

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-21221-CIV-ALTONAGA-BROWN

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

Plaintiffs,

vs.

MARS, Inc., et al.,

Defendants.

THE MANUFACTURING DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

Pursuant to Fed. R. Civ. P. 53 and 59(e), Defendants The Iams Company; Mars Inc.; Mars Petcare U.S, Inc.; Nutro Products, Inc.; Nestlé Purina Petcare Co.; Natura Pet Products, Inc.; Hill's Pet Nutrition, Inc.; and Del Monte Foods, Co. (collectively, the "manufacturing Defendants") file this Memorandum in Opposition to Plaintiffs' Motion for Reconsideration (Doc. No. 410). For the reasons discussed below, Plaintiffs' Motion should be denied.¹

I. INTRODUCTION

This Court's May 23, 2008 decision to grant Iams' Motion to Sequence Document Production (Doc. Nos. 382 and 383)² and to appoint a Special Master for the parties' current and likely future discovery disputes set the stage for an efficient and effective discovery process that

¹ All Defendants in this action support this Opposition and agree with the appointment of a Special Master. All Defendants are signatories to Defendants' Notice of Proposed Special Masters (Doc. No. 406). The non-manufacturing Defendants, however, have not formally joined this Opposition because they were not signatories to the Motion to Sequence Document Production (Doc. Nos. 382 and 383).

² Iams' Motion to Sequence was joined by all the manufacturing Defendants. See Doc. No. 389.

will move this action toward the class certification hearing this fall. Plaintiffs' Motion for Reconsideration cannot show, as it must under Fed. R. Civ. P. 59(e), that the Court's appointment of a Special Master constitutes clear legal error or manifest injustice.³ Instead, Plaintiffs merely rehash arguments previously considered and rejected by this Court. The Court's decision to exercise its broad discretion under Rule 53 to appoint a Special Master was correct, and that discretionary appointment cannot constitute clear legal error.⁴ The appointment of a Special Master, far from causing any injustice, will help ensure for all parties that the discovery process in this industry-wide, purported class action will proceed more efficiently. There is simply no clear legal error or manifest injustice, and no basis for Plaintiffs to re-litigate their arguments. Plaintiffs' Motion, therefore, should be denied.

In granting the Motion to Sequence at the May 23, 2008 hearing and in its May 27, 2008 Order (Doc. No. 401), the Court found that a Special Master was necessary in the face of Plaintiffs' massively broad document requests seeking "the universe" of the manufacturing Defendants' documents, the need to focus and sequence those requests in a manageable manner, and the parties' inability to agree on how to phase and prioritize the threshold issues that will

³ Motions for reconsideration of a non-final order are "construed as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e)." Mishkin v. Gurian (In re: Adler, Coleman Clearing Corp.), No. 06-80157, 2008 U.S. Dist. LEXIS 18552, at *2 (S.D. Fla. Mar. 5, 2008) (Ryskamp, J.) (denying motion for reconsideration of Court's decision to deny the motion to dismiss).

⁴ Grilli v. Metropolitan Life Ins. Co., 78 F.3d 1533, 1538-39 (11th Cir. 1996) (per curiam) (finding "no abuse of discretion" in the District Court's appointment of a special master); Religious Tech. Ctr. v. Scott, Nos. 94-55781, 94-55920, 1996 U.S. App. LEXIS 8954, at *6 (9th Cir. Apr. 11, 1996) (explaining that a special master "may be given broad authority to supervise and conduct pretrial matters, including discovery activity") (internal quotation marks and citations omitted).

confront the parties over the next several months. Hearing Tr., p. 45.⁵ The Court's decision was completely proper and should be reaffirmed.

First, a Special Master is necessary to reconcile Plaintiffs' request for the "universe" of documents stored and maintained by the manufacturing Defendants with the Court's ruling that discovery be sequenced into separate phases. Hearing Tr., pp. 45-46. The letters sent by Plaintiffs' counsel after the May 23, 2008 hearing to some of the manufacturing Defendants -- letters that this Court directed Plaintiffs' counsel to send -- do not obviate the need for a Special Master. Those letters fail to comport with the Court's admonition (Hearing Tr., pp. 30-34). For example, Plaintiffs still have not linked their discovery requests to a product that allegedly has injured a pet or to advertising claims specifically viewed by Plaintiffs that caused any Plaintiff to buy a pet food product that caused injury. Hearing Tr., pp. 39-41. As to Iams, Plaintiffs still seek discovery on 77 products; as to Purina, Plaintiffs seek discovery on more than 300 products. The other manufacturing Defendants face similarly burdensome discovery demands under Plaintiffs' current discovery letters.

