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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR AN ORDER COMPELLING PRODUCTION OF DOCUMENTS AND ANSWERS TO INTERROGATORIES AND FOR AN ORDER EXTENDING THE PERIOD FOR JURISDICTIONAL DISCOVERY

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Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the United States ("Plaintiff") respectfully submits this Memorandum in support of its motion to compel Smithfield Foods, Inc. ("Smithfield" or "Defendant") to comply with Plaintiff's discovery requests, and for an attendant extension of time to conduct jurisdictional discovery. This motion is necessary because Defendant, contrary to Plaintiff's requests for documents and information for the time period 1997 through the present, cut off its production of documents and answers to interrogatories at January 31, 2001. In addition, Defendant has, with two exceptions, refused to produce documents and information relating to Defendant's subsidiaries whose products are sold in this district and indeed, refuses to state which of its subsidiaries' products are sold here. Finally, Defendant has arbitrarily refused to allow Plaintiff to depose four key individuals who are likely to have information about how Defendant and its subsidiaries transact business in the District of Columbia.

I. BACKGROUND

A. Nature and Stage of the Proceeding

On February 28, 2003, the United States filed its Complaint against Smithfield, seeking civil penalties for its failure to comply with the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. In its Complaint, Plaintiff alleged that, on two occasions, Smithfield failed to file pre-acquisition notification and observe the mandatory waiting period in connection with its purchases of stock issued by its competitor, IBP, inc.

Rather than file an answer to the Complaint, Defendant moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for lack of personal jurisdiction on the grounds that it is not incorporated, nor found nor transacting business in the District of Columbia ("Motion to

Dismiss"). Plaintiff filed its Opposition to Defendant's Motion to Dismiss arguing that, for purposes of Section 12 of the Clayton Act, 15 U.S.C. § 22, Defendant in fact does transact business in the District of Columbia through its wholly-owned subsidiaries whose products are sold here.

Shortly after filing its Opposition, Plaintiff sought leave to file a Supplemental Opposition in order to present newly discovered evidence that Defendant transacts business in the District of Columbia through its subsidiaries. On May 12, 2003, the Court admitted Plaintiff's evidence over Defendant's objections that the new evidence was irrelevant because it pre-dated and post-dated the "accrual of the cause of action in June 1998 and December 1999."

Also on May 12, having not yet ruled on Defendant's Motion to Dismiss, the Court entered an order granting Plaintiff's Motion for Leave to Conduct Jurisdictional Discovery ("Motion for Jurisdictional Discovery") and providing for a sixty day discovery period, which closes on July 11, 2003. The Court's May 12 order did not limit Plaintiff's discovery to any time period or to any of Defendant's subsidiaries in particular.

B. Plaintiff's Discovery Requests

On May 19, 2003, Plaintiff served Defendant with written discovery requests and identified the individuals it wanted to depose. *See* Exh. 1. The goal of Plaintiff's discovery was to establish that Defendant, through its subsidiaries that conduct business in the District of Columbia, transacts business in this District for purposes of Section 12 of the Clayton Act, 15 U.S.C. § 22. Plaintiff's written discovery sought documents and information from both

Defendant and its subsidiaries.[1]

When it served its written discovery, Plaintiff also identified eight witnesses for deposition, six employed by Defendant and two by subsidiaries. Defendant rejected this request, stating that eight depositions were unreasonable and unduly burdensome. *See* Exh. 3. Plaintiff explained that some of the depositions would likely be short, *see* Exh. 4, but heard no more from Defendant until June 5, when Defendant reported that it would produce four of the eight individuals without having consulted with Plaintiff as to which four Plaintiff would prefer. *See* Exh. 5. That same day, counsel for Plaintiff and Defendant spoke by telephone. In another effort to reach a compromise, Plaintiff proposed to limit the total amount of deposition time for the eight depositions to 28 hours, the same total deposition time under Defendant's proposal of four 7-hour depositions, for an average of 3 1/2 hours per person. After the call, Plaintiff offered yet another alternative: Plaintiff would reduce the number of depositions to six, one a deposition pursuant to Fed. R. Civ. P. 30(b)(6), in exchange for Defendant's production of documents and information from February 1, 2001 forward. *See* Exh. 6. Although Defendant agreed to substitute one of the witnesses it had chosen for another that Plaintiff preferred (given Defendant's four-deposition limit), Defendant still refused to agree to more than four

