

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 07-21221 CIV ALTONAGA/Turnoff

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

Plaintiffs/Class Representatives,

vs.

MARS INC., *et al*,

Defendants/Class Representatives.

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**PLAINTIFFS' MOTION FOR RECONSIDERATION OF  
ORDER ON DEFENDANTS' MOTION TO SEQUENCE  
DOCUMENT PRODUCTION AND TO LIMIT  
PLAINTIFFS' DOCUMENT REQUESTS**

Plaintiffs, Renee Blaszkowski *et al.*, respectfully request this Court to reconsider the portion of the order with respect to the appointment of a Special Master and as grounds therefor, states as follows:

**I. Introduction**

On May 23, 2008, this Court held a hearing on Defendant, The Iams Company (“Iams”), Motion to Sequence Document Production and to Limit Plaintiffs’ Document Requests.<sup>1</sup> During that hearing, the Court *sua sponte*<sup>2</sup> raised the prospect of appointing a Special Master based upon what appeared to be the number of discovery requests proposed by the Plaintiffs and the lack of dialogue between the parties. Since the hearing, the Plaintiffs have carefully considered the

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<sup>1</sup> Defendants Mars, Inc., Mars Petcare US, Inc., Hill’s Pet Nutrition, Inc., Del Monte Foods, Co., Nestle Purina Petcare Co., Nutro Products, Inc., and Natura Pet Products Inc. (“Defendant Manufacturer”) joined in the Motion. [DE 389].

<sup>2</sup> While consent of the parties is not required, *notice* and an opportunity to be heard before appointing the master is required by the of Fed.R.Civ.P. 53(b)

Court's concerns and have pared down the discovery requests significantly because the production of voluminous documents was never the Plaintiffs' goal. Please see Exhibits A-F attached hereto.<sup>3</sup> Moreover, the Plaintiffs counsel has also advised the Defendant Manufacturers to suspend preparation of responses to the Plaintiffs' formal Requests for Production so that the Plaintiffs could utilize the procedure suggested by the Court at the hearing of sending a letter with narrower requests for production that would be produced in phases.

## **II. Issues Before the Court**

The Plaintiffs respectfully request this Court to reconsider appointing a Special Master based upon several grounds: (1) there has thus far only been only one discovery dispute before this Court as to merits and class discovery, and (2) the Plaintiffs have a proven track record of working with counsel to try to work out discovery issues in this case. In addition, the Plaintiffs request the Court to require the parties to adopt the Court's suggestion of fewer requests by both parties to be propounded in stages and a *bona fide* discourse as to how costs and expenses on both sides can remain as low as possible.

## **III. Background: The Defendants mislead the Court**

While citing to authority that the Court has broad authority in pre-trial proceedings, the Defendants, yet again, urged this Court to err. [DE 382-2 pp. 6-7]. At the hearing on the Motion to Dismiss, the Defendants actually suggested that the Defendants should be allowed to obtain discovery from the Plaintiffs of the pet food products at issue prior to allowing the Plaintiffs any discovery even though discovery had been stayed at their request for a year. [DE 408-2 at pp. 90-91]. The Court rightfully refused such an argument at that time because the Eleventh Circuit has held that while a District Court's discretion is broad, *it is not unfettered* and *must* adhere to the

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<sup>3</sup> The Plaintiffs have also indicated to the Defendants that if they nevertheless maintain that these requests are still voluminous or burdensome, that the Plaintiffs are willing to work with the Defendants to narrow any issues that need to be addressed by either by the Court or the Magistrate Judge.

*liberal scope of the discovery rules.* See *Williams v. City of Dothan*, 745 F.2d 1406, 1415 (11th Cir. 1984); *Duke v. University of Texas*, 729 F.2d 994, 997 (5th Cir. 1984). In its Motion, which sought not only phased discovery, but limitations placed on the Plaintiffs ability to obtain discovery going forward, Iams and the other Defendant Manufacturers urged the Court to severely restrict the Plaintiffs ability to prosecute the case with arguments that are contrary to established law and the Federal Rules of Civil Procedure.

**A. The Plaintiffs were amenable to phased and/or rolling discovery from the beginning**

Iams' Motion erroneously lead this Court to believe that the Plaintiffs were absolutely entrenched about having each Defendant Manufacturer produce every piece of paper in their companies, which is not true and never has been. At the meet and confer at the offices of Defendant, Iams, the undersigned repeated that the Plaintiffs were not seeking all documents in the Defendants' files. In fact, at that meeting, the Plaintiffs' counsel and the Manufacturer Defendants *agreed* to a rolling production. [DE 383-7 p. 1]. The *only* point of contention as to a rolling or phased discovery was that the Defendants wanted to dictate to the Plaintiffs what discovery they need for class certification and as to merits and the Plaintiffs, of course, objected to that as it would fundamentally undercut the Plaintiffs ability to prepare their case for class certification and trial. [DE 383-5 pp. 1-2]. The Court rightfully indicated at the hearing that the Plaintiffs would be able to determine which documents *they* want to review and when. [DE 409-2 p. 35].

