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 AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA **PLAINTIFFS**

v. **CASE NO.: 05-CV-00329 TCK –SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARCILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC. **DEFENDANTS**

TYSON DEFENDANTS' REPLY TO THE STATE OF OKLAHOMA'S RESPONSE TO THE "TYSON DEFENDANTS' MOTION FOR LEAVE TO EXCEED NUMERICAL LIMITATION ON REQUESTS FOR ADMISSION"

Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively, "Tyson") hereby reply to the State of Oklahoma's Response to the "Tyson Defendants' Motion for Leave to Exceed Numerical Limitation on Requests for Admission" [DKT # 969] and respectfully request the Court grant leave to serve the Requests for Admission attached as Exhibit A to the Tyson Defendants' Motion for Leave to Exceed Numerical Limitation on Requests for Admission. [DKT #949].

I. INTRODUCTION

Plaintiffs argue that the Court should deny leave to serve the additional Requests for Admission because: 1) Tyson has not demonstrated "good cause" for the requests; 2) the Plaintiffs have provided meaningful discovery; 3) the requests are being used as an improper discovery device; and 4) the requests are burdensome. Plaintiffs' arguments are not persuasive and their ceaseless crusade to avoid any and all efforts to move this case towards completion is shameless and tiresome.

A. "Good Cause" is Not the Legal Standard for Leave to Serve Additional Requests for Admission

Plaintiffs assert that "[c]ourts with local rules limiting the number of requests for admission employ a 'good cause' standard in evaluating requests for leave to serve requests for admission in excess of the local rule". (Plfs. Resp. Br. pg. 2). This is incorrect and misleading. Northern District Local Rule LCvR 36.1 states: "[w]ithout leave of Court or written stipulation of the parties, the number of requests for admissions for each party is limited to twenty-five (25)". This rule neither mentions nor establishes a "good cause" standard.

Plaintiffs claim, *Estate of Manship v. United States*, 232 F.R.D. 552, 559 (M.D. La. 2005) and *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Company, Inc.*, 130 F.R.D. 92,93 (N.D. Ind. 1990) support their good cause standard. Neither case helps Plaintiffs. Both of these cases were decided under local rules that expressly contain "good cause" standards. In *Estate of Manship*, the Middle District of Louisiana Local Rule 36.2 expressly provides: "[a]ny party desiring to serve additional requests for admission shall file a written motion setting forth the proposed additional requests for admission and reasons establishing good cause for their use". 232 F.R.D. at 59. Similarly, in *Golden Valley Microwave Foods*, the Northern District of Indiana Local Rule 14(c) expressly provides: "[a]ny party desiring to serve additional …

requests for admission shall file a written motion setting forth the proposed … requests for admission and the reasons establishing good cause for there use". 130 F.R.D. at 94. Unlike the local rules at issue in *Golden Valley* and *Estate of Manship*, Northern District Local Rule LCvR 36.1 does not establish a good cause requirement. Thus, Plaintiffs are incorrect that a good cause standard exists in the Northern District of Oklahoma for a motion for leave to exceed the limitation on requests for admission set forth in LCvR 36.1. In any event, for the reasons set forth in the Motion for Leave and herein, good cause exists here for granting additional requests for admission.

