Exhibit G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE

MITCHELL H. COHEN COURTHOUSE
1 John F. Gerry Plaza, Room 2060
CAMDEN, NJ 08101-0887
(856) 757-5446

LETTER ORDER
ELECTRONICALLY FILED
October 5, 2007

Mark R. Cuker, Esquire
Williams, Cuker & Berezofsky, Esqs.
Woodland Falls Corporate Center
210 Lake Drive East
Suite 101
Cherry Hill, NJ 08002-1163

Gita F. Rothschild
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
PO Box 652
Newark, NJ 07102-0652

Peter S. Pearlman, Esquire
Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP
Park 80 Plaza West One
Saddle Brook, NJ 07663

Russell D. Paul, Esquire
Berger & Montague PC
1622 Locust Street
Philadelphia, PA 19102

Warren W. Faulk, Esquire
Brown & Connery, Esqs.
360 Haddon Avenue
PO Box 539
Westmont, NJ 08108

Re: **Franulovic v. The Coca-Cola Company, et al., Civil No. 07-539 (RMB)**
Melfi v. The Coca-Cola Company, et al., Civil No. 07-828 (RMB)
Simmens v. The Coca-Cola Company, Civil No. 07-3855 (RMB)

Dear Counsel:

I am writing to confirm the Court's rulings made at the October 2, 2007 conference that addressed the parties' discovery disputes. Except as expressly stated in this letter, if there are any inconsistencies between this letter and the transcript of the proceedings, the transcript controls. This letter identifies one subject area that the Court reconsidered.

1. Defendants shall produce all test results and advertising for Enviga.

2. The Court has reconsidered its decision not to Order defendants to produce any additional documents regarding their tests on Enviga. At the October 2 conference, the Court denied without prejudice plaintiffs' request for additional "testing documents." The Court now Orders defendants to produce to plaintiffs all documents relating to the tests they performed on Enviga (and not merely the test results) that defendants produced to any State or Federal government entity or agency that is investigating Enviga. As set forth in the Manual for Complex Litigation, §21.14, pp. 322-23 (4th Ed.), "[t]here is not always a bright line between the two [merits and class action discovery]. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes." See also Coopers & Lybrand v. Livesay, 457 U.S. 463, 469 n. 12 (1978)(the evaluation of many of the questions involved with deciding whether to certify a class is intimately involved with the merits of the claims); Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001)(a preliminary inquiry into the merits is sometimes necessary to determine whether class certification is appropriate).

   At this time the Court is not Ordering defendants to identify all ongoing government investigations. The Court, however, is Ordering defendants to produce to plaintiffs the documents relating to their tests that have already been produced to government entities investigating Enviga. The Court rules that these documents are relevant to the elements plaintiffs must prove to establish a class action pursuant to Fed. R. Civ. P. 23. The Court believes this is a fair balance between not permitting open-ended discovery on merits issues but yet giving plaintiffs a fair opportunity to obtain the discovery they need in support of their motion for class certification. Defendants' production does not preclude plaintiffs from requesting additional documents in the future. If plaintiffs intend to request additional "government" documents from defendants in the class certification phase of the case, the Court will not entertain plaintiffs' request until after plaintiffs receive written responses to their FOIA/Right to Know requests.

3. Defendants shall produce in "native format" all the PowerPoint documents previously produced to plaintiffs.

4. Within three (3) weeks after receiving records authorizations from defendants, plaintiffs' counsel shall arrange for the authorizations to be signed and returned to defendants.

Defendants are permitted to obtain copies of all of plaintiffs' medical and employment records for the past ten (10) years, without prejudice to their right to request additional records if good cause is shown. See id. at 324 (discovery may be necessary to determine if the plaintiff's claim is atypical).

5. At this time plaintiffs are not required to answer the contention interrogatory identified on page 2 of Ms. Thorpe's September 17, 2007 letter. Plaintiffs are required to identify all oral and written representations made to them regarding Enviga.

6. By **November 2, 2007,** defendants shall serve plaintiffs with their Fed. R. Civ. P. 30(b)(6) deposition notice(s). Defendants shall serve plaintiffs with their objections by **November 16, 2007.**

7. By **October 26, 2007,** plaintiffs and defendants shall supplement their answers to discovery. By **November 5, 2007,** defendants shall produce the "testing" documents referred to in paragraph 2 of this letter.

