Exhibit D

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September 13, 2007

VIA EMAIL

Stephen Gardner, Esquire
Center for Science in the Public Interest
5646 Milton Street, Suite 211
Dallas, TX 75206

Re: *Franulovic v. The Coca-Cola Company*, No. 1:07-cv-00539-RMB-JS (D.N.J.)

Dear Steve:

In connection with our discussions regarding discovery in this action, this letter summarizes the deficiencies in Plaintiff's discovery responses in *Franulovic*. As discussed on our recent conference call, the issues addressed are essentially identical to those discussed in connection with *Melfi* and *Simmens*.

Interrogatory number 1 requests Plaintiff to "describe with particularity all facts which support that each such representation was false at the time it was made." You incorporate an objection and state that "such facts are set forth in [detail] in the Complaint. Plaintiff otherwise relies upon the investigation of her counsel."

Reliance upon the investigation of counsel is not a proper objection to this interrogatory and does not provide an appropriate basis for limiting this response. Whether responsive facts have been identified by Plaintiff or counsel, all such facts should be described with particularity in the response, as these allegations form the basis of Plaintiff's claims. If there are responsive facts in addition to the allegations identified in the Complaint, please describe them with particularity.

Interrogatory number 5 requests the identification of "each person that witnessed Plaintiff purchasing, storing, or consuming Enviga." You state that "sales clerks at the stores referenced in Answer number 3 may have seen Plaintiff purchase Enviga, and some of Plaintiff's co-workers and/or customers may have seen her consume Enviga."

As requested, please provide, "to the extent known, the ... full name, present or last known address, and ... the present or last known place of employment" of each "store clerk, co-worker and/or customer" Plaintiff believe may have seen her purchase or consume Enviga. Specifically, information regarding Plaintiff's co-workers should be available to Plaintiff at this time.

Interrogatory number 11 requests the identification of "all reports, treatises, literature, studies, investigations, or publications that you contend support your allegation that Enviga does not burn calories or increase metabolism." You incorporate an objection and state that "Plaintiff relies upon the investigation of her counsel. Responsive information is set forth in Plaintiff's Second Amended Complaint filed on August 13, 2007."

Reliance upon the investigation of counsel is not a proper objection to this interrogatory and does not provide an appropriate basis for limiting this response. Whether responsive materials have been identified by Plaintiff or counsel, all such materials should be identified in the response, as this is an appropriate contention interrogatory. If there are responsive materials in addition to those identified in the referenced Complaint, please identify them.

Interrogatory number 12 requests the identification of "employers, physicians, chiropractors, and osteopaths, or other healthcare givers for the last fifteen years." You incorporate an objection and state that "the time frame for this request is overly broad and seeks personal information that is not relevant to the issues of this litigation and not reasonably calculated to lead to the discovery of admissible evidence."

The Plaintiff's medical history is relevant to this litigation because it could impact the extent of the calorie burning expected in these individuals. Medical history could also impact the claim that Plaintiff perceived an implied weight loss message in the Enviga advertising. In addition, whether Plaintiff's medical history impacts these issues could affect whether Plaintiff is an adequate class representative or has claims that are typical of other purported class members. Accordingly, we request an answer to this interrogatory. Also, we enclose a HIPAA authorization to allow Defendant to obtain Plaintiff's medical records, and we request that the authorization be executed and returned.

Interrogatory 13 asks you to identify any employees or former employees with whom you have communicated. Your response incorporates an objection and indicates that "Plaintiff does not currently possess any responsive information or documents." Please clarify that "Plaintiff" in this response includes Plaintiff's counsel and that no information is being withheld at this time on the basis of privilege.

Interrogatory number 18 raises the same issue as number 13. Please clarify that "Plaintiff" in your response includes counsel and that no information is being withheld at this time on the basis of privilege.

