UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, ex rel. W.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. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Aviagen, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL 30(B)(6) DEPOSITION, CROSS MOTION FOR PROTECTIVE ORDER, AND INTEGRATED AND CONSOLIDATED MEMORANDUM**

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Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("The Cargill Defendants") submit their Response in Opposition to Plaintiffs' Motion to Compel Rule 30(b)(6) Depositions, and respectfully request this Court to enter a Protective Order. The Cargill Defendants offer the following integrated and consolidated memorandum in support.

INTRODUCTION

Plaintiffs' oddly timed motion to compel the Cargill Defendants' 30(b)(6) deposition is based on misstatement, misunderstanding, and speculation. Rather than depose the witnesses the Cargill Defendants have offered, Plaintiffs have instead brought a vague motion based on unasked questions that misapprehends the law and repeatedly misstates the Cargill Defendants' positions. The Cargill Defendants urge the Court to deny Plaintiffs' motion and to grant the Cargill Defendants a related protective order barring Plaintiffs from inquiring into particular areas set forth in Section II below.

The timing of Plaintiffs' motion is its most questionable aspect. Ordinarily, a party first notices a deposition, then takes the deposition, and finally—if necessary—moves to compel responses to questions that it believes were inadequately answered. Indeed, this is the approach that Plaintiffs have taken with every other Defendant in this action: first notice, then depose, and finally, if necessary, move. Although the Cargill Defendants find no merit in these motions, at least Plaintiffs followed a procedurally sensible path. (See, e.g., Plaintiffs' "Motion to Compel Defendant Peterson Farms Inc. to Produce a Properly Prepared 30(b)(6) Designee to Allow Full Questioning of that Designee, and Integrated Brief in Support" at Docket No. 1250.)

With respect to the Cargill Defendants, however, Plaintiffs have turned this normal sequence of events on its head. Plaintiffs began by serving the Cargill Defendants (as they did the other Defendants) with a 30(b)(6) deposition notice containing a list of dozens of boilerplate

deposition topics. (Docket No. 1244-3.) Like the other Defendants, the Cargill Defendants responded with a letter to Plaintiffs' attorneys outlining their expected objections to various aspects of the deposition notices. (Docket No. 1244-4.) And, like the other Defendants, the Cargill Defendants offered to provide 30(b)(6) witnesses for deposition in August 2007 subject to those anticipated objections. (See Docket No. 1244-5; attached as Exhibit 1.) In contrast to their approach to every other Defendant, however, Plaintiffs refused to depose the Cargill Defendants' proffered witnesses and instead brought the present motion to compel. Plaintiffs have provided the Cargill Defendants with no reason for this disparate treatment of identically situated Defendants, and Plaintiffs' motion offers no explanation of the decision.

Plaintiffs' pursuit of this counterintuitive course hamstrings both the Cargill Defendants and the Court in evaluating exactly what Plaintiffs are seeking. With respect to other Defendants, specific questions have been asked, specific objections and instructions made, and the issues cleanly joined. Indeed, Plaintiffs' motion with respect to the Peterson deponent directs the Court (albeit selectively) to certain questions and answers with which they take issue. (See, e.g., Docket No. 1250 at 3-15.) Here, however, the State has not asked any Cargill deponent a single question, and the Cargill Defendants are left to defend and the Court to evaluate Plaintiffs' motion essentially in a vacuum. Even after Plaintiffs served the present motion, the Cargill Defendants noted this problem to Plaintiffs and urged them to take advantage of the opportunity to depose the Cargill Defendants' offered witness. (See Exhibit 2.) Plaintiffs repeatedly declined. (See Exhibit 3.)

Rather than recognizing and addressing this problem of uncertainty and vagueness, Plaintiffs' motion ignores and exacerbates it. Beyond the issue of unasked questions, the motion fails to identify a single one of the 36 noticed Topics as a specific subject area about which

Plaintiffs seek to compel a deponent's response. Instead, the motion is framed in terms of vague, general issues that leave the Cargill Defendants and the Court with little clue as to what specific, discrete subjects may actually be in dispute. As the discussion below demonstrates, these tactics often obscure and undercut the arguments on which Plaintiffs base their motion.

Finally, Plaintiffs' own anticipatory request for a "follow-up deposition" beyond the as-yet-untaken initial deposition spotlights the unfortunate timing of their motion. Plaintiffs' argument that they will need a second deposition necessarily rests on an assumption that issues will arise at the depositions that are beyond the scope of the present motion and that the Court will need to address in a later, *second* motion. Plaintiffs could have avoided needless motion practice, correspondence, and expense by actually *taking* the first depositions before moving to compel without a useful context.

PROCEDURAL BACKGROUND

Plaintiffs' motion presents a number of significant omissions, misstatements, and mischaracterizations concerning the Cargill Defendants' response to Plaintiffs' Rule 30(b)(6) deposition notices. More significantly, although Plaintiffs submitted with their motion a substantial portion of the correspondence exchanged by Plaintiffs' and the Cargill Defendants' attorneys concerning the 30(b)(6) deposition notices, the motion notably omitted the Cargill Defendants' final communication in that chain expressly offering a 30(b)(6) designee for deposition on August 31, 2007:

> In follow-up to my communication yesterday, the Cargill Defendants can make its first designee available on August 31st at 9:00 a.m. in the offices of Rhodes, Hieronymous in Tulsa, Oklahoma. Please let me know as soon as possible whether this date and time is agreeable to the State. If so, I ask that you serve an Amended 30(b)(6) Notice confirming same.

