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

Linda Franulovic, individually and on behalf of a class of persons,	§	
Plaintiff,	§	
	§	Civil Action No. 1:07-cv-00539-RMB-JS
v.	§	
	§	**ORAL ARGUMENT REQUESTED**
The Coca-Cola Company, Defendant.	§	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF APPEAL FROM MAGISTRATE JUDGE'S DISCOVERY ORDER

Mark R. Cuker
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002-1163
(856) 667-0500

Stephen Gardner
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
5646 Milton Street, Suite 211
Dallas, TX 75206
(214) 827-2774

Counsel for Plaintiff Linda Franulovic and the class

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b), Plaintiff Linda Franulovic hereby appeals the Magistrate Judge's Order entered on October 5, 2007 compelling her to produce ten years of her medical and employment records in this consumer fraud action.[1]

Plaintiff filed this action alleging that Defendant the Coca-Cola Company ("Coke") committed consumer fraud by deceptively marketing and branding the soft drink Enviga as a weight-loss product based on unsubstantiated claims that it causes calorie burning and has other metabolic effects. She contends that Coke had no substantiation for these representations when it marketed and sold Enviga and that, as a result of this deception, she sustained economic losses in paying for Enviga. She seeks class-wide injunctive and individual monetary relief to prohibit and remedy Coke's fraudulent marketing. Whether she did or did not burn calories after drinking Enviga is not part of any of her claims.

Despite the limited focus of Plaintiff's claims on the substantiation for Coke's calorie burning representations, and despite the fact that she seeks only injunctive relief and a refund of money she paid for Enviga, and not personal injury damages, the Magistrate Judge ordered her to produce all of her medical and employment records for the past ten years. *See* Order dated 10/5/07, Exhibit G to Cuker Affidavit, at 3. Plaintiff respectfully submits that the Court should reverse this part of the October 5 Order and hold that these records are not discoverable because they are both irrelevant and privileged.

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[1] This case is consolidated for discovery with *Melfi v. The Coca-Cola Co., et al.* (No. 07-828), and *Simmens v. The Coca-Cola Co., et al.* (No. 07-3855). The Magistrate Judge's Order being appealed was issued in all three cases. Although the Plaintiffs in the three cases are filing separate appeals pursuant to the Court's instruction, the arguments raised and the relief sought in these appeals are substantively the same in all three cases.

First, Plaintiff's medical and employment records are outside the scope of permissible discovery under Fed. R. Civ. P. 26. Rule 26 allows discovery of information that is relevant or "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Coke has not even tried to explain why **employment records** are relevant, and they are not. Coke's only argument as to why **medical records** are relevant, *i.e.*, that "information about diet and nutrition received from or discussed with a physician could impact a Plaintiffs' [*sic*] claim that he or she did not understand the Enviga calorie-burning claim and, therefore, distinguish Plaintiff from typical proposed class members" (Exhibit E at 4), is wholly unavailing. Plaintiff alleges that she saw Coke's calorie-burning claims in advertising and on the Enviga can itself, that these claims were not substantiated, and that she suffered economic loss in paying for Enviga. Plaintiff makes no allegation that she or other class members did or did not burn calories after drinking Enviga, and indeed makes no allegation pertaining to *any* physical or health condition. To the extent Coke claims that Plaintiff's perception of its Enviga advertising is at issue (which it is not), it must direct discovery to Plaintiff herself and not her medical records. Significantly, Plaintiff already has stated in response to interrogatories that she did not have any discussions with or receive information from her physicians or from any other facility concerning caloric intake, diet, or nutrition. Thus, her medical records, like her employment records, contain no information bearing on class certification or the merits of her claims. For this reason alone, Coke should have no access to Plaintiff's medical or employment records.[2]

[2] Plaintiff has given Coke her current height and weight and level of weight fluctuations in the past five years (Answer to Interrogatory 6); her diet regimens and diet supplements used, if any (Answer to Interrogatory 7); and the light, diet, or reduced calorie or low-fat foods and beverages that she consumed in the past two years (Answer to Interrogatory 9).

