UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	**Civil No. 05-CV-0329 GKF-SAJ**
Plaintiffs,	)	
	)	**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A STATUS CONFERENCE REGARDING MATTERS PERTAINING TO THE MOTION FOR PRELIMINARY INJUNCTION**
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

Defendants jointly submit this Response to Plaintiffs' Motion for a Status Conference Regarding Matters Pertaining to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 1465). Defendants welcome a status conference with the Court, but offer this response opposing Plaintiffs' requested pre-hearing schedule and protocol.

ARGUMENT

Plaintiffs' motion is essentially an improper motion for reconsideration of Judge Frizzell's December 7, 2007 directions concerning the hearing on Plaintiffs' preliminary injunction ("PI") motion, and serves as another example of Plaintiffs' continued attempts to seek unfair advantages. In this motion, Plaintiffs:

- Demand depositions of Defendants' experts, despite the Court's ruling that Plaintiffs had effectively foregone any right to depose the experts before the PI hearing through the extreme time constraints that Plaintiffs created.
- Seek enforcement of a proposed disclosure deadline that the Court declined to adopt.
- Request permission to ignore the Court's hard deadline for Plaintiffs' expert disclosures, a deadline that Plaintiffs have already repeatedly violated.

This Court should reject Plaintiffs' motion and adopt Defendants' reasonable alternatives.

A. Plaintiffs Have No Right to Depose Defendants' Experts Before the PI Hearing, and Defendants Will Timely Disclose Their Expert Materials.

Directly contrary to Judge Frizzell's ruling in the December 7, 2007 conference, Plaintiffs now contend that Defendants should be forced to make their experts available for deposition before the PI hearing, and should produce expert disclosures at least two weeks prior to the start of the PI hearing. (See Dkt. No. 1465 at 2-3.) Because Judge Frizzell has already weighed in on these issues and found against Plaintiffs, the Court should deny their demands.

First, Judge Frizzell concluded that, because of the nature and timing of Plaintiffs' PI motion and Plaintiffs' desire for an early hearing, "as a practical matter, the plaintiffs would not have an opportunity to depose defendants' experts before the preliminary injunction hearing." (Dec. 7, 2007 Tr.: Dkt. No. 1411 at 43:1-3.) Second, the Court rejected Plaintiffs' request that Defendants disclose all expert materials at least two weeks prior to the PI hearing. (See id. at 43:7-22.) Defendants are able and willing to provide expert materials by February 12, 2008 – ten days before the start of Defendants' case-in-chief. (Letter of R. George to L. Bullock: Dkt. No. 1465-2 at 1.) Given the extraordinary situation, this offer is reasonable and allows Plaintiffs sufficient time to absorb the information before the hearing.

At the December 7, 2007 hearing, Judge Frizzell stated the following with respect to these issues:

> So the question then is whether or not given the plaintiffs' extraordinary request here for a mid court proceeding preliminary injunction hearing relative to an issue in which none of the expert witnesses, and there being nine, have been identified prior hereto, despite the fact the plaintiffs have had the opportunity to avail themselves of court process and discovery, the question is whether or not the plaintiffs ought to be then given time to depose defendants' proposed experts.
>
> And the problem there is that that would require kicking the schedule so far out that it would defeat the plaintiffs' stated purpose and given that this is a preliminary proceeding which does not prejudice any issues as to final determination of the case, it would seem to me that as a practical matter that the

> plaintiffs would not have an opportunity to depose defendants' experts before the preliminary injunction hearing, but if plaintiffs insist on that I'm afraid it's going to kick us out to at the earliest late March.

(Dec. 7, 2007 Tr.: Dkt. No. 1411 at 42:13 – 43:5.) Plaintiffs fail to cite this key portion of the transcript for the Court's attention. Instead, Plaintiffs cite only to the following counter-proposal offered by Plaintiffs' counsel, to which neither the Court nor any Defendant agreed:

> Well, Judge, what I would propose is that if we could have a statement of the opinions to be offered by the expert, CV and the materials relied on in giving that opinion two weeks before any hearing that – or the materials considered as we're providing them, if they could do that two weeks before the hearing we'll go without a deposition of their experts. ....

(Id. at 43:7-12) (cited by Pls.' Mot. Status Conf.: Dkt. No. 1465 at 2.) This request was implicitly rejected by Judge Frizzell. In response he stated:

> All of these preliminary injunction matters are to some degree loosely governed. .... But in any event what I'm thinking of is setting this matter maybe the second and third week of February.

