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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 05-CV-0329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION FOR
LEAVE OF COURT TO FILE SUR-REPLY BRIEF

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 under CERCLA (hereinafter "the State"), and as provided by Rule 7.2(h) of the Local Civil Rules (N.D.Okla.), respectfully requests leave of Court to file a supplemental sur-reply brief in order to respond fully to new allegations made in Defendants' Reply in Support of Motion to Compel Plaintiffs' Compliance with Court's Order on Data Production (Dkt. #1672). In support of this Motion, the State submits:

1. Defendants have filed a reply brief containing **new** allegations and **new** matters not addressed in any previous briefs regarding their Motion to Compel (Dkt. #1605). The State should therefore be permitted to file a sur-reply brief.

2. Defendants filed their Motion to Compel Plaintiff's Compliance with the Court's Order on Data Production on February 29, 2008 (Dkt. #1605). The subject matter of the Motion to Compel was focused almost exclusively on perceived

deficiencies in the State's production of DNA data. Aside from Defendants' specific complaints about the DNA data production, Defendants raised generalized concerns about the production of additional *unknown* and *unspecified* data. Motion to Compel at 9–10 ("**If** additional undisclosed data exists…) (emphasis added). In this regard, Defendants broadly sought an order compelling the State to produce "…all data as required by the Order of January 5, 2007..." *Id.* at 10. Notably, Defendants did **not** ask the Court to impose sanctions or award attorney fees.

3. Defendants also shirked their responsibility to meet and confer by failing to give the State notice of its plan to file a Motion to Compel (as evidenced by the fact that the correspondence between counsel referenced in the Motion all dates back to December 2007).[1] Thus, the State was not given any opportunity to informally resolve Defendants' alleged discovery concerns outside of Court.

4. In any event, once the Motion to Compel was filed, the State made an exhaustive and diligent effort to determine whether there were any pending disclosures that needed to be made, such as any data which had only recently completed the State's internal Quality Assurance / Quality Control ("QA/QC") process. After this review, on March 25, 2008, the State produced **all** of the remaining data that was ready to be produced. In addition, on April 4, 2008, the State produced remaining chain of custody forms and photographs, which were clearly not "data" as sought in the Motion to Compel.

5. After producing the remaining data, the State rightfully argued in its Response that the Motion to Compel was now moot (Dkt. #1665). The State also

[1] Defendants' failure to try to informally resolve their alleged remaining production concerns with the State prior to filing the Motion to Compel is a ground to deny the sanctions which Defendants now seek in their Reply brief. Fed.R.Civ.Pro. 37(a)(5)(i).

specifically addressed Defendants' many unfounded and misleading allegations concerning the State's production of DNA data.

6. But rather than simply acknowledging that they now have the data they need, and that the Motion to Compel is in fact moot, Defendants have once again come out with both guns blazing. In their reply brief, Defendants argue that the data and other materials supplemented by the State on March 25 should have been produced earlier, and **for the first time**, seek an award of attorney fees as a sanction (Dkt. #1672). Importantly, Defendants also raise several new factually specific allegations concerning the March 25 production. Defendants point to these allegations in support of the argument that "Plaintiffs' own production proves that they have substantially violated both Rule 37 and this Court's January 5, 2007 Order." *Id.* at 7.

7. Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides that when discovery is provided after a motion to compel is filed:

> …the **court *must not* order th[e] payment [of attorney fees] if:**
>
> **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
>
> **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or
>
> **(iii)** other circumstances make an award of expenses unjust.

(emphasis added). The State continues to maintain that the Motion to Compel should be denied as moot. Nonetheless, the State should be given the opportunity to fully address the new allegations raised in Defendants' Reply and to show the Court why Defendants' new request for attorney fees should be denied under Rule 37(a)(5)(A). Specifically, the State will demonstrate that the March 25 production was more than substantially justified. The State will further show that the request for fees should be denied as

Defendants did not attempt in good faith to resolve their newly alleged discovery concerns before bringing them to the Court.

8. For these reasons, the State asks for leave of Court, under LCvR 7.2(h), to file a supplemental sur-reply brief. And due to the fact-intensive nature of Defendants' new allegations, the State asks for eighteen (18) days, or until Monday, April 28, 2008, in which to file the sur-reply.

9. The State has contacted Defendants' counsel, who state they do not object to the filing of a sur-reply but object to the time requested.

Respectfully submitted,

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I certify that on the 11th day of April, 2008, 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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