# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF ARKANSAS**
**EL DORADO DIVISION**

**IN RE: PILGRIM'S PRIDE FAIR LABOR STANDARDS ACT LITIGATION**

**MDL DOCKET No. 1:07-CV-1832**

**THIS DOCUMENT RELATES TO:**

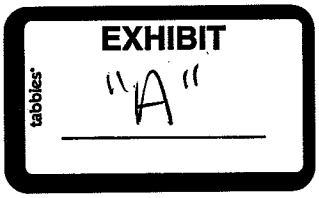
**JURY DEMANDED**

***Elaine L. Chao v. Pilgrim's Pride Corp.,***
**Civil Action No. 1:08-CV-01011**

# PLAINTIFFS' OBJECTION TO REQUEST FOR SUGGESTION OF REMAND OF DOL LITIGATION

## I. INTRODUCTION

Plaintiffs in all private actions ("Plaintiffs") before this Court object to the Agreed Request for Suggestion of Remand of the Department of Labor's ("DOL") action, *Chao v. Pilgrim's Pride Corp.*, No. 3:07-cv-1352-B, (N.D. Tex.). By overseeing this litigation for nearly two years, this Court has acquired extensive experience with the legal and factual issues surrounding this MDL action. This Court's continued coordination of the DOL action "will further the expeditious resolution of the litigation taken as a whole," and best serve the original goals set forth by the Judicial Panel on Multidistrict Litigation ("JPML") in transferring this action. *See* Transfer Order, No. 1:08-1011-HFB, (W.D. Ark. Feb. 15, 2008) ("DOL Transfer Order"), attached hereto as Ex. 1. The JPML has already determined that the DOL action "seeks relief on a company-wide basis . . . and involves common questions of fact with the actions in this litigation previously transferred" such that coordinated pretrial proceedings, "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.*



Pilgrim's Pride Corporation's ("Pilgrim's") petition for Chapter 11 bankruptcy protection has not diminished the substantial efficiencies that may be achieved through coordinated pre-trial proceedings in these related actions. As this Court has already carefully considered the appropriate scope of discovery in issuing a comprehensive Discovery Order, Nov. 25, 2008, (MDL Dkt. #60), this Court's continued coordination of the discovery in these related actions will promote the just and efficient conduct of these actions. Significant opportunities for coordinated discovery remain. For example, should the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, grant Plaintiffs' motion for relief from the automatic stay, discovery will be allowed to progress for an estimation hearing to occur prior to plan confirmation. *See* Pls.' Mot. for Relief from Stay, *In re Pilgrim's Pride Corp.*, No. 08-45664-DML (Bankr. Ct. N.D. Tex. Feb. 5, 2009), (Bankr. Dkt. No. 777), attached hereto as Ex. 2. In addition, even if the Bankruptcy Court does not lift the automatic stay at this time, prior to plan confirmation, Plaintiffs may move the Bankruptcy Court, pursuant to Bankruptcy Code Section 502(c)(1) for an estimation of the value of their claims, which permits Plaintiffs to conduct discovery.[1] Further, even if Plaintiffs' claims are not ultimately resolved through the bankruptcy proceeding, ample opportunity remains for coordinated common discovery and pretrial proceedings when Pilgrim's re-emerges from bankruptcy, anticipated in the fall of 2009.[2]

Finally, even in the unlikely situation that discovery in the DOL action can not be contemporaneously coordinated with Plaintiffs' action, this Court's continued oversight over all related pretrial proceedings would continue to provide important benefits to all parties and the

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[1] *See* Bankruptcy Rule 9014(c) which makes Bankruptcy Rule 7026 (Fed. R. Civ. P. 26) applicable to contested matters.

