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BEFORE THE

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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IN RE PET FOOD PRODUCTS LIABILITY	:	
LITIGATION	:	
	:	
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NOTICE OF OPPOSITION AND OPPOSITION TO CONDITIONAL TRANSFER ORDER (CTO-1)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff Margaret Picus, hereby files her Notice of and Opposition to Conditional Transfer Order (CTO-1) filed by the Judicial Panel on Multidistrict Litigation on June 28, 2007 in regard to Picus. v. Wal-mart Stores, Inc et al., Case No. CV-S- 00682- PMP-LRL District of Nevada.

I. INTRODUCTION

This action alleges that Defendants have cheated consumers and Defendants' competitors by lying about the origin of their "Ol' Roy" brand pet food products as "MADE IN USA." Mislabeling as to product origin is expressly prohibited under Nev. Rev Stat §598.0915 and 62 Fed. Reg. 63756, and is therefore a per se violation of Nevada's unfair competition statute Nev. Rev. Stat. § 41.600 *et seq.* Based on this mislabeling, Plaintiff asserts three causes of action 1) violation of the Nevada

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unfair competition statute Nev. Rev Stat. § 41.600 *et seq.*; 2)unjust enrichment; and 3) common law fraud.

This action should not be transferred and centralized with the MDL cases for pretrial purposes because the questions of fact in this case are very different from those in the MDL actions and transfer of this case would not eliminate any duplicative discovery or conserve the resources of the parties, their counsel and the judiciary. Nor is transfer necessary to avoid inconsistent rulings because the legal issues in this case are also very from those int the MDL cases. This case is based on the mislabeling of products as "MADE IN USA" while the other actions are focused on the adulteration and contamination of certain lots of the pet food itself. The MDL cases are primarily products liability cases alleging design defects and/or manufacturing defects based on the contamination of specific lots of pet food sold by many companies during a six month period in 2006 and 2007.

This action, on the other hand addresses Defendants' misrepresentations during the entire class period beginning in 2003, four years prior to the filing of this action and still being committed by Defendants.[1] The factual and legal issues in this case all focus on Defendants unlawful mislabeling of the geographic origin or their products over the last four and a half years in direct violation of Nevada statutory law, not whether a few batches of pet food sold by Defendants and many other companies who are not defendants in this action were contaminated and caused physical injury to pets. There are not issues of causation or contamination at issue in this case and therefore the expert issues will be distinct from the MDL.

Instead, this case is brought on behalf of a very different, and much broader, class of consumers based on a uniform statutory and common law claim under Nevada law. Accordingly, both the merits issues and class certification issues here will be different from the issues in the MDL proceedings. Because, this case and the MDL cases involves entirely different of fact and law, transfer of this case would not eliminate any duplicative discovery, avoid inconsistent pretrial rulings or conserve judicial resources. These different issues will burden the MDL court that will be dealing with the multitude of contamination and product liability claims. Plaintiff therefore respectfully

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[1] Claims under the Nevada unfair competition statute claims are subject to a four year statute of limitations. If applicable, the delayed discovery rule could toll the statute of limitations for certain claims even further.

requests that the conditional transfer order be vacated with respect to her case.

II. STATEMENT OF FACTS

This case is a class action arises from Defendants' scheme through which "Ol' Roy" brand pet food products were intentionally mislabeled and sold to consumers as "MADE IN USA" when in fact major components of the "Ol' Roy" brand pet food products were made and/or manufactured in China. This action is brought on behalf of consumers who purchased "Ol' Roy" brand pet food products which falsely represent on the product label to have been "MADE IN USA" during the applicable Class Period. Complaint ¶ 1.

Central to the Defendants' marketing of certain of their "Ol' Roy" products is the representation and designation that such products were and are "MADE IN USA." Defendants package these products with the designation on the label or packaging, in capital and bold lettering, that the products were "MADE IN USA." Compl. ¶ 2.

Studies show that the "MADE IN USA" designation is a substantial factor in consumer purchasing decisions and that consumers are deceived by false "MADE IN THE USA" designations. 62 Fed. Reg. at 63768 and 63764. More importantly here, in the context of food products, the designation that the products were "MADE IN USA" becomes a central and primary consumer concern because of fears about contaminants and the differences in health and safety procedures in foreign countries. Compl. ¶ 2. Defendants have admitted that the "Ol' Roy" brand pet food products contained components manufactured in China. Compl. ¶ 6.

Consumers generally believe that "MADE IN USA" products are higher quality products than those of other countries. This is especially true with respect to food products. Unaware of the falsity of the Defendants' country-of-origin claims, Plaintiff and the other members of the Class all purchased "Ol' Roy" brand pet food products that had been mislabeled and sold by Defendants. Defendants' deception is ongoing and will victimize consumers every day until the practice is deterred by judicial intervention. (Complaint at ¶ 11).

The Plaintiff Margaret Picus is a resident of Nevada, who purchased "Ol' Roy" brand pet food products on multiple occasions at a Wal-Mart retail store located in Henderson, Nevada during the Class Period. (Complaint at ¶ 13). When the Plaintiff learned of the Defendants' fraudulent conduct

she filed the instant lawsuit on behalf of herself and all similarly situated consumers nationwide who purchased fraudulently labeled Ol' Roy pet food products at Wal-Marts prior to March 16, 2007. (Complaint at ¶ 21). The Complaint alleges three causes of action based upon the fraudulent designation of Ol' Roy products as "Made in the USA": (1) violations of Nevada's consumer fraud laws, Nev. Rev. Stat.. Sections 41.600 and 598.0915, (2) unjust enrichment, and (3) common law fraud and concealment.[2] The Complaint alleges a class of consumers dating back years to limit of the statute of limitations, irrespective of any contamination:

> All Individuals in the United States Who Purchased One or More Ol' Roy Brand Pet Food Products Prior to March 16, 2007.