Second, Plaintiffs have reserved their right to revive the 3,008 document requests that they previously served on the manufacturing Defendants,⁶ and those requests have not been supplanted since the hearing. The manufacturing Defendants thus have every reasonable expectation that a Special Master will be necessary to resolve disputes regarding those requests.

⁵ Relevant portions of the May 23, 2008 Hearing Transcript ("Hearing Tr.") are attached to this Opposition as Exhibit 1.

⁶ On each manufacturing Defendant, Plaintiffs served a First, Second and Third Request for Documents -- a total of 3,008 separate requests. The First Request for Documents has 116 requests, the Second Request for Documents has 102 requests, and the Third Request for Documents has 158 requests. The document requests served on Iams are attached to Doc. No. 383 as Exhibits C, D and E, respectively.

Third, appointing a Special Master to address the parties' discovery disputes will not impose a "manifest injustice" on Plaintiffs, but will actually benefit Plaintiffs and their counsel. Hearing Tr., pp. 21-22 (Court stated that "phased production of documents is actually [Plaintiffs'] benefit"). The use of a Special Master will allow Plaintiffs and Defendants to efficiently and effectively resolve their discovery disputes and will help the parties keep discovery moving forward and toward the class certification hearing scheduled for the fall of 2008, while also providing meaningful merits discovery. Despite Plaintiffs' contention (Motion for Reconsideration, pp. 3-5), their counsel has not acted cooperatively to work out discovery issues with Defendants.

The manufacturing Defendants respectfully request that the Court deny Plaintiffs' Motion for Reconsideration and appoint either the Honorable Herbert Stettin or Mr. Brian Spector to serve as the Special Master to address all discovery disputes between the parties.⁷ Plaintiffs concede in a recent filing (Doc. No. 411) that Judge Stettin is an appropriate Special Master.

II. PLAINTIFFS HAVE NOT MET THE RIGOROUS STANDARD UNDER
FED. R. CIV. P. 59(e) FOR THE GRANTING OF A MOTION FOR
RECONSIDERATION

Plaintiffs do not meet the stiff requirements under Fed. R. Civ. P. 59(e). Pursuant to Rule 59(e), the Court may alter its judgment on only three grounds: (1) the need "to correct a clear error of law or prevent manifest injustice"; (2) an intervening change of controlling law; or (3) newly-discovered evidence. Walmsley v. Mercury Fin. Co., No. 92-433, 1994 U.S. Dist. LEXIS 21343, at *3 (S.D. Fla. Sept. 12, 1994) (Marcus, J.); Compagnoni v. United States, No. 94-

⁷ On May 30, 2008 (Doc. No. 406), the manufacturing Defendants submitted the names of these individuals for their consideration to serve as Special Master in this action.

0813, 1997 U.S. Dist. LEXIS 7706, at *3 (S.D. Fla. May 13, 1997) (Marcus, J.). Plaintiffs raise only the first ground in their Motion, rehashing arguments previously considered and rejected by this Court. On this basis alone, the Court should deny Plaintiffs' Motion.

Motions for reconsideration are "disfavored." Compagnoni, 1997 U.S. Dist. LEXIS 7706, at *3, *13 (denying motion for reconsideration). The granting of a motion for reconsideration is an "extraordinary remedy" and should be "employed sparingly in the interests of finality and conservation of scarce judicial resources." Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc., 169 F.R.D. 680, 685, 690 (M.D. Fla. 1996) (denying motion for reconsideration). A motion for reconsideration "is not a vehicle for rehashing arguments already rejected by the court or for refuting the court's prior decision." Id.; Mishkin v. Gurian (In re: Adler, Coleman Clearing Corp.), No. 06-80157, 2008 U.S. Dist. LEXIS 18552, at *4 (S.D. Fla. Mar. 5, 2008) (Ryskamp, J.) ("A motion for reconsideration should not be used as a vehicle to reiterate arguments previously made or to present issues or cite authorities the party should have presented prior to the court's ruling.").

Plaintiffs have failed to establish grounds for the extraordinary remedy of a motion for reconsideration. Instead, they seek a second bite of the same apple.