**B. The Plaintiffs have a track record of working with Defendants *if* a Defendant is willing**

Where Defendants are willing to cooperate and maintain a dialogue about discovery, the Plaintiffs have worked with them to narrow the scope of document production because, as the Plaintiffs counsel has stated before, the Plaintiffs do not want to incur unnecessary costs and do

not want to the Defendants to either. During the jurisdictional discovery arguments in late 2007 and early this year, the Jurisdictional Defendants, like the Manufacturer Defendants here, argued that that there were too many discovery requests and the Plaintiffs were limited in what they were going to be allowed to obtain based on the pleading. The Plaintiffs' narrowed the issues by dismissing certain defendants because, based on the volume of paper filed by the Defendants, personal jurisdiction litigation would have inordinately delayed the case for months even though the Court ruled that the Plaintiffs' pleading was sufficient to obtain jurisdictional discovery. In other words, *the Plaintiffs compromised*.

At the January 25, 2008 hearing on the scope of jurisdictional discovery, the one remaining jurisdictional defense counsel, James Reuss, agreed that *communication* with the Plaintiffs' counsel had resulted in resolving *almost all of the discovery issues and very few were left for the Court to decide*:

Mr. Reuss: I must say, Your Honor, *I think Ms. MacIvor and I made very good progress*. We resolved most of the discovery requests... *there would be maybe an issue with breadth, all the documents, as opposed to sufficient documents. There were some issues with duplication. **But I have to acknowledge that we sat down and worked our way through those things** and Ms. MacIvor would say "Well, really, what I'm after are these documents" or "I'm after documents that reflect revenue streams," for example. I would also be in a position *because of having done my due diligence to get these documents organized*, to say "Here's what we've got: We've got a guy in the income tax department that can address this issue which seems to be called for. But, you know, literally read, your document request seems to ask for a stack of documents I can't believe you want." **That process worked beautifully because we were both flexible and cooperative about the process. We really did resolve most of the issues.***

[DE 407-2 pp. 25-26]. This Court noted that as well:

The Court: I think the purpose for today was really to see where you all were with the jurisdictional discovery, *and I see you have been very successful* because we only have one remaining defendant with those issues and we have addressed that now already.

*Id.* at pp. 37. This was exactly what the Plaintiffs' counsel represented to this Court that she would do. The Plaintiffs' goal is no different during this stage of the litigation.

At the hearing, Iams' counsel argued that the Plaintiffs' counsel expected Iams to go over each and every one of the 376 document requests, but that is not the case. [DE 409-2 p. 13]. The document requests break down into 26 categories of documents. The Plaintiffs expected the Defendants to identify the requests by number that Iams' claimed were overbroad, which Iams refused to do. [DE 383-5 p 3, 383-6 p. 1].<sup>4</sup> At the very least, the Plaintiffs thought that Iams might discuss the categories of documents and how production of the categories *might be* burdensome. While the Plaintiffs could have attempted to narrow the requests without any discourse at all, which is what the Plaintiffs did in December 2007, the concern was that the Plaintiffs would go to that work and the Defendants would nevertheless claim that the requests are burdensome, just as the Jurisdictional Defendants' claimed in December 2007.<sup>5</sup> One of the primary reasons that the Plaintiffs moved to strike Iams' Motion, as to the portion of the Motion that deals with limiting the document production, was that there had been no real conference about the limitation aspect of the Motion other than Iams wanted to produce marketing only as to specific products referenced in the Fourth Amended Complaint. Indeed, 99% of the information contained in the limitation aspect of the Motion and the Declarations were never even discussed with the Plaintiffs' counsel prior to filing the Motion. Instead, the Defendants dictated what would be produced and there was no dialogue. It is impossible to compromise if there is an utter refusal to cooperate.

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<sup>4</sup> Contrary to Defendant Iams' contention in correspondence, the Plaintiffs never expected, nor did they request Iams to narrow the requests for them, but Iams *refused* to even identify *any* request other than numbers 12-15 prior to filing the Motion. [DE 383-6 pp. 1-2]. For example, it is difficult for the Plaintiffs to determine without some input from the Defendants how "[d]ocuments reflecting the organizational structure of your sales and marketing employees" or "[a]ny and all Euromonitor or other market studies of the pet food industry" is over broad when the requests are limited to a four (4) year period. [DE 383-10].

