

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.

**RESPONSE TO NATURA PET PRODUCTS, INC.'S MOTION TO STRIKE
PLAINTIFFS' EVIDENTIARY OBJECTION TO REPLY BRIEF
AND CROSS-MOTION TO ALLOW LEAVE TO FILE OBJECTION**

The Plaintiffs hereby respond to Defendant's, Natura Pet Products, Inc. ("Natura"), Motion to Strike Plaintiffs' Evidentiary Objections to Reply Brief [DE 545] and Cross-Motion to Allow Leave to File Objection, and state as follows:

I. Introduction

On October 10, 2008, Natura filed a Motion for Summary Judgment against Non-Natura Plaintiffs Linda Brown, *et al.* [DE 515]. The Plaintiffs filed a Response to that Motion and Natura filed a Reply on November 5, 2008. [DE 534]. Two days later, on November 7, the Plaintiffs filed an Evidentiary Objection to Natura's Reply because the Reply contained a substantial amount of information that relied upon evidence that was irrelevant to the motion before this Honorable Court, mischaracterized the law, and unfairly confused the issues. [DE 543]. Natura subsequently filed a motion to strike the Evidentiary Objection, alleging that it was a sur-reply. [DE 545]. Because the Evidentiary Objection was limited to objecting to irrelevant

evidence put forth by Natura in its Reply and was not a “legal memoranda” as Natura suggests, the Plaintiffs respectfully request that the Evidentiary Objection be considered and that Natura’s Motion to Strike the Evidentiary Objection be denied.

II. The Evidentiary Objection is not a Sur-Reply under Local Rule 7.1

Natura uses Local Rule 7.1 for the basis of its motion and improperly claims that the Plaintiffs’ evidentiary objection constituted a sur-reply filed by the Plaintiffs without first obtaining leave of Court. [DE 545, p. 3]. Natura asserts that the evidentiary objection “does not actually address any evidence” and instead “responds to legal argument raised in the reply.” [DE 545, p. 3]. Natura also erroneously suggests that the only point of the Plaintiffs’ evidentiary objection was to “tenuously argue that plaintiffs who pled no claims against Natura can nonetheless maintain an action and seek legal recovery against Natura by using discovery responses to amend the pleadings.” [DE 545, p. 3]. As explained in more detail *supra*, the Plaintiffs *were not* attempting to make *any* legal argument, but were instead simply objecting to the evidence relied upon by Natura to disingenuously support the issues raised in its Reply that were irrelevant to the motion for summary judgment, mischaracterized the question before this Honorable Court, and ultimately attempted to confuse the issues. More specifically, in its Reply in Support of its Motion for Summary Judgment as to all *non-Natura* Plaintiffs, Natura used three pleadings that, as relied upon by Natura, were unrelated to Natura’s particular motion for summary judgment in its attempt to make a number of legal arguments and factual assertions regarding the Plaintiffs in this case who have *demonstrated that they have viable claims against Natura* and who are clearly *not the subject of the motion* for summary judgment as to the non-Natura plaintiffs. In doing so, Natura put forth factual and legal assertions that, pursuant to

Federal Rules of Evidence 402 and 403, are outside the scope of this Honorable Court's consideration and which are therefore objectionable.

Natura filed a motion for summary judgment as to all non-Natura Plaintiffs. However, Natura devoted its Reply brief to arguing that Plaintiffs Jennifer Damron, Cindy Tregoe, Jo-Ann Murphy, and Susan Peters do not have valid claims against Natura. The evidence relied upon to support this argument is not germane to Natura's Motion for Summary Judgment, which does *not* pertain to these four plaintiffs. In fact Natura's Motion for Summary Judgment explicitly pertains to only *non-Natura* Plaintiffs,¹ which does not include Jennifer Damron, Cindy Tregoe, Jo-Ann Murphy, or Susan Peters. For this very reason, the Plaintiffs object to the Reply itself to the extent that it uses and represents *any evidence* concerning the claims that Jennifer Damron, Cindy Tregoe, Jo-Ann Murphy, and Susan Peters have against Natura. This includes the Fourth Amended Complaint, [DE 349], the Notice of Pending and Dismissed Claims, [DE 494], and a Motion for Voluntary Dismissal [DE 518], all of which are cited to in pages two through five of Natura's Reply,² are relied upon as the sole base of Natura's argument, and are considered evidence. *See Pruitt v. Mote*, 503 F.3d 647, 659 n.14 (7th Cir. 2007) (explaining that the complaint and legal memoranda are considered evidence); *Stat-Tech Int'l Corp. v. Delutes (In re Stat-Tech Int'l Corp.)*, 47 F.3d 1054, 1058 (10th Cir. 1995); *May v. Vanlandingham*, 2008 U.S. Dist. LEXIS 43642, *14 (E.D.N.C. June 3, 2008).

