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WESTERN DISTRICT OF WASHINGTON  
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C07-411  
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C07-457

BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION

IN RE MENU FOODS POISONED PET  
FOOD LITIGATION

No. MDL DOCKET NO. 1850

**MEMORANDUM OF PLAINTIFFS WHALEY *et al.* IN OPPOSITION TO MOTIONS  
FOR TRANSFER AND CONSOLIDATION OF RELATED ACTIONS SUBMITTED BY  
PLAINTIFFS SEXTON AND TROIANO**

Under Rule 7.2(a) of the Rules of Procedure and 28 U.S.C. § 1407, Plaintiffs Tom Whaley, Stacey Heller, Toinette Robinson, David Rapp, Cecily and Terrence Mitchell, Suzanne E. Johnson, Craig R. Klemann, Audrey Kornelius, Barbara Smith, Michele Suggett and Don James (the "Whaley Plaintiffs") submit this memorandum of law in opposition to two motions to transfer and consolidate related actions, submitted by plaintiff Shirley Sexton and by plaintiff Christina Troiana.

**I. INTRODUCTION**

The federal statute, 28 U.S.C. § 1407, permits transfer and consolidation of related civil actions when three express conditions are met: First, the related civil actions must involve "one or more common questions of fact." Second, transferring and consolidating these actions must facilitate the "convenience of the parties and witnesses," and third, it must also "promote the just and efficient conduct of such actions." *Id.* All moving plaintiffs agree that all of these

requirements are met with respect to the related actions. The only disputed issue is whether the related actions should be transferred and consolidated in (i) the Western District of Washington, as the Whaley Plaintiffs propose; (ii) the District of New Jersey, as the "*Pittsonberger* Plaintiffs" propose; (iii) the Central District of California, as proposed by plaintiffs Shirley Sexton; or (iv) the Southern District of Florida, as plaintiff Christina Troiano proposes. Because this litigation has no "center of gravity" in any forum in this country, the related actions should be transferred to a district that can handle the scores of related actions capably and expeditiously. The Western District of Washington has ample experience – and resources to spare – to oversee this litigation.

## II. ARGUMENT

### A. The Western District of Washington Will Be a Just and Efficient Venue For Litigating All Related Actions

As the Whaley Plaintiffs explained in their brief supporting their motion to transfer, the Western District of Washington has a capable and efficient bench. To this we add that it is also underrepresented in terms of assigned MDLs. The District of New Jersey, where 26 cases filed largely by a revolving group of four firms, currently has 15 pending MDLs. The Central District of California has nine pending MDLs. The Western District of Washington (and the Southern District of Florida) have just one. *See Distribution of Pending MDL Dockets*, Exhibit A, at 1, 3, 5, 10 (attached hereto). Many of the judges in the Central District of California and District of New Jersey have multiple MDL actions.

While the Western District of Washington and the Southern District of Florida have been equally underutilized as an MDL transferee forum, we note that the Florida district is relatively disadvantaged by its crushing criminal docket – 6716 criminal felony filings in 2006 versus only 474 in the Western District of Washington. *See Exhibits D and H attached to Plaintiffs' Memorandum of Law in Support of Their Motion For Transfer and Consolidation of Related Actions to the Western District of Washington*, filed March 29, 2007. This, of course, is

pertinent because criminal defendants' constitutional right to a speedy disposition can disrupt civil-litigation calendars by displacing scheduled civil trials and hearings. The Western District of Washington's smaller criminal docket poses a correspondingly smaller risk of displacement.

The judges of the Western District should have the opportunity to participate in MDL actions. The *Whaley* case is assigned to the Honorable Ricardo S. Martinez, who has nine years experience on the federal bench, first as a district-court magistrate, then as district-court judge. He is a seasoned candidate to handle a defective product MDL. A judge's experience with an MDL usually has positive benefits to the district in terms of knowledge that comes from handling an MDL that is then passed on to litigants and other judges handling other complex cases in the district.

**B. Due to The International Scope of Defendant's Manufacturing Misconduct, No Single District Is More Convenient Than Others**

Plaintiffs Pittsonberger, Sexton and Troiano erroneously assert, respectively, that the District of New Jersey, the Central District of California, and the Southern District of Florida are more convenient for likely witnesses. First, in light of Menu Food's multinational business operations reaching from China to Ontario, Canada, to various pet-food processing and distributing plants scattered about the United States, it is unlikely that all witnesses, or even a substantial majority, will be located in any one jurisdiction. Urging transfer to the District of New Jersey, Pittsonberger asserts that one of the defendants, Menu Foods, Inc., is located in and has a processing plant in New Jersey. But even if so, that entity is merely a subsidiary of Ontario, Canada-based Menu Foods Limited, and only one of several at that. More importantly, Pittsonberger also alleges that it was Ontario-based Menu Foods Income Fund – not Menu Foods Inc. – that “manufactured the pet food at issue in this action.” *Pittsonberger Class Action Complaint* ¶ 9. *See Ex. B* hereto. *Pittsonberger* thus alleges that “[t]he events complained of occurred throughout the United States,” as well as in New Jersey. *Id.* ¶ 10. Discovery in this case hence will not focus on New Jersey-based conduct. Witness convenience thus does not

favor the District of New Jersey, and certainly not the Central District of California or the Southern District of Florida.

Second, it is probable – indeed almost certain – that all or almost all documents produced in connection with the litigation will be produced electronically. The situs of these documents is thus wholly irrelevant.

Third, “since the parties and witnesses ordinarily do not attend pretrial conferences or hearings, it is unlikely that any of the named plaintiffs or putative class members will ever be required to travel to the transferee forum for pretrial purposes under Section 1407. And under the provisions of Fed. R. Civ. P. 45(d)(2), depositions of witnesses will probably occur in proximity to where they reside.” *In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936-37 (J.P.M.L. 1977) (transferring and consolidating all related actions in Hawaii, notwithstanding arguments that most witnesses reside in the continental United States). There is thus no viable argument that witnesses will be inconvenienced if these related actions are litigated in the Western District of Washington.