<sup>5</sup> If that was appropriate, and it is not, discovery could be framed and re-framed in perpetuity and never satisfy the Defendants demand for precision.

C. ***If many documents may be decentralized and may not be susceptible to document organization, that is not a reason to punish the Plaintiffs, as the Defendants suggest***

After having failed to conduct a Rule 7.1(A) conference as to the limitation portion of the Motion, the Defendants rather disingenuously argued that the Plaintiffs want every piece of paper in their companies produced. That is not the case and quite contrary to the pattern of conduct evinced by the Plaintiffs in this case. A plain reading of the declarations filed by Iams reveals that they are not supported by anything of substance. For example, the Defendants argued as to Requests 12-15 that these requests would encompass “tax information, Equal Employment Opportunity Commission compliance information, worker’s compensation, and many other categories having nothing to do with the Plaintiffs’ Complaint.” [DE 383-13 p. 6]. The Plaintiffs concede that some of the requests are broad, but a request should be read reasonably. “Defendants had an obligation to construe [the] Plaintiff’s discovery requests in a reasonable manner. *King-Hardy v. Bloomfield Bd. of Educ.*, 2002 U.S. Dist. LEXIS 27384, 2002 WL 32506294, \*5 (D. Conn. 2002) (holding that discovery requests must be given a reasonable construction); *Cache La Poudre Feeds, LLC v. Land O’Lakes Farmland Feed, LLC*, 244 F.R.D. 614, 618-619 (D. Colo. 2007). Of course the Plaintiffs do not want W-2s, worker’s compensation or other such information. That is why the rules specifically require that an objection to be made and a response given to the portion of the request that can be answered. *See Bernal v. All Am. Inv. Realty, Inc.*, 479 F. Supp. 2d 1291, 1298-99 (S.D. Fla. 2007) (“Civil discovery is designed to force both sides to lay the evidence “on the table,” so that each side has the opportunity to assess the merits of its position. Reasonable and responsible counsel speak with opposing counsel to clarify the scope of discovery....”)

The thrust of Iams’ argument about the scope of discovery is that the documents are decentralized and the Plaintiffs are seeking every document that they have in their company files.

Courts in the Eleventh Circuit have rejected the type of argument that Iams' raised with this Court because to accept Iams' statements on their face would result in no plaintiff ever being able to obtain discovery from a large corporation without paying substantial costs and having some sort of specific inside knowledge as to exactly how the documents are kept and maintained. In *Centrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Group*, 2005 U.S. Dist. LEXIS 44619 at \*5-6 (M.D. Fla. June 8, 2005), the Middle District of Florida rejected the broad and generalized sort of information provided by Iams in its Motion and accompanying declarations.

Here, Defendants have failed to show good cause why a protective order should be issued to prevent Plaintiff from obtaining the claims files sought. Rather, they have simply advanced a generalized and inadequate assertion that furnishing the proposed discovery would be unduly burdensome because Plaintiff seeks claims files throughout the country "which deal with either a CGM or BM claim." This broad and conclusory allegation, by itself, falls far short of satisfying Defendants' burden of proof. Moreover, even if Defendants better articulated why such discovery would be unduly burdensome, the mere fact that production would be difficult or expensive is not inherently a reason to refuse an otherwise legitimate discovery request.

*Id.* The declarations are all similar in nature in that they simply state that the Plaintiffs are seeking every document in the company and that they cannot estimate the amount of documents that would be involved, but then they nevertheless somehow estimate that it would involve thousands of dollars and shut various departments down because the requests are so broad that they would include W-2s and other such arguments. [DE 383-11 pp. 2-4, 383-12 pp. 2-3, 383-13 2-3].

For example, Mr. Rajczak failed to substantiate how a request for documents indicating that Iams has inspected the rendering facilities with which it does business is overbroad or unduly burdensome. [DE 383-11 pp. 7-8]. The answer may be none, but Mr. Rajczak instead determined that he would simply lump a series of requests together, presumably by design, to attempt to mislead this Court to believe that each and every document request served by the

Plaintiffs was unduly burdensome. [DE 383-11 pp. 7-8]. Instead, he simply notes that Iams has hundreds of thousands of documents relating to the “supply” of rendered material. *Id.* The Plaintiffs do not deny that the scope of some of the requests may have been broad,<sup>6</sup> but Iams completely failed to support the request for limitation, particularly where the supporting declarations lump the requests together, generally fail to offer specifics and repeatedly state that the amount of documents cannot be estimated. Surely Iams has a manner and method of searching through its own documents and if it does not, the Plaintiffs should not be penalized.

