

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, INCORPORATED, et al.,

Defendants.

**STATUS REPORT AND NOTICE OF THE
DEFENDANTS' PROPOSED PLAN OF SEQUENCED DISCOVERY**

Pursuant to this Court's June 24, 2008 Order (p. 2) (Clerk's Doc. No. 414), Defendants¹ are providing a Status Report and Notice of their good faith, but unsuccessful efforts to reach any agreement with Plaintiffs on a plan for sequenced discovery. Despite numerous communications among counsel, a two-hour conference call on July 15, 2008 and exchanges of correspondence, no agreement could be reached on sequenced discovery. Further, Plaintiffs' counsel stated they will not abide by the schedule for Plaintiffs' depositions that had been previously accepted by Plaintiffs' counsel, and no agreement could be reached on the scope of Plaintiffs' document production. Despite the Court's setting a discovery and class certification

¹ Since the June 24, 2008 Order was directed to all parties, all Defendants have tried to work with Plaintiffs; however, this Status Report and Notice refers to the manufacturing Defendants because they are the only Defendants that received discovery requests. The manufacturing Defendants are: The Iams Company ("Iams"); Mars Inc., ("Mars"); Mars Petcare U.S., Inc. ("Mars Petcare"); Nutro Products, Inc., ("Nutro"); Nestlé Purina Petcare Co. ("Purina"); Natura Pet Products, Inc. ("Natura"); Hill's Pet Nutrition, Inc. ("Hill's"); and Del Monte Foods, Co. ("Del Monte").

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briefing schedule, and despite Plaintiffs' counsel's representation that she would be "happy and willing to work with" Defendants in regard to meeting that schedule (May 23, 2008 hearing transcript, p. 14), Plaintiffs have now moved to "stay these proceedings as to all Defendants except Defendant, Natura" (D.E. 421, p. 1).² Plaintiffs' proposal for sequenced discovery is unacceptable, and would require this Court to further amend and extend the pretrial deadlines set forth in its April 25, 2008 Amended Order Setting Trial and Pre-Trial Schedule (D.E. 355, "Amended Scheduling Order"). Defendants are opposed to Plaintiffs' proposal for sequenced discovery, which in reality is a stay as to all Defendants except Natura. Moreover, Plaintiffs' plan purports to revive their previous document requests demanding that the manufacturing Defendants respond to the 376 individual (3,008 total individual requests of the manufacturing Defendants) requests for documents contained in their First, Second, and Third Requests for Documents.³

Plaintiffs' refusal to comply with the Court's Order for sequenced discovery compounds the difficulties faced by Defendants. Deposition dates accepted by Plaintiffs' prior lead counsel are scheduled to begin on August 4, 2008, and are now at risk in light of Mr. Keegan's decision that these depositions will not proceed as agreed to by Ms. MacIvor. The parties are farther apart -- not closer -- than they were on June 24, 2008 when they were ordered to present a plan for sequenced discovery.

² The Motion was denied on July 21, 2008 (D.E. 421).

³ See P. Keegan's letter attached to the Ireland Declaration, ¶ 8, Ex. G. The letters and emails to and from Plaintiffs' and Defendants' counsel that are discussed in this Notice are authenticated through the July 21, 2008 Declaration of D. Jeffrey Ireland Concerning Status Report and Notice of the Defendants' Proposed Plan of Sequenced Discovery ("Ireland Decl."), which is attached to this Notice as Exhibit 1.

The Defendants, however, have created a plan for sequenced discovery that delineates what should and should not be produced -- by both sides -- during the first, second, and third phases of discovery, and is consistent with the Court's Amended Scheduling Order. They respectfully request that the Court adopt this proposal. Further, Defendants ask that the Court convene a status conference and consider next steps to end Plaintiffs' continuing delay and obstruction of these proceedings, including consideration of the appointment of a Special Master. Given Defendants' inability to get Plaintiffs to even agree to a discovery schedule that will meet the deadlines set by the Court, much less to ensure that Plaintiffs will actually abide by the schedule once it is set, the parties need the Court to intervene and order that the discovery take place in the manner suggested by Defendants.

