

07-cv-00736-JLK

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 29 2007

GREGORY C. LANGHAM
CLERK

IN RE PET FOOD
PRODUCTS LIABILITY
LITIGATION

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MDL Docket No. 1850

**RESPONSE OF PLAINTIFFS MARK CASHMAN
AND CIRO AIELLO TO MOTION FOR TRANSFER AND
COORDINATION PURSUANT TO 28 U.S.C. § 1407**

Plaintiffs Mark Cashman and Ciro Aiello (the "Cashman Group"), plaintiffs in a class action currently pending in the Southern District of New York, styled *Cashman v. Menu Foods Midwest Corp., et al.*, No. 07-cv-3236 (S.D.N.Y), submit their response in support of the request for Transfer and Coordination or Consolidation of Actions to the District of New Jersey pursuant to 28 U.S.C. § 1407.

INTRODUCTION

At last count there were approximately 93 cases pending in the District Courts of United States against numerous defendants including Menu Foods Midwest Corporation, Menu Foods Income Fund, Menu Foods Limited, Menu Foods Inc., and Menu Foods Holdings, Inc. (collectively "Menu Foods"). Menu Foods is a Canadian entity with two subsidiary/manufacturing facilities in the U.S., one is headquartered and incorporated in New Jersey and the other is headquartered in Kansas but incorporated in Delaware.

The pending actions are on behalf of persons who purchased contaminated pet food and pet food products produced, manufactured and/or distributed by defendants that caused injury, illness and/or death to their household pets. Menu Foods' manufacturing facilities are directly responsible for manufacturing the tainted pet food and pet food products.

Plaintiffs, situated all over the U.S., have moved to have these actions transferred and consolidated to a number of districts including the Western District of Washington, Southern District of Florida, Central District of California, Northern District of California, Western District of Arkansas, and the District of New Jersey. While the of these forums have been proposed merely because plaintiffs have filed suits there, Defendant Menu Foods, custodian of the majority of the evidence required to litigate this case, has its strongest ties to New Jersey and a transfer to that district would promote judicial economy and expediency.

ARGUMENT

28 U.S.C. § 1407(a) provides, in pertinent part, that when, “civil actions involving one or more common questions of fact are pending in different districts” the Judicial Panel on Multidistrict Litigation may transfer such actions to one forum “upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. A motion for transfer pursuant to Section 1407 should be granted where (a) the cases are all federal civil actions pending in different federal judicial districts, (b) one or more common questions of disputed fact exist among the cases, and (c) transfer of the cases will promote efficiencies and conserve the resources of the parties, counsel and the judiciary. *Id.*

When choosing a transferee forum, significant consideration is given to a district that is convenient to witnesses and parties and is easily accessible. *See, e.g., In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 400 F.Supp. 1400 (J.P.M.L. 1975). Similarly, where the litigation has a strong nexus to a particular district, that district court is an appropriate transferee forum. *See, e.g., In re Pfizer Inc. Sec., Derivative & “Erisa” Litig.*, 374 F. Supp.2d 1348 (J.P.M.L. 2005). Moreover, the existence of common factual allegations militate in favor of

transferring actions to a single forum for coordinated pretrial proceedings. *See, e.g., In re Plastics Additives Antitrust Litig.*, 374 F. Supp. 2d 1351 (J.P.M.L. 2005).¹

Variances in legal theories presented are not a hindrance to coordinated treatment. *See, e.g., In re Fed. Nat. Mort. Ass'n. Sec., Deriv. & ERISA Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) ("Whether the actions be brought by securities holders seeking relief under the federal securities laws, shareholders suing derivatively on behalf of Fannie Mae, or participants in Fannie Mae's retirement savings plans suing for ERISA violations, all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses.").

The Multidistrict Litigation Panel also takes into account the district court's capacity to manage such litigation, *See, Bextra & Celebrix Prods. Liab. Litig.*, 391 F.Supp.2d 1377 (J.P.M.L. 2005), and whether a governmental investigation related to the litigation has taken place in that district. *See, e.g., In re Foundry Resins Antitrust Litig.*, 342 F.Supp.2d 1346 (J.P.M.L. 2004).

Lastly, the Panel must consider whether centralization will promote convenience and efficiency and whether it will preserve judicial resources by avoiding duplicative expenses for travel across the country to appear at multiple status and scheduling conferences and hearings in different courts. Having multiple pretrial proceedings handled by different courts is inconsistent with the efficient and expeditious resolution of these actions. *See, e.g., In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002) ("Centralization under Section 1407 is necessary in order to prevent duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary.").

