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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.

MAY 23, 2008

MARS, INC., et al.,
Defendants.

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

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ADMINISTRATIVE CONVENTIONS:

When counsel does not identify themselves each time they address the Court during a telephone conference, the industry-standard speaker identification is indicated by chevrons, i.e., >>>:

1 THE COURT: Good morning. Renee Blaszkowski versus
2 Safeway. Could I have counsel state your names for the record
3 please.

4 MR. GREER: Good morning, Your Honor. Alan Greer, of
5 Richman Greer, for the defendant, Iams. With me is my
6 co-counsel, Jeff Ireland, of the Faruki Ireland firm in Dayton
7 Ohio.

8 THE COURT: Good morning.

9 MS. MacIVOR: Catherine MacIvor, for Renee
10 Blaszkowski, et al., Bjorg Eikeland and Jeffrey Maltzman.

11 THE COURT: Did you get the names, Barbara? Yes, you
12 did. I didn't get her name. I'm sorry.

13 MS. MacIVOR: Bjorg Eikeland.

14 THE COURT: Thank you.

15 MS. LICKO: Good morning, Your Honor. Carol Licko,
16 here on behalf of Nestle Purina PetCare Company.

17 THE COURT: Good morning.

18 MS. CRAIG: Ana Craig --

19 THE COURT: I can't hear. You need to approach a
20 microphone. I'm sorry.

21 MS. CRAIG: Good morning, Your Honor. Ana Craig, from
22 Carlton Fields, on behalf of Hill's Pet Nutrition.

23 THE COURT: Good morning.

24 MR. McCOY: Good morning, Your Honor. Kevin McCoy, of
25 DLA Piper, on behalf of Menu Foods, Inc.

1 MS. COLOMBO: Good morning, Your Honor. Sherril
2 Colombo, from Cozen O'Connor, on behalf of Del Monte.

3 THE COURT: Good morning.

4 MR. SECHLER: Good morning, Your Honor. Phil Sechler,
5 on behalf of Mars, Incorporated, Mars Pet Care and Nutro
6 Products.

7 MR. GARCIA-LINARES: Good morning, Your Honor. Manny
8 Garcia-Linares, of Richman Greer, on behalf of Iams.

9 THE COURT: Good morning.

10 MR. HANGER: Good morning, Your Honor. Robin Hanger,
11 of Squires Sanders, on behalf of Petco.

12 MR. BAUMBERGER: Good morning, Your Honor. Peter
13 Baumberger, on behalf of Pet Supermarket.

14 THE COURT: Good morning.

15 Do I have counsel on the phone?

16 MR. HOOVER: Craig Hoover, for Nestle Purina.

17 MR. FAMA: Richard Fama, Cozen O'Connor, for Del
18 Monte.

19 MS. LITTEN: Barbara Litten, Squire Sanders, Petco,
20 Walmart, Target Corp. and Petsmart.

21 MR. TAMARAZZO: Dominick Tamarazzo, on behalf of Pet
22 Supplies.

23 MS. WALLER: Monica Waller, Lane Alton & Horst, on
24 behalf of Kroger.

25 MR. ARDEN: James Arden, Sidley Austin, on behalf of

1 Hill's Pet Nutrition.

2 MS. SANOM: Laura Sanom, for Iams.

3 THE COURT: Let me just say for the benefit of those
4 who are appearing by phone, I don't think I or my court
5 reporter got any of your names, and if you would like to appear
6 on any transcript of today's proceeding, you had best contact
7 my court reporter and let her know your name and who you are
8 representing because the communication is not all together
9 clear.

10 I have Mr. Greer at the podium. This is his motion.

11 MR. GREER: Thank you, Your Honor.

12 Your Honor, defendants are asking this Court for
13 phased discovery in this case, not bifurcation of discovery,
14 because based on the plaintiffs' representations at the last
15 hearing of April 4, that the plaintiffs did not wish to review
16 millions of documents, but would tailor their discovery
17 requests, the defendants agreed to a very tight case management
18 and trial schedule.

19 However, instead of that tailored discovery, the
20 defendants, manufacturers, received three sets of requests for
21 production constituting 376 individual requests and when we got
22 these, the defendants all reviewed their own individual
23 companies' processes and procedures to see what it would take
24 to respond to all 376 and quickly came to the conclusion that
25 it would take four or more months of massive work just to get

1 the documents together and begin to review them. This would
2 make it all but impossible to adhere to the currently set case
3 management schedule and trial schedule.

4 So, in order to avoid that problem, we have proposed
5 phased discovery, not bifurcated discovery, but phased
6 discovery that will provide the necessary class cert. discovery
7 and tailored merits discovery of the core issues of this case
8 to allow us to move forward on an expeditious basis and adhere
9 to the current schedule.

10 For example, Your Honor, 128 of the plaintiffs'
11 requests to Iams implicate all 163 of Iams products. Mars has
12 over 500 products. Del Monte has between 325 and 350 products.
13 Natura has only 74 products, but just using Iams as an example
14 to understand what would have to occur, I have a graphic here
15 and I'd like to hand up to the Court, if I may --

16 THE COURT: Yes.

17 MR. GREER: -- a miniature so you won't have to try to
18 read it across the courtroom.

19 THE COURT: Thank you. I actually can't see that far.
20 Thank you.

21 MR. GREER: And what this graphic demonstrates is the
22 process each Iams product has to go through from inception to
23 being marketed to the consumers. It goes through research and
24 development, pre-manufacturing processes and communications
25 with various agencies and governmental entities, getting the

1 supplies that will be needed. Then the manufacturing process,
2 which is two different sets of processes, one for dry pet food,
3 one from co-packers that is not dry -- what is known as the wet
4 food -- and everything that has to be done to coordinate
5 between those entities.

6 Then it goes from there into manufacturing, and once
7 it's manufactured, it goes to the direct customers who are the
8 people who sell the products to the consumers, and there's all
9 sorts of communications involved in that process, all sorts of
10 documentation, invoices. That's the point where the
11 advertising begins and then it's sold to the consumers.

12 At the consumer level, there's all sorts of research,
13 marketing efforts, and then there's consumer follow-up at the
14 end of the day.

