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

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S OBJECTION AND RESPONSE TO DEFENDANT SIMMONS FOODS, INC.'S MOTION TO COMPEL DISCOVERY

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STATE OF OKLAHOMA'S OBJECTION AND RESPONSE TO DEFENDANT SIMMONS FOODS, INC.'S MOTION TO COMPEL DISCOVERY

COMES NOW the 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, ("the State"), and for its Objection and Response to Defendant Simmons Foods, Inc.'s Motion to Compel Discovery states as follows:

I. INTRODUCTION

On or about May 9, 2006, Poultry Integrator Defendant Simmons Foods, Inc. ("Simmons") served a set of interrogatories seeking the following categories of information:

- Total P loading to Lake Tenkiller from 1985 through 2005 (see Interrogatory No. 1);
- Total N loading to Lake Tenkiller from 1985 through 2005 (see Interrogatory No. 2);
- Amounts of total P and total N loading to Lake Tenkiller attributable to poultry growers under contract with Simmons (see Interrogatory No. 3);
- How the State arrived at the information sought above (see Interrogatory No. 4); and
- The identity of individuals of persons who have suffered any adverse health effect as a result of water contact in the IRW which was caused by the land application of poultry litter (see Interrogatory No. 5).

Simmons also propounded a request for production of documents seeking copies of "all studies, datasets, articles and any other documents which support the State's answers to Interrogatories Number One through Four."

Apparently dissatisfied with the State's responses to that written discovery, Simmons has filed a Motion to Compel Discovery (Dkt. No. 844-1) without engaging in the "meet and confer" conference required by Federal Rule of Civil Procedure 37(a)(2)(B) and this Court's Local Civil Rule 37.1. Simmons' Motion merely states that "[r]equests to Plaintiff by email and letter have not succeeded in convincing Plaintiff to cooperate in discovery." (Def.'s Mot. at 2.) In reality, the email Simmons referred to was one from its counsel, Mr. Elrod, proposing that the parties dispense with any conference to resolve differences. [Ex. 1] Mr. Garren, counsel for the State, received that email and proposed a telephonic conversation, which counsel for Simmons failed to initiate prior to filing the motion. [Ex. 1] After Simmons filed its motion to compel, the State further reached out to Simmons, outlined its positions regarding its responses, and invited Simmons to contact the State's counsel to meet and confer on these issues. [Ex. 2]

By the terms of its own rule, the Court shall refuse to hear Simmons' Motion until its counsel demonstrates, in writing, its compliance with the Rules. LCvR 37.1. Simmons' counsel not only failed to comply with the Rules; it has proposed an evasion of the Rules and gone forward in defiance of it. At the time of this writing, Simmons has proposed a belated meeting to confer on outstanding issues. Only if such a meeting is actually conducted in good faith should the Court address the merits of Simmons' motion to compel.

Should the Court determine that despite Simmons' failure to comply with the Rules and decide to hear Simmons' motion, the State respectfully requests that the Court deny Simmons motion on the merits. Although the State has provided Simmons with a list of "potentially

responsive"[1] documents, Simmons glosses over the State's compliance with the Rules in an effort to paint the State in a negative light and to get to the materials that Simmons really seeks—work product data compiled by the State's consultants

As part of their preparation for litigation and trial, the State's counsel and its consultants have performed environmental sampling and analysis to characterize the impact of poultry waste and the Poultry Integrator Defendants' disposal practices on the IRW (the "Information"). As discussed below, the Information is protected by the attorney work product doctrine. In addition, the experts who performed this investigation and who are evaluating this Information have not been designated as testifying experts. Thus, the Information is entitled to the protection extended to non-testifying experts until the decision is made to designate the experts as testifying experts pursuant to Rule 26(a)(2).

The Information sought by Simmons need not be disclosed or produced in response to Simmons' discovery requests because it reflects the strategy of the State's counsel and thus: (1) the Information is trial preparation material – opinion work product – and not discoverable until the State makes its expert disclosures under Rule 26; (2) even if the Information could be divided into "fact" and opinion work product, Simmons has not shown a substantial need of such facts or that it is unable without undue hardship to obtain the substantial equivalent of them by other means; (3) the Information comprises facts known or opinions held by the State's expert consultants who have not yet been designated to testify at trial; (4) Simmons has failed to show any exceptional circumstances under which it would be impracticable for it to obtain facts or

[1] The Documents identified by the State are those documents which are, in part, responsive to Simmon's interrogatory identified to date. The State continues to identify and review documents and has informed Simmons that as documents are identified which are responsive the State will supplement its response.

opinions on the same subject by other means; and (5) the State has not waived any applicable work-product or consulting expert protections.

