IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al., **PLAINTIFFS**

v. **CASE NO.: 4:04-CV-329-TCK-SAJ**

TYSON FOODS, INC. et al., **DEFENDANTS**

REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO TYSON CHICKEN, INC.'S OBJECTION TO AND MOTION TO QUASH SUBPOENA FOR INSPECTION AND SAMPLING OF PREMISES AND BRIEF IN SUPPORT

Separate Defendant Tyson Chicken, Inc. ("Tyson") submits the following as its Reply to Plaintiff's Response to Tyson's Objection to and Motion to Quash Plaintiff's Subpoena for Inspection and Sampling of Premises:

I. INTRODUCTION

In its Motion to Quash, Tyson demonstrated that Plaintiff's subpoena is an unnecessary and unduly burdensome fishing expedition by Plaintiff which presents very real risks of damage to Tyson's real and personal property. It was also shown that Plaintiff's subpoena fails to comport with the specificity requirements of Rules 34 and 45 concerning the time, place and manner of inspection and sampling. In its Response, Plaintiff has wholly failed to provide this Court with factual or legal grounds sufficient to permit inspection and sampling to proceed pursuant to this subpoena. Accordingly, the subpoena should be quashed.

II. ARGUMENT AND LEGAL AUTHORITY

A. The Subpoena Lacks the Specificity Required by Rules 34 and 45

Plaintiff's Response does not challenge Tyson's assertion that Rules 34 and 45 require that a subpoena specifically set out with reasonable particularity the times, dates and locations of any inspections or sampling events to be conducted pursuant to the subpoena. Likewise,

Plaintiff does not challenge Tyson's assertion that the subpoena at issue fails to provide the specific times, dates and locations of all of the inspections and sampling events which Plaintiff seeks to accomplish under this subpoena. Instead of offering to comply with the specificity requirements of Rules 34 and 45, Plaintiff seemingly is asking this Court to excuse those requirements in this case. Plaintiff has offered no justification (whether legal or factual) for this Court to grant to them an exemption from the requirements of the Rules of Civil Procedure.

Plaintiff still has not identified the location of the "waste applied fields" it intends to sample. Tyson has supplied the Court with the affidavit of farm manager, Danny Partain attesting to the fact that no litter has been land applied on this property for at least the last 17 years. (*See* Ex. 5 to Motion to Quash.) Plaintiff in its Response claimed to have certain records that generally relate to land applications at unspecified locations in the Watershed by "growers, private and commercial waste applicators" but it failed to supply those records to the Court nor did it even claim that these records relate to the property which is the subject of this subpoena. (Pls. Response, p. 10.)[1] Consequently, the "waste applied fields" which are the subject of Plaintiff's subpoena and which are to be the place of sampling have still not been identified.

Plaintiff likewise has not offered a meaningful response to Tyson's argument that the subpoenas seek to improperly reserve a *continuing* right of access to Tyson's property at *unspecified times* without adequate notice. Plaintiff does not deny that it is seeking a continuing right of access at unspecified times, nor has it explained to this Court or to Tyson how it intends to provide advance and specific notice of the future sampling events it seeks to conduct on Tyson's property. Rules 34 and 45 are clear in their requirement that subpoenas or requests for

[1] In its Response, Plaintiff also states "the State is aware that uncovered piles of poultry waste have been observed on the Tyson property." (Pls. Response, p. 10.) However, Plaintiff provides no photographs, records or documentation to support this claim, nor has it identified the location of the alleged uncovered litter piles. These sort of unsupported statements in pleadings hardly amount to evidence sufficient to justify the roving commission Plaintiff seeks in its subpoena.

inspection provide specific notice of the date and time of the inspection or sampling. FED. R. CIV. P. 45(a)(1)(C); FED. R. CIV. P. 34(b). Plaintiff's response provides no legal authority whatsoever that would permit this Court to grant to Plaintiff a continuing right of access to Tyson's property at unspecified times in the future.

