BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: PILOT FLYING J FUEL REBATE CONTRACT LITIGATION	))	MDL No. 2468

MEMORANDUM OF PETITIONER/PLAINTIFF, OHIO AUTO DELIVERY, INC., IN OPPOSITION TO JOINT AGREED MOTION TO DEFER CONSIDERATION OF PENDING MOTION TO TRANSFER

AND

REQUEST FOR ORAL HEARING

I. Introduction

Deferring a ruling on a motion to transfer may be appropriate where parties have truly reached a global settlement with all parties involved. However, the settlement reached in this case is only a partial preliminary settlement (not a global settlement), many of the plaintiffs were missing from the settlement[1], and the settlement was approved only days before the hearing on the motion to transfer and without the opportunity for the other plaintiffs to participate in the hearing, the motion to stay (doc. 74), along with the motion to transfer, should be discussed with the Panel on the hearing date that is already scheduled for July 25, 2013.

The Panel should deny the motion for two reasons. First, the partial preliminary settlement only resolves claims as to the part of the fraudulent scheme that occurred from January 2008 to present. Consistent with the FBI Affidavit[2], almost all of the complaints filed (including Ohio Auto Delivery) allege a Class Period and fraudulent scheme dating back to at

---

[1] The missing plaintiffs include, without limitation: (1) *Winborn et al v. Pilot Corporation, et al*., N.D. Al., 2:2013-cv-00772; (2) *Osborn Transportation, Inc. v. Pilot Corporation, et al.*, N.D. Al., 4:2013-cv-00897; (3) *Ohio Auto Delivery, Inc. v. Pilot Travel Centers, LLC*, N.D. Ohio, 1:2013-cv-01207; (4) *Shoreline Transportation of Alabama USA, Inc. v. Pilot Corporation, et al.*, M.D. Al., 2:2013-cv-00362; (5) *Industrial & Crane Services, Inc. v. Pilot Corporation, et al*., 1:2013-cv-00266; (6) *Eagle Motor Freight, Inc. v. Pilot Corporation, et al*., M.D. Al., 2:2013-cv-00393; (7) *Woodward v. Pilot Corporation, et al*., N.H., 1:2013-cv-00310; and (8) *Atlantic Coast Carriers, Inc. v. Pilot Corporation, et al.* (a Tennessee state court action).

[2] The FBI Affidavit is attached as Exhibit B.

least 2005, and perhaps earlier. Thus, the settlement is not a global settlement and does not resolve the claims made in the complaints to be centralized.

Second, plaintiffs with cases from around the country were not provided the opportunity to comment or assess the settlement before it was submitted. Further, because it was approved in the same day as it was submitted, plaintiffs with cases pending across the country did not have the opportunity to comment or assess the settlement before it was approved.

Even if this case did resolve claims globally, centralization will allow for an orderly assessment and comment by all plaintiffs who have filed cases.

II. Background

According to the FBI Affidavit, since at least 2004, defendants defrauded customers of Pilot Travel Centers, LLC dba Pilot Flying J ("Pilot Flying J") out of the discounted pricing that was offered to customers for diesel fuel. This fraudulent scheme was discovered by the FBI on May 4, 2011 when an employee of Pilot Flying J contacted the FBI and blew the proverbial whistle. The FBI, using a current employee of Pilot Flying J as an informant ("CHS-2")[3], recorded conversations with several employees of Pilot Flying J detailing the fraud.

The recorded conversations revealed that Pilot Flying J perpetuated the fraud by offering customers "cost plus" pricing, withholding "cost" information, refusing to provide the "cost plus" pricing that was promised, "jacking the discount," tampering with freight charges, and manually changing rebate amounts to decrease the margins between the "cost" and the retail price.

On April 15, 2013, with a search warrant, the FBI and IRS raided Pilot Flying J's headquarters (and other locations) and obtained further evidence of the fraud. On April 18, the FBI Affidavit that detailed the fraud and supported the search warrant was unsealed.

[3] "CHS" is an acronym used by the FBI for "confidential human source."

The FBI Affidavit establishes the scheme dated back to, at least, 2004. In 2012, CHS-2 admitted to FBI Special Agent Root that CHS-2 engaged in the scheme since 2004:

> CHS-2 advised that Rebate Fraud has been occurring at Pilot for more than five years. CHS-2 admitted that approximately eight years ago, he and Crutchman executed the Rebate Fraud scheme against Mesilla Valley Trucking for about two years. CHS-2 stopped once Messilla became a Direct Billed Customer and obtained optimizing software that enabled it to better track the rebates it was due.

