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

LINDA FRANULOVIC, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	)	CIVIL NO. 1:07-539-RMB-JS CLASS ACTION Document Electronically Filed
CATHERINE M. MELFI, on behalf of herself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	)	CIVIL NO. 1:07-cv-00828-RMB-JS CLASS ACTION Document Electronically Filed
ADAM SIMMENS, on behalf of himself and all others similarly situated, Plaintiff, v. THE COCA-COLA COMPANY, et al., Defendants.	)	CIVIL NO. 1:07-cv-03855-RMB-JS CLASS ACTION Document Electronically Filed

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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INTRODUCTION

Defendants The Coca-Cola Company ("TCCC"), Nestlé USA, Inc. ("Nestlé"), and Beverage Partners Worldwide (North America) ("BPWNA") (collectively "Defendants") respectfully request that this Court deny Plaintiffs' motions for protective orders,[1] because Plaintiffs' medical and employment records are relevant to whether Plaintiffs can demonstrate the required elements of adequacy and typicality under Fed. R. Civ. P. 23. Furthermore, because Plaintiffs' allegations place their physical condition, *i.e.*, whether or not they lost weight or have any conditions that would prevent them from losing weight, at issue, Plaintiffs' records are **not privileged**.

Plaintiffs are not entitled to block the discovery Defendants seek for two primary reasons. First, Plaintiffs are required to plead and prove that they did not burn calories or lose weight as a result of drinking Enviga. Accordingly, records that might contain information regarding Plaintiffs' weight loss or ability to lose weight are relevant to these claims. Second, Plaintiffs' central argument against producing the records - that they intend to establish an alleged lack of calorie burning or weight loss through generalized rather than individual proof – ignores the Defendants' right to discover and present different facts on those issues. Plaintiffs cannot limit the scope of **discovery** by pledging to limit the evidence they intend to offer on the issue of whether they burned calories or lost weight as a result of drinking Enviga. In fact, Plaintiffs' pledge does nothing whatsoever to change the essential elements of their claims or the proper scope of discovery relating thereto.

[1] Defendants' response briefing relates to the following two motions: Plaintiff Linda Franuolvic's Notice of Motion for Protective Order Regarding Plaintiff's Medical and Employment Records (June 27, 2008) ("*Franulovic Motion*") [Docket No. 85]; and Plaintiffs' Catherine Melfi's and Adam Simmens' Notice of Motion for Protective Order (June 27, 2008) ("*Melfi/Simmens Motion*")[Melfi Docket No. 73; Simmens Docket No. 92].

Second, Plaintiffs' argument essentially ignores Judge Bumb's prior rulings requiring Plaintiffs to allege *on an individual basis* that they did not burn calories or lose weight as a result of drinking Enviga. *See* October 25, 2007 Opinion at 27-28;[2] March 10, 2008 Order at 2;[3] Transcript of March 10, 2008 Hearing, at 113:15 – 118:1 (March 10, 2008) (hereinafter "March 10, 2008 Transcript"). Without such allegations, which Plaintiffs added to their complaints in response to Judge Bumb's rulings,[4] Plaintiffs fail to state a claim because they do not allege the requisite ascertainable loss.[5] Thus, whether Plaintiffs Franulovic, Melfi and Simmens burned calories or lost weight as a result of drinking Enviga is unquestionably a fact at issue in this case. Moreover, the potential impact of this issue on the class certification issues is apparent. For example, if a plaintiff were taking a drug known to cause weight gain while drinking Enviga, then Defendants would have a defense that is unique to the individual Plaintiff, an important factor in determining adequacy and typicality under Third Circuit precedent. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006) ("A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation."). Prior knowledge or experience with particular diets or weight loss could also impact Plaintiffs' claim that the advertising for Enviga contains an implied promise of weight loss.

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[2] Franulovic Docket No. 60; Melfi Docket No. 46.

[3] Franulovic Docket No. 75; Melfi Docket No. 60; Simmens Docket No. 79.

