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-GKF-PJC
TYSON FOODS, INC., et al.)
Defendants.)))

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO SERVE REBUTTAL EXPERT REPORTS

Defendants respectfully oppose Plaintiffs' motion to amend the expert discovery scheduling order to allow for rebuttal reports. ("Motion" or "Mot."). Expert discovery in this matter has been marred by repeated delays and wasted resources, hindering Defendants' ability to prepare their defense. *See, e.g.*, Opinion and Order, Dkt. No. 1787 (Oct. 28, 2008) (extending expert deadlines following Plaintiffs' service of multiple voluminous "errata" reports long after the deadline for their expert reports); Order and Opinion, Dkt. No. 1756 (Aug. 8, 2008) (extending expert deadlines after Plaintiffs' failure to produce working computer models); Opinion and Order, Dkt. No. 1710 (May 20, 2008) (imposing sanctions and special production obligations on Plaintiffs for failure to comply with discovery orders); Order, Dkt. No. 1658 at 2 (Mar. 27, 2008) (extending Plaintiffs' expert deadlines generally). Because Plaintiffs' case is entirely expert driven, the Court has recognized that Defendants cannot effectively prepare a defense so long as Plaintiffs' experts' claims remain a "moving target." Opinion and Order, Dkt. No. 1787, at 3-4. In light of this, after the question was raised during a hearing, Magistrate Judge

Joyner made it clear that the schedule as contemplated makes no provision for rebuttal reports and that "none should be expected." Dkt. No. 1787. Nevertheless, despite Judge Joyner's express rejection of the possibility of any rebuttal reports, Plaintiffs now seek permission to serve at least three and probably more such reports. Plaintiffs have not demonstrated good cause to reconsider or reverse Judge Joyner's decision (a decision they did not appeal). Moreover, Plaintiffs' request would prejudice Defendants' ability to effectively prepare a defense before the currently-scheduled trial date. Accordingly, Defendants respectfully oppose the Motion.

BACKGROUND

Plaintiffs' expert reports were due originally on December 3, 2007. *See*Scheduling Order, Dkt. No. 1075 (Mar. 9, 2007). In October 2007, chiefly at Plaintiffs' request, the Court granted an across-the-board delay for all expert reports until April 2008. Amended Scheduling Order, Dkt. #1376 (Nov. 15, 2007). In March 2008, Plaintiffs sought and were granted a further extension of their expert reports until May, Opinion and Order, Dkt. No. 1658 (Mar. 27, 2008), and then secured yet another extension for a subset of experts, Opinion and Order, Dkt. No. 1706 (May 15, 2008). Plaintiffs' "final" expert reports were not served until June 2008.

Even thereafter delays continued. Plaintiffs failed to produce working copies of the computer models on which a number of their experts relied. Not until Defendants filed a motion to compel, *see* Dkt. No. 1721, did Plaintiffs acknowledge that critical files had indeed been omitted, necessitating a general delay. Opinion and Order, Dkt. No. 1756. Then, weeks and months after filing their "final" reports, Plaintiffs' experts

2

_

¹ Plaintiffs' reports as to damages were served on January 5, 2008.

continued to serve lengthy "errata" reports, correcting mathematical errors, amending data, and replacing entire sections of their expert reports with new material. This round of new reports required defense experts to revisit work already completed, in some cases to re-start work from scratch, and generally delayed Defendants' ability to prepare their case. These submissions, Judge Joyner noted, were "extremely unfortunate," were "detrimental to the timely resolution of this case," and "force[d] the Court to extend the date Defendants' expert reports are due." Opinion and Order, Dkt. No. 1787. This further compressed the time left for Defendants to prepare their case. *Id.* Finally, in December 2008, Defendants were able to complete and serve most of their expert reports, but will not complete their final five reports until early this year.

