UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-21221-CIV-ALTONAGA/TURNOFF

RENEE BLASZKOWSKI, *et al.*,
individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

MARS, INCORPORATED, *et al.*,

Defendants.
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

After spending several weeks reviewing Defendants' pending motion to dismiss the Second Amended Complaint and skirmishing about jurisdictional discovery they allegedly needed, Plaintiffs have once again reversed course. As they did with respect to Defendants' motion to dismiss their first Amended Complaint, Plaintiffs again seek at the last minute to avoid filing a response that would permit the Court to make a dispositive ruling on their claims and instead to file yet another amended complaint – this time, their so-called "Third Amended Complaint." Plaintiffs' efforts to further delay the progress of this litigation should not be countenanced.

In requesting leave to amend once again, Plaintiffs fail to demonstrate why the Court should grant the requested relief in light of the further delay and unreasonable burden imposed on Defendants by Plaintiffs' dilatory tactics in filing another amended complaint. While Plaintiffs claim that their latest proposed amendments address jurisdictional issues only (*see* D.E. 310 ("Pls. Mot.") at 4, 5), in fact the Third Amended Complaint is replete with new allegations

and substantive revisions that would require Defendants, yet again, to spend substantial time and resources preparing their fourth motion to dismiss. Indeed, as this Court has noted, there has been virtually *no* progress in this case since the action first commenced over nine months ago – a fact attributable for the most part to Plaintiffs' multiple amendments to the operative complaint. Plaintiffs already have had ample time and opportunity to amend their Complaint to assert personal jurisdiction over and state a claim against Defendants. They should not be permitted to amend their Complaint again to avoid a ruling on Defendants' motion to dismiss. Plaintiffs' request for leave to amend should therefore be denied.

BACKGROUND

Original Complaint

This action was originally filed on May 9, 2007. [D.E. 1] Approximately two weeks before Defendants' response was due – and after Defendants had devoted substantial time and resources to preparing a joint motion to dismiss – Plaintiffs' counsel informed Defendants that she intended to amend the Complaint.

Amended Complaint

After the status conference held on July 6, 2007, the Court entered a scheduling order setting July 13, 2007 as the deadline for Plaintiffs to file their Amended Complaint. [D.E. 130].[1] One day before that deadline, Plaintiffs sought an extension to file the Amended Complaint on the grounds that Plaintiffs' counsel had been on vacation and was therefore unable to prepare the filing. [D.E. 141]. The Court extended the deadline until July 25, 2007 [D.E.143], and Plaintiffs filed their Amended Complaint on that date. [D.E. 153]. The Amended Complaint named twelve additional defendants and 21 additional named plaintiffs, added two new claims

[1] Additionally, the scheduling order set November 16, 2007 as the deadline for motions to amend and add parties. (*See id.*)

(for fraudulent inducement (Count II) and negligence per se (Count VII)), deleted two claims for strict products liability, and added a number of allegations regarding Plaintiffs' complaints about the marketing, labeling and manufacturing practices of the pet food industry. (*See id*.) On July 27, 2007, Plaintiffs filed another version of the Amended Complaint purporting to "correct[] scriveners' errors." [D.E. 156].

Plaintiffs' substantial changes to their claims required Defendants to seek an extension of time to respond and to devote a considerable amount of energy and resources coordinating with the newly named defendants and preparing a second motion to dismiss.[2] Defendants filed their single, consolidated motion to dismiss on October 12, 2007. [D.E. 232].[3] One week later, Plaintiffs moved for and were granted an extension until November 30, 2007 to respond to Defendants' motion. [D.E.s 240 and 243].

Second Amended Complaint

Plaintiffs waited almost until their extended deadline. Then, on November 16, 2007, rather than responding to Defendants' motion to dismiss, Plaintiffs moved for leave to file a Second Amended Complaint and also moved to extend the Court's scheduling order to allow an additional four months of time to further amend the pleadings and to join parties. [D.E.s 255 and 256]. Plaintiffs filed their motions on the very deadline set pursuant to the Court's scheduling order for moving to amend and add new parties.

In support of their motion for leave to amend, Plaintiffs claimed that the Second Amended Complaint would "detail[] the personal jurisdiction allegations as to each Defendant"

[2] Defendants sought and were granted an extension of time to prepare a consolidated response. [D.E.s 168, 169 and 191].

