Vassalotti argued the cause for appellants/cross-respondents (Brown & Connery, attorneys; Mr. Vassalotti, on the brief).

Donna Siegel Moffa argued the cause for respondent/cross-appellant (Trujillo Rodriguez & Richards; Speziali, Greenwald & Hawkins; and Anapol, Schwartz, Weiss, Cohan, Feldman and Smalley, attorneys; (Lisa J. Rodriguez, David Speziali, David Jacoby and Ms. Moffa, of counsel and on the brief).

Before Judges CIANCIA, PARKER and R.B. COLEMAN.

PER CURIAM.

***1** Defendant Rexall Sundown, Inc. appeals a judgment entered against it in a class action suit following a jury trial. Defendant contends primarily that the litigation was erroneously certified as a class action. It also challenges the adequacy of plaintiff Ilene Folbaum's proofs and various rulings of the court during trial. Finally, defendant contends the award of counsel fees was excessive. Plaintiff cross-appeals contending the trial court erred by failing to apply a class wide presumption of ascertainable loss and by denying treble damages.

We find that the litigation was erroneously certified as a class action, but judgment in favor of Ilene Folbaum individually may stand as modified. The amount of fees to be awarded is to be redetermined by the trial court.

The gravamen of the case arose from plaintiff's purchase of calcium supplements manufactured and marketed by defendant. The front label on the bottle of softgel capsules, the principal display panel, described the contents as Calcium '900.' The information panel on the back of the bottle indicated that the "suggested adult usage" was "three (3) softgels daily" which provided "900 mg of Liquid Calcium." Plaintiff asserted she bought the product believing each capsule contained 900 milligrams of calcium. She did not read the label on the back of the bottle. Over several months plaintiff took the calcium believing she was receiving 900 milligrams of calcium in each softgel capsule. At a party she heard some discussion about litigation involving calcium labeling and when she got home she read the label on the back of the bottle. Plaintiff conceded that when she read the instructions on the back label she understood them. Nevertheless, plaintiff believed the front label was deceptive and she initiated suit claiming violations of the Consumer Fraud Act, *N.J.S.A.* 56:8-1, *et seq.*

Plaintiff moved to certify a nationwide class of all purchasers of Calcium '900' and Calcium '1200,' another of defendant's products which also failed to state the per-capsule dosage on the front label. Class certification was granted, but the class was limited to persons in New Jersey who had purchased either product between November 5, 1992 and July 1, 1999, "believing each softgel contained '900' mg. and '1200' mg., respectively." The suit proceeded to trial and plaintiff was successful.

We are satisfied that class certification was erroneously granted. Under the Consumer Fraud Act, a

plaintiff in a case such as this is obligated to prove: (1) unlawful conduct by defendant; (2) an ascertainable loss on the part of plaintiff; and (3) a causal relationship between defendant's unlawful conduct and plaintiff's ascertainable loss. *Cox v. Sears Roebuck & Co.*, 138 *N.J.* 2, 23-24 (1994); *N.J. Citizen Action v. Schering-Plough Corp.*, 367 *N.J.Super.* 8, 12-13 (App.Div.), *certif. denied*, 178 *N.J.* 249 (2003). "In order to maintain a class action, the threshold requirements of numerosity, commonality, typicality and adequacy of representation must be fulfilled under *R.* 4:32-1(a)." *Saldana v. City of Camden*, 252 *N.J.Super.* 188, 193 (App.Div.1991), (citing *In re Cadillac V8-6-4 Class Action*, 93 *N.J.* 412, 424-425 (1983)).