As the expert discovery calendar lengthened, Judge Joyner made clear that the scheduling order as designed left no room for expert rebuttal reports. Opinion and Order, Dkt. No. 1787. In fact, not only does the schedule not provide for rebuttal reports, but despite their many opportunities to do so in their numerous scheduling proposals, Plaintiffs only now propose that rebuttal reports be permitted. Had Plaintiffs raised this issue earlier, the parties and the Court could have considered making provision for

_

² Even after Judge Joyner's comments, in early December 2008, at the deposition of their expert Dr. Cooke, Plaintiffs produced another supplemental report for Dr. Cooke, which, far from correcting errors, incorporated entirely new data. Ex. 1, Cooke Depo. 62-63, 321-24. Defendants are still considering how to address this improper supplement. *See*, *e.g.*, *Cohlmia v. Ardent Health Servs.*, *LLC*, 2008 U.S. Dist. LEXIS 65292, at *8 (N.D. Okla. Aug. 22, 2008); *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392, at *16 (N.D. Okla. Dec. 5, 2006).

³ Plaintiffs argue that they had no opportunity to argue whether any rebuttal reports would be permitted. Plaintiffs are mistaken. First, they had every opportunity at every turn of the scheduling process to propose rebuttal reports but failed to do so. Second, the parties raised this issue in the hearing that produced Judge Joyner's emphatic rejection of rebuttal reports. See Dkt. No. 1787. Third, to the extent they disagreed with Judge Joyner's ruling, the proper course was to appeal his order, not to attempt this end run around it.

rebuttal reports without prejudicing Defendants' ability to prepare a response within the allotted time. Instead, Plaintiffs now ask the Court to reverse Judge Joyner's decision and to amend the expert discovery schedule further to allow them several last-minute rebuttal reports. This request should be denied.

ARGUMENT

I. PLAINTIFFS FAILED TO MEET AND CONFER WITH DEFENDANTS AS REQUIRED BY THE FEDERAL AND LOCAL RULES

Plaintiffs' Motion should be denied in the first instance for failure to "meet and confer" with Defendants as required by Local Rule 37.1. That Rule obliges the Court to

refuse to hear any ... motion ... 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.

The Rule makes exceptions from this requirement only where

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.

Plaintiffs' pre-filing efforts in this instance fell well short of the obligation to "confer[] in good faith." Specifically, Plaintiffs' representation that they "attempted to confer with counsel for Defendants but, because of the holiday, Defendants' counsel has been unable to advise if Defendants agree or disagree to the relief," Mot. at 1 n.1, is highly misleading.

Plaintiffs informed counsel for the Tyson Defendants by e-mail in the early afternoon of December 31, 2008, of their intention to file their Motion. *See* Ex. 2. Counsel for Tyson responded within the hour acknowledging the request, indicating the need to confer with counsel for the other defendants, noting that given the holidays "it may be next week before I can complete that process," but nevertheless concluded saying

"I will call you to discuss this request as soon as I can." *Id.* Without response or further communication of *any* kind to *any* counsel for *any* Defendant, and without even waiting for the promised phone call, Plaintiffs filed their motion mere hours later that very same day. Dkt. No. 1819 (filed Dec. 31, 2008).

Plaintiffs thus did not and could not abide by the requirements of Local Rule 37.1, and indeed made essentially no effort to meet and confer in good faith. If the Court's "meet and confer" requirements mean anything, they surely require more than this. Plaintiffs' request was not exigent. Defendants' response was reasonable under any circumstances, and especially so in light of the season. Had Plaintiffs indicated any urgency to their request, or given any warning that absent an immediate response they would simply file their motion, counsel for Tyson could have taken more urgent steps to reach counsel for co-defendants, or attempted some provisional discussion with Plaintiffs regarding their request. But rather than do so Plaintiffs simply filed their Motion late on New Years' Eve. In view of Plaintiffs' abuse of the Court's procedures, their motion should be denied. *See City of Wichita v. Aero Holdings, Inc.*, 2000 WL 33170895 (D. Kan. Oct. 23, 2000) (denying discovery motion for failure to meet and confer).

II. PLAINTIFFS HAVE NOT SHOWN GOOD CAUSE FOR FURTHER MODIFICATION OF THE EXPERT DISCOVERY CALENDAR TO THE PREJUDICE OF DEFENDANTS

Unlike most litigation, this case is entirely expert driven, based on data and theories developed by Plaintiffs' experts. Defendants therefore cannot prepare their own comprehensive expert defense until after Plaintiffs produce their full and final expert case. Despite having had years to prepare their case, Plaintiffs have consistently delayed

5

.

