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' MOTION IN LIMINE TO PRECLUDE GENERALIZED REFERENCES TO DEFENDANTS ON ISSUES REQUIRING DEFENDANT-SPECIFIC PROOF

Defendants respectfully move the Court for an order prohibiting Plaintiffs from making arguments concerning, references to, or from eliciting testimony regarding, Defendants generally pertaining to issues that require Defendant-specific proof. Such generalized references would be irrelevant, highly prejudicial, misleading and confusing, and therefore are prohibited under Federal Rules of Evidence 402 and 403.

As set out in *Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6 and 10*, Dkt. No. 2069, at 1-4 (May 18, 2009) ("Causation Motion"), Plaintiffs have made clear their intention to try this case on an industry-wide basis. To that end, Plaintiffs' evidence of causation and claims of injury turn on undifferentiated allegations of poultry litter application and injuries to waters in the IRW, but with no specific evidence tying any of these instances to any particular Defendant. *Id.* Indeed, throughout the summary judgment briefing, Plaintiffs repeatedly cite to company-specific evidence such as purported admissions of company officials or poultry raising contracts as

evidence against each and every defendant. *See, e.g.*, State of Oklahoma's Response in Opposition to Defendants' Joint Motion for Summary Judgment on Plaintiffs' RCRA Claim, Dkt. No. 2125, at 4 ¶2 (June 2, 2009) (citing only the testimony of a Tyson employee for the proposition that each Defendants' birds are raised with equipment owned by that Defendant); State of Oklahoma's Motion for Partial Summary Judgment, Dkt. No. 2062, at 9-11 ¶10 (offering testimony from specific growers against all Defendants as proof of company-Grower relationships).

Plaintiffs' experts similarly base many of their opinions on undifferentiated evidence regarding some, but not all, Defendants and on aggregated "industry" evidence such as bird population estimates which include bird populations for companies who are not defendants in this case. For example, at trial Plaintiffs will seek to elicit testimony regarding past conditions and operations in the IRW. Plaintiffs' modeler, Dr. Bernard Engel, relies on undifferentiated historical data to construct his model. *See* Ex. A (Engel Report) at 2, 82-90. Similarly, Plaintiffs' expert Dr. Bert Fisher will allege that phosphorous levels in Lake Tenkiller have risen steadily over the past half-century in concert with the growth of the "poultry industry" including growth associated with companies that are not included in this lawsuit. *See* Ex. B (Fisher Report) at 61-62 & Fig. 33. Plaintiffs will use this evidence to allege a linkage between the poultry industry and phosphorous levels in the lake,[1] as well as to support any demand for relief against the current Defendants that they are permitted to make. Yet, Dr. Fisher's report makes no distinction between individual Defendants, and indeed as he admitted at his deposition he is

[1] Defendants dispute this claim, which is misleadingly presented and relies on selectively interpreted data. As Dr. Connolly will show, phosphorous levels in Lake Tenkiller peaked some time ago, and improvements in phosphorous levels track with the reduction in phosphorous from sources such as detergent and waste water treatment facilities. Moreover, as Dr. Sullivan will demonstrate, rising levels of phosphorous also track with rising human, cattle, and swine populations.

not capable of making any such distinction. *See* Ex. C (Fisher Dep.) at 134:24-136:22. Indeed, the only reference Dr. Fisher cited to support his work was a book, *From Hills and Hollers: Rise of the Poultry Industry in Arkansas* by Stephen F. Strausberg. *Id.* at 135:17-22. But that book makes clear that individual Defendant's presence in the watershed have fluctuated substantially over time, and that in fact a substantial portion of the industry's growth was driven by companies such as Ralston Purina, Campbell Soup, Pillsbury, and Swanson, which are no longer present in Northwest Arkansas and who are not defendants in this lawsuit. *See* Ex. D (Strausberg, *From Hills and Hollers*) at 73-75, 88, 100, 117-120.

The fact is that Plaintiffs have not secured a defendant class. Furthermore, this is not an "industry" case. Plaintiffs have not identified any legal theory under which the Defendants in this case can be held liable for the alleged environmental consequences of competitors who previously operated in the watershed. Therefore, each individual Defendant has a right to have its liability proven by evidence specifically demonstrating its responsibility. *See, e.g., Doe v. Cassel*, 403 F.3d 986, 988 (8th Cir. 2005) (motion to dismiss properly granted as to an amended complaint for alleging collective misconduct and not differentiating acts and omissions between individual defendants). As to numerous points to be proved at trial, Plaintiffs must adduce evidence specific to each individual defendant. Each Defendant is a separate corporate entity with different facilities, operations, and activities. *See* Causation Motion, Dkt. No. 2069 at 5-6. Each Defendant contracts with different Contract Growers, pursuant to different agreements and different business practices. Plaintiffs' proofs do not apply to each company equally. Indeed, Plaintiffs admit that they have never even taken a single sample from a Cal-Maine farm, as Cal-Maine has never had any production operations in the IRW. *See* Tyson Foods' Opp. to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 2183, at 3-4 (June 5, 2009). Moreover, while Plaintiffs do not have individualized evidence of litter applications, Plaintiffs'