II. ARGUMENT

A. Until a good faith conference is held, Simmons' Motion is Not Ripe for Consideration

Simmons has made no satisfactory attempt to meet and confer regarding this discovery dispute as required by Federal Rule of Civil Procedure 37(a)(2)(B) and Local Civil Rule 37.1. Federal Rule 37 provides that if a party allegedly fails to answer an interrogatory or respond to a request for inspection:

> [T]he discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

Fed. R. Civ. P. 37(a)(2)(B). Local Civil Rule 37.1 is even more stringent:

> With respect to all motions or objections relating to discovery pursuant to Fed. R. Civ. P. 26 through 37 and 45, this Court <u>shall refuse to hear any such motion</u> or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach an accord. However, no personal conference shall be required where the movant's counsel represents to the Court in writing that movant's counsel has conferred with opposing counsel by telephone and (1) the motion or objection arises from failure to timely make a discovery response, or (2) distance between counsels' offices renders a personal conference infeasible. When the locations of counsels' offices, which will be stated particularity by movant, are in the same city or within thirty (30) miles of each other, a personal conference is always deemed feasible as to distance.

LCivR 37.1 (emphasis added).

As noted above, Simmons has failed in its obligation to meet and confer before filing its Motion to Compel. Indeed, it admits its failure in the single sentence comprising its "certification": "Requests to Plaintiff by email and letter have not succeeded in convincing

Plaintiff to cooperate in discovery." (Def.'s Mot. at 2.) The Court should consider the time and energy the State has been required to expend prematurely responding on the merits to issues which might have been resolved in a proper, good faith conference.

The seriousness with which courts view the need of the parties to meet and confer is reflected in the fact that courts across the country, relying on both the Federal Rules and their own local rules, have gone so far as to summarily deny a party's motion to compel when the party failed to satisfy the mandatory meet and confer requirements. The District of Nevada, in Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166 (D. Nev. 1996), provided one of the most exhaustive analyses of the meet and confer requirement in the context of a motion to compel. In that case, defendant moved to compel plaintiff to respond to discovery, and in its "certification" stated only that "after personal consultation and sincere effort to do so, counsel have been unable to satisfactorily resolve this matter." Id. at 172. The court rejected defendant's certification as unsatisfactory.

First, the court noted that perfunctory statements about attempting to resolve a discovery dispute are inadequate. Instead, a certification must include at least "(1) the names of the parties who conferred or attempted to confer, (2) the manner by which they communicated, (3) the date and time of that communication, (4) the specific discovery disputes discussed, and (5) the results of their meaningful discussions, if any, or an explanation as to why such meaningful discussion were not had." Id. at 173. The Shuffle Master court interpreted Federal Rule 37 as requiring "a personal or telephonic consultation during which the parties engaged in meaningful negotiations or otherwise provide legal support for their position," id. at 172, an interpretation that is made explicit in this Court's Local Rule 37.1. The court concluded by denying defendant's motion to

compel.[2] This Court should require Simmons to make a good faith effort to meet and confer with the State before even entertaining its Motion to Compel.

B. The State's Responses to Simmons' Interrogatories and Request for Production are Sufficient.

The State responded to Interrogatory Numbers One, Two, and Four and to Request for Production Number One[3] by providing Simmons with an index of studies, a copy of which is attached hereto as Exhibit 3, which are available to the public, and documents with corresponding indices that contain the information sought by Simmons. Rule 33 provides as follows:

> (d) Option to Produce Business Records.
>
> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory

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[2] Other courts are in agreement. This Court has noted that, in the context of a motion for attorney fees, a plaintiff's motion "was subject to being rejected without further consideration for failure to comply" with the Northern District's Local Rules 7.1E and 37.1. Rice v. United States, 164 F.R.D. 556, 558 (N.D. Okla. 1995). The Southern District of New York has denied a party's motion to compel simply because it failed to satisfy the Federal and local rules requiring an adequate conference. Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 99-100 (S.D.N.Y. 1997) ("In the case at bar, this Court finds that the instant motion to compel is improper because the parties have not established that they have adequately conferred in an attempt to resolve their disputes with respect to [movant's] document requests.") The District of Kansas has reached the same conclusion: "In this instance the court cannot find that plaintiff made a reasonable effort to resolve the dispute before bringing the motion to compel. The court overrules the motion to compel for failure of plaintiff to comply with these rules." Ballou v. University of Kansas Med. Ctr., 159 F.R.D. 558, 560 (D. Kan. 1994) see also Myers v. Colgate-Palmolive Co., 173 F.R.D. 296, 300 (D. Kan. 1997) ("The court finds that due to plaintiff's failure to file a certificate of compliance in accordance with Fed. R. Civ. P. 37(a)(2)(B) and [the local Kansas district court rule], as a part of the motion to compel, the motion must be overruled.").

[3] It is perplexing that Simmons avers to this Court that "The State declined to answer any of the interrogatories or produce any documents" (Def's Mot. at 3) and yet attaches responsive indexes and complains at length how the State's responses by way of the production of documents or reference to publicly available documents is insufficient under the rules (Def's Mot. at Ex. 4)

> to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Fed. R. Civ. P. 33(d). The State maintains that its responses to Interrogatories Number One, Two and Four comply with the Federal Rules of Civil Procedure. Moreover, by producing these documents, indices, and the reference lists, the State has sufficiently responded to Request for Production Number One. Further, the State continues to identify and review documents in its rolling initial production to the defendants. As stated before, as the State indentifies documents which are responsive to Simmons interrogatories, the State will supplement its response.