[1]Almost immediately upon receipt of Plaintiff's written discovery requests, Defendant informed Plaintiff that responsive documents and information in the possession of its subsidiaries were not in Defendant's "possession, custody or control" and if Plaintiff wanted documents and information from Defendant's subsidiaries, Plaintiff would have to serve them with subpoenas pursuant to Fed. R. Civ. P. 45. Plaintiff did not agree with Defendant on this issue, but in the interests of moving discovery along, prepared subpoenas directed to three of Defendant's subsidiaries whose products were known to be sold in the District of Columbia -- Gwaltney of Smithfield, Ltd ("Gwaltney"); Smithfield Packing Company ("Packing"), and The Smithfield Companies ("Smithfield Companies"). *See* Exh. 2. Attached to the subpoenas were document requests identical to those that had been served on Defendant. Defendant's counsel agreed to accept service of each of these subpoenas. *See* Exh. 3.

depositions. *See* Exh. 7.

C. Responses to Requests for Documents and Answers to Interrogatories[2]

On June 18, 2003, both Defendant and its subsidiaries responded to Plaintiff's discovery requests. These responses are seriously deficient in two ways. First, Defendant and two of its subsidiaries refused to produce any requested documents or information for the time period February 1, 2001 through the present.[3] Defendant and its subsidiaries claimed such materials are irrelevant to whether Defendant transacts business in this District because they are after the period during which the alleged violation of the antitrust laws occurred.[4] *See* Appendices A through E, General Objection 1. Second, Defendant produced documents and information relating to only two of its subsidiaries, Packing and Gwaltney (and their subsidiaries) on the ground that Plaintiff had not alleged that any other companies were amenable to jurisdiction in

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[2]The attached Appendices A and B contain each document request and each interrogatory directed to Defendant, its objections and responses to each, and are incorporated herein by reference. Appendix B will be filed under seal, pending the Court's entry of order granting Plaintiff's Motion for Leave to File Appendix B Under Seal. On June 10, 2003, Gwaltney, Packing and Smithfield Companies each served objections to Plaintiff's Rule 45 Subpoena. Their Objections, prepared by Defendant's counsel, are virtually identical in substance to Defendant's objections and responses. The attached Appendices C, D, and E contain each document request directed to the three subsidiaries, their objections and responses to each, and are incorporated herein by reference. Appendices A, B, C, D and E each contain the information required by Local Rule 30.4.

[3]The third subsidiary, Smithfield Companies, failed to produce any responsive documents whatsoever on the ground that it was acquired after Defendant's asserted "relevant" time period.

[4]Defendant allowed discovery from the start of the period requested by Plaintiff (January 1, 1997) through the accrual of the second cause of action on January 12, 2001, to the end of that month on January 31, 2001, asserting that this represented "a margin of time both before and after the accrual of the cause of action." *See* Exh. 9, at 2.

the District of Columbia. *See* Appendices A and B, General Objection 2.[5]

Through telephone conversations and correspondence, counsel for Plaintiff and Defendant have attempted to resolve the above-described deficiencies in the responses to Plaintiff's discovery.[6] Defendant has been unwilling to compromise on any point.

II. ARGUMENT

Defendant's refusal to produce documents and information from January 1, 1997 to the present deprives Plaintiff of evidence most relevant to Defendant's challenge to the Court's jurisdiction and lacks any foundation. According to Defendant, the only appropriate time for determining whether venue lies in this District under Clayton Section 12 is the time the cause of action arose and any evidence outside that period is irrelevant and undiscoverable. Defendant is wrong on two counts. First, Section 12 of the Clayton Act provides that suit may be brought in any district where a corporation "transacts business" and thus, not surprisingly, courts look at the outset to the time the complaint was filed, asking in essence: Is the Defendant present here?

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[5]Gwaltney and Packing relied on the same objection. *See* Appendices C and D, General Objection 2.

[6]As can be seen from the correspondence attached as exhibits hereto, Plaintiff was aware early on in the discovery period that Defendant intended to resurrect the notion of a "relevant" time period for purposes of discovery (despite the Court's allowing Plaintiff to supplement its Opposition to Defendant's Motion to Dismiss with documents from 1997, 2001 and 2002) and that Defendant was unwilling to respond to discovery requests beyond Packing and Gwaltney. Plaintiff waited until Defendant and its subsidiaries actually served their responses before seeking the Court's intervention on those issues. Plaintiff did not want to file multiple motions in the event their responses to discovery raised other issues. As it turned out, upon reviewing the document production, Plaintiff was not certain that Defendant had held firm because the production included documents bearing dates after January 31, 2001 and documents relating to subsidiaries other than Gwaltney and Packing. *See* Exh. 8, at 2. When confronted with these inconsistencies, Defendant informed Plaintiff that such production was inadvertent. *See* Exh. 9, at 3.

