

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**IN RE CONAGRA PEANUT BUTTER
PRODUCTS LIABILITY LITIGATION**

**Civil Action No.
1:07-md-1845 TWT**

ALL CASES

**PLAINTIFFS' STATUS REPORT PURSUANT TO FED. R. CIV. P. 16
AND BELLWETHER TRIAL PROPOSAL**

Pursuant to Rule 16(c) of the *Federal Rules of Civil Procedure*, and in anticipation of this Court's status conference with the parties set for January 21, 2009, the Plaintiffs respectfully submit this Status Report and revised Early Trial Proposal:

I. Settlement Update

In December, 2008, Plaintiffs' Executive Committee and Counsel for ConAgra negotiated a global settlement program for persons who have acceptable proof of purchase of recalled peanut butter and documented outpatient medical treatment with symptoms consistent with salmonella exposure, but no diagnosis of salmonella. The terms and details of the global settlement program, along with claim forms and release documents, have been circulated among counsel in the MDL and all known other counsel nationally.

MDL and non-MDL counsel have indicated broad intention to participate in the settlement program, including on behalf of many hundreds

of clients whose claims are as yet unfiled. In all, Plaintiffs anticipate that this negotiated settlement would resolve more than two-thousand (2,000) -- and perhaps more -- of these non-hospitalization claims. If such numbers participate in this settlement as expected, then this settlement program would resolve the overwhelming majority of the claims, leaving primarily the hospital claims and the salmonella-diagnosis claims for trial or resolution.

The claims process is just beginning. Because of the recent holidays and because counsel have been focused upon preparing Plaintiff Fact Sheets, based upon this Court's Case Management Order and applicable Tolling Agreements, less than fifty (50) claims have been submitted and approved as of this writing. Counsel will keep the Court apprised of the progress of the settlement program as it develops.

Pursuant to the terms of the settlement program, ConAgra withdraws its opposition to Plaintiffs' Common Benefit Fund proposal with respect to participants in this settlement.

II. Discovery

A. Privilege Log Issues

Pursuant to Plaintiffs' challenges to ConAgra's Privilege Log and subsequent Motion for In Camera Inspection [504], the Court is currently reviewing representative documents with respect to assertions of

privilege. ConAgra has, thus far, produced over eighty thousand (80,000) documents, many of which Plaintiffs have reviewed and coded. However, there remain approximately one thousand six-hundred (1,600) documents on ConAgra's privilege log, many of which relate to the investigation in 2007 and thereafter. Therefore, Plaintiffs anticipate that if the Court should agree that certain of those documents should be produced to Plaintiffs (or that ConAgra's redactions of other such documents is over-broad,) such documents would become very important for purposes of future depositions and other discovery.

B. Depositions

As previously reported, the parties have taken eleven (11) depositions of present and former ConAgra personnel, though no 30(b)(6) depositions have been taken as yet. Plaintiffs await a determination regarding documents for which ConAgra has claimed privilege prior to exercising their limited right to depose corporate representatives of ConAgra.

C. Experts

Plaintiffs continue to prepare Rule 26 disclosures of so called "national" experts. By consent of the parties, the Court entered an Order [588] extending the Plaintiffs' expert disclosure deadline to February 2, 2009. Based upon the continuing disputes regarding documents on

ConAgra's privilege log and the Court's ongoing *in camera* review, Plaintiffs anticipate a need for an additional thirty (30) days in the hope that all relevant documents might be produced by that time.

Furthermore, many "tagalong" attorneys have requested an additional thirty (30) days to make any additional disclosures after the PSC files its expert disclosures.

Therefore, Plaintiffs propose that the PSC receive an additional thirty (30) day extension on the deadline, until March 4, 2009, with all other plaintiffs' counsel in MDL actions having thirty (30) days thereafter for the filing of any additional "national" expert disclosures, on April 3, 2009. Specifically, counsel in *Pope v. ConAgra*, pending in the Middle District of Tennessee, have made this request of the PSC.