It is at this point that Natura fundamentally misunderstands the Evidentiary Objection filed by the Plaintiffs. The purpose of the Evidentiary Objection is not an attempt to argue that

¹ The caption of Natura's Motion for Summary Judgment as to the non-Natura Plaintiffs lists the following plaintiffs: 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.

² As stated in the Evidentiary Objection, *these* pages and the content therein, which arises *only* from these three filings, are the portions of the Reply to which the Plaintiffs object.

Plaintiffs Damron, Tregoe, Murphy and Peters have valid claims against Natura. Instead, the purpose of the Evidentiary Objection is to object to the factual and legal assertions improperly raised by Natura based on the evidence Natura improperly relied upon in its Reply as such evidence is irrelevant to the motion for summary judgment in support of which the Reply was submitted, will cause undue delay and unfairly confuse the issues contained in the Motion for Summary Judgment in support of which the Reply was submitted, and otherwise mischaracterizes the law. If Natura wishes to argue that Natura Plaintiffs Damron, Tregoe, Murphy and Peters do not have valid claims against Natura, they must do so in a separate motion; however, using the three aforementioned filings by the Plaintiffs to litigate, in the Reply to the Motion for Summary Judgment against all *non-Natura* Plaintiffs, the validity of the claims that *Natura* Plaintiffs Damron, Tregoe, Murphy, and Peters have against Natura is inappropriate. Moreover, consideration of the evidence presented by Natura in its Reply that is intended to encourage this Court to consider the validity of these four Plaintiffs' claims in a Motion for Summary Judgment that concerns only non-Natura plaintiffs confuses the issues as they are completely distinct considerations for this Court.³

III. If this Court were to determine that the Plaintiffs' Evidentiary Objection to the Reply Brief is a sur-reply, then the Plaintiffs respectfully request leave that it be accepted as such

As discussed *supra*, the purpose of the Evidentiary Objection is to object to the evidence used for the purpose for which Natura used it in its Reply. However, while the Plaintiffs respectfully suggest that the Evidentiary Objection is not a sur-reply, if this Court were to reach the opposite conclusion, the Plaintiffs respectfully request this Court grant the Plaintiffs leave under Local Rule 7.1 to file the Evidentiary Objection as a sur-reply. Local Rule 7.1(C) grants

³ This is especially true given that the Reply mischaracterizes the law and prejudices the Plaintiffs who have no opportunity to respond because this new mischaracterization of the law was first filed in the Reply.

this Court the discretion to allow a sur-reply to be filed with leave of the Court. *See* Local Rule 7.1(C). Accordingly, although the Plaintiffs contend that the Evidentiary Objection is not a sur-reply, if this Court were to determine otherwise, the Plaintiffs respectfully request leave to file a sur-reply and that the Evidentiary Objection be accepted as such.

IV. Conclusion

The Plaintiffs respectfully request this Court deny all relief requested by Natura in its Motion to Strike Plaintiffs' Evidentiary Objection to Reply Brief or, in the alternative, grant leave to file the objection as a sur-reply, and for all other relief that this Court deems just and proper.

RULE 7.1 CERTIFICATE

The undersigned has conferred with counsel for Natura, Kristen Caverly, who opposes the filing of a sur-reply and opposes a motion to treat the Evidentiary Objections as a sur-reply.

