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) [ORAL ARGUMENT REQUESTED]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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Plaintiff, the United States of America ("Plaintiff"), respectfully submits this memorandum of points and authorities in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction filed by Smithfield Foods, Inc. ("Defendant" or "Smithfield").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an antitrust action seeking civil penalties from Smithfield for its failure to comply, on two separate occasions, with the notice and waiting requirements of the Hart-Scott-Rodino Act[1], before making certain acquisitions of stock issued by its competitor, IBP, inc. ("IBP").

Smithfield seeks dismissal of this action on grounds that it is not subject to the personal jurisdiction of this Court. Section 12 of the Clayton Act provides jurisdiction in the federal district court for any district in which a defendant is "found or transacts business." Contrary to Smithfield's argument that it is a mere holding company that itself does not transact business, the law provides that such a defendant cannot evade personal jurisdiction simply by transacting business only through its numerous wholly-owned or controlled subsidiaries. *United States v. Scophony Corp.*, 333 U.S. 795 (1948).

Smithfield is the head of a large integrated family of wholly-owned or controlled operating companies that transact business throughout the country, including in the District of Columbia. The Smithfield family's brands of fresh and processed meats are ubiquitous, well-recognized and sold in high volumes in the District of Columbia through Smithfield's subsidiaries. And contrary to each subsidiary being "autonomous," as Defendant claims for purposes of this motion, Smithfield has established "clear lines of accountability and

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[1] Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino Act" or "the Act").

communication down through each subsidiary." *See* SMITHFIELD FOODS, INC., 2002 ENVIRONMENTAL AND SAFETY ANNUAL REPORT 5 (2002), www.smithfieldfoods.com/aboutus/environ.html ("Smithfield Environmental Report") (excerpts attached as Ex. A). As shown with particularity below, Smithfield owns, controls and actively manages its subsidiaries, and the law treats Smithfield itself as transacting business in the District of Columbia and therefore subject to the personal jurisdiction of this Court. *See In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. Lexis 25073, at *24 (D.D.C. Oct. 30, 2001).

To defeat a motion challenging personal jurisdiction, a plaintiff need only establish a *prima facie* case that such jurisdiction exists. *Crane v. New York Zoological Soc'y*, 894 F.2d 454, 458 (D.C. Cir. 1990). Plaintiff more than meets its burden by demonstrating that Smithfield transacts business in this district through certain of its wholly-owned subsidiaries whose products are sold here. Defendant's motion should therefore be denied.

II. BACKGROUND

A. The Nature of the Action

The Hart-Scott-Rodino Act, 15 U.S.C. § 18a, requires certain acquiring persons and certain acquired persons whose voting securities or assets are acquired, to file notification with the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") and to observe a waiting period before consummating certain acquisitions of voting securities or assets.[2] Such filings may only be made in the District of Columbia.[3] The waiting period is

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[2]The corporate entity that actually made the IBP stock purchases in this case, the "acquiring person," is SF Investments, Inc., a wholly-owned subsidiary of Smithfield. Smithfield Foods, Inc. Second Narrative Response to Civil Investigative Demand 20835, Answer to Interrogatory No. 1(i)(a), March 16, 2001 (excerpts attached as Ex. B). The obligation to file the notification required by the Act falls on the "ultimate parent entity" if it "controls" the acquiring

intended to provide the FTC and DOJ with an opportunity to investigate proposed transactions and determine whether to seek an injunction to prevent transactions that may violate the antitrust laws. If a person fails to file the required notification, it is liable to the United States for a civil penalty of up to $11,000 for each day it was in violation of the Act.[4]

B. Smithfield is the Publicly-Traded Head of a Large Family of Companies

Smithfield, the self-proclaimed "world's largest pork processor and hog producer," is a vertically integrated enterprise.[5] It has created two business units, the Meat Processing Group and the Hog Production Group, through which it admits it "conducts operations". *See* Smithfield Foods, Inc., Annual Report for the Fiscal Year Ended Apr. 30, 2000 (Form 10-K405), at 1, www.sec.gov ("Smithfield 2000 10-K") (excerpts attached as Ex. D).; *see also* Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss ("Defendant's Memo") at 3. The Meat Processing Group consists of meat processing subsidiaries, whose operations are supplied in part by the entities within the Hog Production Group. Smithfield 2000 10-K at 1