The State responded to Interrogatory Number Three by stating that its position is that the subject injury is indivisible. The State further responded that it would supplement this response. As a supplement to its response through correspondence, dated July 17, 2006 from R. Nance to J. Elrod, the State has provided the following[4]:

> Without waiving any objections stated in the State's responses to your interrogatories, the State has not identified to date, any publicly available studies, reports or data demonstrating Phosphorous and Nitrogen loading attributable to Simmons growers and not subject to the State's claim of privilege or protection. However, should the State locate any Simmons specific studies, reports or data which is publicly available and not subject to the State's claim of privilege or protection, the State will supplement its answer to the interrogatory.

[Ex. 3]. At a proper good faith meeting to confer on discovery issues, the State is prepared to tell Simmons that, at the present time, it does not know how much of the phosphorus and nitrogen

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[4] This position is well supported. In City of Tulsa v. Tyson Foods, Inc., et al., 258 F. Supp. 2d 1263, 1300 (N.D.Okla.2003), withdrawn in connection with settlement, the Court held:

> In this case, plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant. Rather, plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs.

loading to lake Tenkiller is attributable to Simmons acting through its growers. The State has also supplemented its response to Interrogatory No. 5: "At the present time, the State has not identified the identity of any person who has suffered adverse health effects as a result of water contact in the IRW caused by the land application of poultry litter." [Ex. 3] Presumably, this supplementation provides Simmons with the responses that it claims it "deserves." Therefore, the State submits that the sufficiency of its responses to these interrogatories is no longer at issue. Had Simmons conferred in good faith with the State prior to filing its motion, this matter would have been resolved and the burden on the Court, lessened.

C. The Documents Sought Are Protected Under the Work-Product Doctrine of Rule 26(b)(3).

Simmons is dissatisfied by the State's response—not because the State has failed to respond to the discovery, but because the State has objected and refused to produce information and documents that are prepared in anticipation of litigation and protected by the work product doctrine. Federal Rule of Civil Procedure 26(b)(3) provides in part:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative or a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Simmons does not meet any of the conditions imposed by Rule 26(b)(3) that would allow discovery of the information.

First, Simmons has not shown that it has a substantial need of the materials in the preparation of its case. Second, Simmons can obtain the substantial equivalent of the Information

without undue hardship. Only if these required showings are made, which is not the case, need the Court consider if the documents requested are work product. If the Court gets to the work product issue, it will find that the Information sought would provide to Simmons the State's attorneys' mental impressions, conclusions, opinions, and theories of the case. The Information is opinion work product because the methods and means of environmental sampling and analysis provide insight into the State's theory of how to prove its case. The documents sought are not, as Simmons contends, merely factual information, but are a road map to "reverse engineer" the State's opinions, conclusions and legal theories.

1. The Documents and Information are Trial Preparation Materials That Contains Opinion Work Product

Simmons claims that it "has not asked for the opinions of any expert witnesses upon which the State intends to rely" or "the secret theories of legal strategy of the State's lawyers." (Def.'s Mot. at 11) (emphasis added). This claim is disingenuous in the extreme, because "loading" of Phosphorus and Nitrogen to Lake Tenkiller is not a simple perceptible fact. Instead, it is a calculation which is a matter of expert opinion based upon an analysis of various data gathered by consultants acting under the direction of counsel. Loading calculations made by these experts are precisely matters of expert opinion, rather than matters of elemental fact.

Further, an examination of the requests, however, shows that they seek more than just "factual information." The requests seek copies of "all studies, datasets, articles and **any other documents** which support your answers to Interrogatories Number One through Four." (emphasis added) Simmons' explicitly seeks documents and tangible things prepared in anticipation of litigation within the meaning of Rule 26(b)(3).

2. Simmons Has Not Shown a Substantial Need for the Information and Documents It Seeks

Simmons has not met its first burden for obtaining even "fact" work product. The only time a party may discover "fact" or "ordinary" work product is when it shows it has "substantial need of the materials in the preparation of its case." Fed. R. Civ. P. 26(b)(3). Here, Simmons merely asserts that a party can obtain the Information upon a showing of "substantial need and the inability to obtain substantially equivalent information without undue hardship." (Def.'s Mot. at 16.) Simmons entire argument of substantial need is that "only [the State] knows how much P or N loading it contends occurred in period that is the subject of the discovery requests." (Id.)

