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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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Re: *In re Tyson Foods, Inc. Consol. S'holder Litig.*
Civil Action No. 1106-CC

Dear Counsel:

I have before me plaintiffs' motion to compel discovery. This request arises in a derivative action brought, on behalf of Tyson Foods, Inc. ("Tyson Foods"), by plaintiffs against certain individual former and present directors of Tyson Foods. In Counts IV and VI of plaintiffs' complaint,[1] plaintiffs allege that, by failing to properly review and approve certain transactions between Tyson and its related parties, these directors breached their fiduciary and contractual duties.

[1] As noted by counsel for plaintiffs, this Court, in response to defendant's motion to dismiss, limited claims alleged under Count IV and upheld Count VI in its entirety. *See In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563 (Del. Ch. 2007).

Plaintiffs now seek an order from this Court directing defendant to produce documents and supplement its interrogatory responses. Having carefully considered all arguments raised in plaintiffs' motion, defendant's answer, and plaintiffs' reply, I conclude that defendant must produce the documents requested but does not have to supplement its answers to the interrogatories propounded by plaintiffs. I grant plaintiffs the option, however, to postpone the deposition of certain witnesses for a reasonable period of time after the production of the requested documents and also permit plaintiffs to later notice depositions of individuals identified solely as a result of documents produced in compliance with this order, even if doing so requires an extension of time under the discovery schedule. In so ruling, I have endeavored to strike an equitable balance between plaintiffs' need for information relevant to their claims, the burden such discovery imposes on defendant and deponents, and the timely progression of discovery.

Guiding this Court in ruling on plaintiffs' motion is the familiar standard of Court of Chancery Rule 26(b)(1), which permits discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The scope of discovery is, however, squarely within the sound discretion of this Court.[2] With these principles in mind, I apply them to the pending motion.

I. PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS

Because the discovery sought by plaintiffs is relevant to claims asserted in the consolidated complaint ("complaint"), plaintiffs' request to compel production of documents concerning related party transactions not specifically identified in the complaint or involving non-party individuals is granted.

This discovery dispute is governed by, as articulated above, a standard of relevance.[3] Under this standard, the scope of discovery is broad and liberally construed such that any information that appears reasonably calculated to lead to the discovery of admissible evidence is discoverable.[4] This Court, however, may

[2] *Dann v. Chrysler Corp.*, 166 A.2d 431, 432 (Del. Ch. 1960).
[3] Ct. Ch. R. 26(b)(1).
[4] *See, e.g.*, *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).

limit the scope of discovery to guard against "fishing expeditions" or to ensure that the discovery sought is properly related to the issues presented in the litigation.[5]

Plaintiffs contend that they are entitled to documents pertaining to all related party transactions. Plaintiffs argue that if these transactions were disclosed in Tyson Foods' proxy statements, then they are relevant to Count VI because Count VI alleges that certain Tyson Foods directors breached the terms of the *Heberts* settlement. Plaintiffs then argue that they are also entitled to documents pertaining to transactions that were not disclosed in Tyson Foods' proxy statements because these transactions may give rise to claims under Count IV, which alleges a breach of fiduciary duty for related-party transactions. As plaintiffs note, this Court earlier restricted the scope of claims under Count IV to exclude claims based on transactions admittedly reviewed by an independent committee and claims based on all transactions before 2002 (or not revealed in proxy statements before that date) that were alleged not to have been reviewed at all. Even if review of these transactions does not result in additional claims under Count IV, plaintiffs maintain they are nevertheless entitled to conduct discovery of these transactions because they will "provide insight into the manner in which [Tyson Foods] dealt with related-party transactions, including any differences between its treatment of the transactions alleged in the Consolidated Complaint and other similar transactions."[6]

Defendant responds that the discovery sought by plaintiffs does not relate to any claim asserted in the complaint because the transactions were not required to be disclosed in Tyson Foods' proxy statements or were not required to be reviewed under the terms of the *Heberts* settlement. Defendant thus asserts that it has complied with the discovery request because Tyson Foods has produced all documents concerning the specifically alleged transactions that survived defendant's motion to dismiss. Defendant also argues that to permit discovery for claims not actually alleged in a complaint undermines the underlying policies of the demand requirement and would enable plaintiffs to make an "end run" around this requirement.[7] Finally, relying on *Dann v. Chrysler Corp.*,[8] defendant asserts

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[5] *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2004 WL 1238443, *1 (Del. Ch. May 26, 2004) (citing *Frank v. Engle*, 1998 WL 155553, at *1 (Del. Ch. Mar. 30, 1998)).

[6] Pl.'s Mem. of Law in Supp. of Pl.'s Mot. to Compel the Produc. of Docs. and Answers to Interrogs. at 10.

[7] Nominal Def. Tyson Foods, Inc.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 11.

[8] 166 A.2d 431, 433 (Del. Ch. 1960).

that plaintiffs are not entitled to discovery for the purpose and with the effect of discovering new causes of action.

Plaintiffs respond that discovery should be permitted because it is not clear whether, under applicable SEC regulations, the transactions should have been disclosed, which would then trigger the review requirement under the *Heberts* settlement. In any event, plaintiffs argue, even if the transactions did not need to be disclosed in the proxy statements or were not subject to the terms of the *Heberts* agreement, the transactions are relevant to Count IV's allegation of a breach of fiduciary duty.