II. Early Trial Proposal

As has been discussed at prior status conferences, the Plaintiffs propose that bellwether trials pursuant to *Fed. R. Civ. P. 42(b)* be scheduled, as discussed in the Manual for Complex Litigation – Fourth, §22.93. The results would be dispositive only in the individual cases tried. The use of jury interrogatories or special verdict forms, and the selection of bellwether cases presenting recurring claims and issues would provide the Court and the parties valuable information and insight on the merits and values of many

cases, without having to try every case. As described by Judge Scheindlin in the “MTBE” products liability MDL litigation,

A bellwether trial allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action... [E]very experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact.

In re Methyl Tertiary Butyl Ether (MTBE) Products, 2007 WL 1791258, at *2 (S.D.N.Y. 2007).

The use of instructive trials is increasingly recognized within the federal judiciary, particularly in multidistrict litigation (“MDL”) involving mass torts, as “one of the most innovative and useful techniques for the resolution of complex cases.” Hon Eldon E. Fallon, et al., “*Bellwether Trials in Multidistrict Litigation*,” 82 Tul. L. Rev. 2323 (June, 2008;) *See, also, In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La.); *In re Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation*, MDL Docket No. 1699(N.D. Cal.); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL Docket No. 1708 (D. Minn.); *In re Propulsid Product Liability Litigation*, MDL Docket No. 1355 (E.D. La.); and *Welding Fume Products Liability Litigation*, MDL Docket No. 1535 (N.D. Ohio). Bellwether trials have been utilized both in

cases in which class certification has not yet been ruled upon (in order to obtain real trial experience to determine which, and to what extent, recurring issues are significant or predominant, *e.g.* *Bextra and Celebrex, id.*, *Guidant, id.*) or after class certification has been denied, as a pretrial alternative to achieve some of its efficiencies (*e.g.*, *Vioxx, id.*; *Propulsid, id.*)

Specifically, with the global settlement program in place for outpatient treatment cases, and considering the Court's earlier instruction regarding the presentation of a broad range of cases, Plaintiffs propose the selection of six (6) cases for early trial before this Court: Two (2) cases with negative stool cultures; two (2) cases with no stool culture; and two (2) cases with positive salmonella laboratory findings. Plaintiffs suggest that the parties confer with respect to proposed early trial candidates from each category and submit within ten (10) days and if the parties are unable to agree, that the Court select one (1) per category from Plaintiffs and one per category from ConAgra.

Respectfully Submitted, this 19th day of January, 2009.

Respectfully submitted by,

/s/ Robert H. Smalley, III

Elizabeth J. Cabraser
Plaintiffs' Lead Counsel
**LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP**
275 Battery Street, 30th Floor
San Francisco, California 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Robert H. Smalley, III
Plaintiffs' Liaison Counsel
**MCCAMY, PHILLIPS, TUGGLE &
FORDHAM, LLP**
P.O. Box 1105
Dalton, Georgia 30722
Telephone: (706) 278-4499
Facsimile: (706) 278-5002

Kathryn E. Barnett
**LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP**
Suite 1650, One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219
Telephone: (615) 313-9000
Facsimile: (615) 313-9965

Craig G. Harley
CHITWOOD HARLEY HARNES LLP
2300 Promenade II
1230 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 873-3900
Facsimile: (404) 876-4476

S. Randall Hood
**MCGOWAN, HOOD, FELDER &
JOHNSON**
1539 Health Care Drive
Rock Hill, South Carolina 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656

Clay Jenkins
JENKINS & JENKINS, PC
516 W. Main Street
Waxahachie, Texas 75165
Telephone: (972) 938-1234
Facsimile: (972) 938-7676

M. David Karnas
BELLOVIN & KARNAS, PC
131 East Broadway Blvd.
Tucson, Arizona 85701
Telephone: (520) 571-9700
Facsimile: (520) 571-8556

Seth Lesser
KLAFTER, OLSEN & LESSER, LLP
1311 Mamaroneck Avenue
Suite 220
White Plains, New York 10605
Telephone: (914) 997-5656
Facsimile: (914) 997-2444

