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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

APPEARANCES,

FOR THE PLAINTIFFS:

CATHERINE J. MacIVOR, ESQ.
BJORG EIKELAND, ESQ.
JEFFREY B. MALTZMAN, ESQ.
Maltzman Foreman, P.A.
One Biscayne Tower
2 South Biscayne Boulevard, Ste. 2300
Miami, FL 33131 - 305.358.6555
Email: cmacivor@mflegal.com
dfriedman@mflegal.com

Exhibit 1

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 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 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 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 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.

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DATE

BARBARA MEDINA
Official United States Court Reporter
301 North Miami Avenue, Suite 404
Miami, FL 33128-7792 305.523.5518
(Fax) 305.523.5519
Email: barbmedina@aol.com