⁴ The Court recognized the importance of Plaintiffs' data to Defendants' ability to prepare a defense when it sanctioned Plaintiffs and imposed special discovery obligations

production of their experts' data and opinions, depriving Defendants of a fair opportunity to prepare their own case. Having never previously indicated any need for rebuttal reports, Plaintiffs now seek to amend the schedule at the last minute to provide for them. But Plaintiffs have not even attempted to make a showing of good cause to justify such an amendment. Moreover, further delay for rebuttal reports would substantially prejudice Defendants.

A. A Scheduling Order May Be Modified Only for "Good Cause"

Because parties and courts act in reliance on the deadlines spelled out in scheduling orders, such schedules may be amended only for "good cause." Fed. R. Civ. P. 16(b). That standard is demanding. Merely demonstrating a "[1]ack of prejudice to the nonmovant does not establish good cause." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1220 (D. Kan. 1995). Rather, the moving party must also demonstrate an affirmative need for the modification. *Colo. Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2007) (emphasis added). Scheduling orders are not amended lightly even to add expert rebuttal reports. *Lavender v. Fla. Gas Transmission Co.*, 2003 U.S. Dist. LEXIS 27604 (S.D. Ala. Jun. 30, 2003). Here, Plaintiffs have not demonstrated an affirmative need for rebuttal reports. Moreover, the addition of three, and probably more, rebuttal reports, will prejudice Defendants. *Marcin Eng'g, Inc. v. Founders at Grizzly Ranch, LLC*, 219 F.R.D. 516, 523-24 (D. Colo. 2003) (denying motion to extend time for expert discovery in part due to prejudice to non-movant).

on them for their failure to comply with the Courts' orders that they produce testing data to Defendants within a reasonable time. *See* Opinion and Order, Dkt. No. 1710 (May 20, 2008).

6

0

B. Plaintiffs Have Not Demonstrated "Good Cause" As To Drs. Myoda, Jarman, and Clay

Plaintiffs seek leave to serve rebuttal reports as to three of Defendants' experts, Dr. Myoda, Dr. Jarman, and Dr. Clay. But Plaintiffs fail to put forward any substantial justification for unscheduled rebuttal reports as to any of these witnesses.

Plaintiffs assert as a general matter that these witnesses' reports contain "a number of opinions on subject matters not directly addressed by the State's experts in their respective expert reports or which are based on methods or data which the State has a right to rebut," Mot. at 1, but nowhere do Plaintiffs identify the specific opinions, data, or methods to which they refer. Quite the contrary, the short single paragraphs devoted to each witness individually merely repeat the same general refrain. Plaintiffs assert only that Dr. Myoda's report contains "PCR analyses ... based on methods or data which the State has a right to rebut." *Id.* at 2. With regard to Dr. Jarman, Plaintiffs say only that his "report contains analyses of phosphorus and fecal coliform loadings from point sources, overflows, biolsolids and human populations which are based on methods or data which the State has a right to rebut." *Id.* at 3. And as to Dr. Clay, Plaintiffs state only that his "report contains analyses of the relative contribution of phosphorus and bacteria of cattle and poultry waste which are based on methods or data which the State has a right to rebut." *Id.*

In no instance do Plaintiffs identify the particular "methods or data" they wish to challenge. More critically, for no witness do they outline the rebuttal opinions they would present, nor explain why the defense expert's statements are not fair criticisms and analyses of the issues Plaintiffs themselves have raised in this case. In fact, Plaintiffs

7

⁵ "PCR" refers to "polymerase chain reaction," a process used for replicating strands of DNA employed by Plaintiffs' expert Dr. Valerie Harwood in this case.

nowhere even identify who would submit each of these rebuttal reports, whether it would be an existing expert, or an entirely new, previously undisclosed expert. The fact of the matter is that Plaintiffs now realize that Defendants' expert reports expose critical holes and bias in Plaintiffs' experts' work, based principally on Plaintiffs' failure to assess and quantify various sources of alleged contaminates other than poultry litter, which account for the conditions about which Plaintiffs complain. And, having initially ignored those obvious sources, Plaintiffs now seek yet another bite at the apple to fill those gaps. *accord Cohlmia*, 2008 U.S. Dist. LEXIS 65292, at *19 (supplemental reports cannot be used to redress defects in initial report). This does not constitute "good cause."

