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September 24, 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:

This letter on behalf of all Defendants responds to the issues raised in Mr. Fantini's and Mr. Cuker's letters summarizing the discovery disputes in this action.

CENTER FOR SCIENCE IN THE PUBLIC INTEREST v. THE COCA-COLA COMPANY et al

Doc. 53

As noted in Defendants' original letter to Your Honor, Plaintiffs have not attempted to focus or narrow their requests in any meaningful respect. Nor do Plaintiffs explain the purported need for the production of every document in the case in order to address the class certification issues. Below, Defendants address Plaintiffs' specific arguments according to the numbered paragraphs in Plaintiffs' letter.

In paragraph 1, Plaintiffs seek all email communications, inter-office memoranda or internal correspondence responsive to at least 13 different document requests (Doc. Reqs. 3-9, 14-15, 20-21 and 23-24). Together, the requests seek virtually every document in Defendants' possession related to Enviga that has not already been produced. Plaintiffs only explanation for needing those documents at this stage of the litigation is that "internal documents revealing whether Enviga affects all consumers in the same way, and revealing defendants' decisions to make certain uniform representations about Enviga in their advertising, bear on class issues of commonality and predominance." (Fantini Letter, p. 2).

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Fax: 212-210-9444

3201 Beechleaf Court, Suite 600
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Neither of Plaintiffs' rationales withstands examination. At the class certification stage, the inquiry focuses on whether there are common issues, and, if so, whether any individual issues predominate over common ones. Defendants have produced a great deal of scientific information, including published scientific literature, the scientific dossier for this product, reports from the two outside experts consulted during product development and the underlying data from the Enviga clinical trial. Defendants also agreed to confirm that the companies do not have any unpublished scientific studies involving Enviga.

Moreover, the results of the Enviga clinical trial have been published in a peer-reviewed journal, and Defendants have agreed to produce the underlying data collected during the study. The remainder of the applicable scientific evidence comes from studies published by other researchers in the general scientific literature. Thus, Plaintiffs cannot reasonably claim that they do not have sufficient information regarding either the science as a whole or the Enviga clinical trial in order to develop a theory of class certification. To the contrary, Plaintiffs have all of the information necessary to determine what evidence they intend to offer as to whether Enviga "affects all consumers in the same way," and, therefore, address whether any individual issues predominate. Plaintiffs' desire to have every document that might be related to the underlying merits of this scientific issue is not a basis for requiring additional document production at this stage of the case. *See, e.g., Elliott v. ITT Corp.*, No. 90 C 1841, 1992 WL 59102, at * 7 (N.D. Ill.) (denying additional discovery where "all indications are that sufficient material has been amassed to enable the court to make the necessary inquiry into the nature of the parties proof and the form that the trial in this case will take."); *Hubbard v. Potter*, No. 03-1062, 2007 WL 604949 (D. D.C.) (limiting discovery during class certification stage because additional discovery would not be necessary to address Rule 23 issues).

Plaintiffs' second rationale – that all of the internal communication might "[reveal] defendants' decisions to make certain uniform representations about Enviga in their advertising" – is equally unpersuasive. The question for class certification is *whether* Defendants' advertising makes uniform representations about Enviga. Those facts can be determined from the actual ads and information regarding when and where those ads appeared, and Defendants have produced that information. *Why* Defendants chose to include particular statements in the Enviga advertising does not affect whether the ads make uniform representations.

In paragraph 2, Plaintiffs seek all documents that Defendants sent to or from any test facility or marketing firm. As to the test facility documents, Plaintiffs assert that those documents "will reveal how defendants wanted the studies structured, the data collected, and the results generated. Such information will bear on whether the conclusions generated by the studies are applicable to all class members." This is the same argument Plaintiffs made in paragraph 1 regarding the scientific issues, and the response is the same. Plaintiffs have all of the information necessary to determine what

evidence they intend to offer regarding whether any scientific studies are “applicable to all class members,” and, therefore, address whether any individual issues predominate.

Plaintiffs next assert that all documents related to outside marketing firms are necessary because the documents “will show whether a uniform message was delivered to the public, and whether the public interpreted the advertising in a similar way.” As noted above, the actual ads and information about their dissemination are the only documents necessary to determine whether Defendants delivered a “uniform message.” Communications with marketing firms during the development of the ads will provide no additional information as to whether the purported class viewed uniform advertising messages. As to how consumers interpreted the advertising, Defendants have produced the results of all consumer survey research conducted with respect to Enviga. All of the documents related to the survey firms could be used only to argue the merits of Plaintiffs’ claims in the motion for class certification.