Second, the evidence about Defendant's relationship with its subsidiaries, particularly those whose products are sold here, is relevant *even if* Defendant were correct about the time frame for determining venue. The requested evidence will show how much control Smithfield exercises over its subsidiaries, going to the ultimate jurisdiction question: Is Smithfield present here through its subsidiaries?

Defendant's refusal to produce responsive documents and information relating to subsidiaries other than Gwaltney and Packing, which it justifies in its General Objection 2, is similarly unfounded. Defendant's Objection 2 seems to be based on the bizarre notion that discovery is limited to verifying what the requesting party already knows. In addition, Defendant apparently believes that evidence of its relationship with other subsidiaries can in no way cast light on its relationship with those subsidiaries whose products are sold in the District of Columbia and is therefore irrelevant. These views have no basis in law or fact, and are contrary to the goals of discovery.

Finally, Defendant's refusal to make more than four witnesses available for deposition is equally without a legitimate basis.

Accordingly, Plaintiff asks the Court for an order compelling Defendant and its subsidiaries to comply with Plaintiff's written discovery requests.[7]

A. Defendant's Objection as to a "Relevant Time Period" for Discovery is

[7]Because Defendant and its subsidiaries asserted General Objections 1 and 2 to every single document request and Defendant asserted them in response to every single interrogatory, Plaintiff's arguments for the Court's intervention are the same across the board. *See* Exh. 9, at 2. Plaintiff has taken the liberty of addressing the two General Objections in depth without discussing the deficiency of each specific discovery request to avoid multiple reiteration of the same arguments.

Unfounded

Defendant's General Objection 1 to Plaintiff's Requests for Documents[8] states:

> SFD objects to the Document Requests to the extent they require the production of documents prepared, written, sent, dated, or in effect prior to January 1, 1997 or after January 31, 2001. The Department of Justice has alleged that the first cause of action accrued on June 28, 1998 [sic], and that SFD was in violation of the relevant statute from June 26, 1998 through October 1, 1998. DOJ has alleged the second cause of action accrued on December 8, 1999 and that SFD was in violation of the relevant statute from December 8, 1999 through January 12, 2001. Therefore, requests for documents prepared, written, sent, dated or in effect prior to January 1, 1997 or *after January 31, 2001* seek documents that are irrelevant and such requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in determining whether or not SFD is amenable to jurisdiction in this district.
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> (emphasis added).

This objection is not a legitimate basis for refusal to provide discovery.[9] Therefore, Defendant and the Rule 45 subpoena recipients, Gwaltney, Packing and Smithfield Companies, improperly withheld documents responsive to Document Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. *See* Appendices A, C, D and E. Defendant also improperly withheld information responsive to Interrogatory Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. *See* Appendix B.

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[8]Plaintiff's General Objection 1 to Plaintiff's Interrogatories is identical (*see* Appendix B), except that it refers to interrogatories and information rather than requests for documents. Likewise, Gwaltney, Packing and Smithfield Companies' General Objection 1 is identical. *See* Appendices C, D and E.

[9]Incongruously, Defendant's counsel promised that no relevance objections will be made to questions posed in the upcoming depositions seeking information outside of Defendant's unilaterally defined time period, despite refusing to provide documents and information for that time period. *See* Exh. 6, at 2.

1. The Relevant Time for Determining Whether the Court Has Personal Jurisdiction over Defendant Is the Date the Complaint Was Filed

Consistent with the present tense language of Section 12[10] and the objectives of general venue statutes -- the convenience of the parties and witnesses -- courts routinely look to the time of the filing of the case in determining whether a defendant transacts business. *See generally* 15 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3811 (2d ed. 1987). There is no need for this Court to depart from the plain meaning of the statute and from clear precedent. S*ee, e.g., United States v. Scophony*, 333 U.S. 795, 810 (looking to whether defendant was transacting business "during the period covered by the institution of the suit and the times of serving process"); *see also King v. Johnson Wax Assoc.*, 565 F. Supp. 711, 717 (D. Md. 1983); *In re Chicken Antitrust Litig.*, 407 F. Supp. 1285, 1293 (N.D. Ga. 1975). At least three of Defendant's wholly-owned subsidiaries have current and long-standing contacts with the District of Columbia.[11] With the exception of Smithfield Companies, which Defendant acquired in July 2001, Defendant's controlling interest in these subsidiaries is also long standing.[12] Assuming their contacts with the District are attributable to Defendant, there is no question that Defendant "transacts business" at the time the complaint was filed.

