IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DENNIS ADKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 1:12CV2871**
	)	
NESTLE PURINA PETCARE COMPANY, et al.,	)	
	)	
	)	
Defendants.	)	

INTERVENOR CONNIE CURTS' INITIAL OBJECTIONS TO PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF NATIONWIDE CLASS

COMES NOW Connie Curts ("Ms. Curts") and submits the following Initial Objections to Preliminary Approval of Class Settlement and Certification of Nationwide Class:

Introduction

Ms. Curts is the named plaintiff in a putative class action lawsuit pending the Circuit Court of Jackson County, Missouri (the "Curts Lawsuit"). She has moved to intervene in this case for the limited purpose of opposing the parties' Joint Motion for Preliminary Approval of Class Action Settlement, Approval of Proposed Form of Notice, and Preliminary Certification of Settlement Class ("Motion for Preliminary Approval") (Doc. #158). As explained in detail below, the Court should deny the parties' request for preliminary approval of the proposed nationwide class settlement because the settlement is not fair, adequate or reasonable to the class as a whole or to the Missouri consumers represented by Ms. Curts. The Court also should deny the parties' request for certification of a nationwide class because the record demonstrates that the named plaintiffs in this case (who hail from only a select number of states) cannot adequately represent the interests of consumers from all 50 states, including the Missouri consumers who are putative class members in the Curts Lawsuit.

Argument and Authorities

In Eubank v. Pella Corp., --- F.3d ----, 2014 WL 2444388 (7th Cir. June 22, 2014), the Seventh Circuit recently acknowledged that "[t]he class action is a worthwhile supplement to conventional litigation procedure" but also warned that "it is frequently abused." Id. at *1. The court in Eubank explained:

> [W]e and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.
>
> Fortunately the settlement, including the amount of attorneys' fees to award to class counsel, must be approved by the district judge presiding over the case; unfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class.
>
> Enter the objectors. Members of the class who smell a rat can object to approval of the settlement. . . .
>
> The case underscores the importance both of objectors (for they are the appellants in this case—without them there would have been no appellate challenge to the settlement) and of intense judicial scrutiny of proposed class action settlements.

Id. at *2-3.

The decision in Eubank makes clear that the Court must intensely scrutinize the parties' joint request for approval of the proposed class action settlement. And because the parties' request for class certification is made hand-in-hand with their request for settlement approval, the standard of judicial scrutiny is even greater. See, e.g., Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 834 F.2d 677, 682 (7th Cir. 1987) ("The inquiry must as we have said be especially careful and penetrating in a case such as this where class certification is deferred to the settlement stage."); Martin v. Cargill, Inc., 295 F.R.D. 380, 385 (D. Minn. 2013) ("Such

"settlement class actions" require closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process.").

In this case, the parties' requests to approve the proposed class action settlement and to certify a nationwide settlement class do not withstand even the most generous scrutiny, let alone the "intense" and "penetrating" level of scrutiny required by the Seventh Circuit. For reasons discussed in detail below, Ms. Curts submits that the Court should not preliminarily approve the proposed class settlement or certify this case as a nationwide class action.

I. The Court Should Deny the Parties' Request for Preliminary Approval of the Proposed Nationwide Class Settlement

At the preliminary approval stage, the Court is called upon to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Manual for Complex Litigation (Fourth) § 21.632 (2004). Although the Court has discretion in making this determination, "preliminary approval is not simply a judicial 'rubber stamp' of the parties' agreement," and "the Court must be particularly scrupulous because preliminary approval establishes 'an initial presumption of fairness.'" Martin, 295 F.R.D. at 384 (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)). Indeed, the Seventh Circuit insists that this Court must serve as "a fiduciary of the class" to "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." Reynolds, 288 F.3d at 279-80.

The parties argue that their proposed settlement is entitled to a presumption of fairness because it was negotiated at arm's length using a mediator. This assertion ignores the fact that Plaintiffs have not conducted any formal discovery and have received from Defendants only non-descript "information" regarding the case, which negates any presumption of fairness that might otherwise apply. See Martin, 295 F.R.D. at 386 n.6 ("Plaintiffs argue the settlement is

'presumptively valid' because it was negotiated at arm's length, with the assistance of a neutral mediator. . . . Where, as here, the precise nature of the parties' informal exchange of information is not presented to the Court, and where no formal discovery has taken place, it is highly doubtful that a presumption of fairness should apply."). And even if a presumption of fairness applied, the proposed settlement should not be approved for the reasons discussed below.

A. The Proposed Nationwide Class Settlement Does Not Fairly, Adequately and Reasonably Compensate the Class as a Whole

In deciding the motion for preliminary approval, "[t]he primary question is whether the proposed settlement amount is reasonable, given the risk and likely return to the class of continued litigation." Sutton v. Bernard, No. 00 C 6676, 2002 WL 1794048, at *1 (N.D. Ill. Aug. 5, 2002). This means that "the Court should 'begin by quantifying the net expected value of continued litigation to the class,' and then 'estimate the range of possible outcomes and ascribe a probability to each point on the range.'" Martin, 295 F.R.D. at 384 (quoting Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006)).

Here, the most glaring deficiency in the parties' request for preliminary settlement approval is that no information has been provided that would enable the Court to quantify the potential recovery for the class at trial or compare that potential recovery against the settlement amount. It is not surprising that the parties have glossed over this point, however, because the evidence indicates that the potential recovery could be in excess of **$1 billion** – a far cry from the parties' proposed $6.5 million settlement.[1]

[1] Among other measures of damage, Plaintiffs in this case seek to recover the "purchase price" paid by consumers for the subject products. (See Doc. #156-1, ¶¶ 110, 113, 135, 142, 151, 157, 231, 238, 245, 254, 264, 273, 280, 289 and 298.) An affidavit submitted by Defendants in removal proceedings in the Curts Lawsuit states that "[i]n fiscal years 2011 and 2012 combined, Waggin' Train revenue from sales of Waggin' Train and Canyon Creek Ranch brand jerky dog treats in Missouri exceeded $7.5 million." (See **EXHIBIT 1** ¶ 5.) United States

This disparity in the values of potential recovery and settlement – a ratio of more than 150 to 1 – demonstrates clearly that the proposed settlement cannot survive this Court's scrutiny. See Cullan & Cullan LLC v. M-Qube, Inc., No. 8:13CV172, 2014 WL 347034, at *9 (D. Neb. Jan. 30, 2014) ("The intervenors contend that over $225 million in fraudulent charges is at issue. . . . A settlement fund of $6 to $6.5 million seems inadequate in the face of alleged losses of such magnitude.").

The value of the proposed nationwide settlement becomes even more objectionable when considering that the net recovery for class members may be almost **zero**. Before the class recovers even one dollar, the $6.5 million gross settlement fund will be reduced by attorneys' fees (up to $2,145,000), litigation expenses (up to $100,000) and incentive awards for the named plaintiffs ($120,000). This leaves a net settlement fund of $4.135 million that will be further reduced by the costs of an elaborate and costly claims administration process that may consume most or all of the remaining settlement proceeds.[2] Although the parties' attorneys apply window dressing by claiming recovery for the class of "up to 100% of certain economic damages"

Census Bureau data indicates that Missouri's population is less than 2% of the overall U.S. population. See United States Census Bureau, State & County QuickFacts – Missouri, available at: http://quickfacts.census.gov/qfd/states/29000.html. Extrapolating from the 2011/12 sales figures in Missouri, it can be estimated that nationwide sales of the subject products for the six-year time period from 2007 (when the FDA first warned the harmful nature of the products) to January 2013 (when the products were finally recalled) were approximately $1.125 billion. This is a conservative estimate of "purchase price" damages because it reflects only manufacturer revenue and does not account for retailer mark-up that could increase the purchase price by as much as 35%. (See **EXHIBIT 2** ¶ 16.) It also is conservative because the proposed settlement class is temporally unlimited and would include purchases dating further back than 2007.

[2] It is curious that the parties have selected Epiq Systems, Inc. as the claims administrator based on its response to a request for proposal (see Doc. #160-1 at 9-10), but they have not provided any information on what those administrative services – including notice publication, extensive document review and medical analysis related to injury and death claims – are expected to cost. Similar services in another contaminated pet food case totaled **$3.6 million** (see **EXHIBIT 3** at 5), which would almost completely wipe out the remaining amount of the settlement fund after attorneys' fees, litigation expenses and incentive awards are deducted.

(Doc. #160-1 at 5 (emphasis added)), even the putative class representatives do not believe that the settlement will be adequate to pay these claims. In recent comments about the proposed settlement, named plaintiff Terry Safranek wrote:

> According to our lawyers and [Nestle Purina's], the amount should be able to pay out at 100%. **Not that I believe that for one single second.**

(**EXHIBIT 4** at 8 (emphasis added).)[3]

The parties and their attorneys likely will tout the significance of injunctive relief to justify settlement approval, but this victory is hollow because the Waggin' Train Defendants months ago implemented the quality assurance practices called for under the proposed settlement when they brought the dog treats back to the market. (See **EXHIBIT 5**.) And even if these quality assurance practices could be credited as an achievement of the settlement, the "value" assigned to this injunctive relief should have little, if any, bearing on the Court's preliminary approval determination:

> The Court has not ignored Plaintiffs' claims for injunctive relief mandating changes to the marketing and labeling of Truvia products or the changes Cargill has agreed to make under the settlement. Nevertheless, the Court believes those changes add little to the "valuation" mix for two reasons. First, consumer class actions are primarily driven by the recovery of damages and attorneys' fees. Second, the proposed changes will not aid the class in any significant way, as its members have (allegedly) already been "deceived" by the labeling and marketing of Truvia.

Martin, 295 F.R.D. at 384 n.4; see also Synfuel Techs., 463 F.3d at 654 ("The class complaint specifically sought '[a] sum of money that represents the difference between the illegal penalties imposed on the Plaintiff and the Class and the amount that should have been imposed.' The fairness of the settlement must be evaluated primarily based on how it compensates class members for these past injuries.").

[3] This exhibit highlights generally the insufficiency of the proposed settlement and the public criticism that it has received to date.

The parties suggest that the settlement is reasonable in light of the "significant hurdles," "risks" and "uncertainty" in the litigation, but these concerns exist in every lawsuit and the generalities offered by the parties are insufficient to permit the Court to properly evaluate the fairness of the proposed settlement. See Cullan & Cullan, 2014 WL 347034, at *9 ("[T]he parties have presented only generalities about the relative strengths and weaknesses of the parties' respective positions. . . . Accordingly, the court is unable to make any reasoned assessment of the value of the putative class members' claims."). It also is suggested that the settlement is reasonable simply because the parties and their attorneys have reached that conclusion, but these opinions cannot substitute for the Court's own heightened, fiduciary-like scrutiny. See Martin, 295 F.R.D. at 386 ("At bottom, the Court knows nothing about this case beyond the cursory record presented with the instant Motions. And yet the parties seek the Court's blessing over their settlement, based primarily upon their *ipse dixit*—the proposed settlement is fair, adequate, and reasonable because they say so. The Court cannot approve a settlement on such a rocky foundation.").

The parties note that their counsel have significant experience in complex litigation, including an MDL case regarding contaminated pet food styled In re Pet Food Products Liability Litigation, Case No. 07CV2867 in the United States District Court for the District of New Jersey. What the parties neglect to mention, however, is that the settlement reached in that case was vacated on appeal to the Third Circuit because the parties and their counsel failed to provide any justification for capping the recovery of "purchase claims" (i.e., claims for recovery of the purchase price of the subject products). In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 353-56 (3d Cir. 2010). The very same problem exists in this case because the proposed settlement limits the recovery for purchase claims to an aggregate maximum of $650,000 but does not provide any

justification for this cap.[4] This limited recovery for purchase claims is especially troublesome because the bulk of the damages in this case – exceeding $1 billion – are derived from the purchase of the subject products.[5]

In addition to these glaring deficiencies, the parties have failed to provide other basic, but crucial, information related to the proposed settlement. For example, the parties have not provided any estimate (let alone evidence) of the expected number of class members, nor have they provided any evidence regarding the value of claims other than the purchase claims (i.e., claims for recompense of pet injuries, deaths and health screenings). Without this additional information, it is "nigh impossible for this Court to compare the value of the proposed settlement with a reasonable estimate of the class's likely recovery." Martin, 295 F.R.D. at 385.

Because the parties have not given the Court any information that would allow it to properly value the claims in the case or to sufficiently assess the reasonableness of the proposed settlement, the Court cannot grant preliminary approval of the settlement. See, e.g., Eubank, 2014 WL 2444388, at *11 (reversing approval of class settlement because district judge did not "estimate the likely outcome of a trial, as he should have done in order to evaluate the adequacy of the settlement"); Sutton, 2002 WL 1794048, at *1 ("Class counsel has failed to demonstrate

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[4] The parties' Memorandum of Law states that recovery for "purchase claims" is capped at $650,000. (See Doc. #160-1 at 6-7.) The Stipulation of Settlement, however, provides that the purchase claims are capped at $700,000. (See Doc. #158-1 at 16, § II.D.2.) For purposes of these objections, Ms. Curts will use the figure discussed in the parties' Memorandum of Law. As a practical matter, the difference is immaterial because both figures are grossly inadequate to compensate the purchase claims.

[5] Plaintiffs in this case allege that "the damages suffered by Plaintiffs and the Class may be measured, at a minimum, by each dollar paid for the Jerky Treats" (Doc. #156-1 ¶ 113). This amounts to more than $1 billion, and if the class stands even a 1% chance of victory at trial, the expected return on continued litigation of the purchase claims would be valued at more than $10 million. A settlement of the purchase claims that is artificially capped at $650,000 is not a fair or reasonable resolution of these claims by any measure.

why the proposed settlement is fair, adequate, and reasonable. Plaintiffs simply have not given us sufficient information to enable us to make a reasonable assessment of the damages to the plaintiffs, the evidence supporting and rebutting plaintiffs' claims, or the percentage of actual damages each class member would recover if the settlement were approved.").

B. The Proposed Nationwide Class Settlement Does Not Fairly, Adequately or Reasonably Compensate the Claims of Missouri Consumers

The proposed settlement is not fair, adequate or reasonable as a whole, but the concerns with the settlement are magnified when Ms. Curts' claim under the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 et seq., is specifically considered. The Curts lawsuit has been on file in Missouri since February 2013 and is much more developed than this case: Ms. Curts has defeated a motion to dismiss, the parties have served and responded to extensive written discovery, Ms. Curts has been deposed, and the issue of class certification is now pending for the court's determination after extensive legal briefing and oral argument. This procedural posture gives Ms. Curts and her attorneys a unique perspective on the factors weighing against the proposed settlement in this case.