The only case cited by Plaintiff -- *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 57 (9th Cir. 1961) – offers no support for the broad rights Plaintiff seeks under its subpoena. The *Martin* case is cited by Plaintiff for the proposition that "nothing in Rule 34 limits a party to only one entry on land for inspection purposes." (Pls. Response, p. 6.) As a preliminary matter, Plaintiff is trying to rebut an argument never advanced by Tyson. It has never been argued by Tyson that Rule 34, or any other rule, limits Plaintiff to one inspection or to one sampling event. The point of law raised by Tyson is that Rules 34 and 45 require that the *dates* of any and all such inspections or sampling events be specifically stated in the subpoena and that it would be improper for this Court to grant Plaintiff the right to access property at future *unspecified* dates to be determined by Plaintiff. Even if with distinction aside, the *Martin* case offers no support for Plaintiff's subpoena. That case involved a motion to preserve evidence prior to litigation through an inspection and sampling of property under Federal Rule 27 and a prior version of Rule 34. There is no discussion in *Martin* of the specificity requirements under Rules 34 or 45. Furthermore, the inspection order entered by the district court in *Martin* did <u>not</u> grant a continuing right of access at unspecified times in the manner Plaintiff seeks in the present case. Quite to the contrary, the inspection and sampling events permitted by the court in that case were scheduled for specific dates. *Id.* at 53, fn. 1 (access permitted "on the third Tuesday of each month."). Moreover, the objections raised by the landowner in that case were limited to questions concerning the power of the court to order pre-litigation depositions or inspections on

the circumstances of that case. *Id.* at 55. As such, the court expressly stated "we do not consider or pass upon the propriety of the protective provisions or of the details of other provisions of the order. We do not necessarily approve of all of them." *Id.* at 54.

Finally, Plaintiff's Response offers no legal justification sufficient to excuse it from the obligation under the Federal Rules to specify the "manner of making the inspection and performing the related acts." FED. R. CIV. P. 34(b). The "related acts" for purposes of the subpoenas at issue are the various laboratory tests, assays and chemical analysis that Plaintiff intends to perform on the samples collected and, of course, the results of those tests. Plaintiff has flatly refused to provide such information. This refusal is particularly surprising given the comments made by Attorney General Edmondson at the March 23, 2006 hearing that resulted in the issuance of theses subpoenas. At that hearing, Mr. Edmondson sought to impugn the Poultry Defendants for resisting the Plaintiff's desire to issue these subpoenas by remarking:

> The one item of curiosity that I have left with me, Your Honor, is why these defendants are not joining with us in this motion, why these companies are not as eager as we are to find out for certain what the samples tell us, to find out for certain what the degree of risk is, to find out for certain what the danger is to public health, to find out for certain whether or not carcinogens are in our water supplies . . . . .

(Tr. 3/26/06 Hrg., p. 13.) Now that Tyson has tried to exercise the right offered by Mr. Edmondson, it has been met with the absurd claim that the nature of tests to be performed and the results of those tests are "attorney work product" and will not be disclosed. (Pls. Response, p. 7.) There are, of course, at least two problems with that response. First, the Federal Rules of Civil Procedure require Plaintiff to specify the related acts it intends to perform on samples collected through court-ordered inspections or tests. FED. R. CIV. P. 34(b). This is formal discovery and formal discovery is conducted openly and honestly; not in secret. Second, the results of environmental sampling are <u>not</u> attorney work-product. *See, e.g., Horan v. Sun*

Company, Inc., 152 F.R.D. 437, 439 (D. RI 1993) ("Environmental test results contain relevant, non-privileged facts.")[2]

B. Plaintiff's Rule 45 Subpoena is Unduly Burdensome.

Under the subpoena at issue, Plaintiff intends to repeatedly access Tyson's property at unspecified times over a two-month period and once there to bore hundreds of holes in Tyson's property, install edge-of-field run-off plots and a groundwater monitoring well complete with a concrete pad. Over the course of this sampling regime, Tyson will be forced to mobilize, on numerous occasions and at its expense, lawyers and experts to monitor and document Plaintiff's activities on its property. Despite all this, Plaintiff contends that its subpoena is not unduly burdensome.

Plaintiff's first cogent legal argument is that Tyson is "a multi-billion dollar company." (Pls. Response, p. 4.) Assertions such as these warrant little by way of a response. The protections afforded by the Rules of Civil Procedure against unduly burdensome discovery are available to all litigants regardless of their financial status. Unfounded fishing expeditions and over-reaching discovery requests do not magically become reasonable and well founded when propounded to "multi-billion dollar" companies.

Plaintiff's second line of defense to Tyson's claim that its subpoena is unduly burdensome is to refer this Court to the case of *Thomas v. FAG Bearings Corp.*, 846 F.Supp. 1382 (W.D. Mo. 1994). This case, however, does not provide support for Plaintiff's argument. In *Thomas*, the court did permit the inspection of property over the objections of the landowners.

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[2] Even case law relied upon by Plaintiff in its Response recognizes that a party on whose land environmental testing has been conducted is entitled to disclosure of the results of such tests. *Martin v. Reynolds Metals Corporation*, 297 F.2d 49, 53 fn. 1 (9th Cir. 1961) (reviewing district court's Rule 34 order which provided, among other things, "Reynolds Metals Company shall give to Paul Martin a copy of the report of the results of all chemical analyses from samples taken in accordance with the order of the court within 10 days after the completion of the analyses.")