Simmons' "substantial need" argument is insufficient. A party cannot make a showing of substantial need when it could have conducted exactly the same testing or investigation at the same time as its adversary. See, e.g., Goodyear Tire & Rubber Co. v. Cles Power Supply, Inc., 190 F.R.D. 532, 539 (S.D. Ind. 1999) (rejecting discovery of witness statements provided three years earlier because the requesting party could have begun its own investigation much earlier if it had wanted to); Martin v. Monfort, Inc., 150 F.R.D. 172, 174 (D. Colo. 1993) (ruling no substantial need existed when "[n]o showing has been made as to why the [party] could not have performed similar studies" during the same time frame); Almaguer v. Chicago, Rock Island, & Pac. R.R., 55 F.R.D. 147, 149 (D. Neb. 1972) (finding that unexplained failure to interview witnesses immediately after an incident does not create substantial need for discovery of opponent's information about and statements from those witnesses). Simmons has been aware of the adverse environmental impacts of its waste disposal practices for many years. Simmons has not, and cannot, claim that it could not hire its own consultants to gather data and make its own calculation of phosphorus and nitrogen loading to Lake Tenkiller, and the quantum of that loading caused by its own waste generated by its own birds.

3. Simmons Has Not Shown It Is Unable Without Undue Hardship to Obtain the Substantial Equivalent of the Materials Sought

Again, assuming arguendo that the information comprises "fact" work product rather than "opinion" work product, Simmons also fails completely to address the "undue hardship" and "substantial equivalent" test of Rule 26(b)(3) that, in some limited conditions, could allow discovery of fact or ordinary work product. This is because it cannot. Simmons certainly has the resources to conduct the sampling and testing necessary to calculate the historical loading to the lake. Simmons has set forth no facts verifying that it would suffer undue hardship or, for that matter, even made a conclusory claim that it would suffer undue hardship.

4. Even if Simmons had established a substantial need and undue hardship, these documents and information are protected as opinion work product.

Simmons' expansive definition of "fact" includes not just raw data, but the way that the State, its counsel and consultants interpret that data to calculate loading to Lake Tenkiller. Contrary to Simmons' position, the environmental sampling work and analysis performed by the State's consulting experts – and the fact that counsel chose to perform this work – reveal the mental impressions and strategy of the State's counsel preparing its case for trial. In this case, attorneys for the State have worked closely with its experts, and in so doing, counsel has discussed evidentiary objectives and trial strategy with its experts as part of the process of designing and planning collection of the information and analysis recorded in the documents sought by Simmons. Further, the means whereby the State's counsel and its consultants are studying loading to the lake are intertwined with other aspects of the State's scientific proof.

The environmental testing and analysis performed by the State in this case contains the imprint of its attorneys' mental impressions and theory of the case. In Shoemaker v. General

Motors Corp., 154 F.R.D. 235 (W.D. Mo. 1994), the issue before the court was whether the plaintiff would be allowed to attend all litigation testing performed by the defendant. Id. at 236. The plaintiff requested to be present at all testing because it was afraid the defendant would perform tests by itself and later claim discovery of the tests would be barred by the work product doctrine. Id. Plaintiff also claimed that its attendance was necessary to insure the integrity of the test at issue, its foundation, and its results, and also to allay its fear that the defendant would conduct numerous tests to get the result it wanted. Id.

The defendant argued that the presence of plaintiff's attorney "will reveal protected attorney work product and consulting expert information." Id. The court agreed: "The decision of what to test and how is essentially a working-out of the [party's] interpretation of facts and testing of its [case]. Those processes involve either the attorney's mental processes or the opinions of consulting experts. Both are protected." Id. The court reiterated that "the decision about what to test and how is the embodiment of the attorney's legal theories." Id. Finally, the court recognized that lawyers need the assistance of experts to design and conduct tests, and if the experts were designated to testify, the plaintiff would be able to conduct discovery on the tests later. Id. If the experts were retained for consultation only, however, the facts known and opinions held by them would not be disclosed because the plaintiff had not shown any "exceptional circumstances." Id.; see also AK Steel Corp. v. Sollac & Ugine, 234 F. Supp. 2d 711, 714 n.2 (N.D. Ohio 2002) (recognizing that testing data and results of gas composition tests "could reflect opinions and mental impressions of counsel").

The recognition that testing, sampling, and their analysis provide a window for a party to gain insight into the opposing party's mental impressions and theory of the case is based on the truism that the mere order or selection of documents can represent the mental impressions and

legal theories of a party's attorney. In Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), the court confronted the issue of "whether the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of Hickman v. Taylor, 329 U.S. 495 (1947)." Sporck, 759 F.2d at 315. The court determined that it was.

The court agreed with the petitioner's argument that "the selection process itself represents [party] counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation." Id. Moreover, the court determined that such a selection or compilation was entitled to the "highly-protected category of opinion work product," not just the protection afforded to "ordinary," or "fact," work product. Id. at 316.[5] Relying on Hickman, the court realized that "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Id. The Eighth Circuit stated succinctly the rationale for this legal tenet: answers to questions concerning the selection and compilation of documents can "reveal more than the mere existence of documents." Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1987).