**C. The Proliferation of Redundant Complaints Filed in New Jersey by a Select Group of Firms Does Not Tip Transfer in Favor of New Jersey**

Pittsonberger also contends that the sheer number of related actions filed in New Jersey tips the balance in favor of transferring all related actions to the District of New Jersey. But any inference that this number indicates New Jersey has a heightened interest in this litigation or would be more convenient for the parties would be incorrect. Pittsonberger does not mention that the New Jersey actions were filed by a small, revolving group of local law firms.<sup>1</sup> The Panel should give little weight in this motion to those firms’ effort to inflate the number of related actions filed in their home jurisdiction.<sup>2</sup>

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<sup>1</sup> Chief among those firms are Lite DePalma Greenberg & Rivas, LLC (12 actions), Kaplan Fox & Kilsheimer LLP (four actions), and Trujillo Rodriquez & Richards, LLC (four actions).

<sup>2</sup> The *Whaley* Plaintiffs noted in their opening brief that five related actions with 12 plaintiffs were filed in the Western District of Washington. But they also indicated that this did not change the facts that the parties’ location

### III. CONCLUSION

For the reasons set forth above and in the Whaley Plaintiffs' opening brief, this Panel should transfer all related actions in this matter to the Western District of Washington for consolidated or coordinated proceedings.

DATED: April 18, 2007

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By \_\_\_\_\_

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was a neutral factor to selecting a transferee court and that "[n]o particular district court is more conveniently located for the parties ... than another." See *Whaley Br.* at 11.

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**EXHIBIT A**

**DISTRIBUTION OF PENDING MDL DOCKETS**  
(AS OF MARCH 12, 2007)

District	JUDGE	LITIGATION	Actions Pending	Total Number of Actions
ARE	D.J. William R. Wilson, Jr.	MDL-1507 In re Prempro Products Liability Litigation	3,377	4,027
AZ	Sr.J. Paul G. Rosenblatt Sr.J. Roger G. Strand	MDL-1541 In re Allstate Insurance Co. Fair Labor Standards Act Litigation MDL-972 In re Diamond Benefits Life Insurance Company & American Universal Insurance Company Contracts Litigation	4 1	5 10
CAC	D.J. David O. Carter D.J. Dale S. Fischer D.J. A. Howard Matz Sr.J. Mariana R. Pfaelzer D.J. Manuel L. Real D.J. Manuel L. Real D.J. Christina A. Snyder C.J. Alicemarie H. Stotler Sr.J. Dickran M. Tevrtizan, Jr. D.J. Stephen V. Wilson	MDL-1807 In re Wachovia Securities, LLC, Wage and Hour Litigation MDL-1822 In re Bluetooth Headset Products Liability Litigation MDL-1610 In re Conseco Life Insurance Co. Cost of Insurance Litigation MDL-1574 In re Paxil Products Liability Litigation MDL-1601 In re StarMed Health Personnel, Inc., Fair Labor Standards Act Litigation MDL-1737 In re American Honda Motor Co., Inc., Oil Filter Products Liability Litigation MDL-1671 In re Reformulated Gasoline (RFG) Antitrust & Patent Litigation MDL-1803 In re Banc of America Investment Services, Inc., Overtime Pay Litigation MDL-1475 In re Heritage Bonds Litigation MDL-1745 In re Live Concert Antitrust Litigation	19 14 19 39 3 5 11 5 2	19 14 21 148 6 5 12 5 9 22
CAN	D.J. Sandra Brown Armstrong D.J. Charles R. Breyer D.J. Charles R. Breyer D.J. Jeremy D. Fogel D.J. Jeremy D. Fogel D.J. Phyllis J. Hamilton D.J. Martin J. Jenkins D.J. Marilyn Hall Patel D.J. Marilyn Hall Patel C.J. Vaughn R. Walker C.J. Vaughn R. Walker D.J. James Ware D.J. James Ware D.J. Claudia Wilken D.J. Jeffrey S. White D.J. Ronald M. Whyte D.J. Ronald M. Whyte	MDL-1781 In re Cintas Corp. Overtime Pay Arbitration Litigation MDL-1809 In re Terminix Employment Practices Litigation MDL-1699 In re Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation MDL-1793 In re International Air Transportation Surcharge Antitrust Litigation MDL-1257 In re Cable News Network and Time Magazine "Operation Tailwind" Litigation MDL-1654 In re Compression Labs, Inc., Patent Litigation MDL-1486 In re Dynamic Random Access Memory (DRAM) Antitrust Litigation MDL-1648 In re Rubber Chemicals Antitrust Litigation MDL-1369 In re Napster, Inc., Copyright Litigation MDL-1770 In re Wells Fargo Home Mortgage Overtime Pay Litigation MDL-1606 In re Deep Vein Thrombosis Litigation MDL-1791 In re National Security Agency Telecommunications Records Litigation MDL-1527 In re Cisco Systems, Inc., Securities & Derivative Litigation MDL-1665 In re Acacia Media Technologies Corp. Patent Litigation MDL-1819 In re Static Random Access Memory (SRAM) Antitrust Litigation MDL-1761 In re Ditropan XL Antitrust Litigation MDL-1423 In re Cygnus Telecommunications Technology, LLC, Patent Litigation MDL-1754 In re Apple iPod nano Products Liability Litigation	71 2 1,520 100 1 10 42 10 1 4 4 53 48 1 22 25 6 15 8	71 2 1,704 101 8 10 44 13 19 4 4 78 48 2 22 25 6 30 8



