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

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

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER REGARDING PLAINTIFF'S MEDICAL AND EMPLOYMENT RECORDS

I. INTRODUCTION

Defendant The Coca-Cola Company ("Coke") does not and cannot establish a right to discover ten years of Plaintiff's medical and employment records in this consumer fraud case. As Coke recognizes, a party's discovery must be "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Coke's blanket requests for *all* of Plaintiff's medical and employment records for a ten-year period are in no way tailored to the issues raised by her consumer fraud claims, and thus are not reasonably calculated to lead to admissible evidence. Accordingly, Plaintiff should not be compelled to produce these records.

Coke's arguments for discovery of Plaintiff's employment records fail for several reasons. First, Coke does not come close to demonstrating the relevance of these records to the class certification issues before the Court. Coke alludes to Plaintiff's "knowledge" as to the meaning of its calorie-burning advertisements, without explaining how ten years of her employment records would pertain to this. But even if they did, Plaintiff's knowledge is not an element of her class-wide claim for injunctive relief under the New Jersey Consumer Fraud Act, which requires that she show a "deception, fraud, false pretense, false promise, misrepresentation . . . ***whether or not any person has in fact been misled, deceived or damaged thereby*** . . ." N.J.S.A. 56:8-2 (emphasis added). Although Plaintiff's knowledge arguably could relate to whether she sustained an "ascertainable loss" under N.J.S.A. 56:8-19 as a result of Coke's deception, this is a merits question that has no bearing on her typicality or adequacy as a class representative because the Consumer Fraud Act does not require proof of ascertainable loss by absent members of a class seeking *solely* injunctive relief. *Laufer v. U.S. Life Ins. Co.*, 896 A.2d 1101, 1110 (N.J. Super. App. Div. 2006). Second, even if Plaintiff's knowledge as to the

meaning of calorie burning advertisements were relevant at this stage, Coke's blanket request for ten years of employment records from all of her jobs (such as her work as a hairstylist) without regard to their bearing on this knowledge is not reasonably calculated to lead to discovery of admissible evidence. Certainly, the information most likely to be found in her employment records--her attendance and rate of pay--says nothing whatsoever about her 'knowledge of calorie burning.' Since there is no basis for Coke's discovery demand on employment records, Plaintiff should not be compelled to answer it.

Likewise, Coke's arguments for production of all of Plaintiff's medical records for the past ten years fail for similar reasons. First, Coke's stated rationale that these records may bear on Plaintiff's ability to lose weight while she was drinking Enviga at best would relate to the merits of her claim of ascertainable loss, not to her typicality or adequacy to represent class members seeking only to enjoin Coke's ongoing violation of N.J.S.A. 56:8-2. Second, even if Plaintiff's ability to lose weight were relevant to her typicality or adequacy to represent a class, Coke's blanket request for ten years of her medical records from all doctors without regard to whether their treatment could conceivably bear upon weight-loss matters again is not reasonably calculated to lead to discovery of admissible evidence. Indeed, the information most likely to be found in these records, which include results of gynecological exams and other highly personal matters, again will likely say nothing about her knowledge or experience of burning calories. This is precisely why these records are privileged under applicable New Jersey law. Coke's contention that Plaintiff waived this privilege *wholesale* by putting her ability to lose weight into issue when she challenged the accuracy of a soft drink label is belied even by the case law Coke cites, which recognizes waiver of the privilege only "to the extent that plaintiff's medical

condition will be a factor in the litigation." *Stigliano v. Connaught Laboratories, Inc.*, 658 A.2d 715, 718 (N.J. 1995) (quoting *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985)). Thus, to whatever extent Plaintiff's consumer fraud claims put into issue her ability to lose weight, she should not be held to have waived the privilege as to *all* of her medical records over ten years, including those from gynecological and any psychiatric exams she may have had, without any prior determination by the Court based on an in camera review as to their bearing on weight-loss issues. For all of these reasons, Coke's overbroad discovery requests should be denied.

II. ARGUMENT

A. Coke Provides No Basis for Compelling Plaintiff to Produce Her Employment Records.

Coke does not and cannot show why ten years of Plaintiff's employment records are relevant or reasonably calculated to lead to discovery of admissible evidence concerning her consumer fraud claims. Coke's off-hand references to Plaintiff's "knowledge" of diet and weight loss issues (*see, e.g.*, Brief at 10) utterly fail to explain either how such knowledge would bear on the "typicality" and "adequacy" requirements for class certification that Coke elsewhere alludes to (Brief at 1), or how ten years of her employment records could conceivably bear on such knowledge. Coke's failure and inability to make any reasonable connection between Plaintiff's employment records and the class certification issues currently before the court should mandate denial of its attempt to obtain this discovery.

