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**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF NEW JERSEY**

**Linda Franulovic**, individually and on  
 behalf of a class of persons,

Plaintiffs,

v.

**The Coca-Cola Company**,  
 Defendant.

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§  
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§  
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§  
§  
§

Civil Action No. 07-539 (RMB)

CLASS ACTION

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**AFFIDAVIT OF MARK R. CUKER IN SUPPORT  
 OF PLAINTIFF’S RULE 56(f) MOTION AND  
 OPPOSITION TO SUMMARY JUDGMENT**

---

MARK R. CUKER, in lieu of oath, hereby certifies and says:

1. I am a partner at the law firm of Williams Cuker Berezofsky, attorneys for Plaintiff Linda Franulovic and the Class in the above-captioned matter. I submit this

Affidavit in support of Plaintiff's Rule 56(f) Motion and Opposition to Defendant's Motion for Summary Judgment. I am personally familiar with the facts set forth herein.

2. Attached as **Exhibit A** hereto is a true and correct copy of transcript excerpts of the deposition of Plaintiff Linda Franulovic, taken September 30, 2008;

3. Attached as **Exhibit B** hereto is the Court's October 5, 2007 Letter Order (Doc. 57) on discovery issues, wherein the Court said that it would not permit "open-ended discovery on merits issues." Order at 2 ¶2.

4. Attached as **Exhibit C** hereto is a true and correct copy of Defendant The Coca Cola Company's ("Coke's") Responses and Objections to Plaintiff's Supplemental Discovery Requests in this matter, served August 31, 2007. In her Requests for Production, Franulovic asked Coke to produce documents pertaining to the truthfulness of its advertising statements concerning Enviga's alleged "calorie burning" effects. *See, e.g.*, Requests No. 1, 2, 10, 12, 13, 14, 15, 16, 27, 28. In response to these and other Requests, Coke objected to producing and refused to produce such documents on the grounds that the Court did not authorize merits discovery: "Defendant objects to the production of these documents, if any, at this time on the grounds that ***such documents are not relevant to class certification and are inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.***" *See* Responses to Requests No. 1, 2, 3, 5, 10, 11, 12, 13, 14, 15, 16, 17, 27, 28, 29 (emphasis added).

5. Attached as **Exhibit D** hereto is a true and correct copy of Defendant's Responses and Objections to Plaintiff's Second Set of Supplemental Discovery Requests in this matter, served on October 27, 2008, almost a month *after* Coke deposed

Franulovic and three months before Coke moved the Court for summary judgment on the merits. In her Second Set of Supplemental Requests for Production, Franulovic again asked Coke to produce documents pertaining to the truthfulness of its advertising statements concerning Enviga's alleged "calorie burning" effects. *See, e.g.*, Requests No. 30, 31, 32, 33, 34, 35, 36, 37, 41, 42, 48. In response to each of these and other Requests, Coke again objected to producing and refused to produce such documents on the grounds that the Court did not authorize merits discovery, claiming that "these requests are not appropriate *at this point in the litigation*. *Discovery has been limited to information which is necessary for class certification*, and Plaintiff already filed her Motion for Class Certification, so any other class certification discovery is unnecessary." General Objections at 2 (emphasis added); *see also* Responses to Requests No. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48.

6. Attached as **Exhibit E** hereto is a true and correct copy of "The Special K Challenge" Print Advertisement (Shape, Oct. 2008).

7. Pending ruling on class certification, the parties have not designated experts on the merits of this case, and Franulovic has not deposed any of Defendant's employees or other persons with knowledge of the merits of this case. Thus, Franulovic cannot present evidence essential to oppose summary judgment on all possible grounds.

I hereby certify that all of the foregoing statements are true and accurate. I further certify that I am aware that if any of the statements made by me herein are wilfully false, I am subject to punishment.

/s/Mark R. Cuker  
Mark R. Cuker

Dated: March 1, 2009

# **Exhibit A**

1

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE

LINDA FRANULOVIC, individually and  
on behalf of a class of persons,

CIVIL NO. :  
1:07-cv-00539-RMB-JS

Plaintiff, CLASS ACTION

v. THE COCA-COLA COMPANY,

Defendant.

---

DEPOSITION OF  
LINDA FRANULOVIC  
TAKEN ON BEHALF OF THE DEFENDANT

September 30, 2008  
9:05 a.m.

1100 Southeast 17th Street  
Room 1120  
Fort Lauderdale, Florida

Terri J. Flicek, Shorthand Reporter

2

1 APPEARANCES OF COUNSEL

2

3 On behalf of the Plaintiff:

4 CENTER FOR SCIENCE IN THE PUBLIC INTEREST

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12 On behalf of the Defendant:

13 ALSTON & BIRD, LLP

14 SCOTT A. ELDER, ESQ.

15 1201 West Peachtree Street

16 Atlanta, Georgia 30309

17 404-881-7000

18 404-881-7777

19 scott.elder@alston.com

20

21 Also Present:

22 SHANI C. THOME, The Coca-Cola Company

23 NABINA J. SINHA, Nestle, U.S.A.

24

25

3

1 INDEX OF EXAMINATION

2 WITNESS:

3 Linda Franulovic

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5 DIRECT EXAMINATION 4

6 By Mr. Elder

7

8 INDEX TO EXHIBITS

9 Defendant's

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23

24 (Original Exhibits 1 - 13 have been attached to the

25 original transcript.)

4

1 Deposition of Linda Franulovic

2 September 30, 2008

3

4 LINDA FRANULOVIC, having been first duly sworn,

5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. ELDER:

8 Q. Ms. Franulovic, good morning, my name is Scott

9 Elder, I represent the Coca-Cola Company in the lawsuit

10 that you've brought about the product Inviga.

11 Could you start by telling us your full name and

12 address for the record, please?

13 A. Linda Franulovic, 5200 North Ocean Boulevard

14 Lauderdale By The Sea, Florida 33308.

15 Q. How long have you lived at that address?

16 A. Since April 1st.

17 Q. Of 2008?

18 A. 2008.

19 Q. And prior to that where did you live?

20 A. Merchantville, New Jersey. My God, I forgot the

21 address already. 39 West Chestnut Street, Apartment B.

22 Q. And how long did you live at that address?

23 A. Eight years, seven years.

24 Q. At your address in New Jersey, did anyone else

25 live there with you?



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21

1 know what I'm referring to when I use that term?  
 2 A. The other people, the other people in New Jersey,  
 3 Pennsylvania, in my area, yes.  
 4 Q. So you understand who I'm referring to by the  
 5 class members?  
 6 A. Uh-huh.  
 7 Q. Yes?  
 8 A. Yes.  
 9 Q. And do you know whether or not you have duties in  
 10 this lawsuit to look out for the interests of those class  
 11 members as the named class representative?  
 12 A. Yes.  
 13 Q. Okay. You believe that you have those duties?  
 14 A. Yes.  
 15 Q. And tell me how you are fulfilling those duties,  
 16 how are you looking out for the interests of the other  
 17 class members?  
 18 A. By being here.  
 19 Q. By being here at the deposition?  
 20 A. Yes.  
 21 Q. Okay. And what other things?  
 22 A. I'm not sure that there are other things that I  
 23 need to do.  
 24 Q. In terms of the allegations that have been made  
 25 in your lawsuit and the claims that have been asserted,

22

1 have you had any involvement in developing those claims,  
 2 deciding which things to assert or not assert?  
 3 A. I don't understand your question.  
 4 Q. Okay. We'll look at some documents in a minute,  
 5 but you understand in this case there's a written document  
 6 called a petition or a complaint that sets out your claim  
 7 against the Coca-Cola Company, do you understand that?  
 8 A. Yes.  
 9 Q. You've seen that document before?  
 10 A. Yes.  
 11 Q. Did you have any input in deciding what goes into  
 12 that document?  
 13 A. I don't know.  
 14 Q. And why don't you know?  
 15 A. Because I don't know if that document is based on  
 16 what I say, or if it's already a predetermined paper that  
 17 lawyers write up, I don't know.  
 18 Q. Tell me what you understand to be the basic  
 19 allegation or claim that you're making in this case.  
 20 A. Inviga has false representation on the can and in  
 21 advertisements of what the product is supposed to do.  
 22 Q. And what do you believe those false  
 23 representations are?  
 24 A. That it burns calories while you're drinking it,  
 25 that you're supposed to drink, on TV it didn't say three

23

1 cans, on TV it just says to drink it, then it says three  
 2 cans, then I come to find out that it's 17 cans.  
 3 Q. Tell me what you mean by you came to find out  
 4 that it's 17 cans?  
 5 A. I saw it on one of the television shows, one of  
 6 the news TV shows.  
 7 Q. And it's 17 cans to do what?  
 8 A. To burn calories.  
 9 Q. Your understanding, you believe from a television  
 10 show that to burn -- Tell me, to burn how many calories?  
 11 A. I believed on the advertisements that I saw in  
 12 magazines and on billboards that drinking the drink would  
 13 help you to burn calories, then I read on the can that it  
 14 was three cans a day, then after that had gone on for a  
 15 couple months I heard on TV that they were saying that it  
 16 was not true, that's when I started to believe that they  
 17 were lying, and then I started to ask questions.  
 18 Q. And tell me about this 17 can issue again.  
 19 A. Well, you could probably go on Channel 3 and find  
 20 out what newscast they were broadcasting at the time,  
 21 because I always have CBS on in New Jersey. And I was  
 22 listening to the TV, I wasn't actually watching it, and I  
 23 heard them make claims that there was something going on  
 24 with the product.  
 25 Q. And specifically tell me what you remember about

24

1 the 17 cans.  
 2 A. That it was, that you needed to drink 17 cans a  
 3 day in order for the claims that they're claiming to be  
 4 true.  
 5 Q. What else, if anything, about the advertising or  
 6 the claims do you believe to be untrue?  
 7 A. All of them.  
 8 Q. Okay. When you say all of them, what do you  
 9 mean?  
 10 A. Well, they didn't do anything for me, and if  
 11 they're advertising on TV just to drink it and it burns  
 12 calories, then you actually have to go to the back of the  
 13 can and read the very small print and read that it's three  
 14 cans, which I did one day because I just happened to be  
 15 reading the can, then that's not true, it's just --  
 16 Everything is not true.  
 17 Q. Tell me when you first purchased Inviga.  
 18 A. February.  
 19 Q. February of 2007?  
 20 A. Yes.  
 21 Q. And at that time were you trying to lose weight?  
 22 A. Yes.  
 23 Q. What things were you doing to try to lose  
 24 weight?  
 25 A. Exercise, removing a few things from my daily



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25

1 diet.