District	JUDGE	LITIGATION	Actions Pending	Total Number of Actions				
FLS	D.J. Federico A. Moreno	MDL-1334 In re Managed Care Litigation	6	123				
GAN	D.J. Thomas W. Thrash, Jr.	MDL-1804 In re Stand 'n Seal Products Liability Litigation	13	13				
GAS	C.J. William T. Moore, Jr.	MDL-1677 In re Novasair Home Mortgage Inc. Mortgage Lending Practices Litigation	3	3				
IAS	Sr.J. Ronald E. Longstaff	MDL-1733 In re Teflon Products Liability Litigation	22	22				
ILN	Sr.J. Marvin E. Aspen Sr.J. Marvin E. Aspen D.J. Elaine E. Buckle D.J. David H. Coar D.J. David H. Coar D.J. Mark R. Filipp D.J. Robert W. Gettleman Sr.J. John F. Grady	MDL-1425 In re Ainstem Copyright Litigation	11	11				
		MDL-1715 In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation	318	322				
		MDL-1784 In re McDonald's French Fries Litigation	10	10				
		MDL-1536 In re Sulfuric Acid Antitrust Litigation	7	7				
		MDL-1783 In re JP Morgan Chase & Co. Securities Litigation	3	3				
		MDL-1818 In re Citifinancial Services Incorporated Prescreened Offer Litigation	5	5				
		MDL-1350 In re Trans Union Corp. Privacy Litigation	14	15				
		MDL-986 In re "Factor VIII or IX Concentrate Blood Products" Products Liability Litigation	103	356				
		MDL-1521 In re Wireless Telephone 911 Calls Litigation	10	10				
		MDL-1703 In re Sears, Roebuck & Co. Tools Marketing and Sales Practices Litigation	6	7				
ILS	C.J. G. Patrick Murphy C.J. G. Patrick Murphy D.J. George W. Lindberg D.J. Charles R. Norgle, Sr. D.J. Amy J. St. Eve D.J. James B. Zagel D.J. James B. Zagel	MDL-1562 In re General Motors Corp. Dex-Cool Products Liability Litigation	6	11				
		MDL-1748 In re Profliter Products Liability Litigation	4	4				
		MDL-1767 In re H&R Block Mortgage Corp. Prescreening Litigation	3	3				
		MDL-1700 In re FedEx Ground Package System, Inc., Employment Practices Litigation (No. II)	36	42				
		INN	D.J. Rudy J. Lozano C.J. Robert L. Miller, Jr.	MDL-1373 In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation	23	819		
				MDL-1313 In re AT&T Corp. Fiber Optic Cable Installation Litigation	35	35		
				MDL-1727 In re COBRA Tax Shelters Litigation	3	3		
				INS	D.J. Sarah E. Barker D.J. David F. Hamilton D.J. John D. Tinder	MDL-1468 In re Universal Service Fund Telephone Billing Practices Litigation	63	68
						MDL-1616 In re Urethane Antitrust Litigation	30	30
		KSS	C.J. John W. Lungstrum D.J. Kathryn H. Vratil	MDL-1721 In re Cessna 208 Series Aircraft Products Liability Litigation	7	7		

District	Judge	LITIGATION		Actions Pending	Total Number of Actions
MN	D.J. Michael J. Davis D.J. Donovan W. Frank Sr.J. Paul A. Magnuson Sr.J. Paul A. Magnuson C.J. James M. Rosenbaum D.J. John R. Tunheim	MDL-1431 In re Baycol Products Liability Litigation MDL-1708 In re Guidant Corp. Implantable Defibrillators Products Liability Litigation MDL-1328 In re Monosodium Glutamate Antitrust Litigation MDL-1724 In re Viagra Products Liability Litigation MDL-1726 In re Medtronic, Inc., Implantable Defibrillators Products Liability Litigation MDL-1396 In re St. Jude Medical, Inc., Silzone Heart Valves Products Liability Litigation	1,392 1,200 1 65 966 30	9,044 1,212 14 70 966 57	
MOE	D.J. Jean C. Hamilton Sr.J. Stephen N. Limbaugh D.J. Catherine D. Perry D.J. Rodney W. Sippel	MDL-1702 In re Air Crash Near Kirksville, Missouri, on October 19, 2004 MDL-1672 In re Express Scripts, Inc., Pharmacy Benefits Management Litigation MDL-1811 In re LLRice 601 Contamination Litigation MDL-1736 In re Celera and Lexapro Products Liability Litigation	6 9 59 32	11 12 59 32	
MOW	D.J. Richard E. Dorr	MDL-1786 In re H&R Block, Inc., Express IRA Marketing Litigation	21	21	
NCE	Sr.J. W. Earl Britt	MDL-1132 In re Exterior Insulation Finish System (EIFS) Products Liability Litigation	1	109	
NCM	C.J. James A. Beary, Jr.	MDL-1622 In re Cotton Yarn Antitrust Litigation	9	9	
NCW	C.J. Richard L. Voorhees	MDL-1516 In re Polyester Staple Antitrust Litigation	17	36	
NH	D.J. Paul J. Barbadoro	MDL-1335 In re Tyco International, Ltd., Securities, Derivative and "ERISA" Litigation	13	101	
NJ	Sr.J. Harold A. Ackerman C.J. Garrett E. Brown, Jr. C.J. Garrett E. Brown, Jr. D.J. Stanley R. Chester D.J. Stanley R. Chester Sr.J. Dickinson R. Debevoise D.J. Joseph A. Greenaway, Jr. Sr.J. John C. Lifland Sr.J. John C. Lifland Sr.J. John C. Lifland D.J. Jose L. Linares D.J. William J. Martini D.J. Jerome B. Simandle Sr.J. William H. Walls D.J. Susan D. Wigenton D.J. Freda L. Wolfson	MDL-1687 In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II) MDL-1471 In re Compensation of Managerial, Professional and Technical Employees Antitrust Litigation MDL-1663 In re Insurance Brokerage Antitrust Litigation MDL-1658 In re Merck & Co., Inc., Securities, Derivative & "ERISA" Litigation MDL-1777 In re SFBIC International, Inc., Securities & Derivative Litigation MDL-1337 In re Holocaust Era German Industry, Bank & Insurance Litigation MDL-1419 In re K-Dur Antitrust Litigation MDL-1384 In re Gapabentin Patent Litigation MDL-1479 In re Neuronin Antitrust Litigation MDL-1730 In re Hypodermic Products Antitrust Litigation MDL-1763 In re Human Tissue Products Liability Litigation MDL-1514 In re Electrical Carbon Products Antitrust Litigation MDL-1292 In re Candant Corporation Securities Litigation MDL-1550 In re IDT Corp. Calling Card Terms Litigation MDL-1799 In re Vonage Initial Public Offering (IPO) Securities Litigation	5 4 41 2 1 2 1 15 22 7 136 1 3 4 15	5 4 42 35 14 59 44 17 22 8 136 25 18 5 15	