8. The current end date for the completion of class action fact discovery is **February 29, 2008.** The Court expects that from January 1 through February 29, 2008, the parties will complete all fact depositions relevant to class certification issues. This includes at least the depositions of the three (3) named plaintiffs and a Rule 30(b)(6) deposition of defendants. The parties should "lock-in" the dates of the depositions before the next conference. Plaintiffs represented that at this time they do not presently intend on serving expert reports. Defendants represented that they will not decide whether they will use experts in support of their opposition to plaintiffs' motion for class certification until they receive plaintiffs' motion. The current target date for the filing of plaintiffs' motion is **March 28, 2008.** After plaintiffs' motion is filed, defendants will have two (2) weeks to decide if they will be submitting expert reports or affidavits in support of their opposition. If defendants decide to support their opposition with expert evidence, they will be given a reasonable time to obtain their affidavits and/or reports. In setting the expert schedule, the Court will take into account the long time period defendants have already had to prepare their expert defense. The Court will also set a briefing schedule. Plaintiffs' Motion for Class Certification will not have to be filed before defendants' Motion to Dismiss is decided.

The next scheduling conference in this case is set for **December 14, 2008 at 2:00 p.m.** At least three (3) days prior to the conference, the parties shall send the Court a letter identifying all discovery disputes. No issue will be addressed unless the letter is accompanied by an Affidavit that complies with L. Civ. R. 37.1(b)(1).

Very truly yours,

s/ Joel Schneider

JOEL SCHNEIDER
United States Magistrate Judge

JS:jk
cc: Hon. Renée Marie Bumb

Exhibit H

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

DAVID CUMMIS and STEFANY GESSER, on behalf of themselves and all others similarly situated, Plaintiffs, v. PHILIP MORRIS COMPANIES, INC., PHILIP MORRIS, INC., R.J., NABISCO INC., and R.J. REYNOLDS TOBACCO COMPANY Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO.: MID-L-15216-99 MT **OPINION**
PAMELA TROMBINO, on behalf of herself and all others similarly situated, Plaintiffs, v. R.J. REYNOLDS TOBACCO COMPANY, and N.J.R. NABISCO, INC. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. MID-L-11263-98 MT

Argued: May 14, 1999
Decided: March 7, 2000

Arthur Newbold and Christopher J. Michie for Defendants, Philip Morris Incorporated and Philip Morris Companies Inc. (Dechert, Price & Rhoads)

Stephen J. De Feo for Defendants, Philip Morris Incorporated and Philip Morris Companies Inc. (Brown & Connery LLP)

Cathy K. Brown and Keith Weingold for Defendant, R.J. Reynolds Company (Riker, Danzig, Scherer, Hyland & Perretti LLP)

Lisa J. Rodriquez for Cummis Plaintiffs (Trujillo Rodriquez & Richards, LLC)

Esther Berezofsky for Trombino Plaintiffs (Williams Cuker & Berezofsky)

CORODEMUS, J.S.C.

I. INTRODUCTION

Plaintiffs in Cummis v. Philip Morris Companies, Inc., MID-L-1526-99 MT, and Trombino v. R.J. Reynolds Tobacco Company, and N.J.R. Nabisco, Inc., MID-L-11263-98 MT, filed three count complaints alleging that various entities responsible for manufacturing, distributing, promoting, marketing and/or selling "light" cigarettes violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 et seq ("CFA"). The Cummis and Trombino matters are consolidated herein for purposes of this motion.

Factually, Plaintiffs allege they purchased so-called "light" cigarettes as a result of the misperception created by Defendants that "light" cigarettes are less harmful to human health. (See ¶¶ 26-59 and Count I of the Cummis Amended Class Action Complaint, L-1263-98, filed April 26, 1999; ¶¶ 27-69 and Count I of the Trombino Amended Class Action Complaint, L-1526-99, filed April 20, 1999.) Plaintiffs further allege that notwithstanding Defendants' modification of "light" cigarettes; such cigarettes, in fact, provide no reduced health risk whatsoever. Ibid. Moreover, any possible health benefits attributable to "light" cigarettes are counteracted by: (1) the consumer's enhanced puffing to achieve the same fix from less product, and (2) Defendants' chemical and structural modifications to the cigarettes. Ibid.

Most importantly, however, Plaintiffs' complaints are unified by a single theme. Plaintiffs seek redress under the Consumer Fraud Act in the form of purchase price refunds,

disgorgement of profits, and attorney's fees because "light" cigarettes are not what they purport to be: low in tar and nicotine. (See Count II and III of the Cummis and Trombino Amended Class Action Complaints.) In construing the record for this pretrial motion, the court will accord the plaintiffs every favorable view. Riley v. New Rapids Carpet Center, 61 N.J. 218, 223 (1972).