In *Baine v. General Motors Corp.*, 141 F.R.D. 328, 332 (M.D. Ala. 1991), the Middle District overruled General Motors’ objection to discovery that it claimed was broad, which, as here, was premised upon alleged burden and expense. General Motors, however, was far more specific than these Defendants. At a hearing, General Motors’ Director of the Product Information Group testified because he handled all discovery requests for the company. *Id.* Unlike the defendants here, he specifically testified that, were the court to order production of data pertaining to all vehicles since 1970, the crash test results alone would number 4,300 and estimated that 1,000 personnel hours would be expended in determining if crash tests were responsive to plaintiffs’ needs, and 1,000 hours would be necessary for sled tests. *Id.* at 331. According to General Motors’ witness, most of these tests were on fiche, and the conversion process was lengthy as well as expensive. *Id.* Producing the crash tests only, dating back to 1970, and making only one copy of each, would cost a total of \$540,000 and would take one year to produce. *Id.* However, in response to the Plaintiffs’ query of what General Motors had produced in previous litigation, the witness conceded that there were some research shortcuts that could be used. *Id.* For instance, a search can be restricted using computer features, but said that his

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<sup>6</sup> Broad requests are not uncommon in complex litigation or otherwise because the requesting party almost always has no information on how many documents are involved or the manner in which they are kept. This is why a true a Rule 26 and 7.1(A) conference is so critical.



division lacked the capability to perform, e.g., a subset search for dual versus single-belt system failures. *Id.* He did testify, however, that a centralized location existed for CPIRs (accident reports), and that these reports are indexed in some fashion, but was not sure that the index was such that it could be used to locate all restraint-system failures. *Id.*

The Middle District ruled that the law applicable to an objection to production on grounds of burdensomeness and expense is fairly clear. *The mere fact that producing documents would be burdensome and expensive and would interfere with party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request.* *Biliske v. American Livestock Ins. Co.*, 73 F.R.D. 124 (W.D. Okla. 1977); *Keco Indus., Inc. v. Stearns Elec. Corp.*, 285 F. Supp. 912 (E.D. Wis. 1968); *Speedrack, Inc. v. Baybarz*, 45 F.R.D. 254 (E.D. Cal. 1968); *Technograph, Inc. v. Texas Instruments, Inc.*, 43 F.R.D. 416 (S.D.N.Y. 1967); *Rockaway Pix Theatre, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 36 F.R.D. 15 (E.D.N.Y. 1964). *Scholarly authority clearly perceives the relationship between the enormity of a corporation like General Motors and the paper shield it can erect to discovery.* *Id.* As one treatise has expressed it, “[t]he fact that defendant’s size requires it to keep a great amount of records cannot give it immunity which a small organization would not possess.” *Id.* citing 4A Moore's Federal Practice § 34.19 n.10.

Other courts have followed the same rationale and required defendants to provide adequate support for their claims of their inability to retrieve documents that are within their own custody and control. The lack of an adequate filing system has been deemed inadequate to insulate a party from discovery. *See Baxter v. Travenol Labs., Inc. v. LeMay*, 93 F.R.D. 379 (S.D. Ohio 1981) (plaintiff opposed discovery on the grounds that producing 800,000 sales invoices would require it to search almost 3,000,000 documents. The cost, it was asserted, would be some \$ 80,000, and "hundreds of man-hours." The court ruled that an unwieldy recordkeeping

system could not be used to frustrate discovery). *Accord Alliance to End Repression v. Rochford*, 75 F.R.D. 441 (N.D. Ill. 1977); *Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976) (court found that a corporation that maintained its records in such a way as to make document retrieval totally impracticable could not use this impracticability as grounds to defend against production). If Iams' electronic records keeping system is apparently as ineffective as counsel claims, that should not be used as a basis to charge the Plaintiffs with the cost of searching inadequately maintained documentation (that, if necessary, would very likely be readily retrieved during a due diligence audit for example).

**D. The limitations sought by the Defendants are unreasonable, unfair and severely restrict the preparation of the Plaintiffs case for class certification and trial**

As discussed above, at the conclusion of the hearing on the Motion to Dismiss, the Defendants actually suggested that they be allowed discovery of the Plaintiffs prior to allowing the Plaintiffs any discovery from the Defendants:

Ms. Licko: So what we would like to do, as you suggested, certainly the plaintiffs know which plaintiff had a dog or cat which was injured by a specific product. Through discovery, we could narrow down the issues over which there will be discovery....

The Court: If I don't certify a class here, you still have all of these plaintiffs and all of these defendants with all the same necessary discovery.

Ms. Licko: But they will, if it's not a class, they will be limited to those specific products that they really have a claim about because they were injured by -- let's say if it's Nestle's pet food, the other 23 defendants don't need to be here. Through discovery, we could narrow down because, as she has pointed out, they know exactly what happened. They don't have to put that in their Complaint,<sup>7</sup> but we should have the right to know through discovery what it is they're really talking about so we can start to frame the issues.