15 So, each product goes through this process and each
16 product is like an individual silo and you have to track down
17 all those silos of documents, and if you multiply 163
18 ingredients by 128 requests, that constitutes 20,864 document
19 tracks that Iams will have to go down to respond to just those
20 128 requests for production.

21 That means 2,086,400 individual document reviews, if
22 you assume that each of these silos would only find 100
23 documents that relate to that product and that request.

24 If it is, as is more likely, we'll find closer to
25 1,000 documents, that's 20,864,000 individual document reviews

1 to make sure we're getting the documents that have been asked
2 for, and limiting ourselves to only the 100 document scenario,
3 even though that's the least likely, and if we attribute only
4 one dollar of cost to each review, direct labor cost and
5 out-of-pocket cost to get the paper, produce it and read it,
6 we're talking about an expense of over \$2 million for Iams.
7 For Mars, with over 500 products, it could be five or six or
8 seven million dollars.

9 So, when you add all the defendants together to
10 respond to this 128 requests for all the products, we are
11 talking about well over \$20 million of out-of-pocket expense,
12 and when you add in the remaining 248 requests, which include
13 things such as every document all of these companies ever filed
14 with any governmental agency, State or Federal, we are talking
15 about tens of millions of documents and tens of millions of
16 dollars in cost.

17 In order to avoid this problem and avoid breaking the
18 current case management schedule, the only reasonable way to go
19 is through phased discovery.

20 The defendants have proposed 13 categories of
21 documents to be produced in phase 1 -- and we're going to begin
22 a rolling production of phase 1 the 30th of this month -- and
23 these categories will provide both tailored merits discovery
24 and the class cert. discovery that is needed by all the
25 parties, and the 13 categories are set forth at pages 11 and 12

1 of our motion.

2 In the plaintiffs' responsive pleadings, they complain
3 that they must have defendants' marketing and true ingredient
4 information.

5 The defendants are going to provide all of the
6 marketing material for the products that are complained of in
7 the Complaint in the first phase. We're also going to provide
8 all of the ingredient lists for all of the products, and we,
9 although we haven't said it in our papers, we will also give
10 the plaintiffs samples of all the products and the plaintiffs
11 can then take those products and have them tested. They want
12 to know what's truly there. The best way for them to do it is
13 to test it. We're going to give them the material to do that.

14 So, that is completely covered. We meet what they've
15 indicated in their moving papers, responsive papers, that they
16 have to have.

17 Next, the plaintiff complains there has not been a
18 meaningful meet-and-confer. That is not correct, Your Honor.
19 There was a long interchange of letters sent to Ms. MacIvor
20 that clearly laid out -- my letter of May 2nd, Mr. Ireland's
21 three subsequent letters -- that the defendants wanted to have
22 a meet-and-confer on phased discovery.

23 So, finally, there was a meet-and-confer on May 7th.
24 All of the manufacturing defendants who received requests for
25 productions participated in that by telephonic conference and

1 we were face-to-face with Ms. MacIvor personally, in person. I
2 was.

3 It was made clear by the plaintiffs that they were not
4 prepared to discuss phased discovery. Therefore, there was a
5 complete meet-and-confer through all the parties as to this
6 motion.

7 The plaintiffs misapprehend what should have been done
8 there. They think we should have talked about all 376 requests
9 one at a time, which would have constituted 3,384 separate
10 discussions, and that is not even ripe.

11 On the 30th, all of the defendants will file their
12 responses, request by request, and if the plaintiffs are
13 unhappy with those responses, then -- and want to move forward
14 with some sort of a motion to compel -- we will then have
15 meet-and-confers between each manufacturing defendant and the
16 plaintiffs and discuss all 376 to 400 requests that they have
17 propounded.

18 So, on this basis, we think the only way to go in
19 order to keep the schedule, make meaningful production and not
20 create an incredibly impossible burden on the massive number of
21 defendants involved here, is to phase discovery, and that's
22 what we are requesting from this Court.

23 THE COURT: Thank you very much.

24 Ms. MacIvor.

25 MS. MacIVOR: I'd like to start out with the

1 meet-and-confer portion of this. Yes, letters were exchanged
2 and the plain reading of those letters show that 99 percent of
3 what Mr. Greer argued today were never communicated to the
4 plaintiffs. Nothing in this exhibit that was provided to the
5 Court was ever discussed with the plaintiffs at that time.
6 Nothing in the specific document requests that were filed in
7 declarations before this Court were ever discussed with the
8 plaintiffs at that time.

9 These declarations were filed -- clearly don't comply
10 with the rules for what is really clearly here a protective
11 order.

12 The plaintiffs oppose this phased discovery because,
13 essentially, what it gives is the defendants have the option of
14 controlling the discovery.

15 We are happy and willing to work with them, as I've
16 said before. I do not want to look at millions of documents.
17 I have provided -- during that discussion, I said I would
18 provide the brands -- that has been filed in docket entry
19 390 -- of all the plaintiffs who purchased the specific
20 products. I'm happy to look at that. But for the defendants
21 to stand here and say "This is what we're going to provide and
22 this is all we think they're entitled to. In the first
23 phase, you'll get the advertising and marketing that is
24 specifically mentioned in the Complaint" is somewhat
25 disingenuous, Your Honor, because it was clearly always

1 referenced in there as examples of certain manufacturers.

2 Indeed, under each plaintiff, it says that they
3 reviewed the advertising and marketing for the products they
4 purchased. So, that's disingenuous on the defendants' side and
5 they know it.

6 They have always wanted the specific product brands.
7 I have said many times -- in December and other times I came --
8 if I included all those products, it would make the Complaint
9 unwieldy because there's a number of them, and docket entry 390
10 shows that. It would create a Chinese menu of sorts that would
11 have made the Complaint, you know, hundreds of pages longer.

12 I have provided that now. They should provide the
13 advertising and marketing. Clearly, they have that in their
14 possession. We have no other way of getting it, and we need to
15 go forward with that.

