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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
Case 07-21221-CIV-ALTONAGA

RENEE BLASZKOWSKI,  
AMY HOLLUB and  
PATRICIA DAVIS, individually  
and on behalf of others  
similarly situated,

Plaintiffs,

MIAMI, FLORIDA

vs.

JANUARY 25, 2008

MARS, INC., et al.,  
Defendants.

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TRANSCRIPT OF MOTION HEARING  
BEFORE THE CECILIA M. ALTONAGA,  
UNITED STATES DISTRICT JUDGE

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25 industry-standard speaker identification is indicated by  
chevrons, i.e., >>>:

6

1 THE COURT: Renee Blazkowski. Good morning.  
2 Perhaps you could all just state your appearance for  
3 the record so the record is clear as to who is present for the  
4 hearing. I know I have a sign-in sheet. I don't know if  
5 others have arrived.  
6 We'll hear from the plaintiff first.  
7 MS. MacIVOR: Catherine MacIvor, for the plaintiffs,  
8 with Bjorg Eikeland and Amanda Sample.  
9 MR. REUSS: James Reuss, Your Honor, for defendant,  
10 Kroger.  
11 MR. FULMER: Rick Fulmer, co-counsel with Mr. Reuss.  
12 MS. LICKO: Carol Licko, Hogan & Hartson, for Nestle.  
13 MS. LEES: Gail Lees, Gibson Dunn & Crutcher, for  
14 defendant, Nutro.  
15 THE COURT: Anyone else wish to state your appearance?  
16 MR. KALIL: Good morning, Your Honor. Craig Kalil, on  
17 behalf of New Albertson's and Albertson's, LLC.  
18 MR. HOOVER: Craig Hoover, from Hogan & Hartson, also  
19 for Nestle Purina.  
20 MR. GREER: Alan Greer, Richman Greer, for Proctor &  
21 Gamble and Iams  
22 MS. LITTEN: Barbara Litten, Squires, Sanders &  
23 Dempsey, on behalf of Target, Wal-Mart, PetSmart and Petco.  
24 MS. CRAIG: Ana Craig, from Carlton Fields, on behalf  
25 of Colgate.

7

1 MR. ARDEN: James Arden, from Sidley Austin, for  
2 Colgate and Hill's Pet Nutrition.  
3 MR. FAMA: Richard Fama, from the law firm of Cozen  
4 O'Connor, for Del Monte Foods Co.  
5 MR. SALUP: Good morning, Your Honor. Carlos Salup,  
6 on behalf of Pet Supplies Plus/USA.  
7 MR. WEGNER: Good morning, Your Honor. Bill Wegner,  
8 Gibson Dunn & Crutcher, for Nutro Products.  
9 MS. KAYANAN: Maria Kayanan, Kubicki Draper, for Pet  
10 Supermarket.  
11 MS. RIVIERE-BADELL: Adriana Riviere, Hunton &  
12 Williams, for Nutro Products.  
13 MR. HOULIHAN: Patrick Houlihan, from Williams &  
14 Connolly, for Mars, Incorporated and Mars Petcare U.S.  
15 MR. SIMPSON: Good morning, Your Honor. Lonnie  
16 Simpson, on behalf of Menu Foods.  
17 MR. SHAKNES: Good morning. Alex Shaknes, DLA Piper,  
18 for Menu Foods.  
19 THE COURT: I'm sorry. Could you repeat that?  
20 MR. SHAKNES: Alex Shaknes, DLA Piper, for Menu Foods.  
21 THE COURT: Good morning.  
22 We have three matters to address. The first is the  
23 motion for leave to amend, and, Ms. MacIvor I did receive your  
24 reply. I know you had requested that it not be heard today and  
25 I thought it best to address it today to keep the case moving

8

1 and since we had you all here. It would be difficult to get  
2 everyone gathered together once more.  
3 I reviewed the papers, the opposition, the memorandum  
4 that you have filed. I'll hear any additional argument you  
5 would like to present today on the motion for leave to amend.  
6 Ms. MacIvor.  
7 MS. MacIVOR: Is it all right --  
8 THE COURT: You may remain seated. Just get the  
9 microphone so it gets closer to you. That's fine.  
10 MS. MacIVOR: Your Honor, I tried within a short  
11 period of time to respond to the defendants' allegations, but  
12 the reasons are set forth in the motion.  
13 It was done in good faith, not with the intent to  
14 delay. It was based upon a number of things. The plaintiffs  
15 feel that this case has been delayed not because of the  
16 plaintiffs' conduct or because of one prior amendment, one  
17 motion for leave to amend that was done before, but because of  
18 a three month period of time that we've been litigating  
19 personal jurisdiction discovery.  
20 The amendment was done -- first of all, there was a  
21 deadline coming up that was set by the Court. We needed to  
22 meet that. Certain parties needed to be added and dropped.  
23 As discussed in open court in December, we were  
24 looking at ways in which to try to cut down the amount of  
25 litigation to get the case more quickly to the merits. I