In paragraph 3, Plaintiffs seek the production of all documents concerning any governmental investigations or inquiries related to Enviga. Mr. Cuker’s separate letter to the Court also requests those documents. Neither Mr. Fantini nor Mr. Cuker identifies any remote connection between those documents and any class certification issue. Mr. Fantini simply asserts without further explanation that such documents “may contain information relevant to the issues in this case, and to class certification issues.” (Fantini Letter, p. 2-3). Mr. Cuker makes the exact same unexplained assertion and further asserts that such documents are necessary to permit coordination with government agencies and to “insure that the Court is aware of pending or federal or state investigations.” (Cuker Letter, p. 2).

The alleged need for coordination among Plaintiffs’ counsel and any government agency has no relationship to whether Plaintiffs can satisfy the Rule 23 requirements for class certification. In addition, Plaintiffs’ are plainly aware of the Connecticut Attorney General’s press release regarding these issues and, therefore, are free to attempt to coordinate with that office. Nor is there any reason to suspect that if a government agency were interested in coordination, it would be unable to coordinate with Plaintiffs’ counsel. The litigation is a matter of public record, and all of the relevant pleadings are available on Pacer. If a government agency desired coordination with Plaintiffs’ counsel, that agency would have access to all of the necessary information.¹

¹ Plaintiffs also ignore regulations preserving the confidentiality of FTC inquiries. 15 U.S.C. § 57b-2 provides extensive protections against the disclosure of information provided to the FTC through either compulsory process or voluntarily. See 15 U.S.C. §§ 57b-2(b)(3)(C) and 57b-2(c)(1) – (3). The FTC’s regulations also define “nonpublic material” as including material which is:

received by the Commission: (i) in an investigation the purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission; and (ii) which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, et seq., or which is provided voluntarily in place of compulsory process in such an investigation.

See 16 C.F.R. § 4.10(a)(8). In light of these regulations, any determination as to whether coordination with Plaintiffs’

In paragraph 4, Plaintiffs drop any pretense of trying to connect the documents requested to the class certification issues and instead state only that “Defendants refuse to produce documents concerning whether they considered making different representations in their advertising of Enviga, other than those actually made.” (Fantini Letter, p. 3). Obviously neither the plaintiffs nor any of the purported class members saw any advertising claims that were considered but never made, and those documents cannot possibly impact whether Plaintiffs’ claims are appropriate for class treatment. On that basis, Defendants reasonably declined to produce the requested documents at this time.

In his separate letter to the Court, Mr. Cuker requests that Defendants produce the “actual electronic PowerPoint” files rather than TIFF images (TIFF stands for Tagged Image File Format and is an electronic copy of a document). Plaintiffs’ description of Defendants’ electronic production is both incorrect and incomplete.

Your Honor’s orders, Local Rule 26.1(d) and FRCP 16(b)(5) all required that the parties meet and confer regarding these issues. The parties met and conferred by phone and agreed to a plan for electronic discovery, which was the same plan agreed upon in *Melfi* and *Simmens*. Defendants also wrote a letter to Mr. Gardner and Mr. Cuker explaining the plan. See July 13, 2007 Letter attached as Exhibit 1. That letter states on page 2:

Documents will be produced in electronic form as single-page TIFF images, together with a summation load file.

Following that letter, the parties submitted a Joint Discovery plan in which they were required to address any outstanding issues with respect to electronic discovery. Both parties agreed that there were no outstanding disputes at that time. At the subsequent hearing on August 6, 2007, Mr. Gardner requested that the protective order allow for Plaintiffs’ production of documents as PDF files rather than TIFFS (identified improperly in the transcripts as TSKs) but raised no other issues. In response to the Court’s question about electronic discovery, Mr. Gardner replied, “[w]e have resolved those issues.” August 6, 2007 Hearing Transcript, p. 14 – 16, attached as Exhibit 2.

Only following Defendants’ production did Mr. Gardner first request original PowerPoint files. Initially Mr. Gardner asserted, as does Mr. Cuker in his letter, that the DVDs contain thousands of individual images without any indication as to where the documents start and stop. That assertion is simply wrong. Defendants provided a load file with the TIFF images, and the load file defines the beginning and end of each document. Mr. Gardner now claims that the computer system at the Center for Science in the Public Interest is not compatible with the load file, although Mr. Cuker does not make

a similar claim as to his firm. That issue was never raised earlier, and Mr. Cuker can presumably use the load file. Moreover, Defendants offered to provide Mr. Gardner a hard copy index indicating where each document starts and stops.