[3] Defendants originally filed their joint motion to dismiss and separate personal jurisdiction motions on September 20, 2007 but those motions were denied without prejudice after the Court directed Defendants to combine all motions into a single pleading. [D.E. 225].

and "specifically address issues raised in the Defendants' Motion to Dismiss, which will moot those issues." [D.E. 256 at 2, 3]. In addition, the Second Amended Complaint added a request to "certify equitable claims under Rule 23(b)(2)," "claims for injunctive relief," a claim for strict liability, revised numerous substantive allegations, and included two new named Plaintiffs and an additional defendant. [*Id*. at 3].

Defendants did not oppose either the motion for leave to amend or to extend the scheduling deadline. Defendants made clear to Plaintiffs and this Court, however, that they would oppose any further amendment and corresponding delay of this litigation. [*Id.* at 4].

This Court granted Plaintiffs leave to amend on November 19, 2007, but granted only a two-month extension, until January 16, 2008, to amend pleadings, noting that Plaintiffs did not "establish good cause for the requested four month extension, particularly where Plaintiffs have known, since the earlier motions to dismiss were filed on September 20, 2007, the several bases upon which Defendants sought to dismiss the present pleading." [D.E. 257].

Plaintiffs thereafter filed a second version of the Second Amended Complaint on November 19, 2007 [D.E. 258], and they filed a third version of the Second Amended Complaint on November 29, 2007. [D.E. 260] Each of these versions was substantively different, requiring Defendants to expend additional time and effort to review and determine what changes had been made to each successive version. Notably, Defendants learned through their own efforts that the November 29 version of the Second Amended Complaint differed substantially from the version approved by this Court for filing on November 19. For example, Plaintiffs – without notice to this Court or Defendants – added "treats" – another category of pet food products – to the

challenged pet products allegedly purchased by each of the named Plaintiffs (*see* D.E. 260 at ¶¶ 3–33). Plaintiffs also added allegations of justifiable reliance (*id.* at ¶ 131).[4]

In response to the new claims and allegations asserted in the Second Amended Complaint filed November 29, 2007, Defendants again devoted a significant amount of time preparing their third motion to dismiss. Defendants filed their consolidated motion to dismiss the Second Amended Complaint on December 14, 2007. [D.E. 279]. A review of this motion shows that notwithstanding Plaintiffs' contention that they had "cured" jurisdictional and other defects, Plaintiffs' Second Amended Complaint remained fatally and fundamentally flawed.

On December 20, 2007, the Court held a hearing on the issue of jurisdictional discovery and suspended the briefing schedule on the consolidated motion to dismiss in order to give time to resolve disputes regarding personal jurisdiction as to various defendants (the "Jurisdictional Defendants"). [D.E. 300]. During the hearing, this Court specifically directed Plaintiffs' counsel and counsel for the Jurisdictional Defendants to take a break and confer in order to see if they could reach agreement on how to proceed. This Court offered several alternatives, including specifically offering Plaintiffs' counsel the right to amend:

> ….Ms. MacIvor can say 'Well, you know what? I'm going to go back and be clearer in another amendment to my pleading that I'm addressing specific and general' and/or you all can come back and say 'You know what? We're going to narrow down the scope of these discovery requests in light of the fact that you are now giving us more time,' whatever you all want to tell me and you tell me when you're ready.

[D.E. 300, Tr. at 70: 16-22].

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[4] Plaintiffs also added allegations about Defendants' "scienter," and Plaintiffs' "vulnerability," alleging for the first time that "Defendant manufacturers know that the Plaintiffs and consumers are particularly vulnerable to these representations because the Plaintiffs and the average consumer have no knowledge of cat and/or dog nutrition, or other requirements." (*See id*. at ¶¶ 70-71; *see also* ¶ 104). In addition, Plaintiffs further revised the allegations against Pet Supplies, adding allegations of a "franchise business." (*See id*. at ¶¶ 64, 94).

The parties took a break and conferred. When Plaintiffs' counsel came back into the courtroom, she specifically did *not* accept the Court's offer to allow her to make her complaint "clearer in another amendment." Indeed, as the hearing transcript makes clear, Plaintiffs' counsel did *not* (as Plaintiffs now contend) "agree to amend when requested" during that December 19, 2007 hearing. (*See* Pls. Mot. at 2). Instead, Plaintiffs counsel agreed to try to work with the Jurisdictional Defendants over the holidays to limit the scope of jurisdictional discovery she required to respond to Defendants' motion to dismiss the Second Amended Complaint. The Court accepted Plaintiffs' decision, and the offer of the Jurisdictional Defendants to try to work with Plaintiffs' counsel. [D.E. 300, Tr. at 74-78].

