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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. SMITHFIELD FOODS, INC., *Defendant.*	Civil Action No.1:03-CV-00434 (HHK)

PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF AN ORDER COMPELLING COMPLIANCE WITH PLAINTIFF'S DISCOVERY REQUESTS AND FOR AN EXTENSION OF TIME FOR JURISDICTIONAL DISCOVERY

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I. Introduction

In challenging jurisdiction, Smithfield Foods, Inc. ("Defendant" or "Smithfield") placed squarely before the Court the issue of whether Smithfield is present in the forum through its subsidiaries. As Defendant conceded previously, the issue turns on the relationship between Smithfield and its subsidiaries that conduct business in the District. Even though the Court's Order granting Plaintiff, the United States of America ("Plaintiff"), the opportunity to conduct jurisdictional discovery was not limited to certain topics or time periods, Smithfield has chosen to impose its own limits and has made certain evidence about that relationship, specifically evidence up to and including the time the complaint was filed, off limits to Plaintiff in discovery, and, ultimately, to the Court in ruling on the jurisdiction question.[1]

Despite Defendant's unilateral limitation on discovery of the post-January 31, 2001 period, Plaintiff has learned that Smithfield's influence and control over its subsidiaries has increased in recent years:

- Between 1998 and 2001, the staff at Smithfield's headquarters increased by about 50 percent (from approximately 65 to approximately 100). *See* Ex. A to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Compel ("Def.'s Opp. Memo") at 132:23-133:24, 6:18-21; Ex. B to Def.'s Opp. Memo. at 14:8-14.
- Between November 2001 and the present, that number has increased by another 50

[1]As Plaintiff previously noted in its Motion to Compel, Defendant's steadfast insistence on the irrelevance of evidence from around the time of the filing of the complaint is inconsistent with the Court's Order granting Plaintiff's Motion to Supplement its Opposition to Defendant's Motion to Dismiss with information from 2001 and 2002. Plaintiff's Memorandum of Points and Authorities in Support of its Motion to Compel ("Pl.'s Motion to Compel Memo") at 3.

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percent (from approximately 100 to 150), with a current payroll of approximately [REDACTED] per year. *See* Ex. B to Def.'s Opp. Memo at 13:16-22, 14:8-14, 18:11-25.

[REDACTED]

See Ex. D to Def.'s Opp. Memo at 88:15-25, 81:9-11.[2]

Yet, Plaintiff is unable to explore this evidence of increasing involvement because Smithfield has disclosed only the documents and information of its choosing. Defendant attempts to justify its refusal to comply with the Court's discovery Order by straying from the issue of discovery and instead reciting arguments going to the merits of its jurisdiction battle. Such arguments have no bearing on this motion to compel discovery, and in any event are legally and factually deficient.[3]

II. Argument

A. Defendant's Claims of "Undue Burden" Are Disingenuous

1. Defendant Has Rejected Plaintiff's Offers to Ease the Claimed Burden of Discovery

Defendant claims Plaintiff's discovery requests are unduly burdensome because they reach beyond the "relevant" time period.[4] Defendant's objection is rooted not in the number of

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[2]Exhibits A, B, and D to Def.'s Opp. Memo are transcripts of the depositions of Smithfield executives. Having been designated confidential pursuant to the Stipulated Protective Order, the exhibits were filed under seal. Plaintiff's references to the confidential portions of those exhibits require that this Reply be filed under seal. The requisite motion has been filed.

[3]Plaintiff merely seeks to compel production of documents and answers to interrogatories that were part of Plaintiff's original requests, and is not seeking any "additional" documentary or written discovery as Defendant complains. *See* Pl.'s Motion to Compel Memo.

[4]Defendant's "relevant" time period has been variously described -- at times limited to the two dates its stock purchases exceeded the Hart-Scott-Rodino Act's filing threshold and

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years to which Plaintiff seeks access, but *which* years, and Defendant's alleged burden is in large part its own making. To begin with, when Plaintiff requested documents and information, it was clear that Defendant would persist in maintaining that the relevant time period dated back to June 1998. Plaintiff was therefore compelled to request information encompassing both Defendant's asserted relevant time period and the time period Plaintiff asserted was most relevant, *i.e.*, the time the complaint was filed. Even so, as detailed in its Motion to Compel, Plaintiff offered on several occasions to address Defendant's burden claims while ensuring access to information to which it is entitled. For example, Plaintiff offered that Defendant could produce documents and respond to interrogatories for the time period January 1, 1998 through the present, rather than from January 1, 1997 as originally requested. *See* Ex. 6 to Pl.'s Motion to Compel Memo. Defendant refused this offer, and willingly produced information from 1997, a year which precedes even its relevant time period, while withholding documents from January 30, 2001 forward. It is far from evident why producing documents preceding the accrual of the cause of action was less burdensome for Defendant than producing documents following the periods of the alleged wrongdoing;[5] the older documents are certainly less relevant.