Although courts have looked back to the time the cause of action arose, it is almost always

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[10]Section 12 of the Clayton Act provides: that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought . . . in any judicial district wherein it *may be found or transacts business*. . . ." 15 U.S.C. §22 (emphasis added).

[11]Under Section 12 of the Clayton Act, "the transactions [relied upon to establish venue] do not have to be related to the cause of action or the subject matter of the suit." *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1204 (D.D.C. 1984).

[12]Defendant asserts that it did not acquire Smithfield Companies until July 2002. However, the press release associated with the acquisition is dated July 2001. *See* Exh. 10.

where a defendant is no longer doing business in the forum at the time the complaint was filed. In those cases, the courts, seeking to avoid an injustice, liberally construe the language of the statute to find venue if the defendant was at least transacting business at the time the cause of action accrued. *See, e.g., Eastland Constr. Co. v. Keasby & Mattison Co.*, 358 F.2d 777, 779 (9th Cir. 1966); *see also* Annotation, *Construction and Effect of Venue Provisions of §12 of the Clayton Act (15 U.S.C. §22)*, 3 A.L.R. FED 120, §6 (citing cases); 54 Am. Jur. 2d, *Monopolies and Restraints of Trade* §375 (2003) (citing cases).

Thus, in *Lee v. Ply*Gem Indus., Inc.*, defendant moved to dismiss for lack of venue and personal jurisdiction under Section 12 of the Clayton Act on grounds that it had sold its last shipment to one of the plaintiffs a month before the complaint was filed. 593 F.2d 1266, 1272 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979). The district court denied the motion on grounds that it is "not essential to venue that business must *still* be transacted as of the date of the filing of the complaint" since defendants had been transacting business at the time the cause of action arose. *Id.* at 1271-72 (emphasis added). The Court of Appeals for the District of Columbia affirmed, with the stated goal of honoring "the evident purpose of Congress in enacting Section 12," to prevent corporations from coming to a jurisdiction, violating the law, and then leaving the forum, and observed that:

> *at least* in situations where the business activities relied on to establish Section 12 venue are bound up in the course of conduct alleged to transgress the antitrust laws, the temporal frame of reference of that section is the point at which the cause of action arises.

Id. at 1273 (emphasis added). Similarly, in *Eastland Constr. v. Keasbey & Mattison Co.*, the Ninth Circuit reversed a district court's dismissal of an antitrust case that had been filed against a company that had been, but was no longer, transacting business in that forum. 358 F.2d 777 (9th

Cir. 1966). While noting the statutory language of Section 12, which is in the present tense, furnished the principal argument in favor of selecting the time of the filing of the complaint as the crucial date, the Ninth Circuit observed that the Supreme Court's interpretation of the statute's legislative history allowed for a more liberal approach. *Id.* at 780-81 (citing *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359 (1927); *United States v. Scophony Corp.*, 333 U.S. 795 (1948); and *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948)).

Here, the United States is not asking the Court to look back to the time of the conduct in order to establish jurisdiction that would not otherwise exist at the time the complaint was filed.[13] Assuming that the business activities of Defendant's subsidiaries are attributable to Defendant, Defendant may be said to transact business at the time the complaint was filed. But to establish that, Plaintiff requires evidence of Defendant's relationship with its subsidiaries at the time the complaint was filed, February 28, 2003, as well as evidence from the years leading up to that point in time. *See In re Chicken Antitrust Litig.*, 407 F. Supp. at 1293 (finding that defendant must be transacting business at the time the suit was filed and noting "earlier transactions are clearly relevant and are important considerations in determining the nature and continuity of the defendants' transactions in this district."). It is evidence from that very time period -- February 1, 2001 to the present -- that Defendant refuses to produce.

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[13]Defendant claims a recent D.C. district court decision is "dispositive" of the notion that the Court should look always and only to when the cause of action arose in deciding whether a defendant transacts business for purposes of Section 12 of the Clayton Act. *See* Exh. 7, citing *Diamond Chemical Co. v. Atofina Chemicals*, 2003 U.S. Dist. LEXIS 10549 (D.D.C. June 5, 2003). At most, that case suggests that a different standard may apply when the cause of action arises solely from the conduct of subsidiaries, particularly where the defendant parent did not own the subsidiaries at the time of the alleged violation. In any event, the *Diamond Chemical* court allowed plaintiff to conduct discovery without a limitation as to time frame.