Second, aside from being irrelevant, Plaintiff's medical records also are not discoverable because they are privileged. New Jersey's privilege law applies in this diversity action based on claims arising under New Jersey Law. Fed. R. Evid. 501. Under New Jersey law, any person's medical records are privileged in a civil action. N.J.S.A. 2A:84A-22.2. To overcome this privilege, Coke must demonstrate that it has a legitimate need for Plaintiff's medical records, that they are relevant to issues before the Court, *and* that the information contained in them cannot be secured from less intrusive sources. Here, Coke does not and cannot make any of these showings because Plaintiff's medical history is irrelevant to her consumer fraud claims and her adequacy or typicality as a class representative. Moreover, even if aspects of her medical history were relevant, Coke could not show that such information is unavailable through other means, such as interrogatories or deposition questions posed to Plaintiff herself. Accordingly, Coke cannot overcome the privilege that New Jersey law attaches to Plaintiff's medical records.

Significantly, in a similar consumer fraud suit based on deceptive marketing, a New Jersey court prohibited discovery of the plaintiffs' medical records. In *Cummis v. Philip Morris Co's, Inc.*, No. MID-L-11263-98-MT (March 10, 2000 Order) (Exhibit H), the plaintiffs alleged that Philip Morris committed consumer fraud by misrepresenting that "light" cigarettes are less harmful to human health than regular cigarettes, for which they sought only economic damages. After a Special Master ordered discovery of the plaintiffs' medical records, the Superior Court reversed, finding that "***the defendants' deceptive behavior has nothing to do with the physical condition of the plaintiffs***." *Id.* at 16 (emphasis added). *Cummis* held that these medical records were both irrelevant and privileged. *Id.* at 16-18. The same conclusion should apply here.

STATEMENT OF FACTS

A. Plaintiff's Underlying Consumer Fraud Claims

Plaintiff filed this action alleging that Coke committed consumer fraud by deceptively marketing and branding Enviga as a weight-loss product when it had no substantiation for its claims that Enviga causes calorie burning and other metabolic effects. Plaintiff alleges that Coke extensively advertised that Enviga burns calories, even though there were and are no scientifically valid studies providing a reasonable basis for these factual claims. *See* Exhibit A (Second Amended Complaint) at ¶¶16-44. Plaintiff further alleges that she saw advertisements for Enviga, began drinking one can per day, then read the representations concerning calorie-burning on the label of the Enviga can and increased her consumption to three cans per day with the understanding that this would help her to lose weight. *Id.* ¶¶45-46. Nowhere does Plaintiff make any allegation concerning whether she did or did not burn calories after drinking Enviga.

Among the common questions of fact and law raised in the Complaint are whether Coke's claims of calorie burning were deceptive, misleading or false, whether Coke thereby violated New Jersey's Consumer Fraud Act (N.J.S.A. 56:8-1, *et seq.*), whether Coke had a reasonable basis or substantiation for its calorie burning and metabolic claims, and whether Plaintiff suffered an economic loss as a result of Coke's deceptive marketing of Enviga. Based on these claims, Plaintiff seeks certification of a state-wide class for her injunctive relief claims under Fed. R. Civ. P. 23(b)(2), a declaration that Coke's calorie-burning representations violate the Consumer Fraud Act, an injunction prohibiting Coke from making these representations, an award of individual monetary relief based on her economic loss, attorneys' fees and costs, and such other relief as the Court deems appropriate. Complaint at 14-15 (Prayer for Relief).

B. The Dispute Over Coke's Discovery Requests

Pursuant to the Court's August 7, 2007 Scheduling Order for discovery on class certification, Coke served Plaintiff with its First Set of Interrogatories, asking her to identify her "employers, physicians, chiropractors, and osteopaths, or other healthcare providers for the last fifteen years." *See* Exhibit B at 6 (Interrogatory 12). Plaintiff objected on the grounds that this request exceeded the scope of permissible discovery, was unduly burdensome, was not calculated to lead to discovery of admissible evidence, and that the time frame covered was overly broad. *See* Exhibit C at 8 (Answer to Interrogatory 12). Coke also asked Plaintiff to identify "all physicians, clinics, gyms or other facilities where Plaintiff has been advised or counseled about weight loss or weight maintenance, nutrition or caloric intake." Exhibit B at 5 (Interrogatory 8). Plaintiff objected, but responded that "**there were none.**" Exhibit C at 6 (Answer to Interrogatory 8) (emphasis added).

