

BEFORE THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

IN RE PET FOOD PRODUCTS : Civil Action No. 07-2867  
LIABILITY LITIGATION :  
: MDL Docket No. 1850 (ALL  
: CASES)  
:  
: **AFFIDAVIT OF GOOD FAITH OF**  
: **RICHARD FAMA, ESQ. IN**  
: **SUPPORT OF DEL MONTE'S**  
: **EMERGENCY MOTION TO LIMIT**  
: **THE RETENTION OF RECALLED**  
: **PET TREATS AND FOOD, RAW**  
: **WHEAT GLUTEN AND MIXTURES**  
: **CONTAINING RECALLED WHEAT**  
: **GLUTEN**

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State of New York )  
 ) ss.:  
County of New York )

Richard Fama, being duly sworn deposes and states the following under the penalty of perjury:

I am a member of the law firm of Cozen O'Connor, attorneys for Del Monte Foods, Co. ("Del Monte"), a defendant in the above-entitled litigation, and as such, I am fully familiar with the facts and circumstances of this case and the Motion in support of which this Affidavit is made.

This Affidavit is made pursuant to Local Civ. Rule 37.1 (b) (1) in support of Del Monte's Motion to Limit the Retention of

Recalled Pet Treats and Food, Raw Wheat Gluten and Mixtures Containing Recalled Wheat Gluten.

Your affiant has participated in and is otherwise familiar with the negotiations between this office, co-defendants' counsel and attorneys for the plaintiffs with respect to developing a sampling plan for recalled pet treats and food, recalled raw wheat gluten purchased from ChemNutra, Inc. and mixtures containing recalled wheat gluten (cumulatively referred to herein as "recalled product") and the destruction of remaining recalled product.

As discussed, *infra*, negotiations with plaintiffs to arrive at a sampling plan for recalled product have been largely unsuccessful and, on that basis alone, judicial intervention is required. The need for this Honorable Court's intervention, however, took on greater urgency on November 13, 2007 when the Food and Drug Administration ("FDA") directed Del Monte, in writing, to destroy all recalled product in its possession. See Exhibit "A". Given the clear and unambiguous directives of the FDA and the unlikelihood of reaching an agreement with plaintiffs, Del Monte now respectfully moves this Honorable Court for relief.

Since August 2007, Del Monte along with several other defendants involved in this litigation has attempted to

negotiate with plaintiffs' designated representatives, Jenipher Breckenridge of Hagens Berman Sobol Shaprio, LLP and Scott Kamber of Kamber & Associates, LLC to arrive at a joint agreement on a sampling plan related to the millions of units of recalled product stored by defendants. These negotiations have been multifaceted. For instance, Del Monte and other defendants participated in numerous conference calls with plaintiffs' designated representatives in order to attempt to reach an agreement on a sampling plan for the large quantities of recalled product stored by several defendants. On virtually all of these calls, Del Monte advised plaintiffs' representatives that the recalled product it is storing is infested with insects and maggots and presents an imminent public health and safety risk. These conference calls have continued on a sporadic, albeit decreasing basis to date.

Negotiations with plaintiffs' representatives have also involved the exchange of data, product inspection and even offers to transfer control of all recalled product to plaintiffs.

**OFFERS TO GIVE PLAINTIFFS SAMPLES OF RECALLED PRODUCT,**  
**UP TO AND INCLUDING ALL OF IT**

On October 1, 2007, your affiant sent a letter to plaintiffs' representative offering to allow plaintiffs to obtain samples of Del Monte's stored recalled product, up to including all of such product. This offer was reiterated to plaintiffs' representatives by your affiant on October 30, 2007, November 2, 2007, November 8, 2007 and finally, on November 14, 2007. Rather than accepting a single unit of product from Del Monte, plaintiffs' representatives posed questions to it that have no bearing on plaintiffs' ability to accept samples of Del Monte's recalled product. See Exhibit "B". Notwithstanding the irrelevance of the questions posed by plaintiffs' representatives and solely in an effort to facility an agreement with plaintiffs, on November 14, 2007 your affiant provided answers to those questions and requested that plaintiffs advise your affiant of their position on accepting all or some of Del Monte's recalled product. Plaintiffs, however, have failed to respond to Del Monte's offer in anyway.

**PRODUCT INSPECTIONS**

On September 14, 2007, your affiant's office notified plaintiffs' representatives in writing that Del Monte's recalled

product stored in Mira Loma, California, Watsonstown, Pennsylvania, Independence, Missouri and Topeka, Kansas was immediately available for plaintiffs' inspection. See Exhibit "C". Having received no response from plaintiffs, on October 1, 2006, your affiant once again offered to allow plaintiffs to inspect all of its recalled product. See Exhibit "D".

On October 9-10, 2007, the plaintiffs inspected Del Monte recalled product stored in its warehouses in Independence, Missouri and Topeka, Kansas. On October 16, 2007, your affiant again invited plaintiffs to inspect Del Monte's recalled product stored in its remaining warehouses, namely warehouses located in Mira Loma, California and Watsonstown, Pennsylvania. See Exhibit "E". On October 30, 2007, Bruce Newman of Newman Creed & Associates inspected Del Monte's recalled product stored in Watsonstown, Pennsylvania on behalf of the plaintiffs. To date, however, plaintiffs have made no requests to inspect recalled product stored in Del Monte's Mira Loma, California warehouse and it does not appear that the inspections that were completed had any effect on the negotiations with plaintiffs.

#### **EXCHANGE OF DATA**

In an effort to expedite an agreement on a sampling plan of recalled raw wheat gluten held by Del Monte and pursuant to plaintiffs' request, on October 19, 2007, Del Monte, along with

other defendants, provided plaintiffs' representatives with an inventory of all raw recalled wheat gluten. See Exhibit "F". This inventory identified the quantity of wheat gluten held by Del Monte, the ChemNutra, Inc. batch numbers of that wheat gluten and the locations where that wheat gluten is stored. Plaintiffs' representatives did not respond to the foregoing information provided to them until approximately two weeks thereafter, on October 30, 2007, and only when prompted to do so by defendants. See Exhibit "G". At that time, plaintiffs' representative stated that plaintiffs wanted defendants' statistician to develop a sampling plan without ever explaining why plaintiffs' retained statistician could not develop a plan himself.

The parties had hoped to reach an agreement related to the retention of samples and destruction of the remaining wheat gluten independent of the sampling plan for the recalled pet treats and food by November 15, 2007. See Exhibit "H", p. 2. In light of recent communications with plaintiffs' representatives, however, it is clear that the parties will be unable to reach such an agreement.

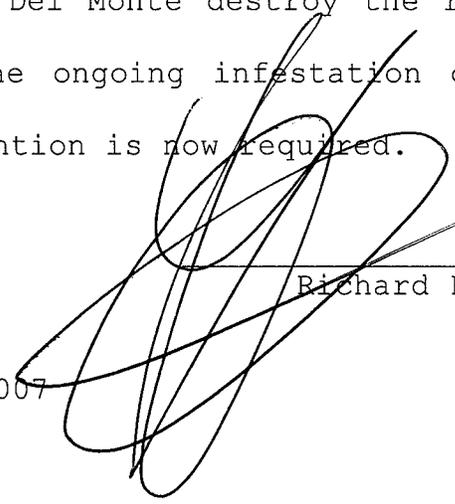
The parties also agreed to destroy certain unorganized pet treats and food retained by various defendants called "banana box material", subject to the disclosure of certain information

requested by plaintiffs' representatives. See Exhibit "I". On November 2, 2007 and November 12, 2007, respectively, Del Monte, along with other defendants, provided plaintiffs' representatives with all of the information they requested, including SKU day inventories and a stipulation governing the destruction of banana box material. See Exhibit "J". Since then, plaintiffs' representatives have wholly failed to agree to the destruction of banana box material or contact your affiant regarding the information provided to them. Also, as stated above, the FDA has directed Del Monte to destroy all recalled product in its possession. Because banana box material is partially comprised of recalled product, the FDA's directives would apply equally to it as well.