Third Amended Complaint

On January 11, 2008, Plaintiffs' counsel announced that, notwithstanding her decision on December 20, 2007 not to amend, she now intended to amend the Complaint for a third time. To that end, Plaintiffs counsel forwarded a proposed version of the Third Amended Complaint to counsel for Defendants and requested that Defendants agree to its filing by the end of that day. Defendants' counsel could not do so, and so advised.

On Monday, January 14, 2008, Plaintiffs counsel forwarded a second, again substantively different, version of the proposed Third Amended Complaint for Defendants' review and asked for Defendants' consent to file the Third Amended Complaint by the close of business on January 16, 2008 – the deadline for motions to amend and add parties. However, at 4 p.m. on Wednesday, January 16, 2008, Plaintiffs' counsel then sent Defendants yet another different third version of the Third Amended Complaint asking for a response by that same night.[5]

[5] The as-filed version of the Third Amended Complaint contains further revisions to the last version forwarded to Defendants' counsel, including the addition of yet another new plaintiff.

In support of their current Motion for Leave, Plaintiffs (as before) state that the proposed amendments were prompted by arguments raised in Defendants' motions to dismiss. (*See* Pls. Mot. at 3-5). However, Plaintiffs certainly knew of these arguments by December 19, 2007 when this Court offered Plaintiffs an opportunity to amend. Plaintiffs' counsel declined that opportunity, choosing instead to work with the Jurisdictional Defendants to limit the scope of the jurisdictional discovery she would need to respond to Defendant's motion to dismiss.

While Plaintiffs claim that the proposed revisions were intended to address only Defendants' objections to jurisdiction (s*ee id.* Mot. at 4, 5), a comparison of the proposed Third Amended Complaint with the pending Second Amended Complaint reveals that Plaintiffs have once again changed the Complaint allegations extensively. For example, the proposed Third Amended Complaint would, among other things, add a request for certification of a defendant class of all pet food manufacturers and pet food retailers (*see* 3AC, D.E. 310 at Exh. A, ¶ 122-127). It would also add allegations that various Defendants are agents of one another (*see id*. at ¶¶ 40-41, 54-55) and that Defendants have acted in concert and conspiracy with one another (*see id*. at ¶ 113), as well as substantially revise existing allegations (*see, e.g.*, at ¶¶ 1, 3-32).

ARGUMENT

Enough is enough. The time has come for Plaintiffs to stop moving the target and for their claims to stand or fall on the allegations asserted in their Second Amended Complaint. Plaintiffs have already have proposed multiple complaints (with multiple versions). Plaintiffs now seek to file their Third Amended Complaint. Although leave to amend is frequently granted, it is not without its limits. Courts may routinely deny leave where the circumstances demonstrate that the non-moving party will be prejudiced, where there has been bad faith, undue delay or dilatory conduct, or where amendment will be futile. *See Andrx Pharmaceuticals, Inc. v.*

Elan Corp., PLC, 421 F.3d 1227, 1236 (11th Cir. 2005). In this case, both Plaintiffs' dilatory conduct in repeatedly attempting to avoid a ruling on Defendants' motion to dismiss, and their pattern of consistently waiting until after defendants have expended substantial resources to address the deficiencies of the version of the complaint on hand, provide separate bases for denying Plaintiffs leave to amend their Complaint for the third time.

While Plaintiffs claim that they are entitled to an opportunity to amend their Complaint in order to establish jurisdiction over and state a claim against Defendants (*see* Pls. Mot. at 2-3), Plaintiffs ignore the fact that they have had ample opportunity to do so and indeed have already filed three different complaints (with several different versions). As this Court has noted, Plaintiffs have been aware since September 20, 2007 – well before the filing of the Second Amended Complaint – of "the several bases upon which Defendants sought to dismiss [Plaintiffs' complaint]" [D.E. 257]. Indeed, Plaintiffs themselves admit that they sought leave to submit their Second Amended Complaint to address the arguments raised in Defendants' motion to dismiss [*see* D.E. 256 at 2, 3] and that they now seek leave to amend again to further respond to Defendants' arguments (*see* Pls. Mot. at 3-5). Plaintiffs have already filed six different complaints in this action. Their latest request for leave should be denied.