This opinion arises from the Plaintiffs' Motion to Appeal the Special Master's Case Management Recommendation and Scheduling Order No. 1, April 13th, 1999. That Recommendation addressed the following issues: (1) Class Certification Discovery, (2) Amendment of Pleadings, (3) Class Certification Discovery Plan, (4) Coordination of Depositions, and (5) Briefing and Hearing Schedule for Class Certification Motion. The important provision for resolution of this motion is (3) Class Certification Discovery Plan. The Class Certification Discovery Plan provides:

> "Discovery related to class certification issues shall be completed according to the following schedule: (a) On or before April ~~16~~ 24, 1999, ***the named plaintiffs shall provide the defendants with (1) executed authorizations for the release of all medical ~~and psychiatric~~ records, and (2) a list of the names and addresses of all his/her treating ~~psychologists, psychiatrists,~~ physicians, hospitals and/or medical facilities where he/she has received treatment, medical, disability ~~and life insurance carriers~~*** (emphasis added). The plaintiffs shall cooperate as required to enable the defendants to obtain such records expeditiously. One copy of all such records shall be provided to the plaintiffs' counsel upon request." (¶ (3) Class Certification Discovery Plan, Recommendation Concerning Case Management and Scheduling Order No. 1, April 13, 1999. The stricken portions indicate editorial changes as shown on the original document.)

Although Plaintiffs objected to other discovery parameters in the Recommendation, they most vigorously objected to the requirement to produce their medical records. Plaintiffs objected that medical records are ". . . wholly irrelevant to Plaintiffs' misrepresentation claims and are not

likely to lead to the discovery of admissible evidence." (Plaintiffs' Objections to Special Master's Recommendation Concerning Case Management Order and Scheduling Order No. 1, April 27, 1999.) Plaintiffs further objected that because they do not claim to suffer from any smoking-related illnesses, do not seek medical monitoring, nor claim to be addicted; the medical condition of the Plaintiffs, or putative class members, is simply not in issue. Ibid. Plaintiffs now oppose production of the medical records on grounds of privilege and relevancy.

Defendants countered that the provision is entirely warranted because of its relevance to issues of class certification. (Defendants' Letter Br., May 28, 1999.) Specifically, Defendants argue that medical records contain information about each putative member's smoking habits, knowledge, and proper membership in the class. (Defendants' Letter Br., June 9, 1999.) In sum, Defendants argue that production of the records is necessary for an examination of each Plaintiff's potential health risks, thereby allowing Defendants to challenge Plaintiffs' inevitable motion for class certification.

After oral argument, the court reserved its decision until conclusion of an unrelated matter, the Diet Drug Class Action Trial. The court now decides whether Plaintiffs, consumers of "light" cigarettes, must provide their medical records to Defendants, tobacco manufacturers, in a consumer fraud case.

Before addressing the substance of the motion at bar, the court takes notice that in mass tort litigation, state and federal courts continually face similar issues. For instance, New York[1],

[1]See Small v. Llorillard Tobacco Co., 698 N.Y.S. 2d 615 (1999).

Ohio[2], Arizona[3], and Florida[4] are just a few of the states in which courts are presently involved in some aspect of the tobacco litigation occurring nationwide. In light of this, the court frequently finds it helpful to consider rulings in mass tort cases from other jurisdictions to better understand the issues which confront it.

II. "LIGHT" CIGARETTES

"Light" cigarettes are designated by their levels of tar, nicotine and carbon monoxide yields as measured by Federal Trade Commission ("FTC") smoke machines. This testing method evolved from 1960's scientific studies which suggested a correlation between high tar and nicotine levels and an increased development of smoking related illnesses. (See ¶ 3 of the Cummis Amended Class Action Complaint; ¶ 3 of the Trombino Amended Class Action Complaint.) In 1967, as a result of a voluntary agreement between the major cigarette manufacturers and the FTC, the FTC Cigarette Test Method became standard. See John Slade and Jack E. Henningfield, "Tobacco Product Regulation: Context and Issues," 53 Food & Drug L.J. 43, 44 (1998).

Government testing was intended to inform the public of the tar and nicotine yields of different cigarettes so that consumers could select brands that would reduce their exposure to toxins. Ibid. The FTC also became responsible for a "watchdog" role on package warnings and advertisements. Ibid. However, since 1996 the Food and Drug Administration ("FDA") has

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[2]See Marrone v. Philip Morris Companies Inc. and Philip Morris Inc., No. 99 Civ. 0954 (OH C.P. Medina Cty., Nov. 8, 1999).