At the outset, it should be noted that Ms. Curts has a strong consumer fraud claim under Missouri law. There is substantial decisional authority in Missouri to support class certification of her MMPA claim.[6] And if a class is certified, Ms. Curts will be entitled to recover economic damages on behalf of the Missouri class under a benefit-of-the-bargain theory, which "compares the actual value of the item to the value of the item if it had been as represented at the time of the

[6] See Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 81-85 (Mo. Ct. App. 2011); Plubell v. Merck & Co., 289 S.W.3d 707, 711-16 (Mo. Ct. App. 2009); Craft v. Philip Morris Cos., 190 S.W.3d 368, 378-88 (Mo. Ct. App. 2005); see also In re Celexa & Lexapro Mktg. & Sales Practices Litig., MDL No. 09-02067-NMG, 2014 WL 108197, at *7-8 (D. Mass. Jan. 10, 2014). The decision in Celexa is significant because it demonstrates that claims under the MMPA can be certified for class treatment even when consumer protection claims under other states' laws (e.g., Illinois and New York) cannot. Celexa, 2014 WL 108197, at *7-9.

transaction" and is "applicable in MMPA cases to meet the element of ascertainable loss." Plubell, 289 S.W.3d at 715. Ms. Curts seeks to recover the entire purchase price of the subject products because they were contaminated, potentially lethal and therefore worthless.[7]

As discussed above in Footnote 1, Defendants sold more than $7.5 million worth of dog treats in Missouri in 2011 and 2012 combined. (See **EX. 1**, ¶ 5.) Over the span of a five-year class period, the members of the Missouri class stand to recover more than $20 million in base damages under a benefit-of-the-bargain model.[8] In addition, the Missouri class will be able to recover punitive damages and attorneys' fees under the MMPA, see Mo. Rev. Stat. § 407.025.1, as well as pre-judgment interest at the statutory rate of 9% on the liquidated amount of the purchase damages, see Mo. Rev. Stat. § 408.020. Altogether, the damages for the Missouri class members could conservatively total **$50 million or more**.[9] On the other hand, the proportionate share of the allocated settlement funds for the purchase claims of Missouri consumers ($650,000 adjusted for Missouri's population that is less than 2% of the national population) would amount to a mere **$13,000**. This settlement amount cannot possibly be considered fair or adequate to compensate the Missouri class members for their MMPA claims.

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[7] Defendants have admitted in the Curts Lawsuit that the benefit-of-the-bargain theory is applicable and that it compensates for the entire product purchase price of the subject products. Specifically, Defendants' Notice of Removal stated without reservation that "[t]he MMPA allows plaintiffs to seek damages for the difference between the actual value of the Jerky Treats and what their value would have been if they had been as represented." (See **EXHIBIT 6** at 4, ¶ 9.)

[8] The sales figures provided by Defendants reflect their own revenues; the retail mark-up for pet treat products (i.e., the price that consumers paid and are entitled to recover) is typically as much as 35% greater than the manufacturers' sales figures. (See **EX. 2**, ¶ 16.)

[9] Empirically, MMPA class actions have been able to recover much more than their nationwide counterparts. In the Vioxx litigation, for example, Missouri consumers recovered a $220 million common fund for purchase claims, while the MDL proceeding asserting those same claims for consumers in all states other than Missouri was settled for only $23 million. Compare http://www.vioxxmoclass.com with https://www.vioxxsettlement.com/FAQ.aspx.

In Cullan & Cullan, the court denied preliminary approval of a proposed nationwide class settlement under circumstances similar to this case where competing class actions appeared to have been sold short, noting that "[t]he pending similar cases in other districts raise the specter of a 'reverse auction' type of situation." Cullan & Cullan, 2014 WL 347034, at *10; see also Manual for Complex Litigation (Fourth) § 21.61 (2004) (identifying "recurring potential abuses" in class settlement, including "a 'reverse auction,' in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees)"). There also is ample authority in the Northern District of Illinois to support denial of preliminary approval when competing state-specific class actions are not sufficiently compensated. See, e.g., Kessler v. Am. Resorts International's Holiday Network, Ltd., Nos. 05 C 5944, 07 C 2439, 2007 WL 4105204, at *6-7 (N.D. Ill. Nov. 14, 2007); Carnegie v. Household Int'l, Inc., 371 F. Supp. 2d 954, 957-59 (N.D. Ill. 2005); Odon USA Meats, Inc. v. Ford Motor Credit Corp., No. 93 C 6848, 1994 WL 529339, at *9 (N.D. Ill. Sept. 27, 1994).

The Seventh Circuit addressed this precise scenario in Mars Steel Corp., where it wrote:

> The fact that Mars charged only a RICO violation would be relevant if the omission of other theories had caused Torshen to scale down his settlement demand; **the settlement would not be fair if it yielded the plaintiffs less money than they could reasonably have hoped to obtain in the parallel state court suit, where other theories had been advanced**.

Mars Steel Corp., 834 F.2d at 683 (emphasis added). Here, Judge Posner's words could not be more true; although there is no MMPA claim asserted in this case and no Missouri resident is included as a named plaintiff, the proposed class settlement attempts to extinguish that claim and bind the rights of all Missouri consumers for the incredibly low price of only $13,000. The Court should not approve the settlement, even preliminarily, under these circumstances.

II. The Court Should Deny the Parties' Request for Certification of a Nationwide Class

Even if the Court were inclined to preliminarily approve the proposed class settlement, the parties have not met their burden to justify certification of the nationwide class that would be required to effectuate the settlement. Although the proposed settlement eliminates the need for a manageability analysis, all other requirements for class certification take on added significance in this context: "other specifications of [Rule 23] – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); see also Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (7th Cir. 2013) (the requirements of Rule 23 are of "vital importance in the settlement context"). Here, the Court should not certify a nationwide class because the adequacy requirement of Rule 23(a) and the superiority requirement of Rule 23(b)(3) are not satisfied. At the very least, the Court should carve the Missouri consumers out of the parties' proposed settlement class and leave the prosecution of the Missouri claims to be handled in the Curts Lawsuit.

A. The Proposed Nationwide Class Does Not Satisfy Rule 23(a)'s Adequacy Requirement

The Supreme Court's decision in Amchem holds that "although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated." Amchem, 521 U.S. at 609. One prerequisite for certification under Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequate representation is . . . the capstone of the Rule 23(a) requirements: it ensures that the class's champion will pursue its interests sufficiently well so as to produce a judgment that can fairly bind all members of a group who cannot appear before the court individually." 1 William B. Rubenstein, Newberg on Class Actions § 3:50 (5th ed. 2011).

This adequacy requirement is not judged merely with respect to "the class as a whole: where there are significant differences among subgroups within the class, 'the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.'" Smith v. Sprint Commc'ns Co., 387 F.3d 612, 614 (7th Cir. 2004) (quoting Amchem, 521 U.S. at 627). Here, the strength of Ms. Curts' MMPA claim and her ability to certify that claim as a class action under Missouri law is a marked difference from the "significant hurdles" and "uncertainty" that Plaintiffs admittedly face in this case on the issue of class certification. (See Memorandum of Law, Doc. #160-1, at 12-13.) And the likelihood that Plaintiffs in this case would be unable to certify a nationwide class for trial demonstrates that Plaintiffs are not adequate to represent the interests of Ms. Curts and other Missouri consumers in settlement negotiations:

> The nationwide class, in contrast, has not been and cannot be certified for trial . . . The nationwide class plaintiffs thus entered negotiations in what the Amchem court describes as a "disarmed" state, unable to "use the threat of litigation to press for a better offer," Amchem, 521 U.S. at 621 . . . —**not a good position from which to represent the interests of parties that do wield such a threat**. . . . We agree with the intervenors that they are inadequately represented by the settling plaintiffs.

Smith, 387 F.3d at 614-15 (emphasis added).

The conflict of financial interests between the Plaintiffs in this case and the Missouri consumers in the Curts lawsuit is manifest in the allocation of settlement proceeds. In particular, the proposed nationwide settlement allocates settlement proceeds between "injury claims" and "purchase claims," placing no limitations on recovery for "injury claims" while arbitrarily capping recovery for "purchase claims" at $650,000. This allocation works to the disadvantage of the Missouri consumers who have the ability under Missouri law to recover tens of millions of dollars in economic damages arising from their purchase of Defendants' products. The zero-sum

game of allocating settlement funds is the classic conflict scenario that precludes the Plaintiffs in this case from representing the divergent interests of the Missouri consumers in a nationwide class. See, e.g., Amchem, 521 U.S. at 627 (finding inadequate representation by named plaintiffs when "the terms of the settlement reflect essential allocation decisions designed to confine compensation"); ARC of Wash. State, Inc. v. Quasim, No. C99-5577FDB, 2001 WL 1448523, at *4 (W.D. Wash. Oct. 26, 2001) (finding inadequate representation when named plaintiffs and class members "are potentially divided by disagreements as to how to allocate such funds").

Because the named plaintiffs in this case are negotiating in a "disarmed" state and have divergent interests from the Missouri class with respect to the allocation of settlement funds, they cannot meet their burden on the adequacy prerequisite for certification of a nationwide class. Accordingly, the Court should deny the parties' request for class certification.

B. The Proposed Nationwide Class Does Not Satisfy Rule 23(b)(3)'s Superiority Requirement

Rule 23(b)(3) permits class certification only if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The factors relevant to the Court's consideration of this requirement include: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

Many of these factors do not favor certification of a nationwide class that would subsume the separate, state-specific class action on behalf of Missouri consumers in the Curts Lawsuit. With regard to factors (a) and (c), a federal judge in the Western District of Missouri recently issued an order denying a motion to transfer in litigation against a different manufacturer of

Chinese-made dog treats based on the finding that claims under the MMPA are unique from other consumer protection claims and are most appropriately litigated in a Missouri forum:

> As illustrated above, however, this Missouri putative class — because they do not have to prove reliance and intent — will not face these issues. . . . The class certification issues involved in this case will require the Court to apply Missouri substantive law, which this Court may be more adept at applying. . . . More importantly, the conduct that could potentially justify class certification of an MMPA class in this case may or may not support class certification for the nationwide class, the California class, the Pennsylvania class, and the North Carolina class. Consequently, the Court finds that transfer under either the first-filed rule or Section 1404(a) is inappropriate.

(See Order, attached as **EXHIBIT 7**, at 9.)

And with regard to factor (b), as discussed above, the Curts Lawsuit has been more fully developed than this case through extensive discovery and motion practice, which also weighs against certification of a nationwide class that would subsume the Curts Lawsuit. See Reynolds, 288 F.3d at 283-84 (questioning propriety of nationwide class certification that would preclude further litigation of well-developed lawsuit in state court). Under these circumstances, the Court should deny certification of a nationwide class action because it is not a superior method for adjudicating the MMPA claims asserted in the Curts Lawsuit.

Conclusion

The proposed nationwide class settlement cannot be preliminarily approved because it does not reasonably compensate the class as a whole or the class of Missouri consumers for the economic damages they sustained from purchase of Defendants' products. A nationwide class cannot be certified because the named plaintiffs are not adequate representatives of the Missouri subgroup, nor is the proposed nationwide class the superior method of adjudicating the Missouri consumers' MMPA claims. For these reasons, the parties' motion for preliminary approval and class certification should be denied.

Respectfully submitted,

CONNIE CURTS,

By: */s/ John R. Schleiter*
One of Her Attorneys

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CERTIFICATE OF SERVICE

I, John R. Schleiter, an attorney, hereby certify that on June 10, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record in this matter.

By: */s/ John R. Schleiter*

EXHIBIT 1

Cummings Declaration in Curts Lawsuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

CONNIE CURTS, on behalf of herself and all others similarly situated, Plaintiff, v. WAGGIN' TRAIN, LLC and NESTLE PURINA PETCARE COMPANY, Defendants.	Case No. _____ [Circuit Court of Jackson County Case No. 1316-CV02706]

DECLARATION OF STEPHANIE CUMMINGS IN SUPPORT OF REMOVAL

I, Stephanie Cummings, declare as follows:

1. I am a resident of the State of Missouri and an employee of Nestle Purina PetCare Company ("Nestle Purina") at its corporate headquarters in St. Louis, Missouri. I submit this Declaration in Support of Defendants' Notice of Removal.

2. I am Manager in the Order, Revenue and Management Department for Nestle Purina and have worked at Nestle Purina for more than twenty years.

3. The statements in this declaration are based on my personal knowledge of the facts set forth herein and my review of records made and maintained by Waggin' Train, LLC as part of its regularly conducted business activities. Waggin' Train, LLC ("Waggin' Train") is a wholly owned subsidiary of Nestle Purina. Waggin' Train distributes "Waggin' Train" and "Canyon Creek Ranch" brand jerky treats for dogs.

4. Over the past several years, Waggin' Train has sold Waggin' Train and Canyon Creek Ranch brand jerky dog treats to retailers in Missouri.

5. In fiscal years 2011 and 2012 combined, Waggin' Train revenue from sales of Waggin' Train and Canyon Creek Ranch brand jerky dog treats in Missouri exceeded $7.5 million.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of March, 2013, in St. Louis, Missouri.

Stephanie Cummings

EXHIBIT 2

Chichili Declaration
in Harmon v. Milo's Kitchen, LLC

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MARY HARMON, on behalf of herself and all others similarly situated, Plaintiffs,	)	Civil Action No.:
v.	)	
MILO'S KITCHEN, LLC and DEL MONTE CORPORATION d/b/a DEL MONTE FOODS	)	

DECLARATION OF DEEPAK CHICHILI

Pursuant to 28 U.S.C. §1746, Deepak Chichili declares and states, as follows:

1. I am the Director Finance Pet Products for Del Monte Corporation ("Del Monte"). I make this Declaration based upon my personal knowledge and I am competent to testify to the matters stated below.

2. Del Monte Corporation is a Delaware corporation with a principal place of business in California.

3. Del Monte Foods Company is a dissolved Delaware corporation that maintained a principal place of business in California.

4. Milo's Kitchen, LLC ("Milo's Kitchen") is a limited liability company organized and existing under the laws of the state of Delaware. It maintains a principal place of business in California. Milo's Kitchen is a wholly-owned subsidiary of Del Monte Corporation.

5. As a brand, Milo's Kitchen is comprised of five (5) pet treat products that are sold in packages of various sizes. Those products are: Chicken Jerky, Chicken Grillers, Beef Jerky, Beef Sausage Slices with Rice, and Chicken Meatball.

6. Milo's Kitchen Chicken Jerky was launched in March of 2011. Milo's Kitchen Chicken Grillers was launched in March, 2012.

7. In my position Director Finance Pet Products, my duties and responsibilities include analyzing and reporting on Del Monte pet brand's financial information, including its net sales pertaining to various Del Monte brands, one of which is Milo's Kitchen.