We understand that your positions regarding these requests are identical to those of Plaintiffs' counsel in *Melfi* and *Simmens*. We will copy you on correspondence regarding those cases, and please let us know if you have any different positions with respect to the discovery issues.

Sincerely,

/S/ Scott Elder

Scott A. Elder

SAE:bk
Enclosure
cc: Jane F. Thorpe, Esq.
Carmine R. Zarlenga, Esq.
Oral D. Pottinger, Esq.
LEGAL02/30524954v1

AUTHORIZATION
FOR
DISCLOSURE OF PROTECTED HEALTH INFORMATION

Patient: **Linda Franulovic** **Date of Birth:** _____

Address: **39 West Chestnut Street** **SSN:** _____
Merchantville, NJ 08109

I hereby authorize the use and disclosure of my "protected health information" covered under privacy regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA Privacy Rule") as specified in this Authorization. I understand that "protected health information" includes records disclosed to health care providers and facilities which currently provides or previously provided treatment to me. I also understand that "protected health information" may include information and records protected under Federal Law (such as alcohol and drug abuse treatment information) and/or protected under State Law (such as mental health treatment, privileged communications, alcohol/drug abuse, AIDS (Acquired Immunodeficiency Syndrome) or HIV (Human Immunodeficiency Virus)).

Information to be Used or Disclosed:

I authorize the release of all of my protected health information, including my complete medical records and all images (x-rays, photographs, etc.) (collectively "My Health Information and Records"), and includes interviews, clarification, explanation or evaluation of My Health Information and Records to Alston & Bird LLP and its agents, employees, experts, and consultants as pertaining to the matter of *Linda Franulovic v. The Coca-Cola Company*, Civil Action File No. 1:07-cv-00539-RMB-JS, currently pending in the United States District Court for the District of New Jersey.

Person(s) Authorized to Make the Use or Disclosure:

I hereby authorize any physician, pharmacist, doctor of osteopathy, other practitioner of the healing arts, hospital, healthcare provider, pharmacy, health insurance company, health facility/institution, governmental or private agency or entity and their respective agents, officers, employees, or attorneys that maintain the Patient's Health Information and Records (collectively "Patient's Healthcare Providers") to release the Patient's Health Information and Records as specified in this Authorization.

Recipient(s) of Use or Disclosure:

My Health Information and Records may be used by or disclosed to the attorneys, employees, experts, consultants, and other agents of Alston & Bird LLP, who represent The Coca-Cola Company and Beverage Partners Worldwide (North America) for the purpose of the matter of *Linda Franulovic v. The Coca-Cola Company*, Civil Action File No. 1:07-cv-00539-RMB-JS, currently pending in the United States District Court for the District of New Jersey.

Purpose(s) of the Use or Disclosure:

The purpose of the use or disclosure is to provide My Health Information and Records regarding my care and treatment, including as to the claims and injuries I have placed at issue in the matter, for use in *Linda Franulovic v. The Coca-Cola Company,* Civil Action File No. 1:07-cv-00539-RMB-JS, currently pending in the United States District Court for the District of New Jersey. I understand that production of My Health Information and Records to the recipients is necessary to evaluate the claims and injuries I have asserted in this lawsuit.

This authorization will expire at the close of litigation, including all appeals, for *Linda Franulovic v. The Coca-Cola Company,* Civil Action File No. 1:07-cv-00539-RMB-JS, currently pending in the United States District Court for the District of New Jersey.

I understand that I may revoke this Authorization by submitting a written revocation to Scott Elder, Esq., Alston & Bird LLP, 1201 W. Peachtree St., Atlanta, GA 30309. However, such revocation will not be effective with respect to any use or disclosure made by agents, experts or consultants of Alston & Bird LLP in reliance on this Authorization before these individuals received my revocation.

I understand that any healthcare provider cannot condition my treatment on whether or not I sign this Authorization.

I understand that My Health Information and Records used or disclosed pursuant to this Authorization may be subject to redisclosure by the recipient, in which case they might no longer be protected under the HIPAA Privacy Rule.

