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

STATE OF OKLAHOMA, ex rel.	)	
W.A. DREW EDMONDSON, et al	)	
	)	
Plaintiffs,	)	**Case No. 05-CV-329-GFK-SAJ**
vs.	)	
	)	
TYSON FOODS, INC., et al,	)	
	)	
Defendants.	)	

DEFENDANT, CAL-MAINE FOODS, INC., MOTION *IN LIMINE*
REGARDING REFERENCE TO BENTON COUNTY FOODS, LLC AND
INTEGRATED BRIEF

The defendant, Cal-Maine Foods, Inc., moves this honorable Court for an Order prohibiting any reference by the State during the trial of this matter to Benton County Foods, LLC. Such references are confusing and therefore unfairly prejudicial Federal Rule of Evidence Rule 403 and should be prohibited.

BACKGROUND

The State of Oklahoma has sued Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc., in this lawsuit. During the pendency of this case Cal-Maine Foods, Inc. (Cal-Maine) and another entity, a partnership, formed Benton County Foods, LLC.[1] Benton County Foods, LLC (BCF) is an Arkansas corporation organized under the laws of that State (Exhibit 1). Cal-Maine is a Delaware corporation (Exhibit 2, Affidavit of Steve Storm, ¶3). BCF is an egg laying operation located in Benton County, Arkansas and is located in the Illinois River Watershed (Exhibit 2, ¶5). It is comprised of eight layer houses.

[1] Defendant's counsel has been informed that Cal-Maine Foods, Inc. has recently acquired the ownership interest of the other legal entity and now owns BCF in its entirety.

The Plaintiffs were made aware of the existence of BCF no later than June 29, 2007 (Exhibit 3). Cal-Maine and BCF are separate legal entities (Exhibit 2, ¶¶ 3, 5). BCF has its own Operating Agreement and Board of Directors (Exhibit 4, Exhibit 5, Affidavit of Tim Dawson ¶5). BCF has made its own arrangements for the disposition of chicken litter using a company known as Terra Renewal Services (Exhibit 2, ¶7) and other third parties. Cal-Maine was not and is not a party to BCF's litter removal decisions (Exhibit 2, ¶7).

Steve Storm is an employee of Cal-Maine and Vice President for Operations (Exhibit 2, ¶ 2). His duties include oversight of egg production operations in four states where Cal-Maine has egg production activities, including Arkansas (Exhibit 2, ¶4). He has oversight responsibility for BCF's egg production activities (Exhibit 2, ¶5). He periodically visits BCF (Exhibit 2, ¶6; Exhibit 5, ¶6). To the extent necessary, he superintends the production of eggs, care of the birds and maintenance of the physical plant (Exhibit 2, ¶6). Day to day operations of BCF are the responsibility of Tim Kimball (Exhibit 2, ¶6) and other BCF employees (Exhibit 5, ¶5).

Mr. Storm's duties do not include the management of any litter produced by BCF, nor does any other employee of Cal-Maine have such responsibility (Exhibit 2, ¶7). BCF has made arrangements with Terra Renewal Services, Inc. (TRS) and other third parties to handle all litter produced by BCF (Exhibit 2, ¶7). If any change in the handling of litter produced by BCF's operations was to be made, it would be done by BCF management (Exhibit 2, ¶7). Cal-Maine would not be involved in such a decision.

BCF is financially independent of Cal-Maine Foods, maintains its own payroll, has its own board of directors, maintains its own records, and pays its own taxes (Exhibit

5, ¶5). BCF maintains its own payroll records, has its own separate bank accounts, separate debt servicing, and is exclusively run by BCF employees (Exhibit 5, ¶5). Mr. Storm's responsibility is to protect Cal-Maine's investment in BCF (Exhibit 5, ¶6).

Defendant, Cal-Maine Foods, Inc. is concerned that the Plaintiffs will attempt to attribute the actions of BCF to Cal-Maine or otherwise insinuate that Cal-Maine still has a presence in the IRW and to improperly attempt to prove that the actions of BFC are attributable to Cal-Maine. This should not be allowed.