In any event, Defendants respectfully suggest that no good cause exists as to any of these witnesses. Each of the defense experts based his report on data or methods produced or created by Plaintiffs, or had previously disclosed his opinions. The defense experts do no more than rebut Plaintiffs' case. Plaintiffs were familiar with these subjects prior to filing their own reports, and should have addressed them well before now. *See* Fed. R. Civ. P. 26(a)(2) (requiring an expert to include all relevant opinions in his initial report); *Ullman v. Auto-Owners Mut. Ins. Co.*, 2007 WL 1057397, at **4-5 (S.D. Oh. Apr. 5, 2007) (rejecting improper supplementation of expert reports).

For example, Plaintiffs assert a need to review defense expert Dr. Myoda's "PCR" analysis. But Dr. Myoda's report is clear that his PCR work consisted of replicating, confirming, and applying Plaintiffs' experts' own process, and performing additional tests on the new bacteria that Dr. Harwood claimed to have identified. Dr. Myoda confirmed that Plaintiffs' process worked as alleged, and then applied that process to a number of samples, both of a type similar to samples Plaintiffs tested, and of some types

they did not test. Plaintiffs are free to depose Dr. Myoda as to his work and to cross examine him on that basis. But beyond that, Plaintiffs had years to develop their process and to run it on any samples they wished. Their failure to do so does not justify their tardy addition of rebuttal reports.

Defense expert Dr. Jarman, for his part, opined as to the effects of various alternate sources of phosphorous and bacteria in the IRW. Dr. Jarman's report addresses data produced by Plaintiffs, or gathered and maintained by other state and municipal entities. This data was fully available to Plaintiffs during the three years they prepared their case. In fact, Plaintiffs' experts uniformly assert that poultry litter is the "dominant" source of phosphorous and/or bacteria in the IRW. Such an assertion should have been based on work identifying and forming opinions regarding alternate sources of phosphorus and/or bacteria. Indeed, a number of Plaintiffs' experts expressly discount various alternate sources: Drs. Engel and Teaf discuss wastewater treatment plants; Dr. Fisher discusses cattle; Dr. Teaf discusses urban impacts; and so on. The fact that Defendants' experts have now quantified and demonstrated what Plaintiffs' experts dismissed does not justify giving them a second bite at the apple. In short, the focus of Dr. Jarman's opinions were well known to Plaintiffs long before he submitted his report, and Plaintiffs have failed to justify their failure to include their full opinions regarding alternate sources in their original reports.

Finally, with regard to defense expert Dr. Clay, not only are the subjects of his testimony not a surprise to Plaintiffs, but they were previously disclosed. Dr. Clay submitted an expert affidavit and testified at length during the preliminary injunction proceeding. The opinions Dr. Clay sets forth in his report now are substantially the same

as the views he shared then. Although the preliminary injunction proceeding regarded bacteria, not phosphorous, Dr. Clays' testimony undeniably put Plaintiffs on notice of Defendants' position that that Plaintiffs were discounting or ignoring the fecal contribution that cattle make to the IRW. Plaintiffs offer no explanation as to why they failed to address this methodology in their own expert reports. Their failure to fully evaluate alternative sources of alleged contaminates throughout the IRW in their expert case-in-chief does not justify re-opening Plaintiffs' expert case at this late date.

In short, Plaintiffs have not demonstrated a need to file a rebuttal report as to any of these individuals, nor excused their failure to include their tardy opinions in their original reports. Because they have not identified the specific opinions, analyses, methods or data they would challenge, what rebuttal opinions they would offer, and who would offer them, Plaintiffs' claims of need cannot be evaluated. Therefore, no "good cause" has been demonstrated.