9

1 mentioned that in December when I was saying it was a great  
2 concern to the plaintiffs that it was taking so long.  
3 Since then, interestingly enough, New Albertson's has  
4 dropped their personal jurisdiction claim. Another defendant  
5 has dropped their personal jurisdiction claim I've been told  
6 orally. It has not a matter of record yet.  
7 If we had gone forward, I think more defendants would  
8 have dropped their claims or we would have prevailed. As I'm  
9 sure Your Honor has read from the papers, that's the  
10 plaintiffs' position.  
11 We decided rather than spend an enormous amount of  
12 time, time effort, energy and money as we did litigating with  
13 New Albertson's and Pet Supplies Plus for three months, we  
14 decided we would amend the Complaint, we would drop certain  
15 parties to try to get the case forward.  
16 We were amending. We added certain plaintiffs who  
17 could no longer participate in the case. We dropped certain  
18 defendants. We also at that time, since we were amending,  
19 added certain other jurisdictional claims based on the  
20 arguments in December. We specified the allegations, even  
21 though we didn't think we had to. We added subject matter  
22 claims the defendants have been saying they needed because we  
23 were amending and this was our last opportunity to amend.  
24 We still didn't think we needed to do that because  
25 that is more the subject of discovery. We've done that, and

10  
1 still the defendants complain. Now they're complaining that  
2 "Oh, my God. We've done it."  
3 Second of all, I included in the reply -- and I hope  
4 Your Honor -- I couldn't hear Your Honor. I'm sorry. You're  
5 very soft-spoken -- I did include a chart on page 4 of the  
6 supply that shows from the defendants' own table of contents  
7 that the only two things that were added, except for the things  
8 that we dropped in the last amendment, were two claims that we  
9 did add.  
10 So, the defendants are also claiming that, you know,  
11 it will be burdensome on them to do it. We have dropped  
12 parties. We have given them the information that they've  
13 wanted. We feel their claims are absolutely invalid, that  
14 their objections are not worthy of denying this motion.  
15 The plaintiffs are proceeding in good faith and, in  
16 particular, the claim at the end of the defendants' motion that  
17 this Court, if it grants leave to amend, should, without  
18 considering any other factor, automatically deny -- excuse  
19 me -- grant with prejudice a motion to dismiss and give the  
20 plaintiffs no further leave to amend is urging this Court to  
21 commit error, and that's what the plaintiffs will say now and  
22 save the rest for rebuttal to the defendants.  
23 THE COURT: Thank you very much.  
24 Ms. Licko.  
25 MS. LICKO: Thank you very much, Your Honor.

11  
1 Carol Licko, from Hogan & Hartson, here on behalf of  
2 Nestlé, but also taking the lead on behalf of the opposition on  
3 the motion for leave to amend.  
4 Your Honor, the defendants are anxious to get this  
5 case moving along as well. When Your Honor held the first  
6 initial status conference in this case, she set a scheduling  
7 order that indicated she wanted to give the parties the benefit  
8 of her opinion, knowing that there would be a motion to dismiss  
9 filed on the initial Complaint.  
10 At that time the plaintiffs' counsel announced she  
11 would be amending her Complaint. Trial schedule came out. By  
12 November of '07th, this Court clearly indicated that it wanted  
13 to have this case set up and teed and end amendment to  
14 pleadings and end of joinder of parties.  
15 Defendants have been traveling on that in good faith,  
16 trying to file their motion to dismiss, having to have it teed  
17 up before this Court so that plaintiffs could have the benefit  
18 of this Court's opinion on that.  
19 Plaintiffs have just now again amended their  
20 Complaint. They filed for leave to amend on the very eve of  
21 this Court's deadline of November the 16th, and at that time  
22 the plaintiffs' counsel said that they did everything that they  
23 thought they needed to do to address all of the arguments that  
24 have been raised in the motion to dismiss by the defendants.  
25 They were very clear on that.

12  
1 At that time the defendants did not oppose that  
2 motion. It was an unopposed motion. We announced at that  
3 time, as part of our good faith conferral, that that was it,  
4 that, you know, given the fact we spent the time on the motion  
5 to dismiss, she had the opportunity, we would not oppose that  
6 one, but that defense counsel would oppose any further  
7 amendment of the Complaint.  
8 In the motion that the plaintiffs' counsel filed with  
9 the Court, she was very clear that they did all of those things  
10 they felt were objectionable, notwithstanding the fact that she  
11 represented in that pleading to the Court that they believed  
12 that even at that time the first Amended Complaint was  
13 completely adequate and would have withstood, based on what  
14 they claim was 11th Circuit precedent, would have withstood our  
15 motion to dismiss.  
16 The Court, based on those representations by the  
17 plaintiffs' counsel at the time, granted the unopposed motion  
18 to amend and the defense counsel did then go back and we did  
19 file another motion to dismiss.  
20 In December we were here again and the Court offered  
21 an opportunity to the plaintiffs to amend because at that time  
22 they were arguing jurisdictional discovery.  
23 Plaintiffs came back and wanted to narrow the scope of  
24 discovery. Narrowing the scope of discovery was with respect  
25 to the Second Amended Complaint. The fact that you started out

