UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE BROILER CHICKEN ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *ALDI, Inc. v. Agri-Stats, Inc., et al.*	Case No: 1:16-cv-08637 Judge Thomas M. Durkin Judge Jeffrey T. Gilbert

TYSON DEFENDANTS' OPPOSITION TO ALDI'S MOTION TO COMPEL INDIVIDUAL DISCOVERY[1]

In 2017 and 2018, Tyson[2] spent scores of hours and millions of dollars searching for, collecting, culling, and producing documents. Over the course of the summer and fall of 2017, with the close oversight of this Court and the Special Master, the parties negotiated search terms, custodians, and precisely how they would utilize technology-assisted review technology. Tyson let the Plaintiffs know the search technology it was using and how it handled various types of search syntax, prioritized the production of documents from certain custodians, and agreed to allow Plaintiffs to propose a second round of search terms after reviewing Tyson's documents.

Tyson has now produced over 1.3 million documents to date. Those documents provide Plaintiffs with rich factual detail about Tyson's production and pricing decisions, interaction with the Georgia Dock index, and relationships with key customers. Since document production

[1] It is Tyson's understanding that ALDI has withdrawn (or will withdraw) its Motion as to Defendants Koch Foods Inc., JCG Foods of Alabama LLC, JCG Foods of Georgia LLC and Koch Meat Co., Inc (collectively "Koch"); Simmons Foods, Inc. and Simmons Prepared Foods, Inc. (collectively "Simmons"); and Foster Farms, LLC and Foster Poultry Farms (collectively "Foster Farms"). "Mot." or "Motion" refers to ALDI's memorandum in support of its motion to compel.

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

was substantially complete in July 2018, the parties have relied on that corpus of documents to take almost 400 depositions and brief three class certification motions.

Now, with 10 days left before the close of fact discovery, ALDI is belatedly pushing to reopen that process. It is asking Tyson to designate a new document custodian, produce new documents, and make a new witness available for deposition.[3] But this Court has been clear, "[t]he attorney fees generated on both sides [of this case] are enormous and may be problematic for smaller defendants. This should not be a war of attrition." (Dkt. 3835 at 8.) Likewise, this Court has explained that "if somebody has been a direct action plaintiff in this case for a long time . . . , I would assume that they have been able to discover their case within the discovery schedule we had until now." (Ex. 1, May 7, 2021 Hr'g Tr. at 54:23-55:2.)

ALDI has had an ample amount of time—eight months—to discover its case, with the full benefit of this voluminous record, experienced counsel, and substantial financial resources. If ALDI wanted additional discovery relating to its purchases of broiler chicken (beyond the 37,722 documents that ALDI produced and the almost 13,000 documents that Tyson produced mentioning ALDI), it should not have waited until the close of discovery to try to carve out an "ALDI only" track for continued discovery.

More broadly, the present motion is a part of the DAPs' threatened "avalanche" of discovery motions. (*See* Ex. 1, at 56:14-15 (Liaison Counsel for DAPs stating, "Well, I think

[3] Tyson attempted to negotiate a compromise to avoid motion practice. Tyson has offered that if it decides to call Eugene Nash to testify against Aldi at trial, it would (1) agree to a limited production of Mr. Nash's documents and (2) cooperate with ALDI to make Mr. Nash available for a deposition prior to such testimony, while (3) preserving Mr. Nash's emails during the pendency of this litigation. While ALDI has agreed to a similar compromise with Defendants Simmons and Foster Farms, ALDI has rejected Tyson's proposal and insists that Tyson produce Mr. Nash's documents now, irrespective of whether he is ever called as a witness at trial.

there will be an avalanche").) Collectively, these DAP motions stand for the proposition that no matter how long they slept on their rights in discovery and no matter how much Tyson has accommodated them, certain DAPs will continue to demand new discovery specific to them on top of the very substantial—and onerous—discovery that Tyson has already provided. With the number of DAPs in this case growing, that is not a tenable position for Tyson, this Court, or the other parties who have expressed an interest in moving this case forward.

Accordingly, ALDI's motion should be denied for two reasons. *First*, ALDI should not be allowed to second guess the carefully-crafted compromises that underlie the parties' agreement concerning the selection of document custodians. *Second*, ALDI's requests are unduly burdensome and disproportionate to the needs of the case.

