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 GKF –SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, 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**

JOINDER BY TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., AND COBB-VANTRESS, INC. IN THE CARGILL DEFENDANTS' MOTION TO MODIFY THE SCHEDULING ORDER

Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. ("Tyson Defendants") submit the following as their joinder in Cargill Defendants' Motion for Modification of Scheduling Order (Dkt. No. 1297):

I. Adoption of Argument of Cargill Defendants

The Tyson Defendants agree that current scheduling order governing this case is no longer realistic given the continuing complexity of this case, the substantial delays that have occurred and the current posture of the case. The Tyson Defendants adopt and incorporate herein by reference the arguments advanced by Cargill in its Motion for Modification of the

Scheduling Order (Dkt. No. 1297). The Tyson Defendants further join the Cargill Defendants in requesting the establishment of a new scheduling order with deadlines substantially in accord with those proposed on page two of the Cargill Defendants' Motion.

II. Additional Facts Supporting Modification of the Scheduling Order

In their motion, the Cargill Defendants provide numerous grounds justifying the modification of the current scheduling order. The Tyson Defendants believe the grounds set forth by the Cargill Defendants are adequate, but feel compelled to apprise the Court of the following additional facts which further substantiate the need to modify the scheduling order:

A. Plaintiffs' Pattern and Practice of Delaying their Responses to Written Discovery has Prejudiced the Tyson Defendants

While some of the delays that have plagued this case are simply the product of the size, scope and complexity of the case, much of the delay is the product of Plaintiffs' deliberate choices. Much like the Cargill Defendants, the Tyson Defendants have been required to write Rule 26 deficiency letters, participate in elongated meet and confer sessions and ultimately file motions to compel with respect to virtually every set of written discovery served upon Plaintiffs. *See, e.g.,* Ex. A, June 30, 2006 Ltr. from R. George to R. Nance (regarding State's refusal to fully answer interrogatories); Ex. B, May 1, 2007 Ltr. from R. George to L. Bullock (regarding State's refusal to properly supplement interrogatory responses as required by the Court in its February 26, 2007 Order); Ex. C, July 3, 2007 Ltr. from R. George to D. Riggs (regarding State's refusal to produce documents requested in Tyson Foods, Inc.'s April 25, 2007 Request for Production of Documents); *see also*, Dkt. No. 743, Cobb-Vantress's First Motion to Compel (granted by January 5, 2007 Order, Dkt. No. 1016); Dkt. No. 1019, Tyson Defendants' Motion to Compel (granted by February 26, 2007 Order, Dkt. No. 1063); and Dkt. No. 1258, Tyson Foods, Inc.'s Second Motion to Compel (still pending before the Court). Plaintiffs' *modus operandi* in

terms of discovery is obvious – delay production as long as possible and produce responsive information only after a motion to compel is filed or in some instances only after being expressly ordered to do so by the Court. Plaintiffs' approach to discovery has severely retarded the development of this case. Plaintiffs' refusal to timely produce clearly relevant information has prejudiced the Tyson Defendants' efforts to prepare a defense to Plaintiffs' expansive claims for relief.

B. Plaintiffs Have Engaged in "File Dumps" Instead of Specifically Responding to Individual Defendant's Discovery Requests

Unfortunately, Plaintiffs' evasive discovery tactics are not limited to the substantial delays in the timing of production of documents. Plaintiffs' manner of production is also abusive and clearly designed to prejudice the defendants. Plaintiffs have named 14 separate companies as defendants in their ill-conceived lawsuit. Each defendant has a right to discover any facts, evidence or proof that Plaintiffs may have to substantiate their claims against it. Similarly, each defendant has the right to discover facts known to Plaintiffs and documents in Plaintiffs' possession that would support that defendant's individual, and often unique, defenses. To that end, the Tyson Defendants have served Plaintiffs with discovery seeking the identification of facts and production of documents relevant to Plaintiffs' claims against the Tyson Defendants and the Tyson Defendants' defenses to those claims. Unlike the scattershot approach embodied in Plaintiffs' discovery to defendants, the Tyson Defendants' have pursued targeted discovery on specific subjects. Specifically, the four Tyson Defendants, collectively, have served only 48 interrogatories and only 38 document requests.