[3]See Cocca et al., v. Philip Morris Inc., No. 99-08532 (AZ Super. Ct., Maricopa Cty., May 13, 1999).

[4]See Engle v. R.J. Reynolds Tobacco Co., No. 96, 862 (Fla. Dec. 30, 1999); Hogue v. Philip Morris Companies, Inc., and Philip Morris Inc., No. 98-4943 (Fla. 13th Cir. Ct., Hillsborough Cty., Feb. 24, 2000 Order).

asserted jurisdiction over cigarettes. Id. at 45. The FTC Cigarette Testing Method has come under great criticism, particularly as it applies to characterization of "light" cigarettes. Under the 1967 testing methodology:

> ". . . thirty five milliliter puffs are taken for durations of two seconds with one minute intervals between puffs until the cigarette has been shortened to a specific butt length. The gas phase of the smoke is collected and analyzed for carbon monoxide. Particulate matter is collected on Cambridge filters and is analyzed for water and nicotine, known as tar." (Id. at 47.)

However, there is a problem with this method of testing. Varied puffing behavior in humans, unlike machines, skews total values resulting in higher smoke deliveries to humans. Ibid. Another reason for the misleading results of machine testing is that subsequent cigarette designs have included significant alterations, including the addition of accelerants to tobacco paper, concealed tobacco under the filter wrap, and ventilation holes in the tipping paper near the butt of the cigarette. (See ¶¶ 26-59 of the Cummis Amended Class Action Complaint; ¶¶ 27-69 of the Trombino Amended Class Action Complaint.)

The results of modern cigarette engineering and the outdated FTC Cigarette Testing Method have been widely documented. See supra; 53 Food & Drug L.J. at fn.'s 39-45 citing to Alan Rodgman, FTC Smoking Method Used for "Tar" and Nicotine Data, app. B, 38 (Aug. 30 1994); U.S. Dep't of Health & Human Servs., The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General (1988)(DHHS Pub. No. (CDC) 88-8406; Lynn T. Kozlowski, "Blocking the Filter Vents of Cigarettes," 256 JAMA 3214 (1986); Massachusetts Dep't of Pub. Health, Nicotine Information (1997); Lynn T. Kozlowski, "Tar and Nicotine Delivery: What a Difference a Puff Makes," 245 JAMA 158 (1981); Colin L. Browne, The

Design of Cigarettes (1990); National Cancer Inst., National Inst. of Health, the FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee (Smoking and Tobacco Control Monograph 7) (1996) (NIH Pub. No. 96-4028).

More recently, a study entitled Doses of Nicotine and Lung Carcinogens Delivered to Cigarette Smokers by Mirjana V. Djordjevic, Steven D. Stellman, and Edith Zang, criticized the misleading results of the FTC Cigarette Testing Method. Journal of the National Cancer Institute, vol. 92, no. 2, 106-11, January 19, 2000. The study was designed to test whether cigarette smoke yields of tar and nicotine obtained under the FTC Cigarette Testing Method accurately reflected the delivery of toxins and carcinogens to the smoker. The study used a pressure transducer system to evaluate puffing characteristics for 133 smokers of FTC rated low and medium yield cigarettes. Programmed measurements were entered from randomly chosen subsets of 133 low yield cigarettes and 77 smokers of medium yield cigarettes into a piston type machine to generate from each smoker's brand of cigarettes an assay of nicotine, carbon monoxide, tar and lung cancer causing agents. The FTC protocol was used to assess levels of target components in the 11 brands most frequently smoked by the study subjects. Ibid.

The results indicated that compared with FTC protocol values, smokers of low and medium yield brands took statistically larger puffs at statistically smaller intervals, and drew larger total smoke volumes than specific FTC parameters. Low and medium yield smokers actually received 2.5 and 2.2 times more nicotine and 2.6 and 1.9 times more tar than FTC derived amounts as well as about twofold higher levels of benzo(a)pyrene in addition to other carcinogens at increased levels. Ibid. Thus, the FTC method appears to underestimate nicotine

and carcinogen doses to smokers and overestimates the allegedly proportional benefit of low yield, "light," cigarettes. Ibid.