[2] At the Debtor's first meeting of creditors conducted January 30, 2009, the Debtor's Chief Restructuring Officer, William Snyder of CRG Partners Group, LLC, testified that he anticipated the Debtor would emerge from bankruptcy in the fall of 2009.

judiciary. As this Court possesses a familiarity with the common legal and factual issues in these actions, its continued coordination of pretrial proceedings will provide substantial efficiencies and avoid having multiple courts duplicate efforts with potentially inconsistent results. *See, e.g., In re Patenaude,* 210 F.3d 135, 144 (3d Cir. 2000) ("To be coordinated, it is not necessary that common issues are being contemporaneously addressed."); *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.,* 498 F. Supp. 2d 25, 36-38 (D.D.C. 2007) (benefits of coordinated proceedings extend to all pretrial proceedings, including resolving summary judgment motions).

## II. PROCEDURAL BACKGROUND

1. On February 15, 2008, the JPML transferred the DOL action to this Court for coordinated pretrial proceedings. *See* DOL Transfer Order, Feb. 15, 2008, Ex. 1. The DOL action requests company-wide injunctive relief for violations of the FLSA as well as overtime compensation and liquidated damages for certain chicken processing employees at a single plant in Dallas. *See* First Am. Compl., *Chao v. Pilgrim's Pride Corp.,* No. 3:07-1352-B (N.D. Tex. Oct. 24, 2007, at 1, 3-4 (Dkt. # 8) ("DOL Am. Compl."); Secretary's Br. in Support of Mot. to Vacate Conditional Transfer Order 3, MDL No. 1832 (J.P.M.L. Nov. 20, 2007), ("Secretary's Brief"), at 10, attached hereto as Ex. 3.

2. On December 2, 2008, Pilgrim's filed a Notice of Suggestion of Bankruptcy in this Court stating that Pilgrim's filed a voluntary petition for bankruptcy protection in the Northern District of Texas under Case No. 08-45664, which operates as an automatic stay of proceedings against the debtor. (MDL Dkt. #63).

3. On December 8, 2008, the Secretary filed a Response to Defendant's Notice of Suggestion of Bankruptcy, which states that the DOL's enforcement action against Pilgrim's is not subject to the automatic stay pursuant to Section 362(b)(4) of the Bankruptcy Code, which exempts the Secretary's FLSA enforcement Action from the automatic stay provision of the Code. 11

U.S.C. § 362(b)(2) and (4). *See* Secretary's Resp. to Def's Notice of Suggestion of Bankruptcy, Dec. 8, 2008 (MDL Dkt. #64). The Secretary may obtain a monetary judgment from the court; however, any liquidated monetary judgment obtained must be pursued through the Bankruptcy Court. *Id.* at 9.

4. On February 5, 2009, Plaintiffs moved the Bankruptcy Court for relief from the automatic stay. *See* Pls.' Mot. for Relief from Stay, *In re Pilgrim's Pride Corp.*, No. 08-45664-DML (Bankr. Ct. N.D. Tex. Feb. 5, 2009), (Bankr. Dkt. No. 777), Ex. 2. The Bankruptcy Court will hear argument on this motion on March 17, 2009. *See* Am. Notice of Hr'g., *In re Pilgrim's* Pride, No. 08-45664-DML (Bankr. Ct. N.D. Tex. Feb. 16, 2009), (Bankr. Dkt. No. 891), attached hereto as Ex. 4.

5. On November 25, 2008, prior to Pilgrim's petition for bankruptcy, Plaintiffs moved this Court to amend their complaint to add the four corporate officers of Pilgrim's who Plaintiffs' allege are individually liable for unpaid overtime under the FLSA. *See* Pls.' Mot. for Leave to Amend Compl. (MDL Dtk. #61-62). These individuals are Lonnie "Bo" Pilgrim, the company's co-founder, controlling shareholder and Senior Chairman of the Board; Lonnie Ken Pilgrim, Chairman of the Board; J. Clinton Rivers, former President and Chief Executive Officer; and Jane T. Brookshire, Executive Vice President of Human Resources. *Id.*

6. On January 12, 2009, Pilgrim's moved the Bankruptcy Court to extend the automatic stay to the individual defendants, to which Plaintiffs filed an objection on February 3, 2009, (Bankr. Dkt. No. 735), attached hereto as Ex. 5. On February 4, 2009, The Official Committee of Unsecured Creditors filed a response to Pilgrim's Motion to extend the automatic stay, which takes the position that the FLSA officer and director actions should be permitted to proceed. Resp. of the Official Committee of Unsecured Creditors Concerning Debtor's Mot. Extending the Automatic

Stay, ¶¶ 4-5, (Bankr. Dkt. No. 767), attached hereto as Ex. 6. ("It is unclear why it is necessary or appropriate to enjoin the prosecution of the ERISA and FLSA actions, or any of the Director and Officer Actions").