13  
1 with seven jurisdictional defendants and that we're now down to  
2 only one has nothing to do with the motion for leave to amend.  
3 In that respect, plaintiffs' counsel is really arguing  
4 apples and oranges here. What has happened is that the  
5 jurisdictional defendants, five of them have been dismissed  
6 voluntarily by plaintiffs' counsel. She no longer wants to put  
7 up the fight with respect to the jurisdictional defendants.  
8 Only two, New Albertson's and Pet Supplies, Inc., have decided  
9 based on the Second Amended Complaint, which is now, you know,  
10 before the Court that they no longer wish to continue that  
11 battle. So, it has nothing to do with the motion to amend, and  
12 certainly nothing to do with judicial economy or trying to move  
13 this case forward.  
14 The defendants in good faith have filed a very  
15 substantive motion to dismiss. We've looked at the motion to  
16 amend. We are not alleging bad faith here. We do believe this  
17 is another delay tactic because, once again, on the eve of the  
18 Court's deadline for deadlines for motions to amend pleadings  
19 or to join parties the plaintiffs have again, on the very leave  
20 eve of that, notwithstanding what they said in December that  
21 they were moving forward on the Second Amended Complaint, have  
22 decided "No, we need to again amend the Complaint."  
23 They're saying the amendments are not substantive.  
24 Your Honor, if we need to, we will certainly show you they are.  
25 We have run red-lines of their current Third Amended Complaint

14

1 based on the Second Amended Complaint.  
2 They've now substantively added a defendants' class.  
3 So, yeah, not only do you have a putative plaintiffs' class,  
4 but also a putative defendants' class.  
5 What we're trying to get resolution. We're trying to  
6 go back to where we are. Your Honor said that at the  
7 appropriate time on a motion to dismiss, once they had the  
8 opportunity to respond -- they've never responded to the  
9 substance of the motion to dismiss. They have never shown this  
10 Court the 11th Circuit authority they claim they've been  
11 relying upon with the allegations of their Complaint.  
12 We propose, Your Honor, that -- and, again, we're not  
13 saying this is with prejudice. We're saying at this particular  
14 time the most expeditious way to advance the progress of this  
15 case is to force the plaintiffs to respond to that motion to  
16 dismiss. Let's keep a briefing schedule. Let's get it teed  
17 up. Let's get it before the Court and let's have the  
18 plaintiffs have the benefit of this Court's opinion on that  
19 motion to dismiss the Second Amended Complaint.  
20 We propose, Your Honor, that's the most expeditious  
21 way of doing this. We'd be glad at the appropriate time to  
22 explain to the Court how that would work into the  
23 jurisdictional discovery that is still ongoing with respect to  
24 not seven defendants now, but only one.  
25 We think that could be accomplished in a fairly

15

1 expeditious time and still allow this Court to proceed with  
2 what it has said it wanted to do all the time, which is to have  
3 closure on the motions to dismiss such that an order could be  
4 issued on that Second Amended Complaint.  
5 I'd be happy to respond to any questions the Court may  
6 have, but we propose, Your Honor, what the Court do at this  
7 time, at this time, is to deny the motion to amend, force them  
8 to respond substantively. We promise we will do our reply  
9 within 14 days. We'll do it expeditiously. We're prepared to  
10 come here for oral argument and have it teed up so we can hear  
11 the arguments back and forth, have appropriate due process for  
12 plaintiffs and plaintiffs' counsel, and allow this to be teed  
13 up appropriately for the Court.  
14 I don't hear plaintiffs' counsel stipulating or  
15 representing to this Court that they're waiving their right to  
16 have this Court's opinion on the Amended Complaint. What I  
17 believe they're trying to do here is to simply avoid that  
18 Court's opinion. That's what we're trying to oppose, Your  
19 Honor.  
20 We want to get this stopped. It's very expensive.  
21 It's very burdensome to the defendants' counsel. What we're  
22 asking for is our day in court. We're asking for a decision  
23 from this Court to say "Enough is enough." Let's get it teed  
24 up and have a decision from the Court.  
25 We respectfully request, Your Honor, that you deny the

16

1 motion for leave to amend at this time and order that they  
2 respond to the motion to dismiss in whatever time they feel is  
3 appropriate and amenable to the Court.  
4 Thank you, Your Honor.  
5 THE COURT: Thank you very much.  
6 Ms. MacIvor.  
7 MS. MACIVOR: Brief response. I don't think you can  
8 parse what has taken place over the last three months from why  
9 we have moved for leave to amend.  
10 It has taken three months, and we still haven't had  
11 one deposition. The reason why we're down to one defendant is  
12 because of the plaintiffs. The plaintiffs could have left all  
13 of them in and believe they would have prevailed over each  
14 and every one of them.  
15 In our reply we detail and in the motion and the other  
16 court papers we've filed, each and every one of these  
17 defendants, once we started getting into it, found out, you  
18 know, through various reasons, through our own investigation  
19 and sometimes through discussions with counsel, we found that  
20 the affidavits filed with the Court in the defendants' motion  
21 to dismiss, by the way, were either not forthcoming or were  
22 false. That has derailed this litigation for three months.  
23 Contrary to Ms. Licko's representations, that has  
24 everything to do with why this amendment was done, not to  
25 mention the results of a deadline to do it that the Court set.