III. PLAINTIFFS' MOTION FOR RECONSIDERATION FAILS IN LIGHT OF THE BENEFITS OF APPOINTING A SPECIAL MASTER

Plaintiffs' Motion for Reconsideration does not set forth any conclusion of law that must be corrected or any manifest injustice that must be prevented by this Court's appointment of a Special Master. To the contrary, the benefits of appointing a Special Master for the efficient litigation of this matter support the Court's decision.

A. A Special Master Will Resolve Disputes Regarding Plaintiffs' Document Requests

At the May 23, 2008 hearing, the Court stated that a Special Master is necessary to resolve the parties' many, on-going discovery disputes, particularly in light of Plaintiffs' insistence on engaging in what this Court described as a "very expensive fishing expedition" and Plaintiffs' demand for the "universe" of documents possessed by the manufacturing Defendants. Hearing Tr., pp. 45-46. Plaintiffs have not withdrawn the 3,008 document requests they served on the manufacturing Defendants. The grossly overbroad requests require the production of hundreds of thousands -- if not millions -- of documents that are not relevant to the allegations in Plaintiffs' Fourth Amended Complaint ("FAC") (Doc. No. 349) and that seek highly confidential commercial information with no discernible relevance at this time.⁸ Accordingly, the manufacturing Defendants have a strong interest in limiting discovery at this stage to the products and advertising claims specifically identified in the FAC.

⁸ Contrary to Plaintiffs' argument (Motion for Reconsideration, pp. 6-7) (which the Court has already rejected), the declarations supporting Iams' Motion to Sequence (Exhibits F, G and H to Doc. No. 383) sufficiently set forth the burdens imposed on Iams by Plaintiffs' 376 requests. The lone case cited by Plaintiffs, Centrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Group, No. 03-cv-420, 2005 U.S. Dist. LEXIS 44619, at *5-6 (M.D. Fla. June 8, 2005), is not relevant because defendants in Centrale Citrus filed no declaration supporting their three-page, conclusory motion for a protective order (see Doc. No. 46 to Centrale Citrus). Ms. Monich, as well as Mr. Rajczak and Ms. Hissong, are clear that these requests, if answered, would create a tremendous burden on Iams.

Moreover, the 376 requests, on their face, demonstrate their over-breadth and undue burden. Plaintiffs' requests seek every document that involves AAFCO, the 50-state body that provides feed regulations, including all communications for the past 10 years from and to AAFCO; third-party communications with AAFCO; mandatory and voluntary test results for all Iams products; inspections by AAFCO; and AAFCO's communications on various ingredients. See First Request for Production of Documents, Nos. 52-70 (Exhibit C to Doc. No. 383). The likelihood that Plaintiffs and Defendants may disagree about a "reasonable" interpretation of these requests is precisely what a Special Master can resolve.

At the Court's direction, Plaintiffs' counsel sent letters to the manufacturing Defendants that seek approximately 13 broad categories of documents.⁹ As indicated in the Motion for Reconsideration (pp. 5, 15), however, these post-hearing letters do not supplant Plaintiffs' 376 document requests served on each Defendant. Defendants anticipate that Plaintiffs will send subsequent letters describing additional categories of documents to be produced, and a Special Master may be needed to address the relevancy and burden of such requests.

The post-hearing letters sent to the manufacturing Defendants confirm the need for a Special Master in this action. The post-hearing letters fail to sufficiently narrow Plaintiffs' document requests, and continue to assert overbroad, unduly burdensome, and irrelevant requests. Plaintiffs continue to seek discovery of products and advertisements that are not at issue. The letter to counsel for The Iams Company ("Iams") (Exhibit 2 to this Opposition), for example, seeks information regarding 77 different dog and cat food products, including dry dog and cat food, wet or canned dog and cat food and pouch products. The FAC (¶¶ 75-76) -- construed liberally -- mentions only two Iams products, Iams Original Cat Food and Iams Original Cat Food with Chicken. Id. There is no reasonable basis¹⁰ for linking the list of 77 products and broad discovery of the May 28, 2008 letter with the claims and products explicitly referred to in the FAC. Plaintiffs simply identify various brands of the manufacturing Defendants' cat and dog foods allegedly purchased by Plaintiffs, but they fail to state whether any named Plaintiff saw an advertisement relating to such products that caused the Plaintiff to purchase the products and fail to describe how such foods injured Plaintiffs or their pets.

⁹ Although they all are dated May 28, 2008, the letters were sent to each manufacturing Defendant over the five day period between May 28 and June 2. These letters are attached to this Opposition as Exhibits 2 (Iams), 3 (Mars and Nutro), 4 (Purina), 5 (Natura), 6 (Hill's), and 7 (Del Monte).

