UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAMPMOR, INC., *Plaintiff*, - *vs.* - BRULANT, LLC, *Defendant*.	CIVIL ACTION NO. 09-CV-5465 (WHW)
BRULANT, LLC, *Counterclaim Plaintiff*, - *vs.* - CAMPMOR, INC., *Counterclaim Defendant*.	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE TESTIMONY AND ARGUMENT CONCERNING CAMPMOR'S SERVICE OF PROCESS FROM TRIAL

Ronald D. Coleman (RC 3875)
David Kuehn (DK 4560) (*Pro Hac Vice*)
Joel G. MacMull (JM 8239) (*Pro Hac Vice*)
55 Harristown Road
Glen Rock, NJ 07452
(201) 612-4444
rcoleman@goetzfitz.com
dkuehn@goetzfitz.com
jmacmull@goetzfitz.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

PRELIMINARY STATEMENT

Plaintiff Campmor, Inc. ("Campmor") submits this memorandum of law in support of its motion for an order, pursuant to Federal Rules of Evidence 401, 402 and 403, excluding from trial all testimony or other proof concerning the date of the filing and service of Campmor's initial pleading.

The need to make such a motion may strike the Court as odd; it is. Campmor has nothing to hide in connection with the matter of when it filed its complaint and when it served process on Brulant, LLC, a subsidiary of Rosetta LLC ("Rosetta").[1] Yet these procedural matters have nothing to do with the claims in defenses in this case. Why, then, are they an issue? Because, having little in the way of substantive defenses to Campmor's claims and owning an unenviable counterclaim in this matter, Rosetta intends to seize on this non-issue to distract, confuse and prejudice the jury – to spin a tale for jurors concerning the arcane civil procedure topic of service of process in which Campmor is the supposed villain. Because the subject of when issue was joined in this case is both irrelevant and, as Rosetta intends to broach it, prejudicial, Rosetta should be prohibited from proffering such proof and making such an argument.

Rosetta's Counterclaim broaches this topic by repeatedly interposing the dates of various events that took place between the time Campmor filed its initial complaint in Bergen County Superior Court on July 30, 2009 and October 20, 2009, when an amended complaint was served on Rosetta. (Counterclaim ¶¶ 152-156.) These allegations smolder with righteous-seeming anger, but generate only heat, not light – for they are never connected, legally or factually, with

[1] Brulant, LLC is a wholly-owned subsidiary of Rosetta, LLC and is so described in the caption of the Complaint and the Amended Complaint. As the Court is aware, LLC purchased Brulant, Inc. (the entity with which Campmor initially had a contract) in 2008 and all services performed in connection with Campmor's website after Rosetta's purchase of Brulant, Inc. were performed and payment was rendered by Campmor in Rosetta's name. For the sake of convenience, these entities are collectively referred to herein as "Rosetta."

any aspect of Rosetta's actual counterclaims. These allegations, and consequently the evidence Rosetta wishes to present at trial to prove them, are legal non-sequiturs. For Rosetta does **not** allege Campmor made a representation about filing a lawsuit. Rosetta does **not** claim that it had a legal right to such knowledge. Rosetta does **not** aver that it acted to its detriment in reliance on its assumption that a lawsuit had not been filed. Rosetta **never** states that it would have acted differently if it had known about the filing. Rosetta does **not** say that it was damaged by its lack of knowledge. Rosetta's counterclaim, ultimately, doesn't do **anything** with its allegations about Campmor not disclosing that it had filed suit in New Jersey. It just leaves them on the page, unconnected to either of its two causes of action – monuments to, or perhaps vents for, Rosetta's resentment over not having filed suit in Ohio first.

Whatever therapeutic benefit Rosetta gained from pleading these facts, it never breathed the air of **relevance** into their nostrils. Now, however, Rosetta has a scheme to animate them. It cannot bring them to life by making them relevant, because they could never be that. What Rosetta does intend, however, is to inflame the jury with indignation akin to its own, taking the jury to law school for a first-year course in civil practice, all so it can argue that the timing of Campmor's service of process was deceptive… dishonest …. sneaky. "You," Rosetta wants to tell the jury, "have heard a mountain of evidence that Rosetta victimized Campmor; that it nearly ruined it, costing it millions in lost sales; that it refused to even try and fix the harm without payment of even more. But did you hear the one about Campmor and the un-served complaint?"