Dated: November 28, 2008
Miami, FL

By: s/ Jonathan C. Schwartz
Jeffrey B. Maltzman (FBN 0048860)
jmaltzman@mlegal.com
Catherine J. MacIvor (FBN 932711)
cmacivor@mlegal.com
Jonathan C. Schwartz (FBN 0051540)
jschwartz@mlegal.com
MALTZMAN FOREMAN, PA
One Biscayne Tower
2 South Biscayne Boulevard -Suite 2300
Miami, Florida 33131
Tel: 305-358-6555 / Fax: 305-374-9077

PATRICK N. KEEGAN
pkeegan@keeganbaker.com
JASON E BAKER
jbaker@keeganbaker.com
KEEGAN & BAKER, LLP
4370 La Jolla Village Drive
Suite 640
San Diego, CA 92122

Tel: 858-552-6750 / Fax 858-552-6749
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court via CM/ECF on this 28th day of November, 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.

s/ Jonathan C. Schwartz _____
Jonathan C. Schwartz

SERVICE LIST

CASE NO. 07-21221 ALTONAGA/Brown

CATHERINE J. MACIVOR

cmacivor@mflegal.com

JEFFREY B. MALTZMAN

jmaltzman@mflegal.com

JEFFREY E. FOREMAN

jforeman@mflegal.com

DARREN W. FRIEDMAN

dfriedman@mflegal.com

MALTZMAN FOREMAN, PA

One Biscayne Tower

2 South Biscayne Boulevard -Suite 2300

Miami, Florida 33131

Tel: 305-358-6555 / Fax: 305-374-9077

Attorneys for Plaintiffs

EDGAR R. NIELD

enield@nieldlaw.com

4370 La Jolla Village Drive

Suite 640

San Diego, CA 92122

Telephone: 858-552-6745

Facsimile: 858-552-6749

Attorney for Plaintiffs

LONNIE L. SIMPSON

E-Mail: Lonnie.Simpson@dlapiper.com

S. DOUGLAS KNOX

E-Mail: Douglas.knox@dlapiper.com

DLA PIPER US LLP

100 N. Tampa Street, Suite 2200

Tampa, Florida 33602-5809

Telephone: (813) 229-2111

Facsimile: (813) 229-1447

*Attorneys for Defendants Menu Foods, Inc.
and Menu Foods Income Fund*

PATRICK N. KEEGAN

pkeegan@keeganbaker.com

JASON E BAKER

jbaker@keeganbaker.com

KEEGAN & BAKER, LLP

4370 La Jolla Village Drive

Suite 640

San Diego, CA 92122

Telephone: 858-552-6750

Facsimile: 858-552-6749

Attorneys for Plaintiffs

ALEXANDER SHAKNES

E-Mail: Alex.Shaknes@dlapiper.com

AMY W. SCHULMAN

E-Mail: Amy.schulman@dlapiper.com

DLA PIPER US LLP

1251 Avenue of the Americas

New York, New York 10020

Telephone: (212) 335-4829

*Attorneys for Defendants Menu Foods, Inc.
and Menu Foods Income Fund*

WILLIAM C. MARTIN

E-Mail: william.martin@dlapiper.com

**DLA PIPER RUDNICK GRAY CARY US
LLP**

203 North LaSalle Street

Suite 1900

Chicago, Illinois 60601-1293

*Attorneys for Defendants Menu Foods, Inc.
and Menu Foods Income Fund*

MARK C. GOODMAN
mgoodman@ssd.com
SQUIRE, SANDERS & DEMPSEY LLP
One Maritime Plaza
Suite 300
San Francisco, CA 94111-3492
Telephone: (415) 954-0200
Facsimile: (415) 393-9887

Attorneys for Defendants PETCO Animal Supplies Stores Inc., PetSmart, Inc., Wal-Mart Stores, Inc. and Target Corporation

JEFFREY S. YORK
E-Mail: jjork@mcguirewoods.com
MICHAEL GIEL
E-Mail: mgiel@mcguirewoods.com
McGUIRE WOODS LLP
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202
Telephone: (904) 798-2680
Facsimile: (904) 360-6330

Attorneys for Defendant Natura Pet Products, Inc.