However, the *Thomas* court's opinion provides very few details about the timing and scope of the inspections and samplings permitted in that case. Whether those inspections required repeated access to the property is not known, nor is there any discussion of the number of samples sought or the potential risks posed by the sampling.

What is clear from the opinion in *Thomas* is that the court's decision to permit the inspection and sampling was heavily influenced by the fact that the court had previously dismissed claims against various property owners because "FAG Bearings has not done the work necessary to show that a third-party defendant may be causally-linked to plaintiff's complaint." *Id.* at 1400. In its prior order, the court had stated that FAG Bearings could bring suit in the future against other parties "only when and if it has procured admissible evidence to show that another party is liable." *Id.* The court further stated that its "express intention [is] that FAG Bearings be afforded an opportunity to make such a showing by using any means available." *Id.* In light of this history, it is not surprising that when FAG Bearings requested the right to inspect and sample property to support a claim against another party it was granted the right to do so. The *Thomas* court's opinion offers nothing on the undue burden issue other than its conclusory statement that "the inspections are to be conducted by and at the expense of defendants and they do not appear to involve any burdensome requests." *Id.* at 1400. That is not the case with respect to the subpoena at issue in the present action. Plaintiff's subpoena is virtually unlimited in scope, completely lacking in specificity and clearly would impose an undue burden upon Tyson.

C. Plaintiff's Proposed Biosecurity Protocols are Inadequate.

In its Response, Plaintiff advances two arguments in opposition to Tyson's request that inspections or sampling on poultry farms be conducted in accordance with its biosecurity

protocols and policies. First, Plaintiff claims that its proposed biosecurity protocols are equivalent to or just as good as the polices and protocols that Tyson uses in the conduct of its business. Second, Plaintiff implies that Tyson has "recently revised" its biosecurity policies in an attempt to interfere with Plaintiff's sampling efforts. (Pls. Response, p. 9) Neither of these claims have any merit whatsoever.

For many years now, Tyson has operated under biosecurity policies which restrict access to poultry farms unless and until certain conditions necessary to protect bird health and to prevent the transmission of bird diseases have been met. These policies were developed by trained personnel who are intimately familiar with those bird disease risks attendant to the business practices of Tyson and the procedures necessary to properly manage those risks. Unfortunately, Plaintiff's 1 page proposed biosecurity protocol and its "one-size-fits-all" approach fall well short of the protocols of required by Tyson under its policies. For example, all Tyson farms in the area to be sampled are currently under a heightened biosecurity status due to the concerns of the public and government officials relating to bird diseases such as Avian Influenza and Infectious Laryngotracheitis ("LT"). (*See* Ex. 1, Affidavit of Dr. Patrick Pilkington, ¶ 5.)[3] In these circumstances, Tyson's biosecurity policies prohibit the entry of farms under contract with Tyson by persons who have been on any other poultry farm within the

[3] Farms in Eastern Oklahoma and Northwest Arkansas have been under a heightened biosecurity status since November 4, 2005, more than five months prior to the service of Plaintiff's Rule 45 subpoenas. (*See*, Ex. 1, Affidavit of Dr. Patrick Pilkington, ¶ 5.)

previous seventy-two hours. (*See* Ex. 1, Affidavit of Dr. Patrick Pilkington, ¶ 6.) Plaintiff's proposed biosecurity protocols do not incorporate the seventy-two hour waiting period.[4]

Plaintiff seeks to brush all of these policies aside with promises that it will conduct the sampling in a safe and reasonable manner and with its "propos[al] that sampling or testing conducted inside poultry houses be conducted when there is no flock present in the house." (Pls. Response, p. 9-10.) Tyson appreciates the sentiment behind Plaintiff's proposal, but this gesture does not dissolve the very real risks presented by Plaintiff's proposed sampling.[5] Bird diseases can be transmitted even in the absence of birds. For example, LT can be transferred through contact with manure, feathers and bedding material. (*See* Affidavit of Dr. Patrick Pilkington, ¶ 7.)

Plaintiff's suggestion that Tyson concocted a scheme to thwart possible sampling by the Plaintiff through a tightening of its biosecurity policies reflects a disturbing degree of either arrogance or paranoia on the part of Plaintiff. Tyson has a business to run. In the course of running that business, Tyson, like all companies, responds to changes in circumstances by adjusting its policies from time to time. Tyson's February 2006 revision of its biosecurity policies was not motivated by the unfortunate fact that it has found itself the subject of Plaintiff's frivolous lawsuit. Those revisions simply reflect Tyson's decision that its biosecurity protocols needed to be updated in light of changed conditions and in an effort to best protect the health of its birds. (*See* Affidavit of Dr. Pilkington, ¶ 8.)