B. Plaintiffs have Participated in Discovery, but Have Not Provided Meaningful Discovery to the Tyson Defendants

Plaintiffs, make the ipse dixit assertion they have provided meaningful discovery in this case and complied with their discovery obligations. That is disingenuous sophistry. A review the discovery responses Plaintiffs filed as exhibits to their response shows they have not. [DKT No. 969 Exs. 1-6]. A non-exhaustive representation of the Plaintiffs' responses can be found in Plaintiffs' Objection and Response to Request for Production Nos. 1, 2 and 3 set forth in Ex. 2, Plaintiffs' Objection and Response to Interrogatory Nos. 3, 4, 5, 6, 8, 11 and 14 set forth in Ex. 3, Plaintiffs' Objection and Response to Interrogatory Nos. 3, 4, 5, 6, 7, 8, 9, 10 and 11 set forth in Ex. 4. [DKT No. 969 Exs. 2-4]. Merely serving responses to written discovery requests does not equate to providing meaningful discovery. The content of the discovery responses and documents and information produced evidences whether the discovery is meaningful. Plaintiffs' "responses" to discovery provide more objections and unfounded assertions of privilege than they do information. (*See* June 30, 2006 letters from the undersigned counsel on behalf of each Tyson Defendant to Plaintiffs outlining deficiencies in Plaintiffs' Discovery responses, attached hereto as Collective Exhibit A). For more than one year, Plaintiffs have engaged in a distasteful

game of cat and mouse with respect to discovery, hiding behind hyper-technical constructions of various federal and local rules and refusing to disclose the basis, if any, of their allegations in this case. Plaintiffs' current assertion that they have provided meaningful discovery to Tyson is laughable. In fact, Plaintiffs so-called meaningful discovery on this issue is the subject of currently pending motions and will likely be the subject of additional motions. (*See* Cobb-Vantress Mot. to Compel). [DKT. No. 743]. Significantly, Plaintiffs' refusal to provide any meaningful discovery here also is the good faith cause for Tyson's motion exceed the number of requests for admission.

C. Plaintiffs' Objections to the Form of Various Requests and Assertions of Privilege are Premature

Most of the arguments raised by Plaintiffs to the Tyson Defendants' Motion for Leave are not appropriate at this time based on the relief requested by Tyson. Plaintiffs have specifically identified 109 of the requests (less than 15%) as objectionable.[1] If Plaintiffs truly believe these requests are objectionable, then they can make those objections after being served with the requests and, if necessary, the Court can determine the validity of any objections in a subsequent motion. The propriety or validity of specific requests which have not yet been served upon Plaintiffs is not before this Court. The sole issue here is whether Tyson should be permitted to

[1] Plaintiffs claim that Request for Admission Nos. 23-70 ("seeking information about the State's sampling and analysis program"), 551-588 ("seeking information about evidence possessed by the State about the poultry industry's contribution of constituents of concern into the Illinois River Watershed environment generally"), and 589-614 ("seeking information about evidence possessed by the state about the Tyson's contribution of constituents of concern into the Illinois River Watershed environment generally") are an improper use of admissions as a discovery device, claiming they "seek facts and opinions in the first instance." (Plfs. Resp. Br. pg. 6,7). In reality, Plaintiffs just do not want to have to respond to the requests, because they do not like the answers they will have to give. None of the requests seek to discover information. Each request seeks an admission. More specifically, each admission seeks to force the Plaintiffs formally to admit the truth of certain facts. This is a wholly proper use of requests for admission.

serve requests for admission that exceed the numerical limitation set forth in LCvR 36.1. Plaintiffs' objections regarding privilege, defenses, form and relevancy are premature. Moreover, as shown below, Plaintiffs' objections and complaints about the underlying requests for admission are baseless.

Plaintiffs object to Request Nos. 87, 88, 717 and 782-790 on the basis that these requests "improperly seek admissions as to issues of law". (Plfs. Resp. Br., p. 9). "Requests for admission … are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case." *Audiotext Communications Network, Inc. v. US Telecom, Inc.*, 1995 WL 625744, *6 (D. Kan. Oct. 5, 1995) (*quoting Ransom v. United States*, 8 Cl. Ct. 646, 648 (1985)). "Requests that seek 'neither abstract opinions of law nor opinions of law unrelated to the facts of this case … [are] permissible and accomplish the goals of Rule 36'." *Audiotext Communications,* 1995 WL 625744, at 6 (*quoting Chesapeake Assocs. Ltd. V. Franklin Realty Corp.*, No. 89-2272-O, unpublished op. at 3 (D. Kan. Mar. 13, 1990)). Here each challenged request seeks an admission with respect to law related to the facts of this case. Requests for Admission Nos. 87 and 88 relate to a specific section of CERCLA under which Plaintiff seeks significant damages. (*See* First Am. Compl. ¶¶ 2, 70-89). [DKT. No. 18]. Request for Admission Nos. 782-790 all relate to Oklahoma law permitting the land application of poultry litter and the use of poultry litter as a fertilizer and a soil amendment. These laws are inextricably related to the facts of this case, and to specific allegations asserted by Plaintiffs. (*See* First Am. Compl. ¶¶ 133-136). [DKT. No. 18].