District		Judge	Litigation	Actions Pending	Total Number of Actions
TXE	D.J. Leonard E. Davis D.J. T. John Ward	MDL-1512 In re Electronic Data Systems Corp. Securities & "ERISA" Litigation MDL-1530 In re Fleming Companies Inc. Securities & Derivative Litigation	4 10	29 22	
TXN	C.J. A. Joe Fish D.J. Sidney A. Fitzwater	MDL-1578 In re UICI "Association-Group" Insurance Litigation MDL-1214 In re Great Southern Life Insurance Company Sales Practices Litigation	15 1	28 25	
TXS	D.J. Vanessa D. Gilmore D.J. Melinda Harmon D.J. Melinda Harmon D.J. Lynn N. Hughes D.J. Janis Graham Jack	MDL-1646 In re Testmasters Trademark Litigation MDL-1422 In re Waste Management Inc., Securities Litigation MDL-1446 In re Eaton Corp. Securities, Derivative & "ERISA" Litigation MDL-1609 In re Service Corporation International Securities Litigation MDL-1810 In re MERSCORP Inc., et al., Real Estate Settlement Procedures Act (RESPA) Litigation	1 1 129 1 19	6 7 196 4 19	
UT	D.J. Dale A. Kimball	MDL-1546 In re Medical Waste Services Antitrust Litigation	1	8	
VAE	D.J. Leonie M. Brinkema	MDL-1705 In re Xybernaut Corp. Securities Litigation	10	10	
WAW	D.J. Barbara Jacobs Rothstein	MDL-1407 In re Phenylpropanolamine (PPA) Products Liability Litigation	402	3,365	
WVS	D.J. Joseph R. Goodwin	MDL-1477 In re Serzone Products Liability Litigation	16	177	
WVY	C.J. William F. Downes	MDL-1293 In re Natural Gas Royalties Qui Tam Litigation	75	83	

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

JAYME PITTSOBERGER,  
on behalf of herself and  
all others similarly situated,

Plaintiff,

vs.

MENU FOODS INC., MENU  
FOODS MIDWEST CORPORATION,  
MENU FOODS INCOME FUND, and  
MENU FOODS LIMITED,

Defendants.

Civil Action No. \_\_\_\_\_

COMPLAINT - CLASS ACTION  
JURY TRIAL DEMANDED

**CLASS ACTION COMPLAINT**

Plaintiff, Jayme Pittsonberger, individually and on behalf of all others similarly situated, by and through her undersigned counsel, hereby brings this action against Defendants Menu Foods Inc., Menu Foods Midwest Corporation, Menu Foods Income Fund, and Menu Foods Limited (collectively, "Defendants") pursuant to Rule 23 of the Federal Rules of Civil Procedure, for breach of express warranty, breach of implied warranty of merchantability, negligence, unjust enrichment, and violation of New Jersey Consumer Fraud Act and seeks damages, attorneys' fees, and costs on behalf of herself and all others similarly situated (the "Class"), and upon information and belief, alleges as follows:

**NATURE OF THE ACTION**

1. Plaintiff brings this class action for breach of express warranty, breach of implied warranty of merchantability, negligence, unjust enrichment, and violation of New Jersey Consumer Fraud Act to redress the harms resulting from the manufacture, production, and sale

by Defendants of contaminated dog and cat food marketed under over 90 brand names.

2. Defendants manufacture and sell over 90 brands of pet food for cats and dogs, including popular labels like Iams and Eukanuba and private label brands sold at large retail chains. On March 16, 2007, the Mcnu Foods Income Fund issued a press release announcing the recall of 60 million cans of contaminated dog and cat food manufactured between December 3, 2006 and March 6, 2007. The recall covers the "cuts and gravy" style pet foods in cans and pouches manufactured at two of Mcnu Foods Limited's U.S. manufacturing facilities - Menu Foods, Inc. and Menu Foods Midwest Corporation, located in New Jersey and Kansas, respectively.

3. The defective pet food caused Plaintiff and Class members injury, in that Plaintiffs and the Class members purchased and fed defective pet food to their pets which caused injury to said pets in that they became ill through kidney disease, requiring veterinarians visits, medications, hospitalizations and, in some cases, burials of those pets that died due to renal failure caused by the contaminated pet food. Many pets that consumed the recalled tainted food now require ongoing monitoring of their health to ascertain the extent of the damage to their kidneys.

4. Plaintiff makes the following allegations, except as to the allegations specifically pertaining to Plaintiff and Plaintiff's counsel, based upon the investigation undertaken by Plaintiff's counsel, which included, inter alia, review and analysis of Defendants' website, press releases, news articles, and pleadings filed in other suits.