With respect to so-called "organized pet treats and food" retained by Del Monte and others, on October 4, 2007, defendants' statistical expert, Dr. George McCabe, provided plaintiffs' representatives with a letter explaining his proposed sampling plan. See Exhibit "K". Nearly two weeks thereafter, on October 17, 2007, plaintiffs' representatives responded to Dr. McCabe's sampling plan with questions regarding certain assumptions he made to formulate same. See Exhibit "L". On October 19, 2007, Dr. McCabe responded to plaintiffs' representatives questions. See Exhibit "M". Despite providing

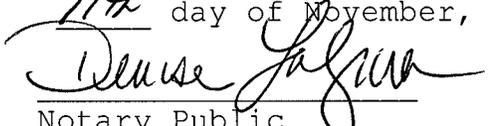
plaintiffs' representatives with all the information they requested, to date, they have been incapable or unwilling to agree upon a plan regarding the retention of samples and destruction of remaining organized pet treats and food.

Your affiant submits that the foregoing illustrates some of the good faith efforts that Del Monte and the other defendants have made to resolve the issue before seeking relief from this Honorable Court. Unfortunately, given the parties' inability to agree upon a sampling plan, the urgency created by the FDA's directive that Del Monte destroy the recalled product in its possession and the ongoing infestation of the recalled product, judicial intervention is now required.



Richard Fama

Sworn to before me this  
11<sup>th</sup> day of November, 2007



Notary Public

DENISE D. LAGRUE  
NOTARY PUBLIC, State of New York  
No. 01LA5049505  
Qualified in Kings County  
Term Expires: September 18, 2009

EXHIBIT "A"

**Fama, Richard**

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**REDACTED**  
**ATTORNEY CLIENT PRIVILEGE**

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**From:** Lauff, Megan [mailto:megan.lauff@fda.hhs.gov]  
**Sent:** Tuesday, November 13, 2007 8:44 AM  
**To:** Hayes, Michael  
**Subject:** RE: Destruction of Recalled Products

Mike

Yes everything in your email below is correct. Please start the process of scheduling the destruction; let me know the tentative date and location so that I can have an investigator witness the destruction.

Please feel free to contact me with any additional questions.

Thanks,  
Megan

Megan M. Lauff, Recall Coordinator  
FDA/Philadelphia District  
U.S. Customhouse, Room 900  
2nd & Chestnut Streets  
Philadelphia, PA 19106  
(215) 717-3749  
fax (215) 717-3721  
[megan.lauff@fda.hhs.gov](mailto:megan.lauff@fda.hhs.gov)

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**From:** Hayes, Michael [mailto:Michael.Hayes@DELMONTE.com]  
**Sent:** Friday, November 09, 2007 2:01 PM  
**To:** Lauff, Megan  
**Subject:** Destruction of Recalled Products

As you may recall, the FDA has advised Del Monte to destroy all recalled pet food products, all ingredients containing recalled wheat gluten distributed by Chem Nutra and all raw recalled Chem Nutra

11/15/2007

wheat gluten in its possession. From our prior communications, I also understand that:

1. The FDA believes that the continued storage of recalled product represents a health and safety hazard to the general public.
2. This belief is based not upon the manner in which the product is being held by Del Monte but, rather, the FDA's past experiences which have shown that the longer an allegedly defective product is held after the initiation of a recall, the greater the chance it will be accidentally introduced into the stream of commerce.
3. The FDA requires that we contact you, Recall and Emergency Coordinator, so arrangements can be made for FDA personnel to witness the destruction of the recalled product and ingredients.

Before we proceed with the arranging destruction of recalled product and ingredients, I ask that you provide written confirmation to me of the accuracy of the above. Is this something you can provide?

Thank you in advance for you assistance.

Mike Hayes  
Del Monte Foods  
Director - QA  
(412)222-8420 Work  
(412)417-0328 Cell  
(412)222-1939 Fax

EXHIBIT "B"

**Fama, Richard**

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**From:** Jeniphr Breckenridge [Jeniphr@hbsslaw.com]  
**Sent:** Monday, October 01, 2007 7:23 PM  
**To:** Fama, Richard  
**Cc:** Sikoscow, Alexander; Scott A. Kamber, Esq.  
**Subject:** RE: Pet Food Litigation

Richard.

I do not know who advised Del Monte that plaintiffs would likely conduct an inspection of Del Monte's stored product on October 2, but it was not I. When you and I spoke to Mary Gately at the courthouse, I indicated that October 1 or 2 would be the *earliest* plaintiffs could mobilize to visit any sites. This fact was based, in part, on what we thought was defendants' collective insistence on the Confidentiality and Nondisclosure Agreement Regarding Sampling Plan, which was not provided to us by Menu Foods until the close of the mediation day on September 25. The prospect of a Confidentiality Agreement had not been raised by any defendant earlier. As with defendants, among plaintiffs there are multiple groups that must weigh in on the language of the proposed Agreement. We had not been able to confer until this afternoon. We do have concerns to raise about the Agreement and we are contacting Mary Gately to discuss them.

Your email today is the first notice that we have received that Del Monte considers a site visit a "condition precedent" to continuing with the mediation. It is also the first notice we have had that we must visit the Missouri site first, which is not what you and I discussed last week. Nevertheless, we continue to be available to conduct site visits on one day's notice. Perhaps Del Monte would be willing to consider a more simple agreement or to allow plaintiffs' counsel to view the site without a confidentiality agreement? This would certainly expedite the process.

Del Monte's offer "to allow plaintiffs to take samples of recalled product and wheat gluten, up to and *including all of it*, from each of the locations where the product is being stored" raises numerous issues. As an initial matter, this seems like a peculiar offer in light of the close controls other defendants have said that the FDA is insisting upon for the contaminated wheat gluten. And does this mean that Del Monte does not intend to retain any of the product? Has Del Monte already taken samples? Has any other entity taken samples? Has Del Monte conducted tests that renders preservation of the product unnecessary? Do these tests cover all product - organized and disorganized? If Del Monte will share the results of such tests, many open issues might be eliminated.

Further, what type of stipulation is Del Monte willing to enter into with respect to the contamination of the product in the warehouses? When will we receive specific information regarding the product stored in each warehouse.

Finally, the preservation of evidence is not an "merely an academic issue" for plaintiffs either. That is why we have spent the month since we first learned of the issue cooperating with Del Monte and other defendants to resolve the issue.

We look forward to your reply.

Jeniphr

Jeniphr Breckenridge  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1301 Fifth Avenue  
Seattle, Washington 98101  
206.224.9325 (direct)  
206.623.0594 (facsimile)

11/15/2007

EXHIBIT "C"



A PROFESSIONAL CORPORATION

16TH FLOOR 45 BROADWAY NEW YORK, NY 10006-3792 212.509.9400 800.437.7040 212.509.9492 FAX www.cozen.com

September 14, 2007

VIA E-MAIL

**Alexander Sikoscow**  
**Direct Phone 212.908.1273**  
**Direct Fax 866.778.6672**  
**asikoscow@cozen.com**

Jeniphr Beckinridge, Esq.  
Blim & Edelson, L.L.C.  
The Monadnock Building  
53 W. Jackson Blvd., Suite 1642  
Chicago, Illinois 60604  
jeniphr@hbsslaw.com

Jay Edelson, Esq.  
Hagens Berman Sobol Shapiro, L.L.P.  
1301 Fifth Avenue, Suite 2900  
Seattle, WAS 92801  
jay@blimlaw.com

Counselors:

This office represents Del Monte Foods Company in the pet food litigation. Del Monte is currently storing recalled finished product in three locations, Mira Loma, California; Independence, Missouri; and Watsonstown, Pennsylvania. In addition, raw wheat gluten related to the pet food recall is being stored in Topeka, Kansas.

In an effort to arrive at an expeditious resolution to the preservation issue, we are making this product available for your inspection. Due to the perishable nature of the wheat gluten and the infestation problem that our client is experiencing with the wheat gluten and finished product, any inspections must be performed on an expedited basis. All of the product will made available to you immediately.

Please contact Richard Fama or me upon your receipt of this letter to arrange your inspection of this product. Mr. Fama's cell phone number is 517.317.5737, and his email is rfama@cozen.com. My cell phone number is 914.563.2068.