17

1 That has been narrowed. Half of the motion to dismiss  
2 is jurisdictional. The reason the plaintiffs did what they did  
3 was to try to narrow it, to catapult past some of those issues  
4 such as subject matter jurisdiction, personal jurisdiction.  
5 Contrary to Ms. Licko's representations, a  
6 conversation that I had with Pet Supplies Plus was that they  
7 were not going forward based upon more specific allegations  
8 that were in the proposed Third Amended Complaint. Why?  
9 Because they had licensing issues and other things that they  
10 told me about that, of course, were not in the affidavits.  
11 The plaintiffs have been chasing their tail, running  
12 around trying to get discovery from the defendants for three  
13 months while many of them have known that they were subject to  
14 the Court's jurisdiction. That is what has caused delay.  
15 The defendants have repeatedly filed things that were  
16 at least not forthcoming. That has caused the plaintiffs undue  
17 burden and enormous expense.  
18 We've been in here on many motions. We even had New  
19 Albertson's in here saying that, you know, "We shouldn't have  
20 been here. There is no personal jurisdiction." Now  
21 they've withdrawn it, after the plaintiffs spent an inordinate  
22 amount of time speaking with them about the scope of discovery.  
23 How they couldn't know they had business contacts in their own  
24 company is beyond the plaintiffs' comprehension.  
25 At this point in time, the case is stayed pending

18

1 jurisdictional discovery which New Albertson's -- excuse me --  
2 Kroger has given us deposition dates, which will be the end of  
3 January.  
4 Because there was a deadline to amend, the plaintiffs  
5 took a look and said "We have to amend. We have to add and  
6 drop these parties anyway. There are certain plaintiffs we  
7 have to drop. Let's go ahead and amend to give them  
8 everything they want for subject matter jurisdiction."  
9 It is incomprehensible why the defendants would oppose  
10 giving them what they claim that they need. The plaintiffs  
11 don't think they need to do it, but they have still yet to say  
12 what is the harm.  
13 If anything, we have reduced what the Court would have  
14 to look at. There's no prejudice on the other side. They're  
15 now complaining that the plaintiffs are giving them exactly  
16 what they have been complaining about by narrowing the issues  
17 to be addressed before the Court.  
18 There is absolutely no rational basis that the  
19 defendants have given that would support denying this leave to  
20 amend.  
21 THE COURT: Thank you.  
22 Is there anything else from the defendants on the  
23 motion?  
24 MS. LICKO: No, Your Honor.  
25 THE COURT: I can appreciate the costs and the burdens

19

1 to both sides in the course this litigation has taken to date.  
2 I agree with Ms. MacIvor that in seeking leave to amend now  
3 before the parties fully brief the motion and resolve or don't  
4 resolve the personal jurisdictional issues, that she has  
5 simplified matters for me certainly.  
6 I very often will ask parties at an oral argument on a  
7 motion to dismiss a pleading, "What do you concede? What  
8 arguments are good and what counts do you concede you need  
9 to amend?" so I don't have to spend additional time or  
10 effort stating the obvious.  
11 Well, if a litigant recognizes the obvious and takes  
12 those issues away from the Court, that's something I, frankly,  
13 appreciate.  
14 If plaintiffs have seen, "All right. Here are the  
15 arguments made as to personal jurisdiction. We can go down  
16 that road. We can litigate this for months. We can get  
17 the Court to take a fully briefed motion, issue a written  
18 decision and maybe sometime in April we'll be talking about  
19 our next amended pleading." If plaintiffs can look at  
20 that -- and I'm sure the defendants can appreciate that as  
21 well -- and say "You know what? Let's short-circuit that.  
22 Let's concede by coming forward with an amended pleading,"  
23 I'm not sure I see that as dilatory. I tend to agree with  
24 Ms. MacIvor. I see that as trying to advance the case, trying  
25 to cut down on the work for both the lawyers and the Court and

20

1 get this case to where I want it to be, which is beyond this  
2 motion practice addressing the infirmities with the plaintiffs'  
3 causes of action and the claims pled and the defendants before  
4 the Court.  
5 So, on this one, I agree with the plaintiffs'  
6 assessment and I don't believe that what I'm seeing is dilatory  
7 conduct. Quite the contrary, I'm seeing an effort to  
8 streamline, get past issues that are just going to cause delay  
9 and narrow down to those issues where I really need to give you  
10 my decision on the causes of action.  
11 Now, I also understand that the plaintiffs have never  
12 responded to any of the arguments addressed as to why the  
13 counts fail under 12(b)(6). So the defendants are now going to  
14 go back to the drawing board, take their first motion to  
15 dismiss, second motion to dismiss, retool that to give me a  
16 third, still without having any benefit of knowing what are the  
17 arguments that Ms. MacIvor will present in opposition, although  
18 I dare say because you have prepared the motions and you've  
19 researched the law, you can fairly anticipate what the response  
20 will be as to each of the counts in the pleading.  
21 And I appreciate this table giving me the comparison  
22 between the two. I think what's going to happen now, you're  
23 all going to go back and you're all going to do a cut and paste  
24 and take out portions of the motion to dismiss and it will be  
25 not quite as lengthy.

