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 6 and MENU FOODS MIDWEST CORPORATION

7 **IN THE UNITED STATES DISTRICT COURT**
 8 **IN AND FOR THE DISTRICT OF NEVADA**

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10 MARION STRECZYN,
 11 Plaintiff

Case No. 3:07-CV-00159-LRH-VPC

12 vs.

**DEFENDANTS' MOTION TO
 STAY PROCEEDINGS**

13 MENU FOODS INCOME FUND, a foreign
 14 corporation; MENU FOODS, INC., a
 New Jersey Corporation, et al

15 Defendants

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16 _____
 17 TO: THE HONORABLE UNITED STATES DISTRICT JUDGE:

18 Defendants, MENU FOODS INCOME FUND, MENU FOODS INC. and MENU
 19 FOODS MIDWEST CORPORATION (Collectively referred to as "MENU FOODS"), moves
 20 this Court to stay all proceedings in this action pending a transfer decision by the Judicial Panel
 21 on Multidistrict Litigation ("JPML") pursuant to U.S.C. §1407 and pending a determination of
 22 class certification by the transferee court pursuant to Federal Rules of Civil Procedure 23(d)(1).

23 In support thereof, Defendants set forth the following:

24 **I. INTRODUCTION**

25 Currently, there are at least fifty-seven (57) actions that seek relief for individuals who
 26 purchased allegedly contaminated pet food from Defendants. Federal courts have original
 27 jurisdiction over these state and common law based actions pursuant to the Class Action Fairness
 28 Act of 2005. 28 U.S.C. §1332(d). Specifically, the pending cases allege that Defendants sold

1 contaminated pet food to the general public and individuals whose pets consumed this pet food
2 sustained injuries and/or death. The pending cases seek to certify a class of United States'
3 residents who purchased allegedly contaminated pet food and seek to compensate them for all
4 damages incurred as a result of Defendants' conduct. None of the pending cases are advanced
5 and no discovery has been conducted. The actions are currently pending in the Western District
6 of Washington, Eastern District of Tennessee, Northern District of Illinois, Western District of
7 Wisconsin, Western District of Arkansas, District of New Jersey, Northern District of Florida,
8 Southern District of Florida, District of Connecticut, Central District of California, District of
9 Rhode Island, District of Maine, Northern District of California, District of Nevada, District of
10 Idaho and Northern District of Ohio.

11 **A. Pending MDL Motions**

12 Four (4) separate motions for transfer and coordination or consolidation pursuant to 28
13 U.S.C. § 1407 were filed by four (4) different plaintiffs. Plaintiff Shirley Sexton filed the first
14 MDL motion, seeking to transfer her case and numerous other cases involving alleged injuries
15 and/or death arising out of the purchase and/or consumption of pet food manufactured by
16 Defendants to the Central District of California. *See* Plaintiff Sexton's MDL Motion attached
17 hereto as Exhibit "A". Plaintiff Christina Troiano filed the second MDL motion, seeking
18 transfer to the Southern District of Florida. *See* Plaintiff Troiano's MDL Motion attached hereto
19 as Exhibit "B". Plaintiffs Tom Whaley, Stacey Heller, Toinette Robinson, David Rapp, Cecily
20 and Terrance Mitchelle, Suzanne E. Johnson, Craig R. Klemann, Audrey Kornelius, Barbara
21 Smith, Michelle Suggett and Don James, filed their MDL motion to transfer the cases to the
22 Western District of Washington. *See* Plaintiff Whaley's MDL Motion attached hereto as Exhibit
23 "C". Plaintiffs Jayme Pittsonberger, David Carter and Jim Bullock filed a MDL Motion, seeking
24 to transfer their case and numerous other cases to the United States District Court for the District
25 of New Jersey. *See* Plaintiff Pittsonberger's MDL Motion attached as Exhibit "D". Defendant
26 will be filing their MDL response on or before April 19, 2007, and are in agreement that MDL
27 consolidation is appropriate. On April 12, 2007, the Judicial Panel on Multidistrict Litigation
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1 (“JPML”) issued a Notice of Hearing Session for May 31, 2007 to consider the MDL motions
2 (“Collectively known as MDL 1850 - *In re Pet Food Products Liability Litigation*). See April
3 12, 2007, Notice of Hearing Session attached hereto as Exhibit “E.”

