UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE BROILER CHICKEN ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *Ahold Delhaize USA, Inc. v. Koch Foods, Inc. et al.*, No. 18-cv-5351	Case No: 1:16-cv-08637 Judge Thomas M. Durkin Judge Jeffrey T. Gilbert **[REDACTED]**

TYSON DEFENDANTS' OPPOSITION TO DIRECT-ACTION PLAINTIFF AHOLD DELHAIZE'S MOTION TO COMPEL TYSON DEPOSITION

Plaintiff Ahold Delhaize USA, Inc. ("Ahold") has been in this case for almost three full years. During that time, Ahold has been given access to more than 1.3 million documents produced by Tyson;[1] it has had the chance to participate in the 30(b)(1) depositions of eighteen present and former employees of Tyson and its affiliates (with one more scheduled on July 29); and it has had the chance to participate in four days of 30(b)(6) testimony of Tyson and its affiliates. Ahold has also taken advantage of the opportunity to request—and receive—discovery specific to the relationship between Tyson and Ahold, including the designation of Michael Shinstine as an Ahold-specific document custodian and the preparation of a Tyson 30(b)(6) witness to testify on Ahold-specific deposition topics.

This combination of general and Ahold-specific discovery is more than proportional to the needs of this case for Ahold—just one of more than 160 direct-action plaintiffs. And Ahold seemed satisfied. Indeed, after first serving its own 30(b)(6) notice in May 2019, Ahold went

[1] Tyson refers to Tyson Foods, Inc.; Tyson Chicken, Inc.; Tyson Breeders, Inc.; Tyson Poultry, Inc.

almost two full years without making any efforts to exceed the twenty specific Tyson depositions that this Court previously allowed. (Dkt. 2024.) When it did so—joining other DAPs' April 2021 motion to compel depositions of four current and former employees of Tyson's subsidiary Keystone and a 30(b)(6) deposition (Dkt. 4565)—Ahold said nothing to suggest that the Court should consider the possibility of yet another Tyson deposition in its proportionality analysis.

But then Defendants asked for more discovery from Ahold. On May 3, 2021—just two weeks after Ahold's first deponent testified—Defendants asked Ahold to add two more 30(b)(1) deponents on top of the one completed 30(b)(6) deposition and the one pending 30(b)(1) deposition. In retaliation, Ahold demanded three days later that Tyson and several other Defendants make additional witnesses available for Ahold to depose. Tyson refused to allow Ahold to hold Defendants' legitimate, timely and proportional request hostage to Ahold's retaliatory, untimely and improper demand. And here we are.

Ahold's Motion to Compel Mr. Shinstine's deposition (Dkt. 4778 ("Motion" or "Mot.")) should be denied for three reasons. *First*, the Court should reject Ahold's attempt to use the threat of Mr. Shinstine's deposition as leverage to avoid additional Ahold witness depositions. When it comes to the cost and burden of discovery compliance, Ahold and Tyson could not be more differently situated. Despite being half Ahold's size, Tyson has had ten times as many depositions and produced about 50% more documents. Tyson has also produced a corporate designee who addressed Ahold-specific topics in response to Ahold's individual questioning. (Mot. at 2.) Further discovery of Tyson is unduly burdensome.

Second, Ahold's argument that it is entitled to discovery on its "unique claims" is a red herring. Ahold's "unique claims" are merely common law claims arising from the same factual predicates as its antitrust and RICO claims regarding the Georgia Dock. Those "unique claims"

will rise or fall with Ahold's core antitrust and RICO claims, and Ahold cannot dress up those claims in common law clothes as a basis for deposing Mr. Shinstine.

Third, courts have denied requests to notice additional depositions where the party requesting discovery waited until near the end of the fact discovery period to seek permission. After identifying Mr. Shinstine as a person with knowledge in 2018, negotiating for Mr. Shinstine's inclusion as a document custodian, and obtaining almost 30,000 documents involving or referencing him, Ahold made the choice not to timely request his deposition. It is simply too late for Ahold to change its mind now.

Discovery must have limits. This Court should deny Ahold's unduly burdensome and untimely request.

BACKGROUND

Ahold filed its original complaint in August 2018. (Compl., *Ahold Delhaize USA, Inc. v. Koch Foods, Inc. et al.*, No. 18-cv-5351 (N.D. Ill. Aug. 6, 2018), Dkt. 1.) Mr. Shinstine's role in the relationship between Tyson and Ahold was no secret—Ahold requested that Tyson designate Mr. Shinstine as a custodian in December 2018 because he "had frequent contact with Ahold Delhaize" and was "named by multiple Ahold Delhaize employees as the point of contact for Tyson[.]" (Ex. 1, Dec. 10, 2018 Letter from E. Bolles to J. Tanski.)

