

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

JENNIFER LEIGH HOLT,
Individually and as Parent of J.S.H., a minor,

Plaintiffs,

vs.

QUALITY EGG, LLC, d/b/a "Wright County
Egg," an Iowa limited liability company,

Defendant.

Case No. 3:10-cv-03046-MWB

**MOTION FOR EXPEDITED RULE 34
ENTRY UPON LAND FOR INSPECTION AND PROTECTIVE ORDER**

COME NOW the plaintiffs, by and through their counsel of record, and move the Court for an Order permitting the inspection of Defendant's egg production plant in Galt, Iowa, pursuant to Fed. R. Civ. P. 34.

FACTUAL BASIS

1. On August 16, 2010, the Centers for Disease Control and Prevention (CDC) announced that it had observed an approximate four-fold nationwide increase, in late June and early July 2010, in reports of human illnesses caused by *Salmonella* enteritidis.

2. On August 13, 2010, the defendant Wright County Egg issued a recall of approximately 228,000,000 shell eggs that it had manufactured and distributed in recent months. Wright County Egg had distributed the recalled eggs to food wholesalers, distribution centers, and foodservice companies in California, Illinois, Missouri, Colorado, Nebraska, Minnesota, Wisconsin and Iowa. In turn, the companies that Wright County Egg had distributed to further distributed and sold the recalled eggs.

3. On August 16, 2010, Wright County Egg expanded the recall described at paragraph 6 of this complaint to include approximately 380,000,000 eggs.

4. The Food and Drug Administration's (FDA) Department of Health and Human Services began an investigation into Wright County Egg's egg manufacturing facilities in Galt, Iowa, including on-site inspections at its various egg laying farms/plants between August 12 and August 30, 2010.

5. The FDA's observations from its on-site inspections are contained in FDA Form 483, issued to Wright County Egg's Chief Operating Officer, Peter A. DeCoster, on August 30, 2010, and include the following findings (See FDA 483, Exhibit No. 1):

5.1 Chicken manure located in the manure pits below the egg laying operations was observed to be approximately 4 feet high to 8 feet high at the following locations: Layer 1 – House 1; Layer 3 – Houses 2, 7, 17, and 18. The outside access doors to the manure pits at these locations had been pushed out by the weight of the manure, leaving open access to wildlife or domesticated animals.

5.2. Un-baited, unsealed holes appearing to be rodent burrows located along the second floor baseboards were observed inside Layer 1 – Houses 1-9 and 11-13; Layer 2 – Houses 7 and 11; Layer 3 – Houses 1, 3, 4, 5, and 6; Layer 4 – House 3.

5.3. Dark liquid which appeared to be manure was observed seeping through the concrete foundation to the outside of the laying houses at the following locations: Layer 1 – Houses 1, 2, 3, 4, 5, 8, 11, 12, and 14; and Layer 3 – Houses 1, 8, 13, and 17.

- 5.4. Standing water approximately 3 inches deep was observed at the southeast corner of the manure pit located inside Layer 1 – House 13.
- 5.5. Un-caged birds (chickens having escaped) were observed in the egg laying operations in contact with the egg laying birds at Layer 3 – Houses 9 and 16. The un-caged birds were using the manure, which was approximately 8 feet high, to access the egg laying area.
- 5.6. Layer 3 – House 11, the house entrance door to access both House 11 and 12 was blocked with excessive amounts of manure in the manure pits.
- 5.7. There were between 2 to 5 live mice observed inside the egg laying Houses 1, 2, 3, 5, 7, 9, 10, 11, and 14.
- 5.8. Live and dead flies too numerous to count were observed at the following locations inside the egg laying houses: Layer 1 – Houses 3, 4, 6, 8, 9, 11, and 12; Layer 2 – Houses 7 and 11; Layer 3 – Houses 3, 4, 4, 5, 7, 8, 15, 16, 17, and 18. The live flies were on and around egg belts, feed, shell eggs and walkways in the different sections of each egg laying area. In addition, live and dead maggots too numerous to count were observed on the manure pit floor located in Layer 2 – House 7.
- 5.9. You did not document washing and disinfecting of your dead hen truck and manure equipment prior to moving from farm to farm.
- 5.10. You did not maintain records documenting the washing and disinfection of the trailers used for the movement of pullets to laying houses.
- 5.11. Birds were observed roosting and flying, chicks heard chirping in the storage and milking facilities. In addition, nesting material was observed

in the feed mill closed mixing system, ingredient storage and truck filling areas.

5.12. Outdoor whole kernel corn grain bins 4 and 6 observed to have the topside doors/lids open to the environment and pigeons were observed entering and leaving these openings. Birds were also observed sitting/flying around and over the openings.

