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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-JOE-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S SUPPLEMENTAL BRIEF IN OPPOSITION TO "COBB-VANTRESS, INC.'S MOTION TO DISMISS COUNTS 4, 6, 7, 8, 9 AND 10 OF THE FIRST AMENDED COMPLAINT OR ALTERNATIVELY TO STAY THE ACTION"

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits the following supplemental brief in further opposition to Defendant Cobb-Vantress, Inc.'s Motion to Dismiss Counts 4, 6, 7, 8, 9, and 10 of the First Amended Complaint or Alternatively to Stay the Action (DKT # 67).[1]

I. Oklahoma statutes intended to protect the State from agricultural and other pollution do not preempt Oklahoma's common law claims.

In support of its contention that the State's common law claims are pre-empted, Cobb-Vantress, Inc. ("Cobb-Vantress") advances two basic arguments. First, while conceding as it

[1] This Memorandum in Opposition is intended to respond not only to the Cobb-Vantress Motion / Reply, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Cobb-Vantress Motion / Reply.

must that the common law is not superseded by enactment of certain Oklahoma statutes, Cobb-Vantress -- without citing to a single provision in any of these statutes that would expressly or impliedly give rise to pre-emption -- nonetheless contends that the State's claims are pre-empted because these certain Oklahoma statutes allegedly expressly authorize the conduct at issue. Cobb-Vantress's contention is wrong. It not only misapprehends pre-emption theory, but also ignores the fact that absolutely nothing in the Oklahoma statutes at issue either expressly or implicitly authorizes the Poultry Integrator Defendants to engage in poultry waste handling and disposal practices that cause pollution of the IRW. Further, it must be remembered that "[t]he fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance." *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 37 (Okla. 1985). Cobb-Vantress's argument is tantamount to a driver claiming that his license to drive allows him to drive as he pleases. It does not. A license to drive is not a license to drive recklessly. Baseless statements by Cobb-Vantress like the "undeniable truth in the present case is that the practices which form the basis of the State Plaintiffs' common law claims are expressly authorized by Oklahoma statutes . . . ," Reply, p. 6 (DKT # 142), should therefore not be credited. Simply put, this "truth" is anything but "undeniable" in light of the allegations of the FAC that the Poultry Integrator Defendants have violated both Oklahoma's statutes and duties imposed by the common law.

Second, Cobb-Vantress advances an implausibly narrow reading of certain of the statutes at issue. For example, the State has alleged that the waste disposal practices of the Poultry

Integrator Defendants violate the prohibitions on discharge and runoff of poultry waste to the waters of the state, prohibitions on creating an environmental or a public health hazard, and prohibitions on the contamination of the waters of the state. *See* FAC, ¶¶ 133-39. Cobb-Vantress's argument that all the statutory prohibitions of the Agriculture Code extend only to discharging poultry excrement directly into the state's waters is plainly wrong. Reply, p. 5. The statutes and regulations comprehensively forbid poultry operations from creating environmental hazards or contaminating the waters of the state by the discharge and run-off of the constituents of poultry excrement. The State has alleged that the Poultry Integrator Defendants dispose of wastes (poultry excrement) in amounts far exceeding the agronomic needs and not consistent with good agricultural practices (FAC, ¶ 50), and that as a result, large quantities of phosphorus and other pollutants run off of the land and are released into the waters of the IRW (FAC, ¶ 52) and that large quantities of phosphorus and other pollutants accumulate in the land and are later released into the waters of the IRW (FAC, ¶ 53). This has caused pollution of the waters of the state and created an environmental or public health hazard (FAC, ¶¶ 57-64). These facts support liability not only under the statutes at issue, but also under common law theories of nuisance and trespass.

II. The State, as prosecutor of law violations, need not exhaust administrative remedies.[2]

Cobb-Vantress argues that the State's causes of action relating to the Poultry Integrator

[2] Many of these arguments are also addressed in the State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay Proceedings, and therefore this Supplemental Brief is incorporated herein.

Defendants' violation of the agriculture statutes should be dismissed for two reasons. First, it argues that the State must exhaust some undefined "administrative remedy" before one of its own administrative agencies before addressing the violation in court, and second, it argues that the Attorney General can only file litigation against violators of the Agriculture Code if requested by ODAFF. Both of these arguments contradict the plain language of the Agriculture Code.

