

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.

**NATURA PET PRODUCTS, INC.'S MOTION TO STRIKE
PLAINTIFFS' EVIDENTIARY OBJECTION TO REPLY BRIEF
AND ACCOMPANYING MEMORANDUM OF LAW**

Pursuant to Federal Rule of Civil Procedure Rule ("Rule") 12(f), Defendant Natura Pet Products, Inc. ("Natura") hereby moves to strike the Evidentiary Objection By Plaintiffs To Natura's Reply in Support of its Motion for Summary Judgment against Non-Natura Plaintiffs Linda Brown, *et al.* ("Plaintiffs' Sur-Reply") [D.E. 543], filed on November 7, 2008, on the following grounds:

1. Plaintiffs' Sur-Reply constitutes redundant, immaterial, impertinent, and/or scandalous matter that should be stricken because (a) no evidence was presented in Natura's Reply and (b) Plaintiffs' Sur-Reply fails to object to any evidence.
2. Furthermore, Plaintiffs' Sur-Reply is redundant, immaterial, impertinent, and scandalous and should be stricken under Rule 12(f) because it seeks only to rebut legal argument raised in Natura's Reply and thus constitutes a sur-reply prohibited by Local Rule 7.1.
3. In support of this motion to strike, Natura submits the attached Memorandum of Law. This motion to strike is further supported by the filings of record in this case.

WHEREFORE, Natura respectfully moves this Court for entry of an order striking the Evidentiary Objection by Plaintiffs to Natura Pet Products, Inc.'s Reply in Support of Its Motion for Summary Judgment against Non-Natura Plaintiffs Linda Brown, *et al.* ("Plaintiffs' Evidentiary Objection"). [D.E. 543.]

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs' Sur-Reply is an impermissible legal memorandum in the guise of an "evidentiary objection." Natura filed no evidence with its reply. Therefore, there is simply no evidence to which to object. Instead, Plaintiffs' Sur-Reply contains only argument, quoted case law, and case cites submitted solely for the purpose of rebutting the legal arguments within Natura's reply. Under the Local Rules, Plaintiffs' Sur-Reply cannot be considered and is irrelevant to these proceedings. As such, it should be stricken.

II. BACKGROUND

On September 23, 2008, the Plaintiffs filed Plaintiffs' Notice of Pending and Dismissed Claims [D.E. 494] in which Plaintiffs admit that Linda Brown, Tone Gaglione, Jane Herring, Deborah Hock, Raul Isern, Claire Kotzampaltiris, Michele Lucarelli, Marian Lupo, Sharon Mathiesen, Deborah McGregor, Julie Nelson, Ann Quinn, Marlena Rucker, Sandy Shore, Stephanie Stone, Beth Wilson, Patricia Hanrahan, Donna Hopkins-Jones, Danielle Valoras, Carolyn White, and Lou Wiggins cannot prevail on any claims against Natura. Accordingly, Natura filed a motion for summary judgment against those identified plaintiffs on October 10, 2008. [D.E. 515.] Plaintiffs filed their opposition in response to the motion for summary judgment on October 27, 2008. [D.E. 528.]

On November 5, 2008, Natura filed its reply brief [D.E. 534] to rebut legal arguments raised in Plaintiffs' opposition to the motion for summary judgment. Though Natura's reply brief was submitted without any accompanying evidence, Plaintiffs filed their Plaintiffs' Sur-Reply as a purported "evidentiary objection" on November 7, 2008. [D.E. 543.]

III. LEGAL ARGUMENT

A. Plaintiffs’ Filing Is an Unauthorized Sur-Reply and Should Be Stricken.

Rule 12(f) permits the Court to strike from pleadings any redundant, immaterial, impertinent, or scandalous matter on its own or upon a party’s motion. In addition, Local Rule 7.1 provides:

The movant may, within five days after service of an opposing memorandum of law, serve a reply memorandum in support of the motion, which reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law. *No further or additional memoranda of law shall be filed without prior leave of Court.*

(Emphasis added.)

While purely evidentiary objections filed in response to evidence presented in a reply brief may be permitted, legal memoranda may not be filed after the filing of the reply brief without leave of Court. *Id.* Here, Plaintiffs disingenuously characterized their Sur-Reply as an “evidentiary objection” in an attempt to evade Local Rule 7.1’s prohibition against sur-replies. Because Natura’s reply brief was filed without evidence, and Plaintiffs’ Sur-Reply does not actually address any evidence, it cannot be characterized as an “evidentiary objection.” Instead, Plaintiffs’ Sur-Reply responds to legal argument raised in the reply and includes authority having nothing to do with the admissibility of evidence. Indeed, the only point of Plaintiffs’ Sur-Reply is to tenuously argue that plaintiffs who pled no claims against Natura can nonetheless maintain an action and seek recovery against Natura by using discovery responses to amend the pleadings.

Natura filed its reply brief on November 5, and Plaintiffs filed their Sur-Reply two days later without leave of Court. Because Plaintiffs’ Sur-Reply was filed after the reply brief, it violates Local Rule 7.1. Accordingly, it is redundant, immaterial, impertinent, and/or scandalous to these proceedings, and the Court should order it stricken.

IV. CONCLUSION

Based upon the foregoing reasons, Defendant Natura Pet Products, Inc. respectfully requests the Court grant this motion and enter an order striking the Evidentiary Objection by

Plaintiffs to Natura Pet Products, Inc.'s Reply in Support of Its Motion for Summary Judgment against Non-Natura Plaintiffs Linda Brown, *et al.* [D.E. 543.]

RULE 7.1 CERTIFICATE

Prior to filing this motion, Natura's attorney, Robert C. Mardian III, made reasonable efforts to confer with the plaintiffs in a good faith effort to resolve the issues raised in the motion. Plaintiffs did not respond to the meet and confer efforts, thus necessitating the instant motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 13, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the counsel so indicated on the attached Service List.

s/Michael M. Giel

Attorney

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