I. THE PARTIES' FAILED EFFORTS TO MEET AND CONFER

Defendants have made multiple good faith efforts to reach agreement with Plaintiffs' counsel. In response to the Court's June 24, 2008 Order, Defendants asked Plaintiffs' counsel (Catherine MacIvor) on July 3, 2008 to meet "in Miami on either the afternoon of July 14 or the morning of July 15."⁴ On July 8, 2008, counsel for Defendants Mars, Mars Petcare and Nutro wrote Plaintiffs' counsel (Ms. MacIvor and Patrick Keegan) about discovery issues, and repeated Defendants' offer to meet in Miami on July 14 or 15, 2008.⁵ On July 9, 2008, counsel for Natura sent an email to Plaintiffs' new California counsel, Patrick Keegan and

⁴ Ireland Decl., ¶ 2, Ex. A (July 3, 2008 email from Craig Hoover to Catherine MacIvor).

⁵ Ireland Decl., ¶ 3, Ex. B (July 8, 2008 letter from Phil Sechler to Patrick Keegan and Catherine MacIvor).

Jason Baker,⁶ about discovery and reiterated Defendants' attorneys' willingness to discuss the issues on July 14 or July 15, 2008.⁷

On the evening of July 9, 2008, Mr. Keegan responded to Mr. Sechler's letter and expressed a willingness to confer via telephone on July 15, 2008.⁸ Mr. Keegan's letter also indicated that, for the first time in this litigation, Plaintiffs would be seeking from this Court a stay of these proceedings as to all Defendants except Natura, based on Mr. Keegan's belief that the claims of named Plaintiffs (except six) against Defendants (except Natura) may be released by the final order of the District Court for the District of New Jersey in the Multidistrict Litigation (In Re Pet Food Products Liability Litigation, Case No. 07-2867) ("MDL Proceeding"). Despite the fact that the MDL Proceeding had been well known to the parties to this litigation since its inception and despite the fact that the MDL settlement had been well publicized, Mr. Keegan noted in his letter that six weeks previously the District Court in New Jersey had granted a motion for preliminary approval of a class action settlement and that, in Mr. Keegan's view, that settlement may "release all claims alleged against Defendant Mars Incorporated, and every other defendant in this case except for Defendant Natura Pet Products,

⁶ On June 26, 2008, this Court granted Catherine MacIvor's motions for the limited appearance of Patrick Keegan and Jason Baker (Clerk's Dkt. No. 418). Ms. MacIvor has informed Defendants' counsel that Mr. Keegan is the new lead counsel for Plaintiffs in this case, and all communication must be sent to him as well.

⁷ Ireland Decl., ¶ 4, Ex. C (July 9, 2008 email from Kristen Caverly to Jason Baker and Patrick Keegan).

⁸ Ireland Decl., ¶ 5, Ex. D (July 9, 2008 letter from Patrick Keegan to Phil Sechler).

regarding the sale of their pet food products"⁹ Ireland Decl., Ex. D (July 9, 2008 letter from Patrick Keegan to Phil Sechler).

On July 10, 2008, Defendants confirmed a meet and confer for Tuesday, July 15, 2008, which they hoped was an opportunity for a "full discussion of a plan for phased discovery," among other things.¹⁰ In order to be able to respond to Plaintiffs' counsel's assertion about the purported effect of the MDL settlement, the letter also requested that Plaintiffs "please identify any Plaintiff who you contend is a member of the Settlement Class in the Menu Foods case pursuing a Released Claim in the Blaszkowski case and provide the basis of that belief." By letter dated July 11, 2008, Mr. Keegan ignored this request and simply repeated his initial belief that these proceedings should be stayed as to all Defendants, except Natura, and that discovery of all Plaintiffs, except for the six name Plaintiffs who purchased some of their pet food from Natura (Damron, Blaszkowski, Trejoe, Peters and Murphy) should be stayed.¹¹ To date, Mr. Keegan still has not identified any Plaintiff who is a member of the Settlement class in the MDL case pursuing a Released Claim in the Blaszkowski case.