In February 2019, Plaintiffs, including Ahold, moved to double the number of depositions that they could take of Tyson, (Dkt. 1920), and identified the specific Tyson depositions they sought. (Dkt. 1920-3.) But despite being a person of interest for Ahold since December 2018, Ahold chose not to ask for Mr. Shinstine's deposition. (*Id.*) The Court granted Plaintiffs' motion on April 10, 2019. (Dkt. 2024.)

Eight days later, Ahold amended its complaint to add its supposedly "unique" common law claims for fraud, breach of the implied covenant of good faith and fair dealing, and negligent

misrepresentation. (Dkt. 2099.) In May 2019, Ahold served its own draft 30(b)(6) deposition notice on Tyson. (Ex. 2, Schedule A to Ahold Delhaize 30(b)(6) Notice to the Tyson Defendants.) Ahold noted in July 2019 that Mr. Shinstine was an "additional contemplated deponent[]." (Mot., Ex. D.) Tyson later agreed to designate Mr. Shinstine as a custodian, (Mot. at 4), above and beyond the 48 document custodians it had designated as of that time. (Mot., Ex. C.) By the end of 2020, Tyson had produced approximately 18,000 documents from Mr. Shinstine's custodial files, bringing the total volume of documents involving Mr. Shinstine up to almost 30,000. Yet Ahold never took any steps toward deposing Mr. Shinstine.

Meanwhile, in early 2021, Ahold joined a request—and ultimately a motion to compel—seeking five depositions of Tyson's subsidiary, Keystone. (Dkt. 4565, at 1 n.1.) At no time during the parties' negotiations, the briefing on the motion to compel, or the argument to the Court did Ahold hint that still more Tyson deposition requests would be coming.

But then Tyson joined other Defendants in requesting to additional Ahold witness depositions. Three days later, on May 6, 2021—after sitting on its hands for months, if not years—Ahold retaliated by formally demanding Mr. Shinstine's deposition. (Mot., Ex. F.) Tyson refused, and the Motion followed.

ARGUMENT

I. AN ADDITIONAL TYSON DEPOSITION OF MR. SHINSTINE IS UNDULY BURDENSOME AND DISPROPORTIONATE TO THE NEEDS OF THE CASE

A. Tyson Has Provided Extensive Discovery to Ahold

Tyson has shouldered an immense discovery burden in this case—the heaviest load of any party. Tyson and its affiliates have produced more than 1.3 million documents from 59 document custodians plus hundreds of gigabytes of structured data. It has been subject to

extensive written discovery, and its witnesses have endured eighteen 30(b)(1) depositions plus four days of 30(b)(6) deposition to date—with one further 30(b)(1) deposition scheduled.[2]

Tyson has also provided extensive Ahold-specific discovery—indeed, Ahold has requested and received more individual discovery from Tyson than any other DAP. Tyson has designated Mr. Shinstine as a document custodian at Ahold's request (Mot. at 4), and produced almost 30,000 documents referencing Mr. Shinstine. Tyson has also prepared and produced a 30(b)(6) witness to testify about the topics in Ahold's individual 30(b)(6) notice. (Ex. 2.)

But Ahold wants more. Ahold claims "that the deposition of Mr. Shinstine is highly relevant to Ahold Delhaize's Unique Claims against Tyson" because he oversaw Tyson's relationship with Ahold. (Mot. at 8-9.) Ignoring the discovery burdens Tyson has already carried, Ahold dismissively insists that "[a]ny burden to Tyson from Mr. Shinstine's deposition is far outweighed by the prejudice Ahold Delhaize will suffer if it is not able to depose him." (*Id.* at 9.)

Courts around the country have made clear that "[t]he mere fact that there are several individuals who may possess relevant information does not necessarily entitle a party to examine each of them." *Hertz Corp. v. Accenture LLP*, 2020 WL 1150053, at *2 (S.D.N.Y. Mar. 9, 2020) (internal citation and quotation omitted). As this Court astutely observed in connection with Plaintiffs' motion to double the number of Tyson depositions two years ago, "there's no divine right to take a deposition . . . in civil litigation in federal court." (Ex. 3, Apr. 10, 2019 Hearing Tr. at 39:20-22.) Another court in this Circuit more recently noted that "[t]he discovery rules are not a ticket . . . to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest." *Ross v. Gossett*, 2021 WL 632963, at *2 (S.D. Ill. Feb. 18,

[2] This figure includes the depositions of Tyson's subsidiaries Cobb-Vantress and Keystone.

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