8. In the ordinary course of its business, Del Monte gathers, records, and maintains data pertaining to the sale of its products to its customers. This data is maintained exclusively by Del Monte.

9. Del Monte's customers include retailers such as Wal-Mart, Sam's Club, B.J.'s Wholesale Club, Target, Petco, PetSmart, and a variety of supermarkets.

10. Because Del Monte does not sell directly to consumers, it does not possess sales data on a state-by-state basis.

11. Therefore, for purposes of this Declaration in support of Del Monte's Notice of Removal, I was asked to gather and state the total Net Sales of Milo's Kitchen Chicken Jerky and Chicken Grillers in the United States, from the dates of launch of those products to January 31, 2013.

12. "Net Sales" is the dollar amount of a particular product sold to customers after deduction for discounts, customer returns, allowances for damaged or missing goods, fees, trade promotional expenses and write-offs. Net Sales is distinguishable from "Retail Sales" in that Net Sales is the dollar amount of represent sales of product to Del Monte's customers, while Retail Sales is the dollar amount of product sold at the retail level to consumers. Stated differently, Retail Sales account for retailer mark-up and represent the total amount actually expended by consumers on a product.

13. As a result of my review and analysis of sales data gathered, recorded and maintained by Del Monte in the ordinary course of its business, I state that the U.S. Net Sales of Milo's Kitchen Chicken Jerky for the fiscal year 2011 was $2,721,405. For the fiscal years 2012, Milo's Kitchen Chicken Jerky Net Sales were $26,915,515. Finally, from the beginning of fiscal year 2013 through January 31, 2013, its Net Sales have thus far totaled $23,116,311. Thus,

the total Net Sales for Milo's Kitchen Chicken Jerky for the period March 2011 to January 31, 2013 are $52,753,231.

14. The U.S. Net Sales of Milo's Kitchen Chicken Grillers for the fiscal year 2012 was $2,661,238. From the beginning of fiscal year 2013 through January 31, 2013, Chicken Grillers' Net Sales totaled $7,288,934. The total Net Sales for Milo's Kitchen Chicken Grillers for the period March, 2012 to January 31, 2013, therefore, was $9,950,172.

15. Thus, total Net Sales of Milo's Kitchen Chicken Jerky and Chicken Grillers from product introduction to date totals $62,703,403.

16. Typically, retailers apply an average margin of 30% to 35% on pet treats, including Milo's Kitchen Chicken Jerky and Chicken Grillers. Thus, total Retail Sales of Chicken Jerky and Chicken Grillers from their respective introductions into the marketplace to January 31, 2013 would have been between approximately **$89,576,290** to **$96,466,774**.

17. Based upon my experience in analyzing financials related to Del Monte pet foods and treats, Net Sales and Retail Sales of Milo's Kitchen Chicken Jerky and Chicken Grillers within the state of Missouri are not disproportionate to its percentage of the total U.S. population.

18. It is my understanding based upon 2010 U.S. Census data that Missouri represents approximately 1.94% of the entire U.S. population. Thus, total Net Sales of Milo's Kitchen Chicken Jerky and Chicken Grillers in Missouri from the introduction of those products into the marketplace to January 31, 2013 was approximately $1,216,446.02 and Retail Sales were approximately $1,737,780.03 to $1,871,455.42.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Deepak Chichili

EXHIBIT 3

VIN News Article re Claims Administration Costs in In re Pet Food Prods. Liab. Litig.

Pet owners receive $12.4 million in melamine case

October 12, 2011
By: Edie Lau
For The VIN News Service

Owners of animals affected by food contaminated with melamine received slightly more than half of the money in a $24-million fund established to settle legal claims stemming from the largest pet food recall in North America.

Like most pet owners affected by the melamine contamination and pet food recall of 2007, Karl Rahder was reimbursed for about half of his claimed expenses under a $24 million class-action court settlement. His cat, Inca, survived, but never regained full vigor. Photo courtesy of Karl Rahder.

The balance of the fund went to lawyers' fees and expenses, claims administration and public notices.

In all, $12,357,277 was paid on 20,229 claims from the United States and Canada, according to information provided by the claims administrator, the accounting firm Heffler, Radetich & Saitta LLP in Philadelphia.

A total of $27,793,975.36 in claims was judged eligible for compensation. However, the collective payout was significantly less — amounting to 45 cents on the dollar. The claims administrator cited several factors for the reductions: Some claims had been reimbursed before the court action. Some exceeded the $900 limit for undocumented damages. Most significantly, most were reduced pro rata because the fund was not big enough to pay all approved claims in full.

The claims concerned pets that ate cat and dog food tainted with melamine and cyanuric acid. Unscrupulous suppliers in China added the contaminants in trying to inflate the apparent protein levels in wheat gluten and rice protein concentrate. The adulterated ingredients ended up in foods and treats made by 12 different manufacturers, according to court documents.

Discovery of the contamination led in 2007 to the biggest pet food recall in history, involving about 180 brands and some of the most prominent names in the business — Hill's Pet Nutrition, Mars Inc., Del Monte Pet Products, Nestle Purina PetCare Co., The Iams Co. and Procter & Gamble among them — as well as dozens of retailers, including Wal-Mart, Target, PetSmart, Petco and Costco. The majority of products came from Menu Foods, a Canadian company contracted to manufacture numerous brand-name and private label pet foods.

Tens of thousands of animals ate the poisoned foods, and many became sick, some fatally. The combination of melamine and cyanuric acid forms crystals in the kidneys, potentially leading to renal disease and renal failure.

The scandal led to the criminal prosecution of the American company ChemNutra, Inc., and its owners for their role in importing the tainted ingredients. They pleaded guilty last year to distributing adulterated food and selling misbranded food, both misdemeanors.

On the civil-court side, more than 100 class-action suits arose out of the incident. Those cases were consolidated and addressed by the $24 million settlement. Although court documents and related information are available online, information on how the fund was distributed is not posted publicly.

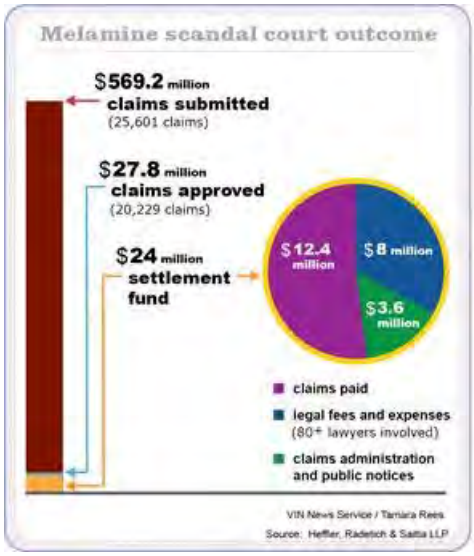
That's not unusual, according to Timothy Eble, a class-action expert in South Carolina who was not involved in the pet food case. "Typically the manner in which payments generally will be calculated is available through the court but the amounts actually to be disbursed to any individual would not necessarily be available," he said.

The VIN News Service obtained details on how settlement funds were disbursed by contacting Russell Paul of Berger & Montague, P.C., of Philadelphia, co-lead counsel for the plaintiffs. Paul, in turn, requested the information from the claims administrator.

Several claimants emailed the VIN News Service to express disappointment with the size of their shares of the settlement. Paul said he, too, has heard from a number of chagrined pet owners. "People want all of their money," Paul acknowledged.

Count Elise Maitland of Victoria Harbor, Ontario, among the dismayed. Maitland lost her collie-Labrador mix Michigan to kidney failure after he ate tainted Ol' Roy canned food with gravy. "The $500 I received did not even pay the vet bill, let alone a new pet," she fumed. "...I feel we were extremely ripped off."

Asked if, in retrospect, he thought that the settlement fund was inadequate, Paul replied, "We pushed and pushed and pushed, and feel we got the maximum we could get."



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Paul described the case as extremely complicated. The litigation involved more than 80 lawyers for plaintiffs in two countries, more than two dozen defendants and several appeals that stalled the payout.

"It was three to four years of bitter fighting, from District Court up to the 3rd Circuit (Court of Appeals) and back to the District Court," Paul said.

Evaluation of claims likewise was complex, he noted. "Each one had to be individually analyzed, and often veterinarians had to be called," Paul said. "The possibility was rife for fraud."

Sherrie Savett, who served as co-lead counsel with Paul, added that even the public-communications aspect of the settlement wasn't simple, involving the placement of notices in multiple periodicals in two countries, and creation and maintenance of the website.

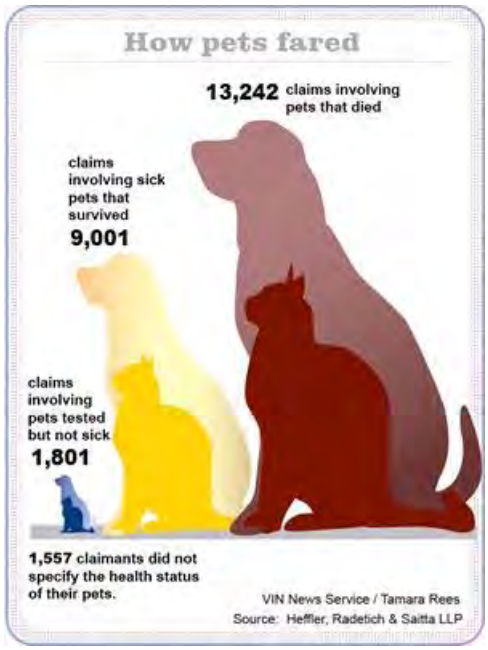
Paul said the fact that plaintiffs did not receive 100 percent of their damages is not unusual in class-action suits.

Eble concurred. "If they got half of their actual damages, that's actually a pretty good result in a class action," said Eble, who operates a website intended as a neutral source of information for the public about class-action issues.

"What you're talking about with 20,000 people, most would have claims that vary from $200 to $3,000, depending on what the specific facts were," he explained. "They (individually) would not have been able to hire a lawyer to go through discovery and pursue the case for less than the value of the claim."

Paul said he understands how deeply the contamination afflicted pet owners. "We (collectively) spent thousands of hours uncompensated talking to aggrieved pet owners just because they needed to talk," he said. "It was a very tragic situation. Tragic. No amount of money can make certain people whole. There are elderly people who lost a pet who are devastated. I spoke to one who is on antidepressants who won't get another dog because he doesn't want to outlive it."

Maitland, a single mother of four, likely represents the feelings of many pet owners when she says she regarded her dog Michigan as family. She adopted him when he was a year old. She was dubious at first about having a dog, but he immediately was so protective of her children — warding off strangers, for example, when the kids were in the car — that Maitland became equally protective of the dog.



Click here for larger view

Michigan was 13 when melamine wound up in his Ol' Roy, a private-label food sold by Wal-Mart. She said the first indication that something was wrong was that Michigan lost control of his bowels. By the second night, he was leaking bloody fluids. Maitland and a friend drove Michigan at 1 in the morning to an emergency clinic 35 to 40 minutes away.

"Just walking into the emergency clinic, right on the spot, it was $500," she recalled. "I had to borrow that money from my friend that was there. I said, 'We can't even get home because my car's on empty.' They took $25 off (the bill) so we could get home."

Maitland ended up with about $1,000 in veterinary expenses from two clinics. When she retrieved Michigan after several days of medical care, it was with the thought that he should die at home. But he didn't, not right away. He actually regained strength, although Maitland said Michigan never fully healed. He died 14 months after the poisoning came to light.

Maitland submitted a claim for $1,072.87. In August, she received a check for $587.

"I don't feel like I got anything out of this," she said. "I feel like it was a four-year wait and I think we all got ripped off."

Like Maitland, Karl Rahder of Naperville, Ill., received a check this summer amounting to about half of his claim, which totaled more than $1,500.

Rahder's cat, a traditional sealpoint Siamese named Inca, became sick from eating tainted Iams cat food. Rahder, a writer and teacher on international relations and global affairs, recalled that Inca began vomiting and having diarrhea, stopped eating and became listless around February 2007 — several weeks before the recall began.

Her condition "caused me a great deal of worry," Rahder said in an interview by email. "I was afraid she was going to starve to death or die from renal failure of some kind. A quick check of various Internet forums revealed that a large number of people were experiencing exactly the same thing and were beginning to panic."

By the time U.S. Food and Drug Administration (FDA) investigators determined the source of the problem, Inca's health had deteriorated sharply. She

spent four or five days in the hospital “close to death,” Rahder recounted. Inca recovered but has never been the same. “Since then, she has been weaker and more fragile,” Rahder said.

His share of the court settlement arrived this summer. He called the payment “quite welcome” if not entirely gratifying.

“It’s hard to say how satisfied we were with the outcome, considering that the payment was reduced by over half and that it took so long for the issue to be resolved,” he mused. “The larger issues, including toxic additives in pet food and a lack of government oversight, certainly trouble me.”

Since the incident, the FDA has taken steps to more closely monitor pet-food safety. In August, the agency announced the establishment of a Pet Event Tracking Network. PETNet, as it’s nicknamed, is a secure, web-based system by which federal, state and territorial agencies can share information about incidents involving pet food, such as illnesses associated with consumption.

For those who lost animals to the melamine scandal, of course, no reforms or compensation will bring back the pets.

More than half of claims involved animals that were fatally poisoned: 13,242 claimants indicated that their pets died. Another 9,001 indicated that their pets were sick but survived; 1,801 indicated that they took their pets for testing after learning about the recall but the pets did not become sick; and 1,557 claimants did not specify the condition of their pets.

An analyst from the claims administration office noted that the claims likely do not fully represent all the animals that were harmed. “The number of claims received in class actions is usually only a percentage of those parties injured,” he wrote. “Therefore, the number of claims received is probably not the total that were injured.”

Many owners whose pets died felt their animals were irreplaceable, judging from some submissions. According to the analyst, claim submissions — not all of which were approved — totaled more than $569 million. One claim alone was for more than $500 million, “almost all of which represented that claimant’s view about the value of her lost pet,” Savett said.

At the other end of the spectrum, someone submitted a claim for 30 cents. The nature of that claim, as with all the claims, is confidential, Paul said. The median claim was $951.46.

Among approved claims, the largest disbursement was $21,986. The smallest was 33 cents. The median disbursement was $430.

The settlement agreement set limits on payments in certain categories. Payment of eligible but undocumented claims was capped at $900 per claimant. Reimbursements for screening and testing of animals that ate tainted food but proved not to be ill were limited to a total of $400,000. Payments for pet food expenses were limited to $250,000 in aggregate.