C. The Late Addition of Expert Rebuttal Reports Would Prejudice Defendants and Likely Cause a Delay in the Trial

As noted, Defendants cannot fully prepare a defensive expert case until Plaintiffs fully disclose the data and opinions of their experts. Plaintiffs have had years to prepare their expert case, much of which they did covertly. *See* Opinion and Order, Dkt. No. 1710 (finding that Plaintiffs failed to comply with Court's prior order to produce data to defendants, imposing a special 10-day production obligation on Plaintiffs, and assessing costs). Defendants, on the other hand, are constrained to a much shorter period, and cannot prepare a comprehensive defense and trial strategy until after Plaintiffs' expert case is fully revealed and stops being what this Court has called a "moving target."

Opinion and Order, Dkt. No. 1787, at 3-4. Allowing rebuttal reports at this late date would further prejudice Defendants.

First, Defendants have already incurred substantial cost and time in discovering Plaintiffs' experts' opinions. For example, a rebuttal to Dr. Myoda's testimony regarding PCR would most likely be submitted by Professor Valerie Harwood, Plaintiffs' microbial source tracking witness. Defendants have already incurred the expense of deposing Dr. Harwood twice. Moreover, after discovering that Professor Harwood did not perform any of the work underlying her testimony, but that Plaintiffs instead hired non-testifying experts in Idaho to create a basis for her testimony, Defendants had to also take the deposition of Dr. Tamzen Macbeth who directed that work. If Professor Harwood (or Dr. Macbeth or anyone else) submits a rebuttal report, Defendants will have to take yet another round of depositions to discover the bases for the rebuttal opinions. The same is true for any rebuttal to Dr. Jarman or Dr. Clay. Defendants have already deposed the majority of Plaintiffs' experts twice, but those depositions were based on the work that had been disclosed to date. Adding another round of expert work and rebuttal reports at this late stage would be wasteful. Plaintiffs' pattern of modifying opinions following depositions suggests an intent to never allow Defendants to see Plaintiffs' final theories and prepare a response.

Second, as noted, each modified report and altered opinion further delays Defendants' ability to prepare their expert case and to prepare for trial. Plaintiffs have had years to develop their expert case. Indeed, in April 2005, even before this lawsuit was filed, Plaintiffs' experts were working to develop their theories, *see*, *e.g.*, Ex. 3 (expert status report), and by September 2005 Plaintiffs' counsel were busy stitching

together their experts' opinions, *see*, *e.g.*, Ex. 4 (memorandum from counsel articulating testimony to be provided by various experts). By contrast, the majority of Defendants' experts had only six months to conduct relevant analyses and prepare their own opinions, with slightly longer for those who had to undertake field work or computer modeling.

Rebuttal reports will require defense experts to reconfirm their prior work, to review any new work performed by Plaintiffs' experts, and possibly to prepare their own sur-rebuttal reports, but will leave no time for any further necessary sampling or substantial lab or computer work. Moreover, this will distract from Defendants' ability to prepare a comprehensive defense on the current timeframes. Plaintiffs have already used their portion of the case schedule for expert work; now they seek to use Defendants' portion as well.

Third, if this motion is granted, Plaintiffs will likely seek to file even more rebuttal reports. Each of Plaintiffs' requests alleges "analyses ... based on methods and data" which Plaintiffs desire to rebut. Although Plaintiffs' instant motion seeks permission to serve only three rebuttal reports, Defendants still have additional expert reports to produce under the existing schedule, including the reports of Defendants' modeling and limnology experts. Plaintiffs' motion holds open the possibility of seeking additional rebuttal reports. Mot. at 2 n.2. If the Court grants Plaintiffs permission to serve the three requested rebuttal reports, Plaintiffs will only be encouraged to seek yet more rebuttal reports as to most or all of these experts.

The upshot of these post-deadline supplements will be to further prejudice

Defendants by extending the years Plaintiffs have had to finalize their expert case, and
compressing the already-short period Defendants have to prepare following the

production of Plaintiffs' last expert reports. This is contrary to the interests of justice. As the Sixth Circuit stated in *Val-Land Farms v. Third National Bank*, 937 F.2d 1110, 1113 (6th Cir. 1991), parties "are not free to present a moving target, thereby making the courts (both us and the district court) as well as their opponent guess at the nature of the claim presented to the court." Therefore, Plaintiffs' motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully oppose Plaintiffs motion for leave to serve rebuttal expert reports.

