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

State of Oklahoma, Plaintiff, vs. Tyson Foods, Inc., et al., Defendants.	)))))))))))	**Case No. 4:05-cv-00329-GKF-PJC**

DEFENDANTS CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC'S MOTION TO STRIKE SUPPLEMENTAL EXPERT REPORT OF J. BERTON FISHER AND INTEGRATED MEMORANDUM IN SUPPORT

Pursuant to Fed. R. Civ. P. 37(c)(1), the Cargill Defendants move the Court to enter an Order striking the May 27, 2009, declaration of J. Berton Fisher, Ph.D. (hereafter Declaration), which Plaintiffs attached to their Opposition to Cargill Defendants' Motion for Summary Judgment and docketed at Dkt. No. 2178-13 Ex. 12. The Declaration, submitted more than a year after the deadline set forth in the Court's scheduling order for submitting Fisher's expert report, contains new opinions and additional information not previously disclosed as required by Rule 26. Thus, Plaintiffs are barred by Rule 37(c)(1) from using this information as evidence in opposition to the Cargill Defendants' (or any other) motion or at trial, and the Court should strike and not give further consideration to the Declaration.

BACKGROUND

Plaintiffs' expert reports concerning liability were due in May 2008. (Dkt. No. 1658.) On May 15, 2008, Plaintiffs submitted an approximately one-hundred-page expert report prepared by Fisher. (See Dkt. No. 2198-5 & 2198-6.) The Cargill Defendants deposed Fisher on

September 3-4, 2008. (See Dkt. No. 2085-3.) At his deposition, Fisher submitted an "errata" report, in which he altered some of his original calculations. (See Ex. A: Fisher 09-03-08 Depo. First Errata Report.) On September 18, 2008, Fisher submitted a second "errata" report, containing more than thirty "errata" pages, in which he further revised his expert report, including revisions to at least sixteen graphs and a substantially revised chart. (See Ex. B: Fisher 09-18-08 Second Errata Report.)

Fisher's May 2008 report identified twenty-nine opinions. (See Dkt. No. 2198-5 & 2198-6.) In his report, Fisher made no attempt to link the Cargill Defendants with any specific application of poultry litter. Instead, Fisher provided a chart allegedly showing the general "waste generation" and "waste disposal" of nine "Defendant[s]" within, without, or on the "border" of the Illinois River Watershed. (Id. tbl. 8.) Fisher did not identify any growers or fields in his report attributable to the Cargill Defendants (or any other Defendant for that matter). (Id.)

On June 5, 2009, Plaintiffs attached the Declaration of Fisher to their Opposition to Cargill Defendants' Motion for Summary Judgment. (Dkt. No. 2178-13 Ex. 12.) That Declaration contains new opinions concerning field-specific analysis of soil test phosphorus (STP). These opinions, which are the basis of this motion, were not previously disclosed to Defendants.[1]

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[1] Plaintiffs attached a different Fisher declaration, dated June 3, 2009, to their brief in opposition to Defendants' Daubert motion seeking to preclude the testimony of Plaintiffs' expert Roger Olsen, Ph.D. (See Dkt. No. 2198-5 & 2198-6, Ex. H.) Defendants have elsewhere in the record of this case jointly moved to strike that declaration as it contains additional sampling and investigation conducted by Fisher after the expiration of the expert discovery deadline. (See Dkt. No. 2241 at 24 n.11.)

