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

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' JOINT MOTION FOR CLARIFICATION OF THE COURT'S JANUARY 29, 2009 ORDERS [DKT. NOS. 1839 & 1842]

Come now, the Defendants in the above-styled case, and respectfully request clarification from the Court regarding its January 29, 2009 Opinions and Orders. [Dkt. Nos. 1839 & 1842]

I. BACKGROUND

The original deadline for Plaintiffs' expert reports was December 3, 2007. [Dkt. # 1075]. In October, 2007 the Magistrate granted the Plaintiffs an across-the-board extension for all expert reports other than damages until April, 2008. [Dkt. # 1376]. In March, 2008 Plaintiffs again sought and were granted a further extension of their non-damages expert reports until May 15, 2008. [Dkt. # 1658]. Thereafter, the Plaintiffs secured another extension for a subset of non-damages experts until the end of May, 2008. [Dkt. # 1706]. Following these extensions came a series of errata from the Plaintiffs' retained non-damages witnesses between July, 2008 and October, 2008.

During the deposition of Dr. Dennis Cooke in early December 2008, Dr. Cooke alerted Defendants' counsel that he and another witness retained by the Plaintiffs, Dr. Gene Welch, had prepared supplemental opinions regarding new 2008 sampling data. Cooke further attested that he had collected and reviewed this data well beyond the already extended Plaintiffs' expert

disclosure deadline. Almost six weeks later, the Plaintiffs sought leave of the Court to allow the filing of this supplemental report. [Dkt. # 1826].

In the Opinion and Order issued by this Court on January 29, 2009, the Court denied Plaintiffs' motion to file the supplemental report of Cooke and Welch. [Dkt. # 1839]. The Court called upon the well-established case law holding that "a supplemental expert report that states additional opinions or rationales or seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1)." [Dkt. # 1839, internal citations omitted].

On December 31, 2008 Plaintiffs also sought leave to file rebuttal reports. [Dkt. # 1819]. On January 29, 2009, this Court unequivocally denied Plaintiffs' request to file rebuttal reports. [Dkt. # 1839]. In the Court's Opinion and Order, the Court recognized Defendants' contention that unscheduled rebuttal reports would prejudice Defendants and likely cause a further delay in the trial. The Court determined that permission to submit

> ***[R]ebuttal expert reports should be denied***. To alter the course previously plotted by the scheduling orders entered by the magistrate judge and permit rebuttal expert reports (and, presumably, sur-rebuttal expert reports) at this late date would unduly increase the cost of this litigation and delay its ultimate resolution. Rebuttal expert testimony will be permitted ***at trial*** to the extent it constitutes true rebuttal." [Dkt. # 1842, emphasis added].

The Magistrate's order refusing to allow ongoing changes to Plaintiffs' expert case was informed by the history of this litigation. Over the last three and a half years, Plaintiffs have repeatedly changed their expert theories and withheld key sampling data from Defendants in order to present the Defendants with a moving target of expert testimony. Indeed, the Court has repeatedly ordered Plaintiffs to produce all data that they collected in this case in a timely manner (and before the expert deadlines), so that Defendants' experts could have an adequate opportunity to prepare a response. *See, e.g.*, January 5, 2007 Order (Dkt #1016); May 20, 2008

Order (Dkt #1710). Plaintiffs have repeatedly violated the Court's instructions and have attempted to continue changing the facts and analyses in their expert case. *See, e.g.*, *Defendants' Motion to Compel Plaintiffs' Compliance with the Court's Order on Data Production*, (Dkt. #1605) (outlining multiple instances where Plaintiffs concealed data from Defendants). As a result, the Court has been compelled to issue a follow-up order and sanctions for Plaintiffs' disregard of their duty to produce their expert data in a timely manner so that Defendants could have an opportunity to prepare a defense. *See* May 20, 2008 Order (Dkt #1710).