4 **B. Instant Case**

5 On April 2, 2007, Plaintiff filed a products liability action in the United States District
6 Court, Northern District of Nevada, alleging that Plaintiff’s pet sustained injuries and/or death as
7 a result of the purchase and/or consumption of pet food manufactured by Defendants. See
8 Plaintiff’s Complaint attached hereto as Exhibit “f.” Defendants now respectfully request this
9 Court to stay all proceedings pending a transfer decision by the JPML and a determination of
10 class certification by the transferee court.

11 **II. SUMMARY OF ARGUMENT**

12 A stay of all proceedings in this action pending a transfer decision by the JPML and a
13 determination of class certification by the transferee court is necessary to promote judicial
14 economy and avoid undue prejudice to the parties. Due to the pending MDL motions and
15 pending motions for class certification, a stay of proceedings in this case is necessary and
16 appropriate to further the interests of judicial economy. This Court should not unnecessarily use
17 its resources and time to supervise pre-trial proceedings and make rulings in a case, which may
18 shortly be transferred to another district court and/or judge for further pre-trial proceedings.
19 Additionally, since all the actions are in the beginning stages of litigation and the Judicial Panel
20 will be hearing the MDL motions on May 31, 2007, no prejudice or inconvenience will result
21 from entry of a stay. See Exhibit “E.” On the other hand, absent a stay, Defendants will be
22 substantially prejudiced if they are required to duplicate efforts and expend significant resources
23 defending multiple cases in jurisdictions around the country. For the reasons herein stated,
24 Defendants respectfully move this Court for an order staying all proceedings in this case pending
25 a transfer decision by the JPML and a determination of class certification.
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III. ARGUMENT

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2 Numerous courts have stayed proceedings pending determinations by the MDL Panel of
3 the appropriateness of coordination under Section 1407. *See, e.g., Gonzalez, v. American Home*
4 *Products, Corp.*, 223 F.Supp.2d 803 (S.D. Tex. 2002); *U.S. Bank, Nat'l Ass'n v. Royal Indem.*
5 *Co.*, 2002 WL 31114069 (N.D. Tex. Sept.23, 2002); *Moore v. Wyeth-Ayerst Laboratories*, 236
6 F.Supp.2d. 509, 511 (D.Md. 2002); *Kohl v. American Home Prods. Corp.*, 78 F. Supp. 2d 885
7 (W.D. Ark. 1999); *Republic of Venezuela v. Philip Morris Companies, Inc., et. al.*, 1999 WL
8 33911677 (S.D. Fla. 1999); *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358 (C.D. Cal. 1997);
9 *American Seafood, Inc. v. Magnolia Processing*, 1992 WL 102762 (E.D. Pa. May 7, 1992);
10 *Arthur-Magna, Inc. v. Del-Val Fin Corp.*, 1991 WL 13725 (D. N.J. Feb. 1, 1991); *Rosenfeld v.*
11 *Hartford Fire Ins. Co.*, 1988 WL 49065 (S.D. N.Y. May 12, 1988); *Portnoy v. Zenith*
12 *Laboratories*, 1987 WL 10236 (D.D.C. Apr. 21, 1987). It is "incidental to the power inherent in
13 every court to control the disposition of the cases on its docket with the economy of time and
14 effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254
15 (1936). Guided by the "policies of justice and efficiency," this Court should exercise its
16 discretion to stay all further proceedings in this action pending the MDL Panel's action.
17 *Boudreaux v. Metropolitan Life Ins. Co.*, 1995 WL 83788, *1 (E.D. La. Feb. 24, 1995).