16 I don't think there's a need for phased discovery. If
17 they had sat down and talked to me and say "These are our
18 concerns. We have these millions of documents," I would
19 have said "Okay. If you want to talk about phases, let's talk
20 about it." But I can't talk about that because they have
21 never been forthcoming about the exact amount of documents.

22 If you even look at their affidavits, you have people
23 like -- and I'm not sure I can pronounce his name. Forgive me.
24 I think it's Radchak (ph.), Mr. Dan Radchak. If you look at
25 the affidavits that have been filed, I'm not sure how Mr. Greer

1 came up with these specific estimates because you've got
2 somebody who says he's a manager for Iams and he's saying many,
3 many times that -- let's see. I'll find an example. This is
4 on page 6. It would be docket entry 383-11, page 6.

5 "Plaintiffs seek an enormous number of documents and
6 amount of data. Iams has hundreds of thousand of documents
7 that relate to co-packers." I'll stop there. It doesn't
8 get any more specific than that. These documents include
9 contracts, purchase orders, bills of lading and shipping
10 documents, formulations, specifications, and then it goes on
11 and on.

12 Well, if someone had sat down and talked to me, which
13 I do believe would have been a real meet-and-confer, I would
14 have said "Well, the plaintiffs are definitely not interested
15 in this. We'll go forward without prejudice," which I have
16 done with Kroger and I've done with others in this case and I
17 have done in other cases.

18 As a defendant in class actions, I have produced
19 within a month hundreds of thousands of documents because,
20 clearly, you can go to certain departments if you sit down with
21 a plaintiff and say "What is it you're looking for?" because a
22 plaintiff doesn't know how documents are kept or what documents
23 are maintained.

24 So, clearly, if there was a discussion, you could say,
25 for example, you know, without prejudice, until they take a

1 30(b)(6) deposition, we're definitely interested in the
2 contracts between co-packers. That was specifically mentioned
3 in the Complaint and that's something the plaintiffs are
4 definitely interested in.

5 What the defendants are proposing right now is "We
6 want to control the litigation. So we're going to say we
7 will give you this," and what was proposed to me at the
8 meet-and-confer is "This is what we think you need for class
9 certification."

10 The plaintiffs would like to obtain the documents that
11 the plaintiff believes are necessary, not only for class
12 certification, but to prepare this case for trial. The type
13 of -- quote/unquote -- phased discovery the defendants are
14 proposing, based upon the current trial order, would actually
15 tie the hands of the plaintiffs because briefing would occur in
16 November.

17 Assuming a response is filed within 30 days, because
18 it's anticipated we'll ask to exceed the page limitation, and
19 I'm assuming the defendants would like additional time,
20 realistically, and then there will be a reply, you know, by the
21 time fact discovery is concluded in February, we may never get
22 to that because I'm presuming that even after class
23 certification, they will ask the Court to wait for a ruling
24 before we're entitled to get the information.

25 The fact that they in their moving papers have asked

1 that we never get the true ingredients, that is one of the
2 principal focuses of this lawsuit, is that what they claim is
3 in this pet food, and beautiful pictures and the marketing,
4 that lured and enticed the plaintiffs to buy this food is not
5 really what it is.

6 They're saying "Well, it's trade secrets." I don't
7 know if it is or not, but I have already told them I'm willing
8 to enter into a confidential order. I have done that with
9 Kroger. As a matter of fact, we have exchanged emails. We
10 haven't even entered into a written one. I haven't disclosed
11 that to anybody. I have no intention of doing that. We just
12 need the information that we need to go forward. Part of that
13 is, obviously, the marketing and advertising.

14 If they do not have it in-house, they can simply pick
15 up the phone and call their advertising companies. We're
16 especially looking to the packaging, for example. I know for a
17 fact they've got marketing studies that say what is on the
18 packaging is what entices consumers, and the more packages they
19 have in a store, that makes the consumers want to buy it more
20 because they're enticed by that and it makes them sell more. I
21 would like those marketing studies.

22 There was no dialogue about any of this. I was told
23 to come to the offices of Mr. Greer. The other defendants sat
24 mute, who have now joined in this, and, basically, they told me
25 what they were going to do, and I said "I would like to get the

1 product brands. I will give you a list of them," which I
2 have done.

3 They said "We're only going to give you what's in the
4 Complaint," which I said before is disingenuous. They
5 don't want to do that. Now they have asked me, which I
6 mentioned in my motion to strike, they've asked me to provide
7 extensive discovery as to each and every plaintiff, which I'm
8 happy to do.

9 But then I feel, and can anticipate because I have
10 seen it done in other cases, that I'm going to have to give
11 extensive merits discovery, extensive class discovery, and then
12 they're going to file a motion for summary judgment while
13 this -- quote/unquote -- phased discovery is going on that will
14 put me at a serious disadvantage. Now, I am going to come in
15 to the court and say "You know what, Your Honor? I don't have
16 the discovery." Meanwhile, they have been able to
17 completely prepare their case.

18 They asked me for every deposition of the plaintiff.
19 I spent quite a bit of time working on a schedule where that
20 could happen. I would like a significant amount of discovery
21 at the same time they're getting discovery so the case can
22 proceed fairly and equitably, and that can't be done when
23 defendants chime in and say "This is what we're going to give
24 you. It's my way or the highway. I'm going to control the
25 litigation and I don't need to meet and confer," and that's

1 essentially what happened today.

2 None of this information that is filed in any of these
3 declarations was ever communicated to me. If so, I could have
4 responded at that time. But to get it in moving papers after
5 the fact does not comply with rule 26. It doesn't comply with
6 the local rule, and it will increase the plaintiffs' litigation
7 costs, the defendants are well aware, and it burdens the Court
8 because here we are standing here talking about things that
9 most likely could have been resolved if two people are
10 reasonable.

11 I have done it with many plaintiffs in the past as a
12 defense attorney. I have done it with Kroger. I worked out
13 discovery disputes with Albertson's.

14 Quite frankly, there's no reason for us to be here
15 right now except for the fact that they insist on phased
16 discovery, that if they had that in their head because they
17 want to control it -- if they had any intent on trying to work
18 out some of the discovery disputes or scope, it wouldn't, most
19 likely, be necessary.

