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April 17, 2017

VIA ELECTRONIC MAIL
Hon. Joseph F. Leeson, Jr.
Edward N. Cahn Federal Courthouse
504 West Hamilton Street
Suite 2401
Allentown, PA 18101

Re: Shane K. Enslin v. The Coca-Cola Company, *et al.*
No. 2:14-cv-06476-JFL

Dear Judge Leeson:

Pursuant to your March 31, 2017 Order (the ***"Order"***), Plaintiff submits this letter as a Status Report concerning the effect that the Order has on Plaintiff's claims against William Rogers, III (***"Rogers"***). Plaintiff and the Class respectfully submit that the Order has no effect on their claims against Rogers and seek leave to proceed with the litigation in the manner addressed herein.

As you may recall, Plaintiff initiated the above-referenced lawsuit on November 12, 2014. Rogers was served on December 2, 2014. On February 6, 2015, Plaintiff filed a Notice of Default by Rogers, which was opposed by the Coca-Cola Defendants via letter dated February 12, 2017. Essentially, the Coca-Cola Defendants argued that an entry of default against Rogers was premature at that time and that it was unjust given that the Complaint asserted claims of conspiracy between Rogers and the Coca-Cola Defendants as well as joint and several liability against and among Rogers and the Coca-Cola Defendants. Your Honor held a telephone conference on March 12, 2015 where Rogers' default status was discussed amongst Your Honor and all represented parties. During that teleconference, Plaintiff and the Coca-Cola Defendants were asked to provide letters to again address Rogers' default, which both did on March 17, 2015. Again, the Coca-Cola Defendants argued against the entry of a default judgment because Plaintiff sought to hold Rogers and the Coca-Cola Defendants jointly and severally liable.

On November 11, 2015, this Court entered an Order pursuant to Federal Rule of Civil Procedure 55(a) and directed the Clerk to enter default against Rogers.

The Order here has no effect on the Court's prior Order of Default for Plaintiff's pending claims against Rogers. The Order does not eliminate the joint and several liability aspect of the case against both Rogers and the Coca-Cola Defendants and, in fact, the Coca-Cola Defendants are liable for Rogers' actions within the scope of his employment.

Accordingly, Plaintiff respectfully requests that this Court:

1. Enter a Default Judgment pursuant to Federal Rule of Civil Procedure 55(b);

2. Allow Plaintiff to submit a Brief on the effect that the Final Default Judgment has on the Coca-Cola Defendants, and

3. Allow Plaintiff to submit a Brief respecting certification of the Class claims against Rogers.

Plaintiff Is Entitled To A Default Judgment Against Rogers

Default was entered against Rogers for his failure to appear, plead or otherwise defend on November 17, 2015. Now, it is appropriate for a Default Judgment to be entered. Since Rogers and the Coca-Cola Defendants should be held jointly and severally liable, Plaintiff intends to execute the Judgment against them; however, if this Court deems it appropriate, Plaintiff will brief how a default judgment impacts the Coca-Cola Defendants despite the Order.

Plaintiff Is Entitled to Brief the Issue of Joint and Several Liability and *Respondeat Superior*/Vicarious Liability Against the Coca-Cola Defendants

As stated in the Complaint, Rogers and the Coca-Cola Defendants should be held jointly and severally liable for the harms suffered by Plaintiff and the Class. The Coca-Cola Defendants have not challenged such liability and, in fact, acknowledged the risk of such liability when opposing default against Rogers. Entry of a Default Judgment is no longer "premature" under the Coca-Cola Defendants' own theory and an assessment is appropriate at this time.

Plaintiff Is Entitled to Brief the Unresolved Class Certification Request In Light of the Order and Rogers' Default

Although the Order determined that the Class Certification portion of this case is moot, it is not. Plaintiff and the Class request an opportunity to supplement their request for class certification in light of the current posture of this case. Given that the Coca-Cola Defendants' liability is not extinguished by the Court's entry of final judgment in favor of the Coca-Cola Defendants, should the Court to so rule after considering Plaintiff's Motion for Reconsideration filed last week, the entry of default judgment against Rogers then requires the Court to address the remaining issues related to Plaintiff's unresolved request for class certification.

Plaintiff appreciates the Court's timely consideration of these outstanding issues.

Respectfully submitted,

HAVILAND HUGHES

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April 27, 2017

VIA ELECTRONIC MAIL

Honorable Joseph F. Leeson, Jr.
United States District Court
for the Eastern District of Pennsylvania
Edward N. Cahn Courthouse
504 West Hamilton Street
Allentown, PA 18101

Re: ***Shane Enslin v. The Coca-Cola Company, et al.,***
U.S.D.C. for the Eastern District of Pennsylvania, Case No. 14-CV-06476

Dear Judge Leeson:

I write on behalf of the Coca-Cola Defendants in response to Plaintiff's letter of April 17, 2017 ("Pl. Ltr."). In this letter, Plaintiff demands an entry of Default Judgment against Defendant William Rogers, III ("Rogers") pursuant to Federal Rule of Civil Procedure 55(b). Plaintiff further demands that he be allowed to brief the effect of such a Final Default Judgment against Rogers on the Coca-Cola Defendants:

> As stated in the Complaint, Rogers and the Coca-Cola Defendants should be held jointly and severally liable for the harms suffered by Plaintiff and the Class. The Coca-Cola Defendants have not challenged such liability and, in fact, acknowledged the risk of such liability when opposing default against Rogers. Entry of a Default Judgment is no longer "premature" under the Coca-Cola Defendants' own theory and an assessment is appropriate at this time.

