UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE BROILER CHICKEN ANTITRUST LITIGATION This Document Relates To: *The Kroger Co., et al. v. Tyson Foods, Inc., et al.*, No. 1:18-cv-04534 *Save Mart Supermarkets v. Tyson Foods, Inc., et al.*, No: 1:19-cv-02805	Case No. 1:16-cv-08637 The Honorable Thomas M. Durkin The Honorable Jeffery T. Gilbert **[PUBLIC, REDACTED]**

REPLY TO THE KROGER PLAINTIFFS' OPPOSITION IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL DISCOVERY OF BENCHMARKING SERVICES AND PROTEIN-RELATED TRADE ASSOCIATIONS

INTRODUCTION

The Kroger Plaintiffs write separately from the other DAPs to argue that they are differently situated, and to make the extreme request for a protective order.[1] But the Kroger Plaintiffs cannot be protected from complying with their own agreement, or from the basic discovery process of a lawsuit that they chose to bring. For all of the Kroger Plaintiffs' hyperbole, the facts do not support their request for a protective order (or their opposition to Defendants' Motion). Seeking proportional discovery consistent with the parties' agreement while discovery is open is not abusive, and seeking correction of discovery errors is not harassment. There is no good cause here. Just the opposite, the Kroger Plaintiffs' motion for a protective order shows the lengths to which they will go to shirk their discovery obligations. The Kroger Plaintiffs' request is extreme, but the solution is simple: their motion for a protective order should be denied.[2]

BACKGROUND

The Kroger Plaintiffs suggest that the Defendants "do not want this Court to consider the actual written record" between the parties (Dkt. 4018, Opp. at 4), but it is they who omit key correspondence and the specifics of the parties' agreement. Negotiations with the Kroger Plaintiffs on protein-related trade associations and benchmarking services began as part of Defendants' global negotiations with all DAPs who were subject to Defendants' first motion to compel in January 2019. (*See* Ex. 1, 1/4/19 Email from S. Pepper to B. Floch.) While the Kroger Plaintiffs ultimately negotiated individually, the agreement on these issues with the Kroger Plaintiffs

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[1] As the Kroger Plaintiffs incorporated by reference DAPs' Opposition to Defendants' Motion to Compel ("the All-DAP Opposition") and the arguments therein, Defendants similarly incorporate by reference to this Reply their Reply to the All-DAP Opposition and the arguments therein, filed contemporaneously herewith. Defendants write separately to address the Kroger Plaintiffs' additional request for a protective order.

[2] Each Defendant joins to the extent the Kroger Plaintiffs have named it as a defendant and have unreleased claims against the Defendant as of the date of this reply.

contains the same key terms of Defendants' agreement with all DAPs. (*See* Ex. 2, 1/18/19 Ltr. from S. Pepper to B. Floch at 13-14; Dkt. 3954, Mot. at 6-8.) Notably, as part of the parties' agreement on the document requests and interrogatories regarding protein-related trade association and benchmarking participation, Defendants "reserve[d] the right to designate additional custodians if further discovery in this matter provides good cause to do so." (Opp., Ex. A, 1/18/19 Email from S. Pepper to B. Floch.) Defendants also "reserve[d] all rights, including to challenge the sufficiency of Kroger Plaintiffs' forthcoming production" with respect to the document requests pertaining to trade association and benchmarking participation. (Ex. 2 at 13-14.) It was thus clear, to everyone, that (a) Defendants reserved the right to future discovery with respect to protein-related trade association and benchmarking participation, and (b) the agreement pertained only to outstanding issues related to the Defendants' pending motion to compel.[3]

The Kroger Plaintiffs make much of their documents produced and other discovery responses on trade associations and benchmarking services to argue compliance with the parties' agreement, but they notably do not share with the Court the issues Defendants have raised with respect to them. For example, on August 24, 2020, Kroger responded to Defendants' Second Set of Interrogatories and identified [redacted]. (Ex. 5, 9/29/20 Email from B. Floch to J. Giulitto at 1.) Defendants accordingly requested that Kroger make a supplemental production