[4] *See* Third Amended Class Action Complaint, No. 07-539, at ¶ 48 (April 14, 2008) (hereinafter "Franulovic Amend. Compl.") [Franulovic Docket No. 79]; Plaintiff's Second Amended Class Action Complaint, at ¶¶ 58, 59, 96, 103 (May 16, 2008) [Melfi Docket No. 67] (hereinafter "Melfi Amend. Compl."); *see also* Plaintiff's Second Amended Class Action Complaint, at ¶¶ 58, 59, 96, 103 (May 16, 2008) [Simmens Docket No. 86] (hereinafter "Simmens Amend. Compl.")

[5] Franulovic has dropped her "calorie burning" claim and is proceeding solely under an implied "weight loss" claim, *see generally* Franulovic Amend. Compl., presumably based on her allegation that "she does not know and cannot prove whether she actually did not 'burn calories' as a result of drinking Enviga." Franulovic Amend. Compl. at ¶ 53.

Plaintiffs attempt to render these individual issues irrelevant by offering a preview of the manner in which *Plaintiffs* intend to prove their claims. Thus, Plaintiffs claim they intend to prove abstractly that drinking Enviga allegedly does not cause calorie burning or weight loss in anyone who drinks it, including Plaintiffs, rather than focusing on the Plaintiffs individually. Even assuming Plaintiffs could prove an ascertainable loss in that manner, Plaintiffs cannot unilaterally limit the scope of *Defendants'* evidence or discovery on that issue. Regardless of Plaintiffs' evidence, Defendants will introduce evidence that Enviga burns calories and could, depending on the consumer's other behaviors, lead to weight loss.[6] And if discovery yields such evidence, Defendants will certainly seek to prove that Plaintiffs did not experience calorie burning or weight loss as a result of a factor or factors unique to Plaintiffs, such as the use of prescription medication, a thyroid condition, diabetes, a physical problem that limits the ability to exercise, unique injuries, etc.

Plaintiffs' suggestion that the issue of whether the advertising for Enviga creates an implied weight loss claim has been resolved also seriously misinterprets the Court's prior rulings. Despite finding other flaws in Plaintiffs' complaints, this Court disagreed with Defendants' argument that Plaintiffs' proffered interpretation of the Enviga advertising is unreasonable as a matter of law. From that comment made during a hearing on a motion to dismiss, Plaintiffs somehow leap to the conclusion that the issue has been decided and is not subject to further discovery and proof in this action. In other words, Plaintiffs equate overcoming a motion to dismiss to full immunity from summary judgment. Plaintiffs are mistaken. Defendants are entitled to discover facts that could demonstrate that Plaintiffs'

[6] Defendants deny that any labeling, advertising or marketing of Enviga promises, either explicitly or implicitly, consumers will lose weight as a result of drinking Enviga. Nevertheless, for purposes of this motion only, Defendants assume that whether drinking Enviga could lead to weight loss will be an issue at trial.

proposed interpretation of the Enviga advertising is unreasonable. And Plaintiffs do not contend that medical records could not contain such facts (if, for example, a Plaintiff had been placed on a low-calorie diet and been provided with nutrition instruction) – only that Defendants should be forced to accept Plaintiffs' representations as to the contents of their records.

Plaintiffs' privilege argument is equally flawed. First, Plaintiffs ignore the fact that one of these cases, *Simmens*, is based on the law of Pennsylvania, not New Jersey. Second, and more fundamentally, medical information is not privileged if the information is relevant to the claims in the litigation. As noted above, the records are relevant, both to Plaintiffs' claims that they did not lose weight and to their claims that they believed that drinking Enviga guaranteed weight loss. Plaintiffs nevertheless argue that Defendants should be limited to asking Plaintiffs about their medical histories. This concession starts Plaintiffs down a slippery slope that leads only to the bottom. Defendants should not be forced to accept Plaintiffs' bare assertions, potentially inaccurate recall, and preferred interpretation of information that is relevant to a central issue in the litigation. Defendants are fully entitled to test Plaintiffs' allegations as well as any testimony they might offer. Finally, Plaintiffs offer no evidence to support the suggestion that Plaintiffs' medical information will be used to embarrass or otherwise harass them. Certainly, Plaintiffs could apply to this Court for relief if they believed such a situation arose. Indeed, Plaintiffs have asserted that Defendants' concerns over sensitive business records are fully alleviated by the confidentiality order. What is good for the goose is certainly good for the gander as well.