(Dkt. No. 1411 at 43:14-22.) The Court then set the hearing to commence on the first available trial block date in February. (Id. at 44:12-13.) Plaintiff did not seek reconsideration of the Court's holdings.

The Court made clear to Plaintiffs' counsel that if they wanted an early hearing on the PI motion, they would necessarily forego any pre-hearing depositions of Defendants' experts. The transcript makes clear that Plaintiffs' counsel understood and accepted this tradeoff.[1] The Court should reject Plaintiffs' audacious attempt to disavow this commitment. Plaintiffs choose to hide

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[1] See, e.g., id. at 47:22-48:1:

> For the plaintiffs, Your Honor, I think that we understand your thoughts and we appreciate your consideration and for taking the time, and I know that that's the responsibility that we've taken on ourselves that you have done this. So we appreciate it and take it seriously.

their experts for years rather than disclose them, as Judge Frizzell said, "despite the fact the plaintiffs have had the opportunity to avail themselves of court process and discovery." (Id. at 43:17-19.) The Court asked itself the question of "whether or not the plaintiffs ought to be then given time to depose defendants' proposed experts," and answered it in the negative. (Id. at 43:19 – 44:3.)

This Court should also deny Plaintiffs' attempt to impose their counsel's counterproposal – not endorsed by the Court – to set an expert disclosure deadline of February 8. Defendants and their experts are working round the clock to prepare a defense against accusations and data that Plaintiffs have been formulating for years. Judge Frizzell himself anticipated that defendants are "going to be taking depositions up to ... the first day of the hearing given the type time frame the plaintiffs have asked for." (Id. at 48:16-20 [sic].) February 12 is the earliest deadline that Defendants can realistically meet, which is why February 12 is the deadline offered.

B. The Court Should Reject Plaintiffs' Effort to Circumvent the Court's Deadline for Expert Disclosures by "Supplementing" Data and Opinions at Will, Up To and During the PI Hearing.

Defendants urge the Court to deny Plaintiffs' request to evade the existing expert disclosure deadlines by "supplementing" expert opinions up to and during the PI hearing. The Court's December 26, 2007 Order directed that Plaintiffs' production of expert materials "shall include all data, documents and information required to be disclosed pursuant to Federal Rule of Civil Procedure 26(a)(2)(B), including ... all data considered by these experts regardless of whether such data is relied upon by the expert ..." (Dkt. No. 1425 at 2.) The parties and the Court discussed the timing of these disclosures at the December 27, 2007 hearing, and the Court ultimately mandated that Plaintiffs produce to Defendants all such considered materials for each expert no later than 21 days before that expert's deposition. Plaintiffs' present motion

effectively asks the Court to let them ignore that deadline without offering any sound ground for reconsideration.

At the December 27 hearing, counsel for Plaintiffs proposed that "as a general matter, we will provide the reliance material on a rolling basis seven days before that [expert's] deposition is scheduled." (Dkt. No. 1411 at 31:5-7.) Defendants strenuously objected, arguing that these materials should have been disclosed when the PI motion was filed on November 15, 2007. Mincing no words, Judge Frizzell found:

> [I[n fairness, the basis for the data here needs to be available to the defendants.
> ....
> And I'm also thinking that this concept of a rolling production of materials upon which these experts relied only seven days before the deposition is scheduled of that ... plaintiffs' expert is **fundamentally unfair and basically seeks to obtain a tactical advantage over the defendants**.
> ....
> I'm toying with the idea of 21 days.

(Id. at 35:20 – 36:7 (emphasis added).) After hearing further argument from all sides, the Court imposed the 21-day deadline. In so doing, Judge Frizzell expressed concern at the short time frame and that Defendants would "not even see these materials until 21 days before the plaintiffs' experts' depositions, the defendants experts will need to review those materials and need to have time to do so as well as listen to the testimony of the plaintiffs' experts," especially given that none of the nine experts had been previously disclosed. (Id. at 41:21-15 – 42:11.)

