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September 24, 2007

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

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

Dear Judge Schneider:

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

INTERNAL DOCUMENTS

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

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

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

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

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but Franulovic also should be able to evaluate Defendant's internal documents relating to those, and possibly other unpublished, studies.

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

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

PRIVILEGE LOG

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

POWERPOINT FILES

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

PLAINTIFF'S MEDICAL INFORMATION

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

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Cuker', written in a cursive style.

Mark R. Cuker
Counsel for Plaintiff and the Class

cc: Electronic Case Filing Service List