20 THE COURT: Let me address a couple of concerns,
21 Ms. MacIvor.

22 Outstanding are how many discovery requests for
23 documents?

24 MS. MacIVOR: There are 376 right now.

25 THE COURT: As to one defendant.

1 MS. MacIVOR: To manufacturer defendants.

2 THE COURT: Right.

3 So, how many discovery requests are outstanding in
4 total?

5 MS. MacIVOR: It would be the same amount as to each
6 manufacturer.

7 THE COURT: Let's multiply. How many are outstanding?

8 MS. MacIVOR: Math is not a strong point, Your Honor.

9 THE COURT: How many manufacturer defendants?

10 MS. MacIVOR: There's approximately five or six.

11 MR. GREER: Nine, Your Honor, and there's outstanding
12 3,384 individual requests to those nine defendants.

13 THE COURT: Thank you.

14 Your emergency motion yesterday, which I denied, was
15 to continue today's hearing, and this is the gist of what you
16 indicated to the Court and to the defendants: That the motion
17 was filed and I set it down for hearing a couple of days ago
18 and you didn't have the assistance of your associates because
19 they were in court before me on another trial involving
20 Mr. Maltzman, who is here, so you didn't have the necessary
21 assistance and you had other commitments as well.

22 MS. MacIVOR: Right.

23 THE COURT: And, therefore, it was not sufficient time
24 for you to respond because you didn't have the woman and
25 manpower available to help you.

1 MS. MacIVOR: Right.

2 THE COURT: I don't think you have the woman or
3 manpower available to look at thousands upon thousands of
4 documents if they were all delivered at your doorstep tomorrow.
5 They would sit there for weeks because you don't have the
6 necessary manpower to start looking through them, deciphering
7 them, coding them, categorizing them, putting them into any
8 semblance of anything other than reams and reams of paper.

9 So, we start with that understanding, that as far as I
10 know, you don't have able, willing bodies there, ready to
11 receive documents and start going at it and complete that the
12 minute you get them.

13 In other words, phased production of documents is
14 actually to your benefit, and I dare say if you received a
15 phased batch of documents tomorrow and I said to you "Let the
16 defendants know when you're ready to receive the next
17 batch," we would all be waiting several weeks.

18 So, what the defendants suggest, phased discovery, is
19 not to your detriment. It doesn't tie your hands in any way
20 because you don't have the capability of looking through every
21 piece of paper the moment each paper is delivered to your
22 doorstep, if we did not have phased discovery.

23 So, I start with that observation, and correct me if
24 I'm wrong with that.

25 The next observation I'm making is that the production

1 requests, as presented to these nine defendants, will require
2 them to spend hundreds of thousands, if not millions, of
3 dollars in response, and besides the photocopying expense,
4 which I'm sure will be passed on to you -- plaintiffs will have
5 to pay for all of the photocopying -- I am inclined to make
6 plaintiffs pay for that manpower on the defense side if we
7 don't phase discovery, and I don't know if you are ready,
8 willing and able to start paying for their time and their
9 efforts at responding to such a massive document request that
10 pretty much ties up the hands of several employees of several
11 defendant manufacturers. I don't know the numbers of them, but
12 it's quite a large number.

13 So, if I were to go with your suggestion, which is
14 don't phase discovery, you all need to start doing some math
15 because you're going to be paying their manpower and womanpower
16 on top of paying the actual photocopy expenses for all of these
17 millions of documents that you want to receive on day one.

18 So, the phased discovery is consistent with my
19 observations earlier that I don't want to bifurcate discovery
20 and have class discovery before we have merits discovery
21 because we're all aware of the overlap involving merits issues
22 and class issues here.

23 It makes sense for all parties concerned, including
24 the plaintiffs, to have a phased production. In fact, I would
25 venture to say let's have it phased so that you can say "Ready

1 for the next batch" when you're ready to get the next
2 batch, as opposed to having some sort of definite schedule
3 because you may be getting the second and the third and the
4 fourth batch of documents and you may still be hiding in a room
5 with the first batch unable to get through that one.

6 The next question becomes do you all want me to
7 appoint a Special Master who you all pay for and who can sit
8 with you and go over every issue that arises, and this sort of
9 ties into your complaint, which was "We didn't have a
10 meaningful meet-and-confer," but I looked at the
11 correspondence and the correspondence was you're not interested
12 in phased discovery. What more is there to discuss?

13 So, we need to open up lines of communication if we
14 want to keep costs down and we all need to be reasonable about
15 it.

16 So, let me hear your responses to my observations.

17 MS. MacIVOR: My response would be, as Your Honor has
18 put it, if we are entitled to determine what we want as phased
19 discovery, as opposed to the defendants telling us, which was
20 not what was proposed to me and I didn't get any sense that the
21 defendants were amenable to it -- it was quite clear in the
22 meeting that they weren't -- if we can determine in phases
23 what we would like produced, I'm absolutely okay with that, but
24 I don't want a defendant controlling and telling me what I need
25 or what the plaintiffs need to prepare because that's

1 inappropriate.

2 But if we can determine, for instance, marketing and
3 advertising relative to the brands on docket entry 390, for
4 example, as being in the first phase of discovery, I'm not
5 opposed to that, Your Honor. Of course not.

6 And I've already mentioned to the defendants, I'm
7 happy. They don't need to copy things. I'll go to their
8 offices and take a look and copy what I need to keep costs down

9 I have already said that I'll work with them on that.
10 I don't want to cause them a lot of trouble. I have said that
11 before in this case. I don't want to incur costs. I don't
12 want them to incur costs. That's not my point in this
13 litigation.

14 THE COURT: So, then I think we're all in agreement
15 the discovery will be in phases. The issue now is who controls
16 that.

17 Plaintiffs are saying "Let us tell you what we want
18 delivered in phases."

19 Mr. Greer, I'll hear from you on that suggestion.

20 MR. GREER: Your Honor, we proposed a series of what
21 we thought of categories of documents that would meet the
22 plaintiffs' needs. We had no response that they would like
23 some other categories. We're certainly willing to talk to them
24 about those other categories in a phased basis.