The Court: Well, I believe what you are suggesting then is you first be allowed to have discovery of the plaintiffs before submitting to discovery by the plaintiffs.

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<sup>7</sup> The Defendants are now arguing the opposite and urging the Court contradict the Court's prior ruling despite Ms. Licko's concession.

Ms. Licko: That would certainly narrow it down, Your Honor, yes.

[DE 408-2 pp. 90-91]. At the hearing and again at the meet and confer with Iams' counsel, the Plaintiffs volunteered to provide the Defendants with a list of all of the pet food and treat products they have purchased and they have done that, several times now.<sup>8</sup> [DE 390] and exhibits A-F.

At the hearing, the Plaintiffs offered to limit the initial round of discovery to only the packaging of the specific products that the Plaintiffs' purchased from the defendant Manufacturers and that their pets consumed. Iams' counsel erroneously urged the Court to reverse the Court's prior rulings and to deny the Plaintiffs' discovery of the only item that the Plaintiffs requested at the hearing, the packaging for the specific pet foods that the Plaintiffs purchased and their companion cats and dogs consumed. [DE 409-2 p. 33]. Notwithstanding the fact that the packaging should solely consist of one or two proofs of the front and back of the package and are likely stored electronically (or could readily be obtained from their advertising vendor in electronic format for the four (4) year period of time at issue), the Defendants disingenuously argued that the Plaintiffs should be limited to advertising specifically set forth in the Fourth Amended Complaint because there is allegedly "nothing" in the Forth Amended Complaint that ties reliance to the advertising. [DE 409-2 pp. 27]. Not only is that a false statement based upon the detailed factual allegations of the pleading, this is a rehash of similar arguments raised during jurisdictional briefing and argument, i.e., the Plaintiffs did not plead with a heightened particularity, including the specific advertising at issue. At the hearing on the

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<sup>8</sup> The list was provided prior to the hearing on Iams' Motion, but the Defendants were still dissatisfied because it contained some products that did not relate to them or that were not specifically mentioned in the Fourth Amended Complaint. Of course it did, because it was a list of all of the products consumed by the Plaintiffs' companion cats and dogs as they had requested in discovery. [DE 390]. It also contained the specific products from each Defendant. The Plaintiffs have now also provided discrete lists to each Defendant Manufacturer of pet food products that were consumed by the Plaintiffs cats and dogs and which caused injury to them. Exhibits A-F.

Motion to Dismiss, this Court rejected the legal argument that false advertising had to be plead with particularity under the Florida Deceptive Trade Practices Act and that Eleventh Circuit precedent held that summarizing the fraud, which the Plaintiffs have in detail in the Fourth Amended Complaint, satisfies the requirement of particularity under Rule 9(b):

The Court: I do not find that the Twombly decision or Rule 8 changes the landscape of my review of this pleading. Twombly reaffirms Rule 8. Twombly reaffirms that this is notice pleading and plaintiffs need to plead sufficient facts to state a claim, but I think the essence of the arguments addressed in the motion to dismiss is that defendants are dissatisfied with the particularity of those facts.

April 4, 2008 hearing transcript at p. 85. Such dissatisfaction is not a basis to grant a motion to dismiss and not a basis to prevent one party from obtaining discovery that goes to the very heart of the case.

The Court: The [Third] Amended Complaint sufficiently alleges reliance and causation. The fraud-based claims are pled with sufficient particularity in light of the nature of the claims that are raised in this lawsuit, and the plaintiffs have discussed that at length in their response with citation to case law. I will not repeat that here. I do not agree that the FDUPTA claim needs to be alleged with the particularity required for a fraud-based claim.

April 4, 2008 hearing transcript at pp. 85-86. The Defendants now urge this Court that they are entitled to discovery of the manner in which the Plaintiffs relied on the advertising before they provide the packaging that is the very center of this case. A fact does not have to be alleged in a pleading to be discoverable based upon the broad discovery rules to which this Court is bound. *See Gagne v. Reddy*, 104 F.R.D. 454,456 (D. Mass. 1984)(“discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible relevance upon the subject matter of the action”); *Cox v. McClellan*, 174 F.R.D. 32, 34 (W.D.N.Y. 1997) (discovery should be permitted where there is *any possibility* of that the information sought will be relevant to the subject matter of the action). *See also Inre PE Corp. Secs. Litig.*, 221 F.R.D. 20, 24 (D. Conn. 2003) the facts sought through discovery need only be

germane to claim alleged in pleading). The Fourth Amended Complaint is replete with allegations regarding the deceptive nature of the packaging and commercials. [See e.g., DE 349 ¶¶63, 66, 67, 68, 69, 71] (“The bag, pouches and cans of the Defendants’ commercial pet food make many strong representations to the Plaintiffs and the class” and providing examples).