Unfortunately, Plaintiffs seek to gloss over their inability to prove claims against the Tyson Defendants and to conceal facts and documents potentially exonerating the Tyson Defendants through an improper "file dump" of over one million pages of documents which

Plaintiffs claim are responsive to all of the defendants' collective discovery requests. Plaintiffs' motives are obvious. Rather than straightforwardly answering the Tyson Defendants' specific discovery requests, they want the Tyson Defendants to search through a million pages of records (most, if not all, of which is unrelated to the Tyson Defendants' requests) in search of "responsive" documents which in many instances apparently do not even exist in the file dump.

This Court has already rejected Plaintiffs' needle-in-the-haystack approach to discovery in the context of producing paper documents under Rules 33(d) and Rule 34. *See* Dkt. No. 1063, February 26, 2007 Order (granting Tyson Defendants' motion to compel); Dkt. No. 1150, May 17, 2007 Order (granting Cargill Defendants' motion to compel). However, Plaintiffs continue to refuse to comply with their discovery obligations. The latest infraction, undoubtedly to be the subject of future motions to compel, occurred when Plaintiffs elected to engage in another "file dump" production of ESI.

By letter dated June 25, 2007 the Tyson Defendants, reminded Plaintiffs of their obligation to provide the Tyson Defendants with documents and ESI responsive to their specific discovery requests. *See* Ex. D, June 25, 2007 Ltr. from R. George to T. Hammons. To facilitate this process the Tyson Defendants provided Plaintiffs with a hard drive to load ESI responsive to the Tyson Defendants' discovery requests. Plaintiffs flatly refused to comply with their obligation to produce ESI to the Tyson Defendants which is responsive the Tyson Defendants' discovery requests. Instead, Plaintiffs sent a single dump of ESI to a copy service in Tulsa (known as RLS), advised counsel for all defendants that this single data dump would be available to all defendants without any effort on the Plaintiffs' part to identify what data is responsive to which defendants' requests, and advised the Tyson Defendants to contact RLS to have a copy of the Plaintiffs' entire ESI production made. *See* Ex. E, July 2, 2007 Ltr. from R. Garren to "all

Counsel". By letter dated July 16, 2007, the Tyson Defendants again requested that the Plaintiffs download onto the Tyson Defendants' hard drive only that ESI which they claims are responsive to the Tyson Defendants' discovery requests. *See* Ex. F, July 16, 2007 Letter from M. Bond to L. Bullock. To date, Plaintiffs have not produced to the Tyson Defendants any ESI, let alone, ESI which is only responsive to the Tyson Defendants' discovery requests.

Plaintiffs' recalcitrant refusals to respond separately to the discovery requests served by the Tyson Defendants is improper and highly prejudicial. As a result, the Tyson Defendants have been relegated to sifting through a mountain of largely non-responsive information to identify for themselves documents or information that could arguably be responsive to discovery requests specifically related to Plaintiffs' claims against the Tyson Defendants or the Tyson Defendants' defenses to those claims. Plaintiffs' flouting of the Federal Rules has turned the discovery process on its head in this case. Such tactics have significantly slowed the development of the issues in this case.

C. Plaintiffs Refuse to Commit to a Completion Date for their "Rolling" Production of Documents

The Tyson Defendants first served written discovery in this case almost one and one-half years ago and it presently has outstanding three sets of document requests and five sets of interrogatories. While Plaintiffs have produced some documents and information purportedly responsive to these discovery requests, their production of documents has been "ongoing" for more than a year and Plaintiffs refuse to provide even an estimated completion date. Counsel for the Tyson Defendants have asked Plaintiffs for an estimated completion date, but to date has received no response. *See* Ex. G, August 8, 2007 e mail from R. George to T. Hammons. Without knowing when Plaintiffs plan to complete their production of documents responsive to the Tyson Defendants' written discovery it is impossible for the Tyson Defendants to determine,

much less implement, the steps necessary to prepare a defense to the "facts" that may be contained within documents still being withheld.

D. Plaintiffs' "Court-Ordered" Production of Sampling Data Remains Incomplete

This is purportedly an environmental case that is likely to turn in part on the nature, extent and reliability of sampling or testing conducted by Plaintiffs in the watershed. The importance of such data was recognized by the Tyson Defendants at the inception of this case. Thus, in written discovery served on a year and one-half ago, Cobb-Vantress asked Plaintiffs to produce the results of all environmental sampling and testing conducted in the IRW and documents relating to the methods used by Plaintiffs to collect and analyze those samples. After a protracted discovery dispute over the discoverability of such data, the Court correctly ordered the Plaintiffs to "produce all documents identified by Plaintiffs and the Court by February 1, 2007." Dkt. No. 1016, January 5, 2007 Order, p. 11.