III. DISCUSSION

Plaintiffs contend that it is irrelevant whether they discussed the dangers of smoking with their physicians because the claim underlying their cause of action is that Defendants mislead consumers by marketing and selling "light" cigarettes as providing lower tar and nicotine when, in fact, they do not. Furthermore, Plaintiffs argue that the proper focus of the litigation should be on Defendants' own deceptive conduct rather than on any individual Plaintiff's actions. On the other hand, Defendants attempt to portray this litigation as one in a series of prior tobacco cases, similar to Small v. Lorillard, 679 N.Y.S. 2d 593 (N.Y. App. Div. 1998), aff'd 698 N.Y.S.2d 615 (1999) or Cleary v. Philip Morris Inc., No. 98-L-6427 (currently pending in Cir. Ct. Cook County, Illinois).

This court agrees with the Plaintiffs. For reasons more fully set forth below, the court GRANTS the Plaintiffs' Motion to Appeal the Special Master's April 13, 1999 Recommendation and holds that the Plaintiffs' medical records should not be disclosed in discovery. Importantly, Plaintiffs do not allege that they suffered health problems as a result of smoking "light" cigarettes. Instead, Plaintiffs simply complain that they did not receive what they were led to believe they were buying: low tar and nicotine cigarettes.

A. Relevancy

At oral argument, Defendants relied on a Pennsylvania tobacco case in which medical records were ordered to be produced. Oliver v. R.J. Reynolds Tobacco Co., No. 268 (Court of Common Pleas, Philadelphia, PA, April 8, 1998)("Oliver, No. 268"). Oliver, No. 268 was a

class action seeking damages for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Plaintiffs in that case argued that they should not have to disclose their medical records because they were not seeking relief for personal injuries. The Pennsylvania court was not persuaded by this argument. Likewise, Defendants in the instant case argue that it is better to have more information than less under these circumstances and that the same result should be reached by this court as in Oliver, No. 268. See also Geiger v. American Tobacco, 674 N.Y.S. 2d 775, 777 (N.Y. App. Div. 1998)(class certification reversed after determination that record was insufficient to make an informed decision as to all prerequisites of class certification).

Apparently, however, there is some confusion with respect to the Oliver case. Plaintiffs distinguished Oliver, citing to Oliver v. R.J. Reynolds Tobacco Co., Pennsylvania Court of Common Pleas, March Term, 1998, No. 4830 ("Oliver, No. 4830"). Oliver, No. 4830 is a personal injury case. Plaintiffs in Oliver, No. 4830 claimed that defendants manipulated levels of nicotine in cigarettes to make it more difficult for consumers to quit smoking. Admittedly, the Oliver, No. 4830 claim related to medical records because principal issues in that case, addiction and personal injury, are inherently linked to such records. Defendants point out that the order requiring production of medical records was issued in Oliver, No. 238, the class action. However, without a copy of Judge Levin's Order and any supporting reasoning for orders in either or both of the Oliver cases, supra, the Court remains unpersuaded that access to the Plaintiffs' medical records is necessary in this case where the health of the Plaintiffs is simply not in issue.

Plaintiffs' claims are distinguishable from both those in Oliver, No. 268 (the class action

case) and Oliver, No. 4830 (the personal injury case). The Cummis and Trombino Plaintiffs move solely under the CFA for economic damages and other relief. (See Trombino Amended Complaint; Cummis Amended Complaint.) No claim seeks compensation for personal injury or medical monitoring. Thus, Plaintiffs have not put their health in issue. The Oliver, No. 268 complaint is pervaded with allegations that plaintiffs smoked "light" cigarettes because they were unlawfully led to believe that "light" cigarettes were less harmful to human health than other types. Whereas in the instant complaints, Plaintiffs' primary allegation is simply that they did not receive what Defendants purported to sell them: low tar and nicotine cigarettes.

Oliver, No. 4830 is not applicable either. That case is a personal injury case. In personal injury cases medical records are unavoidably implicated. See Castano v. The American Tobacco Compnay, 84 F.3d 734 (5th Cir. 1996); Barnes v. The American Tobacco Company, 161 F.3d 127 (3rd Cir. 1998); Avallone v. The American Tobacco Company, Inc., MID-L-4883-98 MT, unpub. op. (Dec. 2, 1999); and Cosentino v. Philip Morris Incorporated, MID-L-5135-97 MT, unpub. op. (Oct. 22, 1998) (inherently individual issue of addiction weighs against class certification.)[5] The instant case, however, is not a personal injury case.