2. All Evidence That Casts Light on the Nature and Scope of Defendant's Relationship with its Subsidiaries at the Time the Complaint Was Filed Is Relevant Regardless of its Date

A party "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). This phrase, like its predecessor "relevant to the subject matter involved in the pending action" has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that bear on, any issue that is or may be in the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2007 (2d ed. 1987).

The focus of Plaintiff's jurisdictional discovery is to establish that Defendant, by virtue of its relationships with wholly-owned subsidiaries whose products are sold in the District of Columbia, indirectly transacts business here, and thus that venue is proper under Section 12 of the Clayton Act, and the Court has jurisdiction over Smithfield. *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25073 (D.D.C. Oct. 30, 2001). While the long list of factors considered by the *Vitamins* court affords a wide range of topics relevant to jurisdictional discovery, how much control a parent exercises over its subsidiaries permeates the inquiry. *Id.* at *25.

Proof of control comes from evidence of practices and patterns in the relationship between a parent and its subsidiaries. Whether a parent exercises sufficient control is typically not a question that can be answered by a single circumstance on a certain date. Rather, "[i]t is the totality of the relationship between subsidiary and parent that must be considered in determining the control exercised by the parent over the subsidiary." *MCI Comm'n v. AT&T*, 1983 U.S. Dist. LEXIS 13066, *19 (D.D.C. 1983). Likewise, a determination of "control" is based on a

continuous pattern proven by a variety of factors. *See, e.g., Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1200 (D.D.C. 1984) (stating that ". . . where the parent exercises *continuing* supervision and intervention in the subsidiaries' affairs, the subsidiaries' activities are attributable to the parent for Clayton Act venue purposes") (citing *United States v. Scophony Corp.*, 333 U.S. 795, 814 (1948)) (emphasis added). Thus, evidence of events and conduct that establish those practices and patterns indicative of the parent's control is therefore relevant, whatever its date. *See Verreries de L'Hermitage v. Hickory Furniture Co.*, 704 F.2d 140, 142 (4th Cir. 1983) (stating in the context of a parent's liability for the activities of its subsidiary, that "[e]vents that depict the control of the parent over the subsidiary may be shown even though they occurred before or after" the event at issue because such evidence "casts light on the nature and extent of control . . . exercised at the [critical] time"); *see also In re Chicken Antitrust Litig.*, 407 F. Supp. at 1293. The age or date of the evidence may well affect the weight it is given in determining whether sufficient control was exercised at the critical time, but does not determine its relevance.

3. Defendant, Gwaltney, Packing and Smithfield Companies Should Be Required to Comply with Plaintiff's Discovery Requests to the Extent They Relied on General Objection 1

For the reasons stated above, Defendant has no legitimate basis for withholding documents or information on the basis of General Objection 1. Plaintiff therefore respectfully requests that the Court direct Defendant to produce all non-privileged documents prepared, written, sent, dated or in effect from February 1, 2001 to the present that are responsive to Requests Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. *See* Appendix A. Plaintiff further requests that the Court order Defendant to provide

complete answers to Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. *See* Appendix B. Plaintiff further requests that the Court direct Gwaltney, Packing and Smithfield Companies to produce all non-privileged documents prepared, written, sent, dated or in effect from February 2001 to the present that are responsive to Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. *See* Appendices C, D, and E.

B. Defendant's View Is To Make Discovery Available Only For What Plaintiff Already Knows

Defendant's General Objection 2[14] to Plaintiff's Requests for Documents states:

> SFD objects to the Document Requests to the extent they relate to companies other than The Smithfield Packing Company, Incorporated ("Packing"), Gwaltney of Smithfield, Ltd. ("Gwaltney"), and the Smithfield Companies, Inc, and their subsidiaries, or SFD. DOJ *has not alleged* that other companies are amenable to personal jurisdiction in the District of Columbia. Therefore, to the extent Document Requests relate to companies other than Packing, Gwaltney, the Smithfield Companies, Inc., and their subsidiaries, or SFD, such requests seek documents that are irrelevant, and such requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in determining whether or not SFD is amenable to jurisdiction in this district. Further SFD objects to the Document Requests to the extent they relate to The Smithfield Companies, Inc., which was acquired on July 31, 2002 [sic], after the alleged causes of action accrued and after the periods DOJ has alleged SFD was in violation of the relevant statute. To the extent Document Requests relate to The Smithfield Companies, Inc., such requests are irrelevant and such requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in determining whether or not SFD is amenable to jurisdiction in this district. (emphasis added).