Respectfully submitted,

BY: ____/s/Jay T. Jorgensen____

Mark D. Hopson Jay T. Jorgensen Gordon D. Todd SIDLEY AUSTIN LLP 1501 K Street, N.W. Washington, D.C. 20005-1401

Telephone: (202) 736-8000 Facsimile: (202) 736-8711

-and-

Robert W. George Vice President & Associate General Counsel Tyson Foods, Inc. 2210 West Oaklawn Drive Springdale, Ark. 72764 Telephone: (479) 290-4076 Facsimile: (479) 290-7967

-and-

Michael R. Bond KUTAK ROCK LLP Suite 400 234 East Millsap Road

Fayetteville, AR 72703-4099 Telephone: (479) 973-4200 Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864 Stephen L. Jantzen, OBA # 16247 RYAN, WHALEY & COLDIRON, P.C. 119 N. Robinson 900 Robinson Renaissance Oklahoma City, OK 73102 Telephone: (405) 239-6040 Facsimile: (405) 239-6766

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Woodson W. Bassett III Gary V. Weeks James M. Graves K.C. Dupps Tucker BASSETT LAW FIRM P.O. Box 3618

Fayetteville, AR 72702-3618 Telephone: (479) 521-9996 Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753 George W. Owens OWENS LAW FIRM, P.C. 234 W. 13th Street Tulsa, OK 74119 Telephone: (918) 587-0021

Facsimile: (918) 587-6111

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY:____/s/A. Scott McDaniel_

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
McDaniel, Hixon, Longwell
& Acord, Pllc
320 South Boston Ave., Ste. 700
Tulsa, OK 74103

Telephone: (918) 382-9200 Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

ATTORNEYS FOR PETERSON FARMS, INC.

BY:____/s/R. Thomas Lay_

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

R. Thomas Lay, OBA #5297 KERR, IRVINE, RHODES & ABLES 201 Robert S. Kerr Ave., Suite 600 Oklahoma City, OK 73102 Telephone: (405) 272-9221

Facsimile: (405) 236-3121

-and-

Jennifer S. Griffin LATHROP & GAGE, L.C. 314 East High Street Jefferson City, MO 65101 Telephone: (573) 893-4336 Facsimile: (573) 893-5398

ATTORNEYS FOR WILLOW BROOK FOODS, INC.

BY:___/s/ John R. Elrod____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

John R. Elrod Vicki Bronson, OBA #20574 P. Joshua Wisley CONNER & WINTERS, L.L.P. 211 East Dickson Street Fayetteville, AR 72701 Telephone: (479) 582-5711 Facsimile: (479) 587-1426

-and-

Bruce W. Freeman D. Richard Funk CONNER & WINTERS, L.L.P. 4000 One Williams Center Tulsa, OK 74172 Telephone: (918) 586-5711

Facsimile: (918) 586-8553 **ATTORNEYS FOR SIMMONS**

BY:___/s/Robert P. Redemann_

FOODS, INC.

(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,

REID, BERRY & TAYLOR, P.L.L.C.

Post Office Box 1710 Tulsa, OK 74101-1710

Telephone: (918) 382-1400 Facsimile: (918) 382-1499

-and-

Robert E. Sanders Stephen Williams YOUNG WILLIAMS P.A. Post Office Box 23059 Jackson, MS 39225-3059 Telephone: (601) 948-6100

Facsimile: (601) 355-6136

ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH PERMISSION) John H. Tucker, OBA #9110 Theresa Noble Hill, OBA #19119 RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC 100 W. Fifth Street, Suite 400 (74103-4287)

P.O. Box 21100

Tulsa, Oklahoma 74121-1100 (918) 582-1173 Telephone: Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich **Bruce Jones** Krisann C. Kleibacker Lee **FAEGRE & BENSON LLP** 2200 Wells Fargo Center 90 South Seventh Street Minneapolis, Minnesota 55402 Telephone: (612) 766-7000 Facsimile: (612) 766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