(See Exhibit 4.) Whether Plaintiffs' omission of this final offer was intentional or not, the letter certainly undercuts Plaintiffs' repeated assertions that the Cargill Defendants refused to offer Plaintiffs a witness. The Cargill Defendants not only offered a witness, they offered a date.

In addition, Plaintiffs' motion mischaracterizes the Cargill Defendants' positions on many significant issues. For example, the Cargill Defendants have not, as Plaintiffs suggest "stated their intention to limit the scope of their 30(b)(6) designee's preparation to only those documents that the Cargill Defendants have produced to date." (Plaintiffs' Memo, Docket No. 1244 at 1.) As the Court knows, its Order of July 6, 2007 requires the Cargill Defendants to produce documents in addition to those contained in their previous productions. (Docket No. 1207 at 3.) After Plaintiffs served the 30(b)(6) deposition notices at issue here, the Cargill Defendants pointed out that they would be producing additional documents to Plaintiffs per the Court's Order and suggested that Plaintiffs wait until after that production to take the corporate depositions so that both Plaintiffs and the witness(es) would have a chance to review those documents and address them as appropriate at the depositions. This is not a matter of *withholding* any documents from a deponent or unilaterally *limiting* the scope of a deponent's preparation. The Cargill Defendants merely offered Plaintiffs a practical suggestion and observed the fact that a deponent could not possibly be prepared with, nor could Plaintiffs ask questions about, documents that neither had ever seen.

Likewise, Plaintiffs misrepresent the Cargill Defendants' positions in asserting that the Cargill Defendants "improperly sought to limit the scope of the State's questioning" regarding the Cargill Defendants poultry-related activities in the IRW, their knowledge of the environmental effects of poultry litter, and their organizational structure. (Docket No. 1244 at 2.) Notably, although Plaintiffs frequently offer their own versions of the Cargill Defendants'

positions and allude to the Cargill Defendants' letters, Plaintiffs rarely quote what the Cargill Defendants *actually* said in that correspondence. As set forth below in actual quotations from the letters, the Cargill Defendants' positions on these issues are both reasonable and different from that described in Plaintiffs' motion.

ARGUMENT

I. PLAINTIFFS' MOTION TO COMPEL SHOULD BE DENIED.

A. The Cargill Defendants Will Produce Deponents Fully Knowledgeable on All Subjects Proper for Inquiry.

Contrary to Plaintiffs' implications, the Cargill Defendants do not dispute either Plaintiffs' right to take these 30(b)(6) depositions or their own general obligation to prepare corporate witnesses to respond to the topics contained in these deposition notices. Neither Plaintiffs' rights nor the Cargill's Defendants obligations, however, are without limit. For example, a 30(b)(6) deponent is only required to testify "as to matters known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). In addition, like all discovery, a 30(b)(6) deposition is limited to non-privileged matters and may inquire only into issues "relevant to the subject matter" of the action or "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Likewise, a party may not pursue, and a court should intervene to prevent, a 30(b)(6) deposition that will cause "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Here, the specific issues that Plaintiffs raise in their motion all transgress one or more of these limits on discovery.

B. Plaintiff Have Made No Showing of the Relevance of or the Need for Decades of History of a Million-Acre Watershed.

Plaintiffs first argue that they are entitled to inquire into, and thus that the Cargill Defendants are required to educate a witness with respect to, 36 distinct topics relating to a

watershed of over 1,000,000 acres over a period of several decades. Plaintiffs' arguments are not well taken.

The first half of Plaintiffs' argument is a pure "straw man." Plaintiffs assert that "many of the subjects"[1] of Plaintiffs' 30(b)(6) notices "go to the issue of the Cargill Defendants' knowledge of the environmental effects of the land application poultry waste." (Docket No. 1244 at 5.) The Cargill Defendants, however, have never tried to impose any time limitation on any 30(b)(6) deposition concerning corporate knowledge. On the contrary, the Cargill Defendants' August 6, 2007 letter to Plaintiffs, which preceded the meet-and-confer session, recognizes that the Court has held that no temporal limit applies to this subject:

> As we discussed, it is the Cargill's Defendant's position that, *but for the issue of corporate knowledge of the allegedly detrimental effects of land application of poultry litter*, the appropriate period of inquiry for discovery has yet to be determined.

(Docket No. 1244-5 at 1.) The Cargill Defendants also tried to make this point clear in the meet-and-confer process itself, apparently without success. In sum, however, there is no dispute here. On the contrary, Plaintiffs' argument presents an excellent example of the unfortunate waste of time and effort occasioned by Plaintiffs' motion tactics. Had Plaintiffs actually taken the offered the Cargill Defendants' designee's deposition and asked the suggested questions about corporate knowledge, they would have quickly discovered the absence of any objection and the lack of any need for a motion on this issue.