Plaintiffs' effort to present a moving target continues in spite of the Court's most recent orders regarding rebuttal and supplemental reports. During the recent depositions of Defendants' experts, Drs. Alex Horne, Glenn Johnson, and Brian Murphy, Plaintiffs have again attempted to introduce new work and new analysis generated by Plaintiffs' experts. The general method used is for Plaintiffs' counsel to show a defense expert an altered exhibit from the Plaintiffs' expert's original report, overlaying onto the exhibit more recent data acquired by the Plaintiffs' experts or analyses performed by them after the expert deadline. Plaintiffs' counsel then poses questions to the defense expert about this newer data and analyses. Over defense objections, this pattern of behavior has continued at the depositions, always with Plaintiffs' counsel claiming that the new information is simply rebuttal allowed by this Court. However, far from seeking to critique or directly rebut opinions of the defense experts, Plaintiffs instead are injecting new data and analysis into evidence. Indeed, the defense experts did not even have this newly acquired data and analysis, either because it was not produced by the Plaintiffs before the deposition or because the defense relied on the aforementioned orders and sequestered the underlying raw data from the defense experts.

Because this Court refused to allow the Plaintiffs to introduce these analyses by way of rebuttal reports or supplemental reports, they are using a perceived loophole in the Court's orders to nevertheless introduce the materials into the case through defense experts. Moreover, Plaintiffs are doing so without providing the accompanying expert disclosures that would ordinarily be required – Plaintiffs in fact refuse to provide any considered materials or communications relating to these new analyses by their retained experts on the grounds that it is "rebuttal" and therefore they insist they are not required to do so.

Defendants now seek clarification of the Court's January 29, 2009 Opinions and Orders. [Dkt. Nos. 1839 & 1842] Specifically, Defendants seek the Court's guidance on whether this kind of sharp practice by Plaintiffs' counsel is permissible in light of the Orders referenced above. This behavior has implications in the continuing expert depositions as well as *Daubert* motions and at trial.

II. DISCUSSION

A. The Plaintiffs are attempting to offer supplemental evidence during the depositions of defense experts.

As explained in Defendants' brief regarding the Cooke and Welch supplemental report, Courts faced with the decision whether or not to admit supplemental expert reports first consider Fed.R.Civ.P. 26(e), which provides, in pertinent part:

> (1) In General. A party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request for admission – or who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.] . . .

> (2) Expert Witness. For an expert whose report must be disclosed under Rule 26 (a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

While an affirmative duty to correct errors in expert reports exists, this duty does not extend beyond correcting or completing errors in original reports. As this Court confirmed in one of its Orders on January 29, 2009, "the right to supplement under Rule 26(e) is not without limits." [Dkt. # 1839]. In analyzing this issue, this Court determined that a report which attempts to "strengthen or deepen" the original opinions expressed by the expert exceeds the bounds of permissible supplementation. [Dkt. # 1839].

Further, this Court has noted that "Rule 26(e) "allows supplementation of expert reports only where a disclosing party learns that its information is incorrect or incomplete." (citing *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec 5, 2006)). [Dkt. # 1787]. The disclosing party is not entitled to undertake new sampling after the expert deadline and alter the expert report to fit the new data. For that reason, the court in *Quarles* struck additional testing by the plaintiff's expert to bolster opinions after submission of the original expert report, relying on *Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002), which states:

> Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be defective in some way so that the disclosure was incorrect or incomplete and, therefore, misleading. It does not cover failures of omission because the expert did an inadequate or incomplete preparation. To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation.

As the court in *Akeva* foretold, unlimited supplemental testing and analysis by experts would result in moving targets for opposing parties and prohibit the timely resolution of cases

relying upon expert testimony. Additional Tenth Circuit case law on this specific issue confirms the holding in *Akeva*.[1] Plaintiffs in the instant matter are attempting to impermissibly supplement their experts' work and introduce newly created work through the proverbial backdoor as deposition exhibits at defense expert depositions (the specifics of the various supplements are discussed below).

In a case of this magnitude, adherence to this Court's Orders regarding discovery is crucial to ensuring a timely and efficient discovery process. Accordingly, Defendants request that the Court clarify its Opinion and Order regarding supplementation as it relates to these exhibits and any anticipated exhibits that may be offered during upcoming depositions.

a. Certain exhibits offered by Plaintiffs during Dr. Glenn Johnson's deposition are supplemental expert documents.

On February 24 and 25, 2009, Plaintiffs took the deposition of Dr. Glenn Johnson. Dr. Johnson was retained by Defendants to examine the principal component analysis (PCA) portion of the report completed by Plaintiffs' witness, Dr. Roger Olsen.