Despite the December 26 Order and these rulings (and again failing to cite these key portions of the hearing transcript), Plaintiffs now seek the Court's permission for their experts to *alter* their opinions and rely on *additional* data relating to the PI motion at any time, including at the PI hearing itself. Specifically, Plaintiffs seek permission in contravention of Rule 26(a)(2)(B) and Judge Frizzell's rulings to "freely allow[]" their experts to "refine or bolster the opinions that were disclosed in connection with the State's Motion for Preliminary Injunction" to

whatever "extent the State's experts come across information that causes them" to want to so alter their opinions.[2] (Dkt. No. 1465 at 4.) Rule 26(a)(2)(B) mandates that expert reports "contain a complete statement of all opinions to be expressed and the basis and reasons therefore; [and] the data or other information considered by the witness in forming the opinions." The Rule allows neither for rolling production of data or alteration of opinion. Permitting Plaintiffs to make 11th- and even 12th-hour changes in both the substance and the basis for their experts' opinions would violate both the letter and spirit of Rule 26(a)(2)(B) and the Order of December 26. Moreover, such changes would be far more egregious and unfair than the rolling data production that Plaintiffs previously suggested and the Court rejected as "fundamentally unfair," and even more obviously "seeks to obtain a tactical advantage over the defendants." (See Dkt. No. 1411 at 36:1-5.) Plaintiffs' experts have had as long as 3 ½ *years* to research, form, and "bolster" their opinions; it is not unreasonable to ask these experts to stand by those opinions for the 3 ½ *weeks* between their depositions and the PI hearing.

Defendants' concern that Plaintiffs' experts will untimely disclose new reliance materials and / or opinions is not theoretical. In fact, last week Defendants were forced to postpone the key deposition of Dr. Roger Olsen when, just two days prior to the scheduled deposition, Plaintiffs produced an entirely new data set on which Dr. Olsen had relied. (See Ex. 1: Email of Jan. 24, 2008 from R. George to D. Page.) This Court should not countenance such blatant flouting of Court orders, particularly where a party is heavily prejudiced as were Defendants

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[2] Plaintiffs are mistaken in asserting that "Defendants have demanded that the State's experts stop working." (Dkt. No. 1465 at 3.) Defendants understand that all the parties' experts need to keep working toward the ultimate expert report disclosure deadlines later this year. Defendants understand that this case as a whole contains far broader issues than those at play in this PI hearing, and have never suggested, much less demanded, that Plaintiffs' experts cease work unrelated to the PI motion.

here. By their tactical late disclosure of this data, Plaintiffs effectively forced the delay of Dr. Olsen's deposition and substantially impaired Defendants' ability to depose Plaintiffs' other PI experts, many of whom rely heavily on Dr. Olsen's conclusions.

Defendants intend to seek specific relief as a result of these tactics by Plaintiffs' counsel, but that precise issue is not presently before the Court. For now, the Court should simply deny Plaintiffs' request to modify Judge Frizzell's disclosure deadline. This Court should reaffirm the 21-day deadline for disclosure of all reliance materials and opinions related to the PI motion, and admonish Plaintiffs that all untimely disclosures be inadmissible at the PI hearing.

C. Staggering Disclosure of Witness Lists, Exhibit Lists, and Page Designations Would Be Most Efficient for All Parties.

Defendants submit that the exchange of fact-witness lists, exhibit lists, demonstrative exhibits, and page designations for the hearing on the PI motion would most efficiently occur on a staggered basis, rather than simultaneously as proposed by Plaintiffs. Plaintiffs of course will go first at the hearing and bear the burden of proof on the motion. Other than Plaintiffs' experts, however, Defendants at present have no idea of what facts Plaintiffs intend to prove at the hearing or what witnesses they intend to call to do so. If Defendants must identify all witnesses and exhibits at the same time as Plaintiffs, Defendants will necessarily have to be overly broad in their designations to ensure their ability to counter all possible witnesses Plaintiffs *might* call and all possible exhibits Plaintiffs *might* offer. Such unavoidably overbroad pretrial lists would not best serve either the Court or the parties.

Defendants propose instead that the moving Plaintiffs make their disclosures first, followed three days later by Defendants' disclosures. Plaintiffs would then have three days after

Defendants' disclosures to produce their counter-designations and disclosures. (Letter of R. George to L. Bullock: Dkt. No. 1465-2 at 2.) Defendants respectfully submit that such a staggered process is more efficient for all parties, particularly given the time constraints in preparing for this PI hearing, and urges the Court in its discretion to adopt it.

Respectfully submitted,

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