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

IN RE:	)	
	)	
CONAGRA PEANUT BUTTER PRODUCTS LIABILITY LITIGATION	)	Docket No. 1:07-MD-1845-TWT
	)	January 21, 2009
	)	2:07 p.m.
_____	)	Atlanta, Georgia

TRANSCRIPT OF THE STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs:	Elizabeth Cabraser David Karnas Robert Smalley
On behalf of the Defendants:	James Neale Angela Spivey James Walsh

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(Proceedings held January 21, 2009, Atlanta, Georgia, 2:07 p.m., in chambers.)

THE COURT: All right. This is the case of In Re: ConAgra Peanut Butter Products Liability Litigation, Case Number 07-MD-1845.

First let me ask counsel for the parties who are present here in my chambers and who intend to participate in the status conference to identify yourselves for the record and the parties you represent beginning with the Plaintiffs.

MS. CABRASER: Good afternoon, Your Honor. Elizabeth Cabraser of Lieff, Cabraser, Heimann & Bernstein, lead counsel for Plaintiffs.

THE COURT: Good afternoon, Ms. Cabraser.

MR. SMALLEY: Good afternoon, Your Honor. Robert Smalley, liaison counsel for Plaintiffs.

THE COURT: Mr. Smalley.

MR. KARNAS: Good afternoon, Your Honor. David Karnas on behalf of the Cease Plaintiffs.

MR. WALSH: Jim Walsh, Your Honor, on behalf of ConAgra.

MR. NEALE: Your Honor, I'm Jim Neale also on behalf of ConAgra.

MS. SPIVEY: I am Angela Spivey also on behalf of ConAgra.

THE COURT: All right. For those who are monitoring

the status conference by telephone, it's not necessary to identify yourselves until you participate if you do in the status conference. At that time please identify yourself by name and the parties you represent.

All right. I have reviewed the joint proposed agenda, and I appreciate y'all putting that together for me, and I will just simply follow the agenda. I will warn you that after we set up the status conference a judges meeting was set for 3:00; so I am going to have to leave by about five 'til 3:00 unfortunately, or fortunately as the case may be. Anyway, that should give us plenty of time, I think.

The first item on the agenda is ConAgra's motions to dismiss and the motion to compel Plaintiff fact sheets.

Mr. Neale?

MR. NEALE: Yes, sir, Your Honor.

I know this is a familiar issue for the Court, and I will be very brief. The case management order requires the fact sheet within 60 days. The clerk is now filing that in each individual case. The word seems to be getting out, Your Honor, because on the first motion to dismiss there's only one remaining name of someone who has not complied with the Court's motion to compel order.

For the benefit of people on the phone and for further notice, that is Douglas Seifert on Docket Number 486, Case Number 1:08 --

UNIDENTIFIED ATTORNEY: I am having a hard time hearing.

UNIDENTIFIED ATTORNEY: Me as well, Your Honor.

MR. NEALE: I'm sorry. I will speak up.

Douglas Seifert is the only name subject to the first motion to dismiss, Docket Number 486. Mr. Seifert's case number is 1:08-CV-02291.

Your Honor, in addition to all the usual notices and meets and confers and Mr. Smalley's effort, we have posted a notice of pending motion in that case and have not received any opposition from Mr. Seifert or counsel.

THE COURT: Anybody want to be heard on the motion to dismiss the Seifert case for failure to comply with the case management order?

(No response.)

THE COURT: All right. The motion is granted, Mr. Neale. And I find that there is no lesser sanction that would be appropriate considering all the notice and the motions and past practices in this matter, so the case is dismissed with prejudice.

MR. NEALE: Thank you, Your Honor.

On Docket Number 590, this covers a few more conditional transfer orders. It actually covers four orders which explains the relatively larger number of names. There are five Plaintiffs subject to this order. They are: Pamela

Short, Case Number 08-CV-2610; Bridgette Jefferson, 08-CV-02650; Louise Riley individually and on behalf of James Turley, Case Number 08-CV-02608; and Catherine Perez Harmison in Case Number 08-CV-0296.

As with the others, Your Honor, the Court's granted motions to compel in these cases. They have been filed in the master case. We filed individual notices in the individual cases of the pending motion. All questions or concerns or late-arriving fact sheets have been stricken from the order. Those five individuals remain.

THE COURT: All right. Anybody wish to be heard as to the motion to dismiss as to those five individuals?

(No response.)