⁹ There are many differences between the instant case and the recalled pet food cases in the MDL Proceeding (which is only one of several recalls mentioned in paragraph 103 of the FAC). Among them, Plaintiffs have alleged that the class period in this case is from May 9, 2003 to May 9, 2007 (FAC, ¶ 111), while the settlement in the MDL Proceeding involves products that were purchased, used or obtained and identified as a recalled product between March 16, 2007 and the present. The short form legal notice for the settlement class approved in the MDL Proceeding on May 30, 2008 is attached to the Ireland Declaration as Exhibit H. On the evening of July 18, Plaintiffs filed a motion to stay, still without indicating which of the claims of which of the Plaintiffs they believe will be released by the settlement of the MDL proceeding.

¹⁰ Ireland Decl., ¶ 6, Ex. E (July 10, 2008 letter from Phil Sechler to Patrick Keegan).

¹¹ Ireland Decl., ¶ 5, Ex. F (July 11, 2008 letter from Patrick Keegan to Phil Sechler). Plaintiffs later identified Thomas as another plaintiff who purchased Natura products. Presumably, Plaintiffs believe that discovery can proceed as to those Plaintiffs because they fed their pets Natura's products. Each of these six Plaintiffs, however, allege that they purchased many other products made by Defendants. See FAC, ¶¶ 3, 5, 13, 26 and 27.

During the July 15, 2008 meet and confer, Plaintiffs' counsel stated that he was new to this case and had not participated in the MDL Proceeding; yet, he insisted that this case should be stayed as to all Defendants, except Natura. Plaintiffs' counsel repeated that their stay proposal would allow discovery only of Plaintiffs who purchased Natura's products and would stay all discovery of other Defendants until a later date. Defendants told Plaintiffs that they would not agree to a stay and certainly not to a stay as to only certain defendants. Plaintiffs' counsel then agreed to prepare a phased discovery plan that would sequence discovery in the event that the Court does, or does not, enter a stay.

On July 18, 2008, counsel for Plaintiffs emailed a letter dated July 17, 2008 that contains Plaintiffs' proposal for discovery.¹² Defendants' position is that Plaintiffs' proposal is wholly inadequate in several respects. First, it unilaterally extends most of the written discovery and many of the depositions until shortly before and even after the date by which the Court ordered that the motion for class certification must be filed (November 15, 2008), as required by the Amended Scheduling Order. Second, it ignores this Court's prior ruling (as well as the extensive briefs and hearing associated with it) that Plaintiffs' First, Second and Third Requests for Documents are overly broad and require sequenced discovery. Rather, Plaintiffs' proposal is that Defendants should respond to those three requests for documents, covering 376 requests to each manufacturing Defendant, on August 25 as to Natura and on November 3, 2008 as to all other manufacturing Defendants. Third, it presupposes that this Court will grant a stay, set aside

¹² Ireland Decl., ¶ 8, Ex. G (July 17, 2008 letter from Patrick Keegan to Phil Sechler).

its prior Amended Scheduling Order and enter a new, further amended scheduling order allowing deposition discovery to continue into January 2009.

Finally, Plaintiffs' July 18, 2008 proposal appears to Defendants to be a tactic to delay Plaintiffs' obligations to produce information and testimony in this case, and it simply ignores the considerable efforts of Defendants (and Plaintiffs' prior lead counsel) to conduct and complete discovery necessary for class certification prior to November 15, 2008, as this Court has already ordered in its Amended Scheduling Order.

Thus, Defendants ask this Court to adopt the plan for sequenced discovery described below.