21

1 We're still going to have, I think, the second half of  
2 it which challenges each count under 12(b)(6) and, perhaps,  
3 something additional as to those matters that go beyond  
4 dropping defendants because of jurisdictional issues, the  
5 defendant class and so forth.  
6 So, I will grant the motion for leave to amend.  
7 I was sitting here and as I was listening to the  
8 arguments, I was thinking should I require the plaintiffs to  
9 give the defendants the benefit of what opposition they would  
10 have to all of these arguments that you've stated as to each  
11 count, but I'm not sure that accomplishes much because, as I  
12 said before, I think you, lawyers for the defendants, have  
13 anticipated already what will be coming in opposition to the  
14 12(b)(6) arguments.  
15 Therefore, the Third Amended Complaint is deemed filed  
16 as of today. I will expect the motion to dismiss it to be  
17 filed within the time permitted by the rules and I will not  
18 give greater time because, as I say, what will happen is you'll  
19 sit back and take this draft which has been revised twice and  
20 revise it yet a third time by deleting most of the first  
21 section which dealt with challenges to personal jurisdiction  
22 and, perhaps, add a section or two with regard to the new  
23 adjustments made in the pleading.  
24 So, that takes us to Kroger's issues with respect to  
25 jurisdictional discovery. Why don't we hear about that?

22

1 I think this is the only jurisdictional defendant  
2 remaining. Is that right?  
3 MR. REUSS: Yes, Your Honor.  
4 Your Honor, Jim Reuss, with the law firm of Lane Alton  
5 & Horst, on behalf of Kroger.  
6 I think it would be helpful to begin by just bringing  
7 us up to speed on what has happened since we were last before  
8 you, Your Honor, on December 19th and to take just a brief step  
9 back from that.  
10 Your Honor granted jurisdictional discovery, I  
11 believe, the week before at a hearing on December the 12th.  
12 Your Honor had before you the discovery request to New  
13 Albertson's at that time. We anticipated that we would receive  
14 similar discovery requests. Your Honor expressed the hope that  
15 those would be narrowed down as we anticipated that all of the  
16 then jurisdictional defendants would be served with their own  
17 30(b)(6)s.  
18 Three days after that hearing, Kroger received its  
19 first service of a 30(b)(6) and this request now had some 74  
20 topics, more than twice those directed at New Albertson's, and  
21 some 84 document requests.  
22 Now, we rolled up our sleeves, Your Honor, and started  
23 working on those. We've been attentive to the fact those  
24 discovery requests would likely mirror a number of the ones  
25 that had been previously sent to New Albertson's.

23

1 We were back before you the next week and the Court,  
2 again, directed the parties to meet and confer in good faith to  
3 have some give-and-take and to try to resolve this so that we  
4 could move the case along.  
5 I want to bring us forward from that point.  
6 On December 21st, two days after that hearing, Your  
7 Honor, we corresponded with plaintiffs' counsel and suggested a  
8 meet-and-confer session with her in person with all of the  
9 jurisdictional defendants.  
10 We had noticed, as we all received our 30(b)(6)  
11 notices, that there was a high degree of commonality between all  
12 of the discovery requests and we thought that the most  
13 appropriate way to begin the process of talking about scope, as  
14 the Court had directed us on the 19th, was to have such a  
15 meet-and-confer session.  
16 We didn't hear from plaintiffs' counsel for several  
17 days. We emailed her again on the 26th of December, and we  
18 really didn't get an agreement to have this meeting until  
19 around January 3rd, as I recall, January 2nd or January 3rd.  
20 Part of that delay was caused by counsel's schedule.  
21 She was traveling. But, in any event, we did arrange a  
22 conference on January the 7th, and we met in her office and we  
23 had scoped out probably 8 or 9 or 10 major subject areas, which  
24 we thought was the most efficient way to go about it. Any one  
25 subject area might encompass 10 or 12 written discovery

24

1 requests sent to one or more of the defendants, major subject  
2 areas where we had some issues that we wanted to resolve in  
3 terms of scope.  
4 I have to say little progress was made in that  
5 meeting. But the good news is that we followed that meeting  
6 up, and now I'm speaking of Kroger, because over the next few  
7 weeks, a number of these defendants dropped out, either by  
8 being dismissed or, in the case of at least one defendant,  
9 withdrawing its jurisdictional defense. But I think it's  
10 important to raise this in the context of the arguments the  
11 Court has heard about delay and dilatory conduct.  
12 We initiated, that is to say I initiated, the process  
13 of a telephone conference meet-and-confer with plaintiffs'  
14 counsel on January 11th. That was cut short when she told me  
15 at that time that she had a more immediate concern and that was  
16 that that day she needed to file a motion for leave to file  
17 this yet another Amended Complaint.  
18 So, we had a lot of housekeeping matters that consumed  
19 us that day. I then initiated the rescheduling of that  
20 meet-and-confer and we spoke, I believe, the next week, if I'm  
21 not mistaken.  
22 Your Honor, during the course of that conference, we  
23 reviewed every single one of the 84 document requests that had  
24 been sent to Kroger. We sat down -- it was a multi-hour  
25 process -- and we went through them one by one.