The Defendants advised the Court that in July 2007 that the Plaintiffs should not be allowed discovery because their pleading would not survive a motion to dismiss. However, it did and the Eleventh Circuit case law relied upon by the Plaintiffs to demonstrate that summaries were sufficient to meet the heightened rule 9(b) standard of particularity are sufficient to obtain discovery of facts that are clearly relevant to what has been plead in the Fourth Amended Complaint. Moreover, contrary to the Defendants’ claims that reliance is a necessary element of claims, that is *not* a basis to preclude discovery of relevant information relating to the Plaintiffs’ claims and the Defendants have cited *no authority to support that argument*.

Under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), “unlike fraud, a party asserting a deceptive trade practice claim *need not show actual reliance on the representation or omission at issue*.” See *Gold Coast Racing, Inc. v. Home Depot U.S.A., Inc.*, 2006 U.S. Dist. LEXIS 96386 \*\*4-5 (S.D. Fla. Feb 3, 2006) (J. Altonaga)<sup>9</sup> (“When addressing a deceptive or unfair trade practice claim, the issue is *not* whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances.”). See *State, Office of Att’y Gen., Dept. of Legal Affairs v. Wyndham Int’l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004); *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla. 1st DCA 2000). The *only* relevant inquiry then is whether a reasonable consumer would have been misled by the packaging and marketing materials and the Plaintiffs are entitled to

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<sup>9</sup> The Legislature’s clear intent was to model the FDUTPA after the Federal Trade Commission Act which does *not* provide for a subjective reliance inquiry. This intent is included in the plain language of the FDUTPA, § 501.204(2).

discovery to prepare their case for class certification and trial on that issue. The Defendants have encouraged this Court to err by unduly restricting the Plaintiffs' right to discovery of advertising that is the focus of this case. Each time the Plaintiffs compromise and provide the Defendants with more information, it is never enough and certainly never detailed enough to be able to finally obtain such critical discovery. The Defendants apparently would only be satisfied if the Plaintiffs were to have to operate in a star chamber with no discovery until the Defendants could file summary judgment motions. Their intent is clear and it is contrary to established law.

Given the scheduling order, unless the Plaintiffs proceed to obtain the discovery that they need to obtain experts and get their opinions and perform other pretrial preparation, they will never be able to meet the Court's deadlines. The Plaintiffs would never have agreed to the schedule as it now stands if they had known the Defendants would seek an end run on prior court rulings and FDUTPA itself. It is contrary to our system of justice to continue to tie the Plaintiffs' hands behind their back after their pleading has been vetted by a voluminous motion to dismiss and this Court's scrutiny. Providing the Plaintiffs with discovery of the packaging and commercials that are at the very heart of this case will not prevent the Defendants from questioning the Plaintiffs about any aspect of this case at their depositions, but it will avoid the star chamber-like atmosphere that the Defendants continue to erroneously push this Court to adopt and which this Court has properly and repeatedly rejected.

**II. The Court's initial discovery proposal at the hearing was the best and most fair option to all parties**

At the hearing, the Court suggested that the parties keep the lines of communication open and be reasonable. [DE 409-2 p. 24]. The Plaintiffs wish to do that and have done so in the

past.<sup>10</sup> They also believe that the Court's suggestion of providing a letter to the Defendants regarding approximately 10 or so categories of documents and when the Plaintiffs would like to review them is a good manner in which to proceed and have already done so. Exhibits A-F. The Defendants argument that the prior 376 requests are a massive undertaking does not apply to that procedure and they have failed to substantiate how any particular request would be so intensely burdensome just because documents are maintained in various locations. Having conceded that most of the potential production is electronic, it can be readily produced from any facility to the Plaintiffs and Defendants. If that were a basis to prevent discovery, no plaintiff would ever be able to prosecute a case against a large corporation. As acknowledged by the Defendants at the hearing, most of the discovery is electronic. [DE 409-2 p. 32]. Electronic documents are subject to search engines, which was an issue not even addressed by Iams in the Motion and can be provided by disk or e-mail without much cost, and, in fact, prior to the hearing, the parties had agreed to electronic production of documents in PDF format.