In Small v. Lorillard, plaintiffs asserted fraud and consumer protection claims in five consolidated actions against tobacco manufacturers. 668 N.Y.S. 2d 307 (1997). Plaintiffs sought to certify two classes of plaintiffs: (1) those who were nicotine dependent, and (2) those who smoked and bought cigarettes. The trial court framed the issue as whether a class could recover

[5]The parties should note that no decisions have been made on class certification in the instant cases. Moreover, although the parties will be left to their proofs with respect to the class certification issue, this court has previously denied tobacco class certification applications. See Avallone, MID-L-4883-98 MT, unpub. op. (Dec. 2, 1999); Cosentino, MID-L-5135-97 MT, unpub. op. (Oct. 22, 1998).

money its members were induced to spend in fraudulent transactions. Id. at 311. The trial court circumvented addiction by redefining the class as one group who purchased and smoked defendants' cigarettes while defendant engaged in fraudulent practices because the trial court recognized that addiction would involve too many subjective factors which would frustrate class certification. Id. at 311-12.

The appellate court reversed the trial court's decision to grant class certification. See Small, 679 N.Y.S. 2d 593 (1998). Under New York law, proof of some actual injury is required for statutory or common law fraud. However, in light of the trial court's shaping of the class, since plaintiffs could not prove addiction, they could not show they were harmed by defendants' unlawful conduct. Id. at 599. The trial court's decision to remove addiction, in effect, was a double edged sword. New York law also requires individualized proof of reliance. Ibid. Plaintiffs based their claim on the fact that defendants tried to conceal the addictive power of nicotine, but the appellate court determined that this fact was commonly known. Id. at 600. Such common knowledge foreclosed any presumption of reliance and required individualized inquiries into whether each class member was aware of the information. Ibid. Furthermore, since the trial court did not define the class by addiction, typicality was destroyed. Id.at 601. The named plaintiffs already admitted they were addicted to smoking. Ibid. Thus, the named plaintiffs could not be similarly situated with those who never would have began smoking had they known that cigarettes were addictive. Ibid. In sum, the appellate court held that individual proof of addiction remains at the core of proving an injury claim.

New York's highest court affirmed the appellate court's reversal of class certification See Small, 698 N.Y.S. 2d 615 (1999). At the Court of Appeals, instead of arguing that addiction

was the injury, plaintiffs argued that defendants' deception prevented them from making an informed choice as consumers. Id. at 620. Plaintiffs posited that had they known nicotine was addictive, they never would have purchased the cigarettes. Ibid. In other words, since consumers would not have purchased cigarettes absent the defendants' deception, their rights were violated. However, the Court of Appeals, like the intermediate court, found that the plaintiffs' "deception as injury" claim was flawed. In the absence of an allegation that the cost of cigarettes was affected by the alleged misrepresentation[6] or that plaintiffs' health was affected as a result of addiction, plaintiffs' claim boiled down to one where the alleged deception is the injury. Id. at 621. Rejection of the "deception as injury" claim "correctly pinpoint[ed] that addiction is inescapably the cornerstone of plaintiffs' legal claims." Id. at 615. The high court further reasoned:

> "Because plaintiffs abandoned the addiction component of the legal theory of their cases, they therefore fail to demonstrate that they were 'actually harmed' or suffered pecuniary injury by reason of any alleged deception within the meaning of the statute. They cannot have it both ways. Without addiction as part of their injury claim, there is no connection between misrepresentation and any harm from, or failure of, the product." (Id. at 620.)

The reasoning in Small, supra, however, is inapplicable to the instant case. Small was not a pure consumer fraud case. It was impossible to divorce personal injury, i.e., addiction, from consumer fraud in that case because both injury and reliance were required under the law. Unlike New York, New Jersey does not require actual harm or reliance under its Consumer

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[6]The Court of Appeals acknowledged the Attorney General's comparison, appearing as amicus curiae, to a situation where a distributor asserted that its bottled water was from a pristine mountain stream when in reality, it was only tap water. 679 N.Y.S. 2d at 621, fn. 5. A plaintiff might have a claim for the higher price the consumer paid for the product as a result of the misrepresentation in that situation. Ibid.

Fraud Act. See N.J.S.A. 56:8-2; Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-09 (1997). And, as stated previously, the Cummis and Trombino Plaintiffs do not allege any physical injury or seek medical monitoring. Therefore, physical harm is not a factor. Addiction is neither part of the claim nor an element of causation under these circumstances.

