

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

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

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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.

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 (4th 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.

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.

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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