This objection is not a legitimate basis for refusal to provide discovery. Therefore,

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[14]Defendant's General Objection 2 to Plaintiff's Interrogatories is identical, except that it refers to interrogatories and information rather than requests for documents. *See* Appendix B, General Objection 2. Likewise Gwaltney and Packing's General Objection 2 is identical to Defendant's General Objection 2. *See* Appendices C and D, General Objection 2.

Defendant and the Rule 45 subpoena recipients, Gwaltney, Packing and Smithfield Companies, improperly withheld documents responsive to Document Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. *See* Appendices A, C, D, and E. Defendant also improperly withheld information responsive to Interrogatory Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. *See* Appendix B.

General Objection 2 is premised on the notion that a party may only seek discovery of what it already knows and has shared with Defendant and the Court. But the purpose of discovery goes well beyond mere verification; the purpose is to allow a broad search for facts, the names of witnesses, or any other matters that may aid a party in the preparation or presentation of its case. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2007 (2d ed. 1987).

According to Defendant's rules, Plaintiff is entitled to discovery of only those Smithfield subsidiaries that, on the basis of publicly available information, Plaintiff was able to identify as the producers of products sold in the District of Columbia. Thus, Defendant declined to provide a complete response to the simple question posed in Plaintiff's Interrogatory No. 1, which asks Defendant to "[i]dentify each Smithfield subsidiary whose products are, directly or indirectly, marketed or sold in the District of Columbia." Plaintiff already knew that products of Gwaltney, Packing and Smithfield Companies are sold in the District of Columbia, but hoped to learn whether there are any other Smithfield subsidiaries that sell products in this District whose contacts could be attributed to Defendant.[15]

[15]Apparently, if Defendant discloses something, Plaintiff is not entitled to follow-up in discovery. For example, in its Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, Defendant included an affidavit from the President of John Morrell, another Smithfield subsidiary. As Defendant answered Interrogatory No. 1, Plaintiff has no idea whether John Morrell's products are sold in the District of Columbia. If they are not, Defendant's explanation

Defendant responded:

> *See* General Objections. Based on General Objections 1 and 2, Smithfield is limiting its response to Gwaltney and Packing, both of which have products that are marketed and sold in the District of Columbia. . . .

Plaintiff still does not know: Are Smithfield Packing and Gwaltney the only subsidiaries that were doing business in the District of Columbia during Defendant's asserted "relevant time period?" Are there other subsidiaries that started selling in this District after January 31, 2001?

Further, contrary to Defendant's assertion in General Objection 2 that Plaintiff "did not allege that any other companies are amenable to personal jurisdiction in the District of Columbia," Plaintiff has consistently stated that *at least* Gwaltney and Packing conduct business in the District of Columbia.[16] In its Motion for Jurisdictional Discovery, Plaintiff stated that it would "supplement [the evidence proffered in support of its opposition to Defendant's Motion to Dismiss] by conducting discovery of Smithfield and *at least* three of its subsidiaries."[17] In granting Plaintiff's Motion for Jurisdictional Discovery, the Court's May 12 order imposed no limits on the topics for jurisdictional discovery.

The second half of General Objection 2 specifically asserts that Defendant will not provide any discovery regarding Smithfield Companies because it was acquired after the time period of Defendant's alleged violation. This reason for limiting discovery is basically the same as Defendant's General Objection 1. For the reasons discussed *supra* at pp. 7-13, the fact that

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for its submission of the affidavit, to illustrate further the autonomy of its subsidiaries *(see* Exh. 9, at 4), suggests an appreciation for the relevance of evidence of its relationship with one subsidiary to its relationships with those having contacts with the forum. Apparently, only when Defendant wants to put such evidence into the record is it relevant.

[16]*See* Plaintiff's Opp. to Defendant's Motion to Dismiss at 9 (emphasis added).

[17]*See* Memo in Support of Motion for Jurisdictional Discovery at 3 (emphasis added).