7. On February 11, 2009, the Bankruptcy Court denied Pilgrim's motion to extend the stay to the officers and directors at issue in Plaintiffs' action, without prejudice to Pilgrim's filing of an adversary proceeding to seek injunctive relief. Order, Mar. 3, 2009, (Bankr. Dkt. No. 1031), attached hereto as Ex. 7.

## III. ARGUMENT

The original reasons the JPML identified for inclusion of the DOL action in these MDL proceedings remain valid, and thus remand of the DOL action is premature. *See, e.g., In re Integrated Resources, Inc. Sec. Litig.,* 851 F. Supp. 556, 562 (S.D.N.Y. 1994) (denying to grant a suggestion of remand because the factors based on common questions of fact relied on by the JPML for the original transfer remain valid). As the JPML explained in its initial transfer order establishing the MDL, "centralization under Section 1407 is necessary in order to eliminate duplicative discovery; prevent inconsistent rulings on pretrial motions . . . ; and conserve the resources of the parties, their counsel, and the judiciary." Transfer Order, *In re Pilgrim's Pride* FLSA, MDL No. 1:07-1832-HFB (W.D. Ark. May 10, 2007), at 2, attached hereto as Ex. 8. After briefing by the parties and a hearing on this matter, the JPML identified this Court as the appropriate tribunal to handle these related actions in light of its docket conditions and the company-wide collective action already pending here. *See id.* 8.

In subsequently transferring the DOL action to this Court over the objection of Pilgrim's and the DOL, the JPML concluded that:

> Regardless of any differences in legal theory, [the DOL action] still alleges that Pilgrim's Pride did not compensate workers for all hours worked in violation of the FLSA and seeks relief on a company-wide basis. Inclusion of the present claims in

> MDL No. 1832 will have the salutary effect of placing all related claims in this docket before a single judge who can formulate a pretrial program that: (1) prevents repetition of previously considered matters; and (2) allows pretrial proceedings with respect to any individual issues to proceed concurrently with pretrial proceedings on common issues. (citation omitted). The familiarity of the transferee judge with this docket and the underlying allegations will further the expeditious resolution of the litigation **taken as a whole** . . . .

DOL Transfer Order, Feb. 15, 2008 (emphasis added), Ex. 1.

The benefits of coordinated pretrial proceedings continue to be equally compelling today, despite Pilgrim's bankruptcy filing. Substantial opportunities remain for coordinated discovery as set forth below. Further, even in the absence of the opportunity to coordinate common discovery, the efficient resolution of the entire litigation is significantly enhanced by having this Court oversee the pretrial program, as the DOL and Plaintiffs' actions present overlapping factual and legal issues.

### A. Remand is Premature where the Litigation will Benefit from Further Coordinated Proceedings.

Only the JPML may remand a case transferred under § 1407. *In re Wilson,* 451 F.3d 161, 165 n.5 (3d Cir. 2006). A decision about whether to suggest remand to the JPML is in the Court's sound discretion. *See U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 38 (D.D.C. 2007); JPML Rule 7.6(c) and (d). The focus of this inquiry is on furthering the expeditious resolution of the "litigation **taken as a whole**" and ensuring "maximum efficiency for **all parties and the judiciary**," and not merely the interests of the parties to the individual case in which remand is sought.[3] Courts have granted remand prior to the conclusion of all pretrial proceedings, only when there was no efficiency gain by keeping the case before the transferee court. *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, No. MDL 1014, 1998 WL 118060, at *13

[3] See Transfer Order, No. 1:08-1011-HFB, (W.D. Ark. Feb. 15, 2008) (emphasis added); *Hockett,* 498 F. Supp. 2d at 38 (the decision of whether to suggest remand should be guided by "whether one option is more likely to 'insure the **maximum efficiency for all parties and the judiciary**.") (emphasis added) (*quoting In re IBM Peripheral EDP Devices Antitrust Litig.*, 407 F. Supp. 254, 256 (J.P.M.L. 1976)).

