

MEMORANDUM

TO: C. Larry Pope

FROM: Richard J. M. Poulson
Richard Cullen

CC: Board of Directors

DATE: February 25, 2008

RE: Missouri Nuisance Litigation

This memorandum summarizes issues related to a recent \$75,000,000 settlement demand from attorneys representing the plaintiffs in the Missouri nuisance litigation. Given the substantial drop from their original \$160,000,000 demand, plaintiffs' attorneys may be signaling a willingness to settle on terms that we should consider.

Background

Plaintiffs' attorneys represent approximately 275 individuals asserting common law temporary nuisance claims against PSF and related entities. Originally filed as "collective" actions in Kansas City, Mo., all but 58 of the cases are now pending in 11 counties in northern and southern Missouri.

Three trials have occurred so far. *Hanes*, filed and tried in St. Louis in 1999, resulted in \$100,000 verdicts for 52 of the 108 plaintiffs. The jury found against 56 plaintiffs. *Turner* was tried in September 2007 in Kansas City, and resulted in \$750,000 verdicts for each of the 6 plaintiffs (who lived on three separate properties). The jury also found grounds for punitive damages, but the case settled before a punitive damage award was made. *Peters* was tried in December, 2007. The jury returned a defense verdict against each of the 3 plaintiffs. It is important to note that *Peters* is the first disaggregated case to be tried. That is, in the spring of 2007, the Kansas City trial judge granted PSF's motion to sever, and set out a schedule where all future cases would concern a single residence, rather than a number of residences and families.

Trying the case individually prevents the "Halo" effect of having one case with good plaintiff facts carrying 5 or 6 cases with bad plaintiff facts to result in huge plaintiff awards.

Approximate fees and costs through verdict for these three cases are as follows:

Hanes - \$2,000,000
Turner - \$2,800,000
Peters - \$2,377,000

As we go forward, the average costs of trying the cases may drop, but some will be higher and some will be lower. The downside of not trying the cases aggressively is large plaintiff awards, punitive damages, and possible piercing of the corporate veil.

In early 2007, plaintiff attorneys demanded \$160,000,000 to settle their claims. This approximates \$600,000 per plaintiff. After securing a continuance of the *Craven* case, the next case scheduled for trial, on February 13, plaintiffs dropped their settlement demand to \$75,000,000 or approximately \$300,000 per plaintiff. When we were first looking at PSF, even as far back as their IPO, our due diligence estimated the exposure on this litigation to be \$150 to \$200 Million. This estimate was later confirmed by McGuireWoods before the acquisition of PSF.

While relatively early in the expected duration of this litigation, plaintiffs' significantly reduced demand warrants consideration and an analysis of the significant risk factors facing the Company in this litigation.

Trial Schedule/Verdicts/Costs

As shown on the attached chart, the current trial schedule is estimated to extend through 2024. Because the court has ruled that each case will be tried separately, it will take many years for the plaintiffs to get through trial and appeals. So, the plaintiffs' counsel must wait a long time to recoup their time and expenses, and that should add to their desire to settle. At the same time, we need to consider whether we want to continue this Chinese water torture for the next 16 years, while we carry reserves with the attendant overhang from the litigation.

Also shown on the attached chart is the estimated cost of defense through 2010. While we expect this cost to show a declining trend in certain areas, we do not expect the assumed aggregate verdicts to exceed the cost of defense in the foreseeable future.

Key Legal Issues

Two critical legal issues must be factored into settlement considerations: disaggregation and punitive damages.

~~Disaggregation appears to be working. However, there is no guarantee that the cases will remain disaggregated and judges are within their discretion to re-consolidate certain groups of cases. The verdicts in *Hanes* and *Turner* suggest that this would not be a~~

positive outcome. If disaggregation remains in place, having the bulk of the trials conducted in rural jurisdiction should be positive. Even so, 58 plaintiffs remain in urban Jackson County. We know the plaintiffs' lawyer will ask the court to reconsider its ruling on disaggregation. There is ample incentive for the Court to do so – it cleans up the court's docket and disposes of cases on a collective basis.

The risk of punitive damages remains. While PSF is on the cutting edge of odor reduction technology, there is a substantial likelihood that courts will allow punitive damages to go to the jury. Every judge in every case has denied our motion to dismiss punitive damages and we have filed multiple motions. We do believe the Supreme Court would ultimately side with us on appeal, but that is opinion, not certainty. We will continue to move to dismiss this issue, but it is likely that judges will deny the motion as in *Peters*. First, it is safer before evidence is heard for the judges to deny rather than grant this motion. Second, if punitive damages go to the jury and are improperly awarded, the judge can take them away. Finally, by sending the issue to the jury, the judge fully develops the record for any appeal.