Moreover, it is not necessary for Plaintiffs to seek any difference in price between regular cigarettes and "light" cigarettes as a result of the alleged misrepresentations for their claim to be actionable as the Attorney General suggested in Small, supra. In New Jersey, "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared an unlawful practice." N.J.S.A. 56:8-2.

New Jersey is not the first state to confront the issue of how the tobacco defendants could be sued under a consumer fraud statute. Plaintiffs, the State of Minnesota and Blue Cross & Blue Shield, settled their law suits against seven tobacco companies and two trade organizations in State ex rel. Humphrey v. Philip Morris Inc., No. CI-S4-8565, 1998 WL 934336 (Minn. Dist. Ct. May 8, 1998). In the Minnesota litigation, for the first time a consumer fraud statute was used based on specific factual predications. See Gary L. Wilson and Jason A. Gillmer, "Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes," 25 William Mitchell L. Rev. 567 (1999). And unlike prior tobacco personal injury cases, the determinative issue was the requirement to establish causation under the statutes. Similar to New Jersey's statute, the Minnesota Consumer

Fraud Act is violated if a statement is made with the intent that others rely on it, regardless of whether any person has in fact been misled, deceived, or damaged. Id. at 590 citing to Minn. Stat. § 325F.69, subdiv. 1 (1998). Also like New Jersey, Minnesota courts construe the CFA liberally, and reliance is not required. Id. at 591 citing to Humphrey v. Alpine Air Products, Inc., 500 N.W. 2d 788 (Minn. 1993).

A violation of the CFA stemming from the sale of "light" cigarettes is analagous to a violation of the CFA stemming from the sale of any type of product. General principles of statutory consumer fraud such as those found in cases involving furnaces, Delgozzo v. Kenny, 266 N.J. Super. 169 (App. Div. 1993), car engines, In re Cadillac V-8-6-4 Class Action, 93 N.J. 412 (1983), and cellular phones, Carrol v. Cellco Partnership, 313 N.J. Super. 488 (App. Div. 1998) may also apply to "light" cigarettes. Under these circumstances, the court recognizes the distinction between a personal injury claim and one based on the duty not to deceive under the CFA.

Personal injury damages have already been separated from economic damages in the context of a CFA action. In Delgozzo v. Kenny, Judge Dreier, writing for the appellate division, reversed the trial court's denial of class certification. 266 N.J. Super. 169. Plaintiffs alleged that Defendants intended to capitalize on growing concerns with fuel conservation and environmental issues among consumers by deceptively marketing "blue flame" furnaces as the state of the art residential heating system. Id. at 174. Defendants claimed that "blue flame" units were technologically superior to traditional "yellow flame" units. Ibid. These claims allegedly induced consumers to purchase the units. Ibid. There were also design defect allegations. In 1987 the U.S. Consumer Product Safety Commission warned of the potential for carbon monoxide

poisonings and that since 1979, seven deaths from carbon monoxide poisonings were linked to "improper maintenence or servicing" of the unit. Id. at 175.

In reversing the trial court's denial of class certification, the appellate division found that the Delgozzo plaintiffs relied on products liability and consumer fraud theories of liability without a personal injury component. Judge Drier addressed the damages issue by reasoning that since plaintiffs sought only economic damages, class members who also suffered personal injuries as a result of using defendants' products may, if warranted, opt out and proceed independently. Id. at 187. After concluding that the prerequisites for class certification pursuant to R. 4:32-1(a) were met, numerosity, commonality, typicality, and adequacy of representation, as well as one of the three alternative requirements of R. 4:32-1(b), common questions of law and fact predominated and the class action was the superior method of adjudication; the appellate division directed class certification.

Although the CFA provides a right of action to private plaintiffs, private plaintiffs are held to higher standard of proof insofar as they must show an "ascertainable loss" as a result of the alleged CFA violation. See Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988); Gross v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 303 N.J. Super. 336, 344-45 (App. Div. 1997); Miller v. American Family Publishers, 284 N.J. Super. 67, 89 (Ch. Div. 1995); N.J.S.A. 56:8-19. One of the clearest constructions of the precise meaning of "ascertainable loss" can be found in Miller, supra. In Miller, Judge Lesseman looked to decisions from Connecticut and Michigan to formulate a standard for "ascertainable loss." In short, wherever plaintiffs show "they received something less than, and different from, what they reasonably expected in view of defendant's presentations," "ascertainable loss" is established.