¹⁰ In their Motion for Reconsideration (p. 6), Plaintiffs caution that their 376 requests must be "read reasonably."

Plaintiffs' counsel also persists in seeking all documents regarding Defendants' "marketing strategy and plans, including competitor information"; Defendants' "plans to increase market share"; and Defendants' ingredient suppliers. These broad-ranging requests are not connected to a legal theory asserted in the FAC.

There are numerous issues outstanding that the Special Master should address as soon as possible if the parties cannot reach an agreement, including but not limited to:

1. A Protective Order for confidential documents (Plaintiffs' counsel has objected to portions of the proposed Protective Order sent to her);
2. The failure to connect Plaintiffs' expansive list of products allegedly purchased by named Plaintiffs to any advertisement or legal theory asserted in the FAC;
3. The lack of any need for business and marketing strategies at this early phase or any phase of discovery (a category listed in the post-hearing letters);
4. The lack of any need for sources of ingredients at this early phase of discovery (a category listed in the post-hearing letters); and
5. Costs associated with document production.

As shown above, the post-hearing letters, rather than resolving the parties' discovery issues, have actually created additional issues which need to be resolved by a Special Master.

B. Nothing Has Changed Since the May 23, 2008 Hearing to Eliminate the Parties' Need for a Special Master

This Court has already rejected Plaintiffs' argument (Motion for Reconsideration, pp. 1-2, 15) that a Special Master would no longer be necessary if Plaintiffs' counsel sent letters to Defendants specifying certain categories of documents she wants produced. Complying with the Court's directive (Hearing Tr., pp. 30-32) -- sending letters -- does not obviate the need for a

Special Master. Nothing has occurred since the May 23, 2008 hearing to alter the Court's previous decision.

At the hearing, the Court anticipated the need for a Special Master to address discovery issues after Plaintiffs' counsel sent the post-hearing letters to the manufacturing Defendants. The Court explained that the letters setting forth specific categories of documents to be produced were only an initial step in the phasing process. Indeed, immediately after the Court directed counsel for Plaintiffs to send those letters, the Court determined that it will "appoint a Special Master" so the parties could resolve their objections request by request. Hearing Tr., p. 44 ("I think what I will do is appoint a Special Master. You send your letter. You object. You meet with a Special Master and go over each and every request for each and every advertising material for each and every product . . . and you can all sort it out request by request, manufacturer by manufacturer, over the period of phased discovery . . .").

Plaintiffs' Motion fails to demonstrate any clear error of law made by the Court to warrant a modification of the Court's decision at the May 23, 2008 hearing or in its May 27, 2008 Order.

C. A Special Master Will Ensure That No Manifest Injustice Is Imposed on the Parties

Appointing a Special Master here is fair and reasonable to the parties, and the expense of a Special Master will not impose a "manifest injustice" on Plaintiffs.¹¹ Appointing a

¹¹ Plaintiffs' concerns about costs (Motion for Reconsideration, pp. 18-19) are meritless. Plaintiffs have asserted serious allegations against the entire pet food industry. Plaintiffs have proposed that the thirty named Plaintiffs should be deposed over three months in six cities throughout the United States. Plaintiffs' depositions of Defendants, although not yet scheduled, also will occur throughout the country. Any expenses of a Special Master will be modest relative to the costs that Plaintiffs will incur to conduct that discovery.

Special Master will impose expenses on Plaintiffs and Defendants only to the extent the parties cannot reach resolution of a discovery issue consistent with the Federal Rules of Civil Procedure and this Court's decision at the May 23, 2008 hearing. If Plaintiffs' counsel is willing to work with Defendants' counsel for the sequenced discovery directed by the Court, the costs will be fair and reasonable. The Court, therefore, properly exercised its broad discretion under Fed. R. Civ. P. 53 in referring discovery issues to a Special Master. Reynolds v. McInnes, 380 F.3d 1303, 1305 n.3, 1308 (11th Cir. 2004) (upholding referral to Special Master; explaining that "a district court's referral of issues to a Special Master [is reviewed] for abuse of discretion") (emphasis added).