Very truly yours,

COZEN O'CONNOR

/s/

By: Alexander Sikoscow

AS

Jenipher Beckinridge  
Jay Edelson  
September 14, 2007  
Page 2

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NEWYORK\_DOWNTOWN\254705\1 205723.000

EXHIBIT "D"

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**From:** Fama, Richard [mailto:RFama@cozen.com]  
**Sent:** Monday, October 01, 2007 12:13 PM  
**To:** Jeniphr Breckenridge  
**Cc:** Sikoscow, Alexander  
**Subject:** Pet Food Litigation

Jennifer,

By e-mail dated September 14, 2007, this office notified plaintiffs that Del Monte's product was immediately available for plaintiffs' inspection. Last week, I was advised that plaintiffs would likely conduct an inspection of Del Monte's stored product on October 2. I've now been informed that plaintiffs are considering conducting inspections on October 4th or 5th or, alternatively, at some point after the scheduled mediation on October 8th.

As you are aware, arriving at an agreement and/or obtaining a court order regarding the preservation of product/wheat gluten is not merely an academic issue for Del Monte. Despite precautions being taken by Del Monte, product infestation has become a critical health and safety concern. Indeed, resolution of the preservation issue is the primary focus of Del Monte. Thus, the inspection of the product is a condition precedent to Del Monte's further meaningful participation in the mediation process.

Given the immediate concern of Del Monte, it has directed me to allow plaintiffs to take samples of recalled product and wheat gluten, up to and including all of it, from each of the locations where the product is being stored.

Finally, I've been informed that Del Monte's distribution center in Independence Missouri houses the largest amount of recalled product. You're welcome to view all of the other distribution centers, including the center located in Topeka, Kansas, after you view the Missouri center. Please contact me forthwith to arrange for the inspection of Del Monte's product this week or the transfer of some or all of the product/wheat gluten to plaintiffs. I look forward to hearing from you soon.

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EXHIBIT "E"

**Fama, Richard**

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**From:** Fama, Richard  
**Sent:** Tuesday, October 16, 2007 11:12 AM  
**To:** PFD[mary.gately@dlapiper.com]; Jeniphr@hbsslaw.com; Scott A. Kamber, Esq.  
**Cc:** Isanom@ficlaw.com; PFD[rctroyer@hhlaw.com]; Shaknes, Alexander; PFD [abrazil@mpplaw.com]  
**Subject:** RE: Follow up on our expert's letter  
**Importance:** High

Jenipher, Scott, are we on for today to discuss the expert's letter. We'd also like to discuss what additional site inspections you may want? We already have the red carpet rolled out for you.

Rich

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**From:** Gately, Mary [mailto:mary.gately@dlapiper.com]  
**Sent:** Monday, October 15, 2007 3:48 PM  
**To:** Jeniphr@hbsslaw.com; Scott A. Kamber, Esq.  
**Cc:** Fama, Richard; Isanom@ficlaw.com; PFD[rctroyer@hhlaw.com]; Shaknes, Alexander; PFD [abrazil@mpplaw.com]  
**Subject:** Follow up on our expert's letter

Jeniphr and Scott, I believe that you indicated that you would be in a position to discuss any questions that you or your expert had regarding our expert's letter. Do you want to discuss this tomorrow? If so, what time and I will try and circulate a dial in for it. Thanks Mary

NOTE: My address and phone number changed as of October 1, 2007

Mary E. Gately  
DLA Piper U.S. LLP  
500 8th Street, N.W.  
Washington, D.C. 20004  
phone: 202-799-4507  
fax: 202-799-5507  
mary.gately@dlapiper.com

Please consider the environment before printing this email.

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11/15/2007

Thank you.

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11/15/2007

EXHIBIT "F"

**Fama, Richard**

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**From:** Fama, Richard  
**Sent:** Friday, October 19, 2007 10:01 AM  
**To:** Jeniphr Breckenridge; 'Scott A. Kamber, Esq.'  
**Cc:** PFD[mary.gately@dlapiper.com]; PFD[rctroyer@hhlaw.com]; lsanom@ficlaw.com;  
PFM[jarden@sidley.com]; PFM[glees@gibsondunn.com]; jireland@ficlaw.com;  
PFD[abrazil@mpplaw.com]; Sikoscow, Alexander; Fama, Richard  
**Subject:** total wheat gluten held in Pennsylvania  
**Attachments:** #261066-v1-NEWYORK\_DOWNTOWN-total\_wheat\_gluten\_held\_in\_Moran.XLS

Jeniphr/Scott, attached please find a spreadsheet detailing the quantity of raw recalled wheat gluten held by Del Monte in its Pennsylvania warehouse. I'm working on getting you numbers for quantities of wheat gluten held in our Topeka warehouse - the only other location where recalled wheat gluten is stored by Del Monte.

Rich



#261066-v1-NE  
RK\_DOWNTOWN

### ChemNutra Wheat Gluten in Pennsylvania

| Lot 20061101 |                            | wt/bag (lb) | totals      |
|--------------|----------------------------|-------------|-------------|
| Full bags    | 21                         | 55          | 1155        |
| Partial bags | 5                          |             |             |
|              | Partial 1                  | 50          |             |
|              | Partial 2                  | 45          |             |
|              | Partial 3                  | 45          |             |
|              | Partial 4                  | 45          |             |
|              | Partial 5                  | 50          |             |
|              | Total wt of partials       |             | <u>235</u>  |
|              | Total wt of lot # 20061101 |             | <b>1390</b> |

| Lot 20061027 |                            | wt/bag (lb) | totals      |
|--------------|----------------------------|-------------|-------------|
| Full Bags    | 17                         | 55          | 935         |
| Partial Bags | 5                          |             |             |
|              | Partial 1                  | 5           |             |
|              | Partial 2                  | 35          |             |
|              | Partial 3                  | 40          |             |
|              | Partial 4                  | 50          |             |
|              | Partial 5                  | 25          |             |
|              | Total wt of partials       |             | <u>155</u>  |
|              | Total wt of lot # 20061027 |             | <b>1090</b> |

| Lot 20061108 |                            | wt/bag (lb) | totals     |
|--------------|----------------------------|-------------|------------|
| Full Bags    | 7                          | 55          | 385        |
| Partial Bags | 5                          |             |            |
|              | Partial 1                  | 45          |            |
|              | Partial 2                  | 30          |            |
|              | Partial 3                  | 15          |            |
|              | Partial 4                  | 25          |            |
|              | Partial 5                  | 30          |            |
|              | Total wt of partials       |             | <u>145</u> |
|              | Total wt of lot # 20061108 |             | <b>530</b> |

| 1 full bag without lot # |   | wt/bag (lb) | totals    |
|--------------------------|---|-------------|-----------|
|                          | 1 | 55          | <b>55</b> |

|            |           |           |             |
|------------|-----------|-----------|-------------|
| Total bags | <b>61</b> | Total wt. | <b>3065</b> |
|------------|-----------|-----------|-------------|

**Fama, Richard**

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**From:** Fama, Richard  
**Sent:** Friday, October 19, 2007 10:21 AM  
**To:** Fama, Richard; 'Jeniphr Breckenridge'; 'Scott A. Kamber, Esq.'  
**Cc:** PFD[mary.gately@dlapiper.com]; PFD[rctroyer@hhlaw.com]; 'lsanom@ficlaw.com'; PFM[jarden@sidley.com]; PFM[glees@gibsondunn.com]; 'jireland@ficlaw.com'; PFD[abrazil@mplaw.com]; Sikoscow, Alexander  
**Subject:** RE: total wheat gluten held by Del Monte in Topeka, KS

Scott/Jenipher,

Following is an inventory of recalled Chem Nutra wheat gluten by lot number held by Del Monte at its Topeka, KS facility:

| ChemNutra Lot | Number of bags |
|---------------|----------------|
| 20061203      | 47             |
| 20061202      | 60             |
| 20070116      | 779            |

Rich

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**From:** Fama, Richard  
**Sent:** Friday, October 19, 2007 10:01 AM  
**To:** Jeniphr Breckenridge; 'Scott A. Kamber, Esq.'  
**Cc:** PFD[mary.gately@dlapiper.com]; PFD[rctroyer@hhlaw.com]; lsanom@ficlaw.com; PFM[jarden@sidley.com]; PFM[glees@gibsondunn.com]; jireland@ficlaw.com; PFD[abrazil@mplaw.com]; Sikoscow, Alexander; Fama, Richard  
**Subject:** total wheat gluten held in Pennsylvania

Jeniphr/Scott, attached please find a spreadsheet detailing the quantity of raw recalled wheat gluten held by Del Monte in its Pennsylvania warehouse. I'm working on getting you numbers for quantities of wheat gluten held in our Topeka warehouse - the only other location where recalled wheat gluten is stored by Del Monte.