According to the claims analyst, most claims fell under the “other economic damages” category. Owing to the number of eligible submissions, those claims were paid at a pro rata share of 52.1 percent. Pet food reimbursement claims were paid pro rata at 49.5 percent. Healthy screening and testing claims were paid at 100 percent. Once all qualified healthy-screening-and-testing claims were satisfied, money remaining in that portion of the fund was applied to qualified claims for other economic damages, Paul said.

Savett said lawyers for the class negotiated liberal claims procedures, such as the allowance of up to $900 in undocumented expenses. Those generous guidelines made more claims eligible for payment, she said — which, overall, ended up reducing the amount of money available for any given claim.

Eble, the class-action expert, said such suits have value beyond the monetary compensation. “They do modify corporate behavior. They do prevent theft,” Eble said. “So many of these cases ... they accomplish a goal to serve a public purpose. You don’t have to worry about getting dog food in the future that is contaminated with melamine because now they know they have to test for it. It’s too expensive not to.”

URL: http://news.vin.com/doc/?id=5139625

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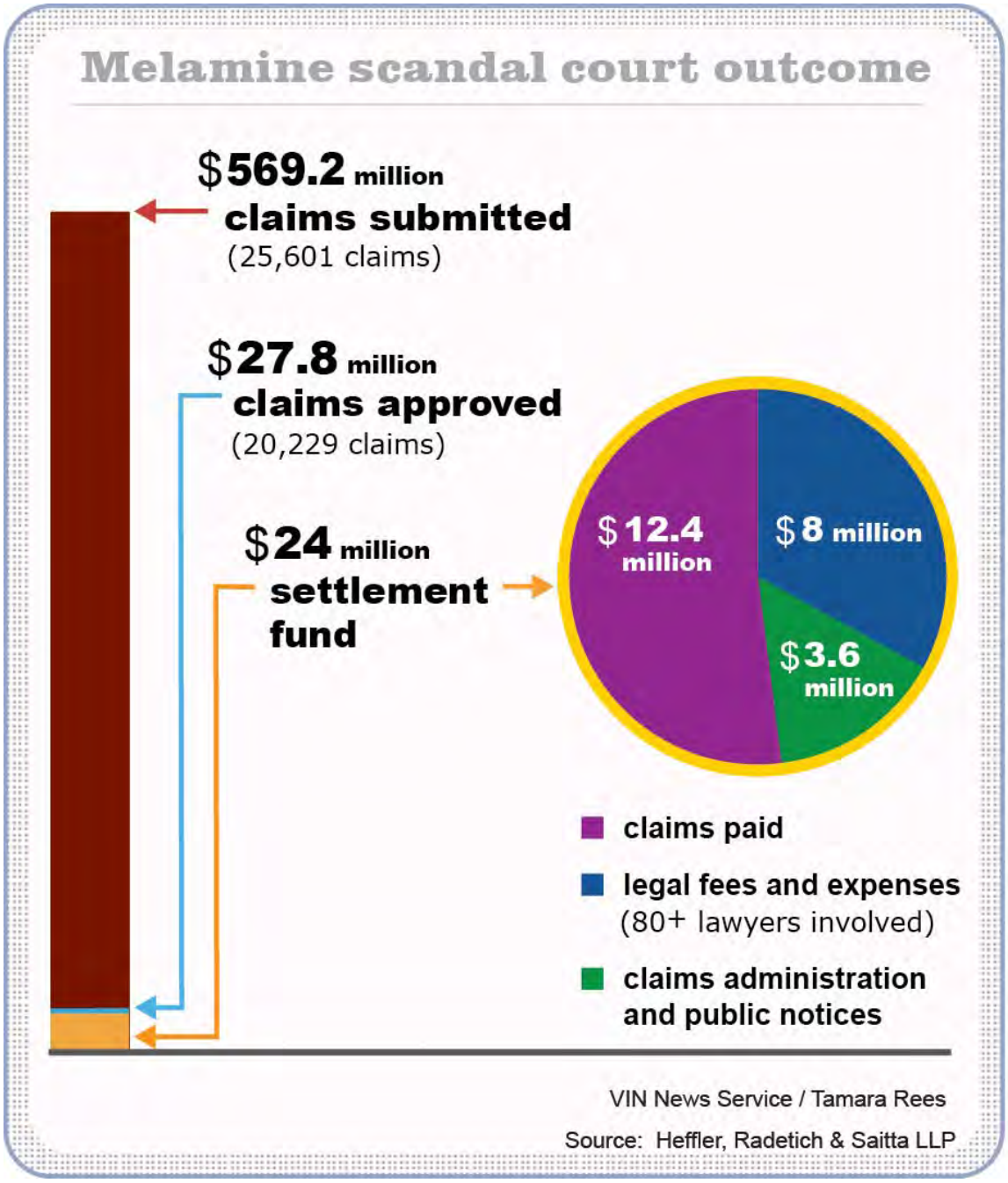
Melamine scandal court outcome
$569.2 million
claims submitted
(25,601 claims)
$27.8 million
claims approved
(20,229 claims)
$24 million
settlement
fund
$12.4 million
$8 million
$3.6 million
claims paid
legal fees and expenses
(80+ lawyers involved)
claims administration
and public notices
VIN News Service / Tamara Rees
Source: Heffler, Radetich & Saitta LLP

EXHIBIT 4

Commentary on Proposed Settlement

Settlement reached in Nestle Purina jerky pet treat class action lawsuit

A nationwide class settlement was reached yesterday between a group of consumers and Waggin' Train and Nestle Purina PetCare Company.

The settlement creates a settlement fund of $6,500,000 and establishes procedures that would permit consumers to submit claims for monetary relief. The agreement also requires Nestle Purina to undertake enhanced quality assurance measures and modify certain language on its packaging.

Chump change

While $6.5 million may sound like a significant sum to some, in fact it is quite small. Paltry even. Particularly after attorney's fees are paid (up to 33% of the settlement), skimming $2,145,000 off the top leaving $4,355,000.

To understand the insignificance of the settlement it helps to realize that in the last year alone Nestle Purina Petcare's sales were an astounding $12,557,537,002 billion. And their profit? $2,416,758,834 billion dollars – that's with a "b".

Purina, a subsidiary of Swiss food giant Nestlé S.A., is the world's largest pet food producer. Purina products are sold internationally by mass merchandisers, supermarkets, pet supply stores, and online retailers. They market a staggering number of pet treats made in China sold under the names Waggin' Train and Canyon Creek Ranch brands all of which are subject to the claims of the settlement.

Purina's pet treat brands

Apple & Chicken Wraps
Apple Bites Wrapped with Chicken
Apples Wrapped with Chicken
Banana & Chicken Wraps
Banana Bites Wrapped with Chicken
Bananas Wrapped with Chicken
Bananzas
Big Blast
Big Blast – Slims
Cartwheels
Cheese & Chicken
Chew Well
Chicken & Veggie Bites
Chicken & Veggie Bites Recipe
Chicken & Veggies
Chicken and Bananas
Chicken Bites
Chicken Breast Tender Snack
Chicken Chips
Chicken Crispy Puffs
Chicken Jerky Bites
Chicken Jerky Links
Chicken Jerky Sticks
Chicken Jerky Tenders
Chicken Kabobs
Chicken Poppers
Chicken Stix
Chicken Tenders
Chicken Wrapped Big Blast
Chicken Wrapped Rawhide
Chicken Yam Good
Chik'n Biscuits
Chik'n Biscuits Recipe
Country Crunch
Country Ham Glow
Country Style Drumettes
Cowboy Steaks
Crispy Puffs
Drumettes
Duck Jerky Bites
Duck Jerky Sticks
Duck Jerky Tenders
Duck Tenders
Duck Wrapped Big Blast
Duck Wrapped Big Blast Kabob's
Duck Yam Good
Fiddlestix
Franks
Freshies Supreme Clean
Freshies Supreme Green
Glide
Ham It Up
Ham'n Biscuits
Ham'n Biscuits Recipe
Happy Trails to Chew
Healthy Promise
Healthy Promise – Chew Well
Healthy Promise – Shine On
Healthy Promise – Walk Tall
Heart & Eyes

Homestyle Ham
I Yam What I Yam
Jerky Bites
Jerky Sticks
Jerky Tenders
Kabobs
Lassos
Onward – Glow
Onward – Heart & Eyes
PBJ
Poppers
Prime Cutlets
Rawhide Wheels Stuffed with Chicken
Shine On
Supreme Clean
Supreme Green
Trail Chews
Trail Mix for Dogs
Turkey Jerky Strips
Twisters
Walk Tall Ringers
Western Chicken Chips
Western Grill
Western Grill Onward – Glide
Western Styl Kabobs
Western Style Chicken Bites
Wholesome Chicken Jerky Tenders
Wholesome Duck Jerky Tenders
Wrapovers – Apple & Chicken
Wrapovers – Banana & Chicken
Wrapovers – Cheese & Chicken
Wrapples
Yam Good
Yam Good – Wholesome Yams Wrapped with Chicken
Yam Good – Wholesome Yams Wrapped with Duck
Yams
Yams Wrapped with Duck Fillet

It's settled

The cases being settled are *Adkins v. Nestle Purina PetCare Company, Gandara v. Nestle Purina PetCare Company,* and *Matin v. Nestle Purina PetCare Company.*

Class action representatives, many whom I have written about, Dennis Adkins, Maria Higginbotham, Mary Ellis, Dwayne Holley, Kaiya Holley, Deborah Cowan, Barbara Pierpont, Cindi Farkas, Terry Safranek, Elizabeth Mawaka, Robin Pierre, Jill Holbrook, Mary Ellen Deschamps, Tracy Bagatta, Hal Scheer, S. Raymond Parker, Kristina Irving, Kathleen Malone, Jeannie Johnson, Rebel Ely, Rita DeSollar, Faris Matin, Rosalinda Gandara, and Felicita Morales shall each be paid $5,000.

If you have any questions about the settlement of these actions, please contact Thomas Soule at (312) 739-4200, or Phong Tran at (800) 449-4900 at EDELMAN, COMBS, LATTURNER & GOODWIN of Chicago.

Nestle Purina Settlement Press Release

Related posts on Poisoned Pets

Nestle Purina pet food plant plagued by putrid stench for years

Purina, Wal-Mart face another lawsuit over lethal jerky treats from China

Milo's to reformulate jerky treats, while Purina remains loyal to China

They're back! Waggin' Train jerky treats are poised to poison pets again

Comprehensive list of jerky treat class action lawsuits including Waggin' Train, Milo's, Sergeant's & Kingdom Pets

Purina Refuses to Recall Tainted Jerky Treats in Canada Citing Regulatory Inconsistencies

Purina's Waggin Train Chicken Jerky Treat Facts Website Disputed

Vets advise avoiding toxic treats while Purina tells them it's all lies

Class action complaint filed against Nestle-Purina & Walmart over deadly Waggin' Train Dog Treats

Nestle Purina pulls compensation offers off the table" in Waggin' Train deaths

One man's personal story of the loss of his beloved dog Sarge, poisoned by a treat

Mollie Morrissette

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Hi, I'm Mollie Morrissette the author of Poisoned Pets, the independent journal covering the critically under-reported topic of pet food safety. Poisoned Pets does not accept any advertising, endorsements or sponsorships and relies entirely on donations from readers like you. Help support Poisoned Pets by **making a donation today.** Join Susan Thixton of Truth About Pet Food and me at the **Association for Truth in Pet Food**, the only pet food consumer advocacy organization committed to reforming the pet food industry in the U.S.

MAY 31, 2014 · COMMENTS 19

Filed under: Consumer Resources, Legal Help

Tagged: Canyon Creek Ranch, chicken, chicken jerky, China, class action, jerky, lawsuit, Nestle-Purina, treats, Waggin Train

Comments (19)

S. Raymond Parker

We all agree that the settlement is a paltry compared to the money they make. The improved QA/QC was our main goal, and it's easy to be critical when you aren't involved. We have fought this for two years. There is NO smoking gun, no evidence against them. The negativity here seems to be intended for us, and will probably be attached whether it is intended or not. Since the antibiotics were discovered, the FDA is still testing for the adulterant, as is the NYDA.
We got concessions for testing never before accomplished in a suit, and feel that every step above their old procedures is a step forward. The goal was to avoid future illness and death for pets, ours and others. Everyone is entitled to their opinion……..

Reply

Mollie Morrissette

I did not mean to offend you, nor any one of you. I am simply critical of the outcome because in our society pets are seen as property in our legal system. That is not a criticism of any one of the people who have fought this tragic case for over two years. I commend each and every one of you for fighting Nestle Purina, and I certainly never meant to dispairage the efforts you made. We are all in your debt and I am deeply grateful for the work you all did.

I too have worked selflessly on behalf of pet parents who were affected by the jerky treats. I have spent thousands of hours researching, and writing about this one topic. I have read hundreds of documents, hundreds of scientific articles, read coun

medical and toxicology journals, and consulted with leading toxicologists all over the world.

Do you remember the articles I did about you and Sarge? **http://www.poisonedpets.com/one-mans-personal-story-of-the-loss-of-his-beloved-dog-sarge-poisoned-by-a-treat/**

I plan to do a follow-up story and I look forward to your input and hopefully you'll find that I only want the same things that you folks do – a world where our beloved pets will not be poisoned by a pet food or treat.

Reply

S. Raymond Parker

I remember the story well, it took a week and a lot of tears to get it written. Maybe I took the article wrong. If any correspondence will help in this effort, I will participate gladly. Having experienced this horror story gives a different outlook on the results of the settlement. It must be stopped, for our pets and their owners.

Reply

Mollie Morrissette

Thank you! I am so sorry – that you have seen my work in a negative light. You are correct, no one, including myself, can ever fully appreciate the case without being in it. I wrote Terry S. and sent her a rough draft of part of my update on the settlement (the QA/QC aspect of the case). I won't publish anything on the case until I get your all's input. Again, I am deeply sorry if you (or anyone involved) have hurt by my negativity or that I seemed to be disparaging. I never meant it as a criticism of any one of you personally. I have the utmost respect for your tireless efforts to bring this to the public's attention and you all deserve tremendous praise for that. I mean that from the bottom of my heart.

Reply

S. Raymond Parker

I didn't see your work as negative, it seems I took the article as negative to the settlement instead of Nestle-Purina. It is true that this suit should never have been needed. They should have insured all along the Quality and Safety of their products instead of ignoring the consumers. Money and Corporate Greed is their bottom line. Nestle is listed in the top fifteen most deadly corporations in the world, and they are Swiss, meaning they cannot be regulated in the same way as US corps. China is known to be nasty, filthy, and very deadly. Combine the two.
I was not personally offended by this, my skin is very thick. Any offense I took was on behalf of our other Admins and supporters. I have watched them many nights until the wee hours, still working for this cause, most dedicated. Terry, Tracey, and Robin deserve to be commended highly.