Such is the case here. Counsel for the State chose the experts to do the Information gathering (sampling, testing, analysis, etc.) and worked with these experts to develop the plan to gather and evaluate the Information. These are pieces of a puzzle that the State's counsel have

[5] Opinion work product is either entitled to absolute protection or discoverable only under compelling circumstances. Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 704 n.12 (10th Cir. 1998). The Tenth Circuit has not yet decided the issue. Id. At any rate, Defendant had not provided any compelling circumstances for discovery of the Information. Also, as the State argues below, it is doubtful that it can even meet the lesser "substantial need" and "undue burden" test that would allow discovery of "ordinary" or "fact" work product.

had to arrange, and the arrangement of these pieces reflects the mental impressions, strategy, opinions, and theories of the State's attorneys. Thus, the requested information comprises opinion work product, deserving the highest degree of protection.

5. Raw Data Can be "Opinion" Work Product, and is, at a Minimum, "Ordinary" or "Fact" Work Product

Simmons claims that all "facts" discovered by a party during its investigation of its case are unprotected "facts." (Def.'s Mot. at 11-14.) It also claims that its interrogatories and requests for production seek only such "facts." Both of these assertions are incorrect. First, as noted above, the expert gathering of data and its analysis is the only way to determine the phosphorus and nitrogen loading to the lake . However, Simmons seeks not only the loading, but all documents pertinent to it, necessarily including the supporting data and analysis, which is "opinion" work product.

Second, even assuming arguendo that the raw data does not constitute "opinion" work product, but rather "fact" work product, the case law is clear that ordinary work product includes "raw factual information." Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) ("Ordinary work product includes raw factual information."); Hollinger Int'l Inc. v. Hollinger Inc., 230 F.R.D. 508, 511 (N.D. Ill. 2005) (same); O'Connor v. Boeing N.A., Inc., 216 F.R.D. 640, 642 (C.D. Cal. 2003) (same). Thus, "[o]rdinary work-product generally consists of 'primary information, such as verbatim witness testimony or objective data' collected by or for a party or a party's representative." Robinson v. Texas Auto. Dealers Ass'n, 214 F.R.D. 432, 441 (E.D. Tex. 2003) (quoting Kent Corp. v. NLRB, 530 F.2d 612, 624 (5th Cir. 1976)) (emphasis added), vacated in part sub nom. In re Texas Auto. Dealers Ass'n, 2003 WL 21911333 (5th Cir. July 25, 2003).

Furthermore, the cases Simmons cites are not on point. For example, Simmons leans heavily on Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86 (W.D. Okla. 1980) (which in turn relies almost entirely on 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2023 (1970)). But the fact at issue in Feldman was not gathered by a consulting expert working with counsel. The fact was not related to expert analysis and testing. It was whether a witness had discovered that a party had acquired certain payments from another company. 87 F.R.D. at 89.

An examination of the cases cited by Wright and Miller also makes clear that the sort of facts at issue in those cases are not the results of empirical, fact-gathering investigations such as environmental sampling, testing, and analysis. Rather, the factual information unprotected as "ordinary" or "fact" work product has to do with whether certain people or documents exist, whether something happened, or the names and addresses of witnesses.[6] None of this relates to facts gathered by experts.

Likewise, the information sought in Resolution Trust Corp. v. Dabney, 73 F.3d 262 (10th Cir. 1995), cited by Simmons, bears no similarity to the sort of data and analysis Simmons seeks here. In Resolution Trust, the court, relying on Feldman, held that "work product does not preclude inquiry into the mere fact of an investigation." 73 F.3d at 266. The privilege log provided by the State discloses the fact that environmental investigations have occurred.

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[6] See 8 Wright & Miller, supra, at § 2023 n.20 (citing LaRocca v. State Farm Mut. Auto. Ins. Co., 47 F.R.D. 278, 282 (W.D. Pa. 1969) (whether particular papers or documents exist); United States v. Glaxo Group Ltd., 302 F. Supp. 1, 17 (D.D.C. 1969) (names and addresses of parties to communications); McCall v. Overseas Tankship Corp., 16 F.R.D. 467, 469 (S.D.N.Y. 1954) (work-product doctrine does not apply to information sought as to whether there was such work product but only to the product itself); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524, 527 (M.D.N.C. 1967) (information concerning the existence of statements and pictures); Harvey v. Eimco Corp., 28 F.R.D. 380, 380-81 (E.D. Pa. 1961) (information as to the existence and whereabouts of reports, statements, and opinions); Taylor v. Atchison, T. & S.F. Ry. Co., 33 F.R.D. 283, 284 (W.D. Mo. 1962) (names of witnesses to occurrence)).

In summary, Simmons' argument that the information and documents it seeks are not protected work product under Rule 26(b)(3) fails on all counts. First, Simmons has not shown a "substantial need" for the information and documents. Second, it has not shown it is unable without undue hardship to obtain the substantial equivalent of the information and documents. Third, the information and documents are opinion work product, entitled to the highest degree of protection. And fourth, even if, as Simmons erroneously claims, the information and documents comprise mere facts or raw information, they are protected as "ordinary" or "fact" work product. Therefore, the Court should deny Simmons' Motion under Rule 26(b)(3).