2 Q. When you say removing a few things, what do you

3 mean?

4 A. Mike and Ike's.

5 Q. Mike and Ike's is ice cream?

6 A. Candy.

7 Q. So why were you removing Mike and Ike's?

8 A. It just wasn't necessary.

9 Q. When you were trying to lose weight were you

10 keeping up with how many calories you were taking in?

11 A. Yes.

12 Q. And how were you keeping up with that?

13 A. Mental, just knowing.

14 Q. Just knowing?

15 A. Uh-huh.

16 Q. How many calories were you trying to take in on a

17 daily basis in February of 2007?

18 A. I don't know.

19 Q. Tell me what your understanding is of the

20 relationship between the calories that you consume and

21 your weight.

22 A. Can you repeat the question?

23 Q. Sure. I'm trying to find out what your

24 understanding is of the relationship between calories and

25 weight?

26

1 A. If you eat too many calories you gain weight.

2 Q. And how many calories do you have to eat to gain

3 weight?

4 A. I think it's, everybody is different.

5 Q. By the same token, you understand that if you

6 take in fewer calories you might lose weight?

7 A. Yes, but you have to burn 3,200 calories to lose

8 one pound.

9 Q. And do you understand that if you take in the

10 same number of calories that you are expending, using up,

11 that your weight will stay the same?

12 A. Yes.

13 Q. And did you understand that in February of 2007?

14 A. Yes. But your product claims to burn calories

15 just by sitting there.

16 Q. Tell me what things you were doing in February of

17 2007 to -- Well, let me back up. Were you doing things in

18 February of 2007 to reduce the number of calories you were

19 consuming?

20 A. Yes.

21 Q. And were you attempting to reduce the number of

22 calories by any certain amount?

23 A. No.

24 Q. And you don't know how many calories you were

25 taking in or trying to take in on a daily basis in

27

1 February of 2007?

2 A. Right.

3 Q. Tell me in February of 2007 what a typical day

4 would have been for you in terms of the food that you took

5 in, what did you eat for breakfast, lunch, dinner, that

6 kind of thing?

7 A. One cup soy milk, one cup Go Lean cereal, lunch

8 probably a banana, chicken, and then again chicken, I eat

9 six times a day, probably vegetables that I cooked, then

10 I'd go home, probably eat more chicken, and maybe some

11 yogurt, and probably Mike and Ike's, but if I was trying to

12 cut them out then I wouldn't eat the Mike and Ike's.

13 Q. And when you say a cup of soy milk and a cup of

14 cereal, did you actually measure it?

15 A. The cereal.

16 Q. You did?

17 A. Yeah.

18 Q. And you measured it every day?

19 A. Yeah.

20 Q. And this was in February of 2007?

21 A. Yes.

22 Q. How many calories are in a cup of --

23 A. Go Lean?

24 Q. -- a cup of soy milk?

25 A. I don't know.

28

1 Q. And when you say Go Lean are you talking about

2 Kashi Go Lean Crunch?

3 A. Yes.

4 Q. How many calories are in a cup of Kashi Go Lean

5 Crunch?

6 A. It's not the Crunch.

7 Q. Okay. It's a different kind of Kashi?

8 A. Kashi Go Lean, yeah.

9 Q. How many calories are in that cereal, in a cup?

10 A. I don't know.

11 Q. Anything else that you would, any other kinds of

12 things that you would typically eat for breakfast?

13 A. Any other things I would typically eat what?

14 Q. For breakfast?

15 A. Do I know how many other calories?

16 Q. For breakfast?

17 A. No, I had Kashi this morning, I've had Kashi

18 every morning since it came out.

19 Q. Do you drink coffee or anything else?

20 A. Very little.

21 Q. Do you drink a cup of coffee every day?

22 A. No.

23 Q. Sometimes you have coffee?

24 A. Sometimes.

25 Q. When you have coffee do you put anything in it?

29	31
<p>1 A. Soy milk.</p> <p>2 Q. Orange juice?</p> <p>3 A. No.</p> <p>4 Q. Fruit juice, anything like that?</p> <p>5 A. Occasionally.</p> <p>6 Q. For lunch --</p> <p>7 MR. GARDNER: Scott, for clarification, are you</p> <p>8 still stuck at 2007? Because I think we're moving</p> <p>9 forward, just so we're clear?</p> <p>10 Q. Sure. My questions right now all relate to</p> <p>11 February of 2007.</p> <p>12 A. Okay.</p> <p>13 Q. For lunch you mentioned, I think you said a</p> <p>14 banana and chicken?</p> <p>15 A. Uh-huh.</p> <p>16 Q. Tell me, when you say chicken, do you mean a</p> <p>17 chicken sandwich, do you mean a piece of chicken?</p> <p>18 A. Piece of chicken, grilled chicken.</p> <p>19 Q. And where would you get lunch?</p> <p>20 A. I'd bring it.</p> <p>21 Q. You brought it every day in February of 2007?</p> <p>22 A. Almost every day.</p> <p>23 Q. If you didn't bring your lunch, where would you</p> <p>24 get it?</p> <p>25 A. Wa Wa or the grocery store across the street,</p>	<p>1 A. Yes.</p> <p>2 Q. At the, I don't know what you would call them, at</p> <p>3 the lunches in between breakfast and the last meal of the</p> <p>4 day, would you typically eat the same thing or different</p> <p>5 things?</p> <p>6 A. Typically the same thing.</p> <p>7 Q. And what would that be?</p> <p>8 A. Besides the chicken and the vegetables?</p> <p>9 Q. Right.</p> <p>10 A. Fruit, yogurt, Power Bars, sometimes I would</p> <p>11 bring the crunch, the Go Lean Crunch, as a snack, I'm</p> <p>12 always eating healthy.</p> <p>13 Q. How often do you eat a Power Bar?</p> <p>14 A. You mean then?</p> <p>15 Q. Right.</p> <p>16 A. Maybe three times a week.</p> <p>17 Q. How many calories are in a Power Bar?</p> <p>18 A. I don't know.</p> <p>19 Q. How many calories are in a banana?</p> <p>20 A. I don't know.</p> <p>21 Q. If I listed out the other foods that you listed</p> <p>22 for me, fruits, vegetables, grilled chicken, would you</p> <p>23 know how many calorie ares in any of them?</p> <p>24 A. No, but I know how much fat is in them.</p> <p>25 Q. But you don't know their caloric content?</p>
30	32
<p>1 Stop and Shop.</p> <p>2 Q. So a typical lunch for you would have been a</p> <p>3 banana and a piece of grilled chicken?</p> <p>4 A. Yes, but I eat six times a day.</p> <p>5 Q. Okay. And so, do you eat six times a day at a</p> <p>6 set time?</p> <p>7 A. Every three hours.</p> <p>8 Q. So in February of 2007 you were eating six times</p> <p>9 a day?</p> <p>10 A. Yes.</p> <p>11 Q. And were you eating every three hours then?</p> <p>12 A. Yes.</p> <p>13 Q. And what were the, give me the times?</p> <p>14 A. My schedule is kind of strange, so I'll give you</p> <p>15 approximately, nine, twelve, three, six, and then nine</p> <p>16 again.</p> <p>17 Q. Why was your schedule strange at that time?</p> <p>18 A. Because Bernard's is open every day from 9:00 to</p> <p>19 10:00, sometimes 12:00, so we worked in shifts. Sometimes</p> <p>20 I had an early shift, sometimes I had a late shift.</p> <p>21 Q. Did you have any other jobs at that time?</p> <p>22 A. No.</p> <p>23 Q. How are you employed currently?</p> <p>24 A. Stylist, I'm a hair stylist.</p> <p>25 Q. At a salon here in Fort Lauderdale?</p>	<p>1 A. No.</p> <p>2 Q. In February of 2007 how often did you exercise?</p> <p>3 A. Four times a week.</p> <p>4 Q. And what did you do for exercise?</p> <p>5 A. Tae Bo and running.</p> <p>6 Q. Were you a member of a gym?</p> <p>7 A. No.</p> <p>8 Q. So in February of 2007 these habits that we've</p> <p>9 talked about, your eating and your exercise, were those</p> <p>10 new habits for you or things that you had been doing for</p> <p>11 awhile?</p> <p>12 A. Things that I had been doing for awhile.</p> <p>13 Q. Okay. And how much did you weigh in February of</p> <p>14 2007?</p> <p>15 A. I don't know, approximately, I don't weigh</p> <p>16 myself.</p> <p>17 Q. And between November of 2006 and May of 2007 how</p> <p>18 did your weight change, if at all?</p> <p>19 A. I gained five pounds.</p> <p>20 Q. Is there a particular reason that you remember</p> <p>21 that?</p> <p>22 A. Because I was trying to lose five pounds.</p> <p>23 Q. But you don't know what you weighed in February</p> <p>24 of '07?</p> <p>25 A. No, I just know my clothes were tight.</p>

