

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

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<b>Linda Franulovic</b> , individually and on behalf of a class of persons,	§	
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	§	
Plaintiffs,	§	
	§	Civil Action No. 1:07-cv-00539-
v.	§	RMB-JS
	§	
<b>The Coca-Cola Company</b> ,	§	
Defendant.	§	

**PLAINTIFF’S REPLY IN SUPPORT OF LOCAL RULE 5.3 MOTION  
FOR LEAVE TO FILE DISCOVERY DOCUMENTS UNDER SEAL**

Plaintiff Linda Franulovic filed a motion seeking leave, pursuant to Local Rule 5.3 and the Confidentiality Order entered in this consolidated matter,<sup>1</sup> to file under seal the documents in Appendix B to the motion. (Doc. 71, “Motion.”)

In response, The Coca-Cola Company (“Coke”) failed to address the question whether the documents should remain confidential (as it had designated them), instead making two collateral attacks on the motion, saying that (1) the documents were outside the pleadings and should not be considered by the Court and (2) Franulovic did not comply adequately with Local Rule 5.3 *and* the Confidentiality Order. (Doc. 72, “Response.”)

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<sup>1</sup> Doc. 23, filed in *Melfi v. The Coca Cola Company*, Case 1:07-cv-00828-RMB-JS, herein “Confidentiality Order.”

Neither of these arguments should prevent these documents being filed, either under seal or publicly.

As to Coke's first point — that these documents cannot serve evidence in opposition to the motion to dismiss — Franulovic stated quite clearly in her motion that she does not present these documents as evidentiary matters, but only to demonstrate the fundamental insincerity of Coke's claims. Coke spent a significant amount of space in its brief (in opposition to Franulovic's motion for leave to amend, Doc. 67) arguing that *as a matter of law* Franulovic could not have reasonably interpreted the calorie-burning claims as weight-loss claims.

However, Franulovic believes that Coke's argument is defeated by the clear import of its own internal documents, which are excerpted in the documents for which leave is sought.

Although the documents remain confidential at this point, due to Coke's unilateral designation and its subsequent refusal to agree to their being filed publicly, Franulovic believes the documents in Appendix B will demonstrate that Coke's consumer testing shows that Coke knew that many consumers would interpret a calorie-burning claim to be the same as a weight-burning claim.

As to Coke's second point, Franulovic filed pursuant to both Local Rule 5.3 and the Confidentiality Order, and believes that she has complied with both, as contemplated in Paragraph 10 of the Confidentiality Order.

Nonetheless, Coke complains that Franulovic did not (1) describe the documents, (2) indicate why they should be filed under seal, (3) provide proposed findings of fact and conclusions of law, and (4) follow the procedure for challenging a confidentiality designation. Response at 2-3.

Taking the last point first, Coke is simply incorrect that the Confidentiality Order requires a formal challenge to confidentiality prior to filing under seal. Franulovic is not proceeding under Paragraph 6 (to contest confidentiality) but rather under Local Rule 5.3 and Paragraph 10 of the Confidentiality Order (to file confidential-designated documents).

As to the first three points — that Franulovic did not sufficiently comply with Local Rule 5.3(c)(2) — Coke misstates the requirements of the Rule, which provides that “The motion papers shall describe (a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available.”

Thus, the Local Rule does not in fact require Franulovic to describe the documents. However, since Coke insists on it, Franulovic advises the Court that the documents consist of various summaries of consumer research conducted by Coke and others about what consumers believed were the benefits of Enviga, and that these documents all relate to consumer perceptions that the calorie burning claim related to weight control.

In her Motion, Franulovic addressed points (a)-(d) required by Local Rule 5.3(c)(2) in her Motion.

The only thing Franulovic did not do, and indeed cannot do, is describe why the documents should be filed under seal, aside from the fact that she was required to file them under seal due to Coke's designation of them as confidential.

Franulovic does not believe the documents should be filed under seal, but she clearly met her duty under the Rule and the Confidentiality Order.

The burden should shift to Coke to give the Court some basis for keeping these documents under seal. Coke did not take advantage of that opportunity, instead choosing to cavil about whether or not Franulovic had met her own responsibility in seeking leave to file these documents under seal.

Franulovic has done all that required by both the Confidentiality Order and the Local Rule, except in one respect. The new version of the Local

Rules (published on the Court's website in December 2007) provides that Proposed Findings of Fact and Conclusions of Law shall be submitted with the motion papers in the proposed order.

Franulovic, in all candor, was using the prior version of the Rules, and was unaware of the need for Findings and Conclusions, and expresses her apologies to both the Court and Coke for that inadvertence. Therefore, Franulovic files as Appendix 1 to this reply a revised proposed Order.

Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY



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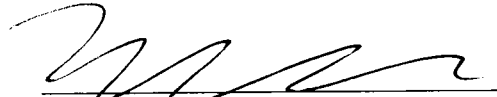
*Attorneys for Plaintiff Linda Franu-  
lovic and the Class*

Dated: January 28, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply Memorandum in Support of Local Rule 5.3 Motion for Leave to File Discovery Documents Under Seal has been served upon Defendant via ECF upon the following counsel:

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Mark R. Cuker

Dated: January 28, 2008

Appendix 1  
Revised Proposed Order

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

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**Linda Franulovic**, individually and on  
behalf of a class of persons,

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v.

**The Coca-Cola Company**,  
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Civil Action No. 1:07-cv-00539-  
RMB-JS

**ORDER ON PLAINTIFF’S LOCAL RULE 5.3 MOTION FOR LEAVE  
TO FILE DISCOVERY DOCUMENTS UNDER SEAL**

THIS MATTER having come before the Court on the motion of Mark R. Cuker, and the Court having considered the Motion (Doc. 71) and Defendant’s Response (Doc. 72), the Court enters the following Findings of Fact and Conclusions of Law.

**Findings of Fact**

1. The materials at issue are documents relating to consumer perceptions about the effects of Enviga.
2. Plaintiff did not present these documents as evidence, but rather in the nature of impeachment of Coke’s claims that the Court should hold as a matter of law that Coke’s marketing of Enviga did not create the perception that it would cause weight loss.



3. Plaintiff advised the Court that she cannot advance an argument why these documents should remain confidential.

4. Coke has not shown any legitimate private or public interests warranting keeping the document confidential.

5. Coke has not shown any injury that would result from the public filing of these documents, much less a “clearly defined and serious injury.”

6. Filing the documents publicly and not under seal is a less restrictive alternative to filing the documents under seal.

### **Conclusions of Law**

1. The requirements of Local Rule 5.3 do not permit these documents to be filed under seal.

2. The burden of demonstrating why these documents should be filed under seal shifted to Coke upon Plaintiff’s filing her Motion.

3. Coke did not meet that burden.

4. The rights of public access require that the documents be filed publicly.

Based on these findings and conclusions, the Court ORDERS that the discovery documents submitted as Appendix B to Plaintiff’s Motion be filed

publicly and not under seal, and directs the Clerk to file Appendix B to Plaintiff's Motion in the public record as part of that Motion.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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RENÉE MARIE BUMB  
UNITED STATES DISTRICT JUDGE