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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO THE CARGILL DEFENDANTS' SUPPLEMENTAL BRIEFING IN SUPPORT OF SANCTIONS

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 ("the State") responds to the Cargill Defendants' Supplemental Briefing in Support of Sanctions ("Supplemental Brief") [DKT #1389] as follows:

I. Introduction

Following a motion to compel, the State, consistent with the Federal Rules, elected to amend its responses to certain interrogatories served by the Cargill Defendants and, accordingly, withdrew certain Rule 33(d) designations made in connection with those answers. This Court in its October 24, 2007 Opinion and Order ("Order") [DKT #1336] subsequently directed the Cargill Defendants to document any prejudice they allegedly suffered as a result of the State's withdrawal of these Rule 33(d) designations. In their Supplemental Brief, the Cargill Defendants have provided no evidence of any such prejudice. Therefore, even assuming *arguendo* that any relief in favor of the Cargill Defendants were appropriate -- which of course it is not because the

State's actions were entirely appropriate -- no relief should be granted. Accordingly, the Cargill Defendants request for sanctions should be denied.

II. Facts

A. The underlying discovery dispute

On or about December 11, 2006, the State responded to interrogatories propounded by the Cargill Defendants. Part of the responses by the State to certain of these interrogatories was the following statement: "In further response to this interrogatory and pursuant to Fed. R. Civ. P. 33(d), information sought in this Interrogatory and whose production is not objected herein, may be found by a reasonable search within the business records being provided to Defendants in onsite agency productions." Following a motion to compel by the Cargill Defendants, the State withdrew this Rule 33(d) designation and amended its answers.[1] The Court's November 24, 2007 Opinion and Order denied the Cargill Defendants' challenge to the sufficiency of the State's answers. *See* Order, p. 4 ("The Court denies the motion as to witnesses and sufficiency of narratives"). Put another way, the State's answers to these interrogatories have been determined to be sufficient without the need for any further information.

Despite the fact (1) that there is no evidence that the Cargill Defendants spent time trying to match designated documents with the State's withdrawn Rule 33(d) designations to these interrogatories, and (2) that the State's answers to these interrogatories are fully sufficient without the need for the withdrawn Rule 33(d) designations, the Cargill Defendants claimed prejudice from the withdrawn Rule 33(d) designations at the September 27, 2007 hearing.

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[1] In the course of withdrawing this Rule 33(d) designation and amending its interrogatory answers, the State also withdrew its designation of certain OSRC documents as responsive to the interrogatories, determining instead to rely on the sufficiency of its narrative answers and other "Tyson Rule" designations. Notably, however, these OSRC documents were not "withdrawn" from State's overall Rule 34 document production and remained available for inspection and copying.

B. The Court's October 24, 2007 Opinion and Order

Following the September 27, 2007 hearing, on October 24, 2007, the Court entered its Order. At page 4 of that Order, the Court ordered as follows:

> The Court denies the motion as to witnesses and sufficiency of narratives. The only action which the Court finds could justify the imposition of Rule 37 sanctions is Plaintiff's withdrawal of its Rule 33(d) designations after Cargill Defendants ("Cargill / Cargill Defendants") expended time and expense in reviewing those designations. Cargill Defendants are therefore directed to file a supplemental brief within two days of the filing of the official Court transcript of this hearing detailing all time and expenses incurred in reviewing the designations before they were withdrawn. The briefing should also address whether those designations contained responsive information which was also withdrawn with the designation. . . . The parties are encouraged to meet and confer to attempt to resolve the issues. . . .

(Emphasis added.) Three important points can be taken from this portion of the Order. The first point is that the Court did not find that the State's actions did in fact justify the imposition of fees and costs. Rather, the Court left the question open to additional briefing, merely finding that given the appropriate evidentiary facts (which plainly do not exist here) it potentially could justify such an outcome. Significantly, nowhere does the Cargill Defendants' Supplemental Brief explain why the State's actions do in fact justify the imposition of fees and costs.

The second point is that the Court directed the Cargill Defendants to file supplemental briefing (1) "detailing all time and expenses incurred in reviewing the designations before they were withdrawn" and (2) "address[ing] whether those designations contained responsive information which was also withdrawn with the designation." Significantly, again, nowhere does the Cargill Defendants' Supplemental Brief do what the Court expressly directed them to do.

The third point is that the Court encouraged the parties to meet and confer to attempt to resolve the issues. Consistent with the Court's directive, the State did meet and confer with the Cargill Defendants. In the course of those meet and confers the State requested from the Cargill

Defendants (1) any legal authority suggesting withdrawal of a Rule 33(d) designation was improper when the interrogatory had been answered in a proper narrative; and (2) a detailed justification for any fees or costs alleged to have been incurred by the Cargill Defendants as a result of the withdrawal of the Rule 33(d) designations. Significantly, the Cargill Defendants did not provide this information to the State in the meet and confers.