MR. MCMANN: Your Honor, it's difficult for me to understand. I'm sorry. My name is -- good afternoon, Your Honor. My name is Brian McMann. I represent Stacie Caldwell. I couldn't clearly understand the names he was saying.

Did he mention Stacie Caldwell?

THE COURT: No, sir.

MR. MCMANN: Okay.

MR. SAKAGUCHI: I have the same thing, Your Honor. This is Doug Sakaguchi representing Cynthia Singleton, and I want to make sure he didn't mention Cynthia Singleton.

MR. NEALE: Ms. Singleton has been removed from the order.

THE COURT: All right, Mr. Neale, the motion is granted as to those five individual Plaintiffs. I find there is no lesser sanction that would be appropriate considering the notice, the failure to comply with the Court's order and failure to comply with the case management order.

MR. NEALE: Thank you, Your Honor.

The final fact sheet motion, Your Honor, is a motion to compel. This is the first salvo, if you will, for CTOs 27 through 29. No sanction is asked for. If granted, we will file notices in the 12 individual cases that this order affects. But these were due long ago, and we'd ask the Court to grant the motion to compel. It was filed more than 30 days ago, and no opposition has been received.

THE COURT: Anybody wish to be heard as to the motion to compel?

(No response.)

THE COURT: All right, Mr. Neale, the motion is granted. If you will present orders to me on those three matters, I will be glad to sign it.

MR. NEALE: I have them each right here, Your Honor.

(The Court signed the orders.)

THE COURT: All right. Thank you very much, Mr. Neale.

The next item on the agenda is the settlement update.

MS. CABRASER: Your Honor, Elizabeth Cabraser.

We have good news to report in that regard. It's summarized in the Plaintiffs' status report. Plaintiffs have primarily Robert Smalley, our Plaintiffs' liaison counsel, and Kathryn Barnett to thank for taking the lead and laboring or engaging in those discussions. We are not here to talk about the specifics of any of those discussions to date. But with Your Honor's permission, I thought I'd let Mr. Smalley report in greater detail on where this particular group settlement brings us vis-a-vis the cases that are still pending in the MDL and the percentage of cases that it's resolved and the category of cases that it's resolved.

THE COURT: Mr. Smalley, I will be happy to hear from you.

MR. SMALLEY: Thank you, Your Honor.

Just briefly 'cause I know we do have a schedule to keep to, but I was hoping to be able to announce as well to people on the phone who for whatever reason may not have gotten word from the e-mails that I have sent with respect to this matter but we do think that the settlement that we were -- that we negotiated with ConAgra's counsel in early December will -- in our estimation will take care of, will resolve a large number of the cases that we have called, the doctor-visit cases, cases where there's no inpatient stay in a hospital, where there's no diagnosis of salmonella but there are symptoms consistent.

And they are certainly -- the terms are set forth in a term sheet that we have both agreed to, but those are generally the terms. And we expect based upon the reaction that I have gotten from broadcasting that offer to my e-mail service list both to lawyers handling cases within this MDL and lawyers across the country who for whatever reason are not a part of the MDL at this point, the response has been supportive and positive. We anticipate that there will be something on the order of 2,000 participants in this settlement by the time it's said and done.

I had hoped -- I had hoped that there would be more to report today. We did strike this deal in early December, but for a number of reasons they have started to come in. I think now we anticipate, like I said, something on the order of 2,000. It could be more than that. We're not certain. But we do believe that that is the approximate number of those types of cases that will be resolved as a result of this.

THE COURT: All right. Somebody's got us on a speaker phone, and the noise is making it difficult to hear in here. Whoever's got the speaker phone on has to turn it off.

All right. Go ahead, Mr. Smalley.

MR. SMALLEY: And with that, Your Honor, I would just -- if there's anyone on the phone who hasn't read the e-mails or hasn't heard about this settlement with respect to doctor-visit cases with verified medical treatment and not a

diagnosis of Salmonella, please be in touch with me either by e-mail or telephone so I can discuss with you the details of the proposal.

THE COURT: Thank you, Mr. Smalley. That is welcome news.

Mr. Walsh, you want to comment on that, or Mr. Neale?

MR. WALSH: Mr. Neale was instrumental from the ConAgra side in bringing about the agreement, so I am going to let him address it.