During Dr. Johnson's deposition, Plaintiffs' counsel used a document not previously submitted as part of Dr. Olsen's report or errata, and did so under the cover page of Dr. Olsen's original report. [*See* Exhibit A]. Plaintiffs' counsel explained that portions of this document had not been produced previously and Defendants' counsel objected to the use of this document. [A copy of this portion of the deposition transcript is attached as Exhibit B]. When asked to characterize the document presented, Plaintiffs' counsel merely explained it had not been entered as errata and that it was a "sensitivity analysis." [Ex. B, p. 274 – 275]. This "sensitivity

[1] *See generally Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002); *Cohlmia v. Ardent Health Servs., LLC*, 2008 WL 3992148 (N.D. Okla. Aug. 22, 2008); *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec 5, 2006); *and Palmer et. al., v. Asarco, et. al.*, 2007 WL 2254343 (N.D. Okla. Aug. 3, 2007).

analysis" does not "rebut" any analysis by Dr. Johnson, as Dr. Johnson himself was merely performing an analysis of Dr. Olsen's original report and errata, and this new material was not a part of Dr. Olsen's original report or errata. The material is clearly additional, new analysis by Dr. Olsen (or those working under his direction) intended to supplement, bolster, or strengthen his earlier opinions.

Additionally, during Dr. Johnson's deposition, Plaintiffs' counsel used an aerial photograph with new information marked on the image through analysis performed by Dr, Olsen. [See Exhibit C]. Plaintiffs' counsel explained that the photo had been previously produced to the Defendants; however the markings were added to the photo and had not been produced. [A copy of this portion of the deposition transcript is attached as Exhibit D, p. 324 – 325]. Again, this represents new analysis by Plaintiffs' experts.

b. Certain exhibits offered by Plaintiffs during Dr. Alex Horne's deposition are supplemental expert documents.

On March 5 and 6, 2009, Plaintiffs took the deposition of Dr. Alex Horne. Dr. Horne was retained by Defendants to examine trophic state analysis for Lake Tenkiller and Broken Bow Reservoir performed in the report completed by Plaintiffs' witnesses Drs. Cooke and Welch.

After attending the deposition of Dr. Johnson, Defendants anticipated that similar supplemental expert documents might be presented during Dr. Horne's deposition. In anticipation of the possibility of supplemental work appearing during Dr. Horne's deposition, defense counsel requested Plaintiffs provide any considered materials or communications associated with continuing analysis by Plaintiffs' experts for use at the upcoming depositions in advance of those depositions. However, Plaintiffs refused to provide these documents to Defendants. [*See* Exhibit E]. Thus, in addition to their attempt to exploit any alleged ambiguity in this Court's Orders regarding supplemental and rebuttal work by experts, Plaintiffs are also

refusing to supplement their disclosures and document productions with additional materials considered by their experts and any corresponding communications.

During Dr. Horne's deposition, Plaintiffs offered a number of documents generated either by or under the direction of Plaintiffs' experts. The first of these documents was an updated copy of Figures 7, 8, and 9 of the original Cooke and Welch Report. [*See* Exhibit F]. The figures were supplemented using data collected during 2008. This is the same 2008 sampling data that Plaintiffs attempted to enter into evidence as a supplemental Cooke and Welch report, and in fact the exhibits were a part of that supplemental report, all of which this Court expressly barred in its Orders. [Dkt Nos. 1826 & 1939, respectively]. This is clearly an attempted end-run around this Court's Orders. A discussion was held on the record with Defendants objecting to the entry of this exhibit during Dr. Horne's deposition. [A copy of this portion of the deposition transcript is attached as Exhibit G]. These figures clearly state on the bottom of the page that they are "Supplemental" Figures. [Ex. F]. Despite the Court's specific rulings on these very same Cooke and Welch materials, Plaintiffs nonetheless maintained that they could use the materials as purported "rebuttal" at the deposition of Dr. Horne.

During the same deposition, Plaintiffs entered an exhibit consisting of four figures showing temperature and dissolved oxygen content. [*See* Exhibit H]. As explained by Plaintiffs' counsel, the figures are identical to figures in the Cooke and Welch Report, except they have been supplemented with data from 1960 and 2008. [A copy of this portion of the deposition transcript is attached as Exhibit I]. These figures are clearly another supplementation of the Cooke and Welch Report similar to the supplemental report this Court rejected, and do not rebut Dr. Horne's work because Dr. Horne did not provide analysis of 1960 and 2008 data on the subject matter of the exhibits.

c. Certain exhibits offered by Plaintiffs during Dr. Brian Murphy's deposition are supplemental expert documents.