II. THE DEFENDANTS' PLAN FOR SEQUENCED DISCOVERY

A. Phase I of Document Production

After the May 23, 2008 hearing where the Court granted the Motion to Sequence Document Production (Clerk's Dkt. No. 382), Plaintiffs' counsel sent, per this Court's direction, letters to the manufacturing Defendants in an attempt to narrow Plaintiffs' 3,008 document requests served on those Defendants.¹³ The letters, which were sent between May 28 and June 2, 2008, vary depending on the particular manufacturing Defendant, but generally seek approximately 13 broad categories of documents (collectively, "Plaintiffs' Initial Discovery Letters").¹⁴

¹³ The manufacturing Defendants received 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.

¹⁴ These letters are attached to The Manufacturing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration (Clerk's Dkt. No. 412) as Exhibits 2 (Iams), 3 (Mars and Nutro), 4 (Purina), 5 (Natura), 6 (Hill's),
(footnote cont'd...)

The manufacturing Defendants, other than Natura, each responded on June 13, 2008 to Plaintiffs' Initial Discovery Letters (collectively, "Response Letters"). Defendants' Response Letters informed Plaintiffs' counsel of the documents that each manufacturing Defendant agreed to produce and its reasons for doing so. Natura responded to Plaintiffs separately on June 2, 2008. Defendants also objected to the scope and breadth of some requests. The manufacturing Defendants (other than Natura who had already responded) began producing documents and data on a rolling basis on June 13, 2008. The documents and data identified and agreed to be provided in Defendants' Response Letters should define the scope of Phase I of discovery.

As part of the manufacturing Defendants' proposal, Phase I included documents and data (dated between May 9, 2003 and May 9, 2007) that were identified in the response letters. Depending on the specific requests made by Plaintiffs, the manufacturing Defendants, among other things, agreed to produce the following documents and data, as they related to only the named Plaintiffs and the specific products and advertising claims at issue in the FAC:¹⁵

1. materials supporting advertising claims that were publicly available to consumers on Defendants' websites;
2. final packaging materials;

(...cont'd)

and 7 (Del Monte). Plaintiffs' counsel sent a revised letter to Del Monte on June 10, 2008 and asked it to disregard the June 2, 2008 letter.

¹⁵ The specific products at issue in the FAC include: (1) Pedigree dry and The Goodlife Recipe lines (Mars and Mars Petcare); (2) Natural Choice Complete Care Indoor Adult line (Nutro); (3) 9 Lives dry cat food (Del Monte); (4) Beneful (Purina); (5) Iams Original Cat Food; (6) Science Diet Light Adult Feline dry food (Hill's); and (7) EVO dry dog food (Natura). None of these pet foods was part of the recall underlying the MDL Proceeding.

3. broadcasted television commercials;
4. print marketing provided to pet specialty stores, veterinarians and breeders;
5. print marketing published in magazines or on Defendants' websites;
6. in-store marketing used by Defendants' representatives or their retailers that were publicly available to consumers;
7. lists of ingredients and suppliers for the ingredients; and
8. letters from Defendants threatening to sue a consumer (none exists to the best of each manufacturing Defendant's knowledge).

Limiting Phase I to documents and data that Plaintiffs requested of each manufacturing Defendant falling within categories (1) through (8) above is a reasonable plan and is fair to Plaintiffs since it is based on their initial request for documents. To date, the manufacturing Defendants have produced documents responsive to the above categories without any objection from Plaintiffs. Defendants, however, have not produced confidential documents falling within the proposed Phase I categories because Plaintiffs' counsel has not yet accepted the Stipulated Protective Order. An initial draft was sent to Plaintiffs' counsel via email on May 19, 2008. Plaintiffs' counsel proposed a revision on June 2, 2008, and Defendants' counsel responded on June 10, 2008. Plaintiffs' counsel has not responded to Defendants' June 10 communication. Once an acceptable Protective Order is in place, Defendants will complete their Phase I production, as described in their Response Letters.