I hereby release Alston & Bird LLP, including all of its attorneys, employees, agents, experts, and consultants from any liability, damages or expenses arising in connection with the use or disclosure of My Health Information and Records pursuant to this authorization.

Linda Franulovic
Patient Name

_____ _____
Patient Signature Date

[Note: A copy of the signed Authorization must be provided to Patient]

Exhibit E

ALSTON&BIRD LLP

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Jane Fugate Thorpe **Direct Dial: 404-881-7822** **E-mail: jane.thorpe@alston.com**

September 17, 2007

Honorable Joel Schneider
United States District Court
District of New Jersey
Mitchell H. Cohen Courthouse
1 John F. Gerry Plaza, Room 2060
Camden, New Jersey 08101-0887

Re: *Melfi v. The Coca-Cola Company, et al.*, No. 1:07-cv-00828-RMB-JS (D. N.J.)
Simmens v. The Coca-Cola Company, et al., No. 1:07-cv-03855-RMB-JS (D. N.J.)
Franulovic v. The Coca-Cola Company, No. 1:07-cv-00539-RMB-JS (D. N.J.)

Dear Judge Schneider:

Pursuant to the Court's June 6, 2007 Order in *Melfi* and the August 7, 2007 Order in both *Franulovic* and *Melfi*, this letter on behalf of all Defendants identifies the current discovery disputes in these actions. By agreement, the parties have included *Simmens* in their discovery efforts as well.

Your Honor asked the parties to identify the depositions requested regarding class certification issues. Defendants request the deposition of each Plaintiff and of any expert witness identified by Plaintiffs in connection with Plaintiffs' class certification motion. Defendants may also request the deposition of additional witnesses identified during Plaintiffs' depositions or of Plaintiffs' treating physicians, but Defendants are not able to identify specific witnesses at this time.

As indicated in the attached affidavit, the parties have met and conferred in a good faith effort to resolve the discovery issues. Those efforts included letters, emails

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Fax: 704-444-1111

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New York, NY 10016
212-210-9400
Fax: 212-210-9444

3201 Beechleaf Court, Suite 600
Raleigh, NC 27604-1062
919-862-2200
Fax: 919-862-2260

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
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and a conference call attended by counsel for all parties.[1] This letter primarily addresses the additional discovery that Defendants are seeking from Plaintiffs. Defendants address the additional discovery that Plaintiffs are seeking in general terms below, and Defendants will provide a detailed response to Plaintiffs' requests within the September 24, 2007 deadline for replies established in Your Honor's August 7, 2007 Order.

Defendants' discovery requests to Plaintiffs were focused on the class certification issues. Consequently, Defendants are seeking additional information from Plaintiffs in response to only two interrogatories. First, interrogatory number 1 requests that Plaintiffs:

> Identify each instance in which TCCC, Nestle USA, Inc. or Beverage Partners Worldwide (North America) made a representation to you, or any member of the class, which you claim was false at the time it was made, and describe with particularity all facts supporting that each such representation was false at the time it was made.

All three Plaintiffs responded to this interrogatory by identifying certain allegedly misleading statements and then with respect to the alleged supporting facts, all three Plaintiffs simply stated at the end of their responses:

> ... Regarding facts supporting these allegations, such facts are set forth in detail in the Complaint. Plaintiff otherwise relies upon the investigation of her counsel.

