

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) MDL No. 1285
) Misc. No. 99-0197 (TFH)
)

THIS DOCUMENT RELATES TO:)
Hill's Pet Nutrition, Inc., v.)
F. Hoffman La Roche, Ltd., et al. 00-4001-RDR)
&)
Animal Science Products, Inc., et al v.)
Chinook Group, Ltd., et al.)

FILED

FEB 21 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION
Re: Hill's Pets' Motion to Modify

Currently pending before the Court is Plaintiff Hill's Pet Nutrition, Inc.'s ("Hill's Pet") Motion to Modify Final Order Approving Class Settlement and Final Order with UCB Chemicals, Inc. Upon consideration of plaintiff's motion, defendants opposition, class plaintiffs' response, plaintiff's reply, and the entire record herein, the Court will grant plaintiff's motion to modify.

Background

On July 16, 2001, class plaintiffs moved for preliminary approval of a settlement class between class plaintiffs and defendant UCB Chemicals Corp. On July 25, 2001, this Court certified the settlement class and preliminarily approved the proposed settlement. Attached to the Court's Order were two notices: (1) The notice of class action settlement which informed potential members of the UCB settlement class of the need to opt out even if they had filed their own lawsuit; and (2) the summary notice of the UCB settlement and hearing thereon which

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provided specific instructions on how to obtain a copy of a printed notice if one had not been received. On August 13, 2001, the Claims Administrator sent the mail notice via first class mail and informed settlement class members choosing to be excluded from the settlement class to mail written requests postmarked on or before September 28, 2001 to the Claims Administrator. Additionally, class members were instructed to notify counsel for plaintiffs and counsel for defendants of any objection to the settlement by September 28, 2001. On October 31, 2001, class plaintiffs filed an Affidavit of Anthony P. Fazzone, CPA regarding notice to the UCB settlement class. The affidavit stated that 6,242 notices were mailed to class plaintiffs, that 274 requests for exclusion had been timely received, and that no written objections had been filed. An accompanying exhibit listed all of the opt-outs as of October 20, 2001. On Nov. 9, 2001, class plaintiffs filed a motion for final approval of the settlement between class plaintiffs and UCB Chemicals Corp. and for entry of final judgment. On Nov. 30, 2001, this Court held a final approval hearing and ordered that the settlement between class plaintiffs and UCB Chemicals be finally approved. Hill's Pet, upon discovering that it was not one of the opt-out plaintiffs listed on the November 20, 2001 Order, filed the present Motion to Modify on December 12, 2001. Plaintiff requests that this Court modify its Order of November 20, 2001 because its failure to formally opt out of the class was entirely inadvertent, not based upon bad faith, and because steps were taken to rectify the situation as soon as plaintiff was made aware of the situation.

Discussion

This Court has discretion, pursuant to Fed. R. Civ. P. 6(b) and Fed. R. Civ. P. 60(b), to modify its Order of November 30, 2001, so that plaintiff is able to opt-out of the UCB Settlement Class beyond the agreed upon opt-out date. See Hartman v. Powell, 2001 U.S. App. LEXIS 7560

(D.C. Cir. 2001); In re Cendant Corp. Prides Litig., 233 F.3d 188, 192-197 (3rd Cir. 2000); In re Gypsum Antitrust Cases, 565 F.2d 1123, 1127-28 (9th Cir. 1977). Rule 6(b) states that "the court for cause shown may at any time in its discretion . . . permit the act to be done where the failure to act was the result of excusable neglect." Fed. R. Civ. P. 6(b). Additionally, Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).

The Supreme Court has addressed the issue of what constitutes "excusable negligence" in Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 123 L Ed. 2d 74, 113 S. Ct. 1489 (1993). The Court, in trying to ascertain the meaning of excusable neglect as it relates to Federal Bankruptcy Procedure Rule 9006(b),¹ began by looking at the plain meaning of "neglect." Id. at 388. ("The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness."). Looking also to the intent of Congress in enacting Rule 9006(b), the Court held that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 388. In relating Rule 9006(b) to Fed. R. Civ. P. 6(b), the Court found that "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic

¹Rule 9006 gives a bankruptcy court the discretion to permit a late filing if the failure to comply with an earlier deadline was the result of 'excusable neglect.' See Pioneer, 507 U.S. 380, 382 (1993).

concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Id. at 389. The Court then went on to address the 'excusable neglect' standard as used in Rule 60(b), and found it to include instances attributable to negligence. Id. at 394. ("Thus, at least for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.")