2. Plaintiff's Requests Impose a Minimal Burden on Defendant

Plaintiff's jurisdictional discovery requests are narrowly tailored to produce information relevant to the issues raised by Defendant in its Motion to Dismiss. Defendant misrepresents the burden of jurisdictional discovery by combining it with the pages produced, witnesses deposed, and hours of deposition testimony from Plaintiff's substantive investigation of Smithfield's

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more broadly from June 28, 1998 [sic] through January 12, 2001.

[5]In fact, searching for older documents would seem to be more difficult than finding more recent ones.

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failure to comply with the Hart-Scott-Rodino Act and its "solely for the purpose of investment" defense – discovery that took place before Smithfield filed its Motion to Dismiss and, indeed, before the complaint was even filed.[6] Such pre-complaint discovery does not preclude later discovery before trial. *See SEC v. Saul*, 133 F.R.D. 115, 119 (N.D. Ill. 1990) (noting that "[a]ttaching preclusive effect to the [agency's] pre-filing investigation would raise the stakes of administrative inquiries toward an end which courts have expressly sought to avoid – transforming regulatory investigations into trials." (citing *Hannah v. Larche*, 363 U.S. 420 (1960)).

Finally, some of Defendant's alleged deposition burden, like its claimed written discovery burden, was of its own making. Had Smithfield produced documents and information from January 31, 2001 forward, Plaintiff might well have been able to discern that Messrs. Slavik's and Shipp's testimony would be cumulative of Mr. Luter IV's anticipated testimony, and therefore could have withdrawn its request to depose those two executives before filing its Motion to Compel. Having evaluated the testimony of Mr. Luter IV, whose deposition took place after filing the Motion to Compel, it is now apparent that the testimony of Messrs. Slavik and Shipp, while relevant, would be cumulative. Plaintiff is therefore willing to withdraw its

[6]Defendant asserts that Plaintiff has deposed six witnesses and that Smithfield has produced over 9,000 pages of documents. Def.'s Opp. Memo at 6. Smithfield fails to inform the Court that two of the six witnesses and approximately 3,000 of those pages of documents were produced during Plaintiff's pre-complaint investigation, and that many of the documents produced in jurisdictional discovery were actually duplicates or lengthy publicly available documents, such as SEC filings. Needless to say, Plaintiff has been conducting discovery of Smithfield's relationships with its various subsidiaries doing business in this District only since the Court ordered it on May 12, 2003.

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request to depose them.[7]

Further, Smithfield's assertion that Plaintiff asks for information on 35 subsidiaries fails to mention that Plaintiff only seeks documents and information on subsidiaries that transact business in the District of Columbia, not *all* Smithfield subsidiaries. Even this effort has been made difficult by Smithfield's refusal to answer the interrogatory requesting the identity of these subsidiaries.

B. Defendant's Legal Standard for What Is Necessary to Establish Personal Jurisdiction Is Irrelevant and Incorrect

Straying from discovery objections, Defendant asserts that a parent corporation cannot be subject to personal jurisdiction pursuant to § 12 of the Clayton Act based on control of subsidiaries that were not involved in the alleged violation. Under this theory, Defendant essentially argues there is no possibility that jurisdiction exists, even if Plaintiff successfully demonstrates Smithfield's control over its subsidiaries that conduct business in the District of Columbia. Defendant's new take on jurisdiction -- its "innocent subsidiaries" argument -- is not only irrelevant to Defendant's discovery obligations, but is completely at odds with the law of this Circuit. Courts routinely look to the activities of subsidiaries that have nothing to do with the subject matter of the litigation.[8] *See In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. Lexis

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[7]Testimony from Mr. Trub, Defendant's CFO in the 1998 - 1999 time frame, is still necessary, however, particularly given Defendant's continued insistence that the temporal inquiry for jurisdictional purposes is the time of the cause of action, rather than the time of the filing of the complaint. Plaintiff still seeks to depose Mr. Seely, President of Gwaltney of Smithfield, Ltd., one of the Smithfield subsidiaries doing business in the District of Columbia, as well.

[8]Smithfield recognized this when it stated, "in the *Vitamins* case, relied upon by the government, the subsidiary's conduct did not give rise to the cause of action." Defendant's Reply to Opposition to Motion to Dismiss at 15.