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33

1 Q. You talked about Mike and Ike's candy, did you eat  
2 any other candy, anything else, anything like that, this  
3 is in February of 2007?  
4 MR. GARDNER: Object to the form of the question,  
5 can you get a little more descriptive on anything like  
6 that? I think you're saying junk food, will you do that?  
7 Q. Junk food is a good description, we'll go with  
8 junk food.  
9 A. No junk food. For some reason I only eat candy  
10 at night right before I go to bed.  
11 Q. Don't eat ice cream?  
12 A. No.  
13 Q. Chocolate chip cookies?  
14 A. No.  
15 Q. Snack Wells, anything like that?  
16 A. Maybe something homemade if my mom and grandma  
17 made it, maybe.  
18 Q. How often did you eat out in February of 2007?  
19 A. Once a month.  
20 Q. Ms. Franulovic, would you agree that in February  
21 of 2007 you were aware that whether you gain or lose  
22 weight is a function of how many calories you take in  
23 versus how many calories you expend or use up?  
24 A. Is a function? Can you rephrase that?  
25 Q. Okay. Would you agree that in February of 2007

34

1 you understood, you knew, that whether or not your weight  
2 went up or down, you gained or lost weight, was a function  
3 of how many calories you took in versus how many calories  
4 you used up?  
5 A. Yes?  
6 MR. GARDNER: Object to the form of the question,  
7 could you define function?  
8 MR. ELDER: The question has been asked and  
9 answered, Steve.  
10 MR. GARDNER: I have objected to it, I gave you  
11 the opportunity to fix it.  
12 MR. ELDER: You can object to form, it's a proper  
13 question.  
14 Q. (By Mr. Elder) Is it fair to say that while you  
15 were drinking Inviga you don't know how many calories you  
16 were taking in on a daily basis?  
17 A. Yes.  
18 Q. Tell me about the first time you purchased a can  
19 of Inviga.  
20 A. What led up to it?  
21 Q. Yes, just tell me about buying it.  
22 A. I went into the Wa Wa and I saw it in the aisle,  
23 and I picked it up and took it to the counter and paid for  
24 it.  
25 Q. Did you see any, when you say you saw it in the

35

1 aisle, did you see any point of sale materials, posters,  
2 anything like that, or did you literally just --  
3 A. I --  
4 Q. Let me finish my question.  
5 -- or were you just looking at the can?  
6 MR. GARDNER: Object to form, two questions.  
7 Q. You may answer.  
8 A. I saw advertisements in the magazine before I  
9 bought it, I was aware of it.  
10 Q. Prior to buying it you were aware of it, and  
11 we'll talk about those ads in a minute, but when you went  
12 in to buy the first can, do you recall whether or not you  
13 just saw the can in the Wa Wa or whether there was other  
14 advertising around?  
15 MR. GARDNER: Object to form.  
16 Q. You can answer.  
17 A. Just the can.  
18 Q. And so when you picked up the can off of the  
19 shelf, did you read it?  
20 A. No.  
21 Q. You took it to the front, bought it, did you  
22 drink it immediately?  
23 A. Yes.  
24 Q. Did you read the can before you drank it?  
25 A. Not the whole can.

36

1 Q. Do you recall which parts of it -- Well, when you  
2 say not the whole can, do you mean that you read part of  
3 it?  
4 A. Yes.  
5 Q. And do you recall which parts of it you read?  
6 A. The contents.  
7 Q. The ingredients?  
8 A. Yes.  
9 Q. Other than the ingredients when we're talking  
10 about this first can of Inviga you purchased, do you  
11 recall whether you read any other parts of the can itself?  
12 A. I did not.  
13 Q. You don't recall or you didn't read anything  
14 else?  
15 A. I did not read anything else.  
16 Q. All right. So after that first can, tell me  
17 about your purchase history and, you know, when did you  
18 drink Inviga next?  
19 A. I drank it every day, and I worked five days a  
20 week. Then at some point, I don't remember how long,  
21 maybe a month, I started to drink three a day because I  
22 read it on the can.  
23 Q. What did you understand or think Inviga would do?  
24 A. Burn calories.  
25 Q. How many calories?

37

1 A. I don't know.

2 Q. When you say you don't know, do you mean that  
3 while you were drinking Inviga in 2007 you didn't know how  
4 many calories you thought that it would burn?

5 A. Yes.

6 Q. You said that eventually you started drinking it  
7 every day, so I want to piece in between buying that first  
8 can and drinking in every day. Give me an idea of the  
9 time frame there, and you know, did you, after that first  
10 can did you buy more cans immediately, you know, was it a  
11 little while later? Do you understand what I'm asking?  
12 I'm just trying to understand how your purchases developed  
13 over time. So after that first can, tell me in as much  
14 detail what you remember happened next.

15 MR. GARDNER: Object to form. For form reasons,  
16 do you mind a brief statement, just object, form?

17 MR. ELDER: I think the rules require it.

18 MR. GARDNER: Instead of object to the form of  
19 the question, can I say object, form?

20 MR. ELDER: I got you

21 MR. GARDNER: I need a yes.

22 MR. ELDER: Yes.

23 Q. (By Mr. Elder) You can answer.

24 A. I bought one can and I continued to buy one can  
25 every day.

38

1 Q. Okay. For how long?

2 A. Maybe two weeks.

3 Q. Okay. And do you remember what flavor you  
4 bought?

5 A. Peach.

6 Q. Did you always buy peach?

7 A. Yes. Well no, I tried the other flavors and I  
8 didn't like them.

9 Q. So after buying that first can, for a period of  
10 maybe two weeks --

11 A. Yes.

12 Q. -- you bought a can a day?

13 A. No, I bought a can a day for two weeks, then I  
14 read on the can that you need to drink three a day, so  
15 then I started to buy three a day, and then --

16 Q. During the period -- Let me stop you there.  
17 During the period that you were drinking one can per day  
18 did you read the back of the can during that time period?

19 A. Yes, during the period I was buying one a day,  
20 yes, the day I read three cans was the day I started to  
21 buy three cans.

22 Q. Okay. But you had been buying a can a day for  
23 maybe two weeks, something like that, about that long --

24 A. Right.

25 Q. -- before you read the back of the can?

39

1 A. Yes.

2 Q. Okay. And then you read the back of the can and  
3 you saw the reference to three cans and you started buying  
4 three cans a day?

5 A. Right.

6 Q. And I think what you mean when you say you  
7 started buying three cans a day, I think in your discovery  
8 response you said you started buying it in bulk?

9 A. Yes.

10 Q. So you weren't literally going in to buy it three  
11 times a day?

12 A. I was drinking it three times a day.

13 Q. And when you started buying in bulk, tell me what  
14 you mean, six packs?

15 A. Walgreen's had them on sale for \$12 --

16 MR. GARDNER: Let me stick in an object, form to  
17 the question, but go ahead.

18 Q. How many for \$12?

19 A. 12.

20 Q. So how many did you buy?

21 A. A lot.

22 Q. Do you recall roughly what a lot is?

23 A. Every week I bought them.

24 Q. And when you say you drank three a day, did you  
25 drink them at particular times?

40

1 A. Yes.

2 Q. And what times?

3 A. In the morning, and then two at work, I don't  
4 know, in the afternoon, evening, you know, whenever I felt  
5 like it.

6 Q. So did you keep some at home --

7 A. Yes.

8 Q. -- and keep some at work?

9 A. And in my car.

10 Q. During this time period when you were drinking  
11 Inviga did you believe that Inviga would make you lose  
12 weight?

13 A. I believed it would burn calories.

14 Q. And by your answer do I understand that burning  
15 calories and losing weight aren't necessarily the same  
16 thing?

17 A. They can be.

18 Q. Okay. They can be but they don't have to be?

19 A. For me they are.

20 Q. Okay. You believe that they are the same thing?

21 A. Yes.

22 Q. And so I go back to my question, did you believe  
23 that drinking Inviga would make you lose weight?

24 A. Yes.

25 Q. Why?

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1 A. Because it burns calories.  
 2 Q. And tell me what you understand burning calories  
 3 to mean.  
 4 A. Well, when your metabolism is increased you can  
 5 burn calories even though you're not working out, burn  
 6 calories constantly, so if your metabolism goes up you're  
 7 going to burn calories. So that's what I believed the can  
 8 would do is increase my metabolism.  
 9 Q. By how much?  
 10 A. I don't know.  
 11 Q. When did you, over what period of time did you  
 12 think Inviga would cause you to lose weight?  
 13 A. I don't know.  
 14 Q. How much weight did you expect to lose drinking  
 15 Inviga?  
 16 A. I wanted to lose five pounds.  
 17 Q. And you wanted to lose five pounds just  
 18 generally, does that -- What I'm asking is, does that five  
 19 pound number have a relationship to Inviga?  
 20 A. I don't understand your question.  
 21 Q. Is there anything about the Inviga, is there any  
 22 portion of what you remember about the Inviga advertising  
 23 that you believe told you it would make you lose five  
 24 pounds, specifically that number, five?  
 25 A. No.