Coke responded by letter dated September 13, 2007, contending that Plaintiff's medical history was relevant because it purportedly could impact "the extent of the calorie burning expected in these individuals" and "the claim that Plaintiff perceived an implied weight loss message in the Enviga advertising." Exhibit D at 2. Coke also contended that medical history "could affect whether Plaintiff is an adequate class representative or has claims that are typical of other purported class members." *Id.* With its renewed request for 15 years of Plaintiff's medical records, Coke enclosed an "Authorization for Disclosure of Protected Health Information." *Id.*, Addendum. Coke did not even try to justify its separate request for 15 years of Plaintiff's employment records.

In its letter-brief to the Magistrate Judge of September 17, 2007, Coke argued in support of its right to discovery of the plaintiffs' medical records in the three cases consolidated for discovery that "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." Exhibit E at 4. More specifically, Coke argued that "information about diet and nutrition received from or discussed with a physician could impact a Plaintiffs' [*sic*] claim that he or she did not understand the Enviga calorie-burning claim and, therefore, distinguish Plaintiff from typical proposed class members." *Id.* Coke made this assertion despite the fact that Plaintiff stated in her Answers to Interrogatories that no physicians have counseled her on weight loss or caloric intake. *See* Exhibit C at 6. Coke also once again did not even try to justify its request for 15 years of Plaintiff's employment records.

Plaintiff argued by letter-brief to the Magistrate Judge dated September 24, 2007, that her medical records are irrelevant to her claim that Coke deceptively marketed and branded Enviga, and that these records are privileged in any event under applicable New Jersey law. *See* Exhibit F at 2 (citing N.J.S.A. 2A:84-22.2). Unlike Coke, Plaintiff cited legal authority in support of her arguments against discovery of these records.

After conducting a hearing on various discovery disputes, the Magistrate Judge issued a Letter Order dated October 5, 2007, ordering in relevant part that Defendants in the three cases "are permitted to obtain copies of all of plaintiffs' medical and employment records for the past ten (10) years." Exhibit G at 3. The Magistrate Judge found that these records "may be necessary to determine if the plaintiff's claim is atypical." *Id.*

ARGUMENT

I. Plaintiff's Medical and Employment Records Are Not Discoverable Under Rule 26 Because They Are Not Relevant to Her Consumer Fraud Claims.

It was clearly erroneous and contrary to law for the Magistrate Judge to order Plaintiff to produce 10 years of her medical and employment records because nothing in these records is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).[3] Under Rule 26, as the Third Circuit has found, "relevancy is the touchstone of any discovery request." *Equal Employment Opp'ty Comm'n v. University of Pennsylvania*, 850 F.2d 969, 979 (3d Cir. 1988). Indeed, "'[p]erhaps the single most important word in Rule 26(b) is 'relevant' for it is only relevant matter that may be subject to discovery.'" *Id.* (quoting C. Wright & A. Miller, *Federal Practice & Procedure* § 2008, at 41 (1970)). Here, Plaintiff's medical and employment records bear no conceivable relevance to her consumer fraud allegations based on deceptive marketing and economic loss.

Coke contends that Plaintiff's medical history is relevant because it allegedly could impact "the extent of the calorie burning expected in these individuals" and "the claim that Plaintiff perceived an implied weight loss message in the Enviga advertising," and thus help determine if Plaintiff's claims are typical. Exhibit D at 2. Each of these arguments is wrong.