Defendants have requested that Plaintiffs supplement this response to identify all facts that allegedly support Plaintiffs' claims. Reliance upon the investigation of counsel is not a valid objection and does not provide any grounds for refusing to answer a contention interrogatory. Whether responsive facts have been identified by Plaintiffs or counsel, all such facts should be described with particularity in the response, as these allegations form the basis of Plaintiffs' claims. Fed. R. Civ. P. 33 requires that "each interrogatory shall be answered separately and fully in writing" without referring back to other pleadings, including the Complaint.[2] Referring back to allegations detailed in the

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[1] Despite these efforts, Counsel for Ms. Franulovic, Mr. Stephen Gardner, has alerted the Defendants to his position that the conference call attended by Mr. Gardner constituted a meet and confer as to the discovery Plaintiff Franulovic is seeking from Defendants, but not as to the discovery Defendants are seeking from Franulovic. Defendants have informed Mr. Gardner that they disagree with his position, but Defendants nevertheless offered to have any additional discussions desired by Mr. Gardner. Mr. Gardner has not sought an additional conference.

[2] *See Farran v. Johnston Equip.*, 1995 U.S. Dist. LEXIS 13402, at *15 (D. Pa. 1995) ("Rule 33(a) requires an answer to be complete in and of itself, and should not refer to other pleadings."); *Davidson v. Goord*, 215 F.R.D. 73, 77 (W.D.N.Y. 2003) ("As answers to interrogatories must be in form suitable for use at trial, it is insufficient to answer by merely referencing allegations of pleading."); *J. J. Delaney Carpet Co. v. Forrest Mills, Inc.*, 34 F.R.D. 152, 153 (S.D.N.Y. 1963) ("Incorporation by reference of portions of a deposition of a witness, much of it discursive, or of allegations of a pleading is not a responsive answer....

Complaint are particularly suspect because "they are merely the statements of counsel."[3] This information is relevant to the class certification issues, because addressing class certification involves, among other things, considering the particular claims at issue and the type of evidence that Plaintiffs will present at trial. A detailed description of the facts that Plaintiffs contend support these claims is necessary to define the issues and to evaluate the potential evidence, which in turn impacts the issues of commonality, typicality and predominance.

Second, interrogatory number 12 asks that Plaintiffs:

> Identify Plaintiff's employers, physicians, chiropractors, and osteopaths, or other healthcare providers for the last fifteen years.

All three Plaintiffs responded:

> Objections number 3 and 4 are incorporated by reference.[4] Moreover, the time frame for this request is overly broad and seeks personal information that is irrelevant to the issues of this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

Defendants have alerted Plaintiffs to the fact that paragraph 4 of this Court's June 6, 2007 order states:

> Defendants shall promptly provide authorizations to plaintiff to execute regarding defendants' request for any employment, medical or similar type records they are seeking. Plaintiff shall promptly return the executed authorizations to defendant.

Nevertheless, Plaintiffs remain unwilling to identify their medical providers and to execute the authorizations for release of medical records that have been provided.

Answers to interrogatories should be in such form that they may be used upon a trial, as Rule 33 contemplates.").

[3] *See King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 6 (D.D.C. 1987) ("Nor is it an adequate response to say that the information is reflected in the complaint, no matter how detailed, especially where the complaint has not been verified under oath by the individual plaintiffs. Answers to interrogatories may be relied upon by the opposing party in connection with a motion for summary judgment, can be used as affirmative evidence at trial, and certainly can be used for cross-examination and impeachment. Assertions in the complaint cannot be so used since they are merely the statements of counsel. Thus, even if the information in the complaint was adequate in its detail it could not fulfill the role of answers to interrogatories.").

[4] Plaintiff Franulovic incorporated objections 2 and 3 instead of numbers 3 and 4. Otherwise, the response of all three plaintiffs is identical.

Plaintiffs' medical history is relevant to the class certification issues because it could impact whether Plaintiffs are adequate class representatives or have claims that are typical of other purported class members. For example, information about diet and nutrition received from or discussed with a physician could impact a Plaintiffs' claim that he or she did not understand the Enviga calorie-burning claim and, therefore, distinguish Plaintiff from typical proposed class members. In addition, the operative confidentiality orders provide adequate protection for the privacy of any medical information obtained in these cases.