Mollie Morrissette

I realize now I was insensitive to the plaintiffs who have given their heart and soul to this cause. And you are so right, those three women (and all the others, including you) deserve the highest praise. I have immense respect for all of you. And I am so sorry.

Peter

The negativity here is intended and directed at "the system," not at the litigants. My point is that now Nestle is using enhanced quality control as an advertisement, as if that is something they should be congratulated for implementing. In reality, they did so because they were forced to, both by the terms of the suit, and, as a issue to facilitate re-introducing the products to the market subsequent to the recall. Quality control, for a product that is intended to be FED to our family members, is not something I would give any manufacturer praise for.

I disagree that negativity "will probably be attached (to the litigants) whether it is intended or not," there is no reason (other than Nesle's) for any consumer to take that conclusion.

Reply

Rita DeSollar

Ah, Molly, I do wish you would have mentioned that in cases involving pets, there is no recovery for pain and suffering. Pets, in this nation, are considered property. They are only worth what you paid for them, paid to have them treated, euthanized, cremated, or would have to pay to replaced. The monetary amount is actually significant when all that is factored in. And more than the monetary recovery, the QA/QC requirements are HUGE. Even your co-member of your association reported, ".. "They won quality control requirements from Purina (something I've never seen before in a settlement) including ongoing testing of treats manufactured in China. And they won clear labeling requirements – Made in China – from Purina."

Note the "something I've never seen before" comment.

I'm very disappointed that this article has such a negative slant to it. And I can't help but wonder why?

Also, revealing your sources would help your article's credibility.

Reply

Mollie Morrissette

My source was the 158 page settlement (link provided) and the annual financial reports of Nestle-Purina. I'm sorry you were disappointed Rita. But perhaps if you read the other articles on my site about Nestle-Purina and the many, many I have written about the jerky treat issue it is clear I am no supporter of the pet food industry.

You see it as a victory and I see the settlement as sad. Sad for many reasons, that pets are considered property, that these pet food manufacturers operate knowing they have limited liability – hence the paltry settlement. And yes, I am perfectly aware of the limited liability for pets, which is why I always advocate changing the legal status of pets.

You wonder why I am negative? Because I see every day how the pet food industry gets away with murder. Purina has no corporate responsibility, instead of caring about the health and safety of your pets they sent 20,000 letters to vets telling their version of the "facts" about the CJTs.

The victory of the "Made in China" on the packaging was already a requirement – they just have to make the font size a little bigger (from 8 point to 10 point?). The testing they are required to do – is not a victory if no one is monitoring the results.

And to put the settlement in perspective: In 2001 Purina's annual advertising budget was $140 million. That same year they spent $30 million advertising on just one brand of pet food alone (Purina ONE), $20 million just on the dog food. So, do I think $6.5 million is a huge settlement? Absolutely not. Is the legal system fair? No.

Rita, I hope you realize that I am on your side. I am one of the staunchest advocates for safe pet food in the country. I do this work for no pay, and I sell nothing on my website and the donations I receive are a pittance. I work very, very hard at what I do. My research is meticulous, so I am surprised that you find my article lacks "credibility".

Reply

Rita DeSollar

I have followed your blog for two years. Ever since my dog Heidi died from eating two Waggin' Train treats that came from my hand. I found APAPTMIC and saw some of your posts there. I didn't always agree with everything you wrote but I never, ever read anything and felt personally insulted.

I left the first comment on your article. I wrote a response in haste and in a highly emotional state. I came to your site expecting to see an upbeat commentary. Reporting that though the Giant may not be slain, we got close enough to get in a good bite!

As I continued to read on, it seemed to me the only real point you wanted to make was that the settlement was "paltry". That it wasn't satisfactory. That it didn't matter.

Reading on to the list of each and every class representative's name, and seeing it being pointed out each would be "paid $5000 – from that "paltry" settlement – you know, the "chump change. Well, that felt like a big ol' kick in the gut to me. I was hurt and disappointed and confused.

Being a writer myself I knew that challenging your sources would be irksome. That comment was left with an attitude of resentment, and it was a cheap shot. I apologize. You were, however, spot on in your response asking "Is the legal system fair?" Followed with a resounding "No." An attorney I used to work with was fond of saying, "Fair? Fair is a place you take your pies!"

Reply

Mollie Morrissette

Rita, I can't tell you how sorry I am. I realize, in hindsight, that in my haste I failed to honor and give my respect to each and every plaintiff for their hard work, dedication and determination to fight Golliath. What you all did was not paltry, it is the legal system that does not recognize animals as valuable as humans. They do not have the same rights, therefore cannot be granted in a court of law anything more than the price their owner paid for them. That is tragic.

In our society, we judge the value of something by it's cost. In law, in order to assess damages, they use currency to decide it's value. If we lived in a world where pets were valued for more than their property value, the settlement would have been commensurate with the loss if it were human life.

So when the world's largest food manufacturer agrees to pay out $6.5 million to settle a pet food complaint involving the illness and death of *thousands of pets* — it is a disgrace. Especially when you consider that in just one year's time, Purina spends around $108 billion on advertising — that's with a "b" (source: **http://www.slideshare.net/caitwen12/iams-media-plan-presentation**).

I wrote you, Terry and Ray privately, and hopefully that I can repair some of the damage by covering the subject of the QA/QC aspect of the suit in detail. I have written Terry about some of the questions I have.

Reply

Terry

The amount of the settlement is the same as if we took it all the way to court and won. A fight for another day is that pets are considered property. The only thing that the court can award is to reimburse expenses. There is no loss of companionship, any pain and suffering, nothing. If we took it all the way, the cost would eat up the whole thing, it would take 2-3 years, and they would not have to agree to any of the mfg changes that are in the settlement. That is IF we could win – it is a very shaky case, we can't even prove our case, or maybe even certify a class. According to our lawyers and NPs, the amount should be able to pay out at 100%. Not that I believe that for one single second…. And I don't care. I would rather that ALL the uncounted victims would step forward to be heard, even if it depletes the fund. It is somewhat unprecedented that they agreed to the QA/QC requirements. That is what has always been the most important to us. That, and the publicity. We were never under the assumption that we would hurt them financially. It is literally impossible. However, it makes me so happy to think about the hundreds of millions of dollars they lost when they recalled them in January 2013!! And the public perception of settling is that they ARE admitting guilt!

Reply

Mollie Morrissette

Thank you Terry for your comment.

I agree it must have been a hard case, for so many reasons. And as you so wisely pointed out – they are only liable for the value paid for a pet, which of course as we all know is an utter disgrace. But that is the law today and I trust that someday that will change.

I realize now I should have mentioned in my article the untold losses Nestle suffered as a result of the groundswell of outraged pet parents such as yourself and all the other members of the suit, the efforts of advocates like Tony Corbo and Susan, and among the many, many others that brought the awareness to the mainstream media about the toxicity of the treats. The

punishing treatment Nestle received in the press and the withdrawal in January had to have deeply hurt their image and of course, their bottom line.

How can one calculate those losses though? I just hope and pray that with our continued efforts and the continued testing of the treats will continue to keep more suspect products from being on the market, and that the added pressure of the intense media scrutiny will force pet food manufacturers to be careful in future.

Will you keep me posted about when and how people will be able to submit a claim when all is said and done with the arrangements of the settlement? Will it be handled by a third party hired by the lead council?

I am curious still – were any forensic toxicologists consulted about the possible cause of the illnesses due to contamination of antibiotics, etc.?

I could go on and on…as I'm sure you can. I can't imagine the anguish you all suffered and my heart breaks for the terrible ordeal you endured.

I am deeply grateful to all of you for your work and steadfast commitment to bring about a better, and safer, world for our pets and their food supply. We are forever in your debt. Thank you.

Reply

Peter

The public perception is muted by putting the case to bed. Nestle knows that it will leave the news soon. Settling benefits the company enormously. They are not admitting responsibility, only ceasing the process on the basis of costs, which of course is only public posturing, since cost is meaningless to a multi-billion dollar company out to protect their product at all costs. Few of the public will perceive this as Nestle "admitting guilt." Few of the public are actually even aware of the existence of the case(s) at all. There is very little bad "publicity" for Nestle that will result from this. That is all calculated in advance by multi-billion dollar agribusiness conglomerates like Nestle. Requiring a package disclaimer "made in China" is no victory. No one reads the packaging. If they did, they might think twice about buying the product in the first place. Neither does "made in China" resonate anyway (particularly as to the font size!), it is something stamped on almost everything we buy today. I don't believe the case was "shaky," and the class was certified, that is part of the process. The plaintiffs had passed the test of "standing" before the court, despite being attacked on that issue. Getting a commitment for enhanced "quality control requirements" is pretty meaningless, given how it will be administered… and frankly, why is quality control testing for something that is intended to be fed to our pets something that should be forced on a multi-billion dollar company as a byproduct of a lawsuit?

Reply

Rita DeSollar

Peter, you are wrong on so many factual issues. But I'm not the boss of you so you post whatever you like. I just find it disturbing that you and Molly can't seem to see anything but negative happening. I haven't seen any other place but here where the article was slanted towards "so what?" Disturbs me.

Reply

Peter

I disagree, and feel that both this article, and some comments following, have been dramatically misinterpreted.

Many who follow the pet food industry are perpetually angry, and indignant. Often, that forms the framework for analysis. I take that label, without real remorse. There is much to be angry about. Nestle is an abhorrent business, placing profit above the health and well-being of their customers that support them. But this is hardly unique. It just represents capitalism at its worst. My criticism is quite obviously not with the litigants, but with "the system."

I regard those who pursued this as heroic. But then, I am desperately sorry that they were forced to be so. The horror they have experienced is something no one should have to go through. I doubt I would be able to live with that. So far, I'm lucky. I stand by my comments, but, won't engage further.

Reply

S. Raymond Parker

This case will not be "put to bed" When the settlement is final we will still be able to put this in public view. Mo settlement can violate our First Amendment rights, and we will not allow this to go away. Five of us are members and co-admins of "Animal Parents Against Pet Treats Made In China" We are responsible for many, not all, public knowledge of these treats for the past 2-1/2 years, and will continue to do so.

Reply

Peter

I commend the individuals involved, for pursuing this. However, I am, as in earlier cases, disturbed about the amount of the settlement, which amounts to little more than a "traffic ticket" to Nestle Purina. It's just a cost of doing business… a "double parking" fee to deliver their junk to stores. What protects these businesses is the concept that legally, pets are just "property" to the courts.

Reply

Mollie Morrissette

Yup, I couldn't agree more. It's chump change to Purina.

Reply

Share your thoughts...

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EXHIBIT 5

Waggin' Train Chicken Jerky FAQs

Learn more about the company behind Waggin' Train →

PURINA

FREQUENTLY ASKED QUESTIONS

Q | What antibiotics were found in chicken jerky treats in January, 2013?

A | According to New York State Department of Agriculture and markets (NYSDAM), the trace amounts of residual antibiotics included:

- sulfaclozine
- tilmicosin
- trimethoprim
- enrofloxacin
- sulfamethoxazole
- sulfaquinoxaline

- These antibiotics are approved for use in poultry in China and other major countries, including European Union member states, but are not among those approved for poultry in the United States.
- Antibiotics are commonly used globally, including in the United States, when raising animals fit for human consumption.
- The trace amounts of antibiotic residue (in the parts-

per-billion range) did not pose a health or safety risk for pets.

- In fact, in its January 9, 2013, update, the U.S. Food and Drug Administration and Center for Veterinary Medicine (FDA/CVM) stated that "FDA/CVM is confident that the NYSDAM results do not raise health concerns."
- It's important to note that there is no indication that the trace amounts of antibiotic residue are linked to FDA's ongoing investigation of chicken jerky dog treat products.

Q | Why were Waggin' Train products voluntarily withdrawn in January, 2013?

A | All of us at Nestlé Purina and Waggin' Train care very deeply about pets and pet owners, and the quality and safety of our products are our top priorities. We voluntarily withdrew all of our Waggin' Train and Canyon Creek Ranch dog treats on Jan. 9, 2013, after the New York State Department of Agriculture & Markets (NYSDAM) advised us that they found trace amounts of antibiotic residue in a limited number of samples of our chicken jerky dog treats. FDA confirmed these trace amounts of antibiotic residue never posed a health or safety risk to pets. These antibiotics were approved for use in poultry in China and other major countries, including European Union member states, but were not among those approved in the U.S. for poultry. Antibiotics are commonly used globally, including in the United States, to keep flocks and herds healthy when raising animals fit for human consumption. Due to variances in regulatory requirements among countries, Purina decided to withdraw these products. The health of pets and the

relationship of trust we have with pet owners are critically important to us.

Q | How are you protecting against the antibiotics that led to the brand's 2013 voluntary withdrawal?

A | Waggin' Train now has greater control over our entire supply chain – from egg to treat. For our China sourced products, we test each lot of our Chicken Jerky Tenders dog treats for many things, including antibiotics to ensure we meet all U.S. requirements.

Q | How are you ensuring quality and safety with the new Waggin' Train treats made in the U.S.?

A | Waggin' Train Chicken Jerky Duos and Smoky Jerky Snacks are new varieties made in the U.S. Our single, trusted U.S. manufacturer adheres to strict quality standards that meet or exceed all U.S. requirements.

1. EXCLUSIVE CHICKEN SOURCING: We source all of our chicken from just one trusted ingredient supplier in the U.S. This is important, because sourcing exclusively from one supplier means greater control over all aspects of the chicken supply.
2. STRICT QUALITY CONTROLS: Our treats are quality-checked

at each step and quality-monitored under a comprehensive food safety program designed to prevent potential quality issues before they can occur. We're confident we have the best quality program in the industry.

3. ENHANCED PRODUCT TESTING: Purina has further enhanced our product testing. We test our Jerky Duos and Smoky Jerky Snacks for Salmonella, melamine and antibiotics. We have a rigorous evaluation and sampling program for all raw materials used in our products and have quality assurance specialists at each producing facility who are trained to sample and/or analyze incoming ingredients. *View Product Testing Chart*

4. BACKED BY PURINA: All Waggin' Train treats are backed by Purina—the name pet owners have trusted for quality pet care products for more than 85 years. We've added the Purina logo to every package as a sign of our confidence in the quality and safety of our treats.

Q | How are Waggin' Train Chicken Jerky Tenders made?

A | From start to finish, we're confident we have the highest quality controls in the treats industry:

- First, Waggin' Train Chicken Jerky Tenders start with real white meat chicken raised for human food production from a single, trusted chicken supplier in China, that's part of a U.S.-based company. In China, the dark meat chicken is preferred for human food production, so we are able to source

the quality white meat in the quantities we require to make our Chicken Jerky Tenders.

