

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.

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

Plaintiffs, Renee Blaszkowski, *et al.*, hereby submit this Reply Memorandum in support of their motion for reconsideration. If the Plaintiffs' motion is not granted, the Plaintiffs risk the manifest injustice of being saddled with the financial burdens associated with the appointment of a Special Master, despite the fact that the Plaintiffs have in the past, and still remain, ready and willing to candidly and informally resolve any discovery disputes that may arise with the Manufacturer Defendants and any other parties or non-parties to this case. While some discovery disputes will arise in this action, as a certain amount of disputes inevitably arise in any litigated matter, the Plaintiffs do not believe there will be sufficient disputes to warrant the additional costs and financial burden of appointing a Special Master. As such, the Plaintiffs respectfully request the Court grant the Plaintiffs' Motion.

I. The appointment of a Special Master will unnecessarily increase the Plaintiffs' costs in prosecuting this action

The Plaintiffs respectfully request this Court to reconsider the fairness of imposing the additional cost of appointing a Special Master, especially considering the fact that the Plaintiffs have attempted to compromise on each and every discovery issue to the greatest extent possible. *See, e.g., Fraver v. Studebaker Corp.*, 11 F.R.D. 94 (W.D. Pa. 1950) (financial hardship associated with the appointment of a special master should only be imposed where it is absolutely necessary); *see also Hiern v. Sarpy*, 161 F.R.D. 332, 335 (E.D. La. 1995) (refusing to impose on plaintiffs the financial burden associated with appointing a special master). As recognized by the Fifth Circuit, “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 fact-finder other than a judge.” *Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975).¹

Recognizing this financial hardship, courts have traditionally been reluctant to appoint special masters in complex litigation cases where the financial burden could be cost prohibitive. *See, e.g., Chang v. University of Rhode Island*, 107 F.R.D. 343 (D.R.I. 1985) (granting motion to stay appointment of masters because of potential financial burden); *Galloway v. American Brands, Inc.*, 81 F.R.D. 580, 586 (E.D.N.C. 1978) (“A special master approach is often expensive² and may substantially deplete any damage recovery.”).

II. Because the Plaintiffs have diligently attempted to resolve discovery disputes with Defendants, appointing a Special Master at this time is premature

¹ 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.

² Bedouin L. Joseph, Features: The "Nuts & Bolts": The Louisiana Special Masters Statute: A Valuable Tool or an Expensive and Unnecessary Diversion?, 51 La Bar J. 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).”

As noted previously by this Court, the Plaintiffs have been diligent in their efforts to informally resolve discovery disputes. Defense counsel, James Reuss, agreed that the communication between the parties played a key role in resolving the parties' discovery dispute without the need for Court assistance. Again, there is no reason why the parties could not continue this type of informal resolution, and the Plaintiffs remain willing and ready to continue to informally resolve discovery disputes.

Here, there has not been a significant amount of discovery disputes to warrant the appointment of a Special Master, and the financial burdens and hardship associated therewith. There has only been one discovery dispute to date at this stage of the case. The Plaintiffs respectfully request this Court to reconsider the appointment of a Special Master and order the parties to propose a discovery plan instead, 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.

If the parties reach a point in discovery where they cannot resolve their disputes informally, then the Court could always appoint a Special Master at that time. Furthermore, waiting to appoint a Special Master would be more fair because, in allocating the costs associated with the Special Master, the Court could look at the parties' history of communication and discovery requests to get a better sense of which side is more culpable in the various disputes, and allocate the cost of the Special Master based on that review. This would encourage all parties to cooperate and to ensure the purpose and intent of 7.1 conferences are achieved and

the Court or the Magistrate will not be consequently burdened with unnecessary discovery disputes.

The imposition of a Special Master would be particularly burdensome given the imbalance of resources at the Defendants' disposal. Faced with motion after motion filed by large defense firms with unlimited resources, the Plaintiffs may be litigated out of the case. The result would be that no Plaintiff could afford to litigate a case against large corporate defendants.

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 adopt the Court's reasonable suggestion of an exchange of more narrow 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. Dated: June 20, 2008 Miami, FL

/s Catherine J. MacIvor

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court via CM/ECF on June 20, 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.

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