25 Ms. MacIvor talks about needing all of the marketing

1 materials on the most recent list of products that she filed.
2 That really probably won't work in the sense that many of the
3 products that she listed for Iams, for example, she carved out
4 of the Complaint as not being at issue, those which are the
5 specific veterinary prescription products. Many of the other
6 products, there's no allegation that there has been any false
7 or misleading advertising related to those products.

8 So, we think the products should be limited to those
9 that are identified in the Complaint as to which there have
10 been allegations that defendants engaged in false or misleading
11 advertising.

12 THE COURT: Her position, however, is that those that
13 are identified in the Complaint are not an exhaustive list
14 because had she done that, the Complaint would have been
15 unwieldy, and since then she has supplied you with all the
16 names of the products.

17 MR. IRELAND: May I address that, Your Honor?

18 THE COURT: Sure.

19 MR. IRELAND: Jeff Ireland.

20 What we received yesterday or two days ago is a list
21 of products that are, a list of products that were purportedly
22 fed by the plaintiffs to either their dog or their cat, and the
23 difficulty that I have with the list is that when you look at
24 the list, there are in paragraph -- I think it's 119. It's on
25 page 62 of the Fourth Amended Complaint in the defendants'

1 class allegations -- they carve out several products and say
2 these products aren't at issue, the defendants' products are,
3 but Lick Your Chops and Solid Gold and some other dog and cat
4 food products that I presume are products they believe are okay
5 from an ingredient standpoint -- I don't know I don't that --
6 but these products are also listed on this multi-page list of
7 products that were fed by the plaintiffs.

8 So, we have plaintiffs that are feeding, say, an Iams
9 product and then they feed Paul Newman's product, which is on
10 the list of products that are exempt, and then they feed a Mars
11 product.

12 There's nothing that ties, other than "This is a list
13 of products," there's nothing in the Fourth Amended
14 Complaint or anywhere else that says the plaintiffs relied on
15 something for the purposes of feeding this list of products,
16 and it's compounded by the fact that there are products that
17 are supposedly outside of this litigation that are included on
18 the list, and then there are other products that are no where
19 mentioned in the Fourth Amended Complaint that show up on the
20 list, at least as to my client.

21 So, I've heard Ms. MacIvor say before and I've heard
22 you say that what's in the Complaint is, you know, this is an
23 example of what's at issue, and I certainly appreciate the
24 Complaint is already quite long and we don't need it to be 10
25 times longer, but at the same time, strictly from the

1 standpoint of a document production, it's difficult to know
2 what are the products that are really at issue or, more
3 particularly, what are the advertising claims that are really
4 at issue in the Complaint.

5 Because, for example, for the Iams company, one of the
6 advertising claim is a claim that made on the Iams's brand,

7 "Four out of five vets recommend Iams over the leading
8 grocery product." That is a claim that has never been made
9 with respect to the Eukanuba product line, which is a different
10 product line, but Eukanuba are on this list. I point this out
11 as much as anything to illustrate there are more practical
12 problems than what is being represented as being filed with the
13 Court and how we're trying to deal with it.

14 MS. MacIVOR: May I respond?

15 THE COURT: Yes.

16 MS. MacIVOR: I have exempted veterinary foods. I
17 include it on that list because part of the discovery requests
18 the defendants have asked, they want to know every food that
19 has been fed. Those are every food that has been fed during
20 the relative time period.

21 Part of the other problem is because this industry is
22 so incestuous, I don't really know, except for in certain
23 instances, who manufactured what. It's my understanding that,
24 for example, Mars canned, produced and manufacture, because
25 they acquired Doane, I'm assuming I might be able to get more

1 specifics in discovery and they might manufacture dry food for,
2 let's say, Kroger. So it's very difficult for me, so I
3 included all of that, because if I didn't, I would presume at
4 some point, I would be criticized for that.

5 Second, I did exempt veterinary food. Newman's has
6 nothing to do with Iams, so I'm not really clear why Mr. Greer
7 is arguing that. I'm interested in, for example, from Iams,
8 marketing, advertising for Iams products listed on that list,
9 and that's the concern.

10 He wants to know -- and it is alleged specifically in
11 the Complaint under each paragraph which purchases were made
12 based upon the above-referenced defendants' marketing.

13 It is alleged in the Complaint. I have mentioned to
14 the defendants, I didn't go into a Chinese menu for reasons the
15 Court expressed and I expressed earlier. I think that's
16 somewhat disingenuous.

17 When Mr. Ireland says he doesn't know what the
18 advertising claims are, we've discussed this exhaustively for
19 the motion to dismiss hearing. In paragraph 66, page 28 of the
20 Complaint, there's a long list, as there are elsewhere, of the
21 advertising issues with this. There's examples.

22 They used in their motion that there's, you know,
23 "What are they talking about with Ethoxyquin?" I went
24 in and I said that part of the box is that Ethoxyquin is
25 included in other things and they don't let the consumers know

1 Ethoxyquin is in the food.

2 I wanted documents relating to that. So, what they're
3 saying is a little bit disingenuous. There are two, three
4 pages, paragraph 66 and elsewhere in the Complaint, that put
5 them on notice of what's in the advertising, including pictures
6 on their packaging.

7 THE COURT: How would it work for the plaintiffs if,
8 for example, as to each of these nine defendants you sent a
9 letter next week to each one indicating what documents you
10 wanted to see the following week at their offices and to have
11 them set aside for you and select out a discrete group of
12 documents that one of you can review at their offices on a
13 given day?

14 MR. GREER: Your Honor, if I may respond to that?

15 The problem with that is this is not like a bank, or
16 something like that, where you have a discrete set of
17 documents.

18 When you look at this chart, defendants have to go to
19 all the different departments, co-packers, different plants.
20 There is no one place where everything is. The effort to pull
21 all the documents for each request into one location is a
22 massive multi-million dollar effort.

23 THE COURT: Right. But let's assume for a moment if
24 Ms. MacIvor sent you a letter on Tuesday and said "The first
25 week of June, I'd like to see these 10 categories of

1 documents on my visit to your facility," and you respond to
2 her and you say "Well, you can go to this facility for category
3 1, to that facility for category" -- and you let her know
4 where to go on that given day and to divide herself up in to 10
5 different pieces to go and retrieve and look at those
6 categories of documents. Why would that not work?