MR. NEALE: Your Honor, just a few basic numbers. So far, 20 cases have settled as a result of that deal. It's more or less in the form of a unilateral offer. Anyone who wants to submit their claim may. We will evaluate it and put a number according to a formula on that case, give the Plaintiff the opportunity to accept that offer or not. And then, as I said, 20 people have thus far taken it. We have an additional 47 offers, I think, outstanding. And there have been another hundred cases submitted for evaluation and, as Mr. Smalley promises, many to follow that.

THE COURT: Any estimate as to the number of individual cases in the MDL that'll be dismissed as a result of this, Mr. Smalley?

MR. SMALLEY: I would want to be very conservative with that estimate, Your Honor. My best estimate would be -- and I will certainly be willing to change this -- but my best

estimate would be something approaching a third to a half of the cases in the MDL. It's hard to know. I don't know if ConAgra has a better grasp of that.

MR. NEALE: I would hope it might be even a larger percentage than that, Your Honor.

THE COURT: Very good.

All right. That is welcome news.

Third item on the agenda is the Plaintiffs' bellwether early trial proposal.

MR. SMALLEY: Yes, Your Honor. I will take that as well.

At the risk of sounding like a broken record, we would again ask the Court if you believe you might be able to set aside some time for us for early trials in 2009 we believe we can accommodate whatever the Court's schedule would be and then work our way back to make sure we can do that.

Our proposal as set forth in the status report is set forth toward the end of the document; and it's a little different from the one we submitted back in August, Your Honor. At this point, given the settlement of those doctor-visit cases, we'd ask the Court to consider setting early trials for three different types of cases: Stool culture positive, stool culture negative and no stool culture types of cases. Maybe two of each sort of case.

And if the Court is interested in that proposal, then

we could either meet and confer with ConAgra counsel to try to come up with representative cases or certainly any other format that the Court would prefer in doing that. As Plaintiffs we, of course, have to ask the Court to let us do that.

THE COURT: Mr. Walsh?

MR. WALSH: Judge, I think you know my position on this. These cases are so individualized that the concept of bellwether I think plays a much slighter role here than it would normally. But if bellwether cases were to provide any role, we are already -- we already have that.

We are seeing cases that are being tried or are scheduled for trial, and some of those will take place probably this spring outside the MDL. We are settling cases every day that meet the descriptions that have just been described, so it's not a valuation process for us. We know the value of those cases. We are settling them with some of the top food-industry lawyers in the country. So every category that's mentioned have been settled. And so it's not a process of valuation.

We think the purpose of the MDL is to go ahead and get cases ready for remand and ultimate trial in the courts they are supposed to be. And, of course, there are many of these cases in this court in the Northern District of Georgia that will, of course, stay here once the MDL is concluded and be tried.

So I see almost no value to deferring the business of the MDL and hurrying certain cases around when we already have similar cases to it either going to trial, settling. It's just not a question -- it's not going to give us any information that we don't have access to or will have access to very shortly from other means anyway.

So I think the proper purpose of the MDL is to get the cases ready for remand. I think that's what we should be focused on. I think all it will do to hurry up certain trials and try them here will be to defer the business of the MDL, and I see nothing that's accomplished by that.

MS. CABRASER: Your Honor, may I comment in response?

THE COURT: Yes, Ms. Cabraser.

MS. CABRASER: The argument that every case is unique and there's no benefit for bellwether trials, of course, is made in and has been made in each of the MDLs in which MDL transferee courts have employed bellwether trials and commented favorably upon their utility, including Vioxx, Bextra/Celebrex. And that's not a surprising argument at all.

The goal of MDLs is to accomplish the completion of the discovery and trial preparation that relates to the common questions of fact that justify the centralization of these cases in the first place. And so the idea of the utility of the bellwether trial is that it does set the parties with a timetable and a goal to complete that discovery, that core

common discovery, to work through the privilege issues, to work through the discovery disputes, to get the opinions of the experts public and to use all that. It is not an end runaround or an avoidance of or a deferral of the purpose of any MDL. It's a way to get that purpose accomplished.

With respect to information gathered from individual settlements, that's great and we are all for it. But to date that information to the extent it exists is unilateral information. It's not information necessarily that is shared with other Plaintiffs who have similar cases so that those cases can be valued for settlement, and it's not information that is shared with or known to the Court. Information that comes out regarding the value, the issues, the merits of cases that are selected for bellwether trials is public. And the Court as well as the parties can assess that information.