***2** Although the New Jersey case law is sparse on the issue, case law from other jurisdictions and commentators agree that a class cannot be defined by non-objective criteria such as the state of mind of individual class members. *Simer v. Rios*, 661 *F.* 2d 655, 669 (7th Cir.1981), *cert. denied*, 456 *U.S.* 917, 102 *S.Ct.* 1773, 72 *L. Ed.*2d 177 (1982) (recognizing the difficulty of identifying class members whose membership in the class depends on each individual's state of mind); *De Bremaecker v. Short*, 433 *F.*2d 733, 734 (5th Cir.1970) (indicating that class was neither adequately defined nor clearly ascertainable when determinations must be made into each individual's state of mind); *Schmidt v. U.S. Dept. of Veterans Affairs*, 218 *F.R.D.* 619, 638 (E.D.Wis.2003) (concluding that it would be administratively unfeasible to determine whether an individual was a member of the proposed class because it would necessitate an examination of each individual's state of mind); *Schwartz v. Upper Deck Co.*, 183 *F .R.D.* 672, 679-680 (S.D.Cal.1999) (finding that class certification would be improper when individual determinations must be made into the state of mind of each plaintiff); *Elliott v. ITT Corp.*, 150 *F.R.D.* 569, 574 (N.D.Ill.), *report and recommendation adopted*, 150 *B.R.* 36 (1992) ("An identifiable class exists if its members can be ascertained by reference to objective criteria, but not if membership is contingent on the prospective member's state of mind."); *Gomez v. Illinois State Bd. of Educ.*, 117 *F.R.D.* 394, 397 (N.D.Ill.1987) ("An identifiable class exists if its members can be ascertained by reference to objective criteria. A class description is insufficient, however, if membership is contingent on the prospective member's state of mind." (citations omitted)); *Chaffee v. Johnson*, 229 *F.Supp.* 445, 448 (S.D.Miss.1964), *aff'd on other grounds*, 352 *F.*2d 514 (5th Cir.1965), *cert. denied*, 384 *U.S.* 956, 86 *S.Ct.* 1582, 16 *L. Ed.*2d 553 (1966) ("The vague and indefinite description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or without the alleged class. The members of a class must be capable of definite identification as being either in or out of it."); 5 James W. Moore et al., *Moore's Federal Practice*, ¶ 23.21[4][b] (3d ed.1997); 7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1760 (2d ed.1986).

These authorities, of course, address the federal rule, *Fed.R.Civ.P.* 23, but *R.* 4:32-1 is modeled on the federal rule and federal authority may be considered as persuasive. *In re Cadillac V8-6-4 Class Action, supra*, 93 *N.J.* at 424-425; *Riley v. New Rapids Carpet Ctr.*, 61 *N.J.* 218, 226 (1972); *Saldana, supra*, 252 *N.J.Super.* at 194 n.1. Moreover, the concept that in a false advertising case individual reliance precludes class certification is not entirely without support in New Jersey case law. *See Gross v. Johnson & Johnson-Merck Consumer Pharms. Co*, 303 *N.J.Super.* 336, 346-351 (Law Div.1997) (holding that individual questions of reliance and causation of ascertainable loss predominated over common issues of fact or law making class certification inappropriate in suit alleging fraud, negligent misrepresentation, and violation of the Consumer Fraud Act in defendant's advertising for Pepcid AC); *see also Carroll v. Cellco Partnership*, 313 *N.J.Super.* 488, 500-501 (App.Div.1998) (discussing *Gross* with approval and recognizing the difficulty in certifying consumer fraud claims as a class action when each individual transaction

must be examined.)

*3 Plaintiff here does not contest these principles, but argues that the error in the class description was harmless because it was a subset of the proper class-i.e., all purchasers of the product. In our view, certification of the broader class would not have cured the problem.

Although plaintiff was not obligated to prove the element of reliance, she, on behalf of the class, was obligated to prove a causal nexus between the alleged act of consumer fraud and the damages sustained. *Cox, supra,* 138 *N.J.* at 23; *N.J. Citizen Action, supra,* 367 *N.J.Super.* at 15; *Carroll, supra,* 313 *N.J.Super.* at 502. In some class actions, a causal nexus can be shown through the use of the general "fraud on the market" theory, but when the element of causation is one of the proofs required of plaintiff, such an approach is inapplicable. *N.J. Citizen Action, supra,* 367 *N.J.Super.* at 15-16. This is not a case where it may be said that the fraud adhered to every transaction. Those who purchased the calcium understanding that each capsule contained 300 milligrams, as the back label indicated, would be unable to show a causal connection between the misleading front label and any ascertainable loss. There simply would be no ascertainable loss.

In order to sort which customers suffered a loss and which did not, an individual evaluation of each claimant would have to be undertaken. Defendant cannot be told simply to accept all members of the class who assert they were injured by a misrepresentation. There is insufficient commonality if each claimant must be examined individually to determine qualifications. If such an exploration could be undertaken by using objective criteria, that would be one thing, but when the evaluation must explore the mental processes of each class member, that is quite another. Defendant's conduct is not the sole focus. Not every consumer received defective merchandise or was subject to a misleading practice that reduced the value of the merchandise. The typicality of the claims cannot be ascertained without individual examination of each claimant. Thus, even the larger class urged as appropriate by plaintiff would have been defective. *See generally Fink v. Ricoh Corp.,* 365 *N.J.Super.* 520, 555-567 (Law Div.2003) (denying class certification to digital camera purchasers who were allegedly misled by false advertising). It cannot be said that the error in certifying a limited class in this case was harmless, as plaintiff contends. The larger class would also have been unacceptable. *See id.* at 561-566. The certification of this litigation as a class action constituted an abuse of discretion. *In re Cadillac V8-6-4 Class Action, supra,* 93 *N.J.* at 436 (applying abuse of discretion standard to appeal regarding class action certification).