First, "the extent of the calorie burning expected in these individuals" through consumption of Enviga is not at issue here and thus is not relevant either to the merits or to class

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[3] The Federal Magistrates Act provides two separate standards for judicial review of a magistrate judge's decision: (1) "de novo" for magistrate resolution of dispositive matters; 28 U.S.C. § 636(b)(1)(B)-(c); and (2) "clearly erroneous and contrary to law" for magistrate resolution of nondispositive matters; 28 U.S.C. § 636(b)(1)(A); *accord* Fed. R. Civ. P. 72(a), (b); L. Civ. R. 72.1(c)(1); *see also Cippollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1113 (3d Cir. 1986): *Monaco v. City of Camden*, 2007 WL 2139420 at *3 (D.N.J. July 23, 2007).

certification. As discussed, Plaintiff alleges that Coke committed consumer fraud and breach of warranty by marketing Enviga as a weight-loss product based on representations that it causes calorie burning and has other metabolic effects when it had no prior substantiation or reasonable basis for these claims. *Cf. American Home Products Corp. v. Federal Trade Comm'n*, 695 F.2d 681, 697 (3d Cir. 1982) (under Federal Trade Commission Act, holding that "[f]ailure to disclose that a claim regarding a drug product lacks an appropriate level of support, when such support is non-existent, is misleading."). She further claims that, as a result of this deception, she sustained out of pocket losses based on the money she paid for Enviga. Plaintiff makes no allegation as to whether she did or did not burn calories after drinking Enviga. Nor would any such allegation be relevant to her claims, for which the only issue is whether Coke had sufficient substantiation for its promises about Enviga. Accordingly, any of Plaintiff's possible medical conditions that may enhance or inhibit calorie burning are irrelevant, and thus are not discoverable under Rule 26.

On claims identical in relevant part to those *sub judice*, a New Jersey court overturned a Special Master's Recommendation allowing discovery of the plaintiffs' medical records in a consumer fraud case based on deceptive marketing. In *Cummis*, *supra*, the court disallowed discovery of the plaintiffs' medical records, finding these records to be irrelevant to the claim that Philip Morris had deceptively marketed the relative health danger of "light" cigarettes:

> The *Cummis* and *Trombino* Plaintiffs seek economic damages solely under a statutory consumer fraud theory. The Plaintiffs will not be compelled to disclose medical records at this time because such records are not relevant to the instant cases. The court should focus on liability at this stage of a consumer fraud case, not only damages. The deception of law tar and nicotine yields goes to the inadequacy of the product and/or deceptive marketing. Under the cause of action alleged here, violation of the New Jersey Consumer Fraud Act, ***the Defendants' alleged deceptive behavior has nothing to do with the physical condition of the Plaintiffs.***

Exhibit H (*Cummis*) at 16 (emphasis added). *Cummis* specifically rejected the same argument Coke makes here, that production of these records is "entirely warranted because of its relevance to issues of class certification." *Id.* at 4. The court explained that the Consumer Fraud Act "***does not require actual harm or reliance***," (*id.* at 12) (emphasis added), and then held that:

> This Court agrees with Plaintiffs. For reasons more fully set forth below, the Court . . . holds that the Plaintiffs' medical records should not be disclosed in discovery. Importantly, Plaintiffs do not allege that they suffered health problems as a result of smoking 'light' cigarettes. Instead, Plaintiffs simply complain that they did not receive what they were led to believe they were buying: low tar and nicotine cigarettes.

Id. at 8; *see also Aspinall v. Philip Morris Co's, Inc.*, 813 N.E.2d 476, 488-89 (Mass. 2004) (rejecting Philip Morris's arguments against class certification based on alleged differences in individual health history, finding that "[t]he plaintiffs need not prove individual physical harm in order to recover for the defendants' deception."). The *Cummis* and *Aspinall* cases are squarely on point, and the same result should be reached here. Since Plaintiff likewise asserts consumer fraud claims based on deceptive marketing, and not personal injury claims, evidence concerning her physical health is irrelevant and thus should not be discoverable.

Second, whether or not "Plaintiff perceived an implied weight loss message in the Enviga advertising" also is not at issue. The Consumer Fraud Act prohibits "deception, fraud, false pretense, false promise, [or] misrepresentation . . . ***whether or not any person has in fact been misled, deceived or damaged thereby*** . . ." N.J.S.A. 56:8-2 (emphasis added). Here, Plaintiff claims that she saw Coke's calorie-burning representations concerning Enviga, that these representations lacked substantiation, and that she and class members had economic losses when they purchased Enviga. Since Plaintiff's medical history has no bearing either on the underlying

claims or class certification concerning these claims, the Magistrate Judge's Order compelling Plaintiff to produce ten years of her medical records should be reversed.