(Pl. Ltr. at 2.) Plaintiff further demands that "Plaintiff Is Entitled to Brief the Unresolved Class Certification Request In Light of the Order and Rogers' Default." (*Id.*) Plaintiff does not purport to meet any reconsideration standard, but, in essence, asserts all of the relief demanded is his due given that Rogers did not appear. As set forth below, Plaintiff is now demanding relief on a theory he did not pursue through two years of active litigation, discovery, briefing, and case management. Plaintiff is demanding a do-over after having tried, and failed, to prove any legal claim against the Coca-Cola Defendants. *See Enslin v. The Coca-Cola Company*, 136 F. Supp. 3d 654 (E.D. Pa. 2015); *accord*, *Enslin v. Coca-Cola Company*, No. 14-cv-06476, 2017 WL 1190979, at *1 (E.D. Pa. 2017).

While the Coca-Cola Defendants take no position as to whether Plaintiff should be granted a Default Judgment against Rogers, the Court should deny Plaintiff the leave for the additional briefing he requests. We ask that the Court make clear to Plaintiff that a Default Judgment against Rogers, if granted, does not provide any basis to attack the Court's existing Orders, including judgment as a matter of law for the Coca-Cola Defendants on all counts.

The Complaint Never Alleged A Viable Legal Basis To Impose Liability On The Coca-Cola Companies For The Acts Of Rogers, And Plaintiff Never Tried To Prove One

Now, more than two years into this action, Plaintiff claims that "Plaintiff Is Entitled to Brief the Issue of Joint and Several Liability and *Respondeat Superior*/Vicarious Liability Against the Coca-Cola Defendants." (Pl. Ltr. at 2.) But in his 38-page, 9-count Complaint, Plaintiff never once alleged that the Coca-Cola Defendants were vicariously liable for the actions of Rogers, or liable under a theory of *respondeat superior*. (Dkt. No. 1.)

Plaintiff only mentions "joint and several liability" once in the Complaint, in connection with solely one count – COUNT IX – CONSPIRACY/ CONCERT OF ACTION. The Court dismissed Count IX as to the Coca-Cola Defendants. *See Enslin*, 136 F. Supp. 3d at 679-80. First, the Court found that Plaintiff did not meet pleading standards as to any underlying fraud, making "only vague and general allegations." *Id.* at 674. Second, the Court found as a matter of law that Plaintiff's conspiracy claims failed, because Plaintiff did not plausibly allege "that the sole purpose of the alleged conspiracy was to maliciously harm him." *Id.* at 679. In fact, fatal to his conspiracy claims, "Plaintiff freely admits that the motivations behind the alleged conspiracy are unknown to Plaintiff." *Id.* at 680 (quotation marks omitted).[1] The Court dismissed Plaintiff's claims of conspiracy, the sole claims demanding joint and several liability, **with prejudice**. *Id.*

When Plaintiff later sought leave to file an Amended Class Action Complaint, even that proposed Amended Complaint contained no allegations of vicarious liability, *respondeat superior*, or joint and several liability. (Dkt. No. 127-2.) The proposed Amended Complaint also did not seek to reinstate the dismissed claim for civil conspiracy. In any event, the Court found that even the amendments that Plaintiff did propose were barred as untimely. *Enslin*, 2017 WL 1190979, at *15-16.

In the Rule 26(f) Report submitted to the Court, including Plaintiff's Summary of Claims, Defenses, and Relevant Issues, Plaintiff never stated any intention to raise or prove any theory by which the Coca-Cola Defendants would be liable for the acts of Rogers. (Dkt. No. 33.) Plaintiff never asked the Court to schedule any proceedings on those issues.

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[1] While the Court's decision was in response to a Motion to Dismiss by the Coca-Cola Defendants, the same logic would compel dismissal of claims against Rogers. Since, as a matter of law, Plaintiff failed to state an actionable conspiracy **at all**, it follows inescapably that Plaintiff failed to state an actionable conspiracy among the Coca-Cola Defendants and Rogers. *See, e.g., Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 554 (1872) (finding it "unseemly and absurd, as well as unauthorized by law" for there to be "one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge").