A. James Andrews
905 Locust Street
Knoxville, Tennessee 37902
Telephone: (865) 660-3993
Facsimile: (865) 523-4623

Daniel Becnel, Jr.
**LAW OFFICE OF DANIEL BECNEL,
JR.**
P.O. Drawer H
Reserve, Louisiana 70084
Telephone: (985) 536-1186
Facsimile: (985) 536-6445

Garrett Blanchfield, Jr.
**REINHARDT, WENDORF &
BLANCHFIELD**
E-1250 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101
Telephone: (651) 287-2100
Facsimile: (651) 287-2103

Paul Crouch
BAILEY & GALYEN
1900 W. Airport Freeway
Bedford, Texas 76022
Telephone: (817) 868-5500
Facsimile: (817) 545-4424

Rick DiGiorgio
**CORY, WATSON, CROWDER &
DEGARIS, PC**
2131 Magnolia Ave., South
Suite 200
Birmingham, Alabama 35255
Telephone: (205) 328-2200
Facsimile: (205) 324-7896

Jeffrey A. Klafter
KLAFTER & OLSEN, LLP
1311 Mamaroneck Avenue
Suite 220
White Plains, New York 10605
Telephone: (914) 997-5656
Facsimile: (914) 997-2444

Dennis G. Pantazis
**WIGGINS, CHILDS, QUINN &
PANTAZIS, LLC**
The Kress Building
301 19th Street North
Birmingham, Alabama 35203
Telephone: (205) 314-0500
Facsimile: (205) 254-1500

Bryan N. Cigelske
MCCAIN LAW FIRM
324 East Main Street
Cartersville, Georgia 30120
Telephone: (770) 382-4440
Facsimile: (706) 226-4768

Jeff S. Daniel
LAW OFFICE OF JEFF S. DANIEL, PC
P.O. Box 131323
Birmingham, Alabama 35213
Telephone: (205) 531-1287
Facsimile: (205) 327-5773

Corey Holzer
HOLZER & HOLZER, LLC
117 Perimeter Center West
Suite E-107
Atlanta, Georgia 39338
Telephone: (770) 392-0090
Facsimile: (770) 392-0029

Roger W. Orlando
THE ORLANDO FIRM, P.C.
315 West Ponce de Leon Ave.
Suite 400
Decatur, Georgia 30030
Telephone: (404) 373-1800
Facsimile: (404) 373-6999

Peter Protopapas
LEWIS & BABCOCK, LLP
1513 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 771-8000
Facsimile: (803) 733-3534

MDL COORDINATED COUNSEL

Wm. Gregory Dobson
Morriss, Lober & Dobson, LLC
830 Mulberry Street, Suite 201
Macon, Georgia 31201
Telephone: (912) 745-7700
Facsimile: (912) 745-4888

Jason S. Kilene
Gustafson Gluek PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, Minnesota 55402
Telephone: (612) 333-8844
Facsimile: (612) 333-6622

Brian W. Smith
Smith, Vanture, & Bogani, LLP
1615 Forum Place
West Palm Beach, Florida 33401
Telephone: (561) 684-6330
Facsimile: (561) 688-0630

Marc Aaron Wites
Law Offices of Wites & Kapetan
4400 North Federal Highway
Lighthouse Point, Florida 33064
Telephone: (954) 570-8989
Facsimile: (954) 354-0205

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION**

**IN RE CONAGRA PEANUT BUTTER
PRODUCTS LIABILITY LITIGATION**

**Civil Action No.
1:07-mdl-1845 TWT**

ALL CASES

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2009, a true and correct copy of Plaintiffs' Status Report and Bellwether Trial Proposal was served upon Defendants' Liaison Counsel via electronic mail, as set forth hereinbelow and electronically filed with the Court's CM/ECF system:

Angela M. Spivey
aspivey@mcguirewoods.com

Bethany G. Lukitsch
blukitsch@mcguirewoods.com

James F. Neale
jneale@mcguirewoods.com

Respectfully submitted this 19th day of January, 2009.

/s/ Robert H. Smalley, III
ROBERT H. SMALLEY, III

In accordance with Local Rule 5.1 (C) (3), I hereby certify that the formatting for filing herein is Times New Roman, 14 point.