Likewise, since Coke has not even tried to justify its request for ten years' worth of Plaintiff's *employment* records, the Magistrate Judge's Order compelling production of these records also should be reversed. None of these records bears any conceivable relevance to Plaintiff's consumer fraud claims for purely economic losses based on Coke's deceptive marketing of Enviga.

II. Plaintiff's Medical Records Are Privileged Under Applicable New Jersey Law.

Plaintiff's medical records also are not discoverable in this case because they are privileged under applicable New Jersey law. *See Cummis*, supra at 16-18 (plaintiffs' medical records found to be privileged in consumer fraud case based on deceptive marketing of light cigarettes). Since this is a diversity case with claims arising exclusively under New Jersey law, New Jersey's privilege laws apply. Fed. R. Evid. 501. New Jersey recognizes by statute that communications between a patient and physician are privileged in a civil action. N.J.S.A. 2A:84A-22.2. To overcome this privilege, Coke bears the burden of demonstrating all the elements of a waiver of the privilege. Coke cannot meet this burden here.

As New Jersey courts have recognized, "[t]he purpose of the patient-physician privilege is to enable the patient to secure medical services without fear of betrayal and unwarranted embarrassing and detrimental disclosure in court of information which might deter him from revealing his symptoms to a doctor to the detriment of his health." *Kinsella v. NYT Television*, 887 A.2d 1144, 1148 (N.J. Super., App. Div. 2005) ("*NYT*"). As the Appellate Division recognized in *NYT*, "[i]n some circumstances, the mere fact that a person has obtained treatment

from a particular doctor or been admitted to a particular unit of a hospital may be highly embarrassing or detrimental to that person's personal or professional interests, even if the specific medical condition for which treatment was obtained is not disclosed." *Id.*; *see also United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'") (citation omitted). These concerns apply with full force here, where the Magistrate Judge's Order compelling disclosure of *all* medical records from the past ten years sweeps so broadly as to cover Plaintiff's gynecological records and records of other potentially deeply personal health matters.

The New Jersey Supreme Court set forth the elements required for finding waiver of the psychologist-patient privilege in *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997). Under *Kinsella*, to pierce the assertion of privilege:

> (1) there must be a legitimate need for the evidence; (2) the evidence must be relevant and material to the issue before the court; and (3) by a fair preponderance of the evidence, the party must show that the information cannot be secured from any less intrusive source.

Id. at 568.[4] In *Kinsella*, the New Jersey Supreme Court held that a divorce defendant could not obtain the psychiatric records of a plaintiff who was claiming extreme marital cruelty because the records were not directly at issue and were not necessary to establish the claim or a defense. *Id.* at 576-77 (Plaintiff "has not alleged any specific psychological damage to himself. He apparently intends to rely for his proof of extreme martial cruelty on proof of the alleged acts of

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[4] Under New Jersey law, records covered by the physician-patient privilege are subject to the same waiver analysis as applies to the psychologist-patient privilege. *See Cavallaro v. Jamco Property Mgmt.*, 760 A.2d 353, 357 (N.J. Super., App. Div. 2000) (applying same issue/waiver analysis to assertions of both privileges).

defendant . . ."); *see also Cavallaro*, *supra* note 4, 760 A.2d at 565 (finding that personal injury plaintiff's claim for physical pain damages does not put medical or psychiatric records in issue).

Compared with *Kinsella* and *Cavallaro*, Plaintiff here presents a much clearer case for applying the privilege. Unlike in those cases, Plaintiff makes no allegations whatsoever pertaining to her physical or mental health or condition. Instead, she simply alleges that Coke committed consumer fraud by deceptively marketing and branding Enviga based on calorie burning claims for which it had no substantiation. These claims thus focus entirely on what Coke knew and when Coke knew it. Plaintiff's claims for damages are based not on personal injury or any other physical condition, but on economic loss based from the money she spent for Enviga as a result of Coke's deceptive marketing and branding. Coke thus does not and cannot demonstrate the first two elements of *Kinsella*'s waiver analysis because Plaintiff's medical records have no conceivable relevance either to her consumer fraud claims or to her adequacy and typicality to assert these claims as a class representative.