D. The facts and expert opinons Sought Are Strictly Protected Under Rule 26(b)(4)(B) Because They Are Facts Known and Opinions Held by Retained Experts Who Have Not Yet Been Designated as Testifying Experts

The lake loading "facts," actually the result of expert study and analysis, sought by Simmons are also strictly protected under Federal Rule of Civil Procedure 26(b)(4)(B), which provides:

> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(B) (emphasis added).

1. The Facts Known and Opinions Held By a Retained Expert Who Has Not Been Designated a Testifying Expert Are Entitled to the Same Protections Afforded Those Of a Non-Testifying Expert

Simmons first attempts to evade the ambit of Rule 26(b)(4)(B) by complaining that the State has not yet designated its expert witnesses for trial, despite the fact that Rule 26(a)(2)(C)

dictates that disclosure of expert testimony "shall be made at the times and in the sequence directed by the court," or at least 90 days before the trial date. Fed. R. Civ. P. 26(a)(2)(C). The Court has not yet directed when the parties must disclosure their expert witnesses, by a scheduling order or otherwise, and trial has not yet been set. Simmons' position apparently is that a party can seek all facts and opinions gathered by any expert when the discovery gun goes off. But that position is squarely contradicted by the Federal Rules of Civil Procedure.

The rationale for the protection of non-testifying expert witnesses from discovery is threefold: (1) such discovery is not essential for cross examination; (2) allowing routine discovery of non-testifying experts "would tend to deter thorough preparation of the case and reward those whose adversaries were most enterprising"; and (3) allowing access to the opinions of retained non-testifying experts would provide an opportunity for the opponent "to call them as witnesses to attest to views that the opponent found congenial." 8 Charles Alan Wright et al., Federal Practice and Procedure § 2032 (2d ed. 1994); see also Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496, 502 (10th Cir. 1980) (noting that Rule 26 was designed to "prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation").

Despite the rationale for the protection of non-testifying experts and the fact that the State is not yet required to designate its testifying experts, Simmons claims that it is entitled to the opinion of the State's experts on loading and copies of the State's consultant's underlying data and work product. Simmons' position is, however, directly contrary to the decisions of courts that have examined this very issue and to the advisory committee notes to Rule 26.

For example, the Kansas district court recently addressed the issue whether an affidavit submitted by an undesignated expert was entitled to protection under Rule 26(b)(4)(B).

Employer's Reinsurance Corp. v. Clarendon Nat'l Ins. Co., 213 F.R.D. 422, 424 (D. Kan. 2003). The court framed the issue as whether the facts known and opinions held by a party's expert are discoverable if the expert has not been identified as an expert expected to testify at trial. Id. It noted that the intention to call an expert to testify at trial "may fluctuate from time to time depending upon whether that party perceives the expert's opinion will help or harm its case." Id. "Thus," the court determined, "whether a specially retained expert is regarded as a testifying expert or a consulting expert depends upon whether the party who retained the expert has designated the expert as one who is expected to be called as a witness at trial." Id. at 424-25. The court concluded that because the party never identified the expert as a testifying expert, his affidavit was accorded the protection of Rule 26(b)(4)(B). Id. at 425.

Similarly, in Moore U.S.A. Inc. v. Standard Register Co., 206 F.R.D. 72 (W.D.N.Y. 2001), the defendant filed a motion to compel production of documents gathered by plaintiff's expert consultant. Plaintiff contended – as the State does here – that the discovery sought was protected under the non-testifying expert provision of Rule 26(b)(4)(B) because the expert had not been designated as an expert expected to testify at trial. Id. at 75. The court agreed. First, it rejected the defendant's claim that the party seeking to invoke the protection "bears the burden of establishing the fact that [the expert] is a non-testifying expert in this case." Id. Then, in language directly applicable to the issue before this Court, the Moore court recognized that "[w]hile it is true that [plaintiff] has not yet designated [the expert] as a testifying or a non-testifying expert, neither has the court entered a scheduling order regarding the deadline for the disclosure of the parties' respective trial experts." Id. Finally, the court observed that until the court set a date by which the plaintiff must decide whether to identify the expert as one of its trial

experts, the expert "'is entitled to the protection afforded by Rule 26(b)(4)(B).'" Id. (quoting Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 43 (S.D.N.Y. 1997)).

The court in Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd., 154 F.R.D. 202 (N.D. Ind. 1993), reached the same conclusion: "Until such time as [the party claiming the protection] affirmatively has to identify a testifying expert, they are entitled to assert that [the expert] will not be a witness. In doing so they operate within the spirit of Federal Rule of Civil Procedure 26(b)(4)(B)." Id. at 207 n.8.