OMAR ORTEGA
Email: ortegalaw@bellsouth.net
DORTA & ORTEGA, P.A.
Douglas Entrance
800 S. Douglas Road, Suite 149
Coral Gables, Florida 33134
Telephone: (305) 461-5454
Facsimile: (305) 461-5226

Attorneys for Defendant Mars, Inc. and Mars Petcare U.S. and Nutro Products, Inc.

BARBARA BOLTON LITTEN
blitten@ssd.com
SQUIRE, SANDERS & DEMPSEY LLP
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401-6198
Telephone: (561) 650-7200
Facsimile: (561) 655-1509

Attorneys for Defendants PETCO Animal Supplies Stores Inc., PetSmart, Inc., Wal-Mart Stores, Inc. and Target Corporation

KRISTEN E. CAVERLY
E-Mail: kcaverly@hcesq.com
ROBERT C. MARDIAN III
rmardian@hcesq.com
HENDERSON CAVERLY PUM & CHARNEY LLP
16236 San Dieguito Road, Suite 4-13
P.O. Box 9144 (all US Mail)
Rancho Santa Fe, CA 92067-9144
Telephone: 858-756-6342 x)101
Facsimile: 858-756-4732

Attorneys for Natura Pet Products, Inc.

ALAN G. GREER
agreer@richmangreer.com
**RICHMAN GREER WEIL BRUMBAUGH
MIRABITO & CHRISTENSEN**
201 South Biscayne Boulevard
Suite 1000
Miami, Florida 33131
Telephone: (305) 373-4000
Facsimile: (305) 373-4099

Attorneys for Defendants The Iams Co.

BENJAMIN REID

E-Mail: bried@carltonfields.com

ANA CRAIG

E-Mail: acraig@carltonfields.com

CARLTON FIELDS, P.A.

100 S.E. Second Street, Suite 4000
Miami, Florida 33131-0050
Telephone: (305)530-0050
Facsimile: (305) 530-0050

*Attorneys for Defendants Hill's Pet Nutrition,
Inc.*

KARA L. McCALL

kmccall@sidley.com

SIDLEY AUSTIN LLP

One S. Dearborn Street
Chicago, ILL 60633
Telephone: (312) 853-2666

*Attorneys for Defendants Hill's Pet Nutrition,
Inc.*

SHERRIL M. COLOMBO

E-Mail: scolombo@cozen.com

COZEN O'CONNOR

200 South Biscayne Boulevard
Suite 4410
Miami, Florida 33131
Telephone: (305) 704-5945
Facsimile: (305) 704-5955

Attorneys for Defendant Del Monte Foods Co.

JOHN J. KUSTER

jkuster@sidley.com

JAMES D. ARDEN

jarden@sidley.com

SIDLEY AUSTIN LLP

787 Seventh Avenue
New York, New York 10019-6018
Telephone: (212) 839-5300

*Attorneys for Defendants Hill's Pet Nutrition,
Inc.*

RICHARD FAMA

E-Mail: rfama@cozen.com

JOHN J. McDONOUGH

E-Mail: jmcdonough@cozen.com

COZEN O'CONNOR

45 Broadway
New York, New York 10006
Telephone: (212) 509-9400
Facsimile: (212) 509-9492

Attorneys for Defendant Del Monte Foods

JOHN F. MULLEN

E-Mail: jmullen@cozen.com

COZEN O'CONNOR

1900 Market Street

Philadelphia, PA 19103

Telephone: (215) 665-2179

Facsimile: (215) 665-2013

Attorneys for Defendant Del Monte Foods, Co.