Many MDLs have resolved comprehensively and successfully through non-class mass settlements on the eve of the very first of the MDL trials that the MDL court had set. That occurred in the Guidant litigation literally on the eve of the jury selection in the first bellwether trial. There was a comprehensive non-class mass settlement, essentially a unilateral offer with respect to 8,500 individual personal injury cases.

In Bextra/Celebrex the same thing occurred. We were two days from Judge Breyer's impanelment of a jury. The cases

were resolved in principle. Lots of individual negotiations followed that announcement. And in October of last year, a unilateral offer, a mass settlement was announced for the personal injury claims in Bextra/Celebrex.

And in both cases, although the parties would not have agreed before the fact as to the utility of bellwethers -- and, in fact, all the arguments that both sides are making to you today were made in those cases -- after the fact of settlement I think there's been acknowledgment that the setting of bellwether trials played an instrumental role in promoting the information exchange, the information production, the valuation of the cases and their ultimate resolution which I think is a common goal. Although I'm sure we'd put different price tags on it around this table.

THE COURT: Well, let me give you what my thoughts are at this point in time. I will be very disappointed in what I have done in this MDL if I feel compelled to remand most of the cases without having had a single trial of any case. So I want to try at least a couple of the cases before remanding in a wholesale fashion the cases that have been transferred into the MDL.

Whether you consider that bellwether trials, whether you consider it just early trials with the parties then preparing a case for trial, taking the expert depositions or preparing experts to testify, whatever you call it I think has

a beneficial effect on ultimately resolving these cases and providing a benefit to the transferor courts where the other MDL cases return.

So I am going to try -- I am going to do my best to schedule a couple of cases for trial within the foreseeable future. What I come up with today is going to be a goal. It's not going to be -- and it's going to be contingent upon how things develop. But it is going to be a firm goal for trying a couple of these cases.

Remind me, Mr. Smalley, when discovery concludes.

MR. SMALLEY: Well, under the case management order, I believe it's in April. However, because of the extension we have had with respect to experts at this point and our further requests, it could -- we might ask the Court to push it. But, as I said initially, whatever -- whenever the Court can accommodate early trials, I believe we can go back and make discovery fit into that time frame.

THE COURT: Any thoughts, Mr. Walsh?

MR. WALSH: Judge, nothing above what I have said. We don't -- certainly we know we are going to be trying cases in the Northern District of Georgia. So from whether it occurs a few months earlier than it might otherwise, it really from that standpoint doesn't make any difference. There's a lot of cases filed in the Northern District of Georgia, so they are going to be naturally here. Whether it's on a remand basis or

a non-remand basis, it's not going to make that much difference.

And I do think we don't want to be premature. I do think we want to focus on a central goal of MDLs and get the discovery done. I don't think we should have this continually moving target in which we continue to push out. I think we probably are going to have to push discovery somewhat because we are approaching the second anniversary of this incident which means we are anticipating there will be increased filings, there will be some late filings of people that have been sitting on the sidelines watching.

We have got some tolling agreements in place. We have been handing out tolling agreements on a fairly regular basis to people so that we could have discussions with them and not put them under time pressures. And as those tolling agreements, as they either expire or we pull the triggers on them so we can get the cases in, we probably are going to be bumping discovery a little bit.

I think normal MDL procedure would say you don't have to -- just because there's late-comers, they have been represented by competent counsel through the discovery process, it's not going to require much, if any, extension. But it may require some depending on the circumstances.

So what I would counsel is to let's get the bulk of discovery done. Let's not try to truncate that and force a

case into the middle of discovery. Let's get it done. And then when discovery is sufficiently mature if it's the Court's desire to try a couple of those cases before remanding the others, we don't have any objection to that.

THE COURT: Okay. I am going to go another month or two before I try to set a date for early trials, Mr. Smalley. But you know my thinking, and I'm sure we will have this same conversation again. But I am not going to try to set a trial date today. I think it's premature.

But I agree in concept with what you are asking for, and I -- well, I have said what I am going to do.

All right. Next item on the agenda is the Plaintiffs' request for a 30-day extension for expert disclosures.

MR. SMALLEY: That's mine, Your Honor. It'll be very brief.

If I may, back in December we -- well, at the November status conference we had a colloquy with the Court with respect to the experts and the different understanding of what it meant for in terms of expert disclosures for the tagalong cases particularly. So our request is really twofold. It's the first is -- well, the first request is that we as the steering committee have an additional 30 days from that which was set in -- what we contended or considered to be a stopgap order that was entered by consent of the parties back in

December so that we didn't have to have a hearing at that time during the Christmas season about this matter when we just pushed it to today.