- Next, we maintain strict quality controls throughout the entire manufacturing process. The sliced white meat chicken tenders are placed on drying racks and slow-cooked over many hours in large ovens. During the drying process, the treats go through a heat treatment stage that's important to ensuring quality. The tenders are then cooled before passing through a metal detection stage and packed immediately into heat-sealed air-tight bags.

- Our treats are quality-checked at every step as part of a comprehensive food safety program. This includes having our own quality inspectors on the premises throughout the entire manufacturing process. Because we have the highest quality controls in the treats industry, you can be confident in the quality of our treats.

- Our strict product monitoring and surveillance program helps ensure the highest quality standards are met. We have a rigorous evaluation and sampling program for all raw ingredients used in our products, and we have quality assurance specialists at the manufacturing facility who are trained to sample and analyze incoming ingredients. We test our treats for Salmonella, melamine, and antibiotics, to make sure our treats meet all U.S. standards, and our own high quality standards.

Q | Why is Waggin' Train re-launching chicken jerky dog treats after voluntarily

withdrawing them from the market?

A | We've heard from thousands of consumers who want Waggin' Train chicken jerky dog treats for their dogs. We've worked very hard over the past year to strengthen our already strict quality control measures to ensure Waggin' Train treats meet Purina's high standards. As we said back in January 2013, we planned to re-introduce products once we determined the best way to address the regulatory inconsistencies between countries that led to the voluntary withdrawal.

Q | If some of the Waggin' Train treats are made in the U.S., why can't they all be made in the U.S.?

A | In the U.S., white meat chicken is more popular with consumers, resulting in limited supplies to meet the needs of making our dog treats. In China, dark meat chicken is more popular with consumers than white meat chicken, and so the supply of quality, white meat chicken used in our products is more readily available for these dog treats.

Q | What has the FDA said about chicken jerky dog treats?

A | Over the past several years, FDA has issued several communications about chicken jerky dog treats, including results of extensive testing on chicken jerky treats made in China. Their investigation is in response to reports by some pet owners who

believe their pets became ill or died after consuming jerky dog treats. FDA has consistently stated, "To date, testing for contaminants in jerky pet treats has not revealed a cause for the illnesses."

The FDA notice also includes a reminder that dog treats should be fed as treats, not as a pet's sole source of nutrition. Waggin' Train continues to work with FDA and supports the agency's efforts to help ensure the quality and safety of U.S. pet products. Following is a link to the most recent FDA update on chicken jerky treats: http://www.fda.gov/AnimalVeterinary/NewsEvents/CVMUpdates/ucm371450.htm

The FDA also states its extensive testing includes tests for salmonella, heavy and trace metals or elements, markers of irradiation level, pesticides, antibiotics (both approved and unapproved), molds and mycotoxins, rodenticides, nephrotoxins (such as aristolochic acid, maleic acid, paraquat, ethylene glycol, diethylene glycol, toxic hydrocarbons, melamine and related triazines), and other chemicals and poisonous compounds.

Q | What does the AVMA say about chicken jerky dog treats?

A | The American Veterinary Medical Association website includes the following statement about chicken jerky dog treats: "It is up to you to decide whether or not you will feed your dog chicken jerky treats. If you choose to do so, we recommend that you feed them in small quantities and only on occasion. This is especially important for small-breed dogs." The Oct. 22 FDA communication also included a "Dear Veterinarian" request for assistance from the

veterinary community in gathering factual data to assist in their investigation. Purina welcomes the opportunity to work with the veterinary community to answer any questions about our products and how we work to ensure the quality and safety of all of our products.

Q | Why are Waggin' Train products made in China irradiated but those made in the U.S. are not?

A | All Waggin' Train products go through many strict product quality steps based on a thorough food safety risk assessment. Products coming from China spend several weeks in transit. Irradiation is an extra step taken to ensure product quality.

Q | Is irradiation safe?

A | Yes. Irradiation is a safe and effective process for both human and pet food. Waggin' Train brand products that reflect the Radura symbol go through an irradiation process and level approved for pet food by the FDA. This is similar to the process used to stabilize spices, apples, tomatoes and meat for human food. Products coming from China must spend many weeks in transit. This extra precaution is taken to assure pet owners the treats they buy are safe.

Q | Does Waggin' Train test finished product samples of chicken jerky treats?

A | Yes. Waggin' Train has a comprehensive food safety program for production of our dog treats. As part of that program Waggin' Train dog treats are extensively tested, including for Salmonella, melamine, di-ethylene glycol, and antibiotics. Other routine testing includes analysis for heavy metals, mycotoxins and pesticides.

Q | What does "100% Real" on the package mean?

A | "100% Real" communicates that Waggin' Train treats are made with real, simple ingredients -– like real chicken and, for Jerky Duos, real U.S-sourced sweet potatoes.

Q | Why do Smoky Jerky Snacks say "All Natural," but Chicken Jerky Tenders and Jerky Duos don't? And why don't Jerky Duos say "No artificial colors"?

A | Because each treat variety is made differently, they make different packaging claims. For example, our Chicken Jerky Tenders are irradiated for freshness and quality, so we don't use the "All Natural" language. And, the collagen casings used with our Jerky Duos contain a very small amount of added coloring, so we don't make an "All Natural" or "No artificial colors" claim.

Q | What new dog treats is Waggin' Train introducing in 2014, and where are they

made?

A | In 2014, Waggin' Train is giving consumers a choice, with chicken jerky dog treats made in China and treats made in the U.S., all of which are quality-tested and safe to feed as directed:

- New Waggin' Train Chicken Jerky Tenders are made with real white meat chicken in China, where we now source our chicken exclusively from a single, trusted chicken supplier, which is part of a U.S. based company. In China, the dark meat chicken is preferred for human food production, so the quality white meat chicken is available for our jerky dog treats.
- New Waggin' Train Chicken Jerky Duos and Waggin' Train Smoky Jerky Snacks are made in the U.S. with chicken sourced exclusively in the U.S. from a single, trusted chicken supplier.

Q | What changes have you made with the new Waggin' Train Chicken Jerky Tenders made in China?

A | Waggin' Train has worked hard to strengthen our already strict

quality controls throughout the production process, from egg to finished treat. We're confident that the following enhancements will ensure the quality and safety of every Waggin' Train treat:

1. CHICKEN SOURCED EXCLUSIVELY FROM ONE SINGLE, TRUSTED SUPPLIER: We now source all of our chicken from just one trusted supplier in China. This is important, because sourcing exclusively from a single chicken supplier means greater control over all aspects of the chicken supply, including how the chickens are fed, raised and processed.

2. STRICT QUALITY CONTROLS SUPERVISED BY OUR OWN QUALITY INSPECTORS: We've also strengthened our already strict quality controls throughout the production process. For example, we now exclusively partner with one trusted manufacturer to make these treats, in facilities where we have our own quality inspectors on the premises throughout the entire production process. Our treats are quality-checked at each step and quality-monitored under a comprehensive food safety program designed to prevent potential quality issues before they can occur. We're confident we have the best quality program in the industry, and we know of no other chicken jerky manufacturer in China that has the controls we have.

3. ENHANCED PRODUCT TESTING: Purina has further enhanced our product testing. We test each batch of our Waggin' Train Chicken Jerky Tenders for Salmonella, melamine, di-ethylene glycol and antibiotics. Additional routine testing includes assessing for heavy metals and mycotoxins. For example, our enhanced monitoring and surveillance program tests for more than 45 antibiotics and more than 100 pesticides to ensure we meet all U.S. requirements. *View Product Testing Chart*

4. BACKED BY PURINA: All Waggin' Train treats are backed by Purina — the name pet owners have trusted for quality pet care products for more than 85 years. We've added the Purina logo to every package as a sign of our confidence in the quality and safety of our treats.

Q | Why does the front of the package for Chicken Jerky Tenders and Jerky Duos now say the treats should only be fed to Adult Dogs 5 lbs. & Over?

A | Waggin' Train Chicken Jerky Tenders and Jerky Duos are treats, and should be fed according to a dog's weight, using the treating guidelines on each package. The packaging change makes the feeding instructions clearer and helps consumers make appropriate treating choices for their pets. The recommended caloric intake from treats is not to exceed 10 percent of a dog's total daily caloric requirements. Feeding these treats to puppies and adult dogs weighing less than 5 pounds could result in exceeding that 10 percent recommendation.

Q | Why does the front of the package for Smoky Jerky Snacks now say the treats should only be fed to Adult Dogs 11 lbs. & Over?

A | Waggin' Train Smoky Jerky Snacks are treats, and should be fed

according to a dog's weight, using the treating guidelines on each package. The packaging change makes the feeding instructions clearer and helps consumers make appropriate treating choices for their pets. The recommended caloric intake from treats is not to exceed 10 percent of a dog's total daily caloric requirements. Feeding these treats to puppies and adult dogs weighing less than 11 pounds could result in exceeding that 10 percent recommendation.

Q | Can these treats be used in place of dog food from time to time?

A | No. Treats should not be fed in place of a complete and balanced diet. Always follow the treating guidelines on the package to ensure that dogs eat only the proper amount of treats each day.

Q | What are the Nutrient Analysis, Calories and Ingredients of each new Waggin' Train treat?

A | WAGGIN' TRAIN CHICKEN JERKY TENDERS
Treats for adult dogs 5lbs and over

GUARANTEED ANALYSIS:
Crude Protein (Min) 65.0%
Crude Fat (Min) 1.0%
Crude Fiber (Max) 1.0%
Moisture (Max) 16.0%

INGREDIENTS: Chicken breast, vegetable glycerin.

CALORIE CONTENT (calculated):
2989 kcal/kg
45 kcal/piece

WAGGIN' TRAIN SMOKY JERKY TREATS
made with real chicken & a hint of brown sugar
Treats for adult dogs 11 lbs & over

GUARANTEED ANALYSIS:
Crude Protein (Min) 32.0%
Crude Fat (Min) 16.0%
Crude Fiber (Max) 1.5%
Moisture (Max) 16.0%
INGREDIENTS: Chicken, brown sugar, salt, glycerin, natural smoke flavor, mixed-tocopherols (a preservative).

CALORIE CONTENT (calculated):
3599 kcal/kg
63 kcal/piece

WAGGIN' TRAIN JERKY DUOS
made with real chicken and sweet potatoes
Treats for adult dogs 5 lbs & over

GUARANTEED ANALYSIS:
Crude Protein (Min) 17.0%
Crude Fat (Min) 8.0%
Crude Fiber (Max) 3.5%
Moisture (Max) 16.0%
INGREDIENTS: Chicken, sweet potatoes, brown sugar, salt,

glycerin, natural smoke flavor, mixed-tocopherols (a preservative).

CALORIE CONTENT (calculated):
3298 kcal/kg
40 kcal/piece

Q | What are the feeding guidelines for Waggin' Train treats?

A | Waggin' Train treats are just that – treats - and should be fed according to a dog's weight, using the treating guidelines on each package. Keep in mind that treats are not a complete and balanced food, and should not be fed as a replacement for a balanced diet that includes dog food. Dogs also should get plenty of fresh, clean water every day. Below is the maximum recommended number of treats for a dog per day. This is based on a maximum of 10 percent of the daily calorie needs for an average dog.

- **Waggin' Train Chicken Jerky Tenders**
  (not recommended for puppies or adult dogs under 5 pounds)
  - 5 to 10 pounds – ½ treat
  - 11 to 20 pounds – 1 treat
  - 21 to 40 pounds – 2 treats
  - Over 40 pounds – 3 treats
- **Waggin' Train Jerky Duos**
  (not recommended for puppies or adult dogs under 5 pounds)
  - 5 to 10 pounds – ½ treat over 2 days

- 11 to 20 pounds – 1 treat
- 21 to 40 pounds – 2 treats
- Over 40 pounds – 3 treats

- **Waggin' Train Smoky Jerky Snacks**
  (not recommended for puppies or adult dogs under 11 pounds)
  - 11 to 25 pounds – ½ treat
  - 26 to 60 pounds – 1 treat
  - Over 60 pounds – 2 treats

How Might We Help?

Get in Touch

EXHIBIT 6

Notice of Removal in Curts Lawsuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

CONNIE CURTS, on behalf of herself and all others similarly situated, Plaintiff, v. WAGGIN' TRAIN, LLC and NESTLE PURINA PETCARE COMPANY, Defendants.	Case No. 4:13-cv-00252

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, defendants Nestle Purina PetCare Company ("Nestle Purina") and Waggin' Train, LLC ("Waggin' Train") (collectively, "Defendants"), by their undersigned counsel, hereby remove this action from the Circuit Court of Jackson County, Missouri to the United States District Court for the Western District of Missouri, and state as follows:

1. On or about February 4, 2013, plaintiff Connie Curts filed this action in the Circuit Court of Jackson County, Missouri, in a case captioned *Connie Curts, on behalf of herself and all others similarly situated v. Waggin' Train, LLC and Nestle Purina PetCare Company*, Case No. 1316-CV02706 (the "State Court Action"). Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of all pleadings, process, and orders served upon Defendants in the State Court Action are attached to this Notice as Exhibit 1.

2. A copy of the Petition in the State Court Action was served on Defendants on February 15, 2013.

3. The State Court Action alleges that Defendants falsely marketed and labeled Canyon Creek Ranch and Waggin' Train brand jerky dog treats ("Jerky Treats") as "wholesome" and "healthy," among other representations, when the Jerky Treats allegedly are "made with substandard, nonwholesome, and unnatural ingredients that are contaminated," in violation of the Missouri Merchandising Practices Act ("MMPA"), MO. REV. STAT. §§ 407.010 *et seq*. (*See* Pet. at ¶¶ 1, 8-10, 45, 52-53.)

DIVERSITY JURISDICTION UNDER CAFA

4. Enacted to expand federal jurisdiction over purported class actions, the Class Action Fairness Act ("CAFA") provides that a class action may be removed in accordance with 28 U.S.C. § 1446 if: (a) membership in the class is not less than 100; (b) the aggregate amount in controversy exceeds $5,000,000; and (c) any member of the plaintiff class is a citizen of a foreign country or a state different from any defendant. 28 U.S.C. §§ 1453(b) and 1332(d). Each requirement is met here.

5. First, it is undisputed that the putative class exceeds 100 members. Plaintiff brings this purported class action on behalf of "a state-wide class of all consumers who, at any time from January 2003 to the present . . . purchased Defendants' Dog Treats within the State of Missouri and were citizens of the State of Missouri at the time" the instant action "was filed." (Pet. at ¶ 9.) Plaintiff alleges that this putative class is "numerous," consisting of "thousands of consumers throughout Missouri . . . ." (*Id*. at ¶¶ 44, 8.)