Rich

<< File: #261066-v1-NEWYORK\_DOWNTOWN-total\_wheat\_gluten\_held\_in\_Moran.XLS >>

EXHIBIT "G"

**Fama, Richard**

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**From:** Fama, Richard  
**Sent:** Tuesday, October 30, 2007 7:09 PM  
**To:** 'Jeniphr@hbsslaw.com'; PFD[abrazil@mpplaw.com]; 'skamber@kolaw.com'  
**Cc:** PFD[mary.gately@dlapiper.com]; Sikoscow, Alexander  
**Subject:** Re: Wheat Gluten

I have been very consistent on this issue. Product preservation/sampling is the single most important issue to my client. Because the retention of vast quantities of recalled product greatly affects my client's ability to function as a business entity, at this point product retention is of greater importance to it than mediation. I've expressed the foregoing on several calls.

Del Monte gave plaintiffs its inventory of wheat gluten on October 19th, nearly two weeks ago. Yet until today we've heard nothing from the plaintiffs' side on this issue and your response today fails to offer practical solutions to the problems you raise. You also fail to disclose why your expert cannot propose a sampling plan. This would seem to be the most efficient solution rather than having our expert propose a plan and then have the plaintiffs question his assumptions, unless, of course, delay is the objective.

We've also heard nothing from plaintiffs' side since Dr. McCabe answered plaintiffs' expert's questions regarding assumptions that he made.

Finally, plaintiffs have failed to respond to Del Monte's offer to take custody of all recalled product in its possession. All of the foregoing leads my client to believe that plaintiffs are using the preservation issue to gain some sort of strategic advantage. This belief is supported by the many questions the plaintiffs have asked of the defendants that are wholly unrelated to arriving at a sampling plan and destruction of banana boxes.

I truly hope that we can work together to expeditiously arrive at a solution to this problem and once again focus on the mediation process - something my client cannot do while its unnecessarily storing thousands of cases of recalled product along with Fram automobile air filters and spark plugs.

Rich

Richard Fama  
Cozen O'Connor  
800.437.7040

----- Original Message -----

**From:** Jeniphr Breckenridge <Jeniphr@hbsslaw.com>  
**To:** Fama, Richard; PFD[abrazil@mpplaw.com]; skamber@kolaw.com <skamber@kolaw.com>  
**Cc:** PFD[mary.gately@dlapiper.com]; Sikoscow, Alexander  
**Sent:** Tue Oct 30 15:14:52 2007  
**Subject:** RE: Wheat Gluten

Rich.

I have just spoken to Mary about the status of the raw wheat gluten and the potential for destruction. She recommended that we limit our communications on this topic to writing and I agreed. Last week we received the final information on the retained inventories for raw wheat gluten which we then provided to our statistician. He requested assumptions similar to those provided by Dr. McCabe for the product. E.g., what do defendants propose is an appropriate amount for sampling and on what assumptions is that proposal based. Unfortunately, from a statistical standpoint it apparently not as easy as just reserving a modest number of bags for each batch.

I mentioned to Mary the possibility that this could be dealt with through stipulations concerning the product and the contamination of the product.

We never understood that Del Monte's - or any defendant's - participation in the mediation

process to be dependent on factors related to evidence preservation. Please be more specific about your expectations.

Jeniphr

Jeniphr Breckenridge  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1301 Fifth Avenue  
Seattle, Washington 98101  
206.224.9325 (direct)  
206.623.7292 (firm)  
888.381.2889 (toll free)  
206.623.0594 (facsimile)

-----Original Message-----

From: Fama, Richard [mailto:RFama@cozen.com <mailto:RFama@cozen.com> ]  
Sent: Tuesday, October 30, 2007 11:31 AM  
To: abrazil@mpplaw.com; Jeniphr Breckenridge; skamber@kolaw.com  
Cc: mary.gately@dlapiper.com; Sikoscow, Alexander  
Subject: Re: Wheat Gluten

Can we please get a response to the below this week so that we can move the process along and my client can make the decision as to whether it will continue its participation in the mediation process.

Thank you.

Richard Fama  
Cozen O'Connor  
800.437.7040

----- Original Message -----

From: Anthony G. Brazil <abrazil@mpplaw.com>  
To: Jeniphr Breckenridge <Jeniphr@hbsslaw.com>  
Cc: Fama, Richard; PFD[mary.gately@dlapiper.com]  
Sent: Tue Oct 30 11:38:28 2007  
Subject: Wheat Gluten

Jeniphr

Please give me a call so that we can move forward on getting rid of the excess wheat gluten.  
Thanks  
Tony

Anthony G. Brazil  
Morris Polich & Purdy  
1055 W. 7th St.  
Los Angeles, CA 90017  
213-417-5120 Direct  
213-891-9100  
213-488-1178 Fax  
abrazil@mpplaw.com  
www.mpplaw.com <file://www.mpplaw.com>

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EXHIBIT "H"

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

|  |  |
|--|--|
| IN RE: PET FOOD PRODUCTS LIABILITY<br>LITIGATION | Hon. Noel L. Hillman<br>Civil No. 07-2867 (NLH/AMD)<br>MDL Docket No. 1850<br><u>ALL CASES</u> |
|--|--|

**JOINT STATUS REPORT REGARDING EVIDENCE PRESERVATION**

Following the pet food recall at issue in this litigation, a number of Defendants, including Menu Foods, Del Monte Foods Co., Nestle Purina PetCare Company, Iams Co., and Nutro Products, Inc., retained and are currently storing large quantities of recalled pet food. Menu Foods, Del Monte and ChemNutra also retained and are currently storing varying quantities of raw wheat gluten.

Defendants claim that the preservation of the retained pet food may pose significant health and safety risks and may impose a significant expense on Defendants. At the same time, Defendants and Plaintiffs want to maintain samples of the recalled pet food and wheat gluten for use in this litigation. The recalled pet food inventories retained by Defendants exist both in a disorganized manner (referred to as "banana box material") and an organized manner.

Pursuant to the Court's September 26, 2007 Order, Plaintiffs and Defendants submit this joint status report related to their good faith efforts to agree to a sampling plan for recalled pet food and raw wheat gluten retained by Defendants, to agree to the preservation of recalled pet food and raw wheat gluten required for any sampling plan and to agree to the destruction of such retained pet food and raw wheat gluten not needed for any sampling plan. Since September 26, 2007, the parties have continued to work diligently toward reaching a joint agreement related to

the sampling plan and product destruction. The parties have made significant progress, including completion of the following:

- The parties negotiated a Confidentiality and Non-Disclosure Agreement Regarding Sampling Plan (“Confidentiality and Non-Disclosure Agreement”), which was executed on October 8, 2007. The Agreement, *inter alia*, permits the parties to exchange information regarding the retained recalled pet food and raw wheat gluten in order to facilitate an agreement to a sampling plan and to keep such information confidential.
- Pursuant to the Confidentiality and Non-Disclosure Agreement, on October 9-10, 2007, representatives of the Plaintiffs visited the warehouses of Menu Foods in Emporia and Topeka, Kansas where recalled pet food is stored. Representatives of the Plaintiffs also visited warehouse facilities of Del Monte in Kansas and Missouri. Finally, Plaintiffs visited the warehouse facilities of ChemNutra, Menu Foods and Del Monte where ChemNutra raw wheat gluten is stored. On October 25, 2007, representatives of the Plaintiffs visited the warehouse facilities of Menu Foods in New Jersey. Representatives of the Plaintiffs took photographs of the retained recalled pet food and raw wheat gluten. Representatives of Plaintiffs expect to visit the facilities of Menu Foods, Del Monte and other Defendants in the Northeastern United States in the next ten (10) days.
- Defendants have provided Plaintiffs with certain requested information on the ChemNutra raw wheat gluten retained by Defendants and the parties will attempt in good faith effort to reach an agreement related to retention of samples and destruction of the remaining raw wheat gluten independent of the sampling plan for the recalled pet food within twenty (20) days of this report.