Further, having a Special Master here will benefit Plaintiffs and will alleviate Plaintiffs' groundless concern that Defendants want to control all discovery (Motion for Reconsideration, pp. 3, 14). If the parties cannot agree on a discovery issue, a Special Master -- and not Defendants -- will decide the dispute. A Special Master will assist the parties in determining what documents are necessary for the class certification hearing, thus saving Plaintiffs' counsel the burden of having to review tens of thousands of documents irrelevant to threshold issues. See Hearing Tr., pp. 22-24 (Court discussed how Plaintiffs' counsel lacks the ability "to look at thousands upon thousands of documents"). If anything, the costs of the Special Master impose a financial incentive on both Plaintiffs and Defendants to work out their discovery disputes between themselves.

Last, contrary to Plaintiffs' argument (Motion, p. 1 n.2), Plaintiffs' counsel had "notice and an opportunity to be heard" at the May 23, 2008 hearing regarding a Special Master, but did not assert any valid objection to such an appointment. The notice requirement of Rule 53 is violated only if a party had no opportunity to respond to a District Court's appointment of a

special master, such as when an issue is referred to a master sua sponte through a written order and without any argument from the parties.¹² Thus, there was no manifest injustice when the Court raised the issue of a Special Master at the hearing.

D. A Special Master Will Enable the Parties to Move This Action Forward Efficiently

A Special Master is needed to keep this case on track for a class certification hearing this fall. Plaintiffs' Motion for Reconsideration mischaracterizes Plaintiffs' counsel's degree of cooperation with Defendants. Contrary to Plaintiffs' contention (Motion for Reconsideration, p. 3), their counsel did not agree to sequence discovery into two separate phases prior to the May 23, 2008 hearing or even at the hearing. Hearing Tr., p. 24 (Court stated to Plaintiffs' counsel, "I looked at the correspondence and the correspondence was you're not interested in phased discovery"); id. at 14 (Plaintiffs' counsel stated that "plaintiffs oppose this phased discovery"); see Motion to Sequence, pp. 4-5 (Doc. No. 382). In addition, despite Plaintiffs' counsel's statements (Motion for Reconsideration, pp. 4-5), she did not resolve her discovery disputes with the jurisdictional Defendants in a timely manner. The Court had to hold three hearings (two in December 2007 and one in January 2008) to address such disputes, even though the only issue was whether jurisdictional Defendants were subject to personal jurisdiction in Florida.

In the absence of a Special Master, the Court or the Magistrate Judge will likely have to address an extensive and complicated set of disputes regarding Plaintiffs' document requests, as their counsel continues to propound overly broad, unduly burdensome, and irrelevant

¹² A live hearing, as Plaintiffs' counsel was given, is more than sufficient notice. See Advisory Comments to 2003 Amendments to Rule 53(b) (explaining that the notice requirement "can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony") (emphasis added).

requests on the manufacturing Defendants. Although Plaintiffs' counsel seeks such sweeping discovery, she has been unavailable to respond to Defendants' requests for discovery (e.g., by letter, counsel for Plaintiffs informed Defendants that she is not available for the first deposition of a named Plaintiff until August 4, 2008, even though by April 16, 2008 Defendants attempted to schedule depositions of Plaintiffs between May and July).¹³ As a result of the limited availability of Plaintiffs' counsel and given this Court's active docket, weeks or months may pass before the parties' discovery disputes are resolved. A Special Master, however, will enable Plaintiffs and Defendants to address each discovery dispute with the Special Master as it arises, thus allowing uncontested discovery to move forward while the parties resolve the contested discovery.

IV. CONCLUSION

Plaintiffs cannot meet their burden of demonstrating clear legal error or manifest injustice. Plaintiffs' Motion for Reconsideration should be denied because it provides no basis for altering the well-reasoned decision of this Court to grant the Motion to Sequence and to appoint a Special Master. Defendants respectfully ask the Court to appoint either the Honorable Herbert Stettin or Mr. Brian Spector to serve as the Special Master to address all discovery disputes and to award such further and additional relief. Plaintiffs do not object to Judge Stettin. See Doc. No. 411.

¹³ May 14, 2008 letter from Plaintiffs' counsel to Natura's counsel (attached to this Opposition as Exhibit 8); April 16, 2008 letter from Natura's counsel to Plaintiffs' counsel (attached to Doc. No. 395 as Exhibit C). In her Notices of Unavailability (Doc. Nos. 348 and 385), Plaintiffs' counsel stated that she was not available from April 24 to May 5, 2008; on July 2, 3 and 6, 2008; and from July 25 to August 1, 2008.

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CERTIFICATE OF SERVICE

I HEREBY certify that on June 9, 2008, I electronically filed the foregoing The Manufacturing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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