42

1 Q. Is there any particular amount of weight that you  
 2 believed you were going to lose by drinking Inviga?  
 3 A. No.  
 4 Q. Did you know, you commented earlier about, I  
 5 think you said it was 3,200 calories, the number of  
 6 calories that make up a pound, do you recall that earlier?  
 7 A. Yes.  
 8 Q. Were you aware in 2007 when you were drinking  
 9 Inviga how many calories you have to take out of your  
 10 diet, eliminate, in order to lose one pound?  
 11 A. No.  
 12 Q. Ms. Franulovic, I have marked as Exhibit 1 to  
 13 your deposition a copy of the second amended class action  
 14 complaint in this case, have you seen that document before  
 15 today?  
 16 (Defendant's Exhibit 1 was marked for  
 17 identification.)  
 18 A. Yes.  
 19 Q. When did you see it first?  
 20 A. I don't remember, I don't remember which one this  
 21 is.  
 22 Q. Have you seen several of these over --  
 23 A. Yes.  
 24 Q. -- since you've been involved in this litigation?  
 25 A. Yes.

43

1 Q. Turn with me if you could to Page 4, it says at  
 2 the top, Facts, did you ever take a bus or train to work  
 3 in New Jersey?  
 4 A. Did I ever what?  
 5 Q. Take a bus or a train to work while you were in  
 6 New Jersey?  
 7 A. No.  
 8 Q. Paragraph 17 alleges that, Coke's advertising  
 9 campaign was so extensive that in some places in early  
 10 2007 every single advertisement in a bus or train car  
 11 consisted of Inviga ads, did you ever see a bus or a train  
 12 car where every single ad consisted of Inviga ads?  
 13 A. No.  
 14 Q. The next sentence says, Billboards containing  
 15 extravagant Inviga claims were ubiquitous, did you ever  
 16 see any billboards containing any advertising for Inviga?  
 17 A. I don't remember, maybe.  
 18 Q. You're not sure?  
 19 A. I don't remember.  
 20 Q. Okay. In the next paragraph, Paragraph 18, it  
 21 says, To the average reasonable consumer in New Jersey and  
 22 elsewhere in the United States burning calories or  
 23 reducing caloric consumption results in losing weight, or  
 24 at least offsetting weight gain from other calories. And  
 25 in that sentence it says burning calories or reducing

44

1 caloric consumption results in losing weight, do you  
 2 believe that to be true?  
 3 A. Yes.  
 4 Q. To your understanding, you know, in your mind, to  
 5 your knowledge, is there a difference between burning  
 6 calories and reducing caloric consumption?  
 7 A. Yes.  
 8 Q. What's the difference?  
 9 A. When you burn calories, when I burn calories I  
 10 should say, I'm working out, and if you're working out,  
 11 specifically weight training, it helps you to burn  
 12 calories even while standing still, so that Inviga was  
 13 supposed to increase that, if you're just reducing  
 14 calories you could put yourself in a state of starvation,  
 15 which actually reduces your metabolism, which you could  
 16 gain weight and not lose weight at all.  
 17 Q. Do you believe that reducing caloric consumption  
 18 can result in losing weight?  
 19 A. It can, yes.  
 20 Q. And that's commonly referred to as dieting?  
 21 A. Yes.  
 22 Q. You understand and understood in February of 2007  
 23 that one thing people do to lose weight is reduce caloric  
 24 consumption?  
 25 A. Yes.



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45

1 Q. And have you ever done that yourself?

2 A. Yes.

3 Q. Were you doing that in February of 2007?

4 A. Yes.

5 Q. And how were you trying to reduce your caloric

6 consumption?

7 A. Cutting out the Mike and Ike's.

8 Q. Anything else?

9 A. No.

10 Q. Your diet generally that you've described for me,

11 do you consider that a way of reducing caloric

12 consumption?

13 A. Yes. Wait, I'm sorry, say that again.

14 Q. Your diet that you generally described for me is

15 -- Let me put this way. In February of 2007 were you

16 trying to eat healthy?

17 A. Yes.

18 Q. Were you trying to eat foods that you believed

19 had a lower caloric content than alternative foods, than

20 foods you weren't eating?

21 A. No. It --

22 Q. Go ahead.

23 A. I don't care about calories, I care more about

24 fat and protein.

25 Q. So in your personal diet, the way you believe you

46

1 either lose weight or don't gain weight is to control the

2 amount of fat and protein you're taking in?

3 A. Yes.

4 Q. The end of this sentence where it says, Or at

5 least offsetting weight gain from other calories, what

6 does that mean?

7 A. Offsetting weight gain, it means to tip the

8 scales.

9 Q. I'm sorry?

10 A. To tip the scales, to work in the opposite

11 direction. You're asking me to define a portion of a

12 sentence?

13 Q. I'm asking you what that means to you in terms of

14 this, this is an allegation in your complaint, in terms of

15 this lawsuit.

16 A. I don't understand how else it can be explained

17 except the way it's written.

18 Q. Okay. Was it your interpretation of the Inviga

19 advertising that you could eat or drink whatever you

20 wanted and as long as you were also drinking Inviga you

21 would lose weight?

22 A. No.

23 Q. Why not?

24 A. Because that doesn't make sense. You're saying I

25 can drink a milkshake and Inviga and still lose weight,

47

1 right, that's what you're trying to say?

2 Q. Right.

3 A. That's wrong.

4 Q. And you understood that that was wrong --

5 A. Yes.

6 Q. Let me finish my question.

7 You understood that was wrong the entire time you

8 were drinking Inviga?

9 A. Yes.

10 Q. And the reason that's wrong is because you

11 understood that even while you were drinking Inviga, if

12 the other calories you were taking in put you in this

13 state of taking in too many calories over the whole day,

14 you would still gain weight?

15 A. Yes.

16 Q. From your description of your diet, to me it

17 sounds to me like you pay a fair amount of attention to

18 what you eight, would that be a fair characterization?

19 A. Yes.

20 Q. Let me turn with you to Paragraph 19, Paragraph

21 19, the part I want to ask you about is in the second

22 sentence there, I'm not going to read the whole thing, but

23 it says, basically it says drinking three cans of Inviga

24 every day over a lengthy period of time. And it's the

25 over a lengthy period of time that I want to ask you

48

1 about. Do you recall any Inviga advertising that

2 referenced a lengthy period of time?

3 A. No.

4 Q. Do you believe that any of the Inviga advertising

5 communicated to you that you were supposed to drink Inviga

6 over a lengthy period of time?

7 A. No.

8 Q. Turn with me if you could to Page 10 of Exhibit

9 1, do you see the heading, Facts as to Franulovic, and

10 Paragraph 47, the end of that sentence there says,

11 Franulovic reduced her consumption of Inviga and later

12 stopped drinking it all together.

13 A. Right.

14 Q. Was there a period of time where, after you were

15 drinking three cans a day you then drank less than three

16 cans a day?

17 A. Yes, but I -- Yes.

18 Q. Do you recall how long that was?

19 A. No.

20 Q. Even roughly? What's your best estimate of how

21 long that period of time would be when you went from the

22 three cans to less than three cans a day before you

23 stopped?

