

**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.

**OBJECTIONS TO DEFENDANTS' DECLARATIONS IN SUPPORT OF
NATURA PET PRODUCTS, INC.'S OPPOSITION TO CLASS CERTIFICATION**

Plaintiffs Renee Blaszkowski et al. hereby object to the admissibility of the portions of declarations and exhibits attached thereto submitted in support of Natura Pet Products, Inc.'s Opposition to Class Certification as follows:

OBJECTIONS TO DECLARATION OF PETER ATKINS

8. From May 2003 to November 2008, the advertising materials directed to the public which included the words "human grade" were Natura's website and one or more product brochures. In 2007, prior to this litigation, Natura decided to stop using the phrase "human grade." Prior to November 7, 2008, the phrase "human grade" no longer appeared on Natura's website.

Objection: Lack of personal knowledge. Lacks foundation. Paragraph 8 requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Although Mr. Atkins states his job title is "President" and he is "responsible for the day-to-day operations of Natura," this does not sufficiently indicate how he would have personal knowledge of Natura's current and past advertising and marketing efforts. Mr. Atkins' Declaration fails to state his job duties and responsibilities, and Defendant erroneously relies on his position as "President" as sufficient foundation for any and all of Defendant Natura's activities. Defendant should have submitted a Declaration from Natura's V.P. of Marketing, or an equivalent position, to testify regarding Natura's advertising and marketing efforts.

Sustained: _____

Overruled: _____

9. Natura's product packaging has not and does not include the words "human grade." A picture of Natura's Innova Senior dry dog food package is attached as Exhibit A. Natura has not produced or distributed signs or point of sale displays which say "human grade."

Objection: Lacks foundation; hearsay. Hearsay in affidavits or declarations is inadmissible and should not be considered. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 859 (9th Cir. 1977)

Paragraph 9 requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Although Mr. Atkins states his job title is "President" and he is "responsible for the day-to-day operations of Natura," this does not sufficiently indicate how he would have personal knowledge of Natura's current and past advertising and marketing efforts. Mr. Atkins' Declaration fails to state his job duties and responsibilities, and Defendant erroneously relies on his position as "President" as sufficient foundation for any and all of Defendant Natura's activities. Defendant should have submitted a Declaration from Natura's V.P. of Marketing, or an equivalent position, to testify regarding Natura's advertising and marketing efforts.

Sustained: _____ **Overruled:** _____

12. From May 2003 through November 2008, Natura has used a website located at www.naturapet.com to advertise its products. Prior to 2006, Natura maintained that website using an independent IT contractor. From 2006 to the present, independent advertising agency Brighton Agency, Inc. has created and maintained Natura's website, including the electronic copies of that website. Although a website has been in operation for the entire period of May 2003 to November 2008, the content has changed numerous times. Natura's website content was revised at least in 2005, 2006, 2007, and 2008. I believe the phrase "human grade" did not appear on Natura's website or in product brochures until 2005 or 2006.

Objection: Lacks foundation. Paragraph 12 requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Although Mr. Atkins states his job title is "President" and he is "responsible for the day-to-day operations of Natura," this does not sufficiently indicate how he would have personal knowledge of Natura's current and past advertising and marketing efforts. Mr. Atkins' Declaration fails to state his job duties and responsibilities, and Defendant erroneously relies on his position as "President" as sufficient foundation for any and all of Defendant Natura's activities. Defendant should have submitted a Declaration from Natura's V.P. of Marketing, or an equivalent position, to testify regarding Natura's advertising and marketing efforts.

Sustained: _____ **Overruled:** _____

19. Natura's website invites consumers to write to Natura about their experiences with Natura products. Natura receives a large number of reports from consumers who report

satisfaction with Natura’s products. Consumers use words like “miracle” when describing Natura’s products and often send pictures of their animals. A sample of testimonials received on Natura’s website during the period of May 2003 to November 7, 2008 from consumers who report being from Florida is attached as composite Exhibit F.

Objection: Lacks foundation; hearsay, relevance. Hearsay in affidavits or declarations is inadmissible and should not be considered. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 859 (9th Cir. 1977). The purported client testimonials attached as Exhibit F are all classic hearsay, and Defendant fails to offer facts sufficient to either lay a proper foundation for the statements, or to indicate that the statements would fit into any of the exceptions for hearsay.

