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

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No 05-CV-329-GKF-PJC**
TYSON FOODS, INC., et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the Motion for Protective Order with Respect to State of Oklahoma's Notice of Deposition of John Tyson [Dkt. No. 1975] filed by Defendant Tyson Foods, Inc. (hereafter, "Tyson Foods"). The Motion seeks to prevent the deposition of John Tyson ("Tyson"), Chairman of the Board and former CEO of Tyson Foods on the grounds that Tyson lacks any special knowledge about the subject of this litigation and, furthermore, that Plaintiff has taken multiple depositions pursuant to Fed. R. Civ. P. 30(b)(6) concerning the issues on which they seek to depose Tyson.

Background

This action alleges damage and pollution to the Illinois River Watershed ("IRW") by virtue of Defendants' poultry operations there. The IRW straddles the Arkansas-Oklahoma line and covers large portions of Benton and Washington counties in Arkansas and Adair and Cherokee counties in Oklahoma. Specifically, the suit alleges damage to the IRW caused by improper storage and disposal of chicken litter. State has sued on multiple theories and seeks an award of punitive damages

In July 2007, pursuant to Fed. R. Civ. P. 30(b)(6), Plaintiff served a Notice of Deposition of Tyson Foods. The Notice listed five pages of topics to be covered. Six individuals were subsequently deposed: Patrick Pilkington, former Vice President of Live Production Services for Tyson Foods' poultry operations; Steve Patrick, Director of Environmental Health and Safety; Archie Schaffer, Senior Vice President for Governmental Affairs; Read Hudson, Vice President and Associate General Counsel; Leasea Butler, Director of Product for all Cobb-Vantress poultry operations; and Dr. Chet Wiernusz, World Technical Services Representative for Cobb-Vantress. At the deposition of Steve Patrick, Plaintiff's counsel complained that Patrick was not fully informed or knowledgeable about certain topics.[1] Apparently, however, Plaintiff took no further action about this complaint until nearly two years later. In March 2009, the Plaintiff noticed the video deposition of John Tyson to take place in Fayetteville, AR on April 16, 2009.[2] Tyson is Chairman of the Board of Tyson Foods and formerly served as Chief Executive Officer of the company.

Tyson Foods contends that a protective order should be granted for the following reasons: (1) depositions of senior organization leaders are discouraged absent a showing of unique personal knowledge; (2) Tyson does not have unique personal knowledge regarding this case; (3) Plaintiff has delayed in giving notice, thereby unduly burdening Tyson Foods. Plaintiff believes that Tyson "has unique personal knowledge of pertinent

---

[1] Counsel for Tyson Foods disputed Plaintiff's contention in this regard, indicating that Plaintiff was asking certain questions of the wrong Rule 30(b)(6) witness or that the questions posed were not related to a topic contained in the deposition notice. This conflict was not resolved because the issue was never presented to the Court.

[2] April 16, 2009, was the deadline for fact discovery; however, the parties are continuing with extensive expert witness discovery.

historical events from a vantage point that is not possessed by other witnesses."

(Response to Motion for Protective Order, p. 4).

Applicable Legal Principles

Federal Rule of Civil Procedure 26 provides:

> **(1) In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> **(A)** forbidding the disclosure or discovery;
> **(B)** specifying terms, including time and place, for the disclosure or discovery;
> **(C)** prescribing a discovery method other than the one selected by the party seeking discovery;
> **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
> **(E)** designating the persons who may be present while the discovery is conducted;
> **(F)** requiring that a deposition be sealed and opened only on court order;
> **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
> **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. Rule 26(c)(1)(A)-(H).

The party seeking a protective order has the burden of showing good cause for its issuance. *AG Equip. Co. v. AIG Life Ins. Co.*, 2008 WL 3992789 (N.D.Okla. Aug. 25, 2008). To establish good cause the movant must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Id.*; *Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. Pepsico, Inc.*, 2002 WL 922082 at *1

(D.Kan. May 2, 2002). The decision whether to enter a protective order is within the discretion of the court. *Wang v. Hsu*, 919 F.2d 130, 130 (10th Cir. 1990).