But we are asking that the Court put our deadline for the steering committee back to March the 4th. It's currently February the 2nd. And, hopefully, we are hopeful that within that time frame that we may have some resolution of some of the privilege log issues that are currently pending and hope that we may be able to have production of any of those documents which may be ordered in our experts' hands so that they may be commented upon in their disclosures rather than having to file one or more supplements.

The second part of the request is for the benefit of the tagalong attorneys who for the most part have come to realize only since the November status conference that all experts other than their individually treating medical doctors would be required to be disclosed pursuant to this deadline. And really the issue is many of them have asked for the opportunity to evaluate the disclosures that the steering committee places forth before making the determination as to whether they have to file disclosures for similar types of experts.

And I do think that's a reasonable request that has been made of me by many tagalong lawyers to have the opportunity to review those and then have 30 days after that

point in which to file theirs. So the request on behalf of the tagalong cases would be April 3rd.

THE COURT: Mr. Walsh?

MR. WALSH: Judge, it seems to me it turns the whole MDL process on its head. The object is not to give every lawyer an opportunity to look at what gets filed and then decide to make separate, individual filings on an as-you-go basis. This case has been pending for almost two years. I mean, we have been in litigation now for almost two years.

Many of our experts were deposed during the class certification aspects, and there were many affidavits put in on -- expert affidavits put in on behalf of the Plaintiffs as far back as the class certification submissions. I suspect that the Plaintiffs, the main -- the Plaintiffs who came to this court as a very large steering committee and said representing thousands of cases, the vast bulk of the cases in the MDL being theoretically belonging to the lawyers who were on the Plaintiffs' steering committee, I suspect that those people have had a structure for expert witnesses in place for many, many months now, perhaps since almost the beginning of the case.

I think what the request really boils down to is a request to say let's file certain disclosures, let's see what ConAgra does, and then let's have free choice to file whatever on top of that we want to file. And I'm not sure that's the

way it's supposed to work. They have had two years to put experts in place. We granted -- we agreed to an extension back in December when the first deadline was coming up. We didn't oppose it. But the notion that we are going to have a moving target where anybody can simply file, after they have seen everything that gets filed, file more in different ones I think is not only contrary to the procedures we have set up here but contrary to fundamental fairness. I mean, it just doesn't make sense. We'd never have an end to the filings of expert reports.

THE COURT: Mr. Smalley, I will give you the last word if you want to say anything else.

MR. SMALLEY: Well, Your Honor, I do know that there are perhaps some lawyers on the telephone who might want to be heard on this. I know the Pope attorneys did file a separate motion along these lines as well.

The intent is not anything other than to give -- we are not talking about attorneys on the steering committee, Your Honor. I have been contacted by people who have one or two cases who are just -- have a case in the MDL and want to be able to make an informed decision about whether they need to file their own expert disclosures or not. And that's really the only purpose.

THE COURT: All right. Anybody appearing by telephone that wants to be heard on this issue?

MS. BLAIR: Yes, Your Honor. This is Rebecca Blair. I am from Brentwood, Tennessee, representing Rita and Doug Pope.

And we did, in fact, file a motion yesterday related to this issue; and I have had several conversations with Mr. Smalley about this. And we'd like to explain to the Court that our request is not in any way intended as a way of, you know, seeing what the Defendants do and wanting to try to supplement that or anything like that. We have our single case for our single client here in Tennessee.

And, honestly, Judge, until we -- until the consent order was entered, we had read the Court's case management order to require -- to have this particular expert disclosure deadline only applied to I think what's been referred to on some of these calls as the national experts, so to speak.

And the language that we read from that order is that case-specific experts -- and I think we may have been reading that more broadly perhaps than it was defined, than it has now been defined -- but case-specific experts would be disclosed at a later time once the consent order was entered, that that seems to narrow the definition of case-specific experts more specifically to those -- to health care providers and that sort of thing.

Then that's when we felt like in fairly and in fully representing our client we would like to be given an

opportunity to see the steering committee disclosures and then to make a decision about whether we need to disclose any additional experts that are specific to our case that would not fall into the health care provider category.

And we would not want to prejudice the Defendants, as I understand it, that an additional 30 days -- is an additional 30 days. But given the time frame, I don't think that would be too prejudicial to the Defendants. And we would certainly agree to allow them an additional length of time after our disclosures to make their own disclosures.