Sustained: _____ **Overruled:** _____

OBJECTIONS TO DECLARATION OF JAMES BALSIMO

“4. Consumer product returns are not frequent, and I am not aware of any situations in Florida where a retailer has requested reimbursement for a customer return, and Natura has not honored its 100% product guarantee. Once I advised the retailer of Natura’s policy, the customer’s money was refunded by the retailer”

Objection: Lacks foundation/personal knowledge. Paragraph 4 is cited for the proposition that “Natura always honors this guarantee.” However, Mr. Balsimo lacks personal knowledge about how Natura responds to consumer dissatisfaction, other than these “couple of occasions.” Additionally, Mr. Balsimo may have established that the retailer refunded the money, but he does not establish or claim personal knowledge that Natura refunded money to the consumer. Thus, paragraph 4 lacks foundation and requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602.

Sustained: _____ **Overruled:** _____

Objection: Improper Lay Opinion. Mr. Balsimo, who claims to be a sales representative, has never been and is not qualified to testify as an expert regarding Natura’s refunds made to class members during the class period or any other type of scientific expert and thus, his statements regarding Natura’s history of reimbursing class members for the purchase Natura products is improper lay opinion that is inadmissible under FRE 701.

Sustained: _____ **Overruled:** _____

“5. Natura has a range of food products for cats and dogs, including canned foods and dry foods. Some formulas are made to address particular health concerns, such as California Natural which is made with very few ingredients for pets with food sensitivities. Another of Natura’s products, Karma, is a certified organic product.”

Objection: Lacks foundation/personal knowledge. Paragraph 5 lacks foundation and requires

the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. James Balsimo has no personal knowledge or established other foundation about the formulation of Natura's pet products, its ingredients or its certification as organic.

Sustained: _____ **Overruled:** _____

Objection: Improper Lay Opinion. Mr. Balsimo, who claims to be a sales representative, has never been and is not qualified to testify as an expert in pet food formulation, manufacturing processes or certifications or any other type of scientific expert. Thus, his statement that "some formulas are made to address particular health concerns" and "is made with very few ingredients for pets with food sensitivities" is improper lay opinion, and thus inadmissible under FRE 701.

Sustained: _____ **Overruled:** _____

"6. A significant part of my job is to talk to retailers and consumers about Natura's products. In addition to my retailer visits, I attend trade shows and pet shows representing Natura products. Based on feedback from retailers and consumers that I have spoken to, I believe that people buy Natura products for many different reasons, including particular health concerns, price, inclusion of a specific ingredient like lamb or lack of an ingredient like corn, a friend or retailer recommendation, and Natura's lack of recalls related to the melamine contamination in 2007."

Objection: Hearsay. Paragraph 6 is inadmissible hearsay as Mr. Balsimo attempts to introduce statements made by others as to their reasons for purchasing Natura products satisfaction and their apparent satisfaction with the products. FRE 801.

Sustained: _____ **Overruled:** _____

Objection: Lacks foundation/personal knowledge/speculation. Paragraph 6 lacks foundation and requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Mr. Balsimo merely claims he "believes" a myriad of reasons why consumers purchase Natura products, but he has not established any personal knowledge or other foundation for his "belief." Moreover, Mr. Balsimo does not establish that any of the consumers he has spoken to have discussed any of the products at issue in this case or were even from the State of Florida. Thus, he lacks personal knowledge and proper foundation to establish why consumers purchase Natura products. Moreover, his opinions are not based on any scientific or other market studies of why consumers purchase Natura products. It is mere speculation why such products were purchased by consumers.

Sustained: _____ **Overruled:** _____

Objection: improper lay opinion. Mr. Balsimo, who claims to be a sales representative, has never been and is not qualified to testify as an expert in advertising or consumer reaction to advertising claims or any other type of scientific expert and thus, his statements why consumers

purchase Natura products is improper lay opinion that is inadmissible under FRE 701.