(E.D. Pa. Jan. 12, 1998) (allowing remand only after virtually all case-wide coordinated discovery had been completed with only some case-specific discovery remaining). Where the efficient and fair resolution of certain issues is likely to "require any particular experience that the transferee judge might have gained from supervising this litigation," remand is premature. *Hockett*, 498 F. Supp. 2d at 38. A party seeking remand to the transferor court has the burden of establishing that such remand is warranted. *In re Integrated Resources, Inc.*, 851 F. Supp. at 562.

Courts have applied the Supreme Court's guidance in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998), that "coordinated and consolidated" pretrial proceedings should be broadly interpreted to serve the purposes of § 1407(a) when there is a "'common core' that makes it more just or efficient that the cases continue to be handled in one court or before one judge." *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 36-38 (D.D.C. 2007) (quoting *Lexecon*, 523 U.S. at 34). "To be coordinated, it is not necessary that common issues are being contemporaneously addressed" or that "any one issue be common to all cases, so long as issues 'overlap.' *Patenaude*, 210 F.3d at 143-44 (citing *Lexecon*, 523 U.S. at 34). Courts have therefore denied requests for suggestion of remand even where all discovery had been completed, recognizing that the MDL court's familiarity with the issues foster efficiencies in deciding summary judgment motions and resolving other pretrial issues. *See, e.g., Hockett*, 498 F. Supp. 2d at 36-38; ("much more efficient to proceed to summary judgment motions in this Court rather than to ask the transferor court to play catch-up"); *In re Wilson*, 451 F.3d at 170 ("coordination can be found even if common issues are present only in relation to cases that have already been terminated").

### B. Substantial Opportunities Exist for the Coordination of Common Discovery and Pretrial Matters.

The Request for Suggestion for Remand overlooks the substantial efficiencies to be gained through coordinated pre-trial proceedings. As this Court has issued a comprehensive discovery order and common discovery has yet to begin, the continued centralization of the pretrial proceedings will maximize efficiency for all parties and the judiciary. Courts have long recognized that remand is premature where common discovery or other pretrial matters remain. *See In re Wilson*, 451 F.3d at 171-72 (denying a petition for writ of mandamus on denial of motions to remand where coordinated pretrial proceedings had not yet concluded and potential for issues common to many cases continue to arise); *In re Four Seasons Sec. Laws Litig.*, 342 F. Supp. 758, 760 (J.P.M.L. 1972) (denying remand as premature "common discovery should be completed before remand of plaintiff's claim could be considered").

#### 1. Numerous Avenues Remain for Coordinated Common Discovery in DOL and Plaintiffs' Actions.

The DOL's and Plaintiffs' actions are all in the initial stages of discovery. This Court has already considered the issues relevant to discovery and developed a comprehensive discovery order, after considering extensive briefing and holding a hearing on disputed discovery issues. Discovery Order, Nov. 25, 2008 (MDL Dkt. #60). Both the DOL Action and Plaintiffs' action challenge Debtors' ***company-wide policy*** of not compensating its workers for time they are required to spend putting on, taking off and cleaning the safety and sanitary gear that they must wear to perform their jobs. *See* DOL Am. Comp., Oct. 24, 2007, at 1, 3-4 (Dkt. #8); Secretary's Brief, Ex. 3; Pls.' Consolidated Collective Action Compl., July 20, 2007, at 23, (MDL Dkt. #21). The DOL seeks injunctive relief concerning Pilgrim's company-wide practices, and Plaintiffs seek monetary damages to compensate workers for unpaid overtime. *See* DOL Am. Compl. (Dkt. #8). The central issue in dispute in both the DOL's and Plaintiffs' litigation is whether the time workers spend