Secondly, Plaintiffs seek to expand the "relevant period of inquiry" for all 36 topics to begin from the time that any affiliate or entity of the Cargill Defendants began poultry production operations in the IRW. In so doing, Plaintiffs entirely ignore the prior briefing and

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[1] Here, as elsewhere, Plaintiffs' motion fails to actually identify any of these "many subjects."

oral argument on this issue and the Court's previous directions based on that argument. The Court's July 6, 2007 Order addressed Plaintiffs' claim that they were entitled to take discovery unlimited in time:

> The court is not able to determine the validity of Plaintiff's position without extensive briefing on the legal issues presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed. Even if the court should determine that such evidence is relevant, additional testimony would be needed to determine whether the cost of producing such documents outweighs their probative value.
>
> In the interest of avoiding such additional briefing and testimony the parties, including all defendants, are to meet and confer on or before July 20, 2007 to resolve all remaining issues presented by the motion to compel. The Cargill Defendants are to be prepared to discuss what records they have of such past operations and the cost of producing such information. Should issues remain following the meeting confer the parties shall notify the Court of such unresolved issues which the Court may sit down for briefing or testimony.

(Docket No. 1207 at 2-3.)

As the Court directed, the parties met and conferred on the outstanding temporal issue on July 19, 2007. Prior to the Court's Order, the Cargill Defendants had taken the position that going back five years was sufficient to account for any arguable detrimental effect of poultry litter on the environment and health in the IRW. Recognizing that the Court intended the parties to compromise, however, the Cargill Defendants offered to consider assuming the burden of producing documents further back in time *if* Plaintiffs would identify specific document requests that justified such a burden and explain how the additional documents were likely to be relevant to the issues in the case. During the July 19 meet and confer, Plaintiffs identified only four categories of documents for which they sought supplementation for as far back as the Cargill Defendants possess them: grower contract files, grower payment files, grower/breeder environmental audits, and grower / breeder flock evaluation reports. Based on these discussions,

the Cargill Defendants confirmed in a letter dated August 2, 2007 that they would supplement these categories of documents. (See Exhibit 5.) Since issuing that letter, the Cargill Defendants have received no further communication from Plaintiffs with regard to supplementing their document production based date range and, accordingly, the Cargill Defendants have initiated the process of collecting, reviewing, and preparing the four categories of documents that Plaintiffs identified for production in the near future.

Rather than undertaking a similar meet-and-confer approach with regard to deposition testimony or informing the Court of any remaining disputed issues (as directed by the July 6 Order), Plaintiffs instead served a 30(b)(6) deposition notice on the Cargill Defendants listing 36 categories of testimony that Plaintiffs knew would present the same issues of temporal scope on which the parties had already reached an impasse. In response, the Cargill Defendants objected to the temporal scope as overbroad inasmuch as, according to the Court's rulings to date, the only area of inquiry unlimited by time is the corporate knowledge of detrimental environmental effects from the land application of poultry litter. (See Docket 1207 at 2-3.) The Cargill Defendants explained to Plaintiffs that because the parties were under express direction by the Court to meet and confer on temporal scope, Plaintiffs had no right to impose a unilateral timeline. (Docket Nos. 1244-4 at 2, 1244-5 at 1-2.)

Plaintiffs have now brought the same issue to the Court once again, in a motion that does not acknowledge any of the previous briefings or the Court's prior directions.[2] (Docket No. 1244 at 5-6.) Rather than providing "extensive briefing on the legal issues presented," Plaintiffs' motion cites no law whatsoever on this issue. (See id.) Plaintiffs offer no "expert testimony on

the impact of chicken waste application in the distant past upon the current condition of the water shed." In fact, Plaintiffs' motion cites no record evidence whatever on this issue, substituting instead bald assertions that the information sought is somehow relevant. (Id.) In short, Plaintiffs have not provided the Court with *any* of the legal analysis or authoritative evidence that the Court indicated it needed to reach a sound and reasoned conclusion on this issue. (See Docket 1207 at 2-3.) Plaintiffs simply assert that "the appropriate period of inquiry for discovery for the subjects is clear," (Docket No. 1244 at 6), a proposition with which the Court (according to its July 6, 2007 Order) does not agree.

The burden of preparing a witness to testify about a decades-long history on 36 different topics concerning a 1,000,000 acre watershed is manifest. (See Docket No. 1136 Ex. 1 ¶¶ 2-8 (detailing burden of acquiring documents for Plaintiffs' request.)) Plaintiffs' motion fails to justify imposing this burden, fails to comply with the directions in the Court's July 6, 2007 Order, and fails to justify their intransigent position that they are entitled to temporally unlimited discovery on every one of the 36 topics they have listed. The Court should deny Plaintiffs' motion with respect to this issue and should permit deposition inquiry beyond five years *only* as to the corporate knowledge issue on which the Court has already ruled. At a minimum, the Court should require the supplemental briefing and argument that Plaintiffs sought to evade and evaluate the evidence and briefing that it previously indicated was necessary to decide this issue.

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[2] The omission of any discussion of the Court's directions in the July 6, 2007 Order is particularly egregious given that Plaintiffs themselves rely on the same Order in the previous paragraph of their motion. (Docket No. 1244 at 5) (citing Order, Docket No. 1207))

C. The Cargill Defendants have Offered a Deponent to Testify as to Their Knowledge of the Environmental Effects of Poultry Litter.

Plaintiffs next argue that the Cargill Defendants have improperly restricted the geographic scope of the proposed 30(b)(6) depositions, again without either explaining why or specifying which of the 36 subjects supposedly require Plaintiffs' proposed global scope. Plaintiffs' contentions fail.