Following that offer, Mr. Gardner next asserted that he needed color images and that the images needed to be searchable. Defendants have offered to provide color images and images that are searchable through OCR (optical character recognition). Thus, Defendants have offered to provide all of the requested information. In response to this offer, Mr. Gardner responded only that it “does not address the request to see the electronic versions of the PowerPoint files.” See September 20, 2007 emails between Scott Elder and Stephen Gardner attached as Exhibit 3.

Producing the original PowerPoint files raises several problems that can be easily avoided. For example, it is difficult if not impossible to bates label the original files and, therefore, it is difficult to use the documents during the litigation. If there are multiple but slightly different versions of a single PowerPoint file, the different versions cannot be distinguished. Also, documents that do not have bates labels cannot be referred to consistently or conveniently at depositions or in court filings.

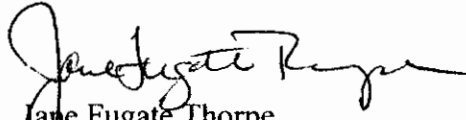
Moreover, many of these documents contain competitively sensitive information, and the original electronic documents cannot be stamped as confidential. Without either a bates number or a confidential stamp, it becomes difficult to insure compliance with the protective order restricting the use of these documents. Defendants have produced a significant amount of competitively sensitive information, and reasonable steps should be taken to protect its dissemination. Because Plaintiffs’ request for additional information can be satisfied in a manner that preserves the agreed-upon format and permits the appropriate labeling of these documents, Plaintiffs’ request for the original PowerPoints should be denied. See, e.g., *Wyeth v. Impax Laboratories, Inc.*, No. 06-222-JJF, 2006 U.S. Dist. Lexis 7961, at * 3 – 5 (D. Del.) (refusing to require production of original electronic documents where defendant provided TIFF images); *DE Technologies, Inc. v. Dell, Inc.*, No. 7:04cv00628, 2007 U.S. Dist. Lexis 2769, at * 7 -8 (W.D. Va.) (denying request to force defendant to provide a “live electronic directory” because Rule 34 requires only that the documents be in a format that is reasonably useable).

Finally, Plaintiffs respond to Defendants’ request for medical records by asserting that Plaintiffs’ medical histories are “completely irrelevant.” As noted in Defendants’ original letter, the Court already has directed Plaintiffs to sign and return authorizations for medical records in paragraph 4 of the Court’s June 6, 2007 Order. The medical records are potentially relevant to issues of typicality, adequacy and commonality. This case involves a claim that Plaintiffs were misled by the Enviga advertising into believing that drinking Enviga by itself would cause Plaintiffs to lose weight. Thus, Plaintiffs’ understanding of diet, nutrition and weight loss could impact their claims and in turn the Rule 23 requirements. And information regarding a Plaintiffs’ prior knowledge and understanding of these issues could very well be in Plaintiffs’ medical records.

Honorable Joel Schneider
September 24, 2007
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Defendants look forward to further discussing these issues with Your Honor at the October 2, 2007 hearing.

Sincerely,



Jane Fugate Thorpe

cc: Plaintiffs' Counsel
Defense Counsel
LEGAL02/30528237v3

EXHIBIT 1

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July 13, 2007

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Mark R. Cuker, Esq.
Williams Cuker Berezofsky
Woodland Falls Corporate Center
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Cherry Hill, New Jersey 08002-1163

Re: *Center for Science in the Public Interest v. The Coca-Cola Company, Nestlé USA, Inc. and Beverage Partners Worldwide*, United States District Court, District of New Jersey, Civil Action No. 07cv539(RMB)

Dear Steve and Mark:

Pursuant to FRCP 16(b)(5) and 26(f)(3) and Local Rule 26.1(d) this letter summarizes the steps that The Coca-Cola Company (TCCC) and Beverage Partners Worldwide (North America) (BPWNA) are taking in order to produce electronically stored information. TCCC and BPWNA use the same computer system, and BPWNA is physically located within a TCCC building. Accordingly, the steps outlined below apply to both companies.

As a starting point, we identified a list of employees with potentially relevant documents. Mark Moore in TCCC's information technology department is supervising the copying of complete email files, hard drive files (files located on individual C drives as opposed to a server) and any files located in dedicated network folders associated with those employees. As a routine operation in the normal course of business, the electronic information system automatically deletes emails older than 18 months old. Although this

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Stephen Gardner, Esq.
Mark R. Cuker, Esq.
July 13, 2007
Page 2

auto-delete feature was disabled for the identified custodians, the preserved emails will necessarily be limited to the 18-month period prior to disabling the auto-delete function.