donning, doffing and cleaning, safety and protective equipment is compensable work. The resolution of this question will turn upon facts concerning whether these activities are necessary to the principal work performed, controlled or required by the employer, and pursued for the benefit of the employer. Plaintiffs' affirmative discovery efforts will overlap with those of the DOL in its parallel action as both will seek common information to establish Pilgrim's liability for unpaid wages, such as on Pilgrim's policies and practices concerning timekeeping, and the equipment workers were required to put on and take off under company policy, federal law or the nature of the job, and other similar evidence. Such discovery will include common requests for production of documents and electronically stored information ("ESI"), which will presumably require Pilgrim's to search the files of many of the same custodians of records and utilize many of the same search terms as the same policies and practices concerning overtime will be at issue. Having the same court resolve any disputes over the scope of discovery such as the reasonableness of the proposed search terms for ESI or the relevant custodians of documents will achieve efficiencies -- whether or not discovery is conducted contemporaneously.

Rather than acknowledge the significant opportunities for coordinated pretrial proceedings, the Request for Suggestion of Remand focuses instead on the convenience of counsel and the parties to the DOL action, as that action will include discovery specific to the Dallas, Texas plant, which is not at issue in Plaintiffs' action. *See* Request for Suggestion of Remand, Feb. 26, 2009, at 5-6 (MDL Dkt. #66). However, the JPML has already found those same arguments unpersuasive in denying Pilgrim's and the DOL's earlier motions to vacate the transfer order, finding the benefits of coordination remained despite any differences presented by the actions. DOL Transfer Order, Feb. 15, 2008 at 2.

Notwithstanding the bankruptcy filing, substantial opportunities for coordinated discovery remain. On March 17, 2009, the Bankruptcy Court will hold a hearing on Plaintiffs' Motion for Relief from the Automatic Stay. Should the Bankruptcy Court grant Plaintiffs' Motion, discovery will be allowed to progress for an estimation hearing to occur prior to plan confirmation. *See* Pls.' Mot. for Relief from Stay, Feb. 5, 2009, (Bankr. Dkt. No. 777), attached hereto as Ex. 2. Should discovery be permitted – even on a limited basis – significant opportunities will exist for coordinated common discovery with the DOL action. Further, even if the Bankruptcy Court does not at this time lift the automatic stay, prior to plan confirmation, Plaintiffs may move the Bankruptcy Court for an estimation of the value of their claims, which permits Plaintiffs to conduct discovery.[4] Continuing the centralized proceedings will protect all parties' interests and conserve the parties' resources by facilitating the coordination of common discovery to avoid duplicative written discovery and multiple depositions of the same defense witnesses.

Should Plaintiffs' claims remain unresolved through the bankruptcy proceeding, ample opportunity remains for coordinated common discovery and pretrial proceedings when Pilgrim's re-emerges from bankruptcy. Pilgrim's has represented to the Bankruptcy Court that its goal is to emerge from bankruptcy in the fall of 2009. *See* Testimony of William Snyder, Pilgrim's Chief Restructuring Officer at the January 30, 2009 first meeting of creditors. The DOL and Pilgrim's have sought an 18-month discovery period, which even if begun promptly, would not conclude until the fall of 2010. *See* Def's Reply in Supp. of Supplemental Rule 26 Report, Nov. 14, 2008, (MDL Dkt. #58), at 8. Thus, should discovery in the DOL case begin prior to discovery in Plaintiffs' action, significant opportunities to coordinate common discovery should nonetheless remain after Pilgrim's re-emerges from bankruptcy.

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[4] *See* Bankruptcy Rule 9014(c) which makes Bankruptcy Rule 7026 (incorporating Fed. R. Civ. P. 26) applicable to contested matters.