6. Second, the amount in controversy in this purported class action clearly exceeds $5,000,000 in the aggregate. *See* 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.").

7. Under CAFA, the removing defendant must demonstrate by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum. *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). This burden is a "'pleading requirement, not a demand for proof.'" *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 945 (8th Cir. 2012) (quoting *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008)). The question is whether a fact finder "*might* legally conclude" that the damages are greater than $5 million. *Bell*, 557 F.3d at 959 (quoting *Kopp v. Kopp*, 280 F.3d 883, 885 (8th Cir. 2002)). And claimed statutory attorneys' fees are considered part of the amount in controversy. *Hartis v. Chicago Title Ins. Co.*, 656 F.3d 778, 781-82 (8th Cir. 2008) (per curiam). Courts have routinely found that declarations and other relevant evidence may be submitted by a defendant to demonstrate that federal jurisdiction exists. *See, e.g., Lewis v. Verizon Commc'n, Inc.*, 627 F.3d 395 401-02 (9th Cir. 2010); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 755 (11th Cir. 2010); *Thornton v. DFS Servs.* LLC, No. 4:09CV1040 SNLJ, 2009 WL 3253836, at *1-2 (E.D. Mo. Oct. 9, 2009); *see also* 28 U.S.C. § 1446(c)(2).

8. The Petition at issue here seeks, *inter alia*, "actual and statutory damages," as well as "reasonable attorneys' fees" for violations of the MMPA. (*See* Pet. at ¶¶ 38, 43.) The MMPA provides that a court may award attorneys' fees to a plaintiff who suffers a cognizable loss under the statute after purchasing merchandise for personal, family, or household purposes. MO. REV. STAT. § 407.025.1. Plaintiff, as noted above, seeks to represent "a state-wide class of all consumers who, at any time from January 2003 to the present . . . purchased Defendants' Dog Treats within the State of Missouri and were citizens of the State of Missouri at the time" the instant action "was filed." (Pet. at ¶ 9.) Plaintiff alleges that Defendants fraudulently marketed the Jerky Treats as "wholesome," "healthy," and "of the highest quality," and that had she and

members of the putative class "known the true nature" of the Jerky Treats, "they would not have purchased" them at a "premium price." (*Id.* at ¶¶ 1, 5, 18-20, 37.)

9. The MMPA allows plaintiffs to seek damages for the difference between the actual value of the Jerky Treats and what their value would have been if they had been as represented. *See Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 570 (8th Cir. 1998) (citing *Sunset Pools v. Schaefer*, 869 S.W.2d 883, 886 (Mo. Ct. App. 1994)). The actual value of the Jerky Treats, Plaintiff asserts, was effectively zero, because "at all times relevant" the Jerky Treats "did not have a reasonable commercial value" due to their unsuitability "for canine consumption." (Pet. at ¶ 35.) Plaintiff claims that if the Jerky Treats had been "wholesome," "healthy," and "of the highest quality," as advertised, they would have been worth the "premium price" Plaintiff and other purported class members allegedly paid. (Pet. at ¶¶ 1, 5, 18-20.) Thus, according to Plaintiff, the difference between zero and the "premium price" Plaintiff and the putative class members allegedly paid is the full retail purchase price of the Jerky Treats. Therefore, even before alleged punitive damages and statutory attorneys' fees, Plaintiff is seeking to recover the aggregate amount she and the putative class paid for the Jerky Treats over the past ten years.

10. The amount in controversy therefore clearly exceeds $5 million. During the alleged class period, Defendants sold Canyon Creek Ranch and Waggin' Train brand Jerky Treats to retailers in Missouri. (*See* Decl. of Stephanie Cummings at ¶ 4, submitted herewith as Exhibit 2.) To make any profit, those retailers had to sell the Jerky Treats to consumers at a retail price higher than what Defendants charged them as a wholesale price to purchase the Treats. Thus, the aggregate amount Plaintiff and the putative class paid for Jerky Treats over the past ten years was greater than Defendants' revenue from sales of the Jerky Treats over that same

period. In fiscal years 2011-12 alone, Defendants' revenue from sales of Jerky Treats in the State of Missouri exceeded $7.5 million. (*See* Decl. of Stephanie Cummings at ¶ 5.) Accordingly, the damages Plaintiff seeks to recover for the past ten years, even before her demand for statutory attorneys' fees, is greater than $5 million. The jurisdictional amount in controversy threshold is easily met. 1/

11. Third, minimal diversity is satisfied even though Defendants and the single representative Plaintiff are alleged to be citizens of Missouri because Plaintiff has attempted to improperly gerrymander the class for the sole purpose of avoiding federal jurisdiction. Plaintiff alleges that both Nestle Purina and Waggin' Train are citizens of Missouri for purposes of diversity. (*See* Pet. at ¶¶ 4-5); 28 U.S.C. § 1332(c)(1). Plaintiff asserts that she is a citizen of Missouri and that the putative "state-wide" class she seeks to represent includes "all consumers who, at any time from January 2003 to the present (the 'Class Period'), purchased Defendants' Dog Treats within the State of Missouri and were citizens of the State of Missouri at the time the Class Action Petition was filed (the 'Class')." (Pet. at ¶¶ 12, 9.) Consequently, despite alleging a ten-year class period based on sales of Jerky Treats in Missouri, Plaintiff artificially has tried to limit the class to people who happened to be citizens of the State of Missouri on one particular day during that ten-year period—February 4, 2013—in a ploy to avoid minimal diversity and, thus, federal jurisdiction.

12. Plaintiff cannot engineer the putative class to defeat minimal diversity under CAFA. As the Sixth Circuit stated, CAFA was "clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper*

1/ While there can be no reasonable dispute that the allegations in Plaintiff's Petition put more than $5 million in controversy in this action, Defendants obviously dispute that Plaintiff and the putative class are entitled to any type of remedy or recovery whatsoever based on those allegations and reserve all rights and defenses with respect to Plaintiff's Petition.

Prods., Inc., 551 F.3d 405, 407 (6th Cir. 2008). The Act was passed to stop abuse of the class action device in state and local courts that "kep[t] cases of national importance out of Federal court." CAFA, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(4). These principles are especially important in this case, because these same Defendants are facing several substantially similar class actions—with nationwide scope—filed by named plaintiffs from over a dozen other states that have been centralized in the United States District Court for the Northern District of Illinois. *See Adkins, et al. v. Nestle Purina PetCare Company, et al.*, Case No. 1:12-cv-02871 (N.D. Ill.) ("*Adkins*") (the Consolidated Complaint in *Adkins* merged four lawsuits that had been filed in three courts across the country and includes twenty-one representative plaintiffs and these same Defendants); *Matin v. Nestle Purina PetCare Company, et al.*, 1:13-cv-01512 (N.D. Ill.) (a California class action in which the district court recently granted Defendants' motion to transfer the case to the Northern District of Illinois). 2/

13. Plaintiff has engaged in such artificial structuring of her complaint, purporting to restrict the "state-wide class" to consumers who "at any time from January 2003 to the present[,] . . . purchased Defendants' Dog Treats within the State of Missouri and were citizens of the State of Missouri at the time the Class Action Petition was filed." (Pet. at ¶ 9.) If the putative class were not gerrymandered and instead included all consumers who purchased Jerky Treats in Missouri over the past ten years, there is no question minimal diversity would exist. Based on simple geographic reality, it is beyond any reasonable dispute that at least one individual who bought Jerky Treats at grocery or other retail stores in Kansas City or St. Louis, Missouri in the last ten years was a citizen of neighboring Kansas or Illinois. Likewise, there is no doubt that there are many former Missouri residents who purchased Jerky Treats in the last ten years and

2/ As in *Matin*, Defendants will be filing a motion to transfer the instant case to the United States District Court for the Northern District of Illinois.

moved out of the state before February 2013. 3/ By attempting to restrict the putative class to "citizens of the State of Missouri" on the specific day that "the Class Action Petition was filed," Plaintiff deliberately is chopping up the class to thwart federal jurisdiction.

14. Courts have recognized that "a Plaintiff is ordinarily the master of the complaint, but there are limits to a Plaintiff's ability to evade removal jurisdiction through artful pleading." *Hamilton v. Burlington N. Santa Fe Ry. Co.*, No. A-08-CA-132-SS, 2008 WL 8148619, at *5 (W.D. Tex. Aug. 8, 2008). Courts pierce the pleadings in CAFA cases just as they "look beyond the pleadings in cases of fraudulent joinder or cases where Plaintiffs deliberately obscure the amount in controversy to defeat traditional diversity jurisdiction." *Id.* at 4. In "determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach." *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) (citations omitted). 4/

15. Here, there is no principled basis for Plaintiff to exclude from the putative class consumers who purchased Jerky Treats in Missouri but were *not* citizens of the state on the exact date when she filed the instant Petition. The only reason Plaintiff defined the putative class in this way was to "plead around" CAFA. *See Hamilton*, 2008 WL 8148619, at *4. The harm Plaintiff alleges Defendants inflicted—misrepresenting the "wholesomeness" of the Jerky Treats—was not confined to persons who were Missouri citizens as of February 4, 2013. The

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3/ Indeed, the United States Census Bureau estimates that between 2004 and 2011 over 1,000,000 people moved out of the State of Missouri. *See* United States Census Bureau, Geographic Mobility/Migration, State-to-State Migration Flows, http://www.census.gov/hhes/migration/data/acs/state-to-state.html (follow the hyperlinks for data from each year).

4/ When the class definition "fails to include a substantial number of persons with claims similar to those of the class members," the leading complex litigation treatise has noted, "the definition of the class may be questionable." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222.

alleged misrepresentations Plaintiff sets forth in the Petition and Exhibit A affected all consumers who purchased Jerky Treats in Missouri regardless of citizenship. (*See* Pet. at ¶¶ 18-19.) Those allegedly fraudulent marketing slogans, moreover, are not alleged to be limited to consumers who purchased the treats in Missouri; indeed, the statements displayed on Waggin' Train and Canyon Creek Ranch brand Jerky Treats packaging are similar across the country and are the basis for related claims in the consolidated *Adkins* class action pending in the Northern District of Illinois. (*See id.* at ¶¶ 1, 18-20, 27, 28; *Adkins* Consolidated Complaint, Dkt. No. 71 at ¶¶ 41, 45-49.) 5/ Plaintiff cannot circumscribe the putative class solely to frustrate federal jurisdiction and CAFA's purpose of putting class actions of nationwide importance in federal court. 6/ *Cf. Proffitt v. Abbott Labs.*, No. 2:09-CV-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008) (denying plaintiff's motion to remand where there was "no justification for dividing one alleged drug conspiracy involving one defendant into eleven lawsuits . . . other than to circumvent the CAFA and federal court jurisdiction"); *Brook v. UnitedHealth Grp., Inc.*, No. 06-CV-12954(GBD), 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) ("Plaintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in various state courts."). Just as the court in *Proffitt* saw CAFA being "undermined by the device of filing multiple lawsuits based on completely arbitrary time periods" to defeat diversity, Plaintiff here has undercut CAFA by

5/ Plaintiff acknowledges the national scope of the purported misrepresentations in the Petition, alleging that "Defendants profited greatly from the sale and deceptive marketing of their Dog Treats. On information and belief, Defendants' Dog Treats sales generated annual revenues of hundreds of millions of dollars." (Pet. at ¶ 28.)

6/ Defendants recognize that some courts in this district have permitted plaintiffs to restrict the scope of their complaints so as to avoid federal jurisdiction under CAFA. *See, e.g., Elsea v. Jackson Cnty., Missouri*, No. 10-0620-CV-W-ODS, 2010 WL 4386538, at *2-3 (W.D. Mo., Oct. 28, 2010). The Eighth Circuit, however, has not ruled on the issue. And the Supreme Court recently took argument in a case that may bear on how expansively CAFA should be read. *The Standard Fire Insurance Co. v. Knowles*, No. 11-1450.

artificially limiting the putative class to Missouri residents on one particular day during a ten-year class period. *Proffitt*, 2008 WL 4401367, at *5.

16. Plaintiff should not be permitted to flout CAFA and circumvent minimal diversity. The putative class should at minimum be construed to include individuals who, during the class period, purchased Jerky Treats in Missouri, including those people who were not Missouri citizens on February 4, 2013. *See Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2008) ("[D]istrict courts have broad discretion to modify class definitions."). Thus, minimal diversity is present.

PROCEDURAL REQUIREMENTS FOR REMOVAL

17. The procedural requirements set forth in 28 U.S.C. § 1446 are satisfied here as well. Section (a) of the statute requires the removing party to file a notice of removal "in the district court of the United States for the district and division within which such action is pending," which Nestle Purina and Waggin' Train do with this filing.

18. This Notice of Removal is timely under 28 U.S.C. § 1446(b) because the Petition in the State Action was served on Defendants on February 15, 2013, and this Notice is filed within thirty days of the Defendants receiving that Petition.

19. As required by 28 U.S.C. § 1446(d), Defendants will provide copies of this Notice of Removal to Christopher Shank, Stephen Moore, and Dane Martin, counsel of record for Plaintiff, and will file a copy of the Notice of Removal with the Department of Civil Records of the Circuit Court for Jackson County, Missouri.

20. By filing this Notice of Removal, Defendants do not waive any defense, argument or principle of equity that may be available to them.

21. Based upon the foregoing, Defendants respectfully submit that this Court has

diversity jurisdiction under 28 U.S.C. §§ 1332, 1441, 1446 and 1453, and that the procedural requirements of 28 U.S.C. § 1446 are met. Accordingly, this action is properly removable to federal court.

WHEREFORE, the above described action now pending against Defendants in the Circuit Court for Jackson County, Missouri is removed to the United States District Court for the Western District of Missouri.

Date: March 14, 2013

Respectfully submitted,

/s/ James T. Wicks

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Of Counsel

CERTIFICATION

I hereby certify that, on March 14, 2013, a copy of the above and foregoing was served via United States mail, first-class postage prepaid, addressed to the following counsel of record:

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/s/ James T. Wicks
Attorney for Defendants

EXHIBIT 7

Order Denying Motion to Transfer in Harmon v. Milo's Kitchen, LLC

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MARY HARMON, on behalf of herself and others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No.: 13-0247-CV-W-SOW
MILO'S KITCHEN, LLC, et al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants Milo's Kitchen, LLC and Del Monte Corporation's Motion To Transfer Plaintiff's Second Amended Complaint Pursuant to the First-Filed Rule and 28 U.S.C. § 1404(a) (Doc. #13). For the following reasons, the Court denies the motion.

