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Date:
September 17, 2007

Recipient:	**Company:**
Honorable Joel Schneider	United States District Court
Fax Number:	**Voice Number:**
(856) 757-5355	(856) 757-5446

Sender:
Jane F. Thorpe, Esq.

Message:

Dear Judge Schneider:

Please find enclosed the Enviga Defendants' Letter Brief and accompanying Rule 37.1 affidavit.

Number of Pages: (including cover page) 9

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September 17, 2007

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

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

Dear Judge Schneider:

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

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

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

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

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

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

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

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

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

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

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

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

Second, interrogatory number 12 asks that Plaintiffs:

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

All three Plaintiffs responded:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

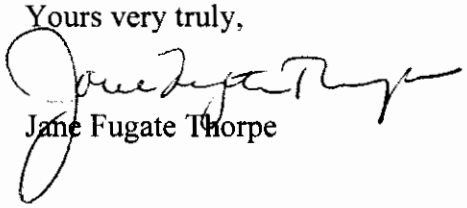
- Extensive underlying scientific data generated in connection with the clinical trial of Enviga;
- Records of consumer questions and complaints regarding Enviga;
- Any unpublished scientific studies regarding Enviga (or confirm that no unpublished studies exist);
- Additional information regarding the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

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

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

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

Yours very truly,



Jane Fugate Thorpe

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

JFT:rfw
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LINDA FRANULOVIC, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	)	Civil No. 07-539(RMB)
CATHERINE M. MELFI, Plaintiff, v. THE COCA-COLA COMPANY, et. al., Defendants.	)	Civil No. 07-828(RMB)
ADAM SIMMENS, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	Civil No. 07-3855(RMB)

L. Civ. R. 37.1(b)(1) Affidavit

I, SCOTT ELDER, ESQUIRE, pursuant to L. Civ. R. 37.1(b)(1) and this Court's June 6, 2007 Scheduling Order, under penalty of perjury, declare as follows:

1. I am a Partner of the law firm of Alston & Bird LLP, with offices at One Atlantic

Center, 1201 West Peachtree Street, Atlanta, Georgia 30309-3424.

2. I am submitting this Affidavit in support of Defendants' Letter Brief of Defendants The Coca-Cola Company and Beverage Partners Worldwide (North America) ("Defendants").

3. I certify that Defendants have conferred with the above-listed parties in a good faith effort to resolve by agreement the issues raised in Defendants' Letter Brief without the intervention of the Court and that the parties have been unable to reach agreement.

4. Defendants have attempted to resolve the issues raised in their Letter Brief through the following communications with Plaintiffs' Counsel: (1) Letter to Plaintiffs' counsel in *Melfi* and *Simmens* on September 7, 2007; (2) telephone conference call between counsel for all parties on September 7, 2007; (3) Letter to Plaintiffs' counsel in *Melfi* and *Simmens* with copy to counsel in *Franulovic* on September 13, 2007; and (4) various emails with Plaintiffs' counsel in *Melfi, Simmens* and *Franulovic* between September 13, 2007 and September 17, 2007.

I declare under penalty of perjury that the foregoing is true and correct.

Scott Elder

SCOTT ELDER, ESQUIRE

Sworn to before me this
17th day of September 2007.

Phoebe Lowry

Notary Public

PHOEBE LOWRY NOTARY PUBLIC GWINNETT COUNTY EXPIRES GEORGIA MAR. 31, 2009