The first half of Plaintiffs' argument repeats the claim that the Cargill Defendants somehow intend to artificially limit their designees' deposition preparation by withholding documents that have not been produced. As explained above, this is not the case. The Cargill Defendants made clear to Plaintiffs that it was Plaintiffs' choice whether (1) to proceed with the depositions with an incomplete set of documents or (2) to wait until all the documents have been produced and then proceed with the depositions:

> Thus, from our perspective, the only remaining issue is whether the State wishes to proceed with the depositions before or after the Cargill Defendants have completed their supplemental production. This is not an area upon which we need to agree, as it is ultimately Plaintiffs' choice. Our position is merely that, should the State proceed prior to the completion of the Cargill Defendants' document production, we will oppose any subsequent effort to redepose our designees on that basis.

(Docket No. 1244-6 at 1-2.)

Although Plaintiffs rejected the Cargill Defendants' suggestion until the production was complete to wait to take the 30(b)(6) deposition, Plaintiffs' present motion will likely have the same effect in any event. By the time this motion is resolved, the Cargill Defendants anticipate that their document production will be substantially complete as to the documents possessed by all domestic poultry growing facilities, and the Cargill Defendants' deponents will be prepared to answer any proper questions about any of the documents that the Cargill Defendants have produced. Thus, by the time the Court hears this portion of Plaintiffs argument (and resolves the

Cargill Defendants forthcoming Motion for Clarification / Reconsideration of the July 6, 2007 Order), the issue may well be moot.

Plaintiffs' second argument in this section is framed in a misleading way. Plaintiffs try to create the impression that the issue here is the geographic scope of the source of the Cargill Defendants' knowledge of possible detrimental environmental effects of poultry litter. (See Docket No. 1244 at 6.) In fact, the Cargill Defendants have *always* been prepared to produce deponents who can speak to the knowledge of Cargill, Inc. and Cargill Turkey Production, LLC concerning such effects, regardless of the source of that knowledge. Cargill, Inc. and Cargill Turkey Production, LLC designees can, of course, only speak on behalf of their own respective entities, and can neither speak for nor bind any other entities. See In re Ski Train Fire of Nov. 11, 2000 Kaprun Aus., MDL No. 1428, 2006 U.S. Dist. LEXIS 29987, 64 Fed. R. Serv. 3d (Callaghan) 594, at *26-28 (S.D.N.Y. May 16, 2006) ("[a]ll the knowledge of Siemens Austria [the subsidiary] is not 'reasonably available' to Siemens AG [the parent]"); see also R.E. Goodson Constr. Co. v. Int'l Paper Co., 2006 U.S. Dist. LEXIS 91342, at *125 n.25 (D.S.C. Dec. 15, 2006) (in CERCLA case, citing the "general rule" that "the knowledge of the parent corporation is not imputed to the subsidiary corporation ... unless a sufficient nexus between them is shown ... to provide an equitable reason for disregarding the separate corporate existences") (ellipses in original, quoting In re Mercedes-Benz Antitrust Litig., No. 99-4311, 2006 U.S. Dist. LEXIS 51202, 2006 WL 2129100, at * 17 (D.N.J. July 26, 2006)).[3] Thus, despite Plaintiffs' superficial suggestions, this aspect of the Notices is not disputed.

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[3] The standard for a binding, Rule 30(b)(6) deposition differs in this respect from the standard for merely producing existing documents. As the Ski Train Fire court noted:

> It is one thing to require a corporate parent to produce documents in the possession of its foreign subsidiary, when, as a practical matter, it is able to

A close read of Plaintiffs' motion, however, reveals that they also intend to depose the Cargill Defendants on issues that go far beyond anything related to the claims in the present lawsuit. As the Cargill Defendants noted in a letter to Plaintiffs (and which Plaintiffs have not denied):

> [I]t is our understanding that the State interprets the Court's Order [of July 6, 2007] to permit inquiry not just into the Cargill Defendants' knowledge of allegedly detrimental effects of land application of poultry litter within the United States, but also to include knowledge of environmental effects (a) globally, (b) regardless whether in the context of land application, and (c) with regard to each individual constituent of poultry litter at issue in this litigation (e.g. phosphates, arsenic, copper, zinc, etc.) even where the constituent's environmental effects have no relation to the land application of poultry litter. The Cargill Defendants consider the State's construction of the Court's Order to be vastly over-reaching.

(Docket No. 1244-5 at 2.) With respect to the "global" effects of poultry litter application, this Court has indicated that the present case is about the Illinois River Watershed: "the court will not require the Cargill Defendants to produce data from anywhere other than within the IRW at this time." (Docket No. 1207 at 3.)[4]

Plaintiffs' other two proposed areas of inquiry—non-land-application uses of poultry litter and non-poultry-litter effects of various elements—are equally remote from the present case, and Plaintiffs' brief discussion of the issue does nothing to suggest otherwise. (See Docket No. 1244 at 6.) Again, Plaintiffs have not identified a single specific deposition topic as to

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> secure those documents. It is simply not comparable to require a corporate parent to acquire all of the knowledge of the subsidiary on matters in which the parent was not involved, and to testify to those matters in a manner which binds the parent, a separate legal entity.

Id. (emphasis added).