BACKGROUND

Long before ALDI joined this case, a group of plaintiffs successfully moved the Court to *double* the number of Tyson depositions they would be allowed to take. (Dkt. 1920.) ALDI's counsel joined this motion on behalf of their client Ahold Delhaize USA, Inc. (*Id.*) The Court's resulting order defined the specific list of twenty Tyson depositions that would be allowed. (Dkt. 2024.) Consistent with the Plaintiffs' focus on supply decisions, this list included numerous present and former senior executives, and not account-level representatives.

Counsel filed ALDI's complaint on November 20, 2020. At the time, approximately eight months from the current close of fact discovery, Defendants promptly served ALDI with discovery requests and began negotiating the scope of ALDI's production. (Mot. at 1.) During those negotiations, ALDI did not suggest that it was contemplating taking any ALDI-specific depositions of Tyson (or other Defendants).

On April 27, 2021, a group of DAPs moved the Court to compel five more Tyson-related depositions—a 30(b)(6) deposition of Tyson's subsidiary, Keystone, and four 30(b)(1)

depositions of current and former Keystone employees. (Dkt. 4565.) ALDI joined this motion. Never in the meet-and-confer discussions that preceded the motion, in the moving papers, or in argument did ALDI suggest that it contemplated seeking further Tyson depositions. As a result, when the Court granted this motion (Dkt. 4616), it never had the opportunity to consider how still more deposition demands would affect its proportionality analysis.

On June 18, 2021, six weeks after the Court's order and almost seven months after ALDI joined the case, ALDI's counsel emailed counsel for Tyson asking Tyson: (i) to designate employee Eugene Nash as a document custodian; (ii) to confirm that Tyson had applied the search term "ALDI" to Tyson's document productions; and (iii) to make Mr. Nash available for a deposition prior to the close of fact discovery. (Mot., Ex. A.)

ALDI indicated it would withdraw these requests if Tyson stipulated that it would not "call Eugene Nash, or any current or former employee of Tyson who had responsibility for managing the ALDI account, to testify at trial, or submit during pretrial motion practice any declaration or evidence from such witness" and "seek to admit at trial or in pretrial motion practice any a) document containing the term 'ALDI' that was not produced during the discovery period or b) any testimony or evidence about ALDI that was not specifically identified in a written discovery response produced during the discovery period." (*Id.*)

Tyson rejected ALDI's proposal as unduly burdensome and disproportionate to the needs of case in light of the significant discovery burden Tyson and its subsidiaries have already shouldered. (*Id.*) Specifically, Tyson has already produced approximately 1.3 million documents to date from 59 document custodians (including over 12,000 referencing Mr. Nash and almost 13,000 referencing ALDI), responded to reams of written discovery, and defended eighteen 30(b)(1) depositions (with another scheduled for July 29) and two 30(b)(6) depositions

occurring over four days. ALDI filed its motion mere days after Tyson's email, with no attempt to meet and confer with Tyson regarding its request or Tyson's response.

LEGAL STANDARD

"Discovery need not be perfect, but [it] must be fair." *Boeynaems v. L.A. Fitness Int'l*, 285 F.R.D. 331, 333 (E.D. Pa. 2012). Rule 26 requires that the requested discovery be both relevant and "proportional to the needs of the case," considering such factors as "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Courts will reject a party's "request to somehow ensure that every single potentially responsive document (no matter how cumulative or burdensome to obtain) should be produced." *Firefighters' Ret. Sys. v. Citgo Grp. Ltd.*, 2018 WL 276941, at *4 (M.D. La. Jan. 3, 2018); *see also Enslin v. Coca-Cola Co.*, 2016 WL 7042206, at *2 (E.D. Pa. June 8, 2016) (movant must justify that discovery from additional custodians "would be different from, and not simply duplicative of, information that the responding party has already produced."). Therefore, courts have rejected requests for additional document custodians where, for example, "the marginal utility" of adding the custodians "is low" or "the cost of producing" such documents "would be substantial." *Mortg. Resol. Servicing, LLC v. JPMorgan Chase Bank, N.A.*, 2017 WL 2305398, at *3 (S.D.N.Y. May 18, 2017). And, where the non-movant has already made voluminous prior document productions, it is "considerably more likely that further discovery will be duplicative." *In re Merck & Co., Inc. Secs., Derivative & ERISA Litig.*, 2012 WL 4764589, at *10 (D.N.J. Oct. 5, 2012).

ARGUMENT

I. ALDI SHOULD NOT BE ALLOWED TO SECOND-GUESS THE LONG-STANDING AGREEMENTS ON DOCUMENT CUSTODIANS

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.