LEGAL STANDARD

The legal standard for reviewing supplemental expert reports is set forth in great detail in Defendants' Motion to Strike Plaintiffs' New and Undisclosed Expert Opinions (Dkt. No. 2241) and, in the interest of judicial economy, the Cargill Defendants hereby incorporate the legal analysis in that brief by reference. In short, this Court has declared that a report which attempts to "strengthen or deepen" the original opinions expressed by the expert exceeds the bounds of permissible supplementation. (Id. at 4 (citing the Court's January 29, 2009 Order: Dkt. No. 1839)). In determining if an untimely expert report may be permitted, courts consider (1) the prejudice to the party against whom the expert testimony is offered, (2) whether the offering party can cure the resulting prejudice, (3) whether the late testimony would disrupt trial, and (4) whether the offering party is acting in bad faith. Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d 985, 993 (10th Cir. 1999). Where the defendants are faced with declarations that are "essentially . . . new expert report[s] with new opinions, and defendants would need to depose [the expert] before trial to prepare a meaningful Daubert challenge," the report should be stricken. Palmer v. Asarco Inc., 03-CV-0498, 2007 U.S. Dist. LEXIS 56969, at *13 (N.D. Okla. Aug. 3, 2007). Simply stated, "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." Akeva, L.L.C. v. Mizuno, Corp., 212 F.R.D. 306, 310 (M.D.N.C. 2002), cited favorably in Quarles v. United States, No. 00-CV-0913, 2006 U.S. Dist. LEXIS 96392, at *16 (N.D. Okla. Dec. 5, 2006).

DISCUSSION

As summarized elsewhere in the record of this case, Plaintiffs have been cautioned by the Court previously about improperly supplementing their expert reports. (See Dkt. No. 2241:

Defs.' Mot. Strike Pls.' New and Undisclosed Expert Opinions at 1-3.) Yet, more than a year after the deadline for submittal of their expert reports on liability, and for the first time in response to the Cargill Defendants' Motion for Summary Judgment (Dkt. No. 2079), Plaintiffs have now submitted additional, heretofore unseen, opinions of their expert, J. Berton Fisher, Ph.D. These new opinions, first presented to the Cargill Defendants on June 5, 2009, would greatly prejudice the Cargill Defendants and the only way to cure the prejudice would be to allow for yet another deposition of Fisher, adequate opportunity to prepare and file rebuttal reports on the new opinions expressed, and an opportunity to supplement the Daubert and summary judgment briefing already submitted to the Court.

I. The Opinions Expressed in Fisher's May 27, 2009 Declaration Are New

The May 27, 2009 Declaration includes three charts and a descriptive map not previously referenced in Fisher's first report or his first or second "errata" reports. The first chart purports to depict "a true and correct summary of . . . [soil test phosphorous (STP)] . . . . for each field with a reported STP" identifying the "integrator" associated with that field. (Dkt. No. 2178-13 Ex. 12 ¶ 7.) This is the first time STP data has been reported by Fisher on a field-level analysis. Indeed, in the aggregate 130 plus pages of his report and "errata" report, Dr. Fisher mentions soil test phosphorous in only one sentence having nothing to do with field-level analysis. That sentence reads: "Non-point source modeling work conducted in the Illinois River Watershed found that a maximum poultry waste transport distance of 8000m (approximately five (5) miles) from poultry houses in the Illinois River Watershed provided the best observed fit between estimated soil test phosphorus and observed soil test phosphorus." (Dkt. No. 2198-5 at 29.) In contrast, in his May 27, 2009 Declaration, filed after the Cargill Defendants challenged the lack of field-level causation analysis, Fisher offers for the first time a number of opinions on STP and

field-level analysis, including the following:

- "As shown in the spreadsheet, the available soil test data indicates that waste from each Defendants' birds has been land applied in the IRW far in excess 120 lbs/acre, let alone 65 lbs/acre."
- "The available STP data also shows that the majority of fields linked to Defendants are in excess of the disposal threshold of 120 lbs/acre."
- "Indeed, many of the soil tests reflect STP levels in excess of 600 lbs/acre (5 times the disposal threshold), and some are over 1,200 lbs/acre (10 times the disposal threshold)."
- "One Cargill grower had an STP of 1,424 lbs./acre and another had an STP of 1,063 lbs./acre."

(Dkt. No. 2178-13 Ex. 12 ¶¶ 11, 15.)

II. Fisher's New Opinions on Field-Level STP Analysis Are Outside the Scope of His Own Description of His May 2008 Expert Report and Opinions

At his deposition, conducted in September 2008—more than three months after he issued his report—Fisher affirmatively claimed he would not "offer an opinion about any specific location" or field, stated a field-specific opinion "wasn't the point of [his] analysis," and testified it "wasn't really [his] charge" to identify specific fields that were contaminated with poultry litter. (Dkt. No. 2085-3: Fisher 09-03-08 (Vol. I) Depo. at 265:25-270:4.) Thus, not only did Fisher not provide a field-level analysis of soil test phosphorus in his May 2008 expert report, he expressly disclaimed any such opinion or analysis at his subsequent deposition in September 2008.