On March 25, 2009, Plaintiffs took the deposition of Dr. Brian Murphy. Dr. Murphy was retained by the Cargill Defendants to examine certain work and reporting completed by Plaintiffs' witness Dr. Roger Olsen. During Dr. Murphy's deposition, Plaintiffs' counsel presented to the witness a document not previously produced with Dr. Olsen's report or through errata. [*See* Exhibit J]. Plaintiffs' counsel stated during this deposition that the document corrected Dr. Olsen's previous work *and* had additional information specific to the Cargill Defendants. [*See* Exhibit K]. This was clearly new analysis performed by Dr. Olsen after the expert deadline.

B. The Plaintiffs' documents and analysis are not "rebuttal."

Fed.R.Civ.P. 26(a)(2)(C) allows rebuttal testimony if the evidence is intended "solely to contradict or rebut" other expert testimony. As explained by the court in *Morgan v. Commercial Union Assurance Cos.*, "Rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in [the] opponent's case in chief." 606 F.2d 554, 555 (5th Cir. 1979). When examining Fed.R.Civ.P. 26(a)(2)(C), federal courts have also been clear about what does *not* constitute rebuttal evidence; rebuttal is "not an opportunity for the correction of any oversights in the plaintiff's case in chief." *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004).

Crowley is directly on point. The items recently characterized as "rebuttal evidence" by Plaintiffs at the depositions are not truly rebuttal. Instead, these documents are merely supplemental opinions of the Plaintiffs' experts. Because these efforts by the Plaintiffs' experts exceed the scope of true rebuttal, the Defendants respectfully request clarification of the Court's January 29, 2009, Orders.

C. Contrary to this Court's scheduling and discovery orders, Plaintiffs continue their sampling work and Defendants therefore anticipate production of additional improper supplemental work by Plaintiffs' experts.

As evidenced by the deposition transcripts and exhibits discussed above, the Plaintiffs in this matter have continued sampling in the Illinois River Watershed well-beyond the cutoff date for their expert reports and disclosures. While the Plaintiffs are periodically producing such sampling results, Defendants would submit that in light of this Court's January 2009 Orders with regard to rebuttal reports and supplementation, this work is an attempt by Plaintiffs to circumvent the expert deadlines. In fact, Defendants continue to receive such sampling reports and most recently received from Plaintiffs on Friday, April 3, 2009, additional lab data and analysis (samples dated February 13, 2009 and analysis dated March 13, 2009). [*See* Exhibit L].

The collection and production of the raw sampling results, even if permissible, does not allow new analysis to be performed on such results by the Plaintiffs' experts after the expert deadline, nor does it excuse the Plaintiffs' continuing to present a moving target in the expert case, now by springing analyses of such results on the defense long past the deadline for any such analyses. Nor does it allow the compounding of the problem by the Plaintiffs' refusal to provide the customary disclosures, considered materials, and communications associated with the generation of expert opinions.

Plaintiffs are clearly continuing to perform expert analysis that does not constitute true rebuttal without obtaining leave of this Court to extend their deadlines to perform such supplemental analysis. In essence, the Plaintiffs are ignoring the directives of the Court regarding supplemental expert work. The continued receipt of this sampling data, combined with the documents entered at the recent defense expert depositions, leads Defendants to believe that until the Court clarifies its Orders regarding supplementation and rebuttal [Dkt. # 1839],

Plaintiffs will continue to sample, analyze, and present additions to their experts' analysis and opinions, all under the false representation that the material is merely rebuttal.

Therefore, Defendants respectfully request clarification of the Court's January 29, 2009, Orders on the grounds that these materials, and any others like them that Plaintiffs are preparing or have prepared, "state additional opinions or rationales or seek to 'strengthen' or 'deepen' opinions expressed in the original expert report" exceeding the bounds of permissible supplementation and subjecting [them] to exclusion under Rule 37(c)(1)." [Dkt. # 1839, internal citations omitted].

III. CONCLUSION

For the reasons stated herein, Defendants respectfully request clarification from the Court regarding its January 29, 2009 Opinions and Orders as these Opinions and Orders relate to documents recently produced by Plaintiffs during depositions and documents anticipated by Defendants at future depositions. If the Court allows such analysis, the Defendants request that this Court at least require Plaintiffs to provide customary expert disclosures and production of considered materials and associated communications. [Docket Nos. 1839 and 1842].

Respectfully submitted,

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