In order to reduce the volume of electronically stored information gathered from the employees to a reasonable collection of potentially relevant documents, the files are being searched using a list of search terms. A copy of the search term list is enclosed. All documents responsive to the search terms will be reviewed for responsiveness, and non-privileged, responsive documents will be produced. Documents will be produced in electronic form as single-page TIFF images, together with a summation load file.

Please give either Jane Thorpe or me a call to discuss these issues. Plaintiff's counsel in the *Melfi* and *Simmens* cases already has agreed to this procedure, and we believe it makes sense to keep the process consistent. Also, please let us know what steps CSPI has taken with respect to electronically stored information in CSPI's possession.

Sincerely,



Scott A. Elder

SAE:aem
Enclosure
LEGAL.02/30442210v1

Search Terms Applied to Electronically Stored Information:

enviga

egcg

epigallocatechin

burn! /10 (calorie! OR energy OR fat)

negative /5 (calorie! OR drink)

metaboli! /10 (increas! OR invigorat! OR contribut! OR enhanc! OR speed! OR boost!)

**(energy /5 expend!) /10 (increas! OR invigorat! OR contribut! OR enhanc! OR speed!
OR boost!)**

thermogen!

"green tea" /10 caffeine

("green tea" OR caffeine) /10 (metaboli! OR calorie! OR weight OR fat)

("green tea" OR caffeine) /10 (energy /5 expend!)

**"green tea" /10 (scien! OR study OR studies OR "clinical trial" OR "clinical trials" OR
"clinical study" OR "clinical studies")**

tappy

rudelle

lausanne

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CENTER FOR SCIENCE, . Case No. 07-539(RMB)
 .
Plaintiff, .
 .
v. . 1 John F. Gerry Plaza
 . 4th & Cooper Streets
 . Camden, New Jersey 08101
COCA-COLA COMPANY, .
 .
Defendants. . August 6, 2007
 .
 3:48 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JOEL SCHNEIDER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: Williams, Cuker & Berezofsky, Esqs.
By: MARK CUKER, ESQ.
STEVEN GARDNER, ESQ.
210 Lake Drive East
Cherry Hill, NJ 08002

For the Coca-Cola McCarter & English, LLP
By: GITA F. ROTHSCHILD, ESQ.
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1 coordinate with Melfi?

2 UNIDENTIFIED ATTORNEY: Your Honor, we have agreed
3 that everything is the same except that on August 15th CSPI
4 will serve whatever discovery they want to serve, written
5 discovery they want to serve on us so long as it's not
6 duplicative. Melfi and Simmons. And we do the same to them.
7 And then we respond by August -- well all agree we will respond
8 by August 31st. And we --

9 THE COURT: Is that a little ambitious or -- I'm
10 delighted, but it sounds ambitious.

11 UNIDENTIFIED ATTORNEY: Well, I think from everybody
12 agreed to it and given the -- we've already produced, in Melfi,
13 we've already responded and produced. I believe Nestles has
14 done the same thing. We're really, I mean, it's moving along.
15 So, you know, we don't anticipate a problem in responding.
16 Particularly since we're not going to duplicate. And we wanted
17 to keep that schedule that you set in Melfi so we could all be
18 together on October 2nd and deal with the issues.

19 THE COURT: That's perfectly fine with me.

20 UNIDENTIFIED ATTORNEY: And we attached a proposed
21 order that lays all these dates out to the joint discovery plan
22 which I think is Exhibit B, if I'm not mistaken. And Exhibit
23 A, Your Honor, is a confidentiality order which is identical to
24 the one in Melfi including the changes that Your Honor wrote
25 in. So we just wrote them in, typed them in and everybody's

1 agreed to that. And that will facilitate the production.

2 THE COURT: If it's the same thing I will enter that
3 right away.

4 UNIDENTIFIED ATTORNEY: Excuse me, Your Honor, Mr.
5 Gardner says there's some minor difference in the
6 confidentiality order which I am not --

7 MR. GARDNER: That I think would not matter at all to
8 the Court. But one provision allows us to share discovery and
9 discuss it with the plaintiff's counsel in the other two
10 classes. Probably an abundance of caution, but I ask that it
11 be in there. And the other one is truly minor. It allows
12 production in PDF rather than TSK format. Otherwise I am told
13 by counsel that it's literally identical, and I trusted them.