Below, Defendants briefly address the additional discovery that Plaintiffs are seeking from Defendants. In short, Plaintiffs original discovery requests were not focused on the class certification issues, and Plaintiffs have not agreed to focus or narrow their requests in any meaningful respect. For example, Plaintiffs seek every email communication, inter-office memoranda and piece of correspondence related to Enviga. These materials fall into three general categories:

1. All internal emails, inter-office memoranda and correspondence regarding the scientific issues, *i.e.*, the effect of caffeine and/or EGCG on calorie burning or weight loss;
2. All internal emails, inter-office memoranda and correspondence regarding any of the consumer research conducted with respect to Enviga;
3. All external emails, memoranda and correspondence with any test facility (scientific or consumer research) or marketing firm that worked on Enviga.

Together, these three categories of materials constitute virtually every document in Defendants' possession related to Enviga. Plaintiffs have not provided Defendants with any explanation as to why the documents already produced on the scientific, consumer research and marketing issues are not sufficient to address class certification. Moreover, as to the scientific issues, Plaintiffs' request for those documents is particularly puzzling given Plaintiffs' earlier position that the substance of scientific issues should not be addressed at this stage of the case.

Defendants produced the following documents with Defendants' initial disclosures or in response to Plaintiffs' requests:

- The scientific studies related to Enviga and to the calorie burning effects of caffeine and EGCG;
- The Nestle scientific dossier prepared in connection with the development of Enviga;
- Reports prepared by two third-party scientific consultants who evaluated the scientific studies in connection with Enviga's development;

- The reports from all consumer research conducted in connection with Enviga's development, including reports from the consumer research on the Enviga advertising claims;
- The national marketing plans, operating plans and regional and retailer-specific marketing plans used in connection with Enviga;
- Exemplars of the Enviga advertising showing all of the different claims made in the Enviga advertising;
- Dissemination schedules showing where and when the Enviga ads ran; and
- The contracts reflecting the relationship among The Coca-Cola Company, Nestle USA, Inc. and Beverage Partners Worldwide (North America).

Defendant Nestle USA, Inc. has produced its document retention policy, and Defendants BPW and TCCC have agreed to produce those policies and will have produced them prior to October 2, 2007. In addition, TCCC has agreed with Plaintiffs regarding the production of relevant sales information, and that information will be produced prior to October 2, 2007.

Following the parties' meet and confer, Defendants agreed to produce the following additional documents and information:

- Extensive underlying scientific data generated in connection with the clinical trial of Enviga;
- Records of consumer questions and complaints regarding Enviga;
- Any unpublished scientific studies regarding Enviga (or confirm that no unpublished studies exist);
- Additional information regarding the job duties of individuals identified in Defendants' interrogatory responses.

Defendants have produced (or agreed to produce) the documents relevant to the class certification issues– numerosity, typicality, adequacy, commonality and predominance – whether or not those documents also relate to the merits. In fact, many of those documents lie at the heart of the claims in these cases. Nevertheless, Plaintiffs continue to seek the production of virtually every document related to Enviga, without offering any explanation as to why the production of those documents is necessary to the motion for class certification. As noted above, Defendants will respond to Plaintiffs' requests in greater detail on September 24, 2007 after receiving Plaintiffs' explanations of the need for these materials.

Defendants have produced the documents reasonably necessary to adjudicate the class certification issues, mindful of Your Honor's caution that it is difficult to draw bright lines between the merits and class certification inquiries. Defendants respectfully request that their production at this stage of the litigation be limited to those documents already produced, unless and until Plaintiffs can demonstrate that additional documents

are necessary for the parties to address one of the Rule 23 pre-requisites to class certification.

Yours very truly,

Jane Fugate Thorpe

cc: Scott A. Elder, Esq.
Carmine R. Zarlenga, Esq.
Oral D. Pottinger, Esq.