In June 29, 2016, the Court set a Scheduling Order requiring that "Plaintiff shall file any motion for class certification no later than July 26, 2016." (Dkt. No. 122 at 3.) In his Motion for Class Certification, brought against solely the Coca-Cola Defendants, Plaintiff cited to more than a dozen allegedly common issues of law and fact to be litigated. (Dkt. No. 125-1 at 37-38.) None involved vicarious liability, *respondeat superior*, or joint and several liability. Despite the entry of a default against Rogers since November 11, 2015, Plaintiff made no argument that this default had any consequence as to class certification.

Likewise, the Court ordered that "[a]ll dispositive motions shall be filed no later than December 21, 2016." (Dkt. No. 122 at 3.) Plaintiff's Motion for Partial Summary Judgment did not propose to establish any vicarious liability, *respondeat superior*, or joint and several liability of the Coca-Cola Defendants for the acts of Rogers. (Dkt. No. 168.) Plaintiff did not file any motion claiming that as a matter of law the Coca-Cola Defendants were liable for Rogers. When the Coca-Cola Defendants moved for judgment as a matter of law on all counts, Plaintiff did not oppose on the basis of any alleged vicarious liability. The same default that exists now against Rogers existed then.

This Court has provided Plaintiff ample opportunity to make his case. All of the relevant deadlines have passed. As a matter of law, after two years of litigation, this Court found that Plaintiff stated no case against the Coca-Cola Defendants. Plaintiff cannot be allowed to pretend that all of his choices (and decisive losses) to date never happened.

Plaintiff's Suggestion That The Coca-Cola Defendants Have Admitted To Joint And Several Liability Is False

This Court knows the truth of the matter, but the Coca-Cola Defendants restate it for the record. Plaintiff asked the clerk to enter default against Rogers "for failure to pled [*sic*] or otherwise defend in accordance with Fed. R.C.P 55(a)." (Dkt. No. 13.)

The Coca-Cola Defendants asked that the Court decline to enter that default as: "Plaintiff alleges that both the Coca-Cola Defendants and Defendant Rogers 'conspired' together to 'defraud' Plaintiff. Based on these accusations, Plaintiff alleges that the Coca-Cola Defendants and Defendant Rogers should be held jointly and severally liable for their alleged conspiracy." (Dkt. No. 22 at 2.)

As noted above, the Court subsequently dismissed the relevant conspiracy claim – the only claim demanding joint and several liability – with prejudice. The dismissal with prejudice of the conspiracy claim mooted the stated concern of the Coca-Cola Defendants. And, as detailed above, Plaintiff never even tried to resurrect this claim.

Following the Coca-Cola Defendants' letter concerning the entry of default, the Court did enter default under Rule 55(a) against Rogers. (Dkt. No. 37.) In so doing, the Court further, meticulously, addressed the concerns of the Coca-Cola Defendants:

> The Coca-Cola Defendants oppose the entry of a default against Defendant [Rogers] because **Plaintiff's counsel "may believe he can use the entry of default against Defendant Rogers to estop the Coca-Cola**

> **Defendants from contesting an issue of law or fact or that entry of default would be admissible evidence against the Coca-Cola Defendants at a future date**." See Letter from Coca-Cola Defendants, at 3, Mar. 17, 2015, ECF No. 22. However, **an entry of default cannot be used in that manner**, and the Coca-Cola Defendants' fear that Plaintiff's counsel may believe otherwise does not warrant denying Plaintiff's request to enter a default against Defendant Rogers.

(Dkt. No. 37 at 1, n.4 (emphasis added).)

Plaintiff has done literally nothing since entry of that decision to prove, or even argue, that the Coca-Cola Defendants are liable for the acts of Rogers. The Third Circuit Court of Appeals has refused to impose liability on a theory *respondeat superior* on the basis of employee defaults. *See, e.g., Boyd v. N.J. Dept. of Corrections*, 583 F. App'x. 30, 32 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 2374 (2015) (non-precedential). In *Boyd*, plaintiffs brought a sexual harassment and discrimination suit against their former employer and multiple co-workers. One such co-worker did not respond, and the District Court entered a default judgment against him. The District Court then dismissed all claims against the employer, Department of Corrections, on the pleadings. On appeal, plaintiffs argued that the employer:

> should be liable under a theory of *respondeat superior* for [the co-worker's] default judgment. She contends that an employer is subject to liability for torts committed by employees acting within the scope of their employment...

Id. at 32. The Third Circuit rejected this application of *respondeat superior*, finding that plaintiffs cited "**no authority for the separate proposition that an employer is liable for a default judgment against an employee**." *Id.* (emphasis added). The Third Circuit affirmed the dismissal of the defendant employer despite the default judgment against the co-defendant employee.

The Coca-Cola Defendants trust this Court's assurances that Plaintiff will not be able to use the default of Rogers to prejudice the Coca-Cola Defendants, who have completely prevailed in this matter and, as a matter of law, should be accorded the benefit of finality. Plaintiff's demands should be denied.

Respectfully submitted,

Nipun J. Patel

cc: All counsel of record (via email)