[FBI Affidavit, page 24 of 120, at ¶39]

Also, Page 81 of 120 of the FBI Affidavit relays the following recorded conversation about when Pilot Flying J bought an airplane in 2009[4] to settle-up with a customer that discovered Pilot Flying J had cheated that customer since 2004 (5 years), and noted that CEO Jimmy Haslam loved it:

> **CHS-2**: Well what if you can't talk your way out of it? They figure out a way and they've got you nailed?
>
> **[VICE PRESIENT OF SALES JOHN] FREEMAN [AKA STICK]**: You pay up.
>
> **CHS-2**: Pay it?
>
> **FREEMAN**: Yeah. Or you buy an airplane.
>
> **CHS-2**: What does [President] Mark [Hazelwood] and [CEO] Jimmy [Haslam] say about shit like that? Do they even catch it or do they know?
>
> **FREEMAN**: Fuckin' A. I mean, I called Jimmy and told him I got busted at Western Express.
>
> **CHS-2**: What'd he say?
>
> **FREEMAN**: Oh he knew it.
>
> **CHS-2**: Oh did he?

[4] The United States of America Department of Transportation Aircraft Registration Application for the airplane at issue is attached as Exhibit A.

FREEMAN: Absolutely. I mean, he knew all along that I was cost-plussin' this guy. He knew it all along. Loved it. We were makin' $450,000 a month on him--

CHS-2: Holy shit!

FREEMAN: -- why wouldn't he love it?

CHS-2: Yeah.

FREEMAN: Did it for five years, cost us a million bucks. I mean, we made $6 million on the guy, cost us a million bucks.

CHS-2: Great investment.

Page 66 of 120 of the FBI Affidavit also memorializes a sales meeting where the airplane purchase was discussed in the presence of CEO Haslam, CFO Mitchell Steenrod, and President Hazelwood:

> On November 20, 2012, CHS-2 attended a diesel sales meeting in which all direct sales personnel were present, including all regional directors, regional sales managers and regional account representatives. Also present were Jimmy Haslam, Mark Hazelwood, and Mitch Steenrod. During Hazelwood's presentation to the entire group, a male voice interrupted Hazelwood to make reference to Freeman's previous deceptive conduct in connection with Customer Western Express, which was the same deceptive conduct that Freeman recounted to the regional sales directors who met at Freeman's lake house on October 25, 2012:
>
> **HAZELWOOD**: ... because what David Owens really tells them is its cost plus five. That's what he tells them with no idea what cost plus five is. We're going to go into the marketplace at four with a zero fee and we are going to give you credit. You're going to pay three times a week. That's going to ...
>
> **Male Voice #1**: -like Stick's old deal with Western ...
>
> **HAZELWOOD**: Yeah, [laughter] Well, we're gonna, we're gonna intro, going to introduce him to a guy by the name of Manuel[5].
>
> **Male Voice #2**: No planes in this deal.

[5] Employees of Pilot Flying J referred to the manual rebate program that Pilot Flying J manipulated as Manuel.

> **FREEMAN**: Yeah, ah, some of us, rich and famous, we have our own, own planes[6].
>
> **HAZELWOOD**: ... [continues presentation to assembled group]

To date, five current and/or former employees of Pilot Flying J have plead guilty to charges (such as conspiracy to commit mail fraud), have agreed to cooperate with law enforcement, and are awaiting sentencing.

Consistent with the foregoing, class action complaints were filed around the country alleging that, since at least January 1, 2005 (and perhaps earlier), Pilot Flying J has defrauded its customers through its fuel discount and rebate program.

On May 30, 2013, Ohio Auto Delivery sought centralization of all of these cases. (Doc. 1) All parties have agreed that centralization and coordination of the pretrial proceedings was appropriate, and the vast majority of the responses have advocated for the Southern District of Mississippi. Now, Ohio Auto Delivery also supports the Southern District of Mississippi for centralization and coordination of pretrial proceedings should the matter not be transferred to the Northern District of Ohio.

The motion to transfer is scheduled for a hearing before the Judicial Panel on Multidistrict Litigation on July 25, 2013 in Portland, Maine. The proposed partial settlement was signed by several plaintiffs on July 15, 2013 and was submitted to the United States District Court for the Eastern District of Arkansas on July 16, 2013, and approved that same day.

---

[6] Presumably, this is a reference to CEO Jimmy Haslam, who is well-known as the owner of the Cleveland Browns.

III. Law & Argument

A. The Settlement does not resolve all claims in the complaints sought to be centralized.

The proposed settlement class is defined to include only claims dating from January 1, 2008 through July 15, 2013. (See, doc. 74, p.3) Consistent with that time period, the settlement only compensates the Eligible victims for that same time period. The complaints that Ohio Auto Delivery seeks to centralize, all allege a class period dating back to at least 2005 (and perhaps earlier). On its face, the settlement does not resolve claims relating to the entire scheme, and centralization and coordination of pretrial proceedings should still occur.

Despite the assertions to the contrary, *In re Power Balance, LLC, Mktg & Sales Prac. Litig.*, 777, F. Supp. 2d 1345 (J.P.M.L. 2011), is distinguishable. In *Power Balance*, the preliminary settlement was a global settlement, unlike the partial preliminary settlement in this case. Furthermore, the preliminary settlement had not yet been approved, which gave the other plaintiffs the opportunity to appear at the preliminary approval hearing and raise any concerns, unlike the instant partial preliminary settlement. Ohio Auto Delivery, and presumably other plaintiffs, were not consulted, were not notified of an approval hearing, and were not given the opportunity to express concerns to the Court prior to approval.