First, Plaintiff's employment records have no reasonable connection to the typicality and adequacy determinations identified by Coke because Plaintiff's alleged "knowledge" about the meaning of calorie burning advertisements has no bearing on these determinations. As

discussed, Plaintiff seeks to certify a class under Federal Rule 23(b)(2) *solely* to obtain injunctive relief prohibiting Coke's deceptive advertising of Enviga as causing calorie burning. The basis for Plaintiff's class-wide claim for injunctive relief is that these advertisements violate the Consumer Fraud Act's prohibition of:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, ***whether or not any person has in fact been misled, deceived or damaged thereby*** . . .

N.J.S.A. 56:8-2 (emphasis added). Because the Consumer Fraud Act prohibits deceptive practices regardless of whether people have been deceived, any "knowledge" Plaintiff might have pertaining to Coke's calorie burning advertisements has no bearing on her typicality or adequacy to represent a class seeking to enjoin this violation of the Act.

Indeed, Coke has only referenced Plaintiff's weight-loss or knowledge of calorie burning in discussing her ability to demonstrate an "ascertainable loss" under Section 19 of the Act, N.J.S.A. 56:8-19. But ascertainable loss is an individual merits issue and *not* a class certification issue in this case because Plaintiff seeks to represent a Rule 23 (b)(2) class seeking solely injunctive relief, and thus does not need to prove ascertainable loss on a class-wide basis. As the New Jersey Appellate Division recognized in *Laufer*, *supra*, the requirement of ascertainable loss under the Consumer Fraud Act "is purely a 'standing' requirement," 896 A.2d at 1110, and, "[i]n a class action, only the putative class representative is required to satisfy any applicable standing requirement." *Id.* Accordingly, "only the named plaintiff . . . is required to satisfy the threshold standing requirement of 'a claim of ascertainable loss that can survive a motion for summary judgment.'" *Id.* (quoting *Weinberg v. Sprint Corp.*, 801 A.2d 281 (N.J. 2002)). Since

ascertainable loss is not a class-wide issue in this case for injunctive relief, Coke's argument for discovery of Plaintiff's employment records based on her "knowledge" about the calorie burning advertisements fails and should be rejected.

Second, even if Plaintiff's knowledge pertaining to these advertisements were relevant at this stage, Coke's discovery request for ten years of Plaintiff's employment records is not "reasonably calculated" to lead to evidence pertaining to such knowledge. Coke has no basis whatsoever for contending that Plaintiff's employment records bear on her knowledge as to the meaning of its calorie burning advertisements. Indeed, at the time she joined this action as class representative, Plaintiff was employed as a hairdresser. Third Amended Complaint ¶44. Coke does not and cannot explain how Plaintiff's employment records from her job as a hairdresser--and the payroll and attendance information that they are certain to contain--are reasonably calculated to lead to admissible evidence about her knowledge of calorie burning advertisements. Absent a limitation of the discovery to Plaintiff's employment in fields involving health, nutrition, or physical fitness (if any), Coke's blanket request for ten years of her employment records would exceed the bounds of permissible discovery under Rule 26 *even if Plaintiff's knowledge were relevant at this stage of proceedings* (which it is not). Accordingly, the Court should prohibit Coke's attempt to obtain discovery of Plaintiff's employment records.[1]

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[1] In light of the foregoing, the Court also should reject Coke's argument (Brief at 5) that Plaintiff fails to satisfy her burden of persuasion as to the appropriateness of a protective order under Rule 26(c). Coke's citation to *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), misses the mark because *Cippolone* addressed a motion for a protective order preventing public disclosure of already-obtained evidence whose *relevance* was not in dispute. *Id.* at 1110. Here, Coke cannot rely on a burden-shifting argument to relieve itself of the obligation to make any threshold showing of relevancy, which it has failed to do.

B. Coke Provides No Basis for Compelling Disclosure of Ten Years of Plaintiff's Confidential and Privileged Medical Records.