As to plaintiff individually, however, the judgment may stand, although certain modifications must be made to the judgment in part because the jury verdict was not specific to the individual plaintiff but, rather, to the "consumer class." Nevertheless, plaintiff testified to her own circumstances and the jury was properly instructed that plaintiff had the duty to establish by the preponderance of the evidence that the violation of the Consumer Fraud Act was a proximate cause of her alleged loss.

*4 The issues raised by defendant that would impugn the verdict as to plaintiff personally are, for the most part, unpersuasive. We do agree, however, that there was no proof plaintiff ever purchased Calcium '1200' and, therefore, she can receive no damages for the alleged misleading label on that product. There was, however, sufficient evidence from which a jury could determine what plaintiff paid for the Calcium '900' and what loss of value resulted from the misleading label. *Chattin v. Cape May Greene, Inc.* (II), 243 *N.J.Super.* 590, 604-605 (App.Div.1990), *aff'd o.b.,* 124 *N.J.* 520 (1991).

The trial court ruled that plaintiff's expert witness, William Kitzes, was qualified to testify. We find no abuse of discretion even if Kitzes' expertise in consumer labeling did not specifically include dietary supplements. Moreover, any error in this regard was harmless. It was undisputed that there were no

FDA regulations prohibiting the front label defendant used on its product at any time relevant to this litigation. The deception, if it existed, was readily apparent to the jury. This was not a technically complex case.

Similarly, we find no error in the court's limitation of the testimony of defense witness, Deborah Shur Trinker, defendant's Senior Vice President of Regulatory Affairs. The witness, a lawyer, was presented as a fact witness. Following a *N.J.R.E.* 104 hearing, the court ruled that some of Trinker's proffered testimony was expert and exceeded the bounds allowed to a fact witness. There was no abuse of discretion in that ruling. *State v. Johnson*, 120 *N.J.* 263, 294 (1990).

The admission of complaint letters to defendant from various consumers was also not reversible error. The letters were admitted to demonstrate defendant's state of mind, particularly its knowledge of consumer response to its labels. Such evidence is not ordinarily excluded as hearsay. *Spragg v. Shore Care*, 293 *N.J.Super.* 33, 57 (App.Div.1996). Moreover, the court gave appropriate limiting instructions that met any attempt by plaintiff to suggest that the correspondence was admitted for the truth of the matter contained therein.

Admission of shelf organization systems, called planograms, and certain marketing/promotional materials was not reversible error. The evidence was relevant to whether defendant committed an unlawful practice as set forth in *N.J.S.A.* 56:8-2.

The trial court's failure to charge comparative negligence was not error. Plaintiff was not required to prove reliance. A misrepresentation constitutes an unlawful practice if it is a materially false statement of fact made to induce the buyer to make the purchase. *Gennari v. Weichert Co. Realtors*, 148 *N.J.* 582, 607 (1997). Consumer fraud requires only a causal nexus between an unlawful practice and an "ascertainable loss of moneys or property." *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 *N.J.Super.* 31, 43 (App.Div.2000) (citing *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 *N.J.* 464, 473 (1988)); *N.J.S.A.* 56:8-19. There was no basis to instruct the jury on comparative negligence.

***5** We agree with plaintiff that she was entitled to treble damages. *N.J.S.A.* 56:8-19. The trial court's reliance on *Feinberg v. Red Bank Volvo, Inc.*, 331 *N.J.Super.* 506 (App.Div.2000), was misplaced. That case is factually distinguishable and does not establish the general proposition that a plaintiff who does not make a prior demand for redress cannot recover treble damages. The *Feinberg* court essentially exercised equitable discretion in denying treble damages in the context of a regulatory violation for which there is strict liability. *Id.* at 511.

The award of counsel fees to plaintiff must obviously be reconsidered in light of our opinion. Plaintiff is entitled to such an award, *Wanetick v. Gateway Mitsubishi*, 163 *N.J.* 484, 490 (2000), but not in the amount of over $528,000, the fee granted here on the premise of a valid and successful class action. *Branigan v. Level on the Level, Inc.*, 326 *N.J.Super.* 24, 31-32 (App.Div.1999).

The matter is remanded for entry of a judgment in favor of plaintiff individually, computation of damages, and an award of appropriate counsel fees.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

N.J.Super.A.D.,2004.
Folbaum v. Rexall Sundown, Inc.
Not Reported in A.2d, 2004 WL 3574116 (N.J.Super.A.D.)

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