- As a condition precedent to agreeing to the destruction of banana box material, Plaintiffs have and will request certain information. The Defendants are assessing what information is available, as well as gathering certain information to confirm that they can retain sufficient product to satisfy the sampling plan. Plaintiffs must evaluate this information in order to determine if an agreement may be reached.
- With respect to the organized recalled pet food retained by Defendants, Defendants' statistical expert, Dr. George McCabe, provided Plaintiffs with a letter explaining the assumptions on which his proposed sampling plan is based. Plaintiffs submitted the assumptions to Plaintiffs' statistical expert, Nicholas Jewell, PhD, who raised several questions regarding Dr. McCabe's assumptions as stated. Dr. McCabe responded and Plaintiffs are evaluating the responses with Dr. Jewell. The parties will attempt in good faith to reach an agreement on such a sampling plan in the next thirty (30) days.

In summary, the parties have made progress toward: (1) agreeing to a sampling plan for the organized recalled pet food that will permit the destruction of any excess pet food; (2) agreeing to a sampling plan for the ChemNutra raw wheat gluten retained by Defendants that will permit the destruction of any excess raw ChemNutra wheat gluten; and (3) agreeing to the destruction of disorganized recalled pet food retained by Defendants.

The parties intend to continue to work together diligently and in good faith to reach the agreements described in this report. If such agreements are reached, they will be submitted to this Court for approval.

|   |  |
|---|--|
| <p>By: <u>/s authorized for ECF filing</u><br/>Lisa J. Rodriguez<br/>TRUJILLO RODRIGUEZ &amp; RICHARDS<br/>LLC<br/>8 Kings Highway West Palm Beach<br/>Haddonfield, NJ 08033<br/>Telephone: (856) 795-9002<br/>Facsimile: (856) 795-9877</p>  | <p>By: <u>/s authorized for ECF filing</u><br/>Amy W. Schulman, Esq.<br/>Mary E. Gately, Esq.<br/>Matthew Lepore, Esq.<br/>DLA Piper US LLP<br/>1251 Avenue of the Americas<br/>New York, New York 10020<br/>Telephone: (212) 335-4500<br/>Facsimile: (212) 335-4501<br/>Amy.schulman@dlapiper.com</p> |
| <p>By: <u>/s authorized for ECF filing</u><br/>Mark C. Goodman, Esq.<br/>SQUIRE, SANDERS &amp; DEMPSEY L.L.P.<br/>One Maritime Plaza, Suite 300<br/>San Francisco, CA 94111-3492<br/>Telephone: (415) 954-0289<br/>Facsimile: (415) 393-9887<br/>mgoodman@ssd.com</p>                 | <p>By: <u>/s authorized for ECF filing</u><br/>Craig A. Hoover, Esq.<br/>Robert C. Troyer, Esq.<br/>HOGAN &amp; HARTSON LLP<br/>Columbia Square<br/>555 Thirteenth Street, NW<br/>Washington, D.C. 20004-1109<br/>Telephone: (202) 637-5600<br/>Facsimile: (202) 637-5910<br/>cahoover@hhlaw.com</p>   |
| <p>By: <u>/s authorized for ECF filing</u><br/>D. Jeffrey Ireland, Esq.<br/>FARUKI, IRELAND &amp; COX, P.L.L.<br/>500 Courthouse Plaza, S.W.<br/>10 North Ludlow Street<br/>Dayton, OH 45402<br/>Telephone: (937) 227-3710<br/>Facsimile: (937) 227-3749<br/>djireland@ficlaw.com</p> |  |

EXHIBIT "I"

**Fama, Richard**

---

**From:** Scott A. Kamber, Esq. [skamber@kolaw.com]  
**Sent:** Tuesday, October 16, 2007 3:11 PM  
**To:** Fama, Richard; Jeniphr Breckenridge; PFD[mary.gately@dlapiper.com]; PFD [abrazil@mpplaw.com]; PFD[gjustice@gibsondunn.com]; PFM[jarden@sidley.com]; Sikoscow, Alexander  
**Subject:** RE: In re Pet Food Litigation - plaintiffs' summary from Friday call

Plaintiffs continue to work in good faith in order to come to an agreement that allows defendants to deal with the issue of retention of contaminated product without prejudicing plaintiffs' right to evidence. While we are working on parallel tracks to reach agreement with defendants regarding the so-called banana boxes, the contaminated "organized food", as well as the remaining wheat gluten, plaintiffs understand the great urgency defendants place on the banana box issue.

As plaintiffs set forth in the call held with defendants on Friday, October 12, 2007 regarding evidence preservation and destruction, plaintiffs believe they may be in a position to stipulate to a destruction plan for the banana boxes upon the accomplishment of the following action-items:

1. Defendants shall provide the following types of additional information to plaintiffs as soon as practicable: (i) the identification of every sku date retained and the identification of SKU dates for which no product was retained; (ii) each defendant should individually provide by sworn statement any inventory, identifying information or other documentation regarding the disorganized inventory - or a sworn statement that no such information or detail or documentation exists; and (iii) all other documentary information that relates to the content of the banana boxes. Ultimately, Defendants are in a much better position than plaintiffs to specifically identify and then deliver to plaintiffs records sufficient for plaintiffs to have a sense of what contaminated product is contained in banana boxes so as to enable plaintiffs to be comfortable that they will not be prejudiced by the destruction of the banana boxes. As we specifically discussed, plaintiffs cannot stipulate to a destruction plan that does not assure the survival of adequate quantities of every contaminated SKU for every contaminated production date. We also discussed the type of stipulations that may be able to substitute for such assurance.

?2. The parties will agree to a stipulation that will be submitted to the Court. As we discussed last Friday, defendants shall provide a draft of stipulations they believe they require for proceeding with the destruction of the banana boxes. Plaintiffs will respond with revisions as may be necessary.

?3. Finally, the parties will submit stipulation to Court for approval.??We also agreed that our ongoing discussion of an evidence discussion protocol for the banana boxes would not impact future site visits and would not impede progress on developing a plan for the wheat gluten and would not impact the ongoing discussions regarding a sampling plan for the organized canned and pouched product.

Plaintiffs believe that once you provide us what is set forth above in items 1 and 2 we can move expeditiously toward the Court approval contemplated in point three and, ultimately, the destruction of the banana boxes.

Regards,

Scott A. Kamber  
Kamber & Associates, LLC?

11/15/2007

EXHIBIT "J"

**Fama, Richard**

---

**From:** Fama, Richard  
**Sent:** Friday, November 02, 2007 4:11 PM  
**To:** 'Scott A. Kamber, Esq.'; Jeniphr Breckenridge  
**Cc:** Sikoscow, Alexander  
**Subject:** Inventory of Del Monte Stored Inventory by SKU date

**Attachments:** #264470-v1-NEWYORK\_DOWNTOWN-DELMONTE\_PET\_PRODUCTS\_RECALL.PDF

Per your request, attached please find an inventory of units of so-called "organized" product by SKU date. Please contact me immediately so that we can discuss the destruction of banana boxes.



#264470-v1-NE  
RK\_DOWNTOWN

Case 1:07-cv-02867-NH-AMD Document 97-1 Filed 11/16/20 Page 20 of 20

## DEL MONTE PET PRODUCTS - RECALL REGARDING MDL LITIGATION

### Held Inventories (Excluding Banana Boxes) - Del Monte Distribution Centers

| SKU    | Product Description                                  | Size      | Lot Code  | Total Units |
|--------|--|-----------|-----------|-------------|
| 103500 | Dollar General Beef Flavored Jerky Strips Dog Treats | 12x3oz    | TP7C05    | 1,392       |
| 103500 | Dollar General Beef Flavored Jerky Strips Dog Treats | 12x3oz    | TP7C06    | 40,440      |
| 103500 | Dollar General Beef Flavored Jerky Strips Dog Treats | 12x3oz    | TP7C07    | 47,424      |
| 103500 | Dollar General Beef Flavored Jerky Strips Dog Treats | 12x3oz    | TP7C08    | 22,260      |
| 103590 | Dollar General Beef Flavored Beef Sticks Dog Treats  | 12x4.5oz  | TP7B20    | 23,496      |
| 103590 | Dollar General Beef Flavored Beef Sticks Dog Treats  | 12x4.5oz  | TP7B21    | 29,988      |
| 103590 | Dollar General Beef Flavored Beef Sticks Dog Treats  | 12x4.5oz  | TP7C08    | 6,492       |
| 103590 | Dollar General Beef Flavored Beef Sticks Dog Treats  | 12x4.5oz  | TP7C09    | 29,676      |
| 103590 | Dollar General Beef Flavored Beef Sticks Dog Treats  | 12x4.5oz  | TP7C10    | 12,480      |
| 106850 | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x26oz    | TP7B19    | 9,450       |
| 106850 | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x26oz    | TP7B20    | 40,308      |
| 106850 | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x26oz    | TP7B21    | 22,152      |
| 106860 | O! Roy Beef Flavor Jerky Strips Dog Treats           | 6x26oz    | TP7B06    | 2,976       |
| 106860 | O! Roy Beef Flavor Jerky Strips Dog Treats           | 6x26oz    | TP7B07/08 | 7,824       |
| 107610 | Jerky Treats Beef Flavor Dog Snacks                  | 12x3.75oz | TP7C05/06 | 20,784      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B08    | 10,044      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B09    | 45,888      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B10    | 7,932       |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B15    | 26,892      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B16    | 540         |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7C05    | 36,984      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7C06    | 33,612      |
| 107650 | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B06    | 4,480       |
| 107650 | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B07    | 30,968      |