ARGUMENT AND AUTHORITY

I. PLAINTIFFS BEAR THE BURDEN OF DEMONSTRATING GOOD CAUSE FOR THE ENTRY OF A PROTECTIVE ORDER.

Federal Rule of Civil Procedure 26(b)(1) allows discovery of "nonprivileged matter that is relevant to any party's claim or defense." For discovery to be "relevant" under Rule 26, the

discovery must only appear "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Additionally, "[i]t is well recognized that the federal rules allow broad and liberal discovery." *Pacitti v. Macy's,* 193 F.3d 766, 777 (3d Cir. 1999). Although the court may, in its discretion, enter a protective order upon a showing of good cause, *Ziemann v. Burlington County Bridge Com'n*, 155 F.R.D. 497, 500 (D.N.J. 1994), the party seeking a protective order bears the burden of persuasion. *See Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir. 2001).

In order to satisfy the good cause requirement, the movant must demonstrate a particular need for protection and cannot rely on broad allegations of harm, unsubstantiated by specific examples of articulated reasoning. *Id*. Here, Plaintiffs medical and employment records are unquestionably relevant to the issue of whether they lost weight after drinking Enviga. On the other side of the equation, however, Plaintiffs have not articulated anything other than broad and wholly speculative allegations of potential harm. Plaintiffs, therefore, have not demonstrated the good cause necessary for a protective order precluding discovery under Rule 26(c). *See Jackson v. Chubb Corp.*, 193 F.R.D. 216, 228 (D.N.J. 2000) (denying plaintiff's motion for protective order of mental health records because "plaintiff has not has not demonstrated any particularized showing of harm establishing "good cause" and necessitating a protective order").

II. REQUESTS FOR PLAINTIFFS' MEDICAL AND EMPLOYMENT RECORDS ARE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF EVIDENCE RELEVANT TO THE PARTIES' CLAIMS AND DEFENSES.

A. Whether Plaintiffs Melfi, Simmens and Franulovic burned calories or lost weight as a result of drinking Enviga is relevant to their claims and to the issues of adequacy and typicality under Rule 23.

The Court already has decided the issue of whether Plaintiffs must plead, and ultimately prove, a lack of calorie burning and weight loss in the named Plaintiffs. The Court first decided this issue when it granted Defendants' motion to dismiss because, *inter alia*, Plaintiffs failed to

plead that Enviga did not cause calorie burning in them and, therefore, failed to plead an ascertainable loss. *See* Opinion at 27-28 (Oct. 25, 2007). The Court decided the issue for the second time when it denied Plaintiffs' motions to amend their complaints on March 10, 2008. *See* Order at 2-3 (March 10, 2008). As the District Court recognized, the putative class representative has not suffered an ascertainable loss, and cannot represent the putative class, unless he or she did not receive a calorie burning or weight loss benefit from Enviga:

> MR. CUKER: Well, we certainly allege unequivocally [Enviga] doesn't [burn calories] in everybody, it doesn't do it in a substantial number of people.
>
> THE COURT: But you're talking about a putative class representative, if she doesn't know who did it in her, how's she going to know there's nobody else?
>
> MR. CUKER: Well, the point is not whether it did it in her, the point is she's making the purchase based on a promise, a statement of fact that's not true. And if the statement of fact is not true and she makes the purchase based on the statement of fact that's true [sic], that is the end of the inquiry as to that claim, there is nothing else to go into….
>
> THE COURT: You're forgetting the one element, though, is your loss was attributable to their conduct.
>
> MR. CUKER: Correct.
>
> THE COURT: **And the loss is, is that it didn't burn calories in her and you don't allege that.**

March 10, 2008 Transcript. at 103:1-23. Accordingly, the Court denied Plaintiffs' motions to amend their complaints as drafted, s*ee* Order at 2-3; March 10, 2008 Transcript, at 113:21 – 114:5; *see also id.* at 114:23 – 115:3 (Melfi and Simmens). Thereafter, each Plaintiff filed an amended complaint, this time alleging that Enviga did not cause them to lose weight or burn calories. The plain language of the operative amended pleadings is fatal to Plaintiffs' motion:

- "Over the period of approximately 90 days that Franulovic used Enviga as prescribed by Coke, *i.e.,* drinking three cans of it per day, **she did not lose any weight and thus did not get the weight-loss benefits** promised by Coke." Franulovic Amend. Compl. at ¶ 48 (emphasis added);

- "**Plaintiff did not experience any calorie burning effect** as a result of drinking Enviga." Melfi Amend. Compl. at ¶ 58 (May 16, 2008) (hereinafter "Melfi Amend. Compl.") (emphasis added);[7] *see also* Simmens Amend. Compl. at ¶ 58;

- "**Plaintiff did not experience any weight loss or other positive effect on her weight** as a result of drinking Enviga." Melfi Amend. Compl. at 59 (emphasis added); *see also* Simmens Amend. Compl at 59 (same);

- "**Plaintiff did not experience calorie burning** as a result of consuming of Enviga." Melfi Amend. Compl. at 96 (emphasis added); *see also* Simmens Amend. Compl. at 96 (same).

- "**Plaintiff did not experience weight loss** as a result of consuming of Enviga." Melfi Amend. Compl. at 103 (emphasis added); *see also* Simmens Amend. Compl. at 103 (same).

Thus, the suggestion that calorie burning or weight loss in the individual plaintiffs is not relevant or not at issue in these cases cannot be reconciled with the pleadings now on file in the litigation. Moreover, any evidence that impacts the Plaintiffs' ability to prove these allegations, such as, for example taking a medication that causes water retention and weight gain, also impacts the issues of adequacy and typicality that will be central to the Court's Rule 23 analysis.

The remaining issue, therefore, is whether the requests for medical and employment records are reasonably calculated to locate potentially admissible evidence. The Court's prior rulings also demonstrate that the answer to that question is yes.

B. Requests for Plaintiffs' medical and employment records are reasonably calculated to reveal (i) a condition that may affect Plaintiffs' metabolism or ability to lose weight and (ii) knowledge that may affect the reasonableness of Plaintiffs' alleged understanding of Defendants' advertising.

It is common knowledge that certain medical conditions and medications may cause weight gain in individuals or affect an individual's ability to lose weight. *See, e.g.,* Centers for

[7] Melfi Docket No. 67.

Disease Control and Prevention, *at* http://www.cdc.gov/nccdphp/dnpa/obesity/contributing_factors.htm (last visited July 10, 2008) ("Some illnesses may lead to obesity or weight gain….Drugs such as steroids and some antidepressants may also cause weight gain. A doctor is the best source to tell you whether illnesses, medications, or psychological factors are contributing to weight gain **or making weight loss hard.**") (emphasis added).

During the March 10, 2008 hearing, the Court also recognized that whether an individual burns calories or loses weight depends on multiple factors unique to that person, including the other things in his or her diet:

- "Their contention is that – what you're saying is, no, she recognizes that she just can't have three cans of Enviga a day and go out and eat a bunch of Big Macs, she realizes that, but I don't think it says that in the complaint ... where in the complaint does it say that she [Franulovic] used – drank Enviga as part of a weight loss management regimen or routine, whatever? Where does it say that?" March 10, 2008 Transcript at 63:9-24

- "No average consumer would ever believe that if they ate 20 Big Macs they would lose weight no matter how many cans of Enviga they drank." March 10, 2008 Transcript, at 123:7-9.

- "And I can't believe that the average, reasonable person would believe if they had 20 Big Macs, they're going to lose weight with Enviga." *Id.* at 125:1-3.

- "Well, Franulovic has already said they're going to – they have no problem amending [the complaint] to say that [drinking Enviga] was part of a weight loss regimen." *Id.* at 120:7-9.