As to the first argument, Cobb-Vantress claims it has never denied that the Attorney General has the right to pursue litigation in a court of law for alleged violations of the agricultural statutes at issue in this case, Reply, p. 8, but it fails to demonstrate any basis in Oklahoma law requiring prior exhaustion of administrative remedies. *Ladd Petroleum Corp. v. Oklahoma Tax Commission* provides that where there is no express exhaustion of remedies requirement in a statutory scheme, the courts will not require exhaustion of remedies. 767 P.2d 879, 882 (Okla. 1989) ("One may not be deprived of his full and fair day in district court by forcing him to surmount nonexistent administrative hurdles"). A review of the Agriculture Code reveals that it does not contain a single administrative process which the Attorney General must, or could, exhaust prior to filing a lawsuit to restrain a violation of the Act. In contrast to an actual administrative exhaustion case in which a litigant must exhaust remedies under the Administrative Procedures Act before resorting to court, the State is not requesting that ODAFF take, or refrain from taking, any administrative action. Rather, the Attorney General has filed a civil action on behalf of the State of Oklahoma against the Poultry Integrator Defendants for violations of the Agriculture Code as the Agriculture Code expressly authorizes without a prior request of an administrative official or agency. No remedy need be exhausted before filing the present action (assuming *arguendo* that the exhaustion doctrine even applies to governmental

entities).

As to the second argument, Cobb-Vantress selectively quotes portions of the statutes to create the mistaken impression that the Attorney General must await the request of a regulatory official before seeking redress in the courts for violation of the statutes at issue. The various statutes at issue are similar and simple in their construction. They create a duty on the part of the Attorney General to act upon the request of the appropriate official (the provision Cobb-Vantress cites) and prosecutorial discretion in the Attorney General to act on his own (the provision Cobb-Vantress ignores) in the absence of such a request. The Registered Poultry Feeding Operations Act can serve as an example of this two-part arrangement. Under this Act, "[i]t shall be the duty of the Attorney General and district attorney if requested by the Commissioner of Agriculture to bring such actions." 2 Okla. Stat. § 10-9.11(C)(3) (emphasis added). However, actions for injunctive relief to redress or restrain violations of the Act or regulations adopted under it, or to recover any administrative penalty "may be brought by" a district attorney, the Attorney General, or the ODAFF "on behalf of the State of Oklahoma." 2 Okla. Stat. § 10-9.11(C)(1) (emphasis added). It is a well-established principle of statutory construction that "may" usually denotes "permissive or discretional, and not mandatory, action or conduct." *Hess v. Excise Board of McCurtain County*, 698 P.2d 930, 932 (Okla. 1985). Thus, while a request from the Commissioner of Agriculture imposes upon the Attorney General a duty to bring an action, the Attorney General has discretion to bring an action, and has done so. The entire Agricultural Code, as well as the CAFO Act and the Environmental Quality Code, contain similar provisions.[3]

[3] The Attorney General has a duty to enforce the Agricultural Code upon request of the Board of Agriculture, 2 Okla. Stat. § 2-16(A), and discretion to enforce that Code even in the absence of such request, 2 Okla. Stat. § 2-16(B); a duty to enforce the CAFO Act upon request of

Further seeking to support its claim that the State must exhaust its administrative remedies, and in a vain effort to distinguish *United States v. Tenet Healthcare Corp.*, 343 F.Supp.2d 922, 934 (C.D. Cal. 2004) (exhaustion doctrine not applicable when government itself decides to pursue judicial remedy), Cobb-Vantress proposes as the rule that where "the agency itself" decides to pursue a judicial remedy, the exhaustion of remedies doctrine is simply not applicable. Reply, p. 7. Similarly, even Cobb-Vantress admits that it would be permissible for the government to go directly to court where it was "inconsistent" with the statutory scheme to bar the decision maker from determining in particular cases that full exhaustion of internal review procedures is not necessary. *Id.* However, in each of the statutes at issue in this case, actions are brought on behalf of the State of Oklahoma, not any particular agency of the State as Cobb-Vantress implies. For instance, in the Registered Poultry Feeding Operations Act the Attorney General may bring actions "on behalf of the State of Oklahoma." 2 Okla. Stat. § 10-9.11(C)(1)(b). Similarly, the Attorney General may bring actions "on behalf of the State of Oklahoma" for violations of any provision of the Agriculture Code, 2 Okla. Stat. § 2-16(B)(2), for violations of the CAFO Act, 2 Okla. Stat. §§ 20-26(E) and (F)(1)(b), and for violations of the Oklahoma Environmental Quality Code, 27A Okla. Stat. §§ 2-3-504(E) and (F)(1)(b). By the very rule advanced by Cobb-Vantress, Reply, p. 7, this suit is proper without exhaustion of administrative remedies.