Motions for protective orders for so-called Apex officials are treated using the same legal standards as apply to any other protective order; however, the court takes into consideration "special factors that may apply to such officials." *Van Den Eng v. The Coleman Co.*, 2005 WL 3776352, *2 (D.Kan. Aug. 22, 2005) (citing *Thomas v. International Business Machines*, 48 F.3d 478, 483-84 (10th Cir. 1995). *Thomas* applied the standard set forth in Fed. R. Civ. P. 26(c) and considered factors such as the executive's knowledge of the issues in the case, the availability of others for deposition, the timing of the deposition request, and scheduling conflicts. *Thomas*, 48 F.3d at 483-84. *Baine v. General Motors*, 141 F.R.D. 332 (M.D.Ala.) 1991) discusses other grounds for protective order where a company executive's deposition is sought. For example, courts have barred such depositions on grounds of convenience and burdensomeness. *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). Some courts have focused on the issue of personal knowledge of the witness whose deposition is sought, even requiring that the witness must have "unique personal knowledge" before the deposition may proceed. *E.g.*, *Folwell v. Hernandez*, 210 F.R.D. 169, 175 (M.D.N.C. 2002). Some courts have required that other witnesses be deposed before the apex employee can be deposed. *E.g.*, *Colonial Capital Co. v. General Motors*, 29 F.R.D. 514 (D.Conn. 1961); *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979).

Previously in this lawsuit U.S. Magistrate Judge Sam Joyner held that corporate officials are entitled to consideration similar to that afforded heads of governmental agencies when evaluating whether a deposition should be permitted. (*See Opinion and*

Order at 6, Dkt. No. 1062 (Feb. 26, 2007)) ("This type of 'protection', however, is not limited to the heads of governmental agencies. Corporate heads are similarly treated."). Judge Joyner cited his previous opinion in *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515 (N.D.Okla. 2003) which in turn relied heavily on *Folwell v. Hernandez*, 210 F.R.D. 169 (M.D.N.C. 2002) and *Baine v. General Motors*, 141 F.R.D. 332 (M.D.Ala. 1991). Judge Joyner quoted *Folwell's* reading of *Baine*:

> The *Baine* Court held that Rule 26(b) gives the court power to regulate harassing or burdensome depositions, and that unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive….

Evans, 216 F.R.D. at 518-19 (quoting *Folwell*, 210 F.R.D. at 173-74).

The preferred method for deposing a corporation is through Fed. R. Civ. P. 30(b)(6). The Rule requires the corporation to obtain information and prepare a witness to testify on topics requested by the other side. The corporation has a duty to designate more than one witness if that is necessary to respond to areas of inquiry specified in the notice. *Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008). If the party taking the deposition is dissatisfied with the corporation's selection of deponent, plaintiffs can select an officer, director, or managing agent for deposition. *Blaine*, 141 F.R.D. 336.

Discussion

This Court's prior rulings on this issue reflect courts' concerns about apex depositions; however, company officials are not immune from deposition discovery. Rather, this is an area where Rule 26 gives the Court great discretion. The Court must exercise that discretion to permit legitimate discovery while guarding against abuse,

harassment and needless inconvenience. *See*, *Horsewood v. Kids "R" Us*, 1998 WL 526 589 at *2 (D.Kan. Aug. 13, 1998); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368 (10th Cir. 1997) (noting the trial court has broad discretion to balance the needs and rights of plaintiff and defendant.).