Even the advisory committee note to Rule 26(b)(4) makes clear the error of Simmons' position. "Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be." Fed. R. Civ. P. 26 Advisory Committee Note, 1970 Amendment, subdivision (b)(4) (emphasis added). See also Hoover v. United States Dep't of Interior, 611 F.2d 1132, 1141 n.12 (5th Cir. 1980) ("The Rule is clear that the test for whether a particular expert should be treated under Rule 26(b)(4)(A) or Rule 26(b)(4)(B) is determined by whether the expert is "expected to testify," and not by whether he "may testify."); In re Shell Oil Refinery, 132 F.R.D. 437, 440 (E.D. La. 1990). Simmons' position that any expert's work should be discoverable before a court has set a schedule for disclosure of expert witnesses and testimony runs contrary to the rationale of the Federal Rules and to the decisions of courts that have considered the issue. The Court should reject Simmons' Motion because, as the case law makes clear, the facts know and opinions held by a retained expert who has not been designated as a testifying expert are afforded the same protections as the facts and opinions of a non-testifying expert.

2. Simmons Cannot Make a Showing of Exceptional Circumstances

"The party seeking discovery from non-testifying retained experts faces a heavy burden." Ager, 622 F.2d at 503 (citing Hoover, 611 F.2d at 1142 n.13); 8 Charles Alan Wright et al., supra, § 2032. The exceptional circumstances requirement "has been interpreted by the courts to mean an inability to obtain equivalent information from other sources." In re Shell Oil Refinery, 132 F.R.D. at 442. The party seeking discovery from a non-testifying expert may meet the exceptional circumstances standard in one of two ways. "First, the moving party may show that the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party's expert has an opportunity to observe it. Second, the moving party may show there are no other available experts in the same field or subject area." Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1152 (N.D. Ill. 2001).

Here, Simmons has not argued and, for that matter, cannot argue either condition exists. First, recalling that Simmons has asked about phosphorus and nitrogen loading to Lake Tenkiller during the period 1985-2005, it is clear that, while the conditions of the IRW and Lake Tenkiller have deteriorated over the years, the IRW and Lake Tenkiller are still in existence and Simmons' own experts can study it to determine the requested historical loading. Simmons can, by designing scientifically reliable sampling and analysis methods, determine this information for the twenty year period as easily as can the State. Courts are particularly reluctant to grant discovery of non-testifying experts to a party when it, like Simmons here, has made no timely effort to get the information itself. Hoffman v. Owens-Illinois Glass Co., 107 F.R.D. 793, 795 (D. Mass. 1985) (finding no exceptional circumstances because "any impracticality which the defendant . . . now faces is a result of its own counsel's tardiness in seeking to inspect the machine"); Spearman, 128 F. Supp. 2d at 1152 ("Defendant had ample opportunity to conduct

whatever investigations it desired . . . ."). Second, environmental consultants and experts in the same field or subject area are obviously available to Simmons and the other Poultry Integrator Defendants.

Simmons cannot meet the very strict standards of the "exceptional circumstances" requirement of Rule 26(b)(4)(B) for the same reasons it cannot meet the "substantial need" requirement of Rule 26(b)(3). Therefore, the State's information is not discoverable under Rule 26(b)(4)(B) and the Court should deny Simmons' Motion to Compel.

E. The Information and Documents Sought Are Not Subject to "At Issue Waiver"

Simmons argues that the State has waived any privilege or work product protection and has made "that information fair game by suing Simmons and relying on it." (Def.'s Motion at 15) This simple assertion of relevance ignores both the entire body of law protecting work product, including the provisions of Rule 26, and the fact that the State has not yet named it's trial expert witnesses, so it is not certain at the present time that the state will rely on the information sought or that it has developed the information Simmons seeks.

Further, Simmons' argument that the State waived its work product privilege for the information and documents sought is merit less because the circumstances fail to satisfy the three-part Hearn analysis for "at issue waiver" adopted by this Court. For a party to waive an otherwise applicable privilege by placing information "at issue," three factors must be satisfied:

1. the assertion of the privilege must be the result of some affirmative act, such as filing suit or asserting an affirmative defense, by the asserting party;

2. the asserting party, through the affirmative act, must have put the protected information at issue by making it relevant to the case; and

3. if the privilege was applied, would it deny the opposing party access to information that was vital to the opposing party's defense.

Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 335 (N.D. Okla. 2002) (citing Hearn v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975)); Cardtoons L.C. v. Major League Baseball Players Ass'n, 199 F.R.D. 677, 681 (N.D. Okla. 2001) (citing Hearn, 68 F.R.D. at 580); see also Frontier Ref. Inc. v. Gorman Rupp Co., 136 F.3d 695, 699 (10th Cir. 1998).

The circumstances in this case do not satisfy the second and third Hearn factors. Because the State filed the instant action, the "affirmative act" required by the first factor is arguably satisfied. However, filing an action alone is insufficient to create a waiver of privilege. See, e.g., Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 416 (D. Del. 1992) (finding that "at issue waiver" cannot be implied merely because one party instituted an action against another party).