25073 (D.D.C. Oct. 30, 2001); *MCI Communication Corp. v. AT&T*, 1983-2 Trade Cas. (CCH) ¶ 65,652 (D.D.C. 1983); *see also Frederick Cinema Corp. v. Interstate Theatres Corp.*, 413 F. Supp. 840, 845 (D.D.C. 1976) (noting "[t]his court will not place a judicial gloss on the statutory words 'transacts business' to make them read 'transacts business which is the subject matter of this suit.'") (citation omitted).[9]

Similarly irrelevant for this motion is Defendant's attempt to limit its production of documentary or written evidence because it falls outside the time period Defendant chooses. As Plaintiff explained in its Motion to Compel, the relevant time period for purposes of establishing jurisdiction in this case is the date the complaint was filed. This time frame is consistent with the law of this Circuit. *See MCI Communications Corp.* 1983-2 Trade Cas. at 69,345 (considering evidence up until the date the complaint was filed).[10] For purposes of discovery, however, there is no corresponding time limitation. Well-settled law entitles Plaintiff to discovery regarding any matter that bears on, or that reasonably could lead to other matters that bear on, the jurisdiction issue. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2007

[9]Defendant's reliance on the recent decision in *Diamond Chem. Co. v. Atofina Chems., Inc.*, 2003 U.S. Dist. LEXIS 10549, (D.D.C. June 5, 2003) as authoritatively establishing an "innocent subsidiaries" defense as the "settled law" of this Circuit is misplaced in light of this clear weight of authority. Def.'s Opp. Memo at 10. Furthermore, the *Diamond Chemical* court also explained, "The difference between jurisdiction under the Clayton Act and D.C.'s longarm statute is that while both look at contacts with the district, under Section 12 of the Clayton Act the transactions do not have to be related to the cause of action or the subject matter of the suit, while under the D.C. long-arm statute there must be a connection between the jurisdiction contacts and the cause of action." *Id.* at *19 (citing *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1195 (D.D.C. 1984)).

[10]Defendant selectively quotes *MCI.* Def.'s Opp. Memo at 4. The full quotation is: "a Corporation must have transacted business in the district *at least* at the time the cause of action accrued, *if not when the complaint was filed*." *Id.* at 69,345-46 n.32 (emphasis added).

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(2d ed. 1987).

C. Defendant's Choice of Forum Is Irrelevant

Defendant argues that Plaintiff could have filed suit in Virginia, a "venue of unquestioned jurisdiction." Def.'s Opp. Memo at 2. Plaintiff, headquartered in the District of Columbia, chose to file suit in this district, and believes the Court has jurisdiction to hear the case. Defendant's preferences on where it would most like to litigate have nothing to do with whether Defendant must produce documents and information it has thus far withheld, let alone with whether the Court has personal jurisdiction over Defendant. Yet again, even if this were an appropriate forum for advancing this argument, it holds little legal weight. *See Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 70 (D.D.C. 1998) (stating that "Plaintiff's choice of forum is due substantial deference. . . . It is almost a truism that a plaintiff's choice of a forum will rarely be disturbed and, so far as the private interests of the litigants are concerned, it will not be unless the balance of convenience is strongly in favor of the defendant.") (quoting *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955)).

Moreover, Defendant's version of the facts underlying its argument are inaccurate. With respect to the merits, most of the key witnesses are in Manhattan. The investment bankers, with whom Joseph W. Luter, III, CEO and Richard J.M. Poulson, Executive Vice President, General Counsel, and Senior Advisor to the Chairman, discussed Smithfield's acquisition of IBP, work in Manhattan. Two principal Smithfield witnesses, Mr. Luter, III and Mr. Poulson, both maintain residences in Manhattan. In addition, most of the key documents are in the District of Columbia in the Antitrust Division's pre-complaint investigation files.

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D. Defendant's Citation of Testimony Is Irrelevant

Defendant's Opposition provides selective quotations from deposition testimony intended to show the autonomy of its subsidiaries. But once again, a discovery dispute is not an appropriate forum for debating the jurisdiction issue. After completion of discovery, Plaintiff will submit to the Court evidence showing that Smithfield's relationship with its subsidiaries whose products are sold in the District of Columbia justifies the exercise of jurisdiction. At that point, Defendant may submit evidence supporting its view. For now, however, Plaintiff seeks only to gain access to documents and information from 2001 forward, which is the most relevant time period and, based on the limited discovery to date of the post-January 31, 2001 period, is likely to be the most telling. Simply stated, Plaintiff seeks only to conduct the discovery the Court granted.

III. Conclusion

For the reasons stated above, Plaintiff respectfully requests that the Court grant Plaintiff's Motion For An Order Compelling Production of Documents and Answers to Interrogatories and for an Order Extending the Period for Jurisdictional Discovery.

Dated: July 25, 2003

Respectfully submitted,

Plaintiff, United States

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