Here, Plaintiff has taken depositions of lower level Tyson Foods employees but contends that one deponent was not fully informed in accordance with Rule 30(b)(6). It is puzzling, however, why the State has waited almost two years until the eve of discovery cutoff before pursuing this matter. This Court has frequently advised litigants that it must timely file discovery motions or risk waiving them. *E.g. Continental Indus* , 211 FRD 442 (N.D.Okla. 1995). While *Continental* involved a motion to compel that was filed after discovery cutoff, the underlying principle has application to situations such as this one. Had the State pressed this issue two years ago, the matter might have been resolved by Tyson Foods producing additional Rule 30(b)(6) witnesses on the specific topics that Plaintiff felt Patrick was not fully informed. Instead, the State has waited until the end of fact discovery – while all parties are frantically trying to conduct expert discovery, prepare dispositive motions and prepare for expert witness challenges. While the timing of Plaintiff's deposition notice is not dispositive of the issue before the Court, it is a factor to be considered. *See Thomas*, 48 F.3d at 483.

The record evidence reflects the following:

1. Plaintiff deposed multiple Rule 30(b)(6) witnesses in August 2007 on a lengthy list of topics.

2. Steve Patrick, one of Tyson Foods' designated witnesses, was allegedly unprepared to answer questions related to some of those topics. Plaintiff complained at the deposition, but did not seek the Court's assistance in resolving the matter.

3. On March 13, 2009, Plaintiff noticed the deposition of John Tyson to occur on the last day of fact discovery.

4. John Tyson's affidavit states he has no "unique personal information" concerning facts related to the case or the policies at issue.

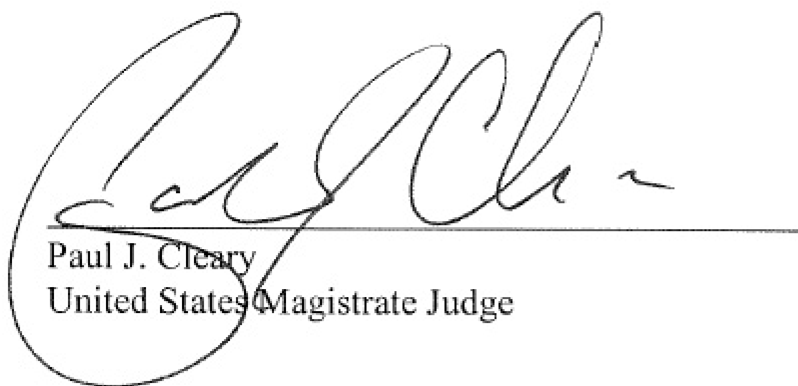
5. On June 22, 2004, John Tyson, as Chairman and CEO of Tyson Foods, signed a document setting forth the company's "Environmental Policy."

6. Kevin Igli, Tyson Foods' Sr. VP and Chief Environmental, Health and Safety Officer, has stated in an affidavit that although John Tyson signed the Environmental Policy, that policy was developed and implemented by Tyson team members within the department that Igli manages.

The Court has considered the record evidence as well as the previous rulings in this case and the case law cited therein. Applying these standards the Court finds that the Motion for Protective Order should be **GRANTED**. Tyson Foods has articulated a specific factual basis for its motion, *i.e.*, the proposed deposition of the company's Chairman of the Board of Directors. The question then is whether the record evidence demonstrates that Tyson has "unique personal knowledge of the controversy" that would warrant permitting the deposition. Plaintiff asserts that it "believes" Tyson has such knowledge, but offers no basis for this belief other than the Environmental Policy that Tyson signed as Chairman and CEO. The Court finds this insufficient. In *Zuniga v. Boeing Co.*, 2007 WL 1072207 (N.D.Okla. April 4, 2007), Judge Joyner allowed an apex

deposition based on testimony of another witness that established the company official had "personal knowledge about issues relevant to Plaintiff's case." *Id.* at *3. In contrast, the Environmental Policy is a little more than an aspirational statement of company goals. In addition, the Affidavit of Kevin Igli establishes that the Environmental Policy "was developed and implemented" by persons within the corporate department that Igli manages. Thus, Igli or others in his department would have been appropriate Rule 30(b)(6) deponents on this topic. Plaintiff could have pursued this course before seeking to depose the Chairman of the Board. Accordingly, the Motion for Protective Order [Dkt. No. 1975] is **GRANTED.**

IT IS SO ORDERED this 24th day of April 2009.



Paul J. Cleary
United States Magistrate Judge