7 MR. GREER: Because, Your Honor, if you multiply this
8 by nine defendants and, say, there are 10 locations,
9 Ms. MacIvor, for one request, would have to go to 90 different
10 places.

11 THE COURT: That's her problem, though, isn't it?

12 MR. GREER: It is. I'm just --

13 THE COURT: She's the one that's making the demand for
14 all of these records and who wants them now.

15 So, you say to her, "Very well. Here are my various
16 facilities. At this facility you will find the records
17 pertaining to this request. At that one" -- and you'll
18 have someone at each facility gather those together and wait
19 for her to arrive and look through them and tag what she wants
20 because she says she doesn't want copies delivered. She wants
21 to identify them.

22 MR. GREER: Your Honor, obviously, that's her
23 decision.

24 THE COURT: Right.

25 MR. GREER: My concern is all of that, 90 times 128,

1 we can never meet the case management schedule.

2 THE COURT: Well, but we start, and then you all
3 report back to me in a month's time and say "Look, as to every
4 letter where she has identified what she wants to see in
5 phases, she has only been able to accomplish 20 percent of
6 that and we have our people waiting at our various
7 facilities for her to come and inspect and review."

8 We don't know until you start the process, and she
9 won't know until she starts the process just how daunting and
10 how realistic or unrealistic her discovery requests are, and
11 she can start tailoring them herself because she's going to see
12 she doesn't have the people power, nor the ability to go to all
13 of these various defendant manufacturers' various sites to
14 start looking at records.

15 MR. IRELAND: I don't want to reject the idea, but A
16 lot of this is electronic.

17 THE COURT: But you're not going to produce it to her
18 in electronic format. You can sit her down in front of a
19 computer and say "There they are."

20 MS. MacIVOR: If it's in electronic form, there should
21 be no copying costs, in which case we would be happier
22 reviewing them in my office, if they're electronic.

23 THE COURT: Yes, but that requires people power on
24 their end to figure out and pull and cull every document.

25 MR. IRELAND: As we stand here today, that's what my

1 people are doing right now simultaneously. We're trying to
2 meet a document production, so we have people doing that
3 literally as I speak.

4 THE COURT: Right.

5 Why doesn't that work for the plaintiffs?

6 MS. MacIVOR: If it's electronic, I -- I'm not quite
7 understanding why it would be so time-consuming and expensive
8 if it's electronic not to just send it to my office.

9 THE COURT: Because you're not in agreement as to what
10 you want to see and when you want to see it.

11 You are all not in agreement what comes in phases so
12 they don't know what they're going to send you electronically.

13 MS. MacIVOR: If I can?

14 MR. IRELAND: Go ahead.

15 MS. MacIVOR: For example, the first thing I would
16 like, and I'll tell Your Honor, I'd like to see the marketing
17 and advertising for the brands listed in docket entry 390 that
18 are Iams.

19 If that is in electronic form, I can't imagine there's
20 a privilege since it was publicly disclosed, and if it's in
21 electronic form, that I would prefer to look at in my office.
22 That would be my first letter.

23 We've agreed that we would do phases. I would like to
24 look at that next week. I will exclude veterinary. Whatever
25 is excluded in the class definition, I don't want to see.

1 THE COURT: Well, it looks like here's what's going to
2 happen: I'm granting the motion for phased discovery and
3 you're going to start communicating to the defendant
4 manufacturers what you want to see in that phased discovery,
5 and they're going to either produce it to you in electronic
6 form, if that's how it's stored and --kept. it doesn't require
7 any additional manpower for them -- and/or they're going to say
8 to you "Come to our offices and look through the materials and
9 pick out what you want and send it to your copier at your
10 expense and have it copied."

11 Does that work for everyone?

12 MR. GREER: At their expense.

13 MR. IRELAND: Yes, Your Honor.

14 THE COURT: All right.

15 Is there anything else we need to address?

16 MR. GREER: I don't think so, Your Honor.

17 THE COURT: This is a daunting prospect on your side,
18 very daunting for the defendant manufacturers.

19 MR. IRELAND: Your Honor, just one thing --

20 THE COURT: I think we all need to sort of -- you're
21 losing sight. We're going far beyond -- this is a litigation
22 that will last forever at this rate because you don't have the
23 folks that can do that review.

24 If they send you everything electronically tomorrow,
25 we'll be here next year and you still won't have been able to

1 have go through it. I think you need to be realistic in your
2 expectations and what it is you hope discover and what for.

3 So, the motion is granted. I think it's a very
4 reasonable request. It's not bifurcating discovery, and I
5 think the ball goes back into your court, Ms. MacIvor. You are
6 all going to get your responses to those requests for
7 production with your objections, and the plaintiff will need
8 to, as to each defendant manufacturer, start sending
9 communication saying "We're ready to see this and that and
10 please have it for us and go about it that way."

11 MS. MacIVOR: To clarify, the Court is granting the
12 motion, not what the defendant is going to tell the
13 plaintiffs --

14 THE COURT: No, you are going to tell the defendant
15 manufacturers what it is you would like to see and when as to
16 each one, and they're going to let you know either "You can see
17 it electronically and we're going to send it to you
18 electronically and/or you can come to our offices and look
19 at it" because they're entitled to do that under the rules,
20 and whatever keeps costs down for the defendant manufacturers,
21 I think, is a reasonable method of production, unless you want
22 me to shift the cost over to the plaintiffs, and I don't think
23 you do.

24 MR. IRELAND: May I just make one --

25 THE COURT: Sure.

1 MR. IRELAND: I apologize. I appreciate the Court's
2 time, as well your consideration of the motions.

3 On the list of products that we keep hearing about and
4 "Give us everything with respect to the list of
5 products," there is a disconnect here, and I think
6 Ms. Licko wants to speak to it as well. As a simple example,
7 the Complaint doesn't refer to any Eukanuba advertising. Iams
8 has three brands. They have the Vet brand, which is out of
9 the case. They have the Iams brand, which is the big green
10 bag, and then they have Eukanuba, which is more of a maroon
11 colored bag, and Eukanuba isn't referred to in the Complaint
12 and yet there are 16 dog food products on the list of products
13 that have been provided to us that are at least, according to
14 the filings that have been made and the argument here this
15 morning, are at issue.