#### PARTIES

5. Plaintiff Jayme Pittsonberger resides in Alexandria, Virginia. Plaintiff Pittsonberger purchased and fed her cat Nutro, Natural Choice pet food that was manufactured

by Defendants during the Class Period. Pittsonberger's cat, named Jada Katrina, became ill and was diagnosed with acute renal failure. Jada was immediately hospitalized at Caring Hands Animal Hospital. In addition to the cost of purchasing the contaminated food, Plaintiff Pittsonberger incurred economic costs in connection with the medical treatment and continued medical care and monitoring of her cat.

6. Defendant Menu Foods Inc. ("MFI") is a New Jersey corporation, with its headquarters at 9130 Griffith Mogan Lane, Pennsauken, NJ 08110. MFI has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit. MFI manufactures pet food for distribution in the United States. MFI is a wholly-owned subsidiary of Menu Foods Limited, and is ultimately owned or controlled by Menu Foods Income Fund, an unincorporated company with its principal place of business in the Province of Ontario, Canada. Some of Defendant MFI's high managerial officers and agents with substantial authority are also high managerial officers or agents of Menu Foods Income Fund.

7. Menu Foods Limited ("MFL") is a Canadian corporation located at 8 Falconer Dr., Mississauga, ON, L5N 1B1 and has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit. MFL is the parent company of, and wholly-owns, both MFI, located in Pennsauken, New Jersey, and MFMC located in Emporia, Kansas.

8. Defendant Menu Foods Midwest Corporation ("MFMC") is a Delaware corporation, with its headquarters at P.O. Box 1046, 1400 East Logan Ave., Emporia, KS 66801. MFMC has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit. MFMC is a wholly-owned subsidiary of MFL and manufactures pet food for distribution in the United States.

9. Defendant Menu Foods Income Fund ("MFIF"), an unincorporated company with its principal place of business in the Province of Ontario, Canada. MFIF manufactured the pet food at issue in this action.

10. The events complained of occurred throughout the United States and in the State of New Jersey.

#### **JURISDICTION AND VENUE**

11. This Court has original jurisdiction over this class action under 28 U.S.C. §1332(d)(2), (d) (5)(B), (d) (6) because (i) there are 100 or more class members, (ii) there is an aggregate amount in controversy of at least \$5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least Plaintiff and Defendants are citizens of different states.

12. Venue in this Court is proper in that Defendants transacted business in this county and the conduct complained of occurred in this district, as well as elsewhere in New Jersey.

#### **FACTUAL ALLEGATIONS**

13. Defendants MFL and MFIF purport to be the leading North American private label/contract manufacturer of wet pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other retail and wholesale outlets. In 2006, MFIF produced more than one billion containers of pet food.

14. Defendant MFL is the parent company of, and wholly-owns, both Defendant MFI, located in Pennsauken, New Jersey, and Defendant MFMC, located in Emporia, Kansas. MFI and MFMC are two of MFL's manufacturing facilities in the United States.

15. At least from December 3, 2006 through March 6, 2007, Defendants failed to adhere to proper safety standards and failed to ensure that the pet food they manufactured and



sold was free from contamination. More specifically, on March 16, 2007, Defendant MFIF, the parent company of MFL, issued a press release whereby it announced the recall of a portion of the dog and cat food manufactured between December 3, 2006 and March 6, 2007. The recall covers the "cuts and gravy" style pet foods in cans and pouches manufactured at two of MFL's facilities – MFI located in Pennsauken, New Jersey and MFMC in Emporia, Kansas.

16. Reportedly, 60 million cans and pouches of the pet food were recalled.

17. The recalled pet food was sold under more than 90 brand names, including popular labels like Iams and Eukanuba and private label brands sold at large retail chains. A list of all brand names that were recalled is contained on the Company's website and is attached hereto as Exhibit A. Retailers who sold the contaminated products include Ahold USA, Kroger Co., Safeway, Wal-Mart, Pet Smart, and Pet Value, among others.

18. MFL acknowledged receiving complaints in the United States which raised concern about pet food manufactured since early December 2006, and its impact on the renal health of the pets consuming the products. The Company has discovered that timing of the production associated with these complaints coincides with the introduction of an ingredient from a new supplier.

19. Stephen Sundlof, the Food and Drug Administration's (FDA) chief veterinarian, said that Menu Foods began its own taste tests of its pet food beginning February 27, 2007 in approximately 40 to 50 pets. Within a few days, animals began showing signs of sickness. In early March 2007, at least seven animals reportedly died.

20. Menu Foods announced its recall weeks later, on March 16, 2007.

21. The FDA has reported that it received numerous calls and complaints from owners of sick and deceased pets, who flooded phone lines at State FDA offices, as well as calls

from veterinarians and pet food companies. See Los Angeles Times, March 20, 2007.

22. To date, there are 50 confirmed deaths. The FDA expects the death toll to rise.

23. The FDA said that the investigation is focused on problems with aminopterin in the wheat gluten used by MFL, which MFL claimed had been coming from a new supplier. Wheat gluten is a source of protein and was used to thicken the gravy in the pet food.

24. On March 30, 2007, the FDA announced that Defendants' recalled pet foods also contained melamine, a chemical used to make plastics. Researchers also found melamine (used to produce plastic kitchen wares and used in Asia as a fertilizer) in the urine of sick cats, as well as in the kidney of one cat that died after eating the Menu Foods' wet food. The Commissioner of the New York State Department of Agriculture and Markets noted that neither aminopterin nor melamine should be in pet food.

25. On March 30, 2007, MFIF confirmed that on March 6, 2007 it had ceased using the Chinese company that supplied it with the contaminated wheat gluten.

#### PLAINTIFF'S INJURIES

26. Plaintiff Pittsonberger owned a cat named Jada Katrina. During February and March 2007, Plaintiff Pittsonberger fed her cat Nutro, Natural Choice pet food, now listed on the Company's recall list as contaminated products.