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19 When considering a motion to stay, the Court typically considers three factors: (1)
20 potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the
21 action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative
22 litigation if the cases are in fact consolidated. *Rivers*, 980 F. Supp. 15 1360. In the case *sub*
23 *judice*, each enumerated factor favors a stay. Thus, this Court should stay all proceedings
24 pending a transfer decision by the Judicial Panel and a determination of class certification by the
25 transferee court.

26 **A. Judicial Economy Mandates a Stay Pending a Transfer Decision by the Judicial 27 Panel and Determination of Class Certification**

28 Considerations of judicial economy weigh heavily in favor of a stay. First, the express
language of 28 U.S.C., §1407 provides that civil actions may be transferred for coordinated or

1 consolidated pretrial proceedings to “promote the just and efficient conduct of such actions.” 28
2 U.S.C. §1407. Second, it is well settled that in the class action context that when similar actions
3 are proceeding in different courts, courts may stay proceedings pending the outcome of the other
4 case. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3D* §1792 (2005);
5 *Knearem v. Bayer Corp.*, 2002 WL 1173551, 1 (D. Kan.2002) (granted motion to stay to
6 purported class action which was one of more than two hundred pending federal cases, nearly
7 half of which were purported class actions). Here, a stay of proceedings pending a transfer
8 decision by the MDL and class certification is necessary and appropriate to achieve the judicial
9 economies that underlie §1407 and class actions.

10 Defendants reasonably anticipate that the Judicial Panel will grant an MDL for the
11 following reasons. First, courts have consistently held that the Judicial Panel will transfer cases
12 to eliminate the possibility of inconsistent class determinations. *In re Certainties Corp. Roofing*
13 *Shingle Prods. Lab. Lit.*, 2007 WL 549356; *In re Guidant Corp. Implantable Defibrillators*
14 *Prods. Lab. Lit.*, 398 F. Supp. 2d 1371 (Jud. Pan. Mult. Lit. 2005); *In re Ford Motor Co. Speed*
15 *Control Deactivation Switch Prods. Lab. Lit.*, 398 F. Supp. 2d 1365 (Jud. Pan. Mult. Lit. 2005);
16 *In re Roadway Exp. Inc. Employ. Pract. Lit.*, 384 F. Supp. 612 (Jud. Pan. Mult. Lit. 1974).
17 Absent a transfer of these cases to a single forum for coordinated and consolidated pretrial
18 proceedings, there is a substantial risk of inconsistent and/or conflicting pretrial rulings on
19 discovery and other key issues, such as class certification. Second, discovery with respect to the
20 Defendants’ conduct in each of the actions proposed for consolidation will be substantially
21 similar and will involve the same and/or similar documents and witnesses. Third, efficiency in
22 the administration of justice will be served by consolidation, because one judge rather than
23 multiple judges can supervise all pretrial proceedings and render rulings that are consistent.
24 Fourth, based on the nationwide distribution of Defendants’ pet food, many additional cases may
25 be filed before the statute of limitations expires.

26
27 Absent a stay, the Court loses the potential efficiencies that would be gained by having
28 pretrial issues, particularly with respect to issues of class certification, decided by a single court.

1 In *Gonzalez v. American Home Products, Corp.*, consumers brought a product liability action
2 against manufacturers and distributors of phenylpropanolamine (PPA) to recover for physical
3 injuries sustained as a result of exposure to PPA. *Gonzalez*, 223 F. Supp. 2d at 804. In granting
4 defendants' motion to stay pending a decision of the MDL Panel, the Court held that "[j]udicial
5 economy and consistency of result dictate that this key issue be decided once, not countless
6 times." *Gonzales*, 223 F.Supp.2d at 805.