5.13. Samples collected during the course of this inspection and tested by an FDA laboratory revealed the following positive analytical results for *Salmonella* Enteritidis:

5.13.1 On 8/13/2010, an environmental sample was collected from Layer 2, house 7 manure swab from row 1 – left side.

5.13.2 On 8/16/2010, an environmental sample was collected from Layer 2, house 11 at manure scraper blade from row 3 – right side.

5.13.3 On 8/13/2010, an environmental sample was collected from Layer 4, house 3 at walkway 1 – right side and walkway 3 – right side.

5.13.4 On 8/14/2010, a sample of meat and bone meal was collected from ingredient bin 7 located at your feed mill.

5.13.5 On 8/17/2010, a sample of finished feed “Developer” pullet feed was collected from the feed mill.

5.13.6 On 8/16/2010, an environmental sample was collected from the roof level covered ingredient bin chute 8; Second Floor

ingredient bin cover 19 (ingredient bin 19 holds ground corn) located at your feed mill.

PROCEDURAL BACKGROUND

The plaintiffs filed their complaint on August 23, 2010. An amended complaint was filed on August 31, 2010. On August 25, 2010, counsel for the plaintiffs sought the cooperation of the defendant in pursuing a joint motion for inspection of the defendant's premises, in conjunction with a protective order. (See Proposed Joint Motion, Exhibit No. 2) The purposes in seeking such a joint motion were (1) to allow the plaintiffs an opportunity to conduct visual inspection, and conduct microbiological testing in order to preserve evidence essential to the plaintiffs claims for liability under theories of strict product liability, negligence, negligence per se, and breach of warranty; (2) to minimize the interruption of the defendant's potential resumption of egg production by moving forward with the inspection immediately, as opposed until waiting until the completion of a Fed. R. Civ. P. 26(f) conference; (3) to ensure the protection of confidential information that might be uncovered through any inspection and testing pursuant to Fed. R. Civ. P. 34. The plaintiffs continued to seek cooperation for a joint motion over the subsequent days on numerous occasions. The defendant has indicated by letter, dated September 7, 2010, that it is unwilling to stipulate to such a joint motion, thus necessitating the instant motion. (See Letter, Exhibit No. 3)

REQUEST FOR INSPECTION

Fed. R. Civ. P. 34(a)(2) permits a party to request an opposing party to "permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." Ordinarily, the responding party has 30 days to respond.

Dispensing with the 30 day response time in this instance would limit changes to the condition of the facility, while at the same time, limiting delay to any possible resumption of operation of the facility.

The general nature and manner of the proposed inspection and testing would encompass:

- (a) inspecting the condition of the plant, its equipment, any and all adjacent or related structures, and the surrounding grounds;
- (b) documenting (by photographs and videotaping) such conditions;
- (c) having one or more retained or specially-employed persons participate in the inspection; and
- (d) conducting microbiological, environmental, or other non-destructive testing, as subsequently agreed to by the parties.

Should the Court grant the plaintiffs' Motion, the plaintiffs would seek to reach agreement with defendant on the specific date, time, and parameters of the inspection and testing.

Limited Protective Order. The plaintiffs remain willing to sign a protective order, in conjunction with the inspection, indicating that all information and material collected as a result of any measurement, survey, inspection, nondestructive test, sample, photo or video at Wright County Egg's Galt, Iowa, plant are proprietary in nature and constitute trade secrets. Accordingly, such information, material, and documentation shall be maintained in confidence, shall be used only in connection with this and related litigation, and not for any commercial or business purpose, and shall not be shared with any third parties except for persons retained or specially employed for trial preparation purposes (see Fed. R. Civ. P. 26(b)(4)), or as may be later ordered by the Court.

The FDA inspection and biological testing make clear that the conditions at the defendant's facility require investigation by the plaintiffs. An inspection of the facility would be calculated to yield evidence of possible violations of regulations, breaches of applicable

standards of care, and the presence of the exact genetic strain of *Salmonella* enteritidis associated with the illnesses of the plaintiffs and hundreds of other individuals. Without the inspection, it is likely that evidence relevant to the plaintiffs' claims will be lost, destroyed, or altered. In addition, there is no prejudice to the defendant in conduction of the proposed inspection and testing. The plaintiffs are willing to conduct the inspection and testing expeditiously in order to limit interference with defendant's business operations. The plaintiffs are willing to submit to a protective order to allay any concerns with respect to trade secrets.

Counsel for the plaintiffs has previously conducted inspection and testing of a defendant's food production facility pursuant to a joint motion and order very similar to the order proposed in this matter. (See Order in ConAgra Peanut Butter Litigation, Exhibit No. 4) In that matter, the inspection and testing was accomplished quickly, with a minimum of disruption and expense, thus alleviating concerns about destruction of evidence.

In light of the foregoing, the plaintiffs seek an order requiring the defendant to allow entry into its facility for the purposes of inspection and testing within 20 days of the date of the Order.

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CERTIFICATE OF SERVICE

I hereby certify that on September ____, 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

/s/ Steven P. Wandro
Steven P. Wandro