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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

PetSmart, Mars Pinning Pet Food Antitrust On FDA, Court Told

By **Sam Reisman**

Law360, New York (May 16, 2017, 4:11 PM EDT) -- Consumers alleging PetSmart, Mars Petcare, Nestle Purina and others conspired to overprice pet food by marketing it as prescription-only argued Monday that the companies' "misleading and deceptive" dismissal bid introduced a new term to punt the blame to the U.S. Food and Drug Administration.

The **April** dismissal motion filed by PetSmart Inc., three pet food manufacturers and two veterinary clinic chains mischaracterized the class claims by substituting the term "veterinary authorization" for "prescription authorization" to shift the focus from the defendants' marketing practices to FDA guidelines, the purchasers said in an opposition brief filed in California federal court.

"In substituting their own term for that actually pleaded by plaintiffs, defendants are moving to dismiss a different lawsuit, not this one," the purchasers said.

There is a "chasm of difference" between "veterinary authorization," which simply signals that a pet doctor has signed off on the use of the product in question, and the term "prescription authorization," which the pet food makers used in marketing to indicate regulatory standards enforced by law, according to the opposition.

The purchasers contend that there is no drug in the products at issue that warrants FDA regulation and that the alleged conspirators invented and enforced a requirement that veterinarians approve the sale of the products, to market phony health benefits and raise prices.

"We think there is no merit to the defense motions," Daniel Shulman, a Gray Plant Mooty Mooty & Bennett PA attorney representing the purchasers, told Law360. "What gives the defendants away is their efforts to mischaracterize what they are doing as involving a 'veterinary authorization requirement,' instead of what they're really doing, which is using a veterinary prescription requirement, for which there is in fact no legal requirement."

The complaint, filed **in December**, alleges that PetSmart conspired with veterinarians and pet food makers to fix prices on four brands of "prescription" dog and cat food that have trumped-up health benefits and inflated prices given the food does not contain a drug but requires the authorization of a pet doctor.

The suit argues that Mars Petcare USA Inc.'s majority ownership of Banfield Pet Hospital, which has about 900 locations inside PetSmart stores, and Mars Petcare's sole ownership of the Blue Pearl Vet Hospital chain enables a price-fixing agreement.

The alleged conspirators violated the Sherman Act by collaborating to fix prices, leading to

anti-competitive effects and unjustifiably high costs, according to the complaint. It asserts California-law claims against Mars Petcare and Hill's Pet Nutrition Inc. for suggesting their products are some sort of drug or medicine.

The proposed classes include a nationwide group of any consumers who bought prescription pet food from PetSmart, Banfield Pet Hospital, Blue Pearl Vet Hospital or any other defendant; a California-wide class for those who purchased Royal Canin prescription pet food; and a class for those who purchased Iams prescription pet food. Royal Canin and Iams fall under the Mars umbrella of brands.

With Monday's filing, the purchasers seek a rejection of the companies' motion to dismiss, or, if it is granted, leave to file an amended complaint.

Representatives for the pet food companies did not respond Tuesday to requests for comment.

The putative class is represented by Michael A. Kelly, Matthew D. Davis and Spencer J. Pahlke of Walkup Melodia Kelly & Schoenberger, Daniel Shulman and Julia Dayton Klein of Gray Plant Mooty Mooty & Bennett PA, Lynwood P. Evans, Edward J. Coyne III and Jeremy M. Wilson of Ward and Smith PA, and Michael L. McGlamry, Wade H. Tomlinson III, Kimberly J. Johnson and Caroline G. McGlamry of Pope McGlamry PC.

Mars Petcare and Royal Canin are represented by John E. Schmidlein, Benjamin M. Greenblum and Xiao Wang of Williams & Connolly LLP and Jeffrey E. Faucette of Skaggs Faucette LLP. Nestle Purina is represented by Bryan A. Merryman and Christopher M. Curran of White & Case LLP. Hill's Pet Nutrition is represented by Richard B. Goetz, Michael F. Tubach and Hannah Y. Chanoine of O'Melveny & Myers LLP.

The case is Moore et al. v. Mars Petcare US Inc. et al., case number 3:16-cv-07001, in the U.S. District Court for the Northern District of California.

--Additional reporting by Fola Akinnibi and Melissa Daniels. Editing by Richard McVay and Edrienne Su.

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