25

1 I must say, Your Honor, I think Ms. MacIvor and I made  
2 very good progress. We resolved most of the discovery  
3 requests. We assured her that as to those discovery requests  
4 where we would be required to produce documents, we'd find the  
5 individuals in her Exhibit A who would satisfy the topic  
6 characterizations or categories.  
7 The format of that conference, Your Honor, was like  
8 this: We'd go through the discovery requests and we'd say --  
9 I'll give an example. We have a custom sales, commercial sales  
10 operation in Florida. We believe it's a very, very small  
11 percentage of our overall revenue. Indeed, it is. But I  
12 understood from the Court's parameters that the Court had set  
13 and from looking at the law that she would be entitled to that.  
14 I would -- the format of this conference was that, you  
15 know, there would be maybe an issue with breadth, all the  
16 documents, as opposed to sufficient documents. There were some  
17 issues with duplication. But I have to acknowledge that we sat  
18 down and worked our way through those things and Ms. MacIvor  
19 would say "Well, really, what I'm after are these documents" or  
20 "I'm after documents that reflect revenue streams," for  
21 example.  
22 I would also be in a position because of having done  
23 my due diligence to get these documents organized, to say  
24 "Here's what we've got: We've got a guy in the income  
25 tax department that can address this issue which seems to

26

1 be called for. But, you know, literally read, your  
2 document request seems to ask for a stack of documents I  
3 can't believe you want."  
4 That process worked beautifully because we were both  
5 flexible and cooperative about the process. We really did  
6 resolve most of the issues.  
7 Now, we were left with the four issues that are raised  
8 in our motion and I'll simply rely upon the papers as far as  
9 the law goes. I want to make a comment on two things and I  
10 promise more good news at the end of my comments.  
11 The first thing is the temporal scope of discovery.  
12 It seems now from reviewing plaintiffs' opposition papers, they  
13 have conceded or agreed that the clock, in effect, stops  
14 running at the time of the filing of the Complaint, and we  
15 appreciate that concession.  
16 As to the beginning of the time period, you know, the  
17 case law is quite varied and some Courts -- we cited the Steel  
18 case and the Tecre case, but there are others -- some Courts  
19 start the clock running at the time the cause of action arose  
20 or, as the Courts characterize it, the time that the events  
21 underlying the Complaint took place.  
22 But it seems, Your Honor, that the common thread that  
23 runs through both parties' papers on this is that the period of  
24 time to be selected is a reasonable period of time and it's  
25 wholly subject to the discretion of the Court.

27

1 Here we have a situation different, I suppose, than a  
2 case that arises out of an occurrence or a specific event, an  
3 accident, for example, or a vehicular accident or something.  
4 Here the plaintiffs have some control over the period of time  
5 when the events underlying the Complaint took place, and that  
6 control is in the selection of the class period that they chose  
7 to allege. They could have alleged a one year class period or  
8 a two-year-class period or, for that matter, a seven year class  
9 period.  
10 They chose in this case to allege a four year class  
11 period and for those reasons, we would recommend the Court  
12 exercise its discretion by choosing the period of time that  
13 corresponds to the class period that they, themselves, have  
14 close chosen.  
15 Now, the good news I promised. One of the categories  
16 that we raise in our papers, and we give the Court law on this,  
17 is our website activities. There is a misstatement -- I hope  
18 it's an innocent one -- but there is a misstatement in  
19 plaintiffs' papers when they say "Kroger believes that all  
20 inquiry into Kroger's website should be foredoomed." I  
21 think I'm reading that as a quote.  
22 That's simply not true, and Ms. MacIvor knows that  
23 when we sat down for our, I think, very productive  
24 meet-and-confer telephone conference, we agreed to produce all  
25 documents relating to Kroger's interactive website

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1 transactions, revenue generating interactive website  
2 transactions. Again, the same theory, I suppose, with respect  
3 to the custom sales, that it represents a revenue stream to  
4 Kroger from contact with Florida residents.  
5 Our objections to the website, that had been basically  
6 two swats. One, again, a number of the website questions also  
7 asked about subsidiaries and affiliates, and we stood pat on  
8 that and I think you've seen in our moving papers, we've given  
9 you that argument and we based some law on that.  
10 The other objection we have had -- and, again, it was  
11 supported by case law we cited in our papers, and I guess this  
12 is more of a more of a horizontal objection, so to speak -- we  
13 objected to producing documentation regarding noninteractive  
14 website activity, so that when, you know, people just access  
15 the website noninteractively -- I've been on the website in my  
16 hotel from Florida, accessing kroger.com -- probably adding to  
17 our jurisdiction when I did that -- we did object to that and  
18 we cited case law stating that's not relevant to the  
19 jurisdiction analysis.  
20 At this juncture, Your Honor, I'd be willing to  
21 concede away that objection, and if we could have a concession  
22 from the plaintiffs or, barring that, I guess, a ruling from  
23 the Court on keeping the temporal period within those four  
24 years because this website documentation is somewhat  
25 burdensome.