ARGUMENT

I. ANY REFERENCE TO BENTON COUNTY FOODS, LLC IS CONFUSING AND THREFORE UNFAIRLY PREJUDICIAL IN THE PLAINTIFFS' ACTION AGAINST CAL-MAINE FOODS, INC. AND SHOULD BE EXCLUDED FROM TRIAL

The relationship between Cal-Maine and BCF is one of parent and subsidiary. This relationship alone is not enough, without more, to justify any references to BCF during the upcoming trial in which Cal-Maine is a defendant and is prejudicial to Cal-Maine because of the confusion such evidence is likely to engender.

A. Because Cal-Maine is not derivatively liable, evidence of BCF's activities is confusing and unfairly prejudicial

Evidence of BCF's activities is confusing and unfairly prejudicial because it infers that a connection between it and Cal-Maine is material to this case and, in fact, it is not. Merely having a corporate relationship is not enough to justify evidence of either parent's actions or the subsidiary's actions in a case where only of the two is party to a case. Case law teaches that the distinctness of the corporate entities is to be respected absent strong evidence that would justify a different approach. This is true even in a CERCLA case where there is a true hazardous substance at issue. While BCF does not

produce any hazardous substances and is therefore even yet another step removed from the present case, the case law in the area that deals with hazardous substances is helpful to the analysis in this case.

The case of *United States v. Bestfoods, et al., 524 U.S. 51, 118 S. Ct. 1876, 141 L.Ed 2d 43 (1998)* shows us that any evidence regarding BCF is not germane to this case and hence confusing because a parent corporation, absent other actions, is not derivatively liable for its subsidiary. *Bestfoods,* provides guidance regarding the potential liability of a parent corporation when a subsidiary has disposed of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C.S. §9601, et seq. The case provides a framework for evaluating potential liability and hence provides a framework for judging the potential prejudice of references to the actions of a subsidiary that has been purposefully left out of an action against the parent corporation.

In *Bestfoods* Ott Chemical Company (Ott I) operated a chemical manufacturing facility, which disposed of hazardous substances in the surrounding area, in Michigan beginning in 1957. CPC International (CPC), whose name was later changed to Bestfoods, created a wholly owned subsidiary to purchase Ott I and operate the new company, also named Ott Chemical Company (Ott II). Ott II continued the disposal practices of Ott I. The United States sued CPC for damage because of the disposal practices.

CPC kept most of the officers and managers of Ott I to run Ott II. Those officers and managers were also given positions with CPC and performed duties for both. CPC's governmental and environmental affairs officer, G.R.D. Williams, became heavily

involved in Ott II's environmental issues. He actively participated in and exerted control over Ott II's environmental matters and help direct Ott II's responses to regulatory inquiries.

The trial court found CPC had both direct liability, as an operator, as defined by CERCLA, and derivative liability as the entity that owned and controlled Ott II. The Sixth Circuit Court of Appeals reversed in part based upon the concept that the parent corporation can be held liable only when the corporate veil of the subsidiary can be pierced. The United States Supreme Court vacated the Sixth Circuit's ruling and remanded the case for further proceedings based upon its analysis of the direct liability theory.

In looking at the derivative liability issue the Supreme Court stated:

> Thus it is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders…will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws…and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal."

524 U.S. at 61-2, 118 S. Ct. at 1884. The Court also noted that if the subsidiary was being used for an improper purpose, most notably fraud, on the shareholders' behalf the veil could also be pierced. Id. at 62, 188 S. Ct. at 1885. It found that there did appear to any such purpose by Bestfoods in the case but the CERCLA had not changed that part of corporate law.

The Supreme Court noted that the Sixth Circuit was correct in holding that "when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions." Id. at 63-64, 118 S. Ct. at 1885-6.

In the case before this Court, Cal-Maine and BCF have kept the corporate formalities and the existence of BCF is to operate an egg laying facility. Additionally, BCF uses recognized companies for the disposition of its chicken manure and does not produce any hazardous substances. If handling truly hazardous substances, such as was the case in *Bestfoods,* did not trigger a stricter scrutiny of the parent subsidiary relationship, handling manure surely cannot.

As such, evidence of BCF's activities could only serve to confuse the issues in this trial and such confusion is unfairly prejudicial because it may lead to the attribution of BCF's actions to Cal-Maine.