As a result of this discussion at the hearing, Plaintiffs' amended complaints now allege that they were using Enviga as part of a diet or weight loss plan:

- "After Franulovic read the representations on the Enviga can about calorie burning, she increased her consumption [of Enviga] to three cans per day with the understanding that this would help her **weight loss regimen**. Franulovic did not otherwise alter her food consumption or physical activities during the period she used Enviga." Franulovic Amend. Compl. at ¶ 45.

- "Plaintiff Simmens is 40 years old. He has generally **dieted during the time period he consumed Enviga**." Simmens Amend. Compl. at 53; *see also* Melfi Amend. Compl. at 52 (same).

In addition to the many medical conditions that might impact these allegations, if Plaintiffs had any conversations with their health care providers regarding dieting, weigh loss or exercise, those conversations are likely to be reflected in the Plaintiffs' medical records. And such conversations may impact the reasonableness of their "implied weight loss" claim, thus bearing on whether they are adequate or typical representatives of the class.

Thus, Judge Bumb's rulings and the resulting amended complaints confirm that the Court's question at the discovery conference on October 2, 2007 remains the right one:

> THE COURT: Well, what if we address counsel's argument that if the plaintiffs are claiming they didn't experience any weight loss from drinking Enviga and it turns out that that plaintiff was on prednisone, as steroid? Would that be relevant to their claim that that's why they weren't able to lose weight because they were taking prednisone? And, is that relevant to whether they're "typical of the class"?

And in response Plaintiff's counsel offers the same untenable position that Defendants should be forced to accept Plaintiffs' verbal representations as to the contents of these records:

> MR. CUKER: Well, it may be relevant but it's information they can get from the plaintiff. The plaintiff can answer that question at a deposition yes or no.

October 2, 2007 Transcript at 60:18 – 61:2. But Plaintiffs offer no support for the notion that Defendants should be forced to rely on Plaintiffs' memory and interpretation of relevant records merely because Plaintiffs would rather not produce them. Certainly Plaintiffs would not accept a "depositions only" limitation to their discovery.[8] Contrary to Plaintiffs hypothetical assertions regarding the potential for misuse of the records, there is no reason to believe that their production will result in any embarrassment or other harm to the Plaintiffs. If the records do not

[8] Plaintiffs requested twenty-five different categories of documents from Defendants in their first set of requests for production of documents. In response, Defendants produced nearly 17,000 pages of documents (NESTLE-CLA 1-7529; TCCC-ENVIGA 1-9205). In contrast, Plaintiffs have produced only a tiny handful of documents.

contain any information relevant to diet, metabolism, weight loss or knowledge of these issues, then the records will not be used in the litigation and can be destroyed or returned. If the records do contain such information, then the records can be designated as confidential under the protective order and used appropriately with due respect and protections for the Plaintiffs' privacy and with the availability of relief from the Court if Plaintiffs believe that the records are being misused.[9]

Plaintiffs' request to limit discovery of their records to the periods they allegedly purchased and consumed Enviga is also without merit. If the Court were to limit discovery to such a narrow time period, it would likely exclude relevant evidence of medical conditions, medications or conversations with physicians that arose prior to Plaintiffs' alleged purchases of Enviga – but which nevertheless may bear upon Plaintiffs' claims. In fact, Plaintiffs may not have visited any physicians or health care providers during the short time period they claim to have purchased and consumed Enviga, but this fact would not preclude relevant information from being contained in prior records.

III. *CUMMIS* HAS NO APPLICATION IN THIS CASE BECAUSE THE PLAINTIFFS' MEDICAL CONDITION IS AT ISSUE.

The unpublished trial court opinion in *Cummis v. Philip Morris Co's, Inc.,* No. MID-L-11263-98-MT (N.J. Super. Law. Div., Middlesex Cty., March 10, 2000), if it has any application here at all, actually supports the discoverability of Plaintiffs' medical and employment records. Plaintiffs contend that *Cummis* somehow demonstrates that medical records are not discoverable in consumer fraud actions in which the plaintiffs seek to recover the purchase price of the

[9] The June 4, 2007 Stipulated Discovery Confidentiality Order ("Confidentiality Order") limits the disclosure of confidential material, designated in accordance with that order, by requiring that such documents be used "only for prosecuting, defending, or attempting to settle" the litigation. Confidentiality Order at ¶¶ 2.3, 2.9, 7.1. As such, Plaintiffs' concerns would be alleviated by designating relevant medical and employment records as confidential.