24 A. Maybe a couple weeks, maybe.

25 Q. If you could turn with me to Page 12, Paragraph



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85	<p>1 water, it's not designed to make you lose weight, there's 2 nothing in it.</p> <p>3 Q. If you drank bottled water instead of drinking 4 orange juice, do you believe it would make you lose 5 weight?</p> <p>6 A. If you drank orange juice all the time, your 7 entire life, and then stopped drinking it and then drank 8 water? Yes.</p> <p>9 Q. Because water has fewer calories?</p> <p>10 A. Yes.</p> <p>11 Q. Would making that change in your diet, do you 12 believe, be a guarantee of weight loss?</p> <p>13 A. No. Oh, yes, I'm sorry.</p> <p>14 Q. You believe that would be a guarantee of weight 15 loss?</p> <p>16 A. Is that the one thing you're going to change?</p> <p>17 Q. If you change that one thing, do you believe it 18 would be a guarantee of weight loss?</p> <p>19 A. Yes.</p> <p>20 Q. No matter what else you did?</p> <p>21 A. No.</p> <p>22 Q. So it would depend on what else you were eating 23 and drinking?</p> <p>24 A. Yes.</p> <p>25 Q. By the same token, you would agree that you never</p>	87	<p>1 metabolism to gently increase calorie burning.</p> <p>2 What did, in February of 2007, or the time that 3 you were drinking Inviga, around that time, what did 4 gently increase calorie burning mean to you?</p> <p>5 A. Raise your metabolism.</p> <p>6 Q. By how much?</p> <p>7 A. I don't know.</p> <p>8 Q. Do you believe that that first line that I just 9 read to you is misleading in any way?</p> <p>10 A. I don't know if it's delicious.</p> <p>11 Q. Setting flavor issues aside --</p> <p>12 A. No.</p> <p>13 Q. By giving your body a little extra boost Inviga 14 is a simple and positive step you can take toward a 15 healthy, balanced lifestyle.</p> <p>16 In 2007 what did you think giving your body a 17 little extra boost meant?</p> <p>18 A. Increasing your metabolism.</p> <p>19 Q. Do you believe that that second line that I just 20 read to you is misleading?</p> <p>21 A. No.</p> <p>22 Q. Skipping down to the bottom where it has the 23 three cans statement, Three cans per day of Inviga have 24 been shown to increase calorie burning by 60 to 100 25 calories in healthy normal weight 18 to 35 year olds.</p>
86	<p>1 thought that drinking Inviga was a guarantee of weight 2 loss; is that fair?</p> <p>3 A. Yes.</p> <p>4 Q. I'm going to mark as a composite exhibit a 5 printout, and some of this is hard to read so I apologize 6 for that, but a printout of the Inviga website as Exhibit 7 13.</p> <p>8 (Defendant's Exhibit 13 was marked for 9 identification.)</p> <p>10 Q. Have you ever been to the Inviga website?</p> <p>11 A. No.</p> <p>12 Q. You've never logged on to Inviga.com?</p> <p>13 A. No.</p> <p>14 Q. Ever?</p> <p>15 A. No.</p> <p>16 Q. Let me ask you to flip to what's marked, you see 17 the little numbers at the bottom of the page, those are 18 called Bates Numbers, it's Bates Number 1740.</p> <p>19 A. I'm there.</p> <p>20 Q. This is just a picture of the back of the can 21 that happens to come from the website, but you have seen 22 the back of the can before, correct?</p> <p>23 A. Yes.</p> <p>24 Q. The top line there begins, Inviga is a delicious 25 and refreshing sparkling green tea that invigorates your</p>	88	<p>1 Individual results may vary. Below that it says, Drinking 2 more than three cans per day will not have an additional 3 effect.</p> <p>4 All of that that I just read, beginning with 5 three cans and ending with additional effect, you read at 6 some point while you were drinking Inviga, correct?</p> <p>7 A. Uh-huh, yes.</p> <p>8 Q. Was it your understanding that the calorie 9 burning effect of drinking Inviga would be in the range of 10 60 to 100 calories while you were drinking Inviga in 2007?</p> <p>11 A. Yes.</p> <p>12 Q. Do you know whether or not on any given day in 13 2007 that you drank Inviga you, in fact, reduced your 14 total caloric intake for that day by 100 calories?</p> <p>15 A. No.</p> <p>16 Q. And I believe you told me earlier that you don't 17 know, and again we're talking about in 2007, you don't 18 know how many calories you were taking in or trying to 19 take in on a daily basis, right?</p> <p>20 A. Right.</p> <p>21 Q. Without counting your calories how would you know 22 whether or not Inviga was burning calories?</p> <p>23 A. Well, I was looking to increase my metabolism, so 24 I was just going by that, and I know I wanted to lose a 25 few pounds, five pounds, whatever, and it was right after</p>

## **Exhibit B**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**CHAMBERS OF  
JOEL SCHNEIDER**  
UNITED STATES MAGISTRATE JUDGE

**MITCHELL H. COHEN COURTHOUSE**  
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**LETTER ORDER  
ELECTRONICALLY FILED**

October 5, 2007

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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.

October 5, 2007  
Page 2

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 (4<sup>th</sup> 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.



October 5, 2007

Page 3

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.

October 5, 2007

Page 4

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 C**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

LINDA FRANULOVIC, individually and )  
on behalf of a class of persons, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE COCA-COLA COMPANY, )  
 )  
Defendant. )

Civil Action No.: 1:07-cv-00539-  
RMB-JS

**DEFENDANT'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S  
SUPPLEMENTAL DISCOVERY REQUESTS**

Defendant The Coca-Cola Company ("TCCC") hereby responds to Plaintiff's Supplemental Discovery Requests as follows:

**GENERAL OBJECTIONS**

Plaintiff's requests incorporate the Definitions, Rules of Construction and Instructions from the written discovery served by the Plaintiff in *Melfi v. The Coca-Cola Company, et al.*, No. 1:07-cv-00828, United States District Court, District of New Jersey. Accordingly, TCCC incorporates its General Objections in their entirety from TCCC's responses to both the interrogatories and document requests served in *Melfi*. TCCC further objects to Plaintiff's discovery requests to the extent they are duplicative of the requests in *Melfi* because Plaintiff has been provided with both the written responses and the documents produced in that case.

## REQUESTS FOR PRODUCTION

1. Documents that substantiate or refute the following statements:
  - a. From a press release dated October 11, 2006: “The accumulated body of scientific research shows the ability of green tea’s powerful antioxidant EGCG (epigallocatechin gallate) to speed up metabolism and increase energy use, especially when combined with caffeine.”
  - b. From the same press release: “Enviga is a great tasting beverage that invigorates your metabolism to gently burn calories.”
  - c. On the can:
    - Enviga “increases your metabolism to gently increase calorie burning.”
    - Enviga gives “your body a little extra boost.”
    - The caffeine and EGCG in Enviga “invigorate your metabolism to burn calories.”
    - The caffeine in Enviga alone “stimulates your body to enhance the calorie burning process.
  - d. On [www.enviga.com](http://www.enviga.com):
    - “Enviga is a precise balance of ingredients that have been proven to invigorate your metabolism helping you burn more calories.”
    - Enviga contains the “powerful EGCG.”
    - Including Enviga in the diet is “much smarter than following fads, quick-fixes, and crash diets.”
    - Each can of Enviga causes a consumer to “end up burning more [calories] than you consume – so for the first time you can actually ‘drink negative.’”
    - Enviga provides “another way to keep those extra calories from building up.”
    - “Enviga results in negative calories, because you burn more calories than you consume.”
    - “Enviga actually provides a negative calorie effect that’s never before been proven in a ready-to-drink green tea.”
    - “there is a calorie burning effect from a single can.”
    - “Enviga is expected to have a comparable effect on individuals on 35.”

- “Consuming the equivalent of three cans of Enviga beverage over the course of the day helped participants increase calorie burning by an average of 106 calories.”
  - “Enviga is the perfect refresher for you: everyday you do your bit to cut out or burn a few extra calories, Enviga is there doing its little bit to help.”
- e. On outdoor advertising:
- “[Enviga is] The calorie burner.”
  - “Burning calories is now officially delicious.”
  - “Be positive. Drink negative.”
  - “Invigorate your metabolism.”

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant produced to Plaintiff with its Rule 26(a)(1) Initial Disclosure documents TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0001822 through TCCC-Enviga-0001931 which are responsive to this request. Defendant objects to the production of additional responsive documents, if any, at this time on the grounds that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

2. All detailed data tables collected in conducting all studies of Enviga or used in the analyses of these studies.

**Response:**

Defendant incorporates its general objections and further objects to this request as vague because it does not define “detailed data tables.” Defendant also objects to this

request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant objects to the production of these documents, if any, at this time on the grounds that such documents are not relevant to class certification and are inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

3. All communications relating to Enviga between Nestlé, Beverage Partners Worldwide, or Defendant and the Federal Trade Commission, the Food and Drug Administration, a state Attorney General, or any other governmental agency.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege and to the extent disclosure of such information is protected by 15 U.S.C. § 57(b), 16 C.F.R. 4.10 or any other applicable statute or regulation. Defendant also objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

4. All documents, data compilations, and tangible things that are in the possession, custody, or control of Defendant and that Defendant may use to support its claims or defenses in this matter through the time of a ruling for class certification.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving these objections,

Defendant has not yet determined which documents it may use in connection with the class certification hearing. Defendant will timely supplement this response if and when such documents are identified.

5. A privilege log for all documents withheld from production in response to these requests or the requests propounded in *Melfi* based on any claim of attorney-client privilege, work product, expert opinion, or any other applicable privilege or immunity, stating with particularity the basis of the privilege or immunity and describing the document with sufficient specificity as to permit Plaintiff to determine the validity of the claim.

**Response:**

Defendant incorporates its general objections and further objects to this request as overly broad to the extent it seeks a privilege log for documents not relevant to the class certification issues and therefore not produced at this time. Subject to and without waiving this objection, Defendant will provide a privilege log for documents that are relevant to the class certification issues but withheld at this time on the basis of privilege.

6. All studies relating to green tea and its effect on calorie burning or weight loss.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request because published scientific studies are equally available to Plaintiff from public sources. Defendant further objects to this request as overly broad and unduly burdensome to the extent that it seeks to impose a duty to continually monitor the scientific literature and is without date limitation. Subject to and without waiving these objections, Defendant has



produced published scientific studies relating to green tea and its effect on calorie burning or weight loss, including the published study resulting from the Enviga clinical trial. Defendant also has produced summaries of these studies prepared by experts consulted during the development of Enviga. See TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0001822 through TCCC-Enviga-0001931.