Plaintiffs' attorneys recently suggested their intention to limit their claims to the period 1999 – 2007 to eliminate odor monitoring data or recent abatement efforts. As this type of evidence is central to our abatement defense, as to both liability and punitive damages, we do not believe plaintiffs will succeed in this gambit. If they should, we would lose one of our major defenses.

Status of Plaintiffs' Attorneys

Their resources appear to be strapped. They recently missed a deadline for expert identification (although it is likely the judge will let them identify late). Their primary expert (Sheffield) may not be able to testify again given his performance in *Peters*. Upcoming trials in central, northern and southern Missouri will likely further stretch their resources. In addition, if the Company were to experience an adverse verdict, we would appeal. Any appeal would probably last 18-24 months, thus extending the time before plaintiffs would actually get any money. If this analysis is correct, it may be one of the issues that prompted the reduced demand.

However, this group of plaintiffs' attorneys is talented and tenacious. They were part of the group that sued Smithfield in North Carolina on public nuisance claims and part of the same group that sued Smithfield for RICO in Florida. Moreover, there are approximately 1500 households within 3 miles of the PSF Missouri farms, all potential plaintiffs. This does not include residents nearby the PSF and Murphy-Brown contract growers in Missouri. These attorneys have filed several cases across Missouri against both the contract growers and the integrators. PSF and Murphy-Brown are involved in 3 of such cases. And, there is at least 1 attorney not affiliated with the Weiss group suing PSF for private nuisance (McDaniel, 4 plaintiffs, Davies County).

Definiteness and Value of Settlement

Two issues, on balance, appear to weigh in favor of a reasonable counteroffer: the definiteness brought by settlement and the value of offered odor easements.

Settlement will bring certain definiteness to the business, but not complete. We should anticipate additional suits filed by others. The notoriety of a multi-million dollar settlement will bring more suits. As noted, there are approximately 1,500 households within 3 miles of the PSF Missouri farms, and more surrounding PSF and Murphy-Brown's contract growers throughout the state.

If granted, odor easements would preclude further litigation by current plaintiffs and future purchasers of their properties. Such easements may have positive, indirect impacts on recommendations by the Expert Panel and enforcement actions by the state. Odor easements would not bind other potential plaintiffs or other parcels of land. While not within the settlement, the Company could consider negotiating odor easements with potentially impacted non-plaintiffs. Odor is a temporary nuisance under Missouri law. What that means is that a plaintiff can bring successive suits, limited only by the statute of limitations. An odor easement prevents that.

Finally, we suggest inquiry be made of plaintiffs' attorneys as to their intention to bring additional private nuisance claims against the Company, should settlement be reached with this group of plaintiffs. If they say they have additional plaintiffs with claims, this counsels against settlement at this time. If they respond in the negative, they likely would not bring additional suits, believing that future settlements would be difficult to achieve. The current plaintiff's attorneys cannot ethically agree not to bring additional cases, but they will not do so in our opinion.

Settlement Ranges Per Plaintiff: Assuming 275 plaintiffs.

\$300,000/plaintiff = \$82.5M
200,000/plaintiff = \$55.0M
100,000/plaintiff = \$27.5M
75,000/plaintiff = \$20.625M
50,000/plaintiff = \$13.75M
25,000/plaintiff = \$ 6.875M

Estimated cost of defense per suit is \$1.5 – \$2.5M.

Insurance: There is potentially \$10,000,000 available. PSF did not do a very good job of pursuing these claims. We have come up with a theory that we believe will enable us to bring the insurers to the table and cause them to consider seriously throwing in the value of the policies. (AIG and Travelers)

To maintain our rights under the policies, we will need to keep the carriers informed of any settlement discussions.

Recommendations. We make a counter offer of \$25,000,000 and be prepared to go to \$35,000,000 if we can get assurance that we would be entitled to \$5 -10,000,000 in insurance proceeds.

Procedure. Settlement would require Board approval after thorough discussion. Richard Cullen would attend to participate in discussions.

Our decision on how to proceed here is time sensitive. If we are going to settle, we need to do it so we can deal with it as an opening balance sheet adjustment to PSF.

5088953v1