[4] Because Plaintiffs and the Cargill Defendants appear to have different interpretations of the Court's July 6, 2006 Order, the Cargill Defendants are preparing and will soon file a Motion for Clarification or Reconsideration of that order.

which this information is supposedly relevant and have offered no factual or scientific basis for inferring such relevance. Plaintiffs have presented no evidence or expert opinion and have cited no authoritative articles suggesting that the poultry litter uses other than land application or the behavior of various elements outside the context of poultry litter have anything whatever to do with the either the liability or the damage issues in this case. Conversely, the burden on the Cargill Defendants to prepare a witness to address such issues on any of 36 different topics is significant.

In sum, Plaintiffs have offered no legal or scientific justification for their proposed broad deposition topics. Plaintiffs are certainly entitled to inquire of the Cargill Defendants concerning their knowledge of detrimental environmental effects of the land application of poultry litter, which is what this case is about, and the Cargill Defendants are fully prepared and have already offered to produce a witness to address that issue. (Docket 1244-5 at 2.) What the Cargill Defendants object to, however, is any requirement that they bear the burden of preparing witnesses for questions in 36 different topic areas concerning a broad array of matters that have nothing whatever to do with the issues in this case. The Court should deny Plaintiffs' motion on this ground.

D. The Cargill Defendants Have Offered a Witness to Testify as to all Relevant Information Concerning Cargill's Corporate Structure.

Plaintiffs next complain that Cargill, Inc. refuses to produce a witness with full knowledge of Cargill, Inc.'s corporate structure. As with their other requests, Plaintiffs have not identified the specific topic(s) as to which this argument relates, but the Cargill Defendants assume Plaintiffs allude to topic 36, which seeks a deponent to testify concerning:

Your corporate organizational structure including without limitation:

a) identification of officers, directors and shareholders;
b) any relationship with any parent, holding company or subsidiary;
c) any relationship in or to any LLC, limited partnership, joint venture or association,
d) identification of any other areas of corporate business or operation conducted by you in addition to your growing, processing and marketing of poultry and poultry products.

(Docket No. 1244-2 at 8.) Cargill, Inc. is fully prepared to offer, and has in fact already offered, a witness to testify as to all aspects of its corporate structure conceivably related to the issues in the present case. The Cargill Defendants view Plaintiffs' insistence on even more as unduly burdensome and bordering on harassment.

As the Cargill Defendants have informed Plaintiffs repeatedly, both through correspondence and in previous submissions, the preparation of a single witness to talk comprehensively about Cargill, Inc.'s corporate structure would be unduly burdensome, assuming it is possible at all. Although Cargill Turkey Production, LLC has a fairly simple corporate structure, Cargill, Inc. is one of the largest privately-owned businesses in existence, with numerous affiliated companies encompassing more than 90 business units. Cargill, Inc. is an international provider of food, agricultural, and risk management products and services with 158,000 employees in 66 countries in Africa, the Asian Pacific, Europe, Latin America, the Middle East, and North America. In the United States alone, Cargill has locations in such states as Arkansas, Colorado, Alabama, Louisiana, Texas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. (See Docket No. 1136-2 ¶¶ 8, 10 (Willardson affidavit); http://www.cargill.com/about/organization/ataglance.htm.) (Additional information concerning the size, scope, and complexity of Cargill, Inc. (along with citations to additional corporate web sources) is provided in the accompanying Exhibit 6.)

In light of this size and complexity, the Cargill Defendants offered Plaintiffs a witness tailored to the facts and issues in the present case:

> In an effort to accommodate the State as much as reasonably possible, the Cargill Defendants will agree to identify a corporate employee who can discuss generally the various segments of industry in which Cargill is involved worldwide. However, the designee(s) would only be prepared to testify specifically to the organizational structure of the businesses with which the Cargill Defendants are affiliated that are involved in live poultry production in the United States. To the extent the U.S. designee has firsthand knowledge of the Cargill Defendants' involvement with live poultry production in countries outside of the U.S., the designee would be permitted to discuss his/her knowledge of the corporate structure of those companies.

(Docket 1244-5 at 3 (emphasis in original).) Considering the circumstances here and the nature and scope of Plaintiffs' claims, the Cargill Defendants respectfully submit that this is a reasonable offer of a witness.

Again, this is the type of issue that the parties could have presented to the Court much more productively had Plaintiffs simply taken the offered deposition, asked the questions they believed were relevant, and determined whether the deponent's answers left any material gaps. If such gaps occurred, the Cargill Defendants could have supplied any material missing information from other sources. If Plaintiffs still remained unsatisfied, they could then have brought a motion asking this Court to compel specific answers to specific questions. Because Plaintiffs chose not to take this route, the Court is left with the vague complaint that the Cargill Defendants have objected on grounds of overbreadth to an extremely broad topic. In this context, Plaintiffs have failed to justify an Order compelling a 30(b)(6) deponent beyond what the Cargill Defendants have already offered.

E. The Cargill Defendants Have Offered a Deponent to Address Issues of Release or Run-off.

Plaintiffs next argue that the Cargill Defendants refuse to prepare a witness to testify about poultry litter "releases" or "run-offs" that the Cargill Defendants know nothing about. As the Court is well aware, the Cargill Defendants have been trying for over a year to get Plaintiffs to specifically identify any alleged release or run-off at any facility of a Cargill Defendant or contractor that Plaintiffs claim constitutes a nuisance or violates a state or federal law or regulation. To date, despite discovery requests, meet-and-confer sessions, motions, and even this Court's Order of May 7, 2007, Plaintiffs have refused to provide this information. The Cargill Defendants have meanwhile repeatedly stated that they have no such information. (See generally Docket No. 1252: Cargill Defs.' Mot. Sanctions.)