III. The doctrine of primary jurisdiction does not bar this suit or permit its referral to

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the Agriculture Commissioner, 2 Okla. Stat. § 20-26(F)(3), and discretion to enforce that Act absent such a request, 2 Okla. Stat. §§ 20-26(E) and (F)(1)(b); a duty to enforce the Oklahoma Environmental Quality Code if requested by Executive Director of the Department of Environmental Quality, 27A Okla. Stat. § 2-3-504(F)(4) and discretion to enforce that Code in the absence of such request, 27A Okla. Stat. §§ 2-3-504(E) and (F)(1)(b).

any other agency.[4]

Cobb-Vantress concedes that this Court has subject matter jurisdiction over this case, Reply, p. 11, but claims that jurisdiction is concurrent with ODAFF and the ASWCC. Cobb-Vantress also recognizes that Oklahoma courts have presided over pollution cases in the past and those cases often involve trespass and nuisance claims. Reply, p. 12. Thus, Cobb-Vantress recognizes, as is certainly true, that this Court has jurisdiction over the subject matter of this case, and that courts often decide pollution cases based upon common law theories of trespass and nuisance. Cobb-Vantress then tries to distinguish this case from other such cases because this case allegedly deals with pollution by entities allegedly operating under animal waste management plans, contending that "[t]he alleged 'pollution' in this case occurs under state-approved animal waste management plans which specify the timing, location and amount of the land application of poultry litter," Reply, p. 12, and that consideration of the State's statutory claims requires the technical expertise of the ODAFF and the ASWCC. Reply, pp. 11-13. Cobb-Vantress's efforts, however, ignore the fact (1) that Oklahoma's animal waste management program explicitly provides that there is to be no run-off or discharge of poultry waste and no pollution, *see* 2 Okla. Stat. § 10-9.7(B)(1); 2 Okla. Stat. §10-9.7(B)(4); 2 Okla. Stat. § 20-10(B)(4); Okla. Admin. Code, § 35:17-3-14(b)(3)(A); Okla. Admin. Code, § 35:17-5-5(c), (2) that Arkansas does not yet even have an animal waste management program in place, *see* Ark. Stat. § 15-20-1106, and (3) that the central issue in this lawsuit is simply whether the Poultry

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[4] Many of these arguments are also addressed in the State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay Proceedings, and therefore this Supplemental Brief is incorporated herein.

Integrator Defendants' conduct is causing run-off or discharge of poultry waste and pollution, thereby causing injury to the waters and lands of the IRW in Oklahoma. Whether or not conduct is causing pollution is a matter routinely handled by the court system and does not necessitate the interpretation of highly technical rules and regulations. Pollution is either occurring or it is not. Indeed, a simple reading of the statutes which the State seeks to enforce within Oklahoma will show the Court that they are not elaborate, and in fact raise issues of proof similar to those issues raised in the State's CERCLA, RCRA and common law claims. *See, e.g., Wilson v. Amoco Corp.*, 989 F.Supp. 1159, 1169-70 (D. Wyo. 1998) (primary jurisdiction doctrine not applicable to RCRA claim). To repeat, the issues presented by the statutory claims are whether or not the Poultry Integrator Defendants' waste disposal practices have released poultry waste and let poultry waste or its constituents pollute Oklahoma's waters, or create environmental or public health hazards or injury to the State's waters, sediments or biota, or whether the placement of those wastes on the land in such large quantities threatens to do so. These are questions the Court is well qualified to determine.

One final argument of Cobb-Vantress actually counsels against referral of Oklahoma's statutory claims to ODAFF or ASWCC. Cobb-Vantress claims that the fact issues underlying the State's statutory claims are "inextricably intertwined" with the statutory scheme it claims is committed to the ODAFF (and, inexplicably the ASWCC). However, the ODAFF (or ASWCC) has no statutory mandate to decide the State's CERCLA and RCRA claims, its claims based upon common law nuisance and trespass, or its equitable unjust enrichment claim. In no event could the ODAFF (or ASWCC) decide these federal, common law, and equitable claims. If, as Cobb-Vantress suggests, the factual basis of all these claims is "inextricably intertwined,"

referral of any part of this case to a regulatory agency creates the possibility of confusion, multiple interpretations and conflicting requirements. Only the Court can address all the State's claims in a coherent fashion. Thus the Court should do so without referring any part of the "inextricably intertwined" issues to any other agency.

CONCLUSION

Because neither the motion to dismiss nor the motion to stay proceedings has merit, the Court should deny them and proceed with this case.

Respectfully Submitted,

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