7. All studies relating to epigallocatechin gallate (“EGCG”) and its effect on calorie burning or weight loss.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request because published scientific studies are equally available to Plaintiff from public sources. Defendant further objects to this request as overly broad and unduly burdensome to the extent that it seeks to impose a duty to continually monitor the scientific literature and is without date limitation. Subject to and without waiving these objections, Defendant has produced published scientific studies relating to green tea and its effect on calorie burning or weight loss, including the published study resulting from the Enviga clinical trial. Defendant also has produced summaries of these studies prepared by experts consulted during the development of Enviga. See TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0001822 through TCCC-Enviga-0001931.

8. All studies relating to the efficacy of caffeine, alone or in combination with other ingredients in weight control, weight loss, or caloric balance.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request because published scientific studies are equally available to Plaintiff from public sources. Defendant further objects to this request as overly broad and unduly burdensome to the extent that it seeks to impose a duty to continually monitor the scientific literature and is without date limitation. Subject to and without waiving these objections, Defendant has produced published scientific studies relating to green tea and its effect on calorie burning or weight loss, including the published study resulting from the Enviga clinical trial. Defendant also has produced summaries of these studies prepared by experts consulted during the development of Enviga. See TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0001822 through TCCC-Enviga-0001931.

9. All studies relating to the effect of EGCG or caffeine on body weight, body composition, or caloric balance in people.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request because published scientific studies are equally available to Plaintiff from public sources. Defendant further objects to this request as overly broad and unduly burdensome to the extent that it seeks to impose a duty to continually monitor the scientific literature and is

without date limitation. Subject to and without waiving these objections, Defendant has produced published scientific studies relating to green tea and its effect on calorie burning or weight loss, including the published study resulting from the Enviga clinical trial. Defendant also has produced summaries of these studies prepared by experts consulted during the development of Enviga. See TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0001822 through TCCC-Enviga-0001931.

10. All raw data, researchers notes, and other material used in the clinical trial referred to at [www.enviga.com/#Science](http://www.enviga.com/#Science).

**Response:**

Defendant incorporates its general objections and further objects to this request as vague because “other material” is not defined. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

11. Any evidence that a person drinking three cans of Enviga daily will lose weight.

**Response:**

Defendant objects to this request to the extent it implies that the Enviga advertising claims that drinking three cans of Enviga daily will cause weight loss. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege.

Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

12. Any evidence that a person who drinks three cans of Enviga daily will experience increased caloric expenditure for a period longer than one week.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

13. Any evidence that a person who drinks one can of Enviga daily will experience increased caloric expenditure for period longer than one week.

**Response:**

Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6,

2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

14. Any evidence that Enviga will have any effect on calorie burning or weight as to a person over 35.

**Response:**

Defendant objects to this request to the extent it implies that Enviga advertising claims that drinking Enviga will cause weight loss. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

15. Any evidence that Enviga will have any effect on calorie consumption or weight as to a person who is overweight or obese.

**Response:**

Defendant objects to this request to the extent it implies that Enviga advertising claims that drinking Enviga will cause weight loss. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for

discovery provided by the Court at the August 6, 2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

16. Any evidence that Enviga will have any effect on calorie consumption or weight as to a person under 18.

**Response:**

Defendant objects to this request to the extent it implies that Enviga advertising claims that drinking Enviga will cause weight loss. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference. Subject to and without waiving these objections, see Defendant's response to requests 6 – 9.

17. All radio advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as vague because "insertion data" is not defined. Defendant further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. No radio advertisements for Enviga aired prior to the filing of this complaint, and plaintiff does not allege that she heard a radio ad for Enviga. Accordingly, Defendant objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the

guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

18. All print advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as overly broad and unduly burdensome because it requests “all print advertisements” rather than exemplars. Defendant also objects to this request as vague because “insertion data” is not defined. Defendant further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving these objections, Defendant already has produced exemplars of advertisements showing all of the advertising claims used in the advertising for Enviga, and Defendant has produced documents, to the extent available, showing where and when the ads ran prior to the filing of Plaintiff’s Complaint. Defendant also has produced the national marketing plans, operating plans and regional- and retailer-specific marketing plans for Enviga.

19. All internet advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant incorporates its objections and response to request number 18 above.

20. All websites for Enviga.

**Response:**

Defendant already has produced to Plaintiff a copy of the Enviga website as of April 2007.

21. All internet advertising for Enviga.

**Response:**

Defendant incorporates its objections and response to request number 19 which seeks identical documents.

22. All television advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as vague because "insertion data" and "media plans" are not defined. Defendant further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. No television advertisements for Enviga aired prior to the filing of this complaint, and plaintiff does not allege that she saw a television ad for Enviga. Accordingly, Defendant objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.



23. All outdoor advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as vague, overly broad and unduly burdensome because “insertion data” and “media plans” are not defined and because the request seeks “all outdoor advertisements” rather than exemplars. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving these objections, Defendant already has produced exemplars of advertisements showing all of the advertising claims used in the advertising for Enviga, and Defendant has produced documents, to the extent available, showing where and when the ads ran prior to the filing of Plaintiff’s Complaint. Defendant also has produced the national marketing plans, operating plans and regional- and retailer-specific marketing plans for Enviga.

24. All other advertisements for Enviga, together with media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as vague, overly broad and unduly burdensome because “insertion data” and “media plans” are not defined and because it requests “all other advertisements” rather than exemplars. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving these objections, Defendant already has produced exemplars of advertisements showing all of the advertising claims used in the advertising for Enviga, and Defendant has produced documents, to the extent available, showing where and when the ads ran prior to the

filing of Plaintiff's Complaint. Defendant also has produced the national marketing plans, operating plans and regional- and retailer-specific marketing plans for Enviga.

25. All draft advertisements and other documents relating to advertisements for Enviga.

**Response:**

Defendant objects to this request as overly broad because "other documents relating to advertisements for Enviga" does not describe the documents being sought with reasonable particularity. Defendant also objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Furthermore, a draft advertisement could not have caused Plaintiff or any of the alleged class members to purchase Enviga. Accordingly, Defendant objects to the production of these documents, if any, at this time on the ground that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

26. All perception studies or other consumer research relating to Enviga.

**Response:**

Defendant objects to this request as vague and overly broad because "perception studies" is not defined and because the request is unlimited as to time. Defendant also objects to this request to the extent it calls for documents protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving these

objections, Defendant already has produced the completed studies of consumer perceptions of Enviga and completed consumer research relating to Enviga.

27. All internal communications relating to the effect of Enviga on calorie consumption or weight.

**Response:**

Defendant objects to this request as overly broad and because the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference. Defendant also objects to the extent it calls for documents protected by the attorney-client, work product or other applicable privilege and to the extent disclosure of such information is protected by 15 U.S.C. § 57(b), 16 C.F.R. 4.10 or any other applicable statute or regulation.

28. All communications between two or more defendants relating to the effect of Enviga on calorie consumption or weight.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege and to the extent disclosure of such information is protected by 15 U.S.C. § 57(b), 16 C.F.R. 4.10 or any other applicable statute or regulation. Defendant also objects to the production of these documents, if any, at this time on the grounds that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

29. All communications relating to Enviga with the Food and Drug Administration, the Federal Trade Commission, a state Attorney General, and any other federal, state, or local agency or law enforcement.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege and to the extent disclosure of such information is protected by 15 U.S.C. § 57(b), 16 C.F.R. 4.10 or any other applicable statute or regulation. Defendant also objects to the production of these documents, if any, at this time on the grounds that such documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court at the August 6, 2007 scheduling conference.

**INTERROGATORIES**

1. If you contend that a class cannot be certified in this matter, please state all facts on which you base that contention.

**Response:**

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving this objection, Defendant contends that a class cannot be certified in this matter. However, Defendant is not yet aware of Plaintiff's theory of class certification and, therefore, cannot state all facts on which this contention is based. Facts of which Defendant is currently aware include: not all purported class members saw the same advertising; not all purported class members purchased Enviga for the same

reasons; not all purported class members interpreted the Enviga advertising in the same manner; and the Enviga clinical trial and related scientific evidence demonstrates that Enviga burns more calories than the can provides.

2. If you contend that Franulovic's claims are not typical of the claims of the other members of the class, please state all facts on which you base that contention.

**Response:**

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving this objection, Defendant has not conducted any discovery of Franulovic at this time and will timely supplement this response as required.

3. If you contend that Franulovic will not fairly and adequately protect the interests of the members of the Class, please state all facts on which you base that contention.

**Response:**

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving this objection, Defendant has not conducted any discovery of Franulovic at this time and will timely supplement this response as required.

4. If you contend that Franulovic has any interests that are contrary to or in conflict with those of the Class she seeks to represent, please state all facts on which you base that contention.

**Response:**

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving this objection, Defendant has not conducted any discovery of Franulovic at this time and will timely supplement this response as required.

5. If you contend that Franulovic has not retained competent counsel experienced in class action litigation, please state all facts on which you base that contention.

**Response:**

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client, work product or other applicable privilege. Subject to and without waiving this objection, Defendant has not conducted any discovery of Franulovic at this time and will timely supplement this response as required.

6. Identify all advertising, marketing, and promotional companies with which Nestlé, Beverage Partners Worldwide, or Defendant has communicated relating to Enviga.

