

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF CONNECTICUT**

SAL TINNERELLO & SONS, INC.	:	CIVIL ACTION NO.
Plaintiff	:	
	:	3:97-cv-01273(RNC)
vs.	:	
	:	
	:	
	:	
TOWN OF STONINGTON, STONINGTON	:	September 26 <sup>th</sup> , 1997
RESOURCE RECOVERY AUTHORITY;	:	
AND DONALD MARANELL,	:	
FIRST SELECTMAN	:	

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PERMISSION TO FILE LATE JURY CLAIM**

**INTRODUCTION**

Plaintiffs initiated this action in the Connecticut Superior Court in June, 1997. Defendants filed a timely and proper removal petition to this court on June 27, 1997. The plaintiff filed an amended complaint on July 8<sup>th</sup>, 1997, and the defendants filed an answer on August 15<sup>th</sup>, 1997.

Pursuant to Rule 38(b), plaintiffs could have filed a demand for jury trial within ten days thereafter, but failed to do so through both inadvertence and legitimate confusion. Plaintiffs now move for permission to seek a trial by jury pursuant to Rule 39. This memorandum is in support of the motion.

**ARGUMENT**

## 1. The Court Has Discretion to Allow Filing of Late Jury Claim

F.R.Civ.P.39(b) provides that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court, in its discretion, upon motion may order a trial by jury of any or all issues."

Further, F.R.Civ.P. 81(c) provides, in pertinent part, that "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . ." Under F.R.Civ.P. 81(c), the Court looks to state law in exercising its discretion. Cascone v. Ortho Pharmaceutical Corp., 94 F.R.D. 333, 335 (S.D.N.Y. 1982).

Connecticut law provides "[a]ny time thereafter [the ten period has expired], a case may be entered on the jury docket by consent of all parties or by order of the court." Falk v. Schuster, 171 Conn. 5, 7, 368 A.2d 40 (1976). In Falk, the Supreme Court upheld the trial court's grant of a late claim for jury trial, even though the claim was late by more than two years, as well within the court's discretion. Id. at 8.

"[A] majority of circuits have held that **absent compelling reasons to the contrary** a party's jury demand should be granted." Printers II, Inc. v. Professionals Publishing, Inc. 596 F. Supp. 1051 (S.D.N.Y. 1986) (emphasis added). This case presents no compelling reasons as to why the plaintiffs' motion for permission to file late jury claim should be denied.

In Printers, supra, the Court denied the untimely jury demand, because the normal "solicitude for petitioners in 39(b)

motions where the movant had been removed state to federal court.  
. . " was not present due the action's origin in federal court.

Contrary to Printers, the normal solicitude is present in the above-captioned case, because the action was **removed from state to federal court**. Further, the reason for the untimely jury claim is due to more than just inadvertence. It is due to the removal of the action from state to federal court, coupled with a delayed ruling on the motion to dismiss, giving rise to plaintiffs' counsel's belief that, as is customary in his firm, a claim for jury was filed with the complaint.

The Supreme Court has held that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80, (1957).

## **2. Plaintiffs Did not Choose the Forum**

It is the regular custom and practice of the undersigned's law firm to file a claim for jury trial with or even included on the Complaint when filing in federal court. This limits inadvertent errors such as the one this motion addresses, because the claim for jury trial, while it must be made within 10 days of the close of the pleadings according to F.R.Civ.P. 38(b), can be made at any time before, including with the filing of the complaint.

In state court, however, the claim for jury can not be included on the complaint. Instead, it must be filed separately,

on a form distributed by the Superior Court Clerk's Office. C.G.S. §52-215. Connecticut's rules of Court closely parallel the Federal Rules of Civil Procedure: both allow filing a claim for jury within 10 days of the close of the pleadings. F.R.C.P. 38(b); Connecticut Practice Book §260; C.G.S. §52-215. Because in state court the claim for jury must be filed as a **separate pleading**, it is the undersigned's firm's custom to file this pleading at the time of filing or receiving the answer.

Plaintiffs filed in state court. Therefore, it was the undersigned's intention to file a Claim for Jury at the time of receipt of defendants' answer, or when plaintiffs filed a reply to defendants' special defenses, if plead. Because the defendants promptly removed the case to federal court and the activity in the litigation focused both on obtaining injunctive relief and pursuit of an expedited appeal, plaintiff was distracted and its counsel overlooked that his regular practice was not followed in this action because of the removal.

### **3. Granting Permission For Late Filing of Jury Claim Will Not Prejudice Defendants**

The filing of the jury demand in this action is approximately 20 days late.

One of the elements to consider when determining a discretionary grant of an untimely claim for jury is whether there will be prejudice the defendant. Cascone, supra, at 335. There can be little prejudice offered by defendants to oppose the request in light of the short amount of time which has passed.

### **CONCLUSION**

For all the foregoing reasons, the plaintiff respectfully requests that this Court grant the motion for permission to file a late jury claim.

PLAINTIFF,

By \_\_\_\_\_  
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