14 THE COURT: It allows production in the -- what did
15 you say, PDF?

16 MR. GARDNER: A different type of electronic. PDF
17 format rather than TSK.

18 THE COURT: Okay. Are we going to get into
19 electronic --

20 MR. GARDNER: We have resolved those issues.

21 THE COURT: Terrific.

22 UNIDENTIFIED ATTORNEY: Well, let me just say we have
23 resolved issued as to Coke. The plaintiffs have agreed that
24 our processes of preserving documents and the electronic
25 discovery process we followed is okay. We made a request of

1 CSPI in May that they preserve their electronic discovery.

2 THE COURT: They're going to be gone.

3 UNIDENTIFIED ATTORNEY: Well, except for the fact
4 that they have relevant documents. And so they have assured us
5 that there's been no deletion or destruction of documents, but
6 I do -- I mean, that will be tested in the course of discovery
7 and there's no dispute here as we stand, I'm happy to report,
8 but it, you know, we haven't really started discovery.

9 THE COURT: This is much too easy. I'm missing
10 something. Usually lawyers --

11 UNIDENTIFIED ATTORNEY: We're just cooperative.

12 THE COURT: But assuming we're on track then do the
13 parties then anticipate that they're going to send letter
14 briefs to the Court by September 17th with all the issues?

15 UNIDENTIFIED ATTORNEY: Yes, Your Honor.

16 THE COURT: Okay. I'm asking this court and I'm
17 perfectly willing to stand by this schedule. I think it's very
18 ambitious, but you all have lives. We're in August and Labor
19 Day. If you want more time I'll give you more time.

20 UNIDENTIFIED ATTORNEY: Thank you.

21 THE COURT: It's a very ambitious schedule. But if
22 you're intent to go with it we'll go with it. For the
23 plaintiff.

24 UNIDENTIFIED ATTORNEY: Your Honor, we've signed off
25 on it so yeah.

EXHIBIT 3

Elder, Scott

From: Elder, Scott
Sent: Thursday, September 20, 2007 3:20 PM
To: Stephen Gardner
Cc: Michael Quirk; Mark Cuker; Thorpe, Jane
Subject: RE: Load files vs. PowerPoints

Steve:

The parties agreed on production in TIFF. Prior to submitting our joint discovery plan to the Court, we informed you of our plan regarding electronic evidence during our meet and confer on the phone. We then followed up that discussion with a letter to both you and Mr. Cuker clearly identifying the production format that we had discussed on the phone. Following that letter, both sides submitted a joint discovery plan to the court indicating that there were no outstanding disagreements, and the local rules specifically required us to discuss this subject at that time. The parties then reported to the Court at the status conference that these issues had been worked out.

Now, the only rationales that you have offered for needing the native powerpoints are:

1. You need color images. We have offered to provide color images.
2. You cannot determine where the documents start and stop. This is not correct as you were provided a load file with that information, and we have offered to provide a hard copy index containing the same information.
3. You cannot search the documents. We have offered to provide searchable images.

The powerpoints contain competitively sensitive information, and the original powerpoints cannot be either bates labeled or marked as confidential under the confidentiality order. We will not agree to produce documents that cannot be identified later as having originated from this litigation. We can provide the above compromises consistent with our original agreement, but we will not produce the original powerpoint files.

-----Original Message-----

From: Stephen Gardner [mailto:sgardner@cspinet.org]
Sent: Thursday, September 20, 2007 10:19 AM
To: Elder, Scott
Cc: Michael Quirk; Mark Cuker; Thorpe, Jane
Subject: Re: Load files vs. PowerPoints

On 9/19/07 6:49 PM, "Elder, Scott" <Scott.Elder@alston.com> wrote:

- > think we can get you the requested information in the current format.
- > If you can provide us a list of the relevant bates numbers, we will
- > provide color images for those documents. At this point, we will not
- > ask you to pay for the color images, but we do want to reserve that
- > right depending on the volume requested.
- >

- > As to determining where the documents start and stop, the Williams
- > Cuker firm should be able to use the load file and provide that
- > information. We can also provide a hard copy index that lists the
- > starting and ending bates number for each document.
- >
- > Finally, we can provide a set of images that is OCR searchable.

Scott <

While I appreciate your suggestions, they do not address the request to see the electronic versions of the PowerPoint files, which would appear to be simpler to produce and which would certainly not involve any color copying expense on your end.

So, no, giving us better images of these electronic files will not suffice.
We need the PowerPoints.

I will be in court in California on Monday, so our reply letter brief to the Court will have to be completed by midday tomorrow. Thus, if y'all will agree to produce the PowerPoints without Court order, please let me know by then, so that we don't further trouble the Court with this dispute.

Thanks,

Steve

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