¹ *See also In re Royal Ahold N.V., Sec. & "ERISA" Litig.*, 269 F. Supp. 2d 1362, 1363 (J.P.M.L. 2003); *In re Am. Online, Inc. Version 5.0 Software Litig.*, No. 1341, 2000 U.S. Dist. LEXIS 13262, at *3 (J.P.M.L. June 2, 2000); *In re Sunshine Mining Co. Sec. Litig.*, 444 F. Supp. 223, 225 (J.P.M.L. 1978); *In re Air West, Inc. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974).

The United States District Court for the District of New Jersey is the forum that most satisfies these above criteria. For example, the United States District Court for the District of New Jersey has the strongest nexus to this litigation because Menu Foods maintains two subsidiary U.S. manufacturing facilities, including one in Pennsauken, New Jersey that is incorporated under New Jersey law under the name Menu Foods Inc.

That New Jersey plant is directly implicated in the manufacture of tainted pet food that is at the core of this litigation. Thus, much of the discovery in the case, including defendants' document production and depositions of defendants' employees, will emanate from or take place in or around Pennsauken, New Jersey, where the manufacturing plant is located. In the same vein, the District of New Jersey is the closest federal court to the location of critical documents and witnesses.

Many of the cases are already being litigated there so defendants can not assert that New Jersey is foreign to them at this stage. Indeed, 31 of the 93 lawsuits filed across the Country are pending in the District of New Jersey - more than in any other district.

It is beyond serious dispute the District of New Jersey has the expertise, experience, and resources to handle this complex litigation. And the District of New Jersey is one of only two fora in which government investigations are pending. The FDA has sent inspectors to investigate the Menu Foods' plants in New Jersey and Kansas.

Accordingly, no other district has any real nexus to defendants, defendants' unlawful actions, the evidence, or the pertinent actors and witnesses to the degree that exists in New Jersey. Thus, there are no compelling reasons to consolidate and transfer these case to any other forum but New Jersey.

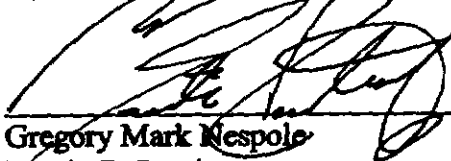
CONCLUSION

For the reasons stated above, the Panel should take jurisdiction over the currently-pending actions and enter an order transferring them, and any "tag along" actions, to the U.S. District Court for the District of New Jersey.

Dated: May 22, 2007

Respectfully submitted,

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DECLARATION OF SERVICE

Martin Restituyo, Esq., an attorney admitted to practice law before the courts of the State of New York, hereby declares that on May 24, 2007, I caused the following:

1. **Response of Plaintiffs Mark Cashman and Ciro Aiello to Motion for Transfer and Coordination Pursuant To 28 U.S.C. § 1407, and**

2. **Declaration of Service,**

to be served upon all District Court Clerks and Counsel for all parties, in accordance with the attached Service List, via United States first-class mail.

Dated: May 24, 2007


Martin Restituyo

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Tallahassee, FL 32301

Clerk of the Court
U.S. District Court, Southern District of Florida
299 B. Broward Blvd., Suite 108
Fort Lauderdale, FL 33301

Clerk of the Court
U.S. District Court, District Court of Idaho
550 West Fort Street, Room 400
Boise, ID 83724

Clerk of the Court
U.S. District Court, Northern District of Illinois
209 S. Dearborn Street

Chicago, IL 60604

Clerk of the Court
U.S. District Court, District Court of Maine
Edward T. Gignoux Federal Courthouse
156 Federal Street
Portland, ME 04101-4152

Clerk of the Court
U.S. District Court, District of Massachusetts
John Joseph Moakley United States Courthouse
One Courthouse Way, Suite 2300
Boston, MA 02210-3002

Clerk of the Court
U.S. District Court, District Court of Minnesota
United States Courthouse
300 South Fourth Street, Suite 202
Minneapolis, MN 55415

Clerk of the Court
U.S. District Court, District Court of Nevada
Lloyd D. George United States Courthouse
333 Las Vegas Blvd. South, 1st Floor
Las Vegas, NV 89101-7065

Clerk of the Court
U.S. District Court, Northern District of Ohio
Carl B. Stokes United States Courthouse
801 West Superior Avenue
Cleveland, OH 44113

Clerk of the Court
U.S. District Court, District of Rhode Island Federal Building and Courthouse
One Exchange Terrace
Providence, RI 02903

Clerk of the Court
U.S. District Court, Eastern District of Tennessee
Howard H. Baker Jr. United States Courthouse
800 Market Street, Suite 130
Knoxville, TN 37902-7902

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U.S. District Court, Eastern District of Tennessee
Howard H. Baker Jr. United States Courthouse

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Knoxville, TN 37902-7902

Clerk of the Court
U.S. District Court
Southern District of New York
500 Pearl Street
New York, NY 10007