JFT:rfw
LEGAL02/30528237v2

Exhibit F

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Christine A. Campbell[‡]

[†] Member, Pennsylvania Bar
[‡] Member, New Jersey Bar
* Member, Conn. Bar
* Member, Wash., D.C. Bar

September 24, 2007

The Honorable Joel Schneider, United States Magistrate Judge
U.S. Post Office & Courthouse
401 Market Street, Second Floor
Camden, NJ 08101

Re: *Franulovic v. The Coca-Cola Company*, Docket No. 1:07-cv-539: Plaintiff's Letter Brief Reply Concerning Discovery Disputes

Dear Judge Schneider:

Plaintiff Linda Franulovic joins in the letter brief filed by the plaintiffs in the *Melfi* and *Simmens* cases, but files this separate letter brief to discuss additional discovery disputes arising out of her own discovery requests that the parties have been unable to resolve.

INTERNAL DOCUMENTS

The fundamental failure of Defendant's position is illustrated by the discovery Defendant itself sought from Franulovic. Defendant's Interrogatory 1 says:

> Identify each instance in which TCCC, Nestle USA, Inc. or Beverage Partners Worldwide (North America) made a representation to you, or any member of the class, which you claim was false at the time it was made, and describe with particularity all facts support that each such representation was false at the time it was made.

Defendant thus seeks to force Franulovic to describe all false statements that Defendant made, and provide "all facts" supporting those claims. In its September 17 letter brief to the Court (at page 3), Defendant says that a full response to this Interrogatory is "relevant to the class certification issues, because addressing class certification involves, among other things, considering the particular claims at issue and the type of evidence that Plaintiffs will present at trial. A ***detailed description of the facts that Plaintiffs contend support these claims is necessary to define the issues and to evaluate the potential evidence***, which in turn impacts the issues of commonality, typicality and predominance." (Emphasis added.)

Thus, Defendant takes the position that Franulovic must give a detailed description of the facts, but refuse to provide Franulovic access to any internal documents related to those very facts.

It is all well and good that Defendant has given Franulovic copies of publicly available studies, but Franulovic also should be able to evaluate Defendant's internal documents relating to those, and possibly other unpublished, studies.

Similarly, Defendant produced PowerPoint presentations that were made to third parties, and that contain some information as to consumer perceptions of Enviga, but Defendant adamantly refuses to produce the studies themselves or their internal files relating to those studies.

Clearly, Defendant seeks to control the facts to which Franulovic has access, primarily by providing documents that are publicly available. Franulovic is entitled to both public and internal documents.

PRIVILEGE LOG

Defendant has agreed to produce a privilege log, but continue to fail to do so, making it impossible for Franulovic to address Defendant's privilege claims.

POWERPOINT FILES

In Defendant's September 17 letter, Defendant failed to address Franulovic's request for the actual PowerPoint presentations used to derive the TIFF files that were produced. Franulovic addressed this point in her separate September 17 letter brief to the Court, but Defendant has not offered any excuse for this refusal.

PLAINTIFF'S MEDICAL INFORMATION

Finally, while Franulovic joins the Melfi and Simmens letter brief in full on this point, she writes separately to add that her communications with her doctors are privileged under N.J.S.A. § 2A:84-22.2, which applies in this diversity action under Fed. R. Evid. 501. Although New Jersey's patient-physician privilege can be overcome where "the condition of the patient is an element or factor of the claim or defense of the patient," N.J.S.A. § 2A:84-22.4, this exception is considerably narrower than the general federal rule allowing discovery that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). In any event, as is set forth in the Melfi/Simmens letter brief, the plaintiffs' medical records have no relevance whatsoever to their claims of deceptive marketing under New Jersey and Pennsylvania's consumer fraud statutes. *See also Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476, 488 (Mass. 2004) ("The plaintiffs need not prove individual physical harm in order to recover for the defendants' deception.").

For all these reasons, Franulovic requests that the Court direct Defendant to supplement its responses.

Respectfully submitted,

Mark R. Cuker
Counsel for Plaintiff and the Class

cc: Electronic Case Filing Service List