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subsidiary. 16 C.F.R. § 801.1(a)(1). An entity controls a subsidiary for purposes of the Act if it owns 50 percent or more of that subsidiary. *Id.* at §801.1(b). Defendant admits that it is the correct defendant for purposes of a cause of action based on a failure to file. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 3.

[3]The Instructions for the Act's Notification and Report Form require the filing to be sent to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. and to Director of Operations, Antitrust Division, Department of Justice, Patrick Henry Building, 601 D Street, N.W., Room 10013, Washington, D.C. 20004.

[4]15 U.S.C. § 18a(g)(1), *amended by* Pub. L. No. 101-410 (28 U.S.C. 2461 note), *amended by* § 31001(s), Pub. L. No. 104-134, 110 Stat. 3009 *et seq.* (1996), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54,548 (Oct. 21, 1996).

[5]Smithfield Foods, Inc.'s Website, *at* www.smithfieldfoods.com (last visited Apr. 7, 2003) (initial page attached as Ex. C).

(Ex. D). In 2000, the Hog Production Group supplied the Meat Processing Group with 50% of its domestic live hog requirements. *Id.*

In 1998, Smithfield's Meat Processing Group consisted of five domestic subsidiaries: Smithfield Packing Company, Inc. ("Smithfield Packing"); Gwaltney of Smithfield, Ltd. ("Gwaltney"); John Morrell & Co. ("John Morrell"); Patrick Cudahy, Inc. ("Patrick Cudahy"); and Lykes Meat Group ("Lykes").[6] In October 1998, Smithfield acquired 100% of the outstanding stock of North Side Foods Corp., a "major domestic supplier of precooked sausage to McDonald's Corporation."[7] Smithfield continued to acquire meat processing subsidiaries, such as the Smithfield Companies in July 2001, Moyer Packing in June 2001, and Stefano Foods in June 2002.[8] Smithfield owns or controls all of its meat processing subsidiaries. *See* THOMPSON EXTEL CARDS DATABASE, Smithfield Foods, Inc., Mar. 28, 2003, last amended Mar. 22, 2003 (available on LEXIS) (excerpts attached as Ex. H).

Smithfield maintains a Website (www.smithfieldfoods.com). The home page of the Website shows the Smithfield name and logo, with various brands of the meat processing subsidiaries listed below. Ex. C. On the page called "About Us" Smithfield describes itself as a "family of companies" that is "known through the activities of its operating subsidiaries."

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[6]Smithfield Foods, Inc., Annual Report for the Fiscal Year Ended May 3, 1998 (Form 10-K) at 3, www.sec.gov ("Smithfield 1998 10-K") (excerpts attached as Ex. E).

[7]Smithfield Foods, Inc., Annual Report for the Fiscal Year Ended May 2, 1999 (Form 10-K), at 2, www.sec.gov ("Smithfield 1999 10-K") (excerpts attached as Ex. F).

[8]Smithfield Foods, Inc., Annual Report for the Fiscal Year Ended Apr. 28, 2002 (Form 10-K), at 3-4, www.sec.gov ("Smithfield 2002 10-K") (excerpts attached as Ex. G).

Smithfield's Website, *at* www.smithfieldfoods.com/aboutus/index.html (last visited Apr. 7, 2003) (attached as Ex. I).