27. Jada is a cat who is approximately 22 months of age. Until ingesting the contaminated pet food, Jada was in very good health and had no recent medical conditions.

28. On Thursday, March 15, 2007, Plaintiff noticed that Jada had significantly increased thirst and water consumption, as well as urinary output. On the morning of March 17, 2007 she did not eat her breakfast meal. Jada was consuming more water and urinating more than usual, stopped eating, was listless, lethargic, had bad breath, and was sleeping more than

usual. Shortly after this, an e-mail notice from Plaintiff's veterinary hospital was sent regarding the food recall. Plaintiff immediately called and made an appointment for Jada to be seen the very next day.

29. Plaintiff took Jada to Caring Hands Animal Hospital in Arlington, VA on Sunday, March 18, 2007. Jada underwent a physical exam and a urinalysis test. This was done via needle withdraw of urine directly from her bladder, which Jada remained conscious for and had to be physically restrained by two technicians while the veterinarian withdrew the urine. The tests showed unusual elements, and the veterinarian then suggested a more expensive, yet more-conclusive blood test. Jada was physically restrained while several samples of blood were taken to run tests. Being of petite stature, Jada has small blood vessels and thus had to be stuck several times to withdraw the appropriate amount of blood for the tests. Throughout the process, Jada appeared frightened and stressed.

30. After review of the blood tests, Jada was diagnosed with acute renal failure. The veterinarian explained that Jada's BUN (blood urea nitrogen) and Creatinine levels were extremely high and she had to be admitted immediately for treatment. Jada was immediately admitted to Caring Hands Animal Hospital and intravenous fluids were administered. In addition to this, Jada was started on antibiotics and an appetite stimulant. On March 20th, more blood was drawn and further tests were run. Jada's BUN and creatinine levels had not come down to normal functioning levels. Jada stayed overnight at the clinic for three nights, for a total duration of 72 hours.

31. Jada was released from Caring Hands Animal Hospital late in the evening of Wednesday, March 21st. Post discharge instructions included continuing treatment at home. It was instructed that Jada have 200 ml of fluid, injected subcutaneously every other day through

Wednesday, March 28th, when she was to return for additional follow-up testing. She was also instructed to be placed on a special diet of 'renal failure' food that could only be acquired at the time directly from the Caring Hands Animal Hospital. On March 28th, additional blood tests were run to check renal activity. The results showed that her renal function levels were now within normal function range. The doctor clearly stated that he was "cautiously optimistic" as the full extent of the damage is still unknown. Jada still requires subcutaneous fluids every three days for a month, at which time an additional full panel of tests will take place, as well as an evaluation to determine if additional critical medical care is required.

### CLASS ACTION ALLEGATIONS

32. Plaintiff brings this action on her own behalf and on behalf of all other persons similarly situated.

33. The class which Plaintiff seeks to represent are composed of:

All persons in the United States who have incurred costs as a result of their pets becoming ill or passing away from ingesting any of the pet food brands manufactured by Defendants during the period commencing December 3, 2006, and ending March 6, 2007 (the "Class Period") that were recalled by Defendants.

34. The class is composed of thousands, and possibly millions, of persons, the joinder of whom is not practicable. The disposition of their claims in a class action will benefit both the parties and the Court. It has been estimated that thousands of cats and dogs have become ill and hundreds have died so far from ingestion of the contaminated pet food throughout the United States during the Class Period, and thus the Class is sufficiently numerous to make joinder impracticable, if not impossible.

35. There are questions of fact and law which are common to all members of the class, including, inter alia, the following:

a. Whether Defendants breached any express or implied warranties when they

manufactured and sold the contaminated pet food;

- b. Whether Defendants violated New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*;
- c. Whether Defendants negligently manufactured and sold the contaminated pet food; and
- d. Whether the Class has been damaged, and if so, the appropriate measure of damages including the nature of the equitable relief to which the class is entitled.

36. The above common issues of fact and law predominate over any arguable individualized issues.

37. Plaintiff's claims are typical of the claims of the other members of the class because Plaintiff's and all of the Class members' damages arise from and were caused by having purchased and fed the contaminated pet food to their pets. As a result, the evidence and the legal theories regarding Defendants' alleged wrongful conduct are identical for Plaintiff and all of the Class members.

38. Plaintiff will fairly and adequately protect the interests of the members of the Class, and Plaintiff has no interests which are contrary to or in conflict with those of the Class they seek to represent. Plaintiff has retained competent counsel experienced in class action litigation to further ensure such protection and to prosecute this action vigorously.

39. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class and would lead to repetitious trials of the numerous common questions of facts and law. Plaintiff does not believe that any difficulty will be encountered in the management of this

litigation that would preclude its maintenance as a class action. Plaintiff believes and therefore avers that claims are small in relation to the costs of an individual suit, and a class action is the only proceeding pursuant to which Class members can, as a practical matter, recover. As a result a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

40. Proper and sufficient notice of this action may be provided to the Class members through notice published in appropriate publications.

41. Plaintiff and the members of the Class have suffered irreparable harm and damages as a result of the Defendants' wrongful conduct as alleged herein. Absent representative action, Plaintiff and the members of the Class will continue to suffer losses, *thereby allowing these violations of law to proceed without remedy.*

**COUNT I**  
**BREACH OF EXPRESS WARRANTY**

42. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

43. Defendants expressly warranted that the contaminated brands of pet food were, in fact, ingestible food that was safe for consumption by dogs and cats.

44. In addition, Defendants made numerous express warranties about the quality of its food and its manufacturing facilities. For example, Menu Foods touts the claim that it "manufacture[s] the private-label wet pet-food industry's most comprehensive product program with the highest standards of quality" and it operates "state-of-the-art" manufacturing facilities in the United States and Canada.