Miller, 284 N.J. Super. at 87. This construction of "ascertainable loss" appears to favor the plaintiff, especially when considered in view of the remedial nature of the statute and its liberal construction in favor of consumers. Id. at 90; see generally Hampton Hosp. v. Bresan, 288 N.J. Super. 372, 378-79 (App. Div. 1996), cert. denied 144 N.J. 588. Thus, "the next question is whether plaintiffs suffered a compensable 'ascertainable loss' as set forth in N.J.S.A. 56:8-19." Roberts v. Cowgill, 316 N.J. Super. 33, 40 (App. Div. 1998), citing to Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994). Toward this end, "A private plaintiff victimized by any unlawful practice under the Act is entitled to 'threefold the damages sustained' by way of 'any ascertainable loss of moneys or property, real or personal. . ." Ibid., citing to Cox, supra, at 21.

The Cummis and Trombino Plaintiffs seek economic damages solely under a statutory consumer fraud theory. The Plaintiffs will not be compelled to disclose medical records at this time because such records are not relevant to the instant cases. The court should focus on liability at this stage of a consumer fraud case, not only damages. The deception of low tar and nicotine yields goes to the inadequacy of the product and/or deceptive marketing. Under the cause of action alleged here, violation of the New Jersey Consumer Fraud Act, the Defendants' alleged deceptive behavior has nothing to do with the physical condition of the Plaintiffs.

B. The Physician Patient Privilege

The court denies access to Plaintiffs' records in this case because they are irrelevant. In addition to being irrelevant, the medical records are also protected by the physician patient privilege. The physician patient privilege is codified at N.J.S.A. 2A:84A-22.1, et seq. A person has a privilege in a civil action to refuse to disclose, and to prevent a witness from disclosing a communication, if he claims the privilege and the judge finds that (a) the communication was a

confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment, and (c) the witness (i) is the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or (ii) for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent and (d) the claimant is the holder of the privilege or person authorized to claim the privilege for him. N.J.S.A. 2A:84A-22.2.

There are five instances in which the privilege may not apply: (1) where the patient's condition is in issue because of question of capacity or committal, N.J.S.A. 2A:84A-22.3; (2) where the condition of the patient is an element or factor of the claim or defense of the patient or party, N.J.S.A. 2A:84A-22.4; (3) where the patient is required to report to a public official, N.J.S.A. 2A:84A-22.5; (4) where the judge finds the physician was retained to commit a crime. N.J.S.A. 2A:84A-22.6; and (5) where a judge finds that any holder of the privilege has testified in any action to any matter in which the physician gained knowledge through the communication, N.J.S.A. 2A:84A-22.7.

While Defendants would rely on (2) above, the court ruled that the physical condition of the Plaintiffs is not in issue under the CFA. The purpose of the privilege is "to permit patients to disclose facts necessary for diagnosis and treatment, . . . a purpose that the privilege achieves by protecting the patient from the adverse consequences that would follow from disclosure." State v. Dyal, 97 N.J. 229, 235-236 (1984). The patient physician privilege applies to Plaintiffs' medical

records because this court believes that the plaintiffs' medical records constitute confidential communications between the patient and his physician. Nothing was presented to the court which would lead it to believe such records were not the type of communications that the patient or the physician did not reasonably believe were necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment to the patient. Thus, as the declarants of any such statements in the medical records, Plaintiffs are authorized to claim the privilege.

Furthermore, none of the exceptions to the privilege apply here. Defendants would argue that the condition of the patient is an element or factor of the claim or defense of the plaintiff-patients and thus, the exception to the privilege found in N.J.S.A. 2A:84A-22.4 should apply. However, this court has already concluded in the preceding analysis that medical records are not relevant to Plaintiffs' claims at this time. The Plaintiffs' pursuit of relief under the Consumer Fraud Act is devoid of any need to show physical injury or addiction. See supra.

The Plaintiffs' medical records in this case are not the very subject of the suit. Therefore, the privilege has not been overcome. This case is not about personal injury. This is a case under the Consumer Fraud Act. It centers on the Defendants' allegedly deceptive trade practices.

IV. CONCLUSION

In light of the irrelevancy of the Plaintiffs' medical records and the protection afforded them by the patient physician privilege, Plantiffs' Motion to Appeal the Special Master's Recommendation of April 13, 1999 is hereby GRANTED. Defendants are denied access to the Plaintiffs' medical records without prejudice at this juncture. However, this result does not foreclose revisitation of this issue when and if a motion for class certification is made, and the

Plaintiffs' medical records become relevant or likely to lead to the discovery of relevant and material evidence in these cases.