Plaintiffs did produce some sampling and test data on February 1, 2007, but not all of the data was produced by that date. To the contrary, Plaintiffs have dribbled out its "court-ordered" production over the course of the last seven months and amazingly this production remains uncompleted as of the filing of this joinder.[1] The Tyson Defendants have tried to work cooperatively with Plaintiffs in securing the data which was the subject of this Court's January 5, 2007 Order of production, but never anticipated that the process of actually completing that production would extend over so many months. Moreover, the Tyson Defendants have recently confirmed their suspicion that Plaintiffs' "court-ordered" production is far from complete and that categories of critical information are being withheld without any commitment as to a likely date for production. On August 29, 2007, counsel for the Tyson Defendants wrote to Plaintiffs

[1] Plaintiffs' "rolling" production of sampling and testing data included productions on February 1, February 8, March 6, May 1, May 21, July 2 and August 7.

raising questions about testing or sampling referenced in materials produced to date for which the Tyson Defendants were unable to locate actual reported results within Plaintiffs' production. *See* Ex. H, August 29, 2007 Ltr. from R. George to L. Bullock. Importantly, Plaintiffs were warned in that letter that:

> The State's actions have already prejudiced the defendants to the degree that some of the deadlines in the current scheduling order will need to be revisited. Any continued delays by the State in addressing these matters will only further delay the timetable for completing this litigation.

Id. at p. 1. In their response to this letter, Plaintiffs confirmed that much of the information inquired about had not been produced. *See* Ex. I, September 19, 2007 Ltr. from L. Bullock to R. George. Specifically, Plaintiffs now concede that they have been withholding sampling or testing data or related documents pertaining to the following areas of the State's sampling program:

- DNA/Microbial Source Tracking which Plaintiffs claim may allow them to "fingerprint" substances in the water to particular sources;
- Results of ground water sampling conducted in the watershed
- Information relating to sediment sampling conducted in 2004 and 2005
- Fish Kill data collected in April 2006
- The State's sub-bottom survey of Tenkiller conducted in 2006
- BIOSEP bead data
- Information on the location where various samples were taken
- Data collected by Plaintiffs in 2006 regarding benthic or macro-invertebrate organisms in the environment
- Quality Assurance /Quality Control packages on samples analyzed by the labs
- Chain of Custody forms relating to the transfer, handling and ultimate disposition of samples collected by Plaintiffs

Id. With respect to sampling or testing data still being withheld (much of which the Plaintiffs have had in their possession for more than a year), Plaintiffs refuse to confirm even an estimated date of production.

Plaintiffs' sampling and testing data is critically important to the Tyson Defendants. Until that production is completed, the Tyson Defendants can only speculate as to the technical

issues they must consider and address in preparing a defense to the case. It may very well be that Plaintiffs' data, when viewed objectively, actually exonerates the Tyson Defendants and thus the defendants need not waste resources commissioning additional sampling or testing of the environment in the IRW. Alternatively, Plaintiffs' testing or sampling may reveal conditions which need to be investigated or explained by the Tyson Defendants through additional targeted sampling or testing. The answers to these questions and thus the necessary direction of the Tyson Defendants' defense of this case cannot be known until after Plaintiffs' "court-ordered" production (which the Court clearly intended to occur in February) is complete.

The Tyson Defendants' expert reports on causation under the current scheduling order are due in approximately five months. *See* Dkt. No. 1075, Scheduling Order. Even if the information still being withheld were produced tomorrow, Plaintiffs' delay in timely producing all the sampling and testing data has already rendered the current scheduling order unworkable. The Tyson Defendants in five months cannot evaluate and respond to data it has taken Plaintiffs three years to generate and complete any testing or sampling necessary to respond to particular aspects of that data. Given the current status of Plaintiffs' court-ordered production, the scheduling order should be modified. The Tyson Defendants submit that the modifications requested by the Cargill Defendants reflect a reasonable restructuring of the deadlines in this case given the current situation.

III. Conclusion

The Tyson Defendants respectfully request that the Scheduling Order be modified in accordance with the deadlines proposed in the Cargill Defendants' Motion for Modification of the Scheduling Order (Dkt. No. 1075).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 26th 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:

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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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