D. The Requests for Admission are Fully Consistent with the Federal Rules and with the Legal Standards Governing the Use of Requests for Admission

Without citation to authority, Plaintiffs argue that Tyson intends to use requests for admission in ways prohibited by the Federal Rules. (Plfs. Resp. Br. pp. 6-7). Plaintiffs either

have not carefully reviewed the proposed requests for admission or they do not to understand the well-recognized purposes of requests for admission. The court in *Audiotext Communications Network*, held that "[a]dmissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be". 1995 WL 625744 at 1. Tyson's proposed requests for admission are clearly would achieve those purposes. Each request either facilitates proof with respect to material issues in the case or seeks to narrow issues through elimination.

Plaintiffs claim that the requests for admission are improper because the subjects of some requests are "in dispute". (Plfs. Resp. Br., p. 6). However, "[t]he very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial". FED R. CIV. P. 36 advisory committee notes (1970 am). "The quintessential function of request for admissions is to allow for the narrowing of the issues, to permit facilitation in presenting cases to the factfinder and, at a minimum, to provide notification as to those facts, or opinions, that remain in dispute." *Lakehead Pipe Line Co. v. American Home Assurance Co.*, 177 F.R.D. 454, 457-58 (D. Minn. 1997). If Plaintiffs' "dispute" a fact which Tyson requests them to admit, then they simply must deny that request. Determining which facts are in dispute and which are not is the very purpose of requests for admission.

E. The Requests for Admission do not Seek Irrelevant Information and Minutiae

Plaintiffs argue that "the 878 requests for admission that the Tyson Defendants seek leave to serve largely dwell on minutiae". (Plfs. Resp. Br. pg. 8). This is absurd. Tyson's proposed requests specifically relate and address to the core facts and issues in this case. Those facts and issues are contained in Plaintiffs First Amended Complaint. [DKT No. 18]. Tyson did not make them up nor do any of the proposed requests relate to anything except specific allegations in the

First Amended Complaint. [DKT No. 18]. Plaintiffs' claim that facts and issues related phosphorus compounds, the human population of the Illinois River Watershed and its own purchase and use of fertilizer in the Illinois River Watershed are irrelevant minutiae simply is frivolous and further evidence that they believe they are exempt from providing discovery in this case.

F. The Requests for Admission do not Invade Matters Protected by the Attorney Work Product Doctrine

Plaintiffs have an exceedingly expansive view of the work product doctrine that is in conflict with the rules. (*See e.g.*, Cobb-Vantress, Inc.'s Motion to Compel). [DKT. No. 743]. Plaintiffs have now decided to expand interpretation of the work product doctrine even further by arguing they can refuse to admit or deny facts under the attorney work product doctrine. (Plfs. Resp. Br., pp. 9-10). Tyson's proposed requests for admission referenced show they do not seek admissions regarding the mental impressions, legal theories or legal strategy of Plaintiffs' counsel; nor do those requests seek to discover the opinions of Plaintiffs' experts. They all seek admissions of facts which are critically related to Plaintiffs' claims and allegations.

Plaintiffs are wrong that they can avoid disclosing or admitting unfavorable facts simply be invoking the phrase "attorney work product". The uncontradicted case law holding that facts are not shielded from discovery by the attorney work product doctrine refutes Plaintiffs' claims. Those matters have been extensively briefed in connection with Cobb-Vantress, Inc.'s Motion to Compel. (*See* DKT. No's 743, 799, 824, 873, 880, 947, 960).

