

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/Class Representatives,
vs.

MARS INC., *et al.*

Defendants.

**MOTION FOR RECONSIDERATION REGARDING COURTS RULING ON
DEFENDANT NATURA PET FOODS PRODUCTS INC.'S MOTION TO COMPEL
PLAINTIFFS' JO-ANN MURPHY, CINDY TREGOE AND PATRICA DAVIS TO
PROVIDE ADDITIONAL RESPONSES TO WRITTEN DISCOVERY**

I. FACTUAL SUMMARY

In mid to late October of 2008, defendant Natura Pet Food Products Inc. served multiple sets of written discovery on Plaintiffs Jo-Ann Murphy, Cindy Tregoe and Patrica Davis. This included Written Interrogatories to each of the Plaintiffs and Requests for Admissions and Requests for Production of Documents to Plaintiff Patricia Davis. After a mutually agreed upon extension to respond, each of the Plaintiffs timely served responses to those discovery requests.

Subsequently, the Defendant indicated it was not satisfied with the responses provided and filed Motions to Compel further responses relating to each of the Plaintiffs for each set of the written discovery propounded. Plaintiffs disagreed with the requests for further responses in several respects and decided to file Oppositions to the Defendant's Motions with the Court setting out their position relating thereto. (See Declaration of Edgar R. Nield ¶ 3).

The Defendant's motions were electronically served upon this office on January 13, 2009. Based upon Local Rule 7.1 (C) (1) of the Federal District Courts for the Southern District of Florida, this office, as well as co-counsel located in Miami, calculated the due date for the Oppositions to be January 28, 2009 and up to February 2, 2009. Although not official, the Electronic Filing Notices relating to the Motions generated by the CM/ECF system (See Exhibit "A" to the declaration of Edgar R. Nield attached in Support of this Motion) set out a response due date of February 2, 2009. Based upon these calculations we calendared the due dates for filing of the Plaintiffs' Oppositions to Defendant's Motions to Compel as January 28, 2009. (See Declaration of Edgar R. Nield ¶ 4).

Based upon these calculations, we were surprised to receive the Court's ruling on the Defendant's Motion to Compel to Plaintiff Davis to provide further Requests for Admission, via Electronic Notice on January 26, 2009, followed by the Court's Ruling as to the other Motions to Compel on January 27, 2009. Confused as to why the Court had apparently issued its rulings on these Motions before what we had believed to be the due date for the Oppositions we, and Miami co-counsel, recalculated the due dates and came up with the same dates as previously. (See Declaration of Edgar R. Nield ¶ 6).

Thereafter, this office contacted Judge Brown's chambers directly and spoke to his paralegal about why the rulings on these motions had been issued prior to what we believed to be the due date for the filing of our Oppositions. After researching the issue she indicated that the filing dates on discovery motions had been expedited by an earlier April 25, 2008 Scheduling Order issued by Judge Altonaga, of which this office was unaware. She also indicated that this was not an uncommon error with these types of orders, since they changed the Local Rule requirements in regards to motions, and recommended we submit a Motion for Reconsideration

of the Judges rulings on the Motions to Compel, seeking relief from the scheduling error relating to the due date for the Oppositions to those Motions to allow the Motions to be determined on their merits. (See Declaration of Edgar R. Nield ¶ 7).

As a consequence of this, the Plaintiffs have filed this Motion for Reconsideration and hereby request that the Court excuse the error in the calendaring of the Opposition date, vacate its prior Orders relating to the Defendant's multiple Motions to Compel and allow the Plaintiffs' Oppositions to those Motions (attached to the Declaration of Edgar R. Nield) to be filed and considered, together with whatever Replies the Defendant might submit, before the Court provides its rulings as to those motions. (See Declaration of Edgar R. Nield ¶ 8).

II. LEGAL ARGUMENT

Federal Rule of Civil Procedure 60 allows the Court to correct “a mistake arising from oversight . . . when one is found in a judgment, order, or any other part of the record.” (See Federal Rules of Civil Procedure Rule 60). Rule 60 (b) states that that the grounds for such relief can be based upon “mistake, inadvertence, surprise or excusable neglect”. (See Federal Rules of Civil Procedure Rule 60 (b)(1)). A motion seeking such relief “must be made within a reasonable time. . . “ when based upon mistake, inadvertence, surprise or excusable neglect. (See Federal Rules of Civil Procedure Rule 60 (c)(1)). Still further, the treatise Federal Practice & Procedure, Federal Rules of Procedure, Chapter 8, Judgment, Rule 60, Relief From A Judgment or Order states that relief under Rule 60 has been exercised in cases where there has been “a miscalculation about the date that a pleading or other documents were due.”

Here the error made with respect to the due date for filing of Plaintiffs' Oppositions to the Defendant's Motions to Compel was made as a result of a mistake, inadvertence and excusable neglect. (See Declaration of Edgar R. Nield ¶ 7). Consequently Plaintiffs request that the Court

reconsider its ruling on the Defendant's Motions to compel and vacate those ruling to allow the filing of the Plaintiffs' Oppositions to those motions, and allow a determination of the Defendant's Motions based upon the merits of those Motions instead of upon the mistake of the Plaintiffs' legal representatives in calculating the correct filing date for those oppositions.

III. CONCLUSION

The error which occurred in the calendaring process was made in good faith and not done in anyway to prejudice or delay the process of having these motions heard expeditiously. To the contrary, the Oppositions could and would have been submitted on a timely basis had this error not occurred, which can probably be determined by reviewing the nature of the Oppositions. Essentially all of the objections Defendant raised in its motions have been acceded to by the Plaintiffs with the exception of the request that Plaintiff Davis produce her personal computer for inspection by the Defendant's, which has been opposed on justifiable grounds.

Still further the few days delay which will occur because of this error will not delay the progress on this issue, or this lawsuit, in any appreciable way and is thereof not prejudicial to the defense. However, to rule on the Defendant's motions without the benefit of Plaintiffs' Oppositions to the motions would be highly detrimental and prejudicial to the interests of the Plaintiffs'.

Consequently the Plaintiffs respectfully request that this court, based upon the above, excuse the error that has occurred and vacate its rulings thereon on the Defendants Motions until Plaintiffs' Oppositions thereto have been considered.

Dated: January 28, 2009

Respectfully submitted,

s/ Edgar R. Nield
(Ca. State Bar # 135018)
E-mail: enield@nielldlaw.com
Law Offices of Edgar R. Nield

Carlsbad Gateway Center
5650 El Camino Real
Carlsbad, California, 92008
Telephone: (760) 929-9880
Facsimile: (760) 929-9260

And

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

And

Jeffrey B. Maltzman (FBN 0048860)
jmaltzman@mlegal.com
Jeffrey E. Foreman (FBN 0240310)
jforeman@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

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 January 28, 2009. 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/ Edgar R. Nield

Edgar R. Nield

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*

JEFFREY S. YORK

E-Mail: jyork@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.

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.

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.

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.

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: scolumbo@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 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.

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

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.

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.

ROBERT C. TROYER

E-Mail: rtroyer@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.*

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*

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*

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.

CRAIG P. KALIL

E-Mail: ckalil@aballi.com

JOSHUA D. POYER

E-Mail: jpoyer@abailli.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.

RALPH G. PATINO

E-Mail: rpatino@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.*

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*