III. Argument

A. The Cargill Defendants have not complied with this Court's Order

There can be no denying the fact that the Cargill Defendants have not complied with the directives contained in this Court's October 24, 2007 Opinion and Order. The Cargill Defendants' failure to provide this information not only has severely prejudiced the State in its ability to respond, but also has made it impossible for this Court to make a finding on the issue before it. The Cargill Defendants' failure to comply with the Order should not be rewarded. The sanctions issue should therefore be deemed abandoned with prejudice.

B. The Cargill Defendants are not entitled to fees and expenses under Rule 37

As a baseline matter, there is absolutely no basis for an award of fees and expenses under Rule 37(b)(2) -- the section under which the Cargill Defendants are moving. First, there is nothing in the Court's May 17, 2007 Order [DKT #1150] that required the State to make a Rule 33(d) designation when amending its interrogatory answers. Second, the Cargill Defendants have cited nothing in the Federal Rules or the caselaw interpreting the Federal Rules supporting the proposition that there is anything improper with a party amending an interrogatory response to utilize a narrative answer in place of a 33(d) designation.[2] Third, the Cargill Defendants have

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[2] Indeed, in answering the Cargill Defendants' interrogatories, the State's obligation was simply to answer each interrogatory "separately and fully in writing under oath . . . ." *See* Fed. R. Civ. P. 33(b)(1). As a means of fulfilling the obligation to answer an interrogatory, Rule

before them a fully responsive answer; in fact, the Court has found that the State's amended interrogatory answers are sufficient. *See* Order, p. 4. And fourth, when ordered by the Court to provide evidence of some prejudice from the State's withdrawal of its Rule 33(d) designations, the Cargill Defendants have come forward with no evidence. Thus, there is plainly no basis under Rule 37 for an award of sanctions in favor of the Cargill Defendants. The State's conduct has been entirely proper, and the Cargill Defendants' supplemental briefing is a filing that should have never been made.

C. The Cargill Defendants are not entitled to a stand-alone deposition of Secretary of the Environment Miles Tolbert

For the reasons just stated, there is no basis to sanction the State, monetarily or otherwise. Thus, there is no basis for granting a stand-alone deposition of Secretary of the Environment Miles Tolbert as a sanction.[3] Indeed, the premise asserted by the Cargill Defendants -- that either the State's original interrogatory answers containing Rule 33(d) designations are false or the State's amended interrogatory answers containing narrative answers and withdrawing the Rule 33(d) designations are false -- is itself a false dichotomy. There is a third alternative -- which, unlike the Cargill Defendants' suggestions, has the added appeal of actually being factually true: that both the State's original and amended interrogatory answers are true. Answers to the interrogatories at issue could have been determined from examining the State's business records. Answers to the interrogatories at issue could also have been determined from reviewing narrative responses. Either approach would have satisfied the requirements of Rule 33; the State had no

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33(d) affords the responding party the option to produce business records. There is no requirement that the responding party make Rule 33(d) designations.

[3] Tellingly, contrary to their assertion, *see* Supplemental Brief, p. 4, the Cargill Defendants never sought a Rule 30(b)(6) deposition of the State regarding the withdrawal of the Rule 33(d) designations; the Cargill Defendants apparently seek this deposition of Secretary Tolbert merely as an (unwarranted) sanction.

duty to use both methods of answering the interrogatories. Thus, the State, when called upon to amend its answers in accordance with the May 17, 2007 Order, made the tactical decision to utilize the latter approach because its counsel felt this approach would be more efficient. There is nothing nefarious or contradictory about what the State did, and it certainly does not call for a stand-alone deposition of Secretary Tolbert as a sanction on this issue.

Defendants have already signaled that they wish to depose Secretary Tolbert on a number of issues. The Cargill Defendants can, should they so desire, question Secretary Tolbert about this issue when that deposition occurs. The Cargill Defendants should not be permitted a stand-alone deposition of Secretary Tolbert on the limited issue of the withdrawal of Rule 33(d) designations. Such a deposition would not only be harassing and burdensome, but also would run afoul of the one-deposition rule. *See* Fed. R. Civ. P. 30(a)(2)(A)(ii).

IV. Conclusion

Given that (1) the State's actions were in accordance with the Federal Rules, (2) the Cargill Defendants have suffered no prejudice, and (3) the Cargill Defendants have failed to comply with this Court's Order, the Cargill Defendants' request for sanctions [DKT #1389] should be denied.

Respectfully Submitted,

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