

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.

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO ADD AND/OR SUBSTITUTE
ARNA CORTAZZO AS A PLAINTIFF/CLASS REPRESENTATIVE (AS TO NON-
NATURA DEFENDANTS' RESPONSE)**

While the non-Natura Defendants take no position as to adding or dropping Ms. Cortazzo, they disagreed with the Plaintiffs' position that claims against the non-Natura Defendants will likely be void based upon the settlement agreement reached in *In re Pet Food Products Liability Litigation*, Case No. 1:2007CV02867, MDL No. 1850 ("Multi-District Case"). [DE 462]. Given that the non-Natura Defendants take this disingenuous position despite the fact that they have refused to stipulate that the non-Natura Plaintiffs' claims are not encompassed by this settlement, the non-Natura Defendants have clearly demonstrated their inclination to engage in smoke and mirror games. In such an effort, the non-Natura Defendants claim that "[t]he release in the Settlement Agreement of the Pet Food Recall Litigation deals only with [pet food and/or treats that may have been contained contaminated wheat gluten or rice protein concentrate ("Recalled Pet Food Products")] and Plaintiffs' claims in this case include products other than Recalled Pet Food Products." [DE 462 p. 2].

However, the release in the Multi-District Case class action settlement agreement is overbroad (requiring release of all known and unknown claims alleged against the Defendants for the Plaintiffs' pet food purchase) and over-inclusive to the point of including the non-Natura Plaintiffs' claims in this action.¹ Specifically, in the settlement agreement reached in the Multi-District Case, the non-Natura Defendants will obtain a release, waiver, and discharge of all claims raised in each of the 113 consolidated U.S. cases and a number of unknown Canadian cases,² including giving the released defendants a general waiver of unknown claims from the entire class and binding the Multi-District Case settlement class with restrictive covenants against participating in any lawsuits against the released defendants, even as a member of a settlement class, without a limitation as to time or a defined settlement class period. Accordingly, while the scope and time period set forth in the Multi-District Case may have been limited to recalled pet food products (which is at variance with the instant action), the parties, issues, products, and class periods between the two cases sufficiently overlap such that the resulting waiver, release, and discharge of claims would waive and discharge all of the Plaintiffs' claims in this action against the non-Natura Defendants.

II. The settlement reached in the Multi-District Case purports to include Plaintiffs as part of the settlement class

The Preliminary Approval Order certifies a class for settlement purposes of:

All persons and entities who purchased, used or obtained, or whose pets used or consumed Recalled Pet Food Products.³

¹ Not only is this instant case *not* excluded from the settlement agreement reached in the Multi-District Case, but the definition of "Release Claims" and "Recalled Pet Food Products" is so overbroad that, if approved, could be used by the non-Natura Defendants to surreptitiously seek a dismissal of all or most of the Plaintiffs' claims in this action, except for those claims against Natura.

² At least one of these consolidated cases involved claims that are similar to the claims in this action. As an example, one case brought a claim for violation of a state's deceptive trade practices act. *See* Complaint for *Picus v. Wal-Mart Stores, Inc., et al.*, Case No.: CV-S-00682-PMP-LRL (attached hereto as Exhibit "A").

³ The Multi-District Case settlement agreement defines "Recalled Pet Food Products" as:

Any pet food product and/or treat products or any ingredient thereof that were recalled by any

[MacIvor Decl. at 1.VV (attached as Exhibit “B” to DE 421)]. This broad definition arguably includes all the non-Natura Plaintiffs and members of the putative class in this action if they simply purchased, used or obtained, or their pets used or consumed, one of the thousands of recalled pet food products, irrespective of time. Moreover, there is no doubt that the Defendants intend to include the named Plaintiffs as part of the Multi-District Case settlement because these named Plaintiffs received claim forms for the Multi-District Case. [MacIvor Dec. at ¶XX (attached as Exhibit “B” to DE 421)]. Thus, it appears that the class certified for settlement in the Multi-District Case includes the non-Natura Plaintiffs in this action.

III. The Multi-District Case settlement includes all non-Natura Defendants in this action

The settlement agreement purports to dismiss some approximate 58 defined pet food “Defendants,” and “any and all entities and individuals that are alleged to have handled, distributed, purchased for resale and/or redistribution, supplied, manufactured and/or sold or offered for sale Recalled Pet Food Products” including some approximate 210 specifically named “Released Entities” as well as well as “their respective insurers, parent companies, subsidiaries, affiliates, and all of their respective franchisees, and the officers, directors, trustees, shareholders, unit holders, partners, governors, managers, employees, agents, assignees, successors and heirs of all of them.” [Stl. Agr. ¶¶1.T, 1.RR]. Essentially, the settlement agreement attempts to release every non-Natura Defendant in the instant action.⁴

IV. The Multi-District Case settlement involves products that are the subject of this case

Released Entity between March 16, 2007 and the present.