A number of cases have made clear that the opportunity to amend under Fed. R. Civ. P. 15(a) is not limitless and that plaintiffs should not be allowed to avoid a dispositive ruling on a motion to dismiss by repeatedly amending their pleadings. *See Ferrell v. Busbee*, 91 F.R.D. 225, 232 (N.D.Ga. 1981) ("[p]laintiff cannot be continually allowed to change aspects of this cause of action after defendants correctly point out the defects and flaws in his case in this court in support of their motions and defenses"). *See also PI, Inc. v. Quality Prods., Inc.*, 907 F. Supp. 752, 764 (S.D.N.Y. 1995) (court is free to deny such leave "[w]hen it appears that leave to

amend is sought in anticipation of an adverse ruling on the original claims"); *Hall v. United Techs., Corp.*, 872 F. Supp. 1094 (D.Conn. 1995) (plaintiffs would not be allowed to avoid ruling on motion to dismiss by amending complaint for third time). In this case Plaintiffs' latest attempt to stay one step ahead of a ruling to dismiss in this case likewise should not be permitted.

Moreover, courts routinely have rejected dilatory tactics similar to those employed by Plaintiffs here, particularly where they would impose an undue burden on defendants. For example in *Cordova v. Lehman Bros., Inc.*, the court denied in part plaintiffs' motion for leave to file an amended class action complaint, because plaintiffs had previously amended the complaint three times and sought to amend again rather than respond to defendants' pending motion to dismiss. 237 F.R.D. 471, 477 (S.D.Fla. 2006). The court specifically noted that "allowing the amendment would prejudice the [] Defendants who have expended large amounts of time and resources in drafting the motions to dismiss. To allow the Plaintiffs to again amend the complaint and, therefore, moot the motions to dismiss would force the [] Defendants to conduct further research and adjust their arguments yet again." *Id.* Likewise in *PI, Inc.*, the court denied plaintiffs leave to amend based in part on the "considerable expense" incurred by defendants in briefing multiple motions to dismiss, and specifically noted that it was "the second time that plaintiff has used the tactic of waiting for the defendants to file motions to dismiss before moving to amend the complaint." 907 F. Supp. at 765.[6]

[6] Other courts have denied motions for leave to amend under similar circumstances. *See, e.g., Lemonds v. St. Louis County*, 222 F.3d 488, 496 (8th Cir. 2000) (affirming denial of motion for leave to file third amended complaint, where defendants' motion to dismiss was already fully briefed and granting further leave to amend "would thus have imposed an undue burden on [defendants]"); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (denial of leave to amend complaint to permit correction of deficiency was not an abuse of discretion when the plaintiffs had three opportunities to articulate their damage theory, including the complaint, the RICO case statement, and the brief in response to the motion to dismiss); *Banks v. York*, 448 F.Supp.2d 213, 215 (D.D.C. 2006) (denying motion for leave to amend to supplement complaint

Similarly here, Plaintiffs' motion for leave to amend their Complaint yet again should be denied. As noted above, Plaintiffs' prior amendments to the Complaint have impeded the progress of this litigation and have caused Defendants to expend a substantial amount of time researching, preparing and coordinating three joint motions to dismiss. Allowing Plaintiffs to amend again at this time would greatly prejudice the Defendants. While Plaintiffs claim that the proposed amendments address jurisdictional issues only (*see* Pls. Mot. at 4), the Third Amended Complaint contains numerous new allegations and revisions that would require Defendants, yet again, to spend substantial time and resources preparing their fourth version of the motion to dismiss. At this rate, Defendants will likely have litigated this case for over one year before they have the benefit of this Court's ruling on their motion to dismiss. Accordingly, Plaintiffs' Motion to Amend should be denied, and Defendants' motion to dismiss the Second Amended Complaint should be heard and decided.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Amend should be denied. Alternatively, if this Court is inclined to grant Plaintiffs' motion and allow the filing of the third amended complaint, Defendants request that the Court's order make clear that Plaintiffs have elected to proceed without the benefit of this Court's order on pending motions to dismiss, that this third amended complaint shall be Plaintiffs' last opportunity to amend, and that any subsequent order of this Court dismissing claims and/or the entire complaint will be with prejudice.

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where civil action "barely has progressed in the 14 months since its inception," the lack in progress was "due in large part to plaintiff's past efforts to amend his complaint" and "[f]urther amendment to plaintiff's pleading will cause additional delays and undue hardship to defendants"); *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F.Supp.2d 559, 583 (E.D.N.Y. 2002) (denying plaintiffs' motion for leave to amend where plaintiffs had amended their complaint twice; "[t]o permit another amendment to the complaint would be unduly prejudicial to the Defendants because of the added expense in again moving to dismiss and the delay such leave would cause").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Carol A. Licko

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