Likewise, *In re Building Products of Canada Corp. Organic Shingles Products Liability Litig*, 856 F. Supp. 2d 1345, 1346 (J.P.M.L. 2012) is distinguishable. In *Building Products*, the Panel denied the motion to transfer because a preliminary settlement had been approved that "would cover all claims in the actions before the Panel.") Here, the partial preliminary settlement will not dispose of all claims in the actions before the Panel. Also, unlike *In re Admission Tickets*, 369 F. Supp. 1339 (J.P.M.L. 1969), where the Panel stayed the motion to transfer to determine what claims would continue to exist and which claims were disposed of, no

such concern exists in this matter. The same distinguishing characteristics exist in *In re Charles Schwab & Co. Best Execution Sec. Litig.*, 2000 U.S. Dist. LEXIS 5101 (J.P.M.L. 2000). Here, the partial preliminary settlement only proposes to settle the portion of the scheme that occurred after January 2008, and not the activities that occurred before that time.

Moreover, a settlement in one district does not render the motion to transfer moot. *In re Banc of America Inv. Services, Inc.*, 466 F.Supp.2d 1353 (J.P.M.L. 2006) (the Panel held that a settlement in one federal district court does not moot the centralization issue). And, sending a case to a district court other than a district court where a global preliminary settlement had been reached sometimes is the best decision and solution. See, e.g., *In re Lease Oil Antitrust Litigation No. II*, 48 F.Supp.2d 699 (S.D.Tex.1998) (noting that the MDL Panel transferred similar federal actions to the district court in Corpus Christi, Texas, even though the plaintiffs and defendants in a case filed in the federal district court in Houston, Texas had reached a global settlement that was before the court).

B. Centralization will still provide an organized manner for Plaintiffs who have filed cases to have their concerns heard prior to the sending of notice to the class.

The partial preliminary settlement was only joined by a few of the plaintiffs that have filed actions relating to the scheme, and Ohio Auto Delivery was not invited to participate or informed about the partial settlement until it was filed. While the settlement might prove to be adequate, many Plaintiffs who had filed cases were unable to assess or comment on the settlement before it was signed.[7] Because there is only one case filed in the Eastern District of

[7] The settlement raises several questions that might be easily addressed if all parties had the opportunity to participate in centralized proceedings, such as: (1) why does the settlement not reach back to the time period that the FBI Affidavit suggests is appropriate; (2) why are 90% of the Class Members releasing claims without receiving any compensation; and (3) why does the settlement rely upon the internal auditors of Pilot Flying J to determine the amounts that customers were short-changed but does not detail the methodologies and procedures that the internal auditors will use.

Arkansas, none of the other Plaintiffs received ECF notification that the settlement had been filed and only learned of the preliminary approval from the press. Centralization in front of one court will allow all parties to comment and assess the partial settlement before costly notice to the absent class is mailed and will allow the parties to centralize and later filed tag along actions.

If the settlement is indeed adequate, no party will be prejudiced by centralization as it will occasion little delay and because Pilot Flying J continues to pay Class Members even prior to final approval. Even in the short week since the settlement was disclosed, opposition has appeared in the press. (See, *e.g.*, http://profootballtalk.nbcsports.com/2013/07/18/opposition-to-pilot-flying-j-settlement-grows/; http://www.knoxnews.com/news/2013/jul/18/ga-lawyer-seeks-to-depose-haslam-hazelwood-of-j/) While it is frequently not necessary to wait until the very last stone is turned over before settling, it is important for the victims who have filed cases to know that the significant rocks have been turned over prior to approval of a preliminary settlement, especially when a federal investigation is ongoing and will shed further light on defendants' misdeeds.

IV. Conclusion

While deferring a ruling on a motion to transfer may be appropriate where parties have truly reached a global settlement at an arm's length transaction, caution should be exercised in this case. The settlement reached is only a partial preliminary settlement (not a global settlement), many of the plaintiffs were missing from the settlement, the settlement was approved only days before the hearing on the motion to transfer and without the opportunity for the other plaintiffs to participate in the hearing.

As such, the motion to stay (doc. 74), along with the motion to transfer, should be discussed with the Panel on the hearing date that is already scheduled for July 25, 2013.

July 19, 2013

Respectfully submitted,

/s/ Adam E. Crowell
Charles H. Cooper, Jr. (0037295)
Rex H. Elliott (0054054)
Adam E. Crowell (0075095)
Adam P. Richards (0085335)
Barton R. Keyes (0083979)
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
E-mail: rexe@cooperelliott.com
chipc@cooperelliott.com
adamc@cooperelliott.com
adamr@cooperelliott.com
bartk@cooperelliott.com

Attorneys for Ohio Auto Delivery, Inc.