C. A Substantial Quantity of Smithfield's Products Are Sold in the District of Columbia

In 1999, Smithfield produced 1.5 billion pounds of processed meat products, which are marketed under labels that include Smithfield Premium, Smithfield Lean Generation Pork, Gwaltney, Patrick Cudahy and John Morrell, as well as Dinner Bell, Ember Farms, Esskay,[9] Great, Kretschmar, Lykes, Patrick's Pride, Rath and Valleydale. Smithfield 1999 10-K at 3 (Ex. F). For its fiscal year ending May 2, 1999, Smithfield reported sales of $3.7 billion. Smithfield 2000 10-K at 12 (Ex. D). By 2001, Smithfield reported that its processed meat production had increased to 1.6 billion pounds and sales had risen to over $5.8 billion. Smithfield 2002 10-K at 5, 18 (Ex. G).

A wide variety of products packaged under some of these brand names are currently sold in retail outlets in the District of Columbia. A cursory survey of three stores in the District identified more than 45 pork, beef and turkey products that are made by Smithfield subsidiaries on the shelves of one retail outlet alone. *See* Declaration of Michael J. Forquer (attached as Ex. J) ("Forquer Decl."). According to Smithfield Packing's Website, three products sold under the Smithfield Premium Meats brand are available for sale at 53 retail establishments in the District of Columbia. Smithfield Packing's Website, *at* www.smithfield.com/stores/

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[9]Esskay brands are produced by Esskay, Inc., a wholly-owned subsidiary of Gwaltney, which is a wholly-owned subsidiary of Smithfield. Smithfield describes Esskay as "[o]ne of the oldest meat brands in Baltimore and Washington, D.C.," which "brought Smithfield Foods important processed meat market shares in both cities." Smithfield Foods, Inc. Website, *at* www.smithfieldfoods.com/invest/acq.html (Fiscal 1986) (last visited Apr. 7, 2003).

index.php (results for zipcode 20000) (last visited Apr. 7, 2003) (attached as Ex. K).

III. ARGUMENT

A. Applicable Legal Standards

1. The United States Need Only Make Out a *Prima Facie* Case In Order to Defeat Smithfield's Motion to Dismiss

After personal jurisdiction over a defendant has been challenged, it is the plaintiff's burden to come forward with sufficient evidence to support the Court's personal jurisdiction. *Second Amendment Found. v. United States Conference of Mayors,* 274 F. 3d 521, 524 (D.C. Cir. 2001). Prior to any jurisdictional discovery,[10] a plaintiff need only make out a *prima facie* case that personal jurisdiction exists. *Crane v. New York Zoological Soc'y*, 894 F.2d 454, 458 (D.C. Cir.1990). Defendant concedes that this is the applicable legal standard. Defendant's Memo at 6.[11]

2. Section 12 of the Clayton Act, 15 U.S.C. § 22, Provides this Court with Personal Jurisdiction Over Defendant.

Personal jurisdiction in this matter is based on Section 12 of the Clayton Act, 15 U.S.C. § 22:

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[10]Plaintiff intends to request such discovery. Certainly, "[a] plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery[.]" *Second Amendment Found.*, 274 F.3d 521, 525. Only after jurisdictional discovery, if the defendant persists in challenging personal jurisdiction, would the United States have to establish personal jurisdiction by a preponderance of the evidence. *See Shapiro Lifschitz & Schram v. Hazard*, 24 F. Supp. 2d 66, 70 (D.D.C. 1998).

[11]Defendant bemoans the "lack of any specific factual allegations" regarding personal jurisdiction in the Complaint given the United States' investigation of Smithfield's alleged Hart-Scott-Rodino Act violations. Defendant's Memo at 7. The United States has no obligation to make specific allegations of personal jurisdiction in the Complaint because lack of personal jurisdiction is an affirmative defense and so must be raised by the Defendant. *Caribbean Broad. Sys. v. Cable & Wireless*, 148 F.3d 1080, 1090 (D.C. Cir. 1998).