Now that the Plaintiffs have not required the Manufacturer Defendants to respond to the 376 requests for production, a dialogue should be open and, if necessary, the amount of documents can be discussed and scope further narrowed, but without any input from the persons who keep and maintain records, it is very difficult for the Plaintiffs to do so. There will be some subject matters that will require rulings, such as occurred during the jurisdictional discovery briefing, but there is no need to argue every single request. A large portion of Iams' Motion was that confidential information cannot be produced without a confidentiality agreement. There was no need for that to be included since the Plaintiffs have been amenable to a confidentiality agreement and have stated so on the record on many occasions, most recently at the meet and

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<sup>10</sup> The Defendants have likewise requested massive amounts of documents that are either irrelevant and/or highly confidential. According to the Defendants, the Court should order that cost to be shifted to the Defendants rather than discussing objections and striving to reach a compromise.

confer with Iams' counsel. They are in the process of discussing the terms of that agreement. The Plaintiffs can and will be happy to work with the Defendants to safeguard truly confidential information and to minimize all parties' costs, but the Defendants have to be willing to do so as well.

On the other hand, if the Court accepts the Defendants' argument that the documents requested will require hundreds of research hours without any real substantiation, those claims are ripe for abuse. Any large corporate defendant can simply file an affidavit without asserting specifics and state that it will take time and effort to compile documents to avoid the production of documents or, as here, to make discovery of even the most basic and important aspects of this case cost prohibitive for the Plaintiffs.

### **III. The Plaintiffs object to the appointment of a Special Master**

As discussed *supra*, the Plaintiffs have repeatedly compromised to try to minimize the expenses of both the Plaintiffs and the Defendants. The concern that the Plaintiffs have about a Special Master<sup>11</sup> is that the Defendants have been all too happy to pull the trigger on filing motions and appear to have no impetus to try to work out *bona fide* disputes unless the Court forces them to do so. This happened last fall with jurisdictional discovery and is now happening again as best evidenced by the Declarations that discuss a plethora of generalized objections that were never voiced to the Plaintiffs' counsel prior to filing Iams' Motion. Even worse, without ever filing a single substantiating declaration, all of the other Defendant Manufactureres have

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<sup>11</sup> Furthermore, in appointing a master a court must consider "the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Fed.R.Civ.P 53(a)(3). *See e.g., Peter v. Progressive Corp., 986 P.2d 865, 872 (Alaska 1999)*. Trial court has limited discretion in discovery matters to impose sanction that has effect of ending litigation entirely. If master's fees are high enough, and if good faith disputes are inevitable, such fees could conceivably be so large as to force plaintiffs to abandon litigation or withhold otherwise legitimate discovery requests on salient issues.



taken a ride on Iams coat tails without even voicing a single specific objection as to their specific companies (presumably they do not all have identical document retention systems).

The Defendants' hair trigger motion practice could be curbed by requiring a real and true 7.1(A) certificate rather than a Special Master. For example, while the Court ruled that the Local Rule 7.1(A) conference was fulfilled as to *phased* discovery, the Court did not rule on the limitation portion of the Motion and the record attached to both parties' Motions' amply demonstrates that 99% of what was encompassed in the limitation portion of Iams' Motion and Declarations was never discussed with the Plaintiffs' counsel prior to filing the Motion. If a defendant can file one motion after the other before a Special Master without a *bona fide* attempt to confer, the Plaintiffs will not be able to be in control of any sort of budget for this case and the Defendants will have free reign to drive the cost of the litigation out of control.<sup>12</sup> The result would be that no plaintiff could afford to litigate a case against large corporate defendants.

There has only been *one* discovery dispute to date in this stage of the case. The Plaintiffs respectfully request this Court to reconsider the appointment of a Special Master and order the parties to come up with a discovery plan such as that outlined above, which was initially suggested by the Court, whereby the Court or the Magistrate Judge can rule on any discovery disputes only after the parties have made a real, verifiable and *bona fide* attempt to resolve the issues that are later placed before this Court or the Magistrate Judge for resolution. The Plaintiffs request the Court to consider the fairness of imposing the additional cost to the Plaintiffs when it is the Plaintiffs who have attempted to compromise whenever that is possible. *See Fraver v.*

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<sup>12</sup> A good amount of Defendants have already done so by filing false Declarations relating to personal jurisdiction and then having to withdraw them or later admit they were not accurate despite the objections filed with this Court. The Plaintiffs engaged in extensive briefing regarding personal jurisdiction discovery, which resulted in several Defendants withdrawing their objections. This lack of good faith motion practice drove up the Plaintiffs' fees and costs. The Plaintiffs would have been able to prevail as to the remaining defendants as well, but the burden of that litigation on the Court and the Plaintiffs and cost of fighting the jurisdictional battle militated in favor of narrowing the issues.