Smithfield Companies was acquired after the alleged law violation ended does not inform the question of whether Smithfield "transacts business" at the time the complaint was filed. Discovery of Smithfield Companies is relevant to jurisdiction and venue because its products are sold in the District of Columbia. That Smithfield Companies is a recent acquisition would also allow Plaintiff to explore the steps Defendant takes to bring a new company into the Smithfield family fold, which is directly relevant to how Defendant interacts with its subsidiaries that are already a part of the family.

Therefore, to the extent Defendant relied on Objection 2 in limiting its responses to Requests Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 (*see* Appendix A), and to Interrogatory Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 (*see* Appendix B), Plaintiff respectfully requests that the Court require Defendant to produce full and complete responses to each document request and interrogatory listed. To the extent that Gwaltney and Packing relied upon General Objection 2 in limiting their responses to Document Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, Plaintiff respectfully requests that the Court direct them to provide full and complete responses. *See* Appendices C and D.

C. Invalidity of Specific Objections

In response to Document Request Nos. 13, 14, 15, 17, and 19 (*see* Appendix A*)* and to Interrogatory Nos. 14, 15, 16, and 17 (*see* Appendix B), Defendant asserted specific objections that are essentially restatements of its General Objection No. 1. According to Defendant, documents and information sought by these requests and interrogatories are irrelevant because they relate to persons who were appointed to their positions after the alleged violation. *See*

Appendices A and B.[18] For the same reasons set forth *supra* at pp. 7-13, these specific objections are not a legitimate basis on which to limit Plaintiff's discovery. Discovery is intended to allow Plaintiff to learn more about Defendant and its subsidiaries, and evidence of Defendant's relationship with its subsidiaries (as reflected in the actions of its officers) from the time leading up to the time of the filing of the complaint is most relevant. Accordingly, Plaintiff respectfully requests that Defendant be required to provide full and complete responses to Request Nos. 13, 14, 15, 17, and 19 and to Interrogatory Nos. 14, 15, 16, and 17.

D. Smithfield Companies' Failure to Comply with Plaintiff's Subpoena Is Not Justified

Smithfield Companies failed to provide any documents whatsoever in response to Plaintiff's subpoena. Smithfield Companies' General Objection 1 appears to provide the basis for its failure to comply. That objection provides:

> Smithfield Companies objects to the Documents Requests as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence in determining whether or not Smithfield Foods, Inc. ("SFD") is amenable to jurisdiction in this district. DOJ has alleged that the first cause of action accrued on June 28, 1998 [sic] and that SFD was in violation of the relevant statute from June 26, 1998 through October 1, 1998. DOJ has alleged the second cause of action accrued on December 8, 1999 and that SFD was in violation of the relevant statute from December 8, 1999 to January 12, 2001. SFD did not acquire Smithfield Companies until July 31, 2002, well after the alleged causes of action accrued and after the periods DOJ has alleged SFD was in violation of the relevant statute. Therefore, the Document Requests seek documents that are irrelevant to

[18] The requested information concerns the activities of Messrs. Slavik, Shipp, Luter, and Zadeh. Plaintiff intended to depose Messrs. Slavik and Shipp. Because of Defendant's four deposition limit, Plaintiff was also denied access to testimony of these individuals. See *infra*, pp. 19-20. In addition, Defendant claims that "DOJ has neither mentioned Mansour Zadeh nor alleged that his conduct is relevant" in its complaint and briefs. *See* Appendix B, Response to Interrogatory 16. This is incorrect. *See* Exh. X to Plaintiff's Opp. to Defendant's Motion to Dismiss (announcing Mr. Zaheh's appointment as Smithfield's Vice President, Information and Technology).

> the issue of personal jurisdiction and the Document Requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

This objection is essentially the same as Defendant's General Objection 1, which restricts Plaintiff's discovery on the basis of an asserted "relevant" time period. For the reasons stated *supra* at pp. 7-13, Smithfield Companies' General Objection 1 does not justify a failure to comply with Plaintiff's Rule 45 subpoena. Accordingly, Plaintiff respectfully requests that the Court order Smithfield Companies to produce any and all documents responsive to Plaintiff's Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. *See* Appendix E.

E. Defendant's Unilateral Limitation on the Number of Depositions Plaintiff May Take Is Unjustified

In response to Plaintiff's request that it depose the following four officers of Smithfield or its subsidiaries, Defendant has refused on the ground that it has provided four other individuals and four is enough. Despite Plaintiff's efforts to reach a compromise, Defendant has been unyielding.