|                                    |  |           |           |                  |
|------------------------------------|--|-----------|-----------|------------------|
| 107630                             | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B08    | 5,832            |
| 130040                             | Jerky Treats Beef Flavor Dog Snacks                  | 8x20oz    | TP7B15    | 27,560           |
| 314410                             | Jerky Treats Beef Flavor Dog Snacks (BOGO)           | 12x15oz   | TP7B08    | 7,560            |
| 314410                             | Jerky Treats Beef Flavor Dog Snacks (BOGO)           | 12x15oz   | TP7B09    | 31,152           |
| 344330                             | Gravy Train Beef Sticks Dog Snacks                   | 12x4.5oz  | TP7B19/20 | 168              |
| 363310                             | Happy Tails Meaty Cuts with Beef in Gravy Dog Food   | 12x22oz   | BC7A29    | 75,372           |
| 396050                             | O! Roy with Beef Hearty Cuts in Gravy Dog Food       | 24x13.2oz | BC6M21    | 3,072            |
| 396060                             | O! Roy with Beef Hearty Strips in Gravy Dog Food     | 24x13.2oz | BC7A19    | 6,768            |
| 401870                             | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x30oz    | TP7C08    | 29,826           |
| 401870                             | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x30oz    | TP7C09    | 42,618           |
| 401870                             | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x30oz    | TP7C10    | 6,294            |
| 401880                             | O! Roy Beef Flavor Jerky Strips Dog Treats           | 6x30oz    | TP7C06    | 28,890           |
| 401880                             | O! Roy Beef Flavor Jerky Strips Dog Treats           | 6x30oz    | TP7C07    | 57,438           |
| 401880                             | O! Roy Beef Flavor Jerky Strips Dog Treats           | 6x30oz    | TP7C08    | 20,706           |
| 424070                             | Happy Tails Beef Flavor Beef Sticks                  | 12x6oz    | TP7C08/09 | 14,736           |
| 424110                             | Happy Tails Beef Flavor Jerky Strips                 | 12x6oz    | TP7B08/09 | 16,368           |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7B08    | 8,136            |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7B09    | 12,624           |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7C05    | 27,990           |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7C06    | 16,086           |
| 566400                             | O! Roy Beef Flavor Jerky Strips Dog Treats           | 12x6oz    | TP7C05    | 36,396           |
| 566400                             | O! Roy Beef Flavor Jerky Strips Dog Treats           | 12x6oz    | TP7C06    | 24,240           |
| 583880                             | O! Roy Country Stew Hearty Cuts in Gravy Dog Food    | 12x22oz   | BC6M15    | 0                |
| 817080                             | Pounce Meaty Morsels Moist Chicken Flavor Cat Treats | 12x2.3oz  | TP7C12    | 13,992           |
| <b>DISTRIBUTION CENTER TOTALS:</b> |  |           |           | <b>1,028,306</b> |

**DEL MONTE PET PRODUCTS - RECALL REGARDING MDL LITIGATION**  
**Held Inventories (Excluding Banana Boxes) - Del Monte Distribution Centers**

| SKU    | Product Description                                  | Size      | Lot Code  | Total Units |
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| 106850 | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x26oz    | TP7B20    | 40,308      |
| 106850 | O! Roy Beef Flavor Snack Sticks Dog Treats           | 6x26oz    | TP7B21    | 22,152      |
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| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B09    | 45,888      |
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| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B15    | 26,892      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7B16    | 540         |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7C05    | 36,984      |
| 107630 | Jerky Treats Beef Flavor Dog Snacks                  | 12x7.5oz  | TP7C06    | 33,612      |
| 107650 | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B06    | 4,480       |
| 107650 | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B07    | 30,968      |

|                                    |  |           |           |                  |
|------------------------------------|--|-----------|-----------|------------------|
| 107650                             | Jerky Treats Beef Flavor Dog Snacks                  | 8x11.25oz | TP7B08    | 5,832            |
| 130040                             | Jerky Treats Beef Flavor Dog Snacks                  | 8x20oz    | TP7B15    | 27,560           |
| 314410                             | Jerky Treats Beef Flavor Dog Snacks (BOGO)           | 12x15oz   | TP7B08    | 7,560            |
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| 344330                             | Gravy Train Beef Sticks Dog Snacks                   | 12x4.5oz  | TP7B19/20 | 168              |
| 363310                             | Happy Tails Meaty Cuts with Beef in Gravy Dog Food   | 12x22oz   | BC7A29    | 75,372           |
| 396050                             | Ol' Roy with Beef Hearty Cuts in Gravy Dog Food      | 24x13.2oz | BC6M21    | 3,072            |
| 396060                             | Ol' Roy with Beef Hearty Strips in Gravy Dog Food    | 24x13.2oz | BC7A19    | 6,768            |
| 401870                             | Ol' Roy Beef Flavor Snack Sticks Dog Treats          | 6x30oz    | TP7C08    | 29,826           |
| 401870                             | Ol' Roy Beef Flavor Snack Sticks Dog Treats          | 6x30oz    | TP7C09    | 42,618           |
| 401870                             | Ol' Roy Beef Flavor Snack Sticks Dog Treats          | 6x30oz    | TP7C10    | 6,294            |
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| 401880                             | Ol' Roy Beef Flavor Jerky Strips Dog Treats          | 6x30oz    | TP7C07    | 57,438           |
| 401880                             | Ol' Roy Beef Flavor Jerky Strips Dog Treats          | 6x30oz    | TP7C08    | 20,706           |
| 424070                             | Happy Tails Beef Flavor Beef Sticks                  | 12x6oz    | TP7C08/09 | 14,736           |
| 424110                             | Happy Tails Beef Flavor Jerky Strips                 | 12x6oz    | TP7B08/09 | 16,368           |
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| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7B09    | 12,624           |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7C05    | 27,990           |
| 487280                             | Jerky Treats Beef Flavor Dog Snacks                  | 6x7.5oz   | TP7C06    | 16,086           |
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| 566400                             | Ol' Roy Beef Flavor Jerky Strips Dog Treats          | 12x6oz    | TP7C06    | 24,240           |
| 583880                             | Ol' Roy Country Stew Hearty Cuts in Gravy Dog Food   | 12x22oz   | BC6M15    | 0                |
| 817080                             | Pounce Meaty Morsels Moist Chicken Flavor Cat Treats | 12x2.3oz  | TP7C12    | 13,992           |
| <b>DISTRIBUTION CENTER TOTALS:</b> |  |           |           | <b>1,028,306</b> |

EXHIBIT "J"

**Fama, Richard**

---

**From:** Sikoscow, Alexander  
**Sent:** Monday, November 12, 2007 7:35 PM  
**To:** jeniphr@hbsslaw.com; skamber@kolaw.com  
**Cc:** PFM[djireland@ficlaw.com]; PFD[mary.gately@dlapiper.com]; Fama, Richard; PFD [abrazil@mpplaw.com]; Sanom, Laura A.; PFD[gjustice@gibsondunn.com]; PFD [rctroyer@hhlaw.com]; PFM[jarden@sidley.com]  
**Subject:** Preservation of Product  
**Attachments:** #265472-v1-NEWYORK\_DOWNTOWN-Destruction\_of\_Unorganized\_Inventory.DOC

Jeniphr and Scott: Attached is a proposed stipulation regarding the destruction of the unorganized inventory being stored by several of the defendants. We look forward to discussing it during our conference call tomorrow.