G. The Requests for Admission are Not Excessive in Number or Overly Burdensome

Plaintiffs attempt to downplay the complicated nature of this case and their broad-ranging allegations and claims by stating that this case presents "some complexities". Plaintiffs are disingenuous. (Plf. Resp. Br. pg. 10). If this were a case involving a motor vehicle accident or

an employment dispute, then 878 requests for admission might be voluminous or even unduly burdensome. However, this is not a typical case. Plaintiffs themselves boast and proclaim that this action is centered around "millions of chickens and turkeys" on "hundreds of farms located throughout the Illinois River Watershed" which "result in generation of hundred of thousands of tons of poultry litter" which are allegedly stored and disposed of on the lands of the Illinois River Watershed and that has allegedly "caused injury to the IRW, including the biota, lands, waters and sediments therein". (First Am. Compl. ¶¶ 1). [DKT No. 18]. Too, Plaintiffs have sued 13 different parties for conduct which allegedly effects more than 1,000,000 acres of land, miles and miles of streams and rivers, a huge man-made reservoir and thousands of individuals who reside in the Oklahoma portion of the Illinois River Watershed or who use the waters at issue for recreation or as a source of drinking water. There is no doubt this is a complex case with many important facts and issues. Indeed, Plaintiffs have made it so. The law requires that Plaintiffs prove their case with evidence.

Logically, the utility of requests for admission increase in cases with multiple parties, broad allegations and complicated legal and factual issue. Tyson's proposed requests for admission will narrow the issues in this case because Tyson and this Court then will be able to determine the actual disputed issues to be tried and those matters which are not in dispute.

Despite the obvious benefits that this Court and the parties would derive from a narrowing of the issues for trial, Plaintiffs argue that these benefits are outweighed by the burden imposed on them from having to admit or deny the requests for admission.

The crux of Plaintiffs' objection to the requests seems to be the supposed size of Plaintiffs and the number of statements the Plaintiffs have made regarding the issues germane to this matter. Specifically, Plaintiffs object to the definition of "plaintiff," "you" and "your",

because it encompasses their attorneys, experts and consultants. Plaintiffs, however, have used a similar definition in their discovery requests to Tyson. Pursuant to the Federal Rules, Tyson set forth objections to Plaintiffs definition of "you" and then responded.[2] Second, Plaintiffs, complain that the definition of "plaintiff," "you" and "your" used by Tyson would cause Plaintiffs to perform a broad search of agencies, offices and personnel. Again, Plaintiffs definition of "you" in its discovery requests to Tyson encompassed a broad range of persons and entities. The Tyson Defendants are made up of four distinct corporations which have many subsidiaries that employ more than 100,000 people around the globe.

Large cases involving large corporations or governmental bodies inherently involve large discovery burdens. Plaintiffs brought this action knowing full well the challenges associated with responding to discovery aimed at the state agencies they claim to represent. Plaintiffs should not be excused from complying with their discovery obligations simply because they now realize that "representing the State of Oklahoma" is no small matter.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Tyson Defendants' Motion for Leave to Exceed Numerical Limitation on Requests for Admission, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc., respectfully request this Court grant

[2] The Plaintiff's definition of "you" in its July 10, 2006 Request for Production served on each of the Tyson Defendants states: "'You' is intended to mean [insert Tyson Defendant name] including its predecessors and successors, its present and former officers, executives, directors, agents, servants, employees, attorneys, insurance carriers, consultants, experts, investigators and other persons or firms acting or purporting to act on its behalf." Importantly, Plaintiff's July 10, 2006 Request for Production contained 125 separate document requests served separately upon each of the four Tyson Defendants, totaling 500 Request for Production served upon the Tyson Defendants. The Tyson Defendants never objected to the number of requests citing burden.

the Tyson Defendants' Motion for Leave to Exceed Numerical Limitation on Requests for Admission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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