B. Phase II of Document Production

After the first phase of discovery is completed, the manufacturing Defendants will produce additional categories of documents and data to Plaintiffs' counsel. Under Defendants' plan, they would produce documents and data (dated between May 9, 2003 and May 9, 2007)

relating directly to the specific allegations against the manufacturing Defendants in the FAC by the individual named Plaintiffs, including these categories:

1. documents the manufacturing Defendants intend to use or rely upon at the class certification hearing;
2. identities of persons with knowledge of the allegations in the FAC;
3. documents mentioning any named Plaintiff;
4. general quality control standards and procedures;
5. summaries of sales histories;
6. lists that identify Defendants' manufacturing facilities, co-packers and rendering facilities;
7. press releases;
8. list of litigation where a Defendant was a named party; and
9. information management, storage and retention policies.

The categories of documents identified above for the first and second phases of discovery -- which include materials relevant to class certification and the merits of Plaintiffs' claims -- are sufficient for Plaintiffs and Defendants to prepare any motion or memorandum in opposition relating to class certification. Defendants' proposal also allows discovery to proceed efficiently toward the anticipated class certification hearing this fall and the anticipated discovery cut-off date. Thus, this' proposed plan for sequenced discovery appropriately balances Plaintiffs' need for certain information prior to the certification hearing against the undue burden that

would be imposed on Defendants if they had to respond to all of Plaintiffs' 3,008 document requests or other requests like them.¹⁶

C. Phase III of Document Production

Phase III of discovery would defer until after the class certification hearing all documents and data that fall outside the 17 categories identified above for the first and second phases of discovery. Such materials should not be produced until the third phase of discovery, if at all. Documents deferred until Phase III include materials that are irrelevant to the allegations in the FAC and that contain trade secrets and other highly confidential commercial information. Plaintiffs should not be permitted to seek irrelevant, unduly burdensome and confidential documents and information from the Defendants at this time. Once the Court addresses whether any class should be certified, the parties will be in a better position to know which documents are necessary for Phase III.

III. THE CONSIDERATION OF A SPECIAL MASTER

The inability of the parties to agree on a plan for sequenced discovery, depositions and documents only highlights the prudence of the Court's prior decision to appoint a Special Master to manage discovery. As the Court indicated in its June 24, 2008 Order (p. 2), "Defendants may seek the appointment of a Special Master in the event the orderly and efficient progress of discovery cannot be resolved without unnecessary expense and delay." Despite Defendants' efforts to comply with the Court's Order, Plaintiffs have refused to do so, and now

¹⁶ Defendants' discovery plan also includes a deposition schedule that was accepted by Ms. MacIvor and then rejected by Mr. Keegan, whom Ms. MacIvor claims is Plaintiffs' new lead counsel. That schedule will be the subject of a motion to compel depositions to be filed on July 21, 2008.

they seek to stay these proceedings and all discovery except as to Natura, and they also seek to revive the patently overbroad document requests. While Defendants will file motions to compel discovery, if Plaintiffs do not stop their delay tactics, a Special Master will be needed to keep this case on the schedule set by the Amended Scheduling Order.

IV. CONCLUSION

As required by the Court's June 24, 2008 Order, Defendants' counsel have met and conferred with Plaintiffs' counsel to develop a plan for sequenced discovery. The Parties' counsel, however, have not agreed on such a plan. Defendants, therefore, respectfully ask this Court to order that the proposal for the sequencing of discovery detailed in this memorandum be adopted in full.¹⁷

Respectfully submitted,

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¹⁷ Pursuant to Fed. R. Civ. P. 16(a), Defendants also request a scheduling conference to consider the discovery schedule, the utilization of a Special Master and any motions to compel discovery.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of July 2008, I electronically filed the foregoing Status Report and Notice of the Defendants' Proposed Plan of Sequenced Discovery with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to CM/ECF participants:

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