45. Members of the Class were induced by Defendants' labeling, advertising and marketing the contaminated brands of pet food as "food" to rely upon said express warranty, and

did so rely in purchasing the contaminated brands of pet food and feeding them to their pets.

46. In reliance on Defendants' untrue warranties, Plaintiff and the Class purchased the contaminated pet food and fed that food to their pets.

47. Plaintiff and members of the Class sustained damages as a proximate result of said breach of warranty.

**COUNT II**  
**BREACH OF IMPLIED WARRANTY**  
**OF MERCHANTABILITY**

48. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

49. Defendants are merchants pursuant to sections 2-104 and 2-314 of the Uniform Commercial Code with respect to pet foods.

50. Through Defendants' marketing, labeling, and sales, Defendants impliedly warranted that the contaminated pet food, which was sold to Plaintiff and Class members and fed to their pets, was fit for the ordinary purpose for which it was intended, namely, to safely feed and nourish pets without any resulting negative health effects, pursuant to section 2-314 of the Uniform Commercial Code.

51. Through Defendants' marketing, labeling, and sales, Defendants knew that Plaintiff and Class members would purchase the contaminated pet food at issue for the ordinary purpose of feeding their pets.

52. Defendants manufactured, labeled, advertised, sold, and distributed the contaminated pet foods at issue for the ordinary purpose for which it was purchased by Plaintiff.

53. Plaintiff and Class members purchased and used the contaminated pet foods for the ordinary purposes for which such goods are sold, namely feeding them to their pets.

54. Plaintiff and Class members relied upon Defendants' representations and claims in purchasing the contaminated pet foods.

55. The contaminated pet foods purchased by Plaintiff and Class members were unfit for their ordinary purpose when sold. In fact, such pet foods were contaminated and caused severe illness and/or death of the pets that consumed them. Therefore, Defendants breached the implied warranty of merchantability in the sale of the contaminated pet foods at issue.

56. Plaintiff and members of the Class sustained damages as a proximate result of said breach of warranty.

**COUNT III**  
**NEGLIGENCE**

57. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

58. Defendants owed a duty to pet owners who purchased its products to ensure that their pet food was safe for pets to consume and free from contamination, such that no pets consuming these products would be injured or die as a result of such consumption.

59. Defendants breached said duty as described herein above when they failed to adhere to proper safety standards and failed to properly ensure the safety of their products when they sold contaminated pet food, proximately causing damage to Plaintiff and members of the Class.

60. As a proximate result of the Defendants' conduct described herein, Plaintiff and members of the Class have suffered damages as a result and continue to suffer damages as a result of the contamination of Defendants' pet food.

**COUNT IV**  
**UNJUST ENRICHMENT**



61. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

62. As a direct, proximate, and foreseeable result of Defendants' acts and otherwise wrongful conduct, Plaintiff suffered damages. Defendants profited and benefited from the sale of their pet food, even as the pet food caused Plaintiff to incur damages.

63. Defendants have voluntarily accepted and retained these profits and benefits, derived from consumers, including Plaintiff, with full knowledge and awareness that, as a result of Defendants' unconscionable wrongdoing, consumers, including Plaintiff, were not receiving products of the quality, nature, fitness, or value that had been represented by Defendants or that reasonable consumers expected. Plaintiff purchased pet food that she expected would be safe and healthy for her pet and instead has had to now endure the illness of her beloved pet.

64. By virtue of the wrongdoing alleged in this Complaint, Defendants have been unjustly enriched at the expense of the Plaintiff who is entitled to, and hereby seeks, the disgorgement and restitution of Defendants' wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court.

**COUNT V**  
**VIOLATION OF NEW JERSEY'S CONSUMER FRAUD ACT**  
**N.J.S.A. 56:8-1, et seq.**

65. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

66. Defendants are the researchers, developers, designers, testers, manufacturers, inspectors, labelers, distributors, marketers, promoters, and sellers and/or otherwise released the contaminated pet food into the stream of commerce.

67. Defendants knew or should have known that the use of the contaminated pet food

causes serious and life threatening injuries to animals, but failed to warn the public, including Plaintiff, of same.

68. In violation of the New Jersey Consumer Fraud Act, Defendants made untrue, deceptive or misleading representations of material facts to, and omitted and/or concealed material facts from Plaintiff and the Class.

69. Defendants' statements and omissions were undertaken with the intent that consumers, including Plaintiff, would rely on Defendants statements and/or omissions.

70. The promotion and release of the contaminated pet food into the stream of commerce constitutes an unconscionable commercial practice, deception, false pretense, misrepresentation, and/or knowing concealment, suppression, or omission of material facts with the intent that others would rely upon such concealment, suppression or omission in connection with the sale or advertisement of such merchandise or services by Defendants, in violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*

71. Defendants concealed, omitted, or minimized the side effects of the contaminated pet food, provided misinformation about risks and potential harms from the contaminated pet food, and succeeded in persuading consumers to purchase for approved use the contaminated pet food.

72. Defendants' practice of promoting and marketing contaminated pet food created and reinforced a false impression as to the safety of the contaminated pet food, thereby placing pets at risk of serious injuries and potentially lethal side effects.

73. Defendants intended that others would rely upon its concealment, suppression or omission of the risk of animals ingesting the contaminated pet food.

74. Defendants' actions in connection with manufacturing, distributing, and

marketing the contaminated pet food as set forth herein evidence a lack of good faith, honesty in fact and observance of fair dealing so as to constitute unconscionable commercial practices, in violation of the New Jersey Consumer Fraud Act, N.J.S.A., 56:8-1 *et seq.*

75. Defendants acted willfully, knowingly, intentionally, unconscionably and with reckless indifference when committing these acts of consumer fraud.

76. As a direct and proximate result of the acts of consumer fraud set forth above, Plaintiff purchased unsafe products and incurred monetary expense, risk and injury to their pets previously set forth herein.