B. Because Cal-Maine is not directly liable under *Bestfoods,* evidence of its activities regarding BCF would be confusing and prejudicial

On the direct liability theory, the *Bestfoods* Supreme Court stated that:

> the District Court failed to recognize that it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. Control through the ownership of shares does not fuse the corporations, even when the directors are common to each.

Id. at 69, 118 S. Ct. at 1888. (Citations omitted) and thus the trial court's focus was wrong. The trial court should have looked at the relationship between the parent corporation and the pollution producing facility not the parent-subsidiary relationship. Id. at 70, 118 S. Ct. at 1889. Based upon this direction the Supreme Court sent the case back to the trial court for a determination of the parent-facility relationship.

Regarding the direct liability theory the Supreme Court also wrote:

> Activities that involve the facility but which are consistent with the parent's investor status, such as monitoring the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to

> direct liability. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

Id. at 72, 118 S. Ct. at 1889 (citations omitted). Thus activities which are in keeping with the parent's investor status are not the type of activities that can amount to direct control such that direct liability can attach. In fact, even having managerial oversight for a subsidiary, "such as monitoring subsidiary's performance" will not give rise to direct liability if that oversight is consistent with the parent's investor status and not eccentric to normal corporate parental activity. Steve Storm's responsibilities, as outlined in his affidavit, clearly fall within such normal corporate parental activity.

On the question of what is necessary for direct liability, and hence non-prejudicial for to our case, the Court stated:

> So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must, manage, direct, or conduct operations **specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.**

Id. at 66-7, 118 S. Ct. at 1887 (emphasis added). In other words, regarding activities of BCF that could be considered allegedly polluting, Cal-Maine must manage, direct, or conduct operations specifically related to leakage or disposal of hazardous waste or decisions about compliance issues to have any direct liability. Because Cal-Maine does not manage, direct or conduct operations having to do with leakage or disposal of hazardous or decisions about compliance with environmental regulations, any reference to actions or missions by BCF or Cal-Maine's actions regarding BCF is irrelevant to the issues the case before the this Court.

The Tenth Circuit has applied *Bestfoods* to the same end, the recognition that ownership, participation as a dual corporate officer and oversight alone, without more, will not necessarily result in either derivative or direct liability under CERCLA for the actions of the subsidiary. *Raytheon Constructors, Inc. v. ASARCO, Inc.*, 368 F. 3d 1214 (10th Cir. 2003).

In the present case Cal-Maine does not exercise any day to day control over BCF and the only management connection is Steve Storm, a Cal-Maine employee. It is part of his job, but not all, to superintend the BCF's egg production operation. His oversight is not specific to BCF but includes several egg laying operations throughout the country. Specifically, he has no direct control of BCF's decisions regarding the disposition of used chicken litter, the only issue of which the Plaintiffs complain in the present suit.

Because there is no evidence that Cal-Maine directly operates or controls BCF's litter disposal policy or compliance, there is no need for any evidence or reference to BCF in the trial of this matter. The framework set out in both *Bestfoods* and *Raytheon* dictate what evidence is material and non-confusing to a consideration of potential corporate parental liability in a pollution case under CERCLA and, when applied to this case, shows that any references to BFC would confuse the issues and be prejudicial.

Rule 403 of the Federal Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In the present case, references to or evidence regarding BCF would be confusing and should not be allowed. "'Unfair prejudice' (under *Rule 403*) means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, *Rule 403, Fed.R.Evid.* quoted in *Depew v. Hanover Insurance Co., 438 F. Supp. 358, 360 (E.D.Tenn. 1977)*. Confusion of the issues warrants exclusion of relevant evidence if admission of the evidence would lead to litigation of collateral issues. *Seven Provinces Insurance Co. v. Commerce & Industry Insurance Co., 65 F.R.D. 674, 689 (W.D.Mo. 1975). United States v Dennis* (8th Cir. 1980) 625 F2d 782, 797-8.

In the present case the only reason to the Plaintiffs could have to mention BCF is to cloud the distinction between the companies and to try to make Cal-Maine responsible for BCF's actions. These issues are clearly collateral to the Plaintiffs action which is a direct claim against Cal-Maine. As such, all references to BCF should be prohibited as being confusing and unfairly prejudicial under Rule 403.

CONCLUSION

For the reasons stated above, any reference to or evidence regarding Benton County Foods, LLC, should be prohibited.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of August 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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