16 The disconnect is producing a bunch of information for
17 products where I don't know what -- did a consumer rely on
18 something said about a Eukanuba product that supposedly was the
19 basis for purchase that caused an injury? You can't tell that
20 from the face of the Complaint.

21 I understand what has been said before, which is these
22 are just examples, but, again, I'm trying to anticipate a
23 problem that may come up with next week's correspondence, Your
24 Honor, and, Carol, if you --

25 THE COURT: Ms. Licko.

1 MS. LICKO: That's correct, Your Honor.

2 The list that was provided and filed with the Court is
3 over 25 pages long single-spaced identifying dozens and dozens
4 of specific products.

5 If she sends us a request for all marketing and
6 advertising for those products, we're going to be back with the
7 same burden and difficulty because at the heart of her case is
8 a false advertising claim.

9 We would like to know what is the false advertising
10 that the plaintiffs are complaining about. Then it links up to
11 a specific product. But simply to have a 25-page list of
12 product, I'm afraid we would have to be back here again next
13 week, Your Honor, because we would have the same problems with
14 the silos. The silos Alan Greer referenced to you applies to
15 each product. So, we're going to be back in the same boat, I'm
16 afraid, if we have to go back and produce all the advertising
17 and marketing for every single product she has identified on a
18 25-page list.

19 MS. MacIVOR: Your Honor, Eukanuba, as far as I
20 know -- and, like I said, part of the problem in this case is
21 it's difficult to identify who manufactures what, but it's my
22 understanding Eukanuba will falls under the Iams company which
23 is mentioned in the Complaint under the list of manufacturers.

24 Eukanuba, unless I'm wrong, Iams manufactures
25 Eukanuba. We have excluded Veterinary Diets. We would like to

1 look at the advertising -- I understand the defendants would
2 like all of that connected, but we have provided an exhaustive
3 list in paragraph 66 and throughout this Complaint about how we
4 believe all of this is false advertising. It's all there.

5 I understand -- we went through the connect-the-dots
6 at the motion to dismiss and all of that, but we're entitled to
7 our discovery of the marketing and advertising.

8 As Ms. Licko conceded right now, this is the
9 centerpiece of the plaintiffs' entire case. We would like it.
10 They have for almost a year "We would like the specific
11 products." Now, they've got that. Now they want us to
12 provide a connection between that, which they will get when
13 they take the plaintiffs' depositions. We're entitled also to
14 try to prepare our case at the same time.

15 THE COURT: Doesn't it make sense then for the
16 plaintiffs to be deposed and identify what was the misleading
17 advertising that caused them harm before they're now required
18 to produce documents about other products that didn't cause
19 them harm?

20 MS. MacIVOR: Absolutely not. Then what Your Honor is
21 saying is a plaintiff can never get discovery of something that
22 is material in a case in order to help prepare a plaintiff for
23 deposition?

24 THE COURT: No, no. But in the nature of this case
25 where the nature of the claim is "You all deceived me with your

1 false an misleading advertising." Let the defendants know
2 what was the false and misleading advertising that is at the
3 heart of this case and then they can go back and say "Here is
4 all that false and/or not false and misleading
5 advertising," not "Here is all of our advertising" because
6 then now we have a Fourth Amended Complaint that adds
7 additional advertising claims or additional categories of
8 plaintiffs. That's not the purpose of discovery.

9 MS. MacIVOR: For example, this is how disingenuous it
10 is: Let's take Iams kitten food which Renee Blaszkowski used.
11 You look at it. Each Iams package contains wonderful pictures
12 of carrots and beautiful meet. Let's take that as an example,
13 and they know it.

14 The same thing with Nestle Beneful and The Good Life.
15 That's a lie. None of that stuff is in the food. They also
16 know, based upon other cases, that people buy packages over a
17 period of time and they can generally remember.

18 What they want to do is they want to withhold
19 advertising so that they can quiz people on their memory from
20 having purchased from four years. People generally remember.

21 There's nothing wrong with me getting that advertising
22 because they know that that's true.

23 There's also a number of other claims that are made
24 and FDUPTA doesn't have a reliance element, as this Court has
25 already ruled.

1 If they make a claim that will help, as some of my
2 plaintiffs know, which will help their dental, which their own
3 materials that I have in my possession show they're absolutely
4 false, they have no support for it. The plaintiffs should be
5 entitled to prepare their case so the defendants who have all
6 this information and will probably use it and rely upon it in
7 the plaintiffs' deposition so that they can pull it out and the
8 plaintiffs have to scramble during the time they're taking
9 their deposition? All of this information is exclusively
10 within the power and control of the defendants. The plaintiffs
11 would like to see it so both parties can prepare their case at
12 the same time.

13 Yes, the plaintiffs generally know. Yes, we have
14 submitted that in a very extensive Complaint and talked about
15 in there all of these issues.

16 It's quite clear that we have said over and over that
17 the packaging -- and they know it. They've got market studies
18 saying what's on the packaging attracts people to the products.
19 We would like the packaging materials. We should be able to
20 prepare our clients for that. It's no different than in a
21 contract case. Why, if this were a contract case, wouldn't we
22 be entitled to the contract?

23 THE COURT: You would have it. You would be a
24 signatory to the agreement.

25 MS. MacIVOR: If there was a real estate agreement

1 that wasn't produced to a client before, we would be entitled
2 to that as well.

3 If there's a side deal or other things -- normally,
4 plaintiffs don't keep packaging materials. I don't know of
5 anyone who does that. Fortunately, some of my plaintiffs did,
6 but not everybody keeps it. They could remember generally.

7 I would like the materials to go over it. I'm not
8 planning on using this material to do another Amended Complaint
9 because I don't want to go down that road. I have a very good
10 Complaint. I have a lot of confidence in it.

11 I understand the Court's concerns. That's not why I'm
12 asking for it. I've given them the specific brands. These are
13 brands these people have purchased. They have relied on the
14 advertising and it was false.