What, however, can Rosetta really claim concerning this supposed deception? Having never connected any legal claim, loss or theory of damages to its allegations about Campmor's "non-disclosure" of the filing of lawsuit, all Rosetta can argue is that if it had known that Campmor had filed suit in the summer, it would not have kept hacking away at the disaster it had

made of the Campmor website. No: It would have immediately ditched the Campmor website project while it continued in the nose-dive that Rosetta put it into – and timely sued Campmor in Ohio for the unpaid invoices, the subject of its counterclaims here!

This is mighty thin gruel. But it is a dish the Court should not allow Rosetta to serve the jury, for both legal and practical reasons. For one thing, it is of no legal relevance. Besides having no relation to Rosetta's counterclaims, Campmor never had a legal obligation to inform Rosetta that it had preserved its right to litigate in its home forum while continuing negotiations. Indeed, if Rosetta had fixed the problem or agreed to a reasonable compromise, instead of merely demanding more money, service would have been unnecessary and the claim would have been voluntarily dismissed. The cases support Campmor's right to maintain just those options.

And in that vein, courts recognize that technical and procedural matters concerning litigation history are not matters for the jury – especially where, as here, none of Rosetta's claims or defenses rests on these facts. Indeed, even if this procedural issue were relevant, any probative value it could have would be far outweighed by the potential for unfair prejudice and jury confusion, plus a disproportionate tax on limited time and resources in a case where the relevant facts developed years and months before litigation was contemplated by anyone.

For these reasons, and as set out more fully below, Rosetta should be precluded from offering any testimony or making any reference to lapse of time between the filing of the initial complaint and service of process on Rosetta.

STATEMENT OF FACTS

Campmor is a corporation of the State of New Jersey with operations in Paramus, New Jersey. (Final Pretrial Order, Stipulated Fact ¶ 1.) On October 1, 2006, Campmor and Brulant entered into a series of written agreements that included a Statement of Work Agreement and a Master Services Agreement/Terms & Conditions. (Opinion dated April 1, 2010, Dkt. No. 13, at 2.) Rosetta is located in Ohio. (Opinion dated April 1, 2010, Dkt. No. 13, at 5.) The terms of the written agreements in this matter provide for the application of Ohio Law. (Final Pretrial Order, Stipulated Fact ¶ 11.) The written agreements in this matter pro do not, however, specify a forum for the litigation of disputes.

Campmor terminated Rosetta from further SEO work for Campmor in July, 2009. (Final Pretrial Order, Stipulated Fact ¶ 21.) Campmor filed its initial complaint in Bergen County Superior Court against Rosetta on July 30, 2009, while the parties were engaged in settlement negotiations and attempted to remedy the problems with Campmor's website. As those negotiations reached an impasse, Campmor filed an Amended Complaint on September 21, 2009, which it served on Rosetta with an amended complaint on October 20, 2009.

LEGAL ARGUMENT

I. A MOTION IN LIMINE IS THE APPOPRIATE METHOD FOR ELIMINATING UNFAIRLY PREJUDICIAL OR IRRELEVANT EVIDENCE PRIOR TO TRIAL.

A motion in limine relating to evidentiary issues is the proper procedure where the court can "shield the jury from unfairly prejudicial or irrelevant evidence." *Ebenhoech v. Koppers Industries, Inc.*, 239 F.Supp.2d 455, 461 (D.N.J. 2002). To be deemed relevant, evidence must: (1) have a tendency to make a fact more or less probable than it would without the evidence; and (2) the fact must be of consequence in determining the action. Fed. R. Evid. 401. Irrelevant

evidence is inadmissible under Fed. R. Evid. 402. Even where evidence is relevant, it may be excluded where "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Evidence that is irrelevant to any issue that a jury will decide should be properly excluded from trial. *See*, e.g., *Sanofi-Aventis Deutschland GMBH v. Glenmark Pharmaceuticals Inc., USA*, 2011 WL 383861, Case No. 07-cv-5855 (DMJ) (JAD), at *3 (D.N.J. Feb. 3, 2011).