7 Like *Gonzalez*, the interest of judicial economy and consistency warrant a stay here.
8 Without a stay, this Court will be required to expend its time and resources familiarizing itself
9 with the intricacies and complexities of this complicated products liability litigation that may be
10 transferred to another court. Alternatively, if the Judicial Panel assigns the case to this Court,
11 each ruling and action taken by this Court may affect other cases without giving the attorney
12 handling those cases an opportunity to provide input to the Court. Clearly, if these cases are not
13 stayed, many issues, particularly with respect to class certification, will have to be revisited by
14 the court assigned to the cases by the Judicial Panel. Thus, the continuation of this case will
15 result in duplicative and unnecessary efforts by this Court and the parties if this action proceeds
16 forward before the Judicial Panel has an opportunity to rule.

17 Additionally, if a stay is not granted and this case proceeds forward, the Court's ruling
18 potentially could be reconsidered after coordination. "The pretrial powers of the transferee court
19 include the powers to modify, expand, or vacate earlier discovery orders." *In re Plumbing*
20 *Fixture Cases*, 298 F. Supp. 484, 489 (J.P.M.L. 1968). In *Kohl v. American Home Prods. corp.*, a
21 consumer brought a products liability action against manufacturers, distributors and sellers of the
22 pharmaceutical drugs, fenfluramine and phentermine, to recover for injuries allegedly caused by
23 the drugs. *Kohl*, 78 F. Supp. 2d at 887. In granting defendants' motion to stay pending the
24 transfer of the case to the MDL Panel, the Court held that judicial economy would be best served
25 if litigation was facilitated in the appropriate forum. *Kohl*, 78 F. Supp.2d at 888. "If the MDL
26 motion is granted, all of the Court's time, energy and acquired knowledge regarding the action
27 and its pretrial procedures will be wasted." *U.S. Bank*, 2002 WL 31114069 at *2.
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1 This Court, like the district court in *Kohl*, should not expend its limited resources
2 “familiarizing itself with the intricacies of a case that would be heard [for pre-trial purposes] by
3 another judge.” *Rivers*, 980 F. Supp. at 1360. Moreover, this Court should abstain from
4 scheduling additional status conferences and/or issuing additional discovery orders because “any
5 efforts on behalf of this Court concerning case management will most likely have to be
6 replicated by the judge that is assigned to handle the consolidated litigation.” *Id.* Furthermore,
7 to avoid the risk of inconsistent substantive legal rulings, pretrial proceedings in this matter and
8 other actions should proceed in an orderly, coordinated fashion, as directed by the single court
9 selected by the Judicial Panel. Accordingly, a stay in this case is appropriate as it will further the
10 just and efficient conduct of this litigation.

11 **B. The Balance of Equities Weighs Heavily in Favor of a Stay as Plaintiffs Will Suffer**
12 **No Prejudice, While Defendants Will Suffer Undue Hardship Absent a Stay**

13 In addition to the waste of judicial resources inherent in proceeding with this matter prior
14 to a ruling by the Judicial Panel, the balance of the parties’ hardships strongly favors a stay. In
15 *Moore v. Wyeth-Ayerst Laboratories*, a patient who took a prescription diet drug brought a
16 products liability action against the drug manufacturer. *Moore*, 236 F.Supp.2d at 511. The court
17 in that case held that the potential prejudice to the drug manufacturer warranted a stay of
18 proceedings pending the decision of Judicial Panel for transfer and consolidation. *Id.*
19 Specifically, the court held that “[c]entralization isnecessary in order to eliminate duplicative
20 discovery, prevent inconsistent or repetitive pretrial rulings....and conserve the resources of the
21 parties, their counsel, and the judiciary.” *Id.*

22 Defendants in the present action would be substantially prejudiced by duplicative
23 discovery and motion practice if a stay is not put in place. *American Seafood*, 1992 WL 102762
24 at *2 (holding that “[t]he duplicative motion practice and discovery proceedings demonstrate that
25 judicial economy and prejudice to the defendants weigh heavily in favor of a stay”). Without a
26 stay, Defendants may continue to be served with discovery requests, deposition notices and
27 various motions resulting in duplicative and costly responses and replies being prepared multiple
28 times in different jurisdictions. This burden is a clear, definable hardship weighing in favor of

1 staying this action until the MDL Panel renders its decision.