product. But Plaintiffs again ignore the fact that this case involves the allegation that drinking Enviga did not result in the allegedly promised effect on the Plaintiffs' bodies, *i.e.*, it did not result in weight loss. By contrast, in *Cummis* the plaintiffs did not put any aspect of their health at issue. *See id.* at 8 ("Importantly, Plaintiffs do not allege that they suffered health problems as a result of smoking 'light' cigarettes."). In contrast, the pleadings in this litigation as quoted above do contain specific allegations about metabolic effects on individual plaintiffs.

Furthermore, the court in *Cummis* did not announce any blanket prohibition on the discovery of medical records in consumer fraud actions. Rather, the court looked to the particular allegations and to whether or not the requested records could contain evidence relevant to those claims, while leaving open the distinct possibility that Plaintiffs' medical records may become relevant **during class certification**. See *Cummis* at 18-19 ("However, this result does not foreclose revisitation of this issue when and **if a motion for class certification is made**, and the Plaintiffs' medical records become relevant or likely to lead to the discovery of relevant and material evidence in these cases.") (emphasis added). Here, Plaintiffs allege, as they must, that drinking Enviga did not cause them to burn calories or lose weight, and, therefore, factors that could affect their ability to burn calories or lose weight are discoverable. Nothing in *Cummis* suggests otherwise.

IV. PLAINTIFFS' MEDICAL RECORDS ARE NOT PRIVILEGED UNDER NEW JERSEY LAW.

Although N.J.S.A. 2A:84A-22.2 recognizes a "patient-physician" privilege in certain circumstances, "[t]here is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient…." October 2, 2007 Hearing Transcript at 65:7-17; N.J.S.A. 2A:84A-22.4. Plaintiffs' claim of privilege, therefore, is merely another way of re-stating

Plaintiffs' flawed belief that whether or not they lost weight – and just as importantly, why they did or not did not lose weight - is not an issue in this case. Because these facts are at issue, Plaintiff cannot dictate which proof is relevant by asserting that Plaintiffs intend to rely only on general proof that drinking Enviga does not work for everyone. *See* N.J.S.A. 2A:84A-22.4; *Stigliano by Stigliano v. Connaught Lab., Inc.,* 140 N.J. 305, 312 (N.J. 1995) ("By bringing suit against Dr. Nagahawatte and Connaught, plaintiffs have waived the physician-patient privilege. Jessica's seizure disorder is the subject of the litigation."); *Goodman v. Hasbrouck Heights Sch. Dist.,* No. 04-5861 (GEB), 2005 U.S. Dist. LEXIS 32902, at *9 (D.N.J. Dec. 12, 2005) (affirming order finding relevant hospital records were not protected by patient-physician privilege because "[i]n a case involving alleged wrongful termination, Plaintiff's purported medical conditions necessarily become relevant with regard to his absences from work, as well as other claims and defenses of the lawsuit"). Defendants are entitled to discovery on this fundamental aspect of Plaintiffs' claim to properly challenge Plaintiffs' claims of adequacy and typicality. *See Freeman v. Lincoln Beach Motel*, 182 N.J. Super. 483, 486, 442 A.2d 650, 652 (N.J. Super. L. 1981) (requiring the release of plaintiff's medical records where plaintiff claimed damages for injuries suffered as the result of falling down allegedly defective steps).

The New Jersey statute has no application whatsoever to the *Simmens* litigation, which is brought under Pennsylvania law. Since Plaintiff's do not invoke any privilege recognized under Pennsylvania law, there is no need to evaluate a privilege issue in that action.

CONCLUSION

Because Plaintiffs' medical records are relevant to determining whether the putative class representatives are adequate and typical class representatives, and because Plaintiffs' records are not privileged under New Jersey law, this Court should deny Plaintiffs' motions for protective

orders and order Plaintiffs to provide authorizations permitting Defendants to obtain Plaintiffs' employment and medical records for the past ten (10) years.

This 16th day of July, 2008.

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