Plaintiff seeks to depose the following individuals:

> **Aaron Trub** is Defendant's former Chief Financial Officer. In addition to this position, Mr. Trub was an officer and/or director of a number of Defendant's subsidiaries. Mr. Trub retired in 2000.
>
> **Timothy A. Seely** is the President of Gwaltney of Smithfield, Ltd., serving as its Vice President for Sales and Marketing before taking his current position in 1996. Mr. Seely is currently a member of Defendant's Management Board, but until its creation in late 2000, he was a member of Defendant's Board of Directors.

Lawrence Shipp is Corporate Vice President, Logistics, for Defendant. From the press release announcing his appointment to this position in January 2002, it appears that among Mr. Shipp's responsibilities are helping Smithfield Foods take advantage of the synergies among its operations through logistics such as integrating distribution, transportation and warehousing of products. *See* Exh. X to Plaintiff's Opp. to Defendant's Motion to Dismiss.

Robert A. Slavik is Corporate Vice President, Sales and Marketing, for Defendant. At the time of his appointment in June 2001, he stated that he intended to "take a leadership role in devising a national brand strategy at Smithfield Foods." He went on to say that his "long-term objective is to assist our operating companies in moving as many product categories as possible to the more profitable, value-added arena and to seek new ideas to meet the needs of tomorrow's consumer." *See* Exh. U to Plaintiff's Opp. to Defendant's Motion to Dismiss.

The testimony of all of these people is highly relevant to understanding the nature and scope of the relationship between Defendant and its subsidiaries.[19] With access to Mr. Seely, Plaintiff would be able to learn about the extent to which Gwaltney perceives that Smithfield influences or controls its activities. Likewise, with access to Messrs. Shipp and Slavik, Plaintiff would be able to explore topics relating to Smithfield corporate level executives' involvement in developing a national strategy for Smithfield brands and coordinating among the various

[19]The reason Plaintiff chose Mr. Trub was because of his role during the 1997-2001 time frame that Defendant says matters. Like other Smithfield executives, Mr. Trub wore multiple hats -- the Smithfield corporate hat and a hat for each subsidiary for which he was an officer and/or director, including Gwaltney and Packing, prior to his retirement.

subsidiaries. This topic is now virtually undiscoverable because of Defendant's attendant refusal to provide any responsive documents or information about these individuals, as discussed at pp. 17-18 *supra*.

Other than the argument that it takes more effort to prepare eight persons for deposition than four, Defendant offered no applicable authority for its unilateral limitation on the number of depositions Plaintiff should be permitted to take. Indeed, the total number of depositions sought is well within the ten deposition limit of Fed. R. Civ. P. 30(a). Despite Plaintiff's various proposals offered by way of compromise, Defendant has refused to budge. Plaintiff respectfully requests that Defendant be ordered to make the above-named witnesses available for deposition.

F. Defendant's Failure to Comply with Plaintiff's Reasonable Discovery Warrants Additional Time to Complete Discovery

For the reasons stated above, Defendant and its wholly-owned subsidiaries have improperly deprived Plaintiff of relevant documents and information for the time period February 1, 2001 to the present and for subsidiaries other than Gwaltney and Packing. Plaintiff has asked the Court to order Defendant and its subsidiaries to produce the withheld materials within 15 days. Plaintiff is entitled to conduct depositions with the benefit of such materials. Therefore, Plaintiff respectfully requests that the Court allow an additional 30 days for discovery once Plaintiff receives the improperly withheld materials, so Plaintiff may reconvene the depositions that will have been started by the time the Court rules on this motion[20] and conduct the additional requested depositions with the benefit of the most relevant materials to the question of whether

[20]Plaintiff warned Defendant that it would not close any of the upcoming depositions so that, depending on the outcome of this motion, the witnesses could be questioned at a later date with the benefit of documents and information from the more recent past. *See* Exh. 6.

Defendant transacts business in this District.

III. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court reject Defendant's attempts to unduly limit the scope of discovery in this case, grant its Motion to Compel, and enter an order requiring Defendant to (1) respond fully to Plaintiff's interrogatories and document requests within 15 days of the Court's order and (2) make Messrs. Seely, Shipp, Slavik and Trub available for depositions. Plaintiff also seeks an order directing Gwaltney, Packing and Smithfield Companies to provide complete responses to the Rule 45 subpoenas within 15 days of the Court's order. Finally, Plaintiff requests that the Court grant a 45 day extension of the time period for jurisdictional discovery, so that Plaintiff will have 30 days to review the documents and information and conduct depositions. A proposed order is filed herewith.

Dated this 3rd day of July, 2003

Respectfully submitted,

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