As demonstrated below, the evidence in question concerning the subject of the timing of the service of Campmor's complaint in this action is not relevant. It is not consequential. Rosetta's sole purpose in making this an "issue" is to distract the jury by introducing an arbitrary, and unjustified, suggestion of "bad faith" or wrongdoing by Campmor concerning a procedural, trivial and subsidiary matter. By doing this, Rosetta seeks, however lamely, to balance the flood of evidence of bad faith tending in the exact opposite direction. Under the standard of Fed. R. Evid. 402, however, this motion is an appropriate vehicle for eliminating such a distraction from the trial of this case and save all concerned an inordinate amount of wasted time, effort and focus.

II. DELAY OF SERVICE OF A COMPLAINT DURING NEGOTIATIONS IS NOT INDICATIVE OF BAD FAITH AND IS IN ANY CASE OF NO MORE THAN PROCEDURAL SIGNIFICANCE, NOT A MATTER FOR THE JURY.

"The delay of service, without more, is not indicative of bad faith." *Pai v. Reynolds Foil, Inc.*, CIVA 10-1465 (MLC), 2010 WL 1816256 (D.N.J. May 5, 2010). Here there is no "more." As a matter of law, Campmor had no obligation to serve the complaint it filed in Bergen County Superior Court on Rosetta at any particular time, or ever. Not only is the placement of such a technical issue before the jury inappropriate, as discussed at length in the next section, but as a

technical – i.e., legal – and equitable matter there is simply no "there there," and no basis whatsoever to permit testimony concerning an entirely procedural issue to go to a lay jury.

The elapse of time between filing and service is of legal relevance is only in two procedural contexts: Dismissal by the court under Fed. R. Civ. 4(m), or as part of a venue battle where a defendant claims that plaintiff has made in impermissible "anticipatory filing." Regarding the former, Fed. R. Civ. P. 4(m) mandates that a complaint filed in the District Court be served within 120 days; the New Jersey Superior Court's analogous rule, R. 1:13-7, provides four months. While these rules both contemplate action by the court, not another party, they do provide some sense of what is regarded as a reasonable amount of time between filing and service of a complaint. The amended complaint here was, as it happens, served on Rosetta 82 days after filing of the original complaint – comfortably within the zones provided by both rules.

But at no time during this litigation, including Rosetta's motion to dismiss Campmor's case and its subsequent summary judgment motion, did Rosetta ever place the matter of Campmor's delay in serving its complaint at issue. Courts dispose of any such question, however, during pretrial motion practice, or it is waived. The timing of service of a complaint is certainly not a matter for a jury trial.

At best, Rosetta's "theory" concerning Campmor's delay is comparable to the "anticipatory filing" scenario. Considering the analysis applied in such cases, it is clear that Campmor's actions here were appropriate as a matter of law. For example, in *Zokaites v. Land-Cellular Corp.*, 424 F. Supp. 2d 824, 838 (W.D. Pa. 2006), the plaintiff argued that defendants filed suit in the Southern District of Florida "to preempt the inconvenience that would be created by plaintiff's inevitable filing in Pennsylvania" which, it claimed, was "thus an act of bad faith" warranting transfer to the Western District of Pennsylvania. The latter court rejected that

suggestion, applying two legal principles: (1) "the mere delaying of notice and service of a complaint in the hopes of avoiding litigation through settlement does not constitute bad faith or improper forum shopping where both parties had a reasonable apprehension that filing suit was imminent," *citing*, *Biogen, Inc. v. Schering AG,* 954 F. Supp. 391, 397–98 (D. Mass.1996); and (2) "[t]his is particularly true where, as here, the first-filed suit was commenced in a forum having a logical and appropriate connection to the parties' dispute." 424 F. Supp. 2d at 838.