I. Background

Plaintiff initially filed this action in the Circuit Court of Jackson County, Missouri, alleging violations of the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 *et seq*. Plaintiff alleges defendants "have been falsely labeling and marketing their Milo's Kitchen brand Chicken Jerky and Chicken Grillers Home-style Dog Treats [] as 'wholesome' '100% real,' and 'made with the same quality of ingredients and care you want with your food' . . . when the Chicken Dog Treats are in fact made with substandard, non-wholesome ingredients that are contaminated with poisonous antibiotics and other potentially lethal substances." The First Amended Class Action Petition contains the following class definition:

> All consumers who, from January 2010 to the present (the "Class Period"), purchased within the State of Missouri Chicken Dog Treats produced and marketed by Defendants.

The case was removed to this Court on March 12, 2013, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). On April 19, 2013, defendants filed the instant motion seeking transfer of the case to the Western District of Pennsylvania.

A. The Pennsylvania Action

On July 19, 2012, Lisa Mazur, a Pennsylvania resident, filed a putative class action Complaint in the United States District Court for the Western District of Pennsylvania ("the Mazur action") against defendants Del Monte Corporation ("Del Monte") and Milo's Kitchen, LLC ("Milo's"). The Mazur action is a putative class action brought by Mazur on behalf of *all* consumers who purchased certain dog treats manufactured, marketed, distributed or sold by defendants. The Mazur action alleges that "the dog treats were unsafe, defective, dangerous, culpably misrepresented as safe and healthy, and did not conform to applicable implied and express warranties." The Mazur action alleges that Milo's dog treats were contaminated or otherwise defective. In Count I, Mazur alleges a breach of implied warranty; Uniform Commercial Code and Magnuson-Moss Act. Count II alleges a breach of express warranty; Uniform Commercial Code. In Count III, Mazur alleges violations of the Pennsylvania Unfair Trade Practices and Consumer Protection law. Count IV is a claim of common law fraud. Count V alleges unjust enrichment. Count VI is a claim for negligence. Count VII alleges strict products liability; defective design or manufacture. Lastly, Count VIII alleges strict products liability; failure to warn. In each Count Mazur seeks compensatory and punitive damages.[1]

[1] On June 25, 2013, United States Magistrate Judge Maureen P. Kelly issued a Report and Recommendation that defendants' motion to dismiss be granted as to plaintiff's unjust enrichment claim but denied as to all other claims. United States District Judge Cathy Bissoon denied defendants' motion for reconsideration of Judge Kelly's Order on July 8, 2013.

B. Northern District of California Actions

On April 19, 2013, plaintiff Maxine Ruff ("Ruff") filed a putative class action Complaint against the same defendants. Ruff sought to represent a putative nationwide class as well as statewide classes of California and North Carolina plaintiffs, including "[a]ll persons in the United States who purchased Milo's Kitchen Jerky dog treats," "[a]ll persons whose dogs suffered harm or death after consuming [Milo's Treats]," and "[a]ll persons residing in North Carolina who purchased [Milo's Treats]." The allegations in Ruff are based, in part, on representations made on Milo's packaging. Ruff's Complaint contains nine Counts: (1) Violation of the California Unfair Competition Law (on behalf of the nationwide class); (2) violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 (North Carolina sub-class); (3) violation of the California False Advertising Law (nationwide class); (4) violation of the California Consumers Legal Remedies Act (nationwide class); (5) violation of the Magnuson-Moss Warranty Act-Implied Warranty, 15 U.S.C. § 2301*et seq.* (nationwide class); (6) unjust enrichment (nationwide class); (7) negligence (nationwide class); (8) strict products liability (subclass); and (9) declaratory relief (nationwide class).

Similarly, Mary Funke ("Funke") brought a putative class action Complaint under the same California consumer protection statute as Ruff, but seeks to represent "[a]ll person in the United States who purchased Milo's Jerky at any time from 2007 until present." The putative class contains four sub-classes: (1) healthy screening subclass; (2) injury claims subclass; (3) deceased animals claims subclass; and (4) consumer food purchase claims subclass. Funke is seeking injunctive relief, restitution, and other equitable and monetary relief. Funke's putative class action Complaint contains four Counts: (1) violation of the Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*; (2) violation of the False Advertising Law, Cal. Bus. & Prof.

Code § 17500, *et seq.*; (3) violation of the Unfair Competition Act, Cal. Bus. & Prof. Code §17200, *et seq.*; and (4) unjust enrichment.

In each of these cases, United States District Judge Jeffrey S. White in California granted the defendants' motion to transfer on the basis of the first-filed rule, as well as the convenience factors located in 28 U.S.C. § 1404(a). See Ruff v. Del Monte Corp., Nos. C 12-05351, C 12-05323, 2013 WL 1435230, at *3-4 (N.D. Cal. Apr. 9, 2013).[2]

Defendants now move to transfer this case to the United States District Court for the Western District of Pennsylvania pursuant to the first-filed rule based on the Mazur action. In the alternative, defendants contend 28 U.S.C. § 1404(a) provides an additional ground for transfer.

Plaintiff opposes transfer for three reasons. First, plaintiff argues defendants have engaged in forum shopping in an attempt to position Mazur as the first-filed case.[3] Second, plaintiff argues defendants have not met their burden to demonstrate that this case is sufficiently similar to the actions pending in the Western District of Pennsylvania. Lastly, plaintiff argues defendants have not overcome the substantial weight afforded plaintiff's forum choice, "which is

[2] Another similar case has been filed in the Western District of Pennsylvania, the Langone case. In all actions pending in the Western District of Pennsylvania, the defendants have filed motions to consolidate all pretrial proceedings. These motions have not yet been ruled. However, Judge Bissoon is presiding over each case and Judge Kelly has been referred on the cases.

[3] Plaintiff spends a considerable amount of time addressing whether Mazur was in fact the first-filed case because prior to the filing of Mazur, a case styled Webster v. Del Monte Corp. was filed in the Superior Court of Los Angeles County, California. Defendants removed the Webster action to federal court, but then agreed to remand the case back to state court. Plaintiff claims that this impacts the Court's analysis on whether Mazur was first-filed. The Court disagrees because the first-filed rule applies only when parallel actions are in federal court, not state court. Cent. States Indus. Supply, Inc. v. McCullough, 218 F.Supp.2d 1073, 1093 (N.D. Iowa 2002). In addition, plaintiff claims the first-filed rule does not apply because defendants manipulated federal jurisdiction to position the Mazur action as the earliest case pending in federal court. Plaintiff notes that the day after the Webster case was remanded, defendants filed their motion to transfer the Ruff action from the Northern District of California to the Western District of Pennsylvania. Thus, plaintiff argues the only explanation for such behavior is forum shopping. The Court will not venture into whether defendants' action amounts to forum shopping. Moreover, even if the action remained in a California federal court, plaintiff would still be looking at the same issue of whether the case should be transferred to California under the first-filed rule.

the natural and logical forum for adjudication of the claim in this case arising exclusively under Missouri law and asserted by a Missouri citizen on behalf of a class of Missouri consumers."

II. Discussion

A. First-Filed Rule

"The well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.'" U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 488 (8th Cir. 1990) (citing Orthmann v. Apple River Campground Inc., 765 F.2d 119, 121 (8th Cir. 1985)). "The first-filed rule holds that the court in which an action is first filed is generally the appropriate court to determine whether subsequently-filed cases involving substantially similar issues should proceed." United States v. Safety Nat. Cas. Corp., No. 10-CV-1782-HEA, 2012 WL 1080817, at*1 (E.D. Mo. 2012) (citing W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728-30 (5th Cir. 1985)). The first-first filed rule is not meant to be applied rigidly or mechanically, Orthmann, 765 F.2d at 121, but rather in a manner that best serves the interests of justice. Goodyear Tire & Rubber Co., 920 F.2d at 489. The first-filed rule only applies when identical or substantially similar parties and claims are present in both courts. Arnold v. DirecTV, Inc., No. 4:10-CV-00352-AGF, 2011 WL 839636, at *4 (E.D. Mo. Mar. 7, 2011). The prevailing standard is that "in the absence of compelling circumstances the first-filed rule should apply." Nw. Airlines, Inc. v. Am. Airlines, Inc., 989 F.2d 1002, 1005 (8th Cir. 1993).

The Eighth Circuit has recognized two "red flags," signaling potential "compelling circumstances" that may warrant an exception to the first-filed rule:

> first, where the first suit was filed after the other party gave notice of its intention to sue; and, second, that the action is one for declaratory judgment rather than for damages or equitable relief.

Boatmen's First Nat'l Bank v. Kan. Pub. Emp. Ret. Sys., 57 F.3d 638, 642 (8th Cir. 1995) (quoting Nw. Airlines Inc., 989 F.2d at 1007). The Eighth Circuit has also recognized other circumstances sufficient to warrant overcoming the first-filed rule. These other circumstances include: (1) where the first-filer was able to file only because it misled the second-filer as to its intention to file suit in order to gain the advantage of filing first; and (2) where the second-filed action is a continuation of a legal process already begun in that court. U.S. Fire Ins. Co., 920 F.2d at 489.[4]

Courts have also recognized another exception to the first-filed rule, the "balance of convenience and interest of justice" exception. Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 696 (8th Cir. 1997) (citing Terra Int'l, Inc. v. Miss. Chem. Corp., 922 F.Supp. 1334, 1348 (N.D. Iowa 1996)); accord Research Automation, Inc. v. Schrader-Bridgeport Int'l. Inc., 626 F.3d 973, 980 (7th Cir. 2010); Emp'r Ins. of Wausau v. Fox Enter. Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008) (two exceptions to the first filed rule: (1) balance of convenience and (2) special circumstances). The balance of convenience factors relevant here are essentially the same as those considered in connection with motions for transfer of venue under 28 U.S.C. § 1404(a). Terra Int'l, Inc., 922 F.Supp. at 1348-49; see also Emp'r Ins. of Wausau, 522 F.3d at 275. The balance of convenience factors include:

> (1) the convenience of the parties, (2) the convenience of the witnesses-including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony, (3) the accessibility to records and documents, (4) the location where the conduct complained of occurred, and (5) the applicability of each forum state's substantive law.

Terra Int'l, Inc., 922 F.Supp at 1357-61. The interest of justice factors are:

> (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating each forum, (4) each party's ability to enforce a

[4] These exceptions are not relevant to this particular case.

> judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.

Id.

B. Analysis

Even assuming *arguendo* that the first-filed rule applies in this case, the Court finds that compelling circumstances warrant departing from the first-filed rule. Specifically, the Court finds that the legal issues surrounding class certification warrant departure from the first-filed rule.

As mentioned above, the putative class in this case is only asserting one claim under the MMPA. "The MMPA prohibits 'deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce' by defining such activity as an unlawful practice." Plubell v. Merck & Co., Inc., 289 S.W.3d 707, 711 (Mo. Ct. App. 2009) (quoting Mo. Rev. Stat. § 407.020.1). Civil claims may be brought under the MMPA by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Mo. Rev. Stat. § 407.025.1. In fact, the MMPA "*specifically authorizes class actions* where an unlawful practice 'has caused similar injury to numerous other persons.'" Plubell, 289 S.W.3d at 712 (quoting Mo. Rev. Stat. § 407.025.2).

A plaintiff is not required to prove the defendant's knowledge because the MMPA "supplements the definition of common law fraud, eliminating the need to prove intent to defraud or reliance." Id. at 713 (quoting Schuchmann v. Air Servs. Heating & Air Conditioning, Inc., 199 S.W.3d 228, 233 (Mo. Ct. App. 2006)). Indeed, the MMPA does "not put forth a

scienter requirement for liability." Id. Therefore, a plaintiff may prove an unlawful practice under the MMPA simply by demonstrating the defendant's conduct. Id. at 714. Lastly, and perhaps more importantly in the class certification context, "[p]laintiffs are [] not required to prove they . . . relied on [defendants'] alleged misrepresentations about [the dog treats], and consequently, they are not required to offer individualized proof that the misrepresentation colored the decision to [buy the dog treats]." See id.

Contrary to the requirements necessary to prove an MMPA claim, the putative classes in Mazur, Ruff, and Funke will have to establish intent,[5] reliance,[6] and actual manifestation to prove their claims and certify a class. Individualized issues, such as reliance, routinely preclude class certification. See, e.g., Thompson v. Am. Tobacco., Inc., 189 F.R.D. 544, 552 (D. Minn. 1999) (citing Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) ("a fraud class action cannot be certified when individual reliance will be an issue.")). Additionally, the Funke putative class is seeking injunctive relief as a remedy. To seek injunctive relief, a class must demonstrate "that the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The plaintiffs seeking monetary relief, however, are required to satisfy the requirements under subsection (a) and (b)(3) of Rule 23 by demonstrating that questions of law or fact common to the members of the proposed class "predominate over any questions affecting only individual members," and that the

[5] In the Mazur action, the plaintiffs must show intent to succeed on their common law fraud claim. See Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

[6] In the Mazur action, the plaintiffs will have to prove reliance. See, e.g., Weinberg v. Sun Co., 777 A.2d 442, 446 (Pa. 2001) (The Pennsylvania protection statute "clearly requires . . . that the plaintiff suffer an ascertainable loss as a result of the defendant's prohibited action. That means . . . a plaintiff must allege reliance."). Likewise, the Ruff and Funke plaintiffs will be required to prove reliance. See Tucker v. Pac. Bell Mob. Servs., 145 Cal Rptr. 3d 340, 357 (Cal. Ct. App. 2012); Sunset Beach Dev., LLC v. AMEC, Inc., 675 S.E.2d 46, 53 (N.C. Ct. App. 2009).

class is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

As illustrated above, however, this Missouri putative class — because they do not have to prove reliance and intent — will not face these issues. While the substance of the claims in these different actions undeniably contains some overlap, the Court finds that transfer is inappropriate. The class certification issues involved in this case will require the Court to apply Missouri substantive law, which this Court may be more adept at applying. See Van Dusen v. Barrack, 376 U.S. 612 (1962) (it is advantageous to have those issues decided in federal court sitting in the state whose substantive law governs).[7] More importantly, the conduct that could potentially justify class certification of an MMPA class in this case may or may not support class certification for the nationwide class, the California class, the Pennsylvania class, and the North Carolina class. Consequently, the Court finds that transfer under either the first-filed rule or Section 1404(a) is inappropriate.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Defendants Milo's Kitchen, LLC and Del Monte Corporation's Motion To Transfer Plaintiff's Second Amended Complaint Pursuant to the First-Filed Rule and 28 U.S.C. § 1404(a) (Doc. #13) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

DATED: July 22, 2013

[7] The Court recognizes that federal courts are routinely tasked with applying the laws of other states, but where, as here, the issues raised by Missouri law are significantly different than issues raised by Pennsylvania law, the Court finds that these issues should be handled by the federal court sitting in the state whose substantive law governs.