**Response:**

Defendant objects to this request as overly broad and unduly burdensome to the extent it seeks the identity of companies with whom Defendant has communicated regarding Enviga but which did not otherwise work on the project. Subject to and without waiving this objection, the following companies were involved in the advertising, marketing, and promotion of Enviga:

1. Added Value  
6 Lower Teddington Rd.  
Kingston Upon Tens, KT14ER  
United Kingdom
2. Anomaly  
536 Broadway  
11th Floor  
New York, NY 10012
3. Artemis Creative  
887 West Marietta St. NW  
Studio D  
Atlanta, Georgia 30318
4. Enterprise IG  
11-33 St John Street  
London, EC1M 4PJ  
United Kingdom
5. Finished Art  
708 Antone St. NW  
Atlanta, GA 30310
6. McCann  
7211 Herbrand Street  
London, UK IN1EX  
United Kingdom
7. Momentum  
384 Northyard Blvd.  
Suite 390  
Atlanta, Georgia 30313
8. Saatchi & Saatchi  
375 Hudson Street  
New York, NY 10014

7. Describe by category and location all documents, data compilations, and tangible things that are in the possession, custody, or control of Defendant and that Defendant may use to support its claims or defenses in this matter through the time of a ruling on a request for class certification.

**Response:**

Defendants object to this interrogatory as overly broad and unduly burdensome. Discoverable documents will be produced as they are kept in the usual course of business. Subject to and without waiving this objection, see Defendant's response to document request number 4 above.

**REQUEST FOR ADMISSION**

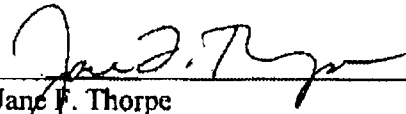
1. Do you admit that drinking Enviga will not result in weight loss in a healthy person of average weight?

**Response:**

Defendant objects to this request as vague because it does not define the extent of the weight loss, does not define a person of "average weight," and does not specify how often or how much Enviga is being consumed. Subject to and without waiving this objection, Defendant states that weight loss is based on many factors unique to an individual, including but not limited to genetics, calories consumed and expended, the amount of physical activity, and diet. Although the Enviga clinical trial did not examine weight loss, and the Enviga advertising does not make any weight loss claims, other scientific studies demonstrate weight loss in study subjects after drinking beverages containing EGCG and caffeine over a number of weeks. Defendant, therefore, denies request to admit number 1.



Dated: August 31, 2007



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**Attorneys for Defendant The Coca-Cola  
Company**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE

Linda Franulovic, individually and on behalf of )  
a class of persons, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No.: 1:07-cv-00539-  
 ) RMB-JS  
THE COCA-COLA COMPANY, )  
 )  
Defendant. )

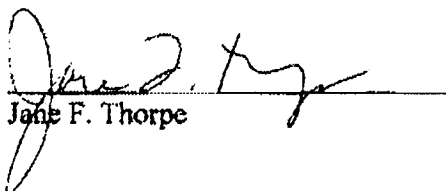
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Defendant's Response to Plaintiff's Supplemental Discovery Requests by electronic mail and regular mail this 31<sup>st</sup> day of August 2007, upon Plaintiffs' Counsel:

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Williams Cuker Berezofsky  
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*Attorneys for Plaintiff*

BY:   
Jane F. Thorpe

## **Exhibit D**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

LINDA FRANULOVIC, individually and )  
on behalf of a class of persons, )

Plaintiff, )

v. )

THE COCA-COLA COMPANY, )

Defendant. )

Civil Action No.: 1:07-cv-00539-  
RMB-JS

**DEFENDANT’S RESPONSES AND OBJECTIONS TO PLAINTIFF’S SECOND  
SET OF SUPPLEMENTAL DISCOVERY REQUESTS TO DEFENDANT**

Defendant The Coca-Cola Company (“TCCC”) hereby responds to Plaintiff’s  
Second Set of Supplemental Discovery Requests to Defendant as follows:

**GENERAL OBJECTIONS**

Plaintiff’s requests incorporate the Definitions, Rules of Construction and  
Instructions from the written discovery served by the Plaintiff in *Melfi v. The Coca-Cola  
Company, et al.*, No. 1:07-cv-00828, United States District Court, District of New Jersey.  
Accordingly, TCCC incorporates its General Objections in their entirety from TCCC’s  
responses to both the interrogatories and document requests served in *Melfi*. TCCC  
further objects to Plaintiff’s discovery requests to the extent they are duplicative of the  
requests in *Melfi* because Plaintiff has been provided with both the written responses and  
the documents produced in that case. TCCC further objects to Plaintiff’s discovery  
requests to the extent they are duplicative of Plaintiff’s Supplemental Discovery Requests  
because TCCC has already responded to those requests. Additionally, TCCC objects on

the ground that these requests are not appropriate at this point in the litigation. Discovery has been limited to information which is necessary for class certification, and Plaintiff already filed her Motion for Class Certification, so any other class certification discovery is unnecessary. Additionally, Plaintiff had ample opportunity to seek additional discovery over the past year and failed to do so. On the contrary, in a letter to this Court dated June 27, 2008 regarding the need for additional discovery, Plaintiff's counsel specifically stated that Plaintiff "does not believe that she will need any further documents in preparing for class certification" without any mention of any other discovery needed. Finally, TCCC objects to these requests to the extent they are substantially similar to requests previously served on TCCC that the Court already ruled were not relevant to class certification.

#### **INTERROGATORIES**

8. Please identify every physical condition and medication that could nullify or impair the "calorie burning" effects of Enviga.

**Response:**

Defendant objects to this interrogatory as vague, overly broad and unduly burdensome. Defendant also objects to this interrogatory to the extent it seeks an expert medical opinion. Subject to and without waiving these objections, Defendant states that any physical condition or medication that impacts an individual's ability to burn calories or that eliminates the effect of burning calories could by definition potentially "nullify or impair" the "calorie burning" effects of Enviga. Such conditions and medications include but are not limited to a high calorie diet, a sedentary lifestyle, depression, hypothyroidism, and any number of medications. Defendant's experts will further address this issue at the appropriate time.

9. For each physical condition and medication identified, please identify all persons with knowledge whether the physical condition and medication could nullify or impair the “calorie burning” effects of Enviga.

**Response:**

Defendant objects to this interrogatory as vague, overly broad and unduly burdensome. Subject to and without waiving this objection, Defendant states, upon information and belief, that many people, to include Ms. Franulovic, understand that many physical conditions and medications could nullify or impair the “calorie burning” effects of Enviga. In this litigation, these issues will be addressed by expert witnesses.

10. Please state all facts on which you relied in formulating your response to requests for admission 2-15.

**Response:**

Defendant objects to this interrogatory to the extent it seeks information protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this interrogatory as vague, overly broad and unduly burdensome. Subject to and without waiving these objections, any facts relied on are either contained in the scientific studies already produced or are apparent from the answer to the request.

11. Please identify all investigations, studies, and analyses about the physiological effects on the human body from consuming *Enviga as manufactured and sold to the public*, excluding studies on the individual ingredients.

**Response:**

Defendant objects to this interrogatory to the extent it seeks information protected by the attorney-client, work product or other applicable privilege. Defendant also objects

to this request to the extent it seeks information already provided in response to prior discovery requests. Subject to and without waiving these objections, see the scientific studies already produced.

### **REQUESTS FOR PRODUCTION**

30. For each physical condition and medication identified, please produce all documents relating to whether the physical condition or medication could nullify or impair the “calorie burning” effects of Enviga.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as vague, overly broad and unduly burdensome. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court’s most recent scheduling order entered on August 6, 2008.

31. Please produce all documents on which you relied in formulating your responses to requests for admission 2-15.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning

at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Subject to and without waiving these objections, see the documents already produced.

32. Please produce all documents relating to medical studies, research, or individual tests concerning caloric consumption or expenditure, weight loss, metabolic effects, or other physiological effects on the human body from consuming *Enviga, as manufactured and sold to the public*. This request includes studies or tests conducted or commissioned by Defendant or by others.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as overly broad and unduly burdensome. Defendant also objects because published scientific studies are equally available to Plaintiff from public sources. Additionally, Defendant objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Plaintiff previously sought the production of substantially similar documents and the Court held that Defendant was not required to produce them at this time. Subject to and without waiving these objections, Defendant has produced the scientific studies relating to green tea, caffeine and Enviga. Defendant has also produced summaries of these studies prepared by experts consulted during the development of Enviga. *See* TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0008122 through TCCC-Enviga-1931.



33. Please produce all documents relating to medical studies, research, or individual tests concerning any evidence that drinking three cans of Enviga each day will have any effect on a person's calorie consumption, calorie expenditure, metabolism, or weight.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as overly broad and unduly burdensome and because published scientific studies are equally available to Plaintiff from public sources. Additionally, Defendant objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Plaintiff previously sought the production of substantially similar documents and the Court held that Defendant was not required to produce them at this time. Subject to and without waiving these objections, Defendant has produced published scientific studies relating to green tea and its effect on calorie burning or weight loss, including the published study resulting from the Enviga clinical trial. Defendant has also produced summaries of these studies prepared by experts consulted during the development of Enviga. *See* TCCC-Enviga-0000001 through TCCC-Enviga-0001571 and TCCC-Enviga-0008122 through TCCC-Enviga-1931.

34. Please produce all documents relating to medical studies, research, or individual tests concerning any evidence that drinking three cans of Enviga each day will have any effect on a person's calorie consumption, calorie expenditure, metabolism, or weight for a period longer than one week.