**JURY DEMAND**

Plaintiff hereby requests a trial by jury on all issues triable by right before a jury.

**PRAYER FOR RELIEF**

THEREFORE, Plaintiff prays for judgment as follows:

1. That this Court certify this action as a Class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), and appoint Plaintiff and her counsel to represent the Class;
2. That this Court enter judgment and award damages in favor of Plaintiff and the Class, and against Defendants under the theories alleged herein;
3. That this Court award Plaintiff all attorneys' fees, expenses and costs of this suit;
4. That this Court award Plaintiff pre-judgment and post-judgment interest at the maximum rate allowable by law, compounded daily; and

5. That this Court grant such other, further, and different relief that the Court deems necessary, just, and proper.

Dated: April 3, 2007

Respectfully submitted,

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Attorneys for Plaintiff and the Class

# EXHIBIT A

# MENU FOODS INCOME FUND



- Home
- Recall Information
- Press Release
- Cat Product Information
- Dog Product Information
- FAQ's for Consumers

## Recalled Cat Product Information Recall Information 1-866-895-2708

Menu Foods  
8 Falconer  
Scraper Hill  
Canada, IL

### Variety or Multi-Packs:

If you are in possession of a variety or multi-pack, please be sure to check the individual can or pouch rather than relying solely on the date coding on the side of the carton.

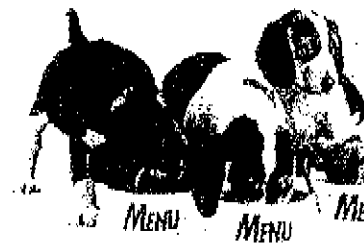
1. Americas Choice, Preferred Pets
2. Authority
3. Best Choice
4. Companion
5. Compliments
6. Demouilas Market Basket
7. Eukanuba
8. Fine Feline Cat
9. Food Lion
10. Foodtown
11. Giant Companion
12. Hannaford
13. Hill Country Fare
14. Hy-Vee
15. Iams
16. Laura Lynn
17. Li'l Red
18. Loving Meals
19. Meijer's Main Choice
20. Nutriplan
21. Nutro Max Gourmet Classics
22. Nutro Natural Choice
23. Paws
24. Pet Pride
25. Presidents Choice
26. Price Chopper
27. Priority US
28. Save-A-Lot Special Blend
29. Schnucks
30. Science Diet Feline Savory Cuts Cans
31. Sophistacat

32. Special Kitty Canada
33. Special Kitty US
34. Springfield Prize
35. Sprout
36. Stop & Shop Companion
37. Tops Companion
38. Wegmans
39. Wels Total Pet
40. Western Family US
41. White Rose
42. Winn Dixie

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Best viewed using Internet Explorer.



# MENU FOODS INCOME FUND



- Home
- Recall Information
- Press Release
- Cat Product Information
- Dog Product Information
- FAQ's for Consumers

## Recalled Dog Product Information Recall Information 1-866-895-2708

Menu Foods  
8 Falcone  
Streetsville  
Canada L1

### Variety or Multi-Packs:

If you are in possession of a variety or multi-pack, please be sure to check the individual can or pouch rather than relying solely on the date coding on the side of the carton.

1. Americas Choice, Preferred Pets
2. Authority
3. Award
4. Best Choice
5. Big Bet
6. Big Red
7. Bloom
8. Cadillac
9. Companion
10. Demoules Market Basket
11. Eukanuba
12. Food Lion
13. Giant Companion
14. Great Choice
15. Hannaford
16. Hill Country Fare
17. Hy-Vee
18. Igms
19. Laura Lynn
20. Loving Meals
21. Meijers Main Choice
22. Mighty Dog Pouch
23. Mixables
24. Nutriplan
25. Nutro Max
26. Nutro Natural Choice
27. Nutro Ultra
28. Nutro
29. O'Roy Canada
30. O'Roy US
31. Paws

32. [Pet Essentials](#)
33. [Pet Pride - Good n' Meaty](#)
34. [Presidents Choice](#)
35. [Price Chopper](#)
36. [Priority Canada](#)
37. [Priority US](#)
38. [Publix](#)
39. [Roche Brothers](#)
40. [Save-A-Lot Choice Morsels](#)
41. [Schnucks](#)
42. [Shep Dog](#)
43. [Springfield Prize](#)
44. [Sprout](#)
45. [Stater Brothers](#)
46. [Stop & Shop Companion](#)
47. [Tops Companion](#)
48. [Wegmans Bruiser](#)
49. [Wells Total Pet](#)
50. [Western Family US](#)
51. [White Rose](#)
52. [Winn Dixie](#)
53. [Your Pet](#)

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LDRP/D  
RECEIVED **MAIL**

APR 19 2007

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
DEPUTY

**BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION**

IN RE PET FOOD PRODUCTS  
LIABILITY LITIGATION

MDL Docket No. 1850

I, Bonney S. McCormack, declare under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1301 Fifth Avenue, Suite 2900, Seattle, Washington 98101.

On April 18, 2007 I caused the following documents to be served upon the parties and courts named below in the manner indicated:

**Memorandum of Plaintiffs Whaley, et al. In Opposition to Motions for Transfer and Consolidation of Related Actions Submitted by Plaintiffs Sexton and Toriano.**

**VIA MAIL**

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- 1  
Case No.

1 Canada L5N 1B1

2 Menu Foods  
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 3 Streetsville, ON  
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7 Menu Foods Midwest Corporation  
 8 c/o The Corporation Trust Company  
 Corporation Trust Center  
 9 1209 Orange Street  
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10 Menu Foods Midwest Corporation  
 11 c/o The Corporation Trust Company  
 Corporation Trust Center  
 12 1209 Orange Street  
 Wilmington, DE 19801

Menu Foods Limited Partnership  
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 Corporation Trust Center  
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13 Menu Foods Gen Par Limited  
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