Rosetta quite desperately needs some offset to the torrent of its own bad faith in commerce that will be the theme of this trial. It is grasping at the hope that it can prompt the jury to punish Campmor for benefitting from Rosetta's continued cooperation while it filed papers in New Jersey to avoid litigating in Ohio if things could not be worked out. But this is not a legitimate inference for the jury to make. As a matter of law, absent any evidence of affirmative misrepresentation a party is entitled to preserve its legitimate forum options while deferring, and perhaps avoiding, the damage that serving papers would inflict on a rapidly deteriorating commercial relationship. As the Court explained in *Biogen*, *supra*, denying a motion to transfer venue, this is a legitimate technique by which a litigant may avoid an unfavorable forum outcome and, possibly, the need to litigate at all:

> Biogen's decision to file but not to serve its suit immediately manifested a desire on its part both to avoid litigation if at all possible and to attempt to secure the convenience of a Massachusetts forum if litigation was required. . . .
>
> While defendants' irritation at not being informed at the May 16, 1996 meeting that this suit had been filed is understandable, this is not a factor that is sufficiently serious to justify penalizing Biogen for its restraint in pursuing litigation by deferring service of its complaint. . . . The scheduling of the meeting Berlex had been unsuccessfully seeking may have had the effect of influencing Berlex to slow down its preparations to sue. However, it is clear that **either party could have properly filed suit** immediately after May 17, 1996, when the parties' meeting had again failed to generate an agreement and the FDA had approved Avonex for sale. Defendant did not do so for another six weeks. . . . **Biogen's delay in serving its complaint in order to assure that it would not be**

> **unnecessarily launching litigation does not alter the conclusion that it would be inappropriate for this court to exercise its discretion to dismiss this case.**

954 F. Supp. at 398 (emphasis added).

The same conclusion obtains here. Certainly there is no serious dispute concerning as to whether the parties anticipated litigation during the relevant time period. The sides were negotiating in attempt to avoid a lawsuit. And there is no doubt that this forum – where the plaintiff is located and does business and which was the geographical center of weight of the commercial relationship – has "a logical and appropriate connection to the parties' dispute." As a purely legal matter, there was nothing inappropriate about the timing of Campmor's service of process, and there is no legal basis to nonetheless place that conduct before a jury so that it may offer its own lay opinion on the matter. Rosetta's "remedy" to any supposed injury it suffered by not being hauled into court faster was not to wait four years so it could ask a jury to salve its disappointment about litigating in New Jersey. Rather, if it believed that Campmor proceeded improperly, it should have sought transfer based on the standards set out in the cases.

That Rosetta did not do, because, despite its obvious preference to litigate in Ohio, it could not meet those standards. That does not, however, mean that Rosetta can ignore those standards and make this procedural issue a question of fact for the jury or an opportunity to inflame the fact-finder by suggesting impropriety where, as a matter of black-letter law, none exists. The issue of who much time has passed between filing and service of a summons and complaint are of relevance only in the narrow, and procedural, parameters of Fed. R. Civ. P. 4(m), not relevant here, or concerning a forum fight, also not a matter for trial. Accordingly, any evidence or reference to the passage of time from July 30, 2009 through until October 20, 2009 as it concerns Campmor's initial complaint should be excluded.

III. THE JURY CONFUSION AND UNFAIR PREJUDICE THAT WOULD RESULT IF ROSETTA WERE ALLOWED TO INTRODUCE EVIDENCE CONCERNING CAMPMOR'S DELAY IN SERVING ITS COMPLAINT WOULD SUBSTANTIALLY OUTWEIGH ANY PROBATIVE VALUE OF SUCH EVIDENCE.