29

1 We haven't had a burdensome issue in this case.  
2 You'll note we haven't raised burdensomeness in our response  
3 because when we agreed upon a subject area of documents to be  
4 produced, I think we've worked fairly admirably in scoping that  
5 down appropriately.  
6 But if we could scope down the temporality, the  
7 temporal period, either by the Court's ruling or agreement with  
8 counsel, we'd be willing to drop our objection to the  
9 noninteractive website activity and produce documents  
10 responsive there.  
11 Now, we'll still stand on our objection on the  
12 subsidiaries and affiliates. Those are sort of interwoven into  
13 the website questions as well. By the way, we've footnoted the  
14 specific document requests that fall within the four areas that  
15 are referenced in our motion papers. If we were to get this  
16 concession, obviously, some of those footnoted discovery  
17 requests would drop out and we would supplement our motion  
18 papers to indicate which ones we'd agree to.  
19 And then I think we'll fight this on the motion to  
20 dismiss. We'll still argue, Your Honor, that noninteractive  
21 website activity is completely irrelevant to the jurisdictional  
22 analysis, but we won't block discovery on it and we'll fight  
23 that fight in connection with the motion to dismiss.  
24 And, by the way, this is not the first time we've  
25 taken this posture. We've been asked for documentation

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1 relating to registered agents and documentation relating to the  
2 filing of annual business reports, and we have case law that  
3 says that's not relevant. In fact, the consolidated case, the  
4 11th Circuit case, says so. But it has not been a battle worth  
5 fighting and we'll fight that fight with the motion itself and  
6 we've agreed to produce documentation relating to those types  
7 of things.

8 So, I guess to summarize, Your Honor, we had 84  
9 document requests. We sat down and worked our way through the  
10 vast majority of them, the vast majority of the topics. We  
11 narrowed down and tried to focus for the Court's attention  
12 subject areas that remained.

13 I came here today with four subject areas or four  
14 remaining issues and I hope by virtue of our concession here on  
15 the website, perhaps we can knock that down to simply two for  
16 the Court's consideration.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Ms. MacIvor.

20 MS. MacIVOR: I was just sitting here trying to think  
21 about the website issue. I'd certainly like to resolve that.

22 I'm not sure if Mr. Reuss was indicating that I could  
23 limit it to four years for the website only, because I would be  
24 willing to do that, although I've never understood how it's  
25 burdensome. But I would like to discuss that with him, if

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1 possible, if we could take a brief break, so that I understand  
2 it more fully. But I'm inclined to try to do that once I  
3 understand the overbreadth issue.

4 THE COURT: I don't mean to interrupt your response,  
5 but in thinking about the four year issue versus the longer  
6 period of time that you request, why can't we go about it in  
7 two stages? In other words, do your discovery as to the four  
8 year time period and if you don't get anything there, then say  
9 "All right. Now let's go beyond it because I don't have  
10 enough here to respond to your motion to dismiss." But you  
11 may find enough information with the documents you receive as  
12 to the four year activity.

13 MS. MacIVOR: I would agree to that, Your Honor.

14 THE COURT: Sort of like a bifurcated "Let's do it in  
15 two steps," because if you get what you need, you may say  
16 "I don't need to go that far back right now."

17 MS. MacIVOR: I agree.

18 THE COURT: All right.

19 And then that would address Mr. Reuss's position with  
20 respect to the noninteractive. He says "I have  
21 no problem giving you noninteractive even though I object  
22 to it, if we're limited to the four years."

23 So, if we agree to limit everything to four years for  
24 now, giving you that opportunity to go beyond it, what else  
25 remains, the issue of the subsidiaries and the affiliates?

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1 MS. MacIVOR: I believe that's the other issue, yes,  
2 Your Honor.

3 As far as subsidiaries, as we discussed in our  
4 response, the Florida Statute itself talks about agency.  
5 Mr. Reuss's position is I need to make specific allegations. I  
6 can't make specific allegations. The cases I've cited from  
7 Florida don't require me to. I need some discovery in order to  
8 determine that from Mr. Reuss I think within a four year period  
9 that's there initially.

10 I think the type of things I've asked for are  
11 relatively simple. I have asked for organizational charts and  
12 that sort of thing just so that I can determine initially if  
13 there is a high degree of inter-relationship, like the Meier  
14 case talks about. I don't want to look at thousands of  
15 documents.

16 I want to see what the inter-relationship is with Tom  
17 Thumb that sells pet food, and if that's the case, then, you  
18 know, I would argue that personal jurisdiction should attach in  
19 Florida, and I think under the case law presented that I am  
20 entitled to look at that.

21 So, I definitely think that I can't concede on  
22 subsidiaries and I know that Mr. Reuss is not going to. So I  
23 think we're going to need a ruling from the Court on that.

24 THE COURT: Mr. Reuss, anything additional?

25 MR. REUSS: I do agree with her on the last statement.

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1 If we could go back to the bifurcated consideration of  
2 the temporality issue.

3 Your Honor, we'll produce the noninteractive website  
4 documents going back to 2003. We can just kind of remove that,  
5 if that makes life easy by removing that from our overall  
6 argument on temporality. But I don't want a situation where we  
7 go through the process of producing available documents,  
8 counsel says that she's not satisfied and we go through the  
9 whole process again.

10 I think I'd like to stand on our motion and get Your  
11 Honor's ruling one way or the other on the temporality issue.  
12 But with respect to the website stuff, just so we can remove  
13 that from further dispute, if counsel is willing to accept a  
14 search for noninteractive website material back to 2003, we'll  
15 undertake to do that search and we'll also agree to withdraw  
16 our objection to it as being noninteractive.

17 Again, with all due respect, Your Honor, I'd prefer to  
18 have a ruling, just up or down, on temporality so as to all the  
19 other documents we'll know the period of time we're talking  
20 about.

