UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH EBIN and YERUCHUM JENKINS,

Plaintiffs,

-v-

KANGADIS FOOD INC. d/b/a THE GOURMET FACTORY,

Defendant.

13 Civ. 2311 (JSR)

MEMORANDUM

FRANK TOSCANO

Plaintiffs,

-v-

KANGADIS FOOD INC. d/b/a THE GOURMET FACTORY,

Defendant.

13 Civ. 5944 (JSR)

MEMORANDUM

JED S. RAKOFF, U.S.D.J.

On April 8, 2013, plaintiffs Joseph Ebin and Yeruchum Jenkins commenced this putative consumer class action against defendant Kangadis Food Inc., doing business as The Gourmet Factory ("Kangadis"), asserting numerous causes of action sounding in fraud and breach of warranty under both New York and New Jersey law. All of plaintiffs' claims relate to Kangadis's alleged practice of selling containers of Capatriti-brand "100% Pure Olive Oil" that actually contain an industrially processed substance known as "olive-pomace oil," "olive-residue oil," or "Pomace." In a "bottom line" Order dated November 11, 2013, the Court denied a motion to consolidate *Ebin* with the related case *Toscano*, discussed below, and granted the motion to stay *Toscano*. This Memorandum sets forth the reasons for that ruling.

On May 16, 2013, plaintiff Frank Toscano filed a class action complaint in the United States District Court for the District of New Jersey against defendant Kangadis, asserting numerous causes of action sounding in fraud and breach of warranty under New Jersey law. The *Toscano* action relates to the same subject matter as the *Ebin* action, seeks to represent an overlapping class of consumers for a subset of *Ebin*'s legal claims, is based on virtually identical factual allegations (e.g., what constitutes olive oil, the making and processing of the Capatri Brand), and is against the same defendant, Kangadis Food Inc.

On May 30, 2013, defendant Kanganis filed a petition before the United States Judicial Panel on Multidistrict Litigation ("JPML"), arguing that the *Toscano* action should be transferred to the Southern District of New York and consolidated with the *Ebin* action. Plaintiffs Ebin and Jenkins in response filed a memorandum in opposition to defendant's motion before the JPML on June 21, 2013, arguing that a § 1407 transfer was unnecessary because counsel for the *Toscano* action was considering a voluntary transfer to the Southern District of New York. On August 6, 2013, the JPML issued an order denying defendant's petition, finding that voluntary coordination was preferable to formal consolidation under § 1407.

On August 20, 2013, the *Toscano* action in the United States District Court for the District of New Jersey was voluntarily dismissed without prejudice, and a substantially similar complaint was filed two days later in the United States District Court for the Southern District of New York, along with a Notice of Related Case concerning the *Ebin* action. On that same day, plaintiffs Joseph Ebin, Yeruchum Jenkins, and Frank Toscano filed a joint motion to consolidate the *Ebin* and *Toscano* actions, pursuant to Fed. R. Civ. P. 42(a). In response on September 6, 2013, defendants filed a cross motion to stay the *Toscano* action pending the resolution of *Ebin*. Oral arguments were heard in the Court on October 24, 2013.

Rule 42(a) provides that "[i]f actions before the court involve a common question of law or fact, the court may: 1) join for hearing or trial any or all matters at issue in the actions; 2) consolidate the actions; or 3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). The legal standard governing a motion to stay requires the consideration of the following factors:

> "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and the burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest."

Kappel v. Comfort, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996). In this instance, the Court believes that a stay of *Toscano* is preferable to consolidation, for three reasons:

First, Toscano will not be significantly prejudiced by a stay, since he is a member of the proposed class in *Ebin*. Specifically, the plaintiffs in *Ebin* are seeking to certify a nationwide class of all purchasers of Capatriti 100% Pure Olive Oil as well as a subclass of New Jersey purchasers of Capatriti 100% Pure Olive Oil, in both of which classes Toscano, as an alleged New Jersey purchaser of Capatriti 100% Pure Olive Oil, would necessarily be included.

Second, consolidation would result in unnecessary delays. For example, because Toscano did not file here until three months after the initial filling in *Ebin*, the schedule of many matters in this case (such as defendant's motion to dismiss) is far behind the schedule in the *Ebin* case, where decisions have now been nearly completed and a final pre-trial conference is set for January 21, 2014.

Third, the interests of the class heavily weigh towards a stay over consolidation. Although some judicial economies might be realized by consolidation, such efficiencies are likely to be outweighed by the inefficiency of having multiple lawyers from two firms duplicating efforts, thereby increasing the likely award of attorneys' fees and, concomitantly, reducing the amount of compensation ultimately available to the class upon recovery should the plaintiffs prevail.

Accordingly, for the foregoing reasons, the Court by Order dated November 11, 2013, granted defendant's motion to stay the *Toscano* action and denied plaintiffs' motion to consolidate the *Ebin* and *Toscano* actions.

Dated: New York, NY
December 6, 2013

JED S. RAKOFF, U.S.D.J.