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[4] Whether Plaintiff intends to incorporate any waiting period whatsoever is unclear. In correspondence from its counsel dated May 2, 2006, Plaintiff proposed a 48 hour waiting period between sampling at farms under contract with different integrators. (*See* Ex. 2 to Defendants' Motion for Protective Order (Dkt. No. 540), May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel.) However, the biosecurity protocols attached by Plaintiff to their Response contains no discussion of any waiting period. (*See* "Poultry Premise Entry Biosecurity Protocols for Regulatory Personnel" attached as Exhibit A to Affidavit of Becky Brewer-Walker, D.V.M.)

[5] In its Response, Plaintiff states "Tyson inexplicably does not address or acknowledge this proposal in their (sic) Motion to Quash." (Pls. Response, p. 10.) Apparently, Plaintiff did not carefully read the Objection and Motion to Quash. This proposal was acknowledged and its inadequacies explained in footnote 5.

D. The Court Should Require Plaintiff to Post a Bond.

It is clear from Plaintiff's Response that Plaintiff absolutely does not want to post a bond. However, what is equally as clear is that the law permits this Court to require a bond in circumstances such as this and that Plaintiff has offered no legal or factual reason to excuse such a requirement in this case.

Plaintiff attempts to confuse this issue by asserting that Tyson's reliance on the district court's opinion in *Williams v. Continental Oil Co.*, 14 F.R.D. 58 (W.D. Okla. 1953) is "doubly misplaced" because the district court was reversed, and the case remanded by the Tenth Circuit. The proposition of law quoted by Tyson from the district court's opinion in that case was as follows:

> The cases uniformly agree that where a survey is ordered the complete risk and hazard, if any must be borne by the plaintiff; the defendant cannot be submitted to possible loss. Without exception the plaintiff must post a bond sufficient to hold the defendant harmless.

Williams, 14 F.R.D. at 66. As it turns out, the district court in the *Williams* case also determined that the inspection and subsurface survey should not be allowed, even though the plaintiff had offered to post a bond. *Id.* at 67. It was this decision – the decision not to permit the inspection – that was reversed by the Tenth Circuit Court of Appeals. The Tenth Circuit did not even address the issue of whether a court may require a party to post a bond prior to beginning inspection and sampling of real property.

Further support for the authority of this Court to require a bond is found in *Gliptis v. Fifteen Oil Co.*, 204 La. 896, 929 (La. 1943), in which the court required the plaintiff to post a bond in an amount "sufficient to protect defendant against such loss or damage as the court may think is reasonably to be expected to result from the survey." The *Gliptis* court reasoned that "[i]f the survey is made, it will be made not at the risk of defendant, but at the risk of plaintiff,

who must pay all costs thereof and provide ample safeguard to protect defendant's rights." *Id.* at 927.

Finally, Plaintiff's attempt to distinguish the case of *Micro Chemical, Inc. v. Lextron, Inc.*, 193 F.R.D. 667 (D. Colo. 2000) is ineffective. The testing in that case involved the alteration of property – a machine - and the court denied that request for such testing, in part, because the party seeking the testing "neither made nor offered any provision for security in the event of damage to the machine or other loss . . ." *Micro Chemical, Inc.*, 193 F.R.D. at 669. Plaintiff's proposed testing in this case also involves the alteration of property. Plaintiff intends to bore hundreds of holes in the surface of these "waste applied fields" (i.e., pastures), to install groundwater monitoring wells complete with a concrete pad for stability, and to drive a pipe deep into the subsurface of these properties to extract groundwater. This is alteration and the *Micro Chemical* case provides further support for the posting of a bond

III. CONCLUSION

For the foregoing reasons, Tyson requests that its Objection to and Motion to Quash Plaintiff's Subpoena for Inspection and Sampling of Premises be granted. Alternatively, Tyson requests that this Court require that Plaintiff modify its subpoena to: (a) specify the time and place of all inspections or sampling events; (b) describe the tests they intend to run on any samples collected and (c) clarify that Plaintiff will comply with proper biosecurity measures in carrying out the sampling. Moreover, Tyson requests that Plaintiff be required to post a bond to indemnify Tyson from any damages that result from sampling and that Plaintiff be ordered to immediately disclose the results of any laboratory tests, assays or analysis performed on samples collected from the property at issue.

Respectfully submitted,

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