Sustained: _____ **Overruled:** _____

“6. I speak to many consumers over the course of a year who say they are very satisfied with Natura’s pet food. Common feedback that I get from Natura consumers are comments such as:

[comments omitted]”

Objection: Hearsay. Paragraph 6 is inadmissible hearsay as Mr. Balsimo attempts to introduce statements made by others as to their reasons for purchasing Natura products satisfaction and their apparent satisfaction with the products. FRE 801.

Sustained: _____ **Overruled:** _____

Objection: Lacks foundation/personal knowledge. Paragraph 6 lacks foundation and requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Mr. Balsimo does not establish that any of these comments were made during the relevant time period, were for products at issue in this case or were even from the State of Florida.

Sustained: _____ **Overruled:** _____

Objection: improper lay opinion. Mr. Balsimo, who claims to be a sales representative, has never been and is not qualified to testify as an expert in advertising or consumer reaction to advertising claims or any other type of scientific expert and thus, his statements why consumers purchase Natura products is improper lay opinion that is inadmissible under FRE 701.

Sustained: _____ **Overruled:** _____

“8. At the request of Natura’s attorney, I recently conducted a price survey of certain Natura products available from retailers in Florida. My survey consisted of me visiting the retailer and writing down the prices I saw on the store shelves for four different dry dog food products distributed by Natura. Below are the prices that I observed.”

Objection: Lacks foundation/Relevance. Mr. Balsimo does not establish the methodology for his price survey or that it was even conducted during any time relevant to the claims in this action. In fact, recent price surveys – even if done correctly – are not indicative of what class members paid during the class period. Paragraph 8 lacks foundation and requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602.

Sustained: _____ **Overruled:** _____

Objection: improper lay opinion. Mr. Balsimo claims to be a sales representative, not a marketing or any other type of scientific expert and thus, his conclusions about a purported price survey is improper lay opinion that is inadmissible under FRE 701.

Sustained: _____ **Overruled:** _____

OBJECTIONS TO DECLARATION OF PATRICIA GILPIN

3. In 2006, Pet Professionals applied for and received credits based on customer returns. The total credits issued to Pet Professionals in 2006 for customer returns totaled \$5,623.94. A print out of portions of my electronic General Ledger Detail Report showing these credits is attached as Exhibit A. I generated the report which is attached as Exhibit A on November 24, 2008 from Natura’s electronic accounting books and records which I maintain as part of my job duties. The redacted portions of Exhibit A do not relate to customer-related credits issued to Pet Professionals.

Objection: Lacks Foundation/Personal Knowledge. Paragraph 3 lacks foundation and requires the introduction of evidence that the statements contained in it are based on personal knowledge as a condition precedent to admissibility under FRE 602. Patricia Gilpin has no personal knowledge or established other foundation about how Pet Professionals applied for and/or received any credit, the purpose of the credit, the type of credit, the amount of credit, whether the credits were issued for products purchased in Florida or other states, and for what product refunds the credits were issued. Moreover, Patricia Gilpin does not have personal knowledge about the consumers’ actions, or even that of Natura’s distributor, Pet Professionals, only that her computer system indicates that some type of credits were issued. Finally, paragraph 3 is cited for the proposition that “class members have received their money back”; however, she has no personal knowledge about what Pet Professionals did with the credit, if anything. Nowhere in the declaration does Ms. Gilpin establish that the credit – if given - was for 100% of the purchase price made in Florida and actually given to the consumer.

Sustained: _____ **Overruled:** _____

Objection: Relevance. Paragraph is introduced for the proposition that “class members have received their money back”; however, refunds, even if established, are not relevant to class certification. Moreover, Exhibit A to the Declaration of Patricia Gilpin is not relevant evidence as defined by FRE 401 and thus, is inadmissible in accordance with FRE 402. Without identifying what products credits were issued for, the purpose of the credits and in what states, the fact that credits were issued is not relevant to any material issue in this case.

Sustained: _____ **Overruled:** _____

Objection: Incomplete Document/Summary. Exhibit A to the Declaration of Patricia Gilpin is incomplete and thus, inadmissible unless the remainder of it is introduced. FRE 106. Likewise,

Exhibit A is not a proper summary and thus is inadmissible under FRE 106.

Sustained: _____ **Overruled:** _____

Dated: January 16, 2009
Miami, Florida

Respectfully submitted,

s/ Catherine J. MacIvor

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