The Supreme Court in Pioneer next discussed the standard for "excusable." The Court set forth factors to consider when determining what kind of neglect will be considered "excusable," the factors are: (1) the danger of prejudice to the debtor, (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. Id. at 395, citing In re: Pioneer Inv. Serv. Co., 943 F.2d 673, 677; see also Yesudian v. Howard Univ. et al., 270 F.3d 969, 971 (D.C. Cir. 2001) (finding no reversible error in the district court's decision to accept a late filing based upon lack of any prejudice, brief delay with no suggestion of a material effect on the proceedings, error based upon mistake, and no suggestion of bad faith). The Court was quick to note that evidence of bad faith would most definitely call for denial of a finding of "excusable neglect." Pioneer, 507 U.S. at 398. ("To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.'")

In this case, plaintiff claims its failure to comply with the opt-out deadline was the result of "excusable neglect" by the Claims Administrator. Plaintiff asserts that the Claims Administrator committed excusable neglect by not sending the requisite Rule 23 notice to Hill's

Pet even though Hill's Pet was a known claimant in this litigation.² The Court finds this argument to be unpersuasive. First, a notice was sent to Hill's Pet's parent corporation, Colgate Palmolive Co., in exactly the same manner as the two previous settlement notices in this case, both of which Hill's Pet managed to respond to and opt-out of within the allotted time frame. The Court finds the fact that Hill's Pet preferred to have correspondence and notifications sent to its Kansas address rather than its parent's address to be irrelevant as it never filed a change of address request with the Claims Administrator, nor did it file an objection to the notification process.³ Second, through various filings and Orders in this case, plaintiff was made well aware of the pending opt-out date.⁴ Considering the July 25, 2001 Order and the attachments therein, it seems highly unlikely that plaintiff, through its counsel, could have remained unaware of the opt-out date. Third, not only did the Claims Administrator comply with this Court's July 25, 2001 Order by notifying all potential members of the UCB settlement class via U.S. First Class mail "to the extent that they can be identified with reasonable diligence, from the databases of

²Because the settlement class was certified in accordance with Rule 23(b)(3), Fed. R. Civ. P. 23(c)(2) applies and provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." See Fed. R. Civ. P. 23(c)(2); see also In re: Gypsum Antitrust Cases, 565 F.2d 1123, 1125 (9th Cir. 1977).

³It is irrelevant that Hill's Pet included the addresses of both Colgate Palmolive Co. in New York, and Hill's Pet in Kansas in its correspondence with the Claims Administrator. It is not up to the Claims Administrator to guess what plaintiff meant by including additional addresses in their correspondence. If Hill's Pet had wanted to ensure that their mail was sent directly to Hill's Pet in Kansas rather than to their parent, Colgate, in New York, they should have made their intentions clear and filed an appropriate change of address request with the Claims Administrator.

⁴This Court and the parties involved in this case have agreed to utilize the Verilaw system, which provides for electronic posting and email notification of all filings. Additionally, all parties have access to the Court's website where all Orders and Opinions are posted.

customers created by the Claims Administrator in this action," he also provided for publication of the notice in *The Wall Street Journal* on August 21, 2001, and August 28, 2001, in *Feedstuffs* on August 27, 2001, and in *Chemical Market Reporter* on August 27, 2001. Thus, the Court finds that the process used by the Claims Administrator was valid and in conformance with the July 25, 2001 Order. Despite plaintiff's claims to the contrary, the Court does not find that Hill's Pet's failure to formally opt-out of the settlement resulted from the Claims Administrator's failure to send the requisite Rule 23 notice to Hill's Pet at its Kansas address or to the address of its counsel of record, nor does the Court find that the processes used by the Claims Administrator were performed in a procedurally inadequate manner.

Hill's Pet further argues that even if they did not give formal notice, the Claims Administrator and defendants were on notice that Hill's Pet's true intention was to opt-out of the class settlement.⁵ The Court finds this argument without merit. The only way for one party to know the real intention of another party is through that party's official actions. The fact that UCB S.A. complied with a court deadline and filed an answer to Hill's Pet's Amended Complaint does not mean that UCB S.A. effectively acknowledged Hill's Pet as an opt-out plaintiff, it merely means that they complied with court rules.