In ruling on this motion, I need not determine whether the related-party transactions, for which plaintiffs seek production of documents, are in fact transactions that should have been disclosed in Tyson Foods' proxy statements or are in fact transactions that should have been reviewed under the *Hebert* agreement. Instead, in ordering production of documents concerning related-party transactions not specifically identified in the complaint or involving non-party individuals, I need only apply the broad standard of relevance to determine that defendant must produce the documents because they are relevant to the subject matter in this action.

Defendant's concern that permitting this discovery would constitute an "end run" around the policies motivating the demand requirement is premature. Should plaintiffs discover evidence of transactions beyond the scope of Count IV, as restricted by this Court, and should plaintiffs seek to amend their complaint to include other transactions that are, arguably, outside the scope of Count IV, then—at that future time—defendant will have ample opportunity to object for plaintiffs' failure to make a demand as to those claims. At this juncture, defendant's argument is simply premature.

Defendant's reliance on *Dann* is misplaced. *Dann*'s prohibition of discovery for the purpose of asserting a new cause of action is inapplicable here because the discovery sought by plaintiffs is relevant to causes of action that have, in fact, already been alleged in the complaint in Counts IV and VI. In the event that plaintiffs do rely on this newly discovered information to assert an entirely new cause of action, such use of the documents would indeed be impermissible under *Dann*. As plaintiffs note in their reply, they are not attempting to discover new causes of action but, instead, are seeking discovery of new instances of wrongdoing for causes of action they have already plead.

II. PLAINTIFFS' REQUEST FOR SUPPLEMENTAL INTERROGATORY RESPONSES

Plaintiffs' request for supplemental interrogatory responses is denied because, as currently articulated, the interrogatories are too broad and because the supplemental information sought is available through deposition. Plaintiffs propounded a number of interrogatories seeking identification of, essentially, certain communications, agreements, and payments, in response to which Tyson Foods invoked Court of Chancery Rule 33(d).

As noted above, the scope of discovery is broad, but not limitless, and this Court may exercise its sound discretion in delineating the appropriate scope of discovery. Additionally, where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," Rule 33(d) provides a party upon whom an interrogatory has been served with the option of "specify[ing] the records from which the answer may be derived or ascertained . . . ."[9]

Plaintiffs contend that defendant improperly invoked Rule 33(d) because Tyson Foods' answers do not specify the documents from which the answers to plaintiffs' interrogatories may be derived. Plaintiffs also argue that, even if Tyson Foods' purportedly inadequate references are sufficient for purposes of Rule 33(d), defendant did not fully respond to the interrogatories because plaintiffs seek both written and verbal communications, the latter of which cannot be ascertained from defendant's references to documents. Similarly, plaintiffs dispute the applicability of Rule 33(d) with respect to the identification of agreements because, plaintiffs argue, production of written agreements does not fully respond to a request for both formal and informal agreements. Lastly, plaintiffs assert that defendant cannot invoke Rule 33(d) in response to plaintiffs' interrogatory for identification of payments because the burden on plaintiffs to derive the answers to this interrogatory is not substantially the same as that on Tyson Foods, which is more familiar with its own records and the manner in which payments were characterized.

Defendant counters that Tyson Foods has produced written communications and, to the extent that the interrogatory sought responses beyond identification and production of these written communication, defendant objected. Defendant also argues that plaintiffs' motion comes too late and that further identification and

[9] Ct. Ch. R. 33(d).

production of documents and providing narrative responses detailing communications among parties would be "burdensome, wasteful and duplicative."[10]

Plaintiffs, in their reply, reiterate their challenge to the sufficiency of the defendant's specification of documents in accordance with Rule 33(d) and further assert that the interrogatory response would contribute to the usefulness of the depositions that are already underway.

I deny plaintiffs' motion to compel defendant to supplement its interrogatory responses because the interrogatories are too broad and, moreover, because the information sought by plaintiffs—particularly oral communications, information regarding informal agreements, and an understanding of the payment system utilized by Tyson Foods—is more appropriately obtained through deposition. That plaintiffs request narrative responses to their interrogatories indicates that depositions will be adequate to discover the information sought. Additionally, as noted by defendant, plaintiffs are deposing all individual defendants who would have been involved in the communications about which plaintiffs request a narrative response.

If, as a result of the production of documents concerning related-party transactions, which this Court orders defendant to produce, plaintiffs determine that they need additional time to prepare for depositions already scheduled, this Court will allow plaintiffs to reschedule the depositions, so long as this is done in a prompt and timely fashion. By permitting this delay, the Court is cognizant both of the need for adequate time to prepare for a deposition as well as the burden that re-deposing an individual imposes. Additionally, though it does not appear that plaintiffs argue that they are unable to identify proper deponents, if, as a result of the production of documents, plaintiffs discover additional individuals whom they wish to depose, plaintiffs may, at that time, serve notice of deposition of these other individuals, even if doing so will entail an extension of the discovery cutoff deadline.

III. CONCLUSION

With respect to the motion to compel discovery, I first grant plaintiffs' motion to compel defendant to produce documents, to the extent such documents are relevant or are likely to lead to discovery of admissible evidence as to Counts

[10] Nominal Def. Tyson Foods, Inc.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 14.

IV and VI and, second, deny plaintiffs' motion to compel defendant to supplement its interrogatory responses with permission to postpone currently scheduled depositions and to notice additional depositions should the need for such depositions become apparent after plaintiffs' review of the additional documents produced by defendant.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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