If Rosetta were permitted to try the question of the lapse of time between Campmor's filing and service of its complaint, the jury would be weighing evidence concerning a purely procedural issue arising under the Rules of Court of the Superior Court of New Jersey, distracting from the real issues and wasting the time of Court and jury alike. As set forth above, the allegations in Rosetta's counterclaims concerning these facts are unconnected in any way to its claims for relief. Even if there were some plausible legal theory by which such evidence could be deemed relevant, however, it should still be excluded under Fed. R. Evid. 403, because any probative value would be outweighed by the certainty of unfair prejudice, confusion, and waste of time. "Exclusion of evidence under Rule 403 is . . . important to avoid significant litigation on issues that are collateral to those required to be tried." *Sims v. Mulcahy*, 902 F.2d 524, 531 (7th Cir. 1990), *cited by Blakey v. Cont'l Airlines*, Case No. 93-2194, 1997 WL 1524797, at *12 (D.N.J. Sept. 9, 1997).

Rosetta's supposed issue of "the complaint that was never served" would, if not excluded by the Court on this motion, amount to a pointless and expensive sideshow. The problems go beyond the inherent distraction and confusion such testimony is certain to cause. Such an evidentiary track may also require the Court to undertake fine-grained supervision over lay testimony about legal matters, entangle itself in matters of attorney-client privilege and include jury instructions concerning the applicable law – each of these exercises promising its own line of colloquy, application, objection and every other sort of delay and complication. Where, as here, such "legal issues" are collateral, procedural and trivial, no purpose can be served by tolerating such complications.

For this reason, courts vigorously reject such invitations to engage in a "trial-within-a-trial." For example, granting a motion in limine, the court in *Gilliland v. Hergert*, 2:05-CV-01059, 2008 WL 2682587 (W.D. Pa. July 1, 2008) explained, "Litigation decisions . . . [are] likely made by [parties'] lawyers, and thus, do not reflect on [the parties' own] credibility. Moreover, the procedural history is not relevant to the underlying facts of the case and would introduce multiple misleading and fruitless side issues which would only serve to confuse the jury and lengthen the trial." *Accord*, *United States v. Richardson*, CRIM.A.01-235, 2002 WL 461662 (E.D. La. Mar. 21, 2002) (excluding evidence in criminal case concerning procedural history of judicial proceedings, including related state court proceedings; "any slight probative value such evidence might have is substantially outweighed by the danger of misleading and confusing the jurors regarding the issues before them").

The Court should also consider, moreover, the extent to which such confusion and distraction would multiply if Rosetta were not barred from this line of proof and argument, because not only one side is trying this case. Indeed, the more rebuttal testimony is required to show that the proffered evidence lacks probative value, the more compelling the argument becomes for excluding the evidence as a "waste of time" under Rule 403. *See*, *In re Agent Orange Product Liab. Litig.*, 611 F. Supp. 1223, 1256 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). Similarly, considering a motion in limine to exclude evidence concerning the legality of certain laboratory procedures in a discrimination case, the court in *Kellerman v. UPMC St. Margaret*, 02:06CV0528, 2009 WL 3183075 (W.D. Pa. Sept. 30, 2009) granted the motion, explaining, "Defendants would feel obligated to vigorously defend their procedures and the jury's time and attention would be diverted by this unnecessary dispute."

Here, too, if this motion were not granted, Campmor would be compelled to defend itself against Rosetta's insinuations of wrongdoing. Campmor would have little difficulty doing so – but by engaging in that process, Rosetta will have improperly placed Campmor in a posture of having to "defend itself" on a matter of irrelevant and collateral significance and thereby distract from the issues actually in controversy. That may be Rosetta's strategy, but it is one Fed. R. Evid. 403 are designed to prevent.

CONCLUSION

Based on the foregoing, Campmor respectfully requests that its motion be granted in its entirety, and that this Court bar the introduction of evidence concerning the deferral by Campmor of its service of process in this matter.

GOETZ FITZPATRICK LLP

By: 
Ronald D. Coleman (RC 3875)

David Kuehn (DK 4560) (*Pro Hac Vice*)
Joel G. MacMull (JM 8239) (*Pro Hac Vice*)
55 Harristown Road
Glen Rock, NJ 07452
(201) 612-4444
rcoleman@goetzfitz.com
dkuehn@goetzfitz.com
jmacmull@goetzfitz.com

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