⁵Hill's Pet states the following reasons to support their claim of actual notice to defendant: (1) Hill's Pet is the Kansas plaintiff referred to in Plaintiffs' Motion and Supporting Memorandum Requesting that No Judgment of Dismissal be Entered Regarding Any Action in Which The Court May Find that Personal Jurisdiction is Lacking Over UCB S.A. filed on September 21, 2001; (2) the Court Order and Memorandum of October 30, 2001 denying UCB S.A.'s Motion to Dismiss specifically holds UCB S.A. subject to personal jurisdiction in Kansas, where Hill's Pet initiated their action; (3) on November 14, 2001, counsel for UCB S.A. contacted Hill's Pet and other direct action plaintiffs requesting an extension of time in which to answer those parties' complaints; (4) on November 20, 2001, UCB S.A. filed an answer to Hill's Pet's Amended Complaint.

Although the Court finds that there was no "excusable neglect" on behalf of the Claim's Administrator, the factors outlined in Pioneer still weigh in favor of modifying the Nov. 20, 2001 Order due to the "excusable neglect" of plaintiff and plaintiff's counsel for the following reasons: (1) UCB will not be substantially prejudiced by allowing Hill's Pet to opt-out after the official opt-out date⁶; (2) the length of delay is short and will not impact the judicial proceedings⁷; (3) while the Court finds the reason for the delay to be within the reasonable control of the movant, the Court finds this to be outweighed by the other factors⁸; (4) there is no indication that the movant acted in bad faith in not filing within the proscribed time frame.⁹

The Court finds the above factors to weigh in favor of modification in accordance with the Supreme Court's view of "excusable negligence." See Pioneer, at 395 ("[W]e conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission"). To bar plaintiff from opting-out of the settlement agreement

⁶Hill's Pet has opted out of two previous settlements and, according to Hill's Pet, has repeatedly indicated its intention to opt-out of this settlement as well. The fact that they failed to formally opt-out by the cut off date, while perhaps giving UCB a short lived belief of finality with respect to Hill's Pet's claim, did not alter UCB's expectations at the time that the settlement agreement. UCB agreed to contribute \$9 million to the settlement pool before knowing which plaintiffs would choose to remain in the class and which would choose to opt-out.

⁷The opt-out date was September 28, 2001 with the hearing on final approval on November 30, 2001. The Court finds that the 73 day delay between the opt-out date and the date of actual notice to UCB was not significant and will not result in a substantial impact upon the judicial proceedings.

⁸Hill's Pet attempts to attribute the failure to file on time to the Claim's Administrator's "excusable negligence." The Court disagrees with plaintiff and finds that fault lies with plaintiff and plaintiff's counsel rather than with the Claim's Administrator.

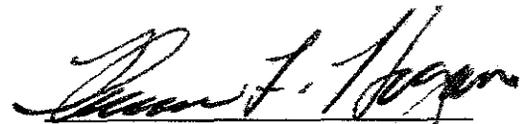
⁹UCB has presented no evidence suggesting that Hill's Pet's failure to opt-out in time was motivated by bad faith.

at this time will not substantially prejudice UCB. Certainly the outcome would be different if this motion was brought many months or years after the opt-out date, however, the Court finds the fact that Hill's Pet moved to rectify the situation as soon as it realized its error to be significant and consequently distinguishes this case from many of the cases cited by UCB.

Conclusion

For the foregoing reasons, the Court will grant Plaintiff's Motion to Modify. An appropriate Order will accompany this Memorandum Opinion.

February 21, 2002


Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER
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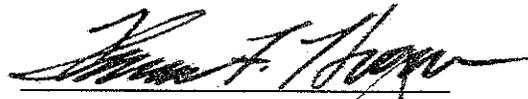
In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Hill's Pet Nutrition, Inc.'s Motion to Modify Final Order Approving Class Settlement and Final Order with UCB Chemical, Inc. is **GRANTED**; Accordingly, its is further

ORDERED that this Court's November 30, 2001 Final Order Approving Settlement and Final Judgment shall be modified to include Hill's Pet Nutrition, Inc. in Exhibit 2 thereto as a class member that has requested exclusion to the settlement.

SO ORDERED..

February 21, 2002


Thomas F. Hogan
Chief Judge

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