For example, Fisher had the following exchanges with counsel for Defendant Tyson at his deposition:

> Q How many fields do you have data on that show contamination from poultry litter?
> MR. GARREN: Object to form.
>
> A I don't know how many fields. We've collected them here from 73 locations, and there may be multiple locations per field.
>
> Q And is it your opinion, sir, that all 73 of the locations that you've collected data on are contaminated by poultry waste?
>
> A I really don't offer an opinion about any specific location.

(Id. at 265:25-266:10.)

> Q So have you sought to identify which of these 73 locations are above the agronomic rate and, therefore, in your opinion contaminated by poultry waste?
> MR. GARREN: Object to the form.
>
> A No, that wasn't the point of this analysis. The point of this analysis was to show that the zinc, copper, arsenic and phosphorus concentrations, especially the zinc and copper and the phosphorus concentrations that one found in soils were consistent with mixing cleaner materials with poultry waste.

(Id. at 267:16-268:2.)

> Q Dr. Fisher, as a scientist working on this case, you were not interested in identifying the specific fields that were contaminated with phosphorus from poultry waste?
> MR. GARREN: Object as to form.
>
> A That wasn't really my charge. My charge was to look at the population behavior of these soils and examine whether or not the chemistry of those soils is consistent with the imbibing or taking up constituents from the poultry waste. The contamination—if they're taking up constituents from poultry waste, then they ultimately will become contaminated. That keeps going on.

(Id. at 269:17-270:4.)

Fisher's testimony shows that even Fisher did not envision, much less plan on creating, the STP charts that appear in his May 27, 2009 Declaration. Fisher clearly testified at his September 2008 deposition that he considered field-level analysis and opinions outside the scope of his May 2008 report and outside the scope of his work and analysis generally.

III. Fisher's New Opinions Are Highly Prejudicial to the Cargill Defendants and the Harm is Incurable Absent Striking the Declaration

Having been omitted from his May 2008 report, Fisher's new opinions on field-level STP analysis come as a great surprise to the Cargill Defendants. Further, as noted above, Fisher, in his September 2008 deposition, assured Defendants he would not "offer an opinion about any specific location" or field, stated a field-specific opinion "wasn't the point of [his] analysis," and testified it "wasn't really [his] charge" to identify specific fields that were contaminated with poultry litter. (Id. at 265:25-270:4.) As a result, the Cargill Defendants did not have an opportunity to question Fisher about his new opinions, did not charge their own experts with rebutting any evidence regarding field-level STP levels, and did not have an opportunity to analyze and refute Fisher's new opinions in their Daubert or summary judgment motion briefing. Cargill vigorously disputes the validity of Fisher's new opinions, which are replete with inaccuracies and which are highly misleading at best. Nor do his new opinions, as demonstrated in Cargill's reply in support of its summary judgment motion, constitute any specific evidence of specific causation as to Cargill (or any other defendant for that matter). (See Dkt. No. 2265 at 3-8.)

Nonetheless, to fully rebut Fisher's inaccurate and misleading new opinions, the Cargill Defendants would need to reexamine Fisher in a supplemental deposition, to reexamine the rebuttal of Fisher's new opinions with the Cargill Defendants' own experts, and to supplement their Daubert and summary judgment motion briefing. Given the impermissible "bolstering" of Fisher's opinion after the close of discovery and after the deadline for supplementation has long since passed, the appropriate solution at this late date is for the Court to strike Fisher's Declaration from further consideration in these proceedings, a result that is contemplated by Fed.

R. Civ. P. 37(c)(1) ("If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

CONCLUSION

As Plaintiffs have provided no basis for the untimely disclosure of Fisher's new opinions and given the prejudice to the Cargill Defendants and the likelihood of the derailment of the trial should his new opinions be considered, the Cargill Defendants urge the Court to strike from these proceedings and its consideration the May 27, 2009 Declaration of J. Berton Fisher, Ph.D.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 1st day of July, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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