Notwithstanding this refusal, Plaintiffs insist that the Cargill Defendants designate a witness to testify concerning such supposed releases and runoff. This conduct by Plaintiffs allows only two explanations:

(1) Either Plaintiffs have no evidence of any specific releases or runoff associated with the Cargill Defendants, in which case substantial sections of Plaintiffs' Second Amended Complaint fail to comply with Rule 11; or

(2) Plaintiffs have such evidence, but have not disclosed it because they want to "surprise" the Cargill Defendants' witness with it in the course of the deposition.

Neither explanation is acceptable under the Rules or provides any justification for withholding the information. See, e.g., Tottenham v. Trans World Gaming Corp., 2002 U.S. Dist. LEXIS 11313, 2002 WL 1967023, at * 2 (S.D.N.Y. 2002) ("Discovery, however, is not intended to be a fishing expedition, but rather is meant to allow the parties to flesh out allegations for which they initially have at least a modicum of objective support.").

Despite Plaintiffs' evasiveness, the Cargill Defendants offered to produce a witness for deposition on this issue:

> While we continue to disagree with regard to the sufficiency of the State's supplemental responses, for the purposes of attempting to proceed with this deposition, the Cargill Defendants will agree to designate an individual who can testify generally with regard to activities known by the companies to have occurred either at their IRW breeder farms or those of their IRW contractor growers. To the extent the designee has any personal knowledge of "run-off" occurring, the State may inquire into that knowledge. However, the designee(s) would not be prepared to discuss any specific instances of "run-off" (as interpreted by the State) that have not been disclosed by the State's interrogatory responses.

(Docket No. 1244-5 at 4.) The Cargill Defendants are not refusing to disclose incidents of "run-off" or "release"—rather, the Cargill Defendants know of no such incidents as Plaintiffs have characterized them and Plaintiffs refuse to share whatever information (if any) they have. The Cargill Defendants have fully complied with their obligations under the Rule 30(b)(6) by offering a designee to "testify as to matters known or reasonably available to the organization."

Yet again, this dispute would likely have been avoided or mitigated had Plaintiffs actually taken the deposition the Cargill Defendants offered, such that any remaining issues would have been properly framed for the Court.

F. Any Discussion of a Follow-Up Deposition Is Premature.

Plaintiffs also seek permission to conduct a follow-up deposition should the Cargill Defendants' witnesses fail to answer questions as directed by the Court. As a threshold matter, the argument is speculative, unfounded, and insulting, assuming without explanation or factual support that the Cargill Defendants and their attorneys will not follow the Court's directions.

Moreover, the request is plainly premature. Despite the Cargill Defendants' repeated offers, Plaintiffs have yet to take a single deposition of any Cargill Defendant 30(b)(6) deponent, and no one can possibly predict what might happen at such a deposition. Indeed, such a

deposition will almost inevitably produce unexpected questions and objections and raise new legal and factual issues that neither the parties nor the Court can anticipate. The Cargill Defendants respectfully suggest that Plaintiffs' request that the Court effectively rule now on such objections and legal issues, without even knowing what they are, is not reasonable. If issues arise at the 30(b)(6) deposition(s) that the Court needs to address, the time to request the Court's intervention is *after* the deposition.

II. THE CARGILL DEFENDANTS ARE ENTITLED TO A PROTECTIVE ORDER.

Inasmuch as Plaintiffs have raised these issues before any deposition pursuant to their 30(b)(6) notices, the Cargill Defendants seek a protective order barring Plaintiffs from inquiring into certain areas, including several of those discussed above. Cargill Defendants recognize that, given that specific questions have not yet been asked, its requested protective order is necessarily general. This is the procedural posture in which the Plaintiffs have framed the issues, however, and the Cargill Defendants can only seek relief in that posture.

In pertinent part, Federal Rule of Civil Procedure 26(c) allows this Court to enter "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including" that "disclosure of discovery not be had" or "be had only on specified terms and conditions," and "that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." The Cargill Defendants are entitled to a protective order as to certain aspects of Plaintiffs' Rule 30(b)(6) deposition notices.

A. Overbroad Issues Irrelevant to Land Application of Poultry Litter (All Topics).

According to Plaintiffs' motion, they intend to ask questions in some or all of their 36 deposition topics concerning issues far removed from the fundamental concern in this case: the

land application of poultry litter. Specifically, Plaintiffs apparently intend to question the Cargill Defendant deponents concerning unspecified uses of poultry litter other than land application and about the behavior of various constituents of poultry litter (e.g., arsenic, copper, zinc, etc.) either independently or in unspecified other contexts.

Rule 30(b)(6) allows a party to take a corporate deposition so long as the notice specifies the areas of inquiry with "reasonable particularity." The District of Kansas recently emphasized that "[a]n overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task. ... Where the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible." Steil v. Humana Kansas City, Inc., 197 F.R.D. 442, 444 (D. Kan. 2000) (citing Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000)). Deposition requests, like all discovery requests, must be reasonably calculated to lead to the discovery of admissible evidence under Federal Rule of Civil Procedure 26. Hence, corporations may receive protective orders to prevent Rule 30(b)(6) depositions on irrelevant noticed topics. See, e.g., id. at 445.