[3] With respect to the Kroger Plaintiffs' argument that Defendants "improperly accused Hy-Vee of not abiding by the agreement" (Opp. at 9), the Kroger Plaintiffs initially disclosed "Kroger ***et al.***" as utilizing [redacted]. Defendants wrote to clarify ***which*** Kroger Plaintiffs they meant, but the Kroger Plaintiffs did not clarify. (Ex. 3, 8/26/19 Ltr. from T. Hunter to B. Floch.) When the Kroger Plaintiffs ultimately responded to Defendants on June 11, 2020 (10 months later), they finally clarified they meant ***all*** the Kroger Plaintiffs. While this particular issue with the Kroger Plaintiffs has been resolved (Ex. 4, 7/24/20 Ltr. from J. Stupar to B. Floch), Defendants are disappointed that the Kroger Plaintiffs wish to mislead this Court with this example and blame Defendants for the Kroger Plaintiffs' own failure to clarify.

[redacted] because they were nowhere in Kroger's production, and should have been per the terms of the parties' agreement. (*See id.*) Kroger refused, improperly pointing to the search terms it ran rather than confirming that it included the custodians or other sources likely to have responsive information for [redacted] when it searched. (*Id.*) And it continues to do so, suggesting that running agreed search terms absolves it from having collected from the wrong places. (*See* Kroger Opp. at 8 ("We have used the broad search terms to search for documents . . . .").) The bottom line is that Defendants still do not know where Kroger's responsive [redacted] are located and why they are not included in Kroger's production to date. Kroger has refused to confirm it identified and included the correct sources consistent with the parties' agreement, or, if not, to correct that error.[4] (*See* Ex. 5.)

Further, on October 28, 2020, Kroger's 30(b)(6) designee on the topics of trade association and benchmarking participation testified that [redacted] (Ex. 7 [redacted]

[4] In response to their motion for a protective order, Defendants have conducted further investigation into the Kroger Plaintiffs' productions and identified additional deficiencies, including, but not limited to: [redacted] (*see, e.g.*, Ex. 6 [redacted] These deficiencies further demonstrate that Defendants are right to request that the Kroger Plaintiffs, at minimum, confirm they searched the correct sources for their disclosed (and amended) entities lists.

[5] Defendants are evaluating what, if any, recourse they wish to pursue with Kroger in response this this lack of preparedness. They reserve all rights.

[redacted]) Simply put, the Kroger Plaintiffs cannot credibly argue that they have fully complied with the parties' agreement (or their obligations in discovery) on these topics, or that they should be immunized from any further discovery requests based on their past performance.

Finally the Kroger Plaintiffs, like all other DAPs, have unjustifiably refused to provide the limited discovery Defendants have requested on the eight highly-relevant additional trade associations, or to consent to the third parties NPD Group, Nielsen, iRi and IHS Markit negotiating with Defendants. They should be ordered to comply with both of these requests, as well.

ARGUMENT

A court may, "for good cause, issue an order to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). The Kroger Plaintiffs must thus show good cause by alleging particular and specific facts to support a protective order. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, n.16 (1981); § 2035 Procedure for Obtaining Protective Orders, 8A Fed. Prac. & Proc. Civ. § 2035 (3d ed.) ("The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause."). Further, the Kroger Plaintiffs, as the party seeking a protective order, "bear[] the burden of showing good cause for the order by 'demonstrating harm or prejudice that will result from the discovery.'" *Gookins v. Cnty. Materials Corp.*, 2020 WL 3397730, at *1 (S.D. Ind. Jan. 7, 2020) (citations omitted); *Global Material Techs., Inc. v. Dazheng Metal Fibre Co., Ltd.*, 133 F. Supp. 3d 1079, 1083 (N.D. Ill. 2015). The Kroger Plaintiffs cannot meet this standard. They fail to adduce particular facts that demonstrate the harm or prejudice that will result from Defendants' requested discovery.

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