CERTIFICATE OF SERVICE

I certify that on the 13th of January, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General Kelly Hunter Burch, Assistant Attorney General J. Trevor Hammons, Assistant Attorney General Tina L. Izadi, Assistant Attorney General Daniel Lennington, Assistant Attorney General drew_edmondson@oag.state.ok.us kelly_burch@oag.state.ok.us trevor_hammons@oag.state.ok.us tina_izadi@oag.state.ok.us daniel.lennington@oak.ok.gov

Douglas Allen Wilson Melvin David Riggs Richard T. Garren Sharon K. Weaver David P. Page Riggs Abney Neal Turpen Orbison & Lewis

doug_wilson@riggsabney.com, driggs@riggsabney.com rgarren@riggsabney.com sweaver@riggsabney.com dpage@riggsabney.com

Robert Allen Nance Dorothy Sharon Gentry Riggs Abney rnance@riggsabney.com sgentry@riggsabney.com

J. Randall Miller

rmiller@mkblaw.net

Louis W. Bullock

lbullock@bullock-blakemore.com

Michael G. Rousseau Jonathan D. Orent Fidelma L. Fitzpatrick Motley Rice LLC mrousseau@motleyrice.com jorent@motleyrice.com ffitzpatrick@motleyrice.com

Elizabeth C. Ward Frederick C. Baker William H. Narwold Lee M. Heath Elizabeth Claire Xidis Ingrid L. Moll Motley Rice lward@motleyrice.com fbaker@motleyrice.com bnarwold@motleyrice.com lheath@motleyrice.com cxidis@motleyrice.com imoll@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Patrick M. Ryan
Paula M. Buchwald
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com pryan@ryanwhaley.com pbuchwald@ryanwhaley.com

Mark D. Hopson

mhopson@sidley.com

Jay Thomas Jorgensenjjorgensen@sidley.comTimothy K. Webstertwebster@sidley.comGordon D. Toddgtodd@sidley.com

Sidley Austin LLP

Robert W. George robert.george@tyson.com

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com

Kutak Rock LLP

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com

Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com

Lathrop & Gage, L.C.

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com

Young Williams P.A.

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com Randall E. Rose gwo@owenslawfirmpc.com

The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com

Gary V. Weeks

Paul E. Thompson, Jr. pthompson@bassettlawfirm.com
Woody Bassett
Jennifer E. Lloyd pthompson@bassettlawfirm.com
jlloyd@bassettlawfirm.com

Bassett Law Firm

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrodjelrod@cwlaw.comVicki Bronsonvbronson@cwlaw.comP. Joshua Wisleyjwisley@cwlaw.com

Conner & Winters, P.C.

Bruce W. Freeman bfreeman@cwlaw.com

D. Richard Funk

Conner & Winters, LLLP

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker jtuckercourts@rhodesokla.com

Leslie J. Southerland ljsoutherlandcourts@rhodesokla.com

Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thillcourts@rhodesokla.com

Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West terry@thewesetlawfirm.com

The West Law Firm

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann Kleibacker Lee kklee@baegre.com
Dara D. Mann dmann@faegre.com
Todd P. Walker twalker@faegre.com

Faegre & Benson LLP

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves mgraves@hallestill.com
D. Kenyon Williams, Jr. kwilliams@hallestill.com

COUNSEL FOR POULTRY GROWERS

William B. Federman wfederman@aol.com
Jennifer F. Sherrill ifs@federmanlaw.com

Federman & Sherwood

Charles Moulton charles.moulton@arkansag.gov Jim DePriest jim.depriest@arkansasag.gov

Office of the Attorney General

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith griffithlawoffice@yahoo.com

COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

Gary S. Chilton gchilton@hcdattorneys.com

Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz vschwartz@shb.com
Cary Silverman csilverman@shb.com

Shook, Hardy & Bacon, LLP

Robin S. Conrad rconrad@uschamber.com

National Chamber Litigation Center, Inc.

COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford fordr@crowedunlevy.com
LeAnne Burnett burnettl@crowedunlevy.com

Crowe & Dunlevy

COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins richard.mullins@mcafeetaft.com

McAfee & Taft

James D. Bradbury jim@bradburycounsel.com

James D. Bradbury, PLLC

COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

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:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION

/s/ Gordon D. Todd