Here, Plaintiffs' proposed lines of inquiry involving unnamed non-land application uses of poultry litter and characteristics of poultry litter constituents either alone or in undefined contexts fail in two respects. First, the topics are overbroad and not delineated with the particularity necessary for the Cargill Defendants to feasible designate a deponent to fully testify. See Steil, 197 F.R.D. at 444. Second, these topics reach far beyond anything calculated to lead to the discovery of relevant evidence. Not only do Plaintiffs seek to depose the Cargill Defendants about the alleged uses and effects of poultry litter in contexts other than land application, they also seek to inquire about the Cargill Defendants' knowledge (if any) of unspecified "effects" of phosphorous, arsenic, zinc, etc. without regard to the context of poultry litter land application. During the July 19 meet and confer, Plaintiffs noted, for example, their

intentions to cross-examine the Cargill Defendants' witnesses concerning environmental effects of phosphorous mining (assuming the Cargill Defendants were ever engaged in such activities) and of the use of commercial fertilizer, a material chemically distinct from poultry litter. Plaintiffs have offered no explanation, in the meet-and-confer session, in correspondence, or in their present motion, suggesting how any of this information bears on the issues in the present case. Plaintiffs have not offered any evidence or identified any scholarly or scientific authority that suggests a connection between the conduct at issue here (land application of poultry litter) and information in these other amorphous contexts.

In contrast, the Cargill Defendants' burden of preparing a witness to answer questions on such a broad and vaguely defined foundation is significant. The Cargill Defendants would have to guess at what other uses of poultry litter Plaintiffs contemplate and what other contexts for such ubiquitous materials as phosphorus, copper, and zinc Plaintiffs intend to pursue, and then prepare a witness to address possible questions on those subjects in 36 different topic areas. The Cargill Defendants respectfully submit that the burden of preparing a witness to testify under such circumstances, assuming it were possible, outweighs any justification Plaintiffs have offered for their broadly defined subject matter. The Court should issue a protective order on these issues.

B. Temporal Limits (All Topics).

The Cargill Defendants also ask the Court to issue a protective order limiting Plaintiffs' inquiries at the deposition to a period of the last five years (going back to the year 2002), absent a specific showing by Plaintiffs that earlier information on a specific topic is likely to lead to the discovery of admissible evidence. As discussed above, the Court has expressed skepticism about the relevance of such earlier evidence, particularly in light of the absence of any scientific basis

for concluding that decades-old events bear on the present condition of the IRW or on Plaintiffs' claims. Hence, the Court contemplated that in the event the parties could not agree on the temporal scope of discovery, the parties would submit additional briefing and evidence, including expert evidence, concerning Plaintiffs' proposed earlier dates.

Plaintiffs' 30(b)(6) deposition notice, like their present motion, seeks to improperly avoid the Court's stated process for resolving this issue and instead to unilaterally impose their view of the appropriate temporal limitations of discovery. Moreover, the Cargill Defendants have already demonstrated the substantial burden that identifying and collecting such earlier information would entail, whether for a document production or for the preparation of a witness. (See Docket No. 1136 Ex. 1 ¶¶ 2-8.)

Because Plaintiffs disregarded this Court's direction and failed to make any evidentiary or expert showing justifying the decades-long scope of their proposed discovery, the Cargill Defendants urge the Court to issue a protective order against inquiry to any Cargill 30(b)(6) deponents beyond a period of five years in the past for all topics except corporate knowledge of the detrimental environmental effects of the land application of poultry litter. The Cargill Defendants remain willing to discuss with Plaintiffs a longer time period for specific topics if Plaintiffs will identify those topics and provide reasonable explanations of their need for a longer inquiry period.

C. Inquiry Regarding "Releases" and "Run-Off" (Topics 13, 14, 16, 18, and 21).

The Court should also issue a protective order—at least for the time being—as to any inquiry by Plaintiffs into supposed incidents of "release" or "run-off" allegedly associated with the Cargill Defendants. As noted above, and as detailed in the Cargill Defendants' Motion for Sanctions, Docket No. 1252, Plaintiffs have stubbornly refused to state whether they are aware

of *any* incidents involving the "release" or "run-off" of poultry litter from any farm operated by Cargill or by any Cargill contractor or, if they are, to identify those incidents. Nevertheless, Plaintiffs now seek to depose the Cargill Defendants concerning just such releases and run-offs, an intention apparent in particular in Plaintiffs' topics Nos. 13, 14, 16, 18, and 21. (See Docket No. 1244-3 at 3-4.)

As noted above, Plaintiffs can have only one of two purposes in pursuing these issues in the present 30(b)(6) deposition: either Plaintiffs have no evidence of any such releases or run-offs, in which case the proposed deposition is merely a fishing expedition to find information that Plaintiffs should have had before they filed their Complaint, or Plaintiffs have such evidence and intend to use it at the deposition to pull a "gotcha" on the witness. Neither purpose is acceptable under the discovery rules. Plaintiffs must obey the Court's Order to disclose its evidence on this issues, and the Court should bar Plaintiffs from any 39(b)(6) inquiry into these issues (topics Nos. 13, 14, 16, 18, and 21) until Plaintiffs satisfactorily make those disclosures.

D. Topics Irrelevant to the Cargill Defendants (Topics 32 and 34).

The Cargill Defendants also urge the Court to issue a protective order as to two topics in Plaintiffs' 30(b)(6) deposition notice irrelevant to the Cargill Defendants. Although the Cargill Defendants explained the irrelevance during the meet-and-confer process, Plaintiffs to date have not withdrawn the Topics. (See Docket No. 1244.)