Even if Plaintiff's medical records were conceivably relevant, however, they still would be privileged and non-discoverable because Coke cannot demonstrate that the information sought in these records is unavailable through less intrusive means. As discussed, Coke asked Plaintiff in a separate interrogatory about all physicians or health-related facilities where she was advised concerning weight, nutrition, and calorie issues, and Plaintiff answered "**there were none.**" *See* Exhibit C at 6 (Answer to Interrogatory 8) (emphasis added). If this issue were relevant (which it is not), Coke could follow up with additional interrogatories or ask related questions when it takes class certification depositions because what was in Plaintiff's mind necessarily is available from Plaintiff herself, without having to compel disclosure of ten years'

worth of her medical records. Thus, Coke also cannot establish the third element necessary for finding a waiver of the privilege.

Accordingly, since Plaintiff's medical records are covered by the physician-patient privilege and Coke does not and cannot demonstrate any of the necessary elements for finding waiver of the privilege, the Court should reverse the Magistrate Judge's Order compelling Plaintiff to produce ten years of her medical and employment records.

III. Granting Access to Medical and Employment Records in Small-Value Consumer Fraud Actions Violates Public Policy.

Coke's request for ten or more years of personal medical and employment records serves to do no more than harass Plaintiff. The burden and embarrassment of exposing many years of medical and employment records far outweighs the potential gain in a consumer fraud action involving small monetary recovery based on the purchase price of Enviga. Public policy favors encouraging consumers to challenge widespread unconscionable and deceptive practices involving small-value damages on a class-wide basis. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 98 (N.J. 2006) ("Class actions fulfill the policies of this State even when only a small amount of damages is at stake."). Requiring a named plaintiff in a case such as this to have his or her personal employment and medical records exposed directly subverts this public policy and should not be allowed. *Cf. In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989) ("[T]he effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of those claims absent a

class action filing procedure."). Allowing a fishing expedition into a plaintiff's irrelevant and highly personal medical history and employment history significantly discourages consumers from coming forward to challenge fraudulent business practices that harm the public.

Finally, even if these records were conceivably relevant (which they are not), the Order for *ten years* of *all* of Plaintiff's medical and employment records still would be vastly overbroad. Enviga has been on the market for less than one year. Plaintiff's medical conditions ten years ago should not have to be disclosed when Plaintiff has consumed Enviga only since at most the fall of 2006. *See* Exhibit A (Complaint) ¶8. Likewise, the Magistrate Judge's Order encompasses *all* physicians Plaintiff has seen for any reason. If any discovery of medical records were allowed, it should be limited to records of physicians relating to weight, diet and/or nutrition over the past year. Any of Plaintiff's other physical ailments that do not relate to diet, nutrition, or weight have absolutely no relevance here and should remain privileged. If the Court believes it necessary, Plaintiff's medical records could be submitted *in camera* for the Magistrate Judge to determine relevance.[5] But in no event should Plaintiff be required to produce ten years of her medical and employment records in a case that is only about consumer fraud.

CONCLUSION

For all of the reasons set forth herein, the Court should reverse the Magistrate Judge's Discovery Order allowing Coke to obtain "all of plaintiffs' medical and employment records for the past ten (10) years," and should hold that Plaintiff's medical and employment records are not discoverable in this consumer fraud case.

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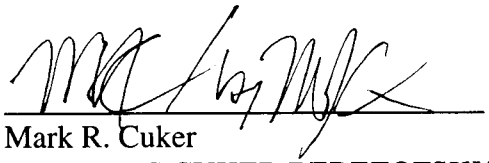
[5] *See, e.g., Corriea v. Sherry*, 760 A.2d 1156, 1162 (N.J. Super., Law Div. 2000) (denying discovery of child study team records sought to determine lost earnings in wrongful death case after conducting *in camera* review of records).

Respectfully submitted,



Mark R. Cuker
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002-1163
(856) 667-0500

Stephen Gardner
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
5646 Milton Street, Suite 211
Dallas, TX 75206
(214) 827-2774

Counsel for Plaintiff Linda Franulovic and the class

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