Compl. at ¶21.

III. THIS CASE SHOULD NOT BE TRANSFERRED FOR CENTRALIZED PRETRIAL PROCEEDINGS BECAUSE THERE ARE NO SIGNIFICANT COMMON QUESTIONS OF FACT AND TRANSFER WOULD NOT ELIMINATE ANY DUPLICATIVE DISCOVERY, AVOID INCONSISTENT PRETRIAL RULINGS OR CONSERVE JUDICIAL RESOURCES

28 USCS §1407(a) allows civil actions in different districts with one or more common questions of fact to be combined and transferred to "any district for coordinated or consolidated pretrial proceedings." The JMDL based its order transferring and centralizing the MDL cases herein on the fact that all these cases were based on tainted pet food products:

> All actions stem from the recall of pet food products allegedly tainted by melamine found in wheat gluten imported from China and used in these products. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery; avoid inconsistent pretrial rulings, especially with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary.

In re Pet Food Prods. Liab. Litig., 2007 U.S. Dist. LEXIS 45540 at *3-*4 (JPML June 19, 2007)

Because this case is not based on the claim that the Defendants' pet food products were tainted, the rationale for centralizing the MDL actions simply does not apply to this action and the facts are not sufficiently common to warrant inclusion of this case in the MDL proceeding. *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351, 1353 (J.P.M.L. 2007) (remanding one action that did not share sufficient questions of fact with claims in other actions which were transferred for pretrial

[2] The complaint also alleges that Defendants' mislabeling violates the consumer protection statutes of the other states including the states where Defendants are headquartered. Compl. at ¶ ¶ 27, 30.

coordination or consolidation); *In re New Century Mortg. Corp. Prescreening Litig.*, 473 F. Supp. 2d 1383, 1384 (J.P.M.L. 2007) ("centralization would neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of this litigation" where common questions of fact and law were not sufficiently complex and/or numerous); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2007) (separating and remanding "unique" claim alleging violation of California consumer protection statute).

This action involves a much longer class period and a much larger class than the MDL case. This case involves a class of purchasers of a specific brand of mislabeled dog food beginning in 2003, four years prior to the filing of this action and continuing through the present based on Defendants' ongoing mislabeling. The claims in the MDL actions address sales of sales of specific lots of tainted pet food during a six month period in 2006 and 2007 and the resulting injury to pets.

Discovery in this action will address ongoing product mislabeling not contamination and will have nothing to do with the physical injuries to pets at issue in the MDL proceedings. Accordingly, there will be no significant duplication between the discovery in this case and the MDL. There is also no significant risk of inconsistent pretrial rulings because the motion practice in this case will address very different issues than the MDL cases all of which are based on the sale of contaminated pet food Here, as in *In re Qwest Communs. Int'l, Inc.*, 395 F. Supp. 2d 1360 (J.PM.L. 2005), "alternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings." *Id.* at 1361. For example, to the extent there proves to be any overlap in discovery, discovery in this case could be coordinated with discovery in the MDL cases without transferring this action or including it in the MDL proceeding.

Further, the legal issues in this case will solely involve whether the Ol' Roy brand products can properly be designated as "MADE IN THE USA" under state and federal legal standards. Nevada law confers a private right of action for consumers who purchase products which falsely designate their geographic origin. As set forth in paragraph 8 of the Complaint, in this case, the legal authority established by the Federal Trade Commission and by 62 Fed. Reg. 63756 will establish the applicable standard for when a product can be called "Made in USA." Under this legal standard, a product must be "all or virtually all" made in the United States and "all or virtually all" means that "all significant

parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content." Here, the labels for the products lied because the key manufactured component of the products was wholly "Made in China." The fact that a product was bagged or assembled in the United States is not sufficient. 62 Fed. Reg. at 63769-70. Bagging a product in the United States, when the product is composed of foreign manufactured components or materials, does not equal "Made in the USA". 62 Fed. Reg. at 63769-70. These factual and legal issues are wholly outside the scope of the product liability cases which comprise the MDL.

IV. CONCLUSION

For all of the reasons discussed herein, Plaintiff Margaret Picus respectfully requests that the conditional transfer order be vacated with respect to Picus v. Wal-Mart et al., and that this case be remanded to the District Court for the District of Nevada.

Dated: July 13, 2007

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PROOF OF SERVICE

I, am, at all relevant times, was a citizen of the United States and a resident of the County of San Diego and am employed by the attorney of record in this action located at 2255 Calle Clara, La Jolla, CA 92037. I hereby certify that the following document(s):

(1) **PLAINTIFF'S NOTICE OF OPPOSITION AND OPPOSITION TO THE CONDITIONAL TRANSFER ORDER**

has been sent via U.S Mail to the attorneys for the Defendants at the following address(es):

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and has been mailed to the Clerk of the district court in this action is pending as follows:

Clerk of the United States District Court
District of Nevada - Las Vegas
333 Las Vegas Blvd.
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and has been mailed to all parties on the MDL service list as set forth on the attached pages:

See Attached Pages 1 through 4

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 13, 2007 at San Diego, California.

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