First, Topic 32 asks the Cargill Defendants to produce a witness to testify concerning "the allegations made in paragraph 3 of the Third Party Complaint [DKT. #80]." (Docket No. 1244-3 at 6.) The Cargill Defendants did not join the Third Party Complaint that appears at Docket No. 80, and thus made no allegations in that document.

Similarly, Topic 34 purports to require the Cargill Defendants to provide a witness to testify concerning "differences in the method, manner, direction or management of your poultry growing operations in Oklahoma compared to Arkansas within the IRW." (Id.) As Plaintiffs are aware, however, the Cargill Defendants have no poultry-growing operations in the IRW in Oklahoma, only in Arkansas. There thus are no "differences" to discuss, and the topic is irrelevant to the Cargill Defendants.

Because Topics 32 and 34 do not relate to the Cargill Defendants, yet Plaintiffs seek to compel such testimony, the Court should bar these inquiries.

E. Attorney Work Product (Topic 35).

Finally, the Cargill Defendants request an Order barring Plaintiffs' Topic 35, which would require the Cargill Defendants to produce a witness to testify concerning "the facts, reason and basis supporting or relied on by you for responses made to the State's Requests for Admission served on or about April 20, 2007." (Docket No. 1244-3 at 6.) This topic is vague, overbroad, and directly and necessarily invades the Cargill Defendants' attorney work-product. Hence, it is not properly the subject of discovery.

The Cargill Defendants timely responded to Plaintiffs' requests for admission last spring and raised a number of objections. Following a meet-and-confer session, the Cargill Defendants supplemented those responses, maintaining many objections but providing substantive admissions or denials in response to each of Plaintiffs' requests. This is all that Rule 36 requires. As the Advisory Committee notes to Rule 36 observe:

> Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions 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 than can be.

Fed. R. Civ. P. 36 advisory committee's notes.

Plaintiffs' deposition notice in essence seeks to expand the scope of the requests for admission by making the Cargill Defendants explain and defend the basis for their responses. The decision whether to admit or contest a given fact is necessarily one of litigation and trial strategy, and unavoidably and inextricably involves the "mental impressions, conclusions, opinions, [and] legal theories" of the Cargill Defendants' attorneys. Fed. R. Civ. P. 26(b)(3). As such, the decision process is protected and beyond the scope of proper discovery, and the Court should bar any examination into the topic by Plaintiffs. See, e.g., Schweinert v. Ins. Co. of N. Am., 1 F.R.D. 247, 248 (S.D.N.Y. 1940) (granting motion for protective order against deposition questions where "plaintiff is seeking to discover the steps being taken by the defendant in preparation for trial and not relevant matters").

Plaintiffs are of course free to inquire of a Cargill witness concerning the *subject matter* of any of Plaintiffs' requests for admission, and in fact many of Plaintiffs' proposed Topics suggest that Plaintiffs intend to make such inquiries. The *strategic reasons* for the Cargill Defendants' responses to those requests, however, are pure attorney work product and thus off limits to discovery. The Court should bar Plaintiffs from inquiry into those reasons.

CONCLUSION

For the reasons set forth above, defendants Cargill, Inc. and Cargill Turkey Production LLC urge the Court to deny Plaintiffs' motion to compel in its entirety and to issue a Protective Order barring Plaintiffs from any inquiry in any 30(b)(6) deposition into any of the following topics without further order of the Court:

a. Matters occurring prior to 2002, except for corporate knowledge of the detrimental environmental effects of land application of poultry litter;

b. Uses of poultry litter other than in the context of land application;

c. The behavior or effects of individual constituents of poultry litter at issue in this litigation (e.g. phosphates, arsenic, copper, zinc, etc.) where those effects have no relation to the land application of poultry litter;

d. Topics Nos. 13, 14, 16, 18, and 21 on Exhibit A to Plaintiffs' Amended Notices of Taking Deposition of Cargill, Inc. and Cargill Turkey Production LLC (Docket 1244-3); and

e. Topics 32, 34, and 35 on Exhibit A to Plaintiffs' Amended Notices of Taking Deposition of Cargill, Inc. and Cargill Turkey Production LLC (Docket 1244-3).

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker (OBA #9110)
JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390
And
DELMAR R. EHRICH
BRUCE JONES
DARA D. MANN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC

CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2007, 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:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Robert D. Singletary	Robert_singletary@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	Daniel.lennington@oag.ok.gov
Douglas Allen Wilson	doug_wilson@riggsabney.com
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	
J. Randall Miller	rmiller@mkblaw.net
David P. Page	dpage@mkblaw.net
Louis W. Bullock	lbullock@mkblaw.net
Miller Keffer & Bullock	
William H. Narwold	bnarwold@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Motley Rice	
COUNSEL FOR PLAINTIFFS	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Sidley Austin LLP	
Robert W. George	robert.george@kutakrock.com
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.comKutackRock
LLP	

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C .Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole M. Longwell nlongwell@mhla-law.com
Philip D. Hixon phixon@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC
Sherry P. Bartley sbartley@mwsgw.com
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

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:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Charles L. Moulton
Arkansas Natural Resources Commission
323 Center Street
Suite 200
Little Rock, AR 72206

s/ John H. Tucker