THE COURT: All right. Mr. Smalley, I am going to grant your request for a 30-day extension of time for experts' disclosures. And we will give you and all of the Plaintiffs until March 4th to make your expert disclosures. That applies to all Plaintiffs and to all non-case-specific experts as I defined that at the last status conference.

MR. HILL: Your Honor, this is Robert Hill in Jackson, Tennessee. I have the case of Milton versus ConAgra.

Could I address you, please?

THE COURT: Not on that particular issue because I just ruled, sir.

MR. HILL: Thank you, Your Honor.

MR. WALSH: Your Honor, that automatically will bump the Defendants' response time? If they are moving 30 days, we will move by 30 days the Defendants' response time too?

THE COURT: Correct. Everything moves.

MR. WALSH: Everything moves. Thank you.

THE COURT: All right. The next matter is the hearing on the Plaintiffs' motion to establish a common benefit fund.

Mr. Smalley, Ms. Cabraser, that's your motion.

MS. CABRASER: Thank you, Your Honor. I will start out, and I will try to be very quick because I know your time is short.

We filed a motion, a bare motion back in the fall of last year to set up a common benefit fund which would provide for a 4 percent assessment taken from costs for settlements or judgments reached by counsel who had any cases in the MDL.

As with most such assessment orders, the assessment order extends not only to cases filed in or transferred to the MDL but of necessity to unfiled cases such as those that are subject to the tolling agreements that we negotiated for the benefit of the Plaintiffs and other cases that lawyers who are involved in the MDL have.

In that respect, the order, proposed order, is absolutely routine, that is, the structure of MDL assessment orders, for the simple reason that if we limit the reach of the order not to the counsel who appear before this Court and over whom this Court has jurisdiction but to file cases what typically happens or can happen is that lawyers file a small

percentage of their cases. They may file some of their cases elsewhere. They may take advantage of the tolling agreement that's been negotiated for them as many have. And what happens is the free-rider phenomenon that the Manual for Complex Litigation 4th condemns and that many MDL courts have found inimitable to good case management.

To avoid confusion here, there are two kinds of assessments in MDL cases when lawyers talk about assessments. There's a front-end assessment. That is the assessment that the members of the PSC make of themselves to come up with money to fund the common costs of the litigation. And as Your Honor knows, the PSC here assesses itself and pays into a fund so that we can pay to retain experts, to deal with documents, depositions, to deal with all the liaison work that Mr. Smalley does.

And we keep time that we spend for the common benefit. That time isn't paid unless and until there are judgments or settlements. It's not paid unless and until Your Honor as MDL transferee judge approves those, whether in the context of a class settlement or as more frequently nowadays a non-class mass settlement.

But in order to assure that counsel know that such an assessment will occur, it has become the common practice of MDL judges to establish an assessment order sometimes called a common benefit order relatively early in the case, sometimes as

early as the first or second or third case management order. And, indeed, in this case, one of Your Honor's early case management orders, I think the initial case management order in Subsection 2, referred to but not -- did not establish a specific assessment.

We deferred it. We deferred it for one major reason, Your Honor. Unlike many MDLs like Vioxx, like Bextra, like Guidant, as to the personal injury claims we asked the Court to consider class certification of some of those issues. And had that motion been granted and had there ultimately been a class resolution, then Your Honor would have been looking at attorneys' fees within the parameters of Rule 23 rather than a more typical MDL assessment order.

We realized going onward negotiating settlements, preparing for trials, proposing bellwether or early trials, dealing with the common discovery, dealing with the Plaintiffs' fact sheet issues, dealing with tolling agreements, that it was not fair, not to anyone, whether it's the PSC lawyers or all of the lawyers with any cases in the MDL, not to establish an assessment that everybody knew about and had notice of and can quickly respond to. So we filed our motion, and we asked for a relatively low 4 percent.

We got minimal objections from the Plaintiffs' side, and those have been resolved. The Plaintiffs' lawyers who objected to the order were lawyers who had been active either

in state court litigation and done their own work and spent their own money that was informally used for the common benefit, or with respect to Mr. Karnas and his firm, Mr. Karnas and his firm had originally been on the PSC and had asked to be on the PSC and had participated in that work.

And we recognized that rather than have them pay money in and get money out, weighing the relative benefits of that expenditure and that work, it made sense to exempt them from the operation of the order which was done. And we have a proposed common benefit order before the Court which does that.

The only objection that has been filed that we are aware of at this time, Your Honor, comes from the Defendant, comes from ConAgra. And I think the basic argument is it's too soon. I think if I had to make any argument against an assessment order at this point it would be that it's too little and almost too late. It is not too late with respect to the settlement program that we announced to Your Honor. ConAgra has withdrawn its objection with respect to that program, and participants in that program are aware of the 4 percent assessment.

The only issue is going forward should we have now a common benefit order that sets a prospective assessment of 4 percent or any other percentage with respect to ongoing settlements or ongoing judgments. And we believe, Your Honor, while it's up to you to decide whether and when to enter such

an order, it would be appropriate to do so at this time, particularly because the PSC is expending costs and time completing the discovery, dealing with experts, addressing privilege issues. The Plaintiffs' fact sheet process is an ongoing process. We would like to be able to see if the remaining categories of cases can be resolved. If not, at least some of them will need to be tried. And those are matters that a common benefit assessment covers.

This assessment is a relatively low one. The Bextra/Celebrex assessment of 8 percent to 10 percent was established prior to the announcement of a major settlement back in April of 2008. It is higher than we are requesting here. Vioxx, as you know, counsel are requesting an 8 percent assessment. That was requested in the context of another mass settlement. The previous assessment order in Vioxx was lower.

Guidant at the very outset of the case in Pretrial Order Number 5, I believe it was, set a similarly low order, a similarly low assessment of 2 percent, a 2 percent assessment. Judge Frank in the Guidant litigation raised that assessment substantially in the form of a superseding common benefit order after the case has settled.

This is an evolving concept in MDLs. What we have found in cases is that the work is often much greater, the costs are much greater than initially conceived of, and the assessments seem to increase.

It's been our principle in this case to try to keep the assessments as low as possible, to encourage early settlements where those could be reached -- many of them have been reached -- to only ask for an assessment out of costs rather than an assessment out of fees and to give ourselves as common benefit counsel every incentive to do this work as efficiently and economically as we can.

That said, we believe as a matter of equity it is fair to everyone on the Plaintiffs' side and it is not unfair to ConAgra. Indeed, our argument would be that ConAgra has no standing with respect to how Plaintiffs manage to fund and subsidize their common prosecution costs and fees to set an assessment at this time at the level of 4 percent with the exceptions that I referenced to those specific firms that have contributed common benefit time and costs and who have reached comprehensive resolutions in their cases. It's really a moot point as to those counsel. As to every other counsel with at least one case in the MDL, it is not.

I would note that ConAgra has brought to Your Honor's attention a remark I certainly remember making in a status conference before this Court, and it was this same principle of the assessment. And what we are asking for today is utterly consistent with that. I told Your Honor and I told everyone in the case by making that statement in the status conference that any assessment we requested would be for counsel who had a case

in the MDL and that if people did not have a case in the MDL the order would not extend to them because the Court's jurisdiction would typically not extend to them other than in a class case.

You have jurisdiction over all the counsel who have any cases in this MDL. For good reasons, many of them have chosen not to file all their cases at all yet or may have filed them in other jurisdictions. If we are to do the work that everyone is to share, if everyone is to collectively spend less time and less money because of the economies of scale, an assessment at this modest level in our opinion at least, Your Honor, makes good sense.

And as I mentioned before, we have not seen any submissions in opposition to this from the Plaintiffs' side. It's certainly understood with respect to the current settlement we have. And it will certainly be necessary, Your Honor, for lawyers in the PSC to do, continue to do the work that you have asked us to do and ordered us to do for the common benefit of the Plaintiffs in this litigation to have some modest source of reimbursement of the costs that we are expending every day.

Thank you.

THE COURT: All right. Anybody on the Plaintiffs' side want to object to the Plaintiffs' steering committee's proposal?

(No response.)

THE COURT: Mr. Walsh?

MR. WALSH: Your Honor, I will be as brief as I can.

Standing, I don't know that I have to address that. We are paying the money. Their order directs us to do certain things. Usually when you are subject of an order that directs you to do things you have standing to object to it, and I don't think the principle changes here.

It's not a timing issue. The order as drafted would reach outside the MDL and to state cases that are not in the MDL, to state lawyers who are not before this Court. The order would in effect change this court to a natural justice court whose jurisdiction extended without regard to statute, Constitution, due process or anything else.

People with no notice -- this is the first time I have ever heard a lawyer argue that the fact of the identity of somebody's lawyer being in this court confers jurisdiction over that person who is not before the Court, has never been served with process, has never received any notice.

They are asking for settlements that were concluded before the steering committee even existed which clearly couldn't have benefitted from it to be upset and overturned and assessed with a 4 percent agreement. They are asking for people to be -- this Court to reach out and assess costs against people who are -- have not been served and are not

before this Court.

Under what constitutional authority, under what possible constitutional authority could that be done?

The leading case -- and we cited it to the Court in our papers -- it's a 4th Circuit case which says definitively there's no power in a federal court. When you MDL a case, it's procedural. It's not jurisdictional. It doesn't extend the jurisdictional reach of the Court. There's simply no power -- Showa Denka I think is the name of the case. There's no constitutional power to do that.

The most recent court that has looked at it in New York District Court said we don't have to reach the underlying power issue because matters of comity, simply how can we tell -- how can we tell a state court judge how to handle their docket, how to handle the lawyers in front of them, how can we reach out and do that simply as a matter of comity. We can't -- a federal court can't do that, and we are not going to do it.

So we object to the order, first of all, on the grounds that it reaches cases not in the MDL. The MDL order itself that Ms. Cabraser referred to made it very clear that any common benefit would apply to cases -- and I am quoting now -- that are adjudicated or resolved through these MDL proceedings, I think a clear recognition by the Court and all the lawyers involved at the time that going beyond the MDL

would be an exercise of power that simply does not exist but applying it retroactively on top of that to upset settlements.

What are we supposed to do, go back to take the settlements that are concluded and ask people now to pay 4 percent?

They have been concluded. They are closed. They are finished. They've signed off with no idea that they would be subject to a 4 percent assessment. We can't go back to them and say, Now pay us 4 percent.

So from that standpoint, we think the order is defective. The order is not even limited to salmonella Tennessee cases. They said contaminated peanut butter. Presumably, if I find a foreign object in my peanut butter and file a claim, under the literal terms of this order that would be covered. There's no limitation even on salmonella Tennessee cases.

Now --

THE COURT: All right, Mr. Walsh, I am going to have to stop.

MR. WALSH: I understand.

THE COURT: I need to take another look at this matter. And what I propose to do is that we schedule another telephone conference call to discuss some questions I have about this. And I am not going to make a hasty decision today that I might regret sometime later.

So we will be in touch with you. Leave me your proposed order, Ms. Cabraser, the revised one. And we will talk about this again.

As far as the privileged documents or the claimed privileged documents are concerned, we have reviewed all of them. I have made a decision about all of them. We will get out an order in due course. That's about the most I can say.

I had an idea that what I would do is I would give each side -- there were some that we had factual questions about that the parties' submission didn't answer. So what I thought I would do is I would give each side five documents that you would be -- you could request de novo review, just from the beginning. All other decisions, all other documents, the usual standards for a motion for reconsideration would apply; that is, clear error of law, newly discovered evidence, et cetera, et cetera.

Anybody have any reaction to that? You want it? You don't want it?

MR. WALSH: Judge, we are willing to go with whatever decision you render. I mean, it's -- to us there is more benefit I believe in moving this issue forward. And we are perfectly comfortable with getting a neutral third party to pass judgment on it, and we can live with that whatever it is.

THE COURT: What do you say for the Plaintiffs?

MR. SMALLEY: Well, Your Honor, that is something we

will need to talk about I would think with the rest of the committee; but I suspect that we would react much the same way.

THE COURT: Well, y'all talk about it and let me know, send me a joint letter with the parties' positions on that within the next week or so.

MS. CABRASER: Yes, Your Honor.

THE COURT: Continue to have the monthly status conferences?

MS. CABRASER: Yes, Your Honor.

MR. WALSH: Yes, sir.

THE COURT: Okay. We will schedule another one, say, toward the end of February. And y'all just get with Ms. Sewell and come up with a date.

MR. WALSH: Your Honor, it's possible I would have to miss. I am scheduled for a trial starting around in that time period. So I may or may not be able to attend the February conference. But, nevertheless, I think we should have one; and we can have representatives here.

THE COURT: You will have very competent representatives I'm sure --

MR. WALSH: Yes, sir.

THE COURT: -- Mr. Walsh.

Okay. That concludes the status conference.

(Proceedings adjourned at 3:00 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 34, are a true and correct copy of the proceedings in the case aforesaid.

This the 27th day of January, 2009.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court