**Response:**

Defendant incorporates its objections and response to request number 33 above.

35. Please produce all documents relating to medical studies, research, or individual tests concerning any evidence that Enviga will have any effect on calorie consumption, calorie expenditure, metabolism, or wait for a person over the age of 35 years old.

**Response:**

Defendant incorporates its objections and response to request number 33 above.

36. Please provide all documents relating to medical studies, research, or individual tests concerning any evidence that Enviga will have any effect on calorie consumption, calorie expenditure, metabolism, or weight as to a person who is overweight or obese.

**Response:**

Defendant incorporates its objections and response to request number 33 above.

37. Please produce all documents relating to medical studies, research, or individual tests concerning any evidence that Enviga will have any effect on calorie consumption, calorie expenditure, metabolism, or weight as to a person under the age of 18 years old.

**Response:**

Defendant incorporates its objections and response to request number 33 above.

38. Please produce all documents and communications from any persons who have provided any form of consultation services to Defendant concerning the formulation and marketing of Enviga.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Plaintiff previously sought the production of substantially similar documents and the Court held that Defendant was not required to produce them at this time.

39. Please produce all documents concerning scientific research on the safety of Enviga, including any evaluations of that research.

**Response:**

Defendant incorporates its objections and response to request number 33 above.

40. Please produce all documents concerning adverse reaction reports or consumer comments about Enviga, including any responses.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and

this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Subject to and without waiving these objections, see documents previously produced. See TCCC-Enviga-0007130 through TCCC-Enviga-0009041.

41. Please produce all internal communications of Defendant concerning the "calorie burning," "calorie expenditure," "metabolic," and "weight loss" effects of Enviga.

**Response:**

Defendant incorporates its general objections and further objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Plaintiff previously sought the production of substantially similar documents and the Court held that the documents were not relevant to class certification and that Defendant was not required to produce them at this time.

42. Please produce all documents concerning marketing data and marketing studies concerning consumer perceptions of the descriptive words on Enviga labels, labeling, and advertisements.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as overly broad and unduly burdensome. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Plaintiff previously sought the production of substantially similar documents and the Court held that Defendant was not required to produce them at this time. Subject to and without waiving these objections, see documents previously produced.

43. Please produce all documents concerning the process of creating and designing labels, labeling, and advertisements for Enviga, including all draft layouts and mock-ups that were used and not used, emails, correspondence, and all other documents concerning the process by which the labels, labeling, and advertisements was [sic] decided.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as overly broad and unduly burdensome. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the

guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Subject to and without waiving these objections, see documents previously produced.

44. Please produce all internet advertisement and media plans and documents giving insertion data.

**Response:**

Defendant objects to this request as overly broad and unduly burdensome. Subject to and without waiving this objection, see documents previously produced.

45. Please produce all documents relating to Plaintiffs Franulovic, Melfi, and Simmens.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this interrogatory on the grounds that it seeks the production of documents that are already part of the record and such documents are equally available to Plaintiff as they are to Defendant. Defendant also objects to this request to the extent it seeks documents relating to plaintiffs Melfi and Simmens, as such documents are not relevant to this litigation. Finally, Defendant objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008.

46. Please produce all documents relating to Center for Science in the Public Interest.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request as vague. Defendant further objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. Finally, Defendant objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008.

47. Please produce all documents reflecting the amount and nature of any financial or other support provided by Defendant to any researcher or author of any of the studies used by, or produced by, Defendant with respect to Enviga.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant also objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008.

48. Please produce all documents that Defendant reviewed or relied on in responding to the preceding interrogatories, requests for admission, and requests for production.

**Response:**

Defendant objects to this request to the extent that it seeks the production of documents protected by the attorney-client, work product or other applicable privilege. Defendant further objects to this request at this time on the ground that the requested documents are not relevant to class certification and this request is inconsistent with the guidelines for discovery provided by the Court beginning at the August 6, 2007 scheduling conference and continuing through the Court's most recent scheduling order entered on August 6, 2008. Subject to and without waiving these objections, see documents previously produced.

49. Please produce a privilege log for all documents withheld from production in response to these requests or the requests propounded in these cases based on any claim of attorney-client privilege, work product, expert opinion, or any other applicable privilege or immunity, stating with particularity the basis of the privilege or immunity and describing the document with sufficient specificity as to permit Plaintiff to determine the validity of the claim.

**Response:**

Defendant objects to this request on the ground that it seeks a privilege log for all documents withheld from production in response to all discovery requests on the ground that the parties agreed that Defendant does not need to produce a privilege log of documents that are not within the categories of documents being produced at this stage of the litigation, and that this agreement was confirmed by letter sent to Plaintiff on September 13, 2007.



## REQUEST FOR ADMISSION

2. Enviga causes calorie burning.

**Response:**

Defendant admits that drinking three cans per day of Enviga has been shown to increase calorie burning and Defendant has produced the science relevant to this claim.

3. Enviga does not cause calorie burning.

**Response:**

Defendant denies that drinking Enviga does not cause calorie burning.

4. Enviga causes weight loss.

**Response:**

Defendant objects to this request to the extent it implies that Enviga is advertised as a weight loss beverage and because it does not specify a quantity of Enviga consumed or a time period over which Enviga is consumed. Subject to and without waiving these objections, Defendant states that whether a person gains, loses or maintains weight while drinking Enviga is the result of multiple factors that influence overall caloric balance.

5. Enviga does not cause weight loss.

**Response:**

Defendant objects to this request to the extent it implies that Enviga is advertised as a weight loss beverage and because it does not specify a quantity of Enviga consumed or a time period over which Enviga is consumed. Subject to and without waiving these

objections, Defendant states that whether a person gains, loses or maintains weight while drinking Enviga is the result of multiple factors that influence overall caloric balance.

6. Enviga burns a hundred calories at a time.

**Response:**

Defendant objects to this request as vague because it does not identify the amount of Enviga consumed or the time period over which it is consumed. Accordingly, Defendant can neither admit nor deny this request as stated.

7. Enviga does not burn a hundred calories at a time

**Response:**

Defendant objects to this request as vague because it does not identify the amount of Enviga consumed or the time period over which it is consumed. Accordingly, Defendant can neither admit nor deny this request as stated.

8. Enviga affects very small changes in weight.

**Response:**

Defendant objects to this request to the extent it implies that Enviga is advertised as a weight loss beverage. Defendant also objects because it does not specify a quantity of Enviga consumed, a time period over which Enviga is consumed or define "very small changes in weight." Nor does it provide any specifics as to the hypothetical person consuming Enviga. Accordingly, Defendant can neither admit nor deny this request as stated.

9. Enviga does not affect very small changes in weight.

**Response:**

Defendant objects to this request to the extent it implies that Enviga is advertised as a weight loss beverage. Defendant also objects because it does not specify a quantity of Enviga consumed, a time period over which Enviga is consumed or define “very small changes in weight.” Nor does it provide any specifics as to the hypothetical person consuming Enviga. Accordingly, Defendant can neither admit nor deny this request as stated.

10. Medications often prescribed by an OBGYN are known to cause weight gain.

**Response:**

Defendant objects to this request as vague to the extent that it does not define “medications often prescribed by an OBGYN” and because information about medications is equally available to Plaintiff. Defendant is not able to admit or deny this request as stated.

11. Medications often prescribed by an OBGYN are not known to cause weight gain.

**Response:**

Defendant objects to this request as vague to the extent that it does not define “medications often prescribed by an OBGYN” and because information about medications is equally available to Plaintiff. Defendant is not able to admit or deny this request as stated.

12. Psychiatric medications are among the class of medications best known to cause weight gain.

**Response:**

Defendant objects to this request as vague to the extent that it does not define “psychiatric medications” and because information about medications is equally available to Plaintiff. Defendant is not able to admit or deny this request as stated.

13. Psychiatric medications are not among the class of medications best known to cause weight gain.

**Response:**

Defendant objects to this request as vague to the extent that it does not define “psychiatric medications” and because information about medications is equally available to Plaintiff. Defendant is not able to admit or deny this request as stated.

14. Things that can make a person lose, gain, or maintain weight vary greatly from individual to individual.

**Response:**

Defendant objects to this request to the extent it seeks an expert medical opinion. Subject to and without waiving this objection, Defendant admits that things that can make a person lose, gain or maintain weight can vary from individual to individual.

15. Things that can make a person lose, gain, or maintain weight do not vary greatly from individual to individual.

**Response:**

Defendant objects to this request to the extent it seeks an expert medical opinion. Subject to and without waiving this objection, Defendant denies that things that can make a person lose, gain, or maintain weight do not vary greatly from individual to individual.

Dated: October 27, 2008



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**Attorneys for Defendant The Coca-Cola  
Company**

# **Exhibit E**

★ ★ THE SPECIAL *K* CHALLENGE™ ★ ★  
WANT TO BE A KNOCKOUT IN YOUR JEANS?



**DROP UP TO A JEAN SIZE *K* 2 WEEKS**

★ ★ ★ TRY SMALL ON FOR FALL ★ ★ ★

When part of the Special *K* Challenge. Offer ends 10/31/06. Limit one pair of jeans per customer. Offer good on all jeans. Offer good on all jeans. Offer good on all jeans. Offer good on all jeans.

Shape  
Oct. 06