2 A stay will not, however, unduly prejudice the Plaintiff in this matter. In *Republic of*
3 *Venezuela v. Philip Morris Companies, Inc., et al.*, the Republic of Venezuela sought damages
4 from the defendants due to *inter alia*, costs allegedly incurred as a result of paying for “medical
5 care, facilities, and services” for Venezuelan residents injured as a result of the use of tobacco.
6 *Republic of Venezuela* 1999 WL 33911677, *1. The Court, in granting Defendant’s motion to
7 stay, held that “upon consideration of what effect a brief stay may have on [Plaintiff], the Court
8 finds that Plaintiff will not be prejudiced by the granting of a stay pending the JPML’s decision.”
9 *Id.*

10 Here, there has been no discovery in the case at bar or any of the pending actions. Since
11 all the actions are in the beginning stages of litigation, no prejudice or inconvenience will result
12 from transfer, coordination and/or consolidation. Any slight delay that Plaintiffs may experience
13 in this case will be minimal and the prejudice to Defendant would far outstrip any harm to
14 Plaintiff. *See Arthur-Magna*, 1991 WL 13725 at *1 (noting that even if a temporary stay can be
15 characterized as a delay prejudice to plaintiffs, there are consideration os judicial economy and
16 hardship to defendants that are compelling enough to warrant such a delay). Indeed, if the
17 Judicial Panel consolidates the case into an MDL, all of the parties - including the Plaintiff here -
18 will benefit through increased efficiency and coordinated pretrial case management. Further,
19 Defendants are not asking this Court to stay the proceedings indefinitely. The Judicial Panel will
20 be hearing the MDL motions on May 31, 2007. *See* Exhibit “D.” Defendants are only asking
21 the Court to issue a stay while the transfer decision by the Judicial Panel and determination of
22 class certification is pending. As such, any potential delay is outweighed by the potential
23 efficiencies available in a coordinated MDL proceeding. Therefore, the benefits of staying this
24 proceeding far outweigh any minimal inconvenience to the Plaintiff. Thus, the granting of a stay
25 is necessary and appropriate.
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IV. CONCLUSION

For all of the foregoing reasons, it is appropriate for this Court to exercise its sound discretion to stay these proceedings pending the decision of the Judicial Panel and a determination of class certification by the transferee court. A stay would further the interests of judicial economy, and promote just and efficient conduct of this litigation, while denying a stay would unnecessarily waste the efforts and resources of this Court and all parties. Without the stay, Defendants will suffer undue hardship and inequity, and the purpose for coordination and consolidation pursuant to 28 U.S.C. § 1407 will be undermined.

WHEREFORE, Defendants respectfully request this Honorable Court enter an Order staying further proceedings, including but not limited to Defendants' obligation to file responsive pleadings, in this matter pending the transfer decision by the Judicial Panel and a determination of class certification by the transferee court.

Dated this 19th day of April, 2007.

PERRY & SPANN
A Professional Corporation



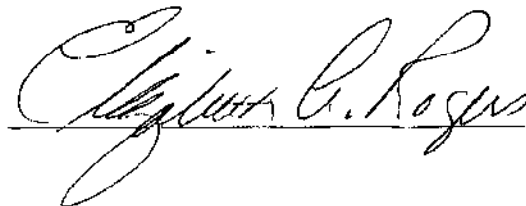
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Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that I am an employee of PERRY & SPANN, and that on the 19th day of April, 2007, pursuant to FRCP 5(b), I personally served, at Reno, Nevada, a true and correct copy of the foregoing **Defendants Motion to Stay All Proceedings**, on the clerk or other person in charge, or by leaving it in a conspicuous place at counsel's office as follows:

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