*Studebaker Corp.*, 11 F.R.D. 94 (W.D.Pa. 1950) (Special masters are many times inappropriate because litigants do not contemplate these extraordinary and unusually heavy expenses and they should not be inflicted except in cases of most compelling necessity); *see also Hiern v. Sarpy*, 161 F.R.D. 332, 335 (E.D. La. 1995) (As to plaintiffs' contention that reference to a special master would cause financial hardship because of the costs associated with the special master's fees, the court refused to impose the financial burden on the plaintiff). The Fifth Circuit has stated that "the policy underlying Rule 53 is the alleviation of unnecessary burdens to litigants and the cornerstone of the rule is the avoidance of delay, costs, and a factfinder other than a judge." *Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975).<sup>13</sup>

Courts have been reluctant to appoint special masters in complex litigation cases where the financial burden can be cost prohibitive. *See Chang v. University of Rhode Island*, 107 F.R.D. 343 (D.R.I. 1985) (Class action had been pending for eight years and appeals pending. The Court granted motion to stay appointment of masters because the possible financial burden to all parties as a result of the appointment could be substantial); *Galloway v. American Brands, Inc.*, 81 F.R.D. 580, 586 (E.D.N.C. 1978) ("Nor is the appointment of a special master pursuant to F.R.Civ.P. 53 a feasible alternative...Moreover, a special master approach is often expensive<sup>14</sup> and may substantially deplete any damage recovery.").

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<sup>13</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

<sup>14</sup> Bedouin L. Joseph, Features: The "Nuts & Bolts": The Louisiana Special Masters Statute: A Valuable Tool or an Expensive and Unnecessary Diversion?, 51 LA Bar Jnl. 261, 262 (2003-2004) ("In contravention with the letter of the law, special masters, in some instances, have been allowed to participate in phases of litigation not contemplated by the parties at the time of the appointment. Such occurrences cost litigants significant amounts of money and resources, which they did not anticipate and for which they did not budget. Fees charged by some special masters are sometimes so high as to shock the conscience. One special master appointed by a court in southwestern Louisiana submitted fee charges totaling \$ 42,000 for one month of work. That amounts to \$ 2,100 per day in special masters fees (assuming a five-day work week and a four-week month).")

Numerous courts have held that a special master should be appointed in exceptional circumstances, which are not present here. Appointment of a special master is an extraordinary action, and under Fed.R.Civ.P. 53(b) a reference to a special master is the exception, not the rule. Thus, unless a discovery dispute is extremely complicated, a court will look on a request for a special master with great skepticism. *U.S. v. Microsoft Corp.*, 147 F.3d 935, 955 (D.C. Cir. 1998) (granting mandamus relief when special master appointed). The case involved the U.S. attempting to hold Microsoft in contempt for violating a consent decree from 1994. In stating that the matter was not so unusually complex as to need to be referred to a Special Master, the *Microsoft* court cited the Supreme Court case of *La Buy v Howes Leather Company*, 352 U.S. 249 (1957) and stated: “More broadly, if *La Buy* was not complex, with its six defendants and nearly 100 plaintiffs (87 in one suit, six in another), 27 pages of docket entries in one of the cases for preliminary pleas and motions, over 50 depositions, and intricate charges of monopolization and Robinson-Patman violations, 352 U.S. at 251-52, 77 S.Ct. 309, we see no reason to think of this case as especially complicated.” *Id.* The instant case is far less complex than *La Buy*, which held that neither complexity of issues, calendar congestions nor the possibility of a lengthy trial constituted exceptional conditions under rule 53.<sup>15</sup> *LaBuy v. Howes Leather Company*, 352 U.S. 249, 313-315 (1957).

#### **IV. Conclusion**

The Plaintiffs respectfully request this Court to reconsider appointing a Special Master, which considering the resources in this case, will only serve to punish the Plaintiffs and potentially foreclose their ability to prosecute this case. The Plaintiffs further request the Court order the parties to to adopt the Court’s reasonable suggestion of an exchange of more narrow

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<sup>15</sup> Notably, the *La Buy* court also stated that time would have been saved at the trial court level if the initial judge would have handled the case, and not referred it, because he was more familiar with the case. *La Buy*, 352 U.S. at 252.

discovery and then a true 7.1(A) discussion about how best to manage the scope and the cost of discovery prior to resorting to the Court. The Plaintiffs should be able to discuss with the Defendants the most cost effective manner and method of obtaining discovery that the Plaintiffs need to prosecute the case, without having to fly to various locations at the behest of Defendants. This method is also in the best interests of the Defendants. The Plaintiffs further urge the Court to either continue to preside over the discovery phase of this litigation or to refer discovery disputes to the Magistrate Judge.

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WE HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court via CM/ECF on June 3, 2008. We also certify that the foregoing was served on all counsel or parties of record on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Filing.

/s Catherine J. MacIvor  
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