

March 29, 2007

Menu Foods Renews Recall of Pet Foods

Retailers and wholesalers have been meeting the challenge of a nation-wide recall by Menu Foods, Inc., a private-label pet food manufacturer, that recalled all its “cuts and gravy” style wet dog and cat food produced at its facility in Emporia, Kansas between December 3, 2006 and March 6, 2007. According to the Food and Drug Administration, on March 24, Menu foods again asked all retail outlets to remove all the impacted varieties of wet food posted on its website, regardless of the code date. To date, Menu Foods, Inc. has reported 14 animal deaths to the FDA. The products are packaged in cans and pouches under numerous brand names. Menu Foods, Inc. has identified the potentially contaminated products on the Internet at www.menufoods.com/recall. The product listing was expanded and updated as of March 23, and consumers were warned to stop feeding them to their pets. The FDA press release advises owners of dogs or cats who have consumed the suspect feed and show signs of kidney failure (such as loss of appetite, lethargy and vomiting) should consult with their veterinarian. Menu Foods, Inc. is notifying retailers by telephone and mail and is arranging for the return of all recalled products. Consumers with questions may contact the company at 1-866-895-2708. Consumers who wish to report adverse actions or other problems can go to <http://www.fda.gov/opacom/backgrounders/complain/html> contact the FDA complaint coordinator in their state.

The Right of All Retailers and Wholesalers to Use EDLP is Preserved! Wal-Mart Withdraws Trademark Application; USPTO Refuses Registration

N.G.A., its retailers, wholesalers and other industry members won an important victory when Wal-Mart withdrew its application to trademark “EDLP”, an acronym standing for “Everyday Low Price”, “Every Day Low Price”, “Every Day Low Prices”, “Everyday Low Pricing” and similar phrases. The United States Patent and Trademark Office ruled, “Because opposer’s (N.G.A. et. al.) consent to the abandonment is not of record, judgment is hereby entered against applicant (Wal-Mart), the oppositions are sustained and registration to applicant is refused.”

N.G.A. welcomed Wal-Mart’s withdrawal because it is in the best interest of the supermarket and other retail industries that all retailers and wholesalers have the right to use EDLP. N.G.A., retailers and wholesalers strongly opposed the effort because EDLP is an acronym and critical marketing tool that is commonly used throughout the retail industry, not just by one company, to advertise and merchandise the Every Day Low Price pricing strategy. Registering this mark in connection with retail store services would have unfairly injured and unduly restricted everyone else’s ability to market and advertise their goods and services in a manner which has been long-standing, on-going and successful. Consumers will now benefit from the ability of all retailers and wholesalers to use EDLP to help customers better understand pricing information.

N.G.A. was the first party and only trade association that filed opposition. A number of other major grocery industry businesses—including N.G.A. members—also took action to oppose Wal-Mart’s move to trademark EDLP. The Opposition was consolidated and N.G.A. was named the lead party in the action, N.G.A. et. al., v. Wal-Mart. The other opposers were: SUPERVALU INC., Associated Wholesale Grocers, Inc., Wakefern Food Corp., Safeway Inc., Meijer, Inc., HEB Grocery Company, LP., Lowes HIW Inc., Publix Super Markets, Inc., Food Lion, LLC, BASHAS’ INC., and Schnuck Markets, Inc. N.G.A. and its members appreciate the industry-wide support it received in leading the effort.

Wal-Mart Withdraws FDIC Application for an ILC; Congress to Consider H.R. 698

Wal-Mart Stores Inc., facing a wall of opposition from the banking industry, Congress, trade groups, and consumer activists, announced Friday, March 16, it has withdrawn its application for an industrial loan company (ILC) charter. The decision may bring an end to nearly two years of debate over Wal-Mart's plans for its ILC, but will not end the debate over whether banking and commerce should continue to remain separate and that ILCs should be subject to consolidated supervision either by the Federal Reserve Bank or the Federal Deposit Insurance Corporation (FDIC).

The Federal Deposit Insurance Corp. refused to rule on Wal-Mart's application. Instead, it put a six-month moratorium on any ILC approvals while it studied its legal and regulatory authority over them. When the moratorium expired Jan. 31, the FDIC extended it for any commercial applicant until Jan. 31, 2008. FDIC Chairman Sheila Bair said Wal-Mart "made a wise move."

Subsequently, Wal-Mart's CEO Lee Scott told Fox News, "So we have withdrawn our application for that charter, and we are looking at how can we get another bite of that apple because our customers in many ways, are underserved, 20 percent do not have a checking account, and how do we serve those people? Today we do it with check-cashing, with wire transfers and money orders at extraordinarily competitive rates but very probable for us. We are going to take another look at it."

N.G.A. continues to support H.R. 698. If Wal-Mart had their own ILC, it would cross the line that requires a separation between banking and commerce, and there would not be any consolidated supervision by the Federal Reserve or the FDIC over the ILC and the parent company under the Bank Holding Act. N.G.A. continues to support the position of former Federal Reserve Chairman Alan Greenspan and current Chairman Ben Bernanke, that Congress should exercise its authority to close the loophole for ILCs to engage in interstate branch banking, and decide the future direction of ILCs and our nation's financial system. H.R. 698 is sponsored by chairman of the House Financial Services Committee, Rep. Barney Frank (D-MA.), Rep. Paul Gillmor (R-OH), and 81 co-sponsors.

U.S. Supreme Court to Rule on Resale Price Maintenance Agreements

The United States Supreme Court heard oral arguments on whether or not to uphold the court's prior ruling against minimum resale price maintenance agreements. In the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, Leegin, a manufacturer of Brighton women's accessories, stopped shipping products to PSKS (a retailer) that sold Leegin's products at discounted prices in violation of Leegin's minimum retail pricing policy. PSKS challenged the Leegin policy on the basis that it constituted illegal minimum price fixing in violation of the Sherman Act. The District Court entered a judgment of \$3.6 million in favor of PSKS and the Circuit Court of Appeals confirmed the decision based upon the 1911 Supreme Court decision in *Dr. Miles Medical Company*. At issue in the case is whether the district court's finding of per se illegality should stand against a manufacturer setting the minimum retail price for all its' retailers. Leegin would like to have the Supreme Court overrule the *Dr. Miles* case and apply a rule of reason standard that would make it much more difficult for a retailer to challenge the minimum retail pricing dictated by a manufacturer. Justice Anthony M. Kennedy noted that if retailers engaged in a horizontal retail price fixing agreement, "it is invalid." So he questioned why shouldn't there be a per se rule against a manufacturer engaging in the same conduct "just for the convenience of the retailers." The Supreme Court is expected to issue a ruling on the case before it adjourns in June.

Food Stamp Program: Proposed Revisions to Bonding Requirements for Violating Retail and Wholesale Food Concerns

USDA proposes to revise the current bonding requirements imposed against participating retailers and wholesalers who have violated the Food Stamp Program rules and regulations. Currently, all violating retailers and wholesalers that are disqualified for a specified period of time or have a civil money penalty imposed in lieu of a disqualification for a specified period of time are required to submit a valid collateral bond usually on an annual basis if they wish to continue to participate in the Food Stamp Program.

Over the years, securing a collateral bond has become increasingly more difficult for retailers and wholesalers to obtain. Thus, the intent of this proposed rule is to revise the current requirement in order to help alleviate the financial burden to those retailers and wholesalers who are required to submit such a bond

and also to reduce the recordkeeping burden with respect to FNS field offices. N.G.A. will file comments with USDA Food and Nutrition Service by the May 14, 2007 deadline.