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**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF NEW JERSEY
 CAMDEN VICINAGE**

LINDA FRANULOVIC, individually and on)	CIVIL NO. 1:07-cv-00539-RMB-JS
behalf of a class of persons,)	
)	CLASS ACTION
Plaintiff,)	
)	Document Electronically Filed
v.)	
)	Return date: February 4, 2008
THE COCA-COLA COMPANY,)	
)	
Defendant.)	

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S
 MOTION FOR LEAVE TO FILE DISCOVERY DOCUMENTS UNDER SEAL**

I. Introduction

Plaintiff filed this motion in connection with Plaintiff's Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint ("Motion for Leave to Amend") filed on November 8, 2007. In its opposition to Plaintiff's Motion for Leave to Amend, Defendant The Coca-Cola Company ("TCCC") argues that the proposed amendment is futile because the amended complaint fails to state a claim against TCCC. The parties agree that the applicable legal standard for assessing futility is identical to the standard for a motion to dismiss under Rule 12. *See* Plaintiff's Reply Memorandum in Support of Rule 59(e) Motion to Amend Judgment to Allow Rule 15(a) Filing of Amended Complaint, p. 2 ("Franulovic agrees with Coke's position that the standard for review of a 'futility' response to a motion to amend is the same as that for a Rule 12(b)(6) motion to dismiss."). Thus, the underlying issue before the Court is whether Plaintiff's proposed amended complaint states a claim for relief under Rule 12. In the instant motion, Plaintiff is seeking leave to file under seal documents obtained from TCCC during class certification discovery that Plaintiff contends should be considered in connection with her Motion for Leave to Amend.

The instant motion should be denied for two independent reasons: (1) the documents Plaintiff seeks to file are outside the pleadings and cannot be considered in determining whether the amended complaint states a claim; and (2) Plaintiff attempts to use Local Rule 5.3 improperly to challenge the confidentiality designation of these documents rather than complying with the requirements of the June 4, 2007 Stipulated Discovery Confidentiality Order ("Confidentiality Order").¹ Accordingly, Plaintiff should be instructed not to file the documents or, alternatively,

¹ A copy of the Confidentiality Order is attached as Exhibit A to the affidavit of Mark R. Cuker filed with the instant motion.

to challenge the confidential designation through the appropriate process set forth in the Confidentiality Order.

II. Argument and Authority

A. The documents cannot be considered when determining whether Plaintiff's proposed amended complaint states a claim under Rule 12.

In her reply brief in support of her Motion for Leave to Amend, Plaintiff references “consumer studies produced by Coke in discovery,” and those documents are the subject of the instant motion. *See* Motion for Leave to Amend, p. 11. Recognizing that those documents cannot be considered when determining whether Plaintiff's amended complaint states a claim, Plaintiff offers the half-hearted explanation that “Plaintiff does not present these documents as evidentiary matters, but only to demonstrate the fundamental insincerity of Coke's claims.” *Id.* Of course, “evidentiary matters” are exactly why Plaintiff offers these documents, and Plaintiff's proposed “fundamental insincerity” exception to the established prohibition against considering documents outside the pleadings should be rejected. *See Acevedo v. Monsignor Donovan High School* 420, F. Supp. 2d 337, 341 (D.N.J. 2006) (refusing to consider matters outside the pleadings on a motion to dismiss); *Garlanger v. Verbeke*, 223 F. Supp. 2d 596, 600-01 (D.N.J. 2002) (same).

B. Plaintiff improperly attempts to use Local Rule 5.3 to challenge Defendant's confidentiality designation.

Plaintiff's motion is flawed for the additional reason that Plaintiff fails to comply with both paragraph 6.3 of the Confidentiality Order and with Local Rule 5.3. Local Rule 5.3 provides the means to seek leave to file documents under seal; it is not the vehicle to challenge the designation of documents as confidential under the Confidentiality Order. Thus, the *movant* under Local Rule 5.3 must describe the documents, indicate why the documents should be filed

under seal, and provide proposed findings of fact and conclusions of law. *See* Local Rule 5.3(c)(2).

Plaintiff ignores those requirements and instead attempts to force TCCC to support Plaintiff's motion. As a result, Plaintiff's counsel has filed a motion seeking leave to file documents under seal but has no intention of actually supporting the motion:

Plaintiff takes no position as to whether these documents meet the requirements of Local Rule 5.3(c)(2). Instead, Plaintiff submits these documents under seal to afford Defendant an opportunity to justify its designation of these documents as confidential in light of Local Rule 5.3(c)(2)'s criteria for filing under seal, and to submit a proposed Order setting forth in good faith the required findings under Local Rule 5.3(c)(5).

See Affidavit of Mark R. Cuker, ¶ 5 filed with the instant motion. Plaintiff, therefore, is attempting to force TCCC to file a proposed order supporting Plaintiff's motion under Local Rule 5.3 by skipping the procedure under the Confidentiality Order for challenging TCCC's confidential designation.

Paragraph 6 of the Confidentiality Order establishes the procedure for challenging a confidential designation. First, the challenging party (Plaintiff) must meet and confer and "explain the basis for its belief that the confidentiality designation was not proper." *See* Confidentiality Order, ¶ 6.2. Next, pursuant to paragraph 6.3 of the Confidentiality Order, Plaintiff must "file and serve a motion under Civil Local Rules 7.1 and 37.1 ... *that identifies the challenged material and sets forth a basis for the challenge.*" (Emphasis added). Moreover, paragraph 6.3 requires Plaintiff to file an affidavit "that affirms that the movant has complied with the meet and confer requirements imposed in the preceding paragraph ... and sets forth a brief description of the justification for the confidentiality designation that was given by the Designating Party in the meet and confer dialogue."

Plaintiff's counsel has never offered any basis for challenging TCCC's confidential designation. Instead, Plaintiff's counsel has chosen to file an unsupported motion under Local Rule 5.3 and to suggest that TCCC should file a proposed order supporting Plaintiff's motion. Plaintiff's motion, however, demonstrates precisely why Plaintiff's bad faith procedural maneuverings should be rejected. The instant documents have been designated properly under the Confidentiality Order, and TCCC welcomes the opportunity to discuss that issue when and if Plaintiff properly challenges their confidentiality. However, those documents should not be filed under seal in connection with Plaintiff's Motion for Leave to Amend because they are absolutely irrelevant to that motion. TCCC has no intention of supporting Plaintiff's attempt to confuse these two issues.

III. Conclusion

Plaintiff's Motion for Leave to File Discovery Documents Under Seal should be denied because (1) the documents are entirely irrelevant to the underlying Motion for Leave to Amend; and (2) Plaintiff's motion fails to comply with any of the applicable requirements in paragraph 6 of the Confidentiality Order or in Local Rule 5.3.

Dated: January 22, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed with the Court the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE**

DISCOVERY DOCUMENTS UNDER SEAL which was served upon all counsel of record as listed on the docket of this Court via CM/ECF.

Dated: January 22, 2008.

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/s/ Peter J. Boyer

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