Regarding the second Hearn factor, Simmons asserts that the State placed the information and documents sought "at issue" in this case by mentioning the existence of sampling information in Plaintiffs' Motion for Leave to Conduct Limited Expedited Discovery. (Def.'s Mot. at 7-8.) The fact that the State mentions the existence of sampling information in a motion for discovery is insufficient to place the information "at issue." Under the second factor of the Hearn analysis, whether information is "at issue" is determined by whether it is relevant to a party proving the elements of its case, defending a case, or addressing affirmative defenses. See, e.g., Sinclair Oil, 208 F.R.D. at 335 (addressing whether information allegedly relevant to the elements of a cause of action was "at issue"); Cardtoons, 199 F.R.D. at 682 (discussing whether information relevant to an alleged affirmative defense was "at issue"). A mention of the existence of sampling information in a peripheral matter such as a motion for limited discovery is not the type of event contemplated in the second factor of the Hearn analysis.

The third factor of the Hearn analysis is not satisfied in this case because the information and documents sought are not vital to Simmons' ability to defend the case, and similar information is available from sources other than the State. In Frontier Refining the Tenth Circuit reviewed a decision of a district court involving the Hearn analysis. 136 F.3d at 701-03. The district court had failed to conduct any analysis of whether the information allegedly subject to "at issue waiver" was available from any source other than the materials over which the plaintiff claimed privilege. Id.

The Frontier Refining court explained that for privileged information to be subject to "at issue waiver" the information must not be available from another source. Id. at 701 (citing Hearn, 68 F.R.D. at 581; Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 20 (1st Cir. 1988)). The court held that because the defendant had access to information from fact and expert witnesses, the privileged information and communications defendant was seeking from the plaintiff were not "vital" to its defense, and reversed the district court's ruling that "at issue waiver" existed. Id. at 702 (reversing the district court based on an erroneous interpretation of "vital" and finding that an abuse of discretion occurred).

Simmons seeks results of sampling that the State's counsel and their consultants designed and undertook in anticipation of litigation and as part of the State's trial preparation. It argues that it has "no other means" of obtaining sampling information. (Def.'s Mot. at 8.) As noted above, this argument is unconvincing. Simmons has had and continues to have the ability to collect similar information. In the event the State intends to have any expert witnesses who will

be called at trial rely upon the information and documents sought, Simmons will have access to that information at that time.[7]

Simmons states it "needs to know as soon as possible what constituents Plaintiffs believe they have found in elevated levels in the IRW and where in the IRW the relevant samples were taken so that it can conduct its own investigation and, if necessary, environmental sampling to determine the extent of the alleged contamination and the likely source of any such contamination." (Def.'s Mot. at 8.) Simmons does not need to wait for the conclusion of the State's investigation. It can do the same investigation now. There is no connection between Simmons' desire to know immediately what the State has found and Simmons' ability to conduct its own investigation.

Finally, any implied claim by Simmons that the Information will "ease" its defense provides no support for the claim that the Information is "vital" to Simmons' defense, as required by the third Hearn factor. See, e.g., Cardtoons, 199 F.R.D. at 681-82 ("The Court will not compel the discovery of otherwise privileged documents simply to permit a party to more easily prove the elements of his cause of action."); Sinclair Oil, 208 F.R.D. at 335-36 (holding that the court would not compel discovery of otherwise privileged documents simply to permit a party to more easily prove its case).

Simmons has failed to establish the second and third elements of the Hearn "at issue waiver" test. Therefore, the Court should reject Simmons' "at issue waiver" argument and deny Simmons' Motion to Compel.

F. The State's Privilege Log Complies with this Court's LCvR 26.4

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[7] As mentioned previously, in the event any of the State's experts were to rely on the information and documents at issue in forming their opinions that would be offered at trial, the State will be required to disclose this information to Defendant pursuant to deadlines scheduled by the Court.

The State has prepared a privilege log of 308 items, which is a work in progress. As ordered by the Court, Counsel will bring a sampling of those items to the hearing of August 10, 2006, should the Court wish to review them en camera. The privilege log is in the format required by this Court's LCvR 26.4 and sufficiently describes the documents and data so that other parties may assess the applicability of the privilege or protection. Because Simmons makes no complaint about any specific item on the privilege log, the State cannot respond further.

G. The State relies upon its specific objections

Without conceding any impropriety in its general objections, the State has not withheld any document based only upon its general objections, but has done so based upon the specific objections set forth for each interrogatory or the request for production of documents. The State has submitted, as part of its privileged log, a general objection for documents not yet identified to date which contain privileged or confidential information. All other documents identified on the privilege log are made upon specific objection. The general objection is not intended to claim privilege over a series of documents identified without providing further specific objections, but rather a place holder for documents that are identified in the State's continuing production process.

III. CONCLUSION

For reasons set forth above, the State respectfully requests that (1) the Court refuse to hear Defendant Simmons Foods, Inc.'s Motion to Compel Discovery until Simmons complies with Federal and Local meet and confer requirements and resubmits it Motion to Compel, if necessary, after the conference or, in the alternative, (2) deny the relief sought in Simmons' Motion to Compel.

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July 31, 2006

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I hereby certify that on this 31st day of July, 2006, I electronically transmitted the attached document to the following:

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