15 I would like to be able to prepare my clients, just as
16 they're going to prepare their clients, for their depositions.
17 In this way, only the defendants will be able to prepare their
18 clients. The plaintiffs will not. There's no reliance element
19 under FDUPTA. They keep saying that, but it's not there.

20 MR. IRELAND: I will point out, Your Honor, that after
21 the last hearing, one of the first things we did was discuss a
22 deposition schedule with Ms. MacIvor and suggested we should
23 start taking plaintiffs' depositions in June in order to try to
24 have a better understanding of the allegations in the
25 Complaint.

1 That was rejected due to her unavailability. We have
2 now -- I think we're about to agree on a deposition schedule,
3 but the plaintiffs' depositions don't start until August 4th or
4 August 3rd, or something like that. They're going to be taken
5 in groups of five or six at a time, and they will continue on
6 into October where we're going to be finding out -- having the
7 opportunity to depose the plaintiffs.

8 So, I mean, that's the reality that we have been
9 handed which is one of the reasons why we're in front of you on
10 this effort to get some management of discovery.

11 I mean, the problem that I have is, okay, I produce
12 all my Eukanuba packaging, marketing materials, advertising
13 that we have ever done associated with the Fourth Amended
14 Complaint so that they can sort through it and try to figure
15 out what somebody relied on. They have filed a Complaint like
16 this against --

17 THE COURT: Ms. MacIvor is saying reliance is not an
18 issue, so they don't need to show who relied on anything.

19 MR. IRELAND: For some of the claims in the Complaint,
20 they absolutely have to show reliance. But if they're going to
21 show they have been damaged in some way or injured, or their
22 cat or dog has been injured in some way, it still has to be
23 tied to some kind of a product, and we don't know that from the
24 Complaint.

25 MS. MacIVOR: I have supplied them with the products

1 they have asked for in discovery, which is what Your Honor
2 ruled at the motion to dismiss that that would be discoverable.
3 They have asked for receipts going back four years. My
4 plaintiffs are doing that now, as we speak. They have asked
5 for every food they have ever purchased, where they purchased
6 it. That will be produced in June. They'll have it well
7 before. I have already with this deposition schedule. They're
8 not being hoodwinked in any way. I'm not trying to do what the
9 defendants are doing right now.

10 I'm saying "I will provide you every food they
11 purchased during that time period, during the relevant time
12 period, where they purchased it, to the best of their
13 memory," and the receipts, I'm giving them the vet records.

14 This is not -- which, by the way, on our part it is
15 not -- they have also asked for every website they have ever
16 looked at. They want to know far more. This is not just a
17 one-sided thing here. The defense has gone way over on the
18 other side as well.

19 We're willing to give them that. We want them to be
20 prepared for the plaintiffs' depositions. All I'm saying is we
21 would like to be able to be prepared as well. My plaintiffs
22 know what they relied on.

23 In the tenor and spirit of the Federal Rules I am
24 entitled to discovery of what their advertising and marketing
25 materials say because I know for a fact that their marketing

1 materials will reveal that they know that they lured these
2 people to buy this food by saying it's something that it's not,
3 and they know it.

4 What is on their packaging material is deceptive.
5 Under FDUPTA, I don't need to prove reliance. I would like to
6 be able to prepare my clients. They will have my plaintiffs'
7 information. They will have more than enough information to go
8 forward and cross examine the plaintiffs on what they like for
9 their depositions. They will have that.

10 They've asked me by mid-June. They will have it by
11 mid-June. They asked me for a product list. I provided it.

12 THE COURT: I think what I will do is appoint a
13 Special Master. You send your letter. You object. You meet
14 with a Special Master and go over each and every request for
15 each and every advertising material for each and every product,
16 Eukanuba and otherwise, and you can all sort it out request by
17 request, manufacturer by manufacturer, over the period of
18 phased discovery, because, quite frankly, there's not much more
19 I can do for you other than sitting down with you and I can't
20 do that, nor will I have the Magistrate Judge do that because
21 this is a massive undertaking as proposed and as sought by,
22 quite frankly, the plaintiffs.

23 I don't think there's anything wrong in saying "In
24 this phased discovery, start with what's in your Complaint.
25 Start with what your plaintiffs are complaining about and

1 move on."

2 If you are not willing to start with what your own
3 clients are complaining about, then you will have a Special
4 Master work with you on that and you all split the costs
5 involved.

6 I will appoint him or her in an order next week.

7 MR. GREER: Do you wish the parties to submit proposed
8 names for a master?

9 THE COURT: That would certainly be advisable.

10 MS. MacIVOR: Your Honor, one thing I would like you
11 to consider. Not once from the other side have I heard the
12 advertising for the specific brands provided are so massive and
13 voluminous. They have produced nothing --

14 THE COURT: The problem is, Ms. MacIvor, you're not
15 willing to start with something less massive than what you
16 propose, less daunting. You are not willing to say "Let's
17 start with what my 29 or 30 clients have recollections of
18 having been misled by or having purchased or having had any
19 sort of connection with. I'm not willing to start with
20 that. I want to start with the universe."

21 They're saying "We don't want to start with the
22 universe because, quite frankly, we need to see a
23 connection first."

24 This is sort of like a very expensive fishing
25 expedition, and where you all can't reach that sort of

1 agreement, that's why the Special Master will help you all be
2 able to sort this out phase by phase as we go through the
3 months of discovery.

4 MS. MacIVOR: I misapprehended what the Court was
5 getting at and I apologize for that.

6 What I was trying to get at is the packaging
7 materials, and maybe I'm not using the terms of art
8 appropriately. When I say "advertising materials," I know for
9 a fact because I've spoken to them, packaging materials are
10 something that they relied upon when they bought the food.
11 They also relied on other things as well. But the packaging
12 materials, we would absolutely want for these foods.

13 THE COURT: You all give me a list of names by Tuesday
14 of next week of someone you propose as a Special Master and I
15 will enter an order appointing one.

16 In the meantime, I will grant the order for phased
17 discovery.

18 MR. GREER: Thank you, Your Honor.

19 THE COURT: You all have a good day.

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

DATE

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