21 THE COURT: I'm not sure I'm in agreement to give you  
22 a ruling up or down because whatever the efforts are in-house,  
23 and with your assistance to get those documents and that  
24 information, if Ms. MacIvor -- I'm giving her a door to come  
25 back and say "I didn't find anything. I want to go back some

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1 more because you, Judge, limited me in scope and I think I  
2 might be able to find something for 2002."  
3 All it would mean would be duplicating whatever  
4 efforts and steps were taken to retrieve information. At that  
5 point, it's sort of "Okay. Now we do the same thing, but go  
6 back a year."  
7 So I'm not in agreement to say -- you're actually  
8 winning on the temporal argument, but you're winning with a  
9 caveat which is Ms. MacIvor can certainly come back to me and  
10 to you first, of course, and say "I'd like to go back a year or  
11 two."  
12 MR. REUSS: Thank you.  
13 THE COURT: And that takes care of that. The  
14 noninteractive websites will be produced as well, and I'm going  
15 to agree with the plaintiffs' position on their request to go  
16 into and explore the contacts of Kroger with subsidiaries and  
17 affiliates as it pertains to activities within the State of  
18 Florida.  
19 So the motion for protective order in that regard is  
20 denied.  
21 Is there anything else you need me to address on this  
22 motion or not?  
23 (No response.)  
24 THE COURT: No. Okay.  
25 MR. REUSS: Your Honor, again, I don't know whether

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1 you are inclined to do it from the bench, but we do have a  
2 branch of the motion on the vendor supplier issue that remains  
3 unresolved.  
4 THE COURT: Any additional argument on that, because I  
5 will deny the motion as well on that issue.  
6 I would rather give the plaintiffs, who are trying to  
7 defend a jurisdictional motion, the information with which to  
8 defend it, rather than limit them so that that becomes an issue  
9 later on.  
10 Ms. Licko.  
11 MS. LICKO: Your Honor, the defendants would ask for  
12 20 days to respond to the Complaint, and let me explain why.  
13 As you've heard, the jurisdictional discovery issue --  
14 well, first of all, let me explain that. It is very, very  
15 difficult to deal with one consolidated motion to dismiss with  
16 all the defendants we have. We make a very good faith effort  
17 to do that. It takes time to create a new draft, circulate it,  
18 to get consensus on everything, and the 10 days we would  
19 normally be allowed on a Amended Complaint would be  
20 insufficient.  
21 We would propose 20 days because based on what you've  
22 heard today, you'll get a consolidated motion to dismiss. It  
23 will include the jurisdictional allegations. The discovery  
24 they're talking about is going to take -- I have no idea, but  
25 it's going to take an extended period of time. They're going

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1 to be moving to extend to file their opposition and we're going  
2 to be right back where we are. So we would request to be given  
3 20 days to respond to the Third Amended Complaint you deemed  
4 filed today.  
5 THE COURT: That's certainly reasonable. I will give  
6 you the 20 days, but let me address the point that you're  
7 forecasting for me.  
8 I will not be amenable to giving the plaintiffs an  
9 extended period of time to oppose the motion for a couple of  
10 reasons. The first of which you've had the motion for months  
11 now, and all we're going to see is the fine-tuning or, like I  
12 called it, a cut-and-paste.  
13 So, on your side, on the plaintiffs' side, you can  
14 actually be working right now in drafting the response in  
15 opposition because what you're going to see, in large part, as  
16 to the specific counts pleading fraud with particularity,  
17 Economic Loss Rule, all those arguments have been there for  
18 months. These are not new arguments, and perhaps you all can  
19 talk with Ms. Licko. I dare say you're not going to be  
20 dropping any of those arguments. They're all going to be there  
21 one more time.  
22 The jurisdictional issue will not be a basis for  
23 putting off a response in opposition. You will tell me, and we  
24 know right now that you can't oppose it yet, and so you will  
25 respond to everything but the jurisdictional issue and we'll

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1 hold that off.  
2 MS. MacIVOR: Okay.  
3 THE COURT: And you'll have as much time as you need  
4 on jurisdictional discovery and Kroger will be here.  
5 MS. MacIVOR: That's fine.  
6 THE COURT: All right.  
7 So that sort of gives the plaintiffs' side my preview,  
8 which is start drafting your opposition now --  
9 MS. MacIVOR: Fine.  
10 THE COURT: -- as they try to sit together or get  
11 together electronically to submit the third version of the  
12 consolidated motion to dismiss.  
13 MS. LICKO: Thank you, Your Honor.  
14 THE COURT: All right.  
15 Are there any other issues we should be addressing?  
16 I think the purpose for today was really to see where  
17 you all were with the jurisdictional discovery, and I see you  
18 have been very successful because we only have one remaining  
19 defendant with those issues and we have addressed that now  
20 already.  
21 I don't know if the other lawyers had any issues you  
22 wanted to address.  
23 (No response.)  
24 THE COURT: No?  
25 MS. LICKO: No, Your Honor. We're fine.

1 THE COURT: All right.  
 2 Well, I thank you all for coming in this morning.  
 3 Have a good weekend.  
 4 MS. LICKO: Thank you, Your Honor.  
 5 MS. MacIVOR: Thank you, Your Honor.  
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1 CERTIFICATE  
 2 I hereby certify that the foregoing is an accurate  
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