

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

-----X

**DANIELLE GENTILE, individually and on**  
**behalf of all others similarly situated,**  
**Plaintiff,**

**Index No.**  
**19139/05**

**-against-**

**Motion Date: 3/29/06**  
**Motion Cal. No. 39**

**STAY SLIM, INC.,**

**Defendant.**

-----X

The following papers numbered 1 to 8 read on this motion by defendant for an order pursuant to CPLR§901for an order determining that this action is a proper class action and certifying the action on behalf of all persons who, between August 1, 1999 and August 1, 2005, who purchased food products from Defendant and certifying Plaintiff as the representative of the class and her counsel as Class counsel.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Exhibits.....	1- 3
Affirmation of Service.....	4
Affirmation in Opposition-Exhibits.....	5-7
Reply Memorandum.....	8

Upon the foregoing papers it is ordered that this motion by defendant for an order pursuant to CPLR §901for an order determining that this action is a proper class action and certifying the action on behalf of all persons who, between August 1, 1999 and August 1, 2005, who purchased food products from Defendant and certifying Plaintiff as the representative of the class and her counsel as Class counsel is denied, for the following reasons:

The complaint reads like an episode from the Jerry Seinfeld Show, people happily eating ice-cream and wondering how something that tastes so good can have so few calories. It turned out that the product did not have as few calories as advertised. In this case, defendant manufactured, distributed and through its seven retail outlets in the metropolitan New York area, sold and marketed under the “Stay Slim” brand name a line of purportedly diet foods. The Company’s product line consists of a wide variety of prepared foods, including frozen entrees, snack and desserts, all of which were marketed to health conscious consumers trying

to lose weight. However, the nutritional information printed on the product packaging was inaccurate. The food was represented as having low calories, fat, sodium, sugar, and carbohydrates, when in fact the food was not low in any of these. For example, their tuna fish wrap sandwich packaging indicated there were only 2 grams of fat and 250 calories; in fact, it contained 51 grams of fat and 770 calories. A significant disparity and this ratio between label and reality existed on all of defendant's food products. This is borne out by a New York Department of Agriculture and Markets investigation that revealed these extreme inaccuracies in the labels. The Department issued a consumer alert about this situation and called it a "real health concern".

Based on these misrepresentations, this action seeks to recover from Defendant compensatory damages and a fund of its improperly retained profits for distribution to the Class. Plaintiff, like other members of the Class, purchased defendant's products on a regular basis, often in large quantities, based upon her belief that the nutritional information was accurate and would lead to a more healthy diet. The complaint asserts four causes of action. The first for violations of New York GBL § 349, the second for violations of New York GBL § 350, the third for violations of § 201 of the New York Agriculture and Markets Law, and the fourth for unjust enrichment.

Plaintiff brings this action on her own behalf and as a class action pursuant to Article 9 of the CPLR on behalf of herself and the Class, which includes all New York State citizens who purchased food products from Stay Slim Diet Clubs during the period from August 1, 1999 to August 1, 2005. She believes that there are thousands of members of the Class who are currently unknown, but can be readily discovered from the books and sales records of Defendant. Given the impracticality of joinder and the common questions of law and fact that exist as to all members of the Class, plaintiff seeks to certify this as a class action. Defendant opposes this request to certify.

CPLR 901, "Prerequisites to a class action," provides in relevant part: "a. One or more members of a class may sue or be sued as representative parties on behalf of all if: 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4. the representative parties will fairly and adequately protect the interests of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

CPLR 902, "Order allowing class action," provides: "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the

parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are: 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions; 2. The impracticability or inefficiency of prosecuting or defending separate actions; 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; 5. The difficulties likely to be encountered in the management of a class action."

"CPLR 902 provides that the court may permit a class action to be maintained only if it finds that all of the prerequisites under CPLR 901 have been satisfied . . ."

(3 Weinstein-Korn-Miller, NY Civ Prac ¶ 902.06 [emphasis added].) The court notes that the Appellate Division, Second Department, has stressed the commonality, predominance, and superiority criteria of CPLR 901 in its more recent class action decisions. (*See, e.g., Karlin v IVF Am.*, 239 AD2d 562; *Komonczi v Fields*, 232 AD2d 374.) The plaintiff has the burden of showing that the criteria of CPLR 901 and 902 have been met. (*Ackerman v Price Waterhouse*, 252 AD2d 179; *Small v Lorillard Tobacco Co.*, 252 AD2d 1; *Canavan v Chase Manhattan Bank*, 234 AD2d 493.)

In the case at bar, the plaintiff's motion for an order permitting this action to be maintained as a class action fails to satisfy all of the elements of CPLR 901. The purportedly common issues advanced by the plaintiff in her complaint and in support of this motion are dependent upon resolution of, inter alia, issues of causation and reliance as to each member of the putative class (*see Geiger v American Tobacco Co.*, 277 A.D.2d 420 (2d Dept 2000); *see also Komonczi v Fields*, 232 A.D.2d 374 (2d Dept 1996); *Rosenfeld v Robins Co.*, 63 A.D.2d 11 (2d Dept 1978). Contrary to plaintiff's assertions, members of the class would have diverse reasons for using the product, including taste, convenience, nutritional value and health value. This suggests that members of the class would not have necessarily purchased the product due to the inaccurate label of nutrition facts. Therefore, the statutory prerequisite that common questions of law or fact "predominate over any questions affecting only individual members" (CPLR 901 [a] [2]) was not satisfied. *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356 (2d Dept 2003.) Moreover, defendant's asserted affirmative defense of Statute of Limitations could not be determined on a class-wide basis. *Rosenfeld v Robins*, supra. Accordingly, the defendant's motion for an order pursuant to CPLR § 901 certifying this as a class action is denied.

**Dated: April 3, 2006**

.....

**ORIN R. KITZES, J.S.C.**