CAROL A. LICKO

E-Mail: calicko@hhlaw.com

HOGAN & HARTSON

Mellon Financial Center

1111 Brickell Avenue, Suite 1900

Miami, Florida 33131

Telephone (305) 459-6500

Facsimile (305) 459-6550

*Attorneys for Defendants Nestle Purina
Petcare Co.*

ROBERT C. TROYER

E-Mail: rectroyer@hhlaw.com

HOGAN & HARTSON

1200 17th Street

One Tabor Center, Suite 1500

Denver, Colorado 80202

Telephone: (303) 899-7300

Facsimile: (303) 899-7333

*Attorneys for Defendants Nestle Purina
Petcare Co.*

CRAIG A. HOOVER

E-Mail: cahoover@hhlaw.com

MIRANDA L. BERGE

E-Mail: mlberge@hhlaw.com

HOGAN & HARTSON L.L.P.

555 13th Street, N.W.

Washington, D.C. 20004

Telephone: (202) 637-5600

Facsimile: (202) 637-5910

*Attorneys for Defendants Nestle Purina
Petcare Co.*

JAMES K. REUSS

E-Mail: jreuss@lanealton.com

LANE ALTON & HORST

Two Miranova Place

Suite 500

Columbus, Ohio 43215

Telephone: (614) 233-4719

*Attorneys for Defendant The Kroger Co. of
Ohio*

D. JEFFREY IRELAND

E-Mail: djireland@ficlaw.com

BRIAN D. WRIGHT

E-Mail: bwright@ficlaw.com

LAURA A. SANOM

E-Mail: lsanom@ficlaw.com

FARUKI IRELAND & COX

500 Courthouse Plaza, S.W.

10 North Ludlow Street

Dayton, Ohio 45402

Attorneys for Defendant The Iams Co.

W. RANDOLPH TESLIK

E-Mail: rteslik@akingump.com

ANDREW J. DOBER

E-Mail: adober@akingump.com

**AKIN GUMP STRAUSS HAUER & FELD
LLP**

1333 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: (202) 887-4000
Facsimile: (202) 887-4288

*Attorneys for Defendants New Albertson's Inc.
and Albertson's LLC*

RALPH G. PATINO

E-Mail: rpato@patinolaw.com

DOMINICK V. TAMARAZZO

E-Mail: dtamarazzo@patinolaw.com

CARLOS B. SALUP

E-Mail: csalup@patinolaw.com

PATINO & ASSOCIATES, P.A.

225 Alcazar Avenue
Coral Gables, Florida 33134
Telephone: (305) 443-6163
Facsimile: (305) 443-5635

*Attorneys for Defendants Pet Supplies "Plus"
and Pet Supplies Plus/USA, Inc.*

HUGH J. TURNER, JR.

E-Mail: hugh.turner@akerman.com

AKERMAN SENTERFITT & EDISON

350 E. Las Olas Boulevard
Suite 1600
Fort Lauderdale, Florida 33301-2229
Telephone: (954)463-2700
Facsimile: (954)463-2224

*Attorneys for Defendant Publix Super Markets,
Inc.*

CRAIG P. KALIL

E-Mail: ckalil@aballi.com

JOSHUA D. POYER

E-Mail: jpoyer@abaili.com

ABALLI MILNE KALIL & ESCAGEDO

2250 Sun Trust International Center
One S.E. Third Avenue
Miami, Florida 33131
Telephone: (303) 373-6600
Facsimile: (305) 373-7929

*Attorneys for New Albertson's Inc. and
Albertson's LLC*

ROLANDO ANDRES DIAZ

E-Mail: rd@kubickdraper.com

PETER S. BAUMBERGER

E-Mail: psb@kubickdraper.com

KUBICKI DRAPER

25 W. Flagler Street, Penthouse
Miami, Florida 33130-1712
Telephone: (305) 982-6708
Facsimile: (305) 374-7846

Attorneys for Defendant Pet Supermarket, Inc.

C. RICHARD FULMER, JR.

E-Mail: rfulmer@Fulmer.LeRoy.com

**FULMER, LEROY, ALBEE, BAUMANN,
&
GLASS**

2866 East Oakland Park Boulevard
Fort Lauderdale, Florida 33306
Telephone: (954) 707-4430
Facsimile: (954) 707-4431

*Attorneys for Defendant The Kroger Co. of
Ohio*