own employees confirm that many areas within the watershed are nutrient-deprived, including for phosphorous. *See, e.g.*, Ex. E (Zhang Dep.) at 43:13-20. And, as the Strausberg book demonstrates, the number, size and identity of the "integrators" operating in the IRW have fluctuated over time, as different companies (including non-defendants) have entered and exited the watershed. *See* Ex. D, *generally*. For these and other reasons, Plaintiffs' generalized attribution of evidence against the "poultry industry" is insufficient to meet Plaintiffs' burden to prove elements such as causation and injury against each Defendant individually. *See* Causation Mot. at 16-21 (setting out legal basis requiring Plaintiffs to show individualized proof as to each Defendant).

DISCUSSION

Because Plaintiffs bear the burden of proving their case as to each individual Defendant, it would be improper of them to make generalized references to "Defendants," to "the Industry," to "Poultry Integrators," or to the "Poultry Companies" or to employ any similar short hand to aggregate Defendants into a single unit, except where evidence previously adduced already establishes proof against each Defendant on a particular point. Unless such proof has already come into evidence, any such generalization would be irrelevant under Rule 402 and in any event prejudicial and confusing under Rule 403.

I. Unsupported Generalizations Against Defendants Are Irrelevant Under Federal Rule of Evidence 402

Rule 402 establishes the baseline rule of evidence that relevant evidence is generally admissible, while irrelevant evidence is always inadmissible. Fed. R. Evid. 402 ("Evidence which is not relevant is inadmissible."). To the extent that previously admitted evidence has not already established that a particular point or claim may be raised against each Defendant, then generalized references to each and every Defendant collectively on that point necessarily invites

the trier of fact to speculate as to the liability of those Defendants not implicated by specific proof.

II. Unsupported Generalizations Against Defendants Would Be Unfairly Prejudicial, Would Confuse the Evidence, And Would Mislead The Jury Under Federal Rule of Evidence 403

Even if such speculative argument or testimony were considered relevant, it would in any event prejudice Defendants, confuse the evidence, and mislead the trier of fact in violation of Rule 403.

As set forth in the Causation Motion, Plaintiffs must prove causation against each, individual Defendant. *See, e.g.*, *McKellips v. St. Francis Hospital, Inc.*, 741 P.2d 467, 470 (Okla. 1987); *Woolard v. JLG Indus.*, 210 F.3d 1158, 1172 (10th Cir. 2000); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007).

> In all tort cases, the plaintiff must prove that *each defendant's conduct was an actual cause*, also known as cause-in-fact, of the plaintiff's injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.

Id., at 113-14 (emphasis added); *see also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-78 (10th Cir. 2009); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma has not and would not adopt alternative, collective or non-identification theories of liability); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same). Meeting this burden requires proof against each Defendant individually, not all Defendants collectively.

The finder of fact, whether the Court or a jury, will have to track carefully what proof has been submitted against each Defendant on each relevant point. Were Plaintiffs permitted to present evidence in summary and collective fashion, and to make their claim against "the Poultry

Defendants" without first having to specify their proofs against each Defendant, this task will become nearly impossible. Plaintiffs are in the best position to accurately put on their case and to minimize this risk of prejudice by keeping their presentations and arguments Defendant-specific, until such time as the evidence supports a more generalized statement.

For this reason, courts facing similar circumstances have properly prevented a party from making generalized references aggregating similarly situated groups of defendants. *See, e.g.*, *United States v. Edwards*, 159 F.3d 1117, 1127 (8th Cir. 1998) (holding that the district court was "appropriately cautious" in allowing clarification of "the number of people referred to by a plural pronoun, to negate any inference it might refer to all defendants."). In *Smith v. Arthur Andersen*, 2005 WL 5976558, at *1 (D. Ariz. 2005), the district court granted a similar motion to prevent collective references to a group of insurance underwriter defendants. *See* Motion at *Smith v. Arthur Andersen*, 2005 WL 2516854 (D. Ariz. Aug. 5, 2005). The same restriction is appropriate in this case.

CONCLUSION

For these reasons, any generalized references to "Defendants," the "poultry integrators" or other shorthand references will unfairly paint each Defendant with evidence attributable to only one or a few Defendants, thereby confusing the evidence, misleading the jury, and prejudicing Defendants. Rather than face constant objections at trial, the better course is to require Plaintiffs *ex ante* to address Defendants individually.

Respectfully Submitted,

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