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

As Defendant explains: "Section 12 of the Clayton Act, 15 U.S.C. §22, is essentially a 'long-arm statute' which provides for personal jurisdiction by permitting 'service of process in a non-forum district *so long as the venue provision is met*.' *Chrysler Corp. v. Gen. Motors Corp.*, 589 F. Supp. 1182, 1195 (D.D.C. 1984) (emphasis added)." Defendant's Memo at 9. The "transacts business" language of Section 12 was intended to broaden the choices of forums available to plaintiffs in antitrust cases. *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 372-73 (1927). In providing for venue (and thus personal jurisdiction) wherever a defendant corporation "transacts business," Section 12 "created a broader and looser concept than the phrase 'doing business' in some of the other statutes." *Riss v. Ass'n of Am. R.Rs.*, 24 F.R.D. 7, 8 (D.D.C. 1959). A corporation "transacts business" in a district

> "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." *Eastman Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L. Ed. 684 (1927) []. The test of venue has been described as the practical, everyday business or commercial concept of doing or carrying on business "of any substantial character." *United States v. Scophony Corp.*, 333 U.S. 795, 807, 68 S.Ct. 855, 861, 92 L. Ed. 1091 (1948).

Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182, 1195 (D.D.C. 1984).

A corporation may transact business directly or indirectly through agents or subsidiaries. *See, e.g, Eastman Kodak Co.*, 273 U.S. at 373; *Scophony,* 333 U.S. at 810; *Vitamins*, 2001 U.S. Dist. Lexis 25073, at *24; *MCI Communications Corp. v. AT&T*, 1983-2 Trade Cas. (CCH) ¶ 65,652, 69,344 (D.D.C. 1983). Here, at least two Smithfield subsidiaries' (Smithfield Packing

and Gwaltney) products are sold in most, if not all, grocery stores in the District of Columbia.[12] Forquer Decl. (Ex. J). It is well-established that if a parent exercises control over its subsidiaries that are transacting business in a particular district, then the activities of the subsidiaries are attributable to the parent for purposes of determining venue under Clayton Act § 12. *See Scophony*, 333 U.S. at 817; *see also Vitamins,* 2001 U.S. Dist. Lexis 25073, at *24; *Tiger Trash v. Browning Ferris Indus., Inc.*, 560 F.2d 818, 822 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Phone Directories Co. v. Contel Corp.*, 786 F. Supp. 930 (D. Utah 1992); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.*, 499 F. Supp. 829 (D. Or. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262 (E.D. Pa. 1975); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975).

In determining whether a parent exercises the requisite control over its subsidiaries, courts look to the totality of the relationship between the parent and its subsidiaries. *MCI Communications Corp. v. AT&T*, 1983-2 Trade Cas. ¶ 65,562, 69,344 (D.D.C. 1983). Courts have considered the presence of such factors as whether the parent has the capacity to influence the major business decisions of the subsidiary, whether the parent supervises and monitors the activities of the subsidiaries, and whether the parent and the subsidiaries operate as an integrated

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[12]Defendant's only attempt to distance itself from the activities of its subsidiaries is one unsupported sentence: "There are no allegations that any of the operating subsidiaries were involved in the conduct allegedly violating the [HSR] Act, so the business of the operating subsidiaries is not material to this motion in any event." Defendant's Memo at 4. The law, however, is clear that, for establishing personal jurisdiction over a parent, the activities of the subsidiary need not be related to the cause of action. *Chrysler*, 589 F. Supp. at 1204 (stating that, in contrast to analysis under the District of Columbia long-arm statute, "[i]n viewing the volume of business to determine whether the defendant transacts business under Section 12, the transactions do not have to be related to the cause of action or the subject matter of the suit.").

whole. *See, e.g., Scophony,* 333 U.S. at 810-17; *Vitamins*, 2001 U.S. Dist. Lexis 25073 at **25;* *Chrysler,* 589 F. Supp. at 1200; *MCI Communications Corp.* 1983-2 Trade Cas. at 69,343.[13]

B. Smithfield Subsidiaries Transact Business in this District and Smithfield Controls Them

The evidence supporting this Opposition shows first, that at least two wholly-owned Smithfield subsidiaries, Smithfield Packing and Gwaltney, transact business in the District of Columbia. The actual volume of current and historic sales and revenues