Coke's arguments for obtaining ten years of Plaintiff's medical records likewise fail. First, as with its request for employment records, Coke tries to connect its request for Plaintiff's medical records to both her typicality and adequacy as representative Plaintiff (Brief at 1) based on their alleged relevance to whether she suffered an ascertainable loss (Brief at 6). But for the reasons already discussed, *supra* at 4-5, Plaintiff's claim of an ascertainable loss has no bearing on class certification because ascertainable loss is not an element of the class-wide claims for injunctive relief under the Consumer Fraud Act. *Laufer*, 896 A.2d at 1110. Since Plaintiff's claim of ascertainable loss is purely a merits issue with no bearing on class certification, Coke's asserted basis for obtaining Plaintiff's medical records fails on its face.

Second, Coke's request for ten years of Plaintiff's medical records from all of her doctors again is overbroad even if the asserted rationale of determining whether Plaintiff had medical conditions that prevented her from losing weight were a valid consideration at this stage of proceedings (which it is not). In defending its request for Plaintiff's medical records, Coke posits that, "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 . . ." (Brief at 2). Putting aside the legal inaccuracy of this assertion as applied to Plaintiff's claims for class-wide injunctive relief, Coke's arguments also fail because this request for ten years of Plaintiff's medical records from *all* of her doctors, not just those she saw for weight or nutrition issues (if any) or even those who prescribed medications in use at the time she drank Enviga (if any), again goes light years beyond this purpose. Since Coke's overbroad request for ten years of Plaintiff's

medical records from all of her doctors again is not "reasonably calculated" to lead to admissible evidence, the Court should reject this request.

Finally, the overbreadth of the request for medical records also is fatal to Coke's argument for overcoming the privilege that New Jersey law applies to them. Coke claims (Brief at 11-12) that Plaintiff waived the Patient and Physician Privilege in its entirety by putting the question of whether she lost weight from drinking Enviga into issue. New Jersey law does recognize waiver where "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 or claiming as a beneficiary of the patient . . ." N.J.S.A. 2A:84A-22.4. But Coke's application of this rule misses the mark for two reasons. First, Plaintiff's physical health is not an element of a "claim or defense of the patient," *i.e.* herself. Plaintiff simply alleges that she did not lose weight when she drank Enviga. It is Coke that is trying to make her health an issue by going on a fishing expedition for other reasons why she might not have lost weight. Second, and more fundamentally, the cases Coke cites as recognizing a waiver of the privilege do not recognize the wholesale waiver Coke is seeking here in attempting to discover *all* of Plaintiff's medical records for the past ten years. Rather, in *Stigliano*, *supra*, the New Jersey Supreme Court recognized that "'instituting suit extinguishes the privilege ***to the extent that plaintiff's medical condition will be a factor in the litigation.***'" 658 A.2d at 718 (quoting *Stempler*, 100 N.J. at 373) (emphasis added); *see also id.* ("Once a patient waives the physician-patient privilege, it 'is a waiver of the privilege in regard to *all* of his knowledge ***of the physical condition asked about.***") (quoting 8 Wigmore on Evidence § 2390 at 861 (McNaughton rev. 1961) (first emphasis in original; second emphasis added). The authority Coke cites thus recognizes a more limited waiver tailored

closely to the party's physical or health condition that is put into issue. It does not support Coke's attempt here to open up discovery to *all* of Plaintiff's medical records for the past ten years without even a prior relevancy determination by the Court based on an in camera review of her gynecological records and other highly personal records that would fall within the sweeping scope of Coke's request.

III. CONCLUSION

For each of these reasons, Coke's attempt to obtain Plaintiff's employment and medical records for the past ten years fails. These records bear no relation to any of the issues before the Court on Plaintiff's forthcoming motion for Rule 23(b)(2) class certification of her Consumer Fraud Act claims for injunctive relief. Even if Plaintiff's knowledge or physical condition were relevant at this stage of proceedings, Coke's overbroad request for ten years of these records is not reasonably calculated to lead to admissible evidence concerning the few months in early 2007 when she drank Enviga. Finally, Plaintiff's medical records are privileged under New Jersey law in any event to the extent they do not contain or reasonably relate to health information that Plaintiff specifically put into issue. Accordingly, the Court should reject Coke's attempt to obtain ten years of Plaintiff's employment and medical records in this consumer fraud action.

Respectfully submitted,

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Dated: July 23, 2008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum of Law has been served upon Defendant via ECF upon the following counsel:

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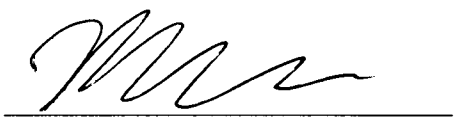

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Dated: July 23, 2008