[Stl. Agr. ¶1.PP]. Although the Multi-District Case settlement agreement refers to the date pet food products were recalled, it does not define when the products were manufactured, purchased, consumed or advertised.

⁴ The Multi-District Case settlement agreement would also reach certain entities in the Defendant class as well.

Although the settlement agreement does not provide a list of Recalled Pet Food Products, the settlement website provides a 17-page list of approximately 1,100 different recalled pet food products, which presumably are the defined “Recalled Pet Food Products.” Many of these products were used by the Plaintiffs in this action.

V. The Multi-District Case settlement appears to resolve claims raised in the this case

The settlement agreement contains a broad waiver, release and dismissal with prejudice which the non-Natura Defendants will likely assert resolves the instant action. For example, paragraph 3.A. of the settlement agreement provides:

Upon entry of the Final Approval Order and Judgment by the MDL Court and all Canadian Courts, the Releasing Parties forever release and discharge all Released Claims against all Defendants and all Released Entities. For purposes of this Settlement Agreement, “Released Claims” are all claims, demands, actions, suits, and/or causes of action that have been brought or could have been brought, are currently pending or were pending, or are ever brought in the future, by any Settlement Class Member against any Defendant or Released Entity, in any forum in Canada or the United States (including their territories and, in the case of the United States, Puerto Rico), whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation, common law or equity, that relate in any way, directly or indirectly, to facts, acts, events, transactions, occurrences, courses of conduct, representations, omissions, circumstances or other matters referenced in any claim raised (including, but not limited to, any claim that was raised against any Released Entity) in the Pet Food Recall Litigation. (emphasis added).⁵

VI. The Multi-District Case settlement purports to preclude any other litigation

The settlement agreement includes many restrictions aimed at insulating the “Defendants” and each “Released Entity” from further litigation from not only the named plaintiffs, but the entire settlement class. For example, paragraph 3.B of the settlement

⁵ Because “Pet Food Recall Litigation” is defined at ¶1.KK. of the Settlement Agreement as the “U.S. Actions” and the “Canadian Actions” which are further defined as “each of the actions that are part of, or become part of, the coordinated proceedings of In re Pet Food Products Liability Litigation, MDL No. 1850, in the United District Court for District of New Jersey” and the “actions listed in Exhibit 1 to the Settlement Agreement,” respectively (which, the publicly posted settlement agreement has no Exhibit 1), the settlement agreement purports to release and discharge any claim brought by our Plaintiffs if those claims were brought in any of the 113 actions brought within the United States and any claims brought in Canada.

agreement contains a covenant not to sue:

The Releasing Parties and each of them agree and covenant not to sue or prosecute, institute or cooperate in the institution, commencement, filing or prosecution of any suit or proceeding in any forum against any Released Entity, or against any other person or entity who may claim contribution or indemnity from or against any Released Entity, based upon or related to any Released Claim. (emphasis added).

Additionally, paragraph 3.C. of the settlement agreement provides:

It is an essential element of the Agreement that the Released Entities obtain the fullest possible release from further liability to anyone relating to the Released Claims, and it is the intention of the Parties to this Agreement that the Agreement eliminate all further risk and liability of the Released Entities relating to the Released Claims. Accordingly, the Parties agree that the MDL Court and Canadian Courts shall include in the Final Approval Order and Judgment an injunction that permanently enjoins the Releasing Parties from (i) filing, commencing, prosecuting, continuing, maintaining, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on any or all Released Claims against one or more Released Entities or against any person or entity who may claim over against any Released Entity for contribution or indemnity; (ii) instituting, continuing, maintaining, organizing class members in, or joining with class members in, any action or arbitration, including but not limited to a purported class action, in any jurisdiction, against one or more Released Entities, or against any person or entity who may claim over against any Released Entity for contribution or indemnity, based on, involving, or incorporating, directly or indirectly, any or all Released Claims; and (iii) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding, or order in any jurisdiction based on an allegation that an action taken by the Released Entities, which is in compliance with the provisions of the Settlement Agreement, violates any legal right of any Settlement Class Member. (emphasis added).

Finally, in addition to a request for a dismissal with prejudice, the settlement agreement includes

a waiver of the provisions of Section 1542 of the Civil Code of California, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

As such, the Plaintiffs respectfully submit to this Court that this overbroad release, if approved, will void the claims of the non-Natura Plaintiffs asserted in this action.

Dated: September 3, 2008
Miami, FL

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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 September 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.

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