Regards,

Alex Sikoscow

Alexander Sikoscow  
Cozen O' Connor  
Phone: 212.908.1273  
Fax: 866.790.9213

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

|  |   |
|--|---|
| IN RE: PET FOOD PRODUCTS LIABILITY<br>LITIGATION | Hon. Noel L. Hillman<br><b>Civil No. 07-2867 (NLH/AMD)</b><br>MDL Docket No. 1850<br><u>ALL CASES</u> |
|--|---|

**AGREEMENT REGARDING THE DESTRUCTION OF UNORGANIZED INVENTORY**

The Parties hereby enter into the following agreement with respect to the destruction of unorganized inventory:

**1. DEFINITIONS**

A. **Party or Parties:** “Party” or “Parties” means Menu Foods, Inc.; Menu Foods Income Fund; Menu Food General Partnership Ltd; Menu Foods Holding, Inc.; Menu Foods Ltd.; Menu Foods Ltd. Partnership; Menu Foods Midwest Corp.; Menu Foods Operating Partnership; Menu Foods South Dakota, Inc.; Menu Foods Operating Trust; Menu Foods Acquisition Inc.; The Iams Company; Del Monte Foods Company; Nestle Purina PetCare Company; Nutro Products, Inc.; PETCO Animal Supplies, Inc.; PETCO Southwest, Inc.; PETCO Animal Supplies Stores, Inc.; PetSmart, Inc.; Target Corp.; Wal-Mart Stores, Inc.; WalMart, Inc.; ChemNutra, Inc.; ChemNutra LLC, (collectively, the “Defendants”),<sup>1</sup> as well as all named plaintiffs in This Litigation (collectively the “Plaintiffs”).

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<sup>1</sup> This Agreement does not apply to those named defendants in This Litigation that do not do business in the pet food industry, including Procter and Gamble Company, Colgate-Palmolive Company, Nestle Holdings Inc., and Nestle USA, Inc. This Agreement also does not apply to those named defendants that have not been served in This Litigation.

B. **The Storing Defendants:** “The Storing Defendants” means Menu Foods, Inc.; Menu Foods Income Fund; Menu Food General Partnership Ltd; Menu Foods Holding, Inc.; Menu Foods Ltd.; Menu Foods Ltd. Partnership; Menu Foods Midwest Corp.; Menu Foods Operating Partnership; Menu Foods South Dakota, Inc.; Menu Foods Operating Trust; Menu Foods Acquisition Inc.; The Iams Company; Del Monte Foods Company; Nestle Purina PetCare Company; and, Nutro Products, Inc. These parties currently possess Unorganized Inventory.

C. **This Litigation:** “This Litigation” means the civil actions included in MDL Docket No. 1850, pending in the United States District Court for the District of New Jersey and collectively captioned *In re: Pet Food Products Liability Litigation*, Civil No. 07-2867 (NLH/AMD) as of the date of this Agreement.

D. **Recalled Pet Food Product:** “Recalled Pet Food Product” means units of pet food, whether in cans, bags or pouches (collectively “units”), that were subject to the voluntary recalls initiated by the Defendants in March, April and May 2007 due to allegedly contaminated wheat gluten.

E. **Customers:** “Customer” or “Customers” means business entities that purchased Recalled Pet Food Product from the Storing Defendants.

F. **Unorganized Inventory:** “Unorganized Inventory” means containers of varying types, such as banana boxes, drums, garbage bins, etc., all dissimilar to the manner in which the Recalled Pet Food Product was packaged and shipped by The Storing Defendants, that were returned by Customers and received by The Storing Defendants in response to the voluntary recalls initiated by the Defendants in March, April and May 2007 due to allegedly contaminated wheat gluten. The contents of these containers are haphazardly organized and may contain Recalled Pet Food Product, but often also contain pet food products that were not subject to the

Defendants' recalls. Many of these containers also contain such items as car parts, household cleaners, and other non pet food products.

G. **Organized Recalled Pet Food Product**: "Organized Recalled Pet Food Product" means cases of Recalled Pet Food Product that were received by The Storing Defendants (returned by Customers or held by the Storing Defendants) in a manner similar or identical to that in which they were packaged by The Storing Defendants. Typically, the Organized Recalled Pet Food Product is packaged by The Storing Defendants with individual units contained within cardboard cases, The cases are then stacked and shrink-wrapped together on top of a wooden pallet. Because Organized Recalled Pet Food Product exists in a manner similar or identical to that in which it was packaged by The Storing Defendants, it can be easily inventoried and accounted for.

## 2. **AGREED UPON FACTS**

A. **Whereas** all Parties to This Litigation agree that The Storing Defendants have in their possession Unorganized Inventory in addition to Organized Recalled Pet Food Product.

B. **Whereas** all Parties to This Litigation agree that the continued storage of Unorganized Inventory poses a serious health and safety risk and imposes a significant expense upon The Storing Defendants. Some or all of the Unorganized Inventory is infested with insects and vermin.

C. **Whereas** all Parties to This Litigation agree that while The Storing Defendants have certain records regarding the return of Unorganized Inventory, such records do not contain information such as the date or manufacturer of the Unorganized Inventory, product code of the Unorganized Inventory or location of the Unorganized Inventory within The Storing Defendants

storage facilities, which would allow The Storing Defendants to determine the content of any particular container of Unorganized Inventory.

D. **Whereas** all Parties to this Litigation agree that inventorying the Unorganized Inventory is not practical given the costs and labor involved.

E. **Whereas** all Parties to This Litigation agree that the Plaintiffs have been provided information by The Storing Defendants sufficient for the Plaintiffs to intelligently enter into this agreement.

### 3. **AGREEMENT**

A. In light of the above, all Parties to This Litigation agree that The Storing Defendants currently possess Organized Recalled Pet Food Product in sufficient quantities to develop a statistically reliable sampling plan based on the Organized Recalled Pet Food Product alone, and therefore there is no need to utilize the Recalled Pet Food Product within the Unorganized Inventory for purposes of developing a sampling plan.

B. All Parties to This Litigation also agree that The Storing Defendants may destroy each and every container of Unorganized Inventory.

C. The Parties to This Litigation agree that no Party to This Litigation may use the Unorganized Inventory subject to this agreement, the absence of it and/or the destruction of it, in any way as against any other Party. Nothing in this agreement, however, shall preclude a Party from creating assumptions regarding the characteristics of the Recalled Pet Food Products contained within the Unorganized Inventory based upon the characteristics of the Recalled Pet Food Product contained within the Organized Recalled Pet Food Product. Similarly, all Parties

reserve the right to object to another Parties' attempt to introduce such assumptions at the trial of This Litigation or otherwise.

|   |   |
|---|---|
| <p>By: <u>/s authorized for ECF filing</u><br/>                 Lisa J. Rodriguez<br/>                 TRUJILLO RODRIGUEZ &amp; RICHARDS<br/>                 LLC<br/>                 8 Kings Highway West Palm Beach<br/>                 Haddonfield, NJ 08033<br/>                 Telephone: (856) 795-9002<br/>                 Facsimile: (856) 795-9877</p>   | <p>By: <u>/s authorized for ECF filing</u><br/>                 Amy W. Schulman, Esq.<br/>                 Mary E. Gately, Esq.<br/>                 Matthew Lepore, Esq.<br/>                 DLA Piper US LLP<br/>                 1251 Avenue of the Americas<br/>                 New York, New York 10020<br/>                 Telephone: (212) 335-4500<br/>                 Facsimile: (212) 335-4501<br/>                 Amy.schulman@dlapiper.com</p> |
| <p>By: <u>/s authorized for ECF filing</u><br/>                 Mark C. Goodman, Esq.<br/>                 SQUIRE, SANDERS &amp; DEMPSEY L.L.P.<br/>                 One Maritime Plaza, Suite 300<br/>                 San Francisco, CA 94111-3492<br/>                 Telephone: (415) 954-0289<br/>                 Facsimile: (415) 393-9887<br/>                 mgoodman@ssd.com</p>                                  | <p>By: <u>/s authorized for ECF filing</u><br/>                 Craig A. Hoover, Esq.<br/>                 Robert C. Troyer, Esq.<br/>                 HOGAN &amp; HARTSON LLP<br/>                 Columbia Square<br/>                 555 Thirteenth Street, NW<br/>                 Washington, D.C. 20004-1109<br/>                 Telephone: (202) 637-5600<br/>                 Facsimile: (202) 637-5910<br/>                 cahoover@hhlaw.com</p>   |
| <p>By: <u>/s authorized for ECF filing</u><br/>                 D. Jeffrey Ireland, Esq.<br/>                 FARUKI, IRELAND &amp; COX, P.L.L.<br/>                 500 Courthouse Plaza, S.W.<br/>                 10 North Ludlow Street<br/>                 Dayton, OH 45402<br/>                 Telephone: (937) 227-3710<br/>                 Facsimile: (937) 227-3749<br/>                 djireland@ficlaw.com</p> |   |

EXHIBIT "K"

**Fama, Richard**

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**From:** Sanom, Laura A. [lsanom@ficlaw.com]  
**Sent:** Saturday, October 06, 2007 11:47 AM  
**To:** jeniphr@hbsslaw.com  
**Cc:** PFM[djireland@ficlaw.com]; PFD[mary.gately@dlapiper.com]; Fama, Richard; PFM [glees@gibsondunn.com]; PFD[abrazil@mpplaw.com]; PFD[rctroyer@hhlaw.com]; PFM [jarden@sidley.com]  
**Subject:** Preservation of Product  
**Attachments:** Letter2007\_10\_05.DOC

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Jeniphr,

Attached is a copy of the letter our statistician mailed to you yesterday on behalf of the defendants who have product. I am forwarding this copy to expedite your statistician's opportunity to review the information. If you have questions, please call at your convenience. Laura Sanom

Laura A. Sanom  
Faruki Ireland & Cox, PLL  
office: 313-882-7477  
blackberry: 937-469-1723  
[lsanom@ficlaw.com](mailto:lsanom@ficlaw.com)

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11/15/2007

**George P. McCabe, Ph.D.**  
**Statistical Consultant**  
**753 Essex Street**  
**West Lafayette, IN 47906-1532**

October 4, 2007

Jeniphr A.E. Breckenridge, Esq.  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1301 Fifth Avenue  
Seattle, Washington 98101

Re: Preservation of Sample Product

Dear Ms. Breckenridge:

I have been asked to identify the assumptions, conclusions and recommendations I have made to create a sampling plan for several companies that have large quantities of pet food and raw wheat gluten. The companies that I have consulted with include ChemNutra, Inc., Menu Foods, Del Monte Foods Company, The Iams Company, Nestlé Purina PetCare Company, Nutro Products, Inc. and Hill's Pet Nutrition (collectively, "the Companies").

To recommend a sampling plan for the Companies, I made the following statistical assumptions:

1. the sample can be viewed as a simple random sample from a large population;
2. to determine the population standard deviation, I assume that the range of contamination is 0-10% and includes four standard deviations of 2.5%; and
3. the margin of error ( $\pm$ ) for the sample mean propagates to the margin of error for the range.

With these assumptions, I conclude that a sample size of 500 cans, pouches or bags, whichever is the container for the product unit sampled, per sku day (an sku day includes

Jeniphr A.E. Breckenridge, Esq.

October 4, 2007

Page 2

the cans, pouches or bags of the same recipe manufactured by or for the Companies on the same production day), would allow one to estimate the range of melamine contamination for a given sku day with a margin of error of  $.22(\pm)$  for 95% confidence.

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Even if the range of melamine contamination is different than the assumed 0-10%, then the relative error in our estimate will not change.

I further conclude that this sample size will provide for future testing to determine the range of melamine contamination per sku day with a high degree of precision.

Very truly yours,

George P. McCabe

GPM/clk

cc: Laura A. Sanom, Esq.  
Liaison for Communications with the Companies

EXHIBIT "L"

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**Fama, Richard**

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**From:** Jeniphr Breckenridge [Jeniphr@hbsslaw.com]  
**Sent:** Wednesday, October 17, 2007 1:15 PM  
**To:** PFD[mary.gately@dlapiper.com]; Fama, Richard  
**Cc:** Scott A. Kamber, Esq.  
**Subject:** In re Pet Food Litigation - questions concerning Dr. McCabe's assumptions

Counsel. As you know, plaintiffs submitted Dr. McCabe's assumptions concerning product retention to a statistician for review and comment. Below are questions from plaintiffs' statistician seeking clarification of those assumptions. The references are to Dr. McCabe's October 4, 2007 letter. Please circulate to other defense counsel as you deem appropriate.

Jeniphr

Jeniphr Breckenridge  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1301 Fifth Avenue  
Seattle, Washington 98101  
206.224.9325 (direct)  
206.623.7292 (firm)  
888.381.2889 (toll free)  
206.623.0594 (facsimile)

Assumption 2.

This assumption appears to envisage a percentage measurement being made on each sampled can (or pouch, etc), e.g., a typical value might be 8%.

What exactly does this number represent -- % of what?  
How do you intend that such measurements would actually be made  
Based on what measurements of contamination would such measurements be made

If the measurement would be a percentage of contamination of some sort, it appears that there is an assumption of the deviation of the measurement in the population of cans is 2.5 %

On what data is this assumption based?  
Are there pre-existing measurements that support this figure?  
If not, precisely how was this assumption reached?

Assumption 3

Assumption 3 suggests that if you base the range of measurements on a "population mean +/- 1.96 x SD", then the margin of error for the range automatically inherits a margin of error from using a sample mean to estimate a population mean. Is this your intent?

Paragraph following Assumption 3

In the first paragraph after 3. it appears that Dr. McCabe envisages estimating the population mean (for a given sku day) by the sample mean from a sample of 500 cans (pouches etc). The standard error for the sample mean (as an estimate of the population mean) is necessarily then given by approximately  $1.96 \times SD/22.4$ , which in turn is roughly  $1.96 \times 2.5\%/22.4 = 0.22\%$ . Thus, if the sample mean is 8%, the 95% confidence interval for the population mean would approximately look like (7.78%--8.22%).



EXHIBIT "M"

**Fama, Richard**

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**From:** Sanom, Laura A. [lsanom@ficlaw.com]  
**Sent:** Friday, October 19, 2007 2:33 PM  
**To:** jeniphr@hbsslaw.com  
**Cc:** PFM[djireland@ficlaw.com]; PFD[mary.gately@dlapiper.com]; Fama, Richard; PFM [jarden@sidley.com]; PFD[gjustice@gibsondunn.com]; PFD[abrazil@mpplaw.com]; PFD. [rctroyer@hhlaw.com]  
**Subject:** Preservation of Product--Dr. McCabe's responses

Jeniphr,

Dr. McCabe's responses to your statistician's questions are in bold print below, annotating your email. If you need further information, please call at your earliest convenience. Thank you, Laura Sanom

Laura A. Sanom  
Faruki Ireland & Cox, PLL  
office: 313-882-7477  
blackberry: 937-469-1723  
lsanom@ficlaw.com

---

**From:** Jeniphr Breckenridge [mailto:Jeniphr@hbsslaw.com]  
**Sent:** Wednesday, October 17, 2007 1:15 PM  
**To:** PFD[mary.gately@dlapiper.com]; Fama, Richard  
**Cc:** Scott A. Kamber, Esq.  
**Subject:** In re Pet Food Litigation - questions concerning Dr. McCabe's assumptions

Counsel. As you know, plaintiffs submitted Dr. McCabe's assumptions concerning product retention to a statistician for review and comment. Below are questions from plaintiffs' statistician seeking clarification of those assumptions. The references are to Dr. McCabe's October 4, 2007 letter. Please circulate to other defense counsel as you deem appropriate.

Jeniphr  
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888.381.2889 (toll free)  
206.623.0594 (facsimile)

Assumption 2.  
This assumption appears to envisage a percentage measurement being made on each sampled can (or pouch, etc), e.g., a typical value might be 8%.

What exactly does this number represent -- % of what? [**Percentage of melamine. With one exception, the products all have less than 10% wheat gluten, so this is a conservative number. It assumes that up to 100% of the wheat gluten content of a product could be melamine. One Del Monte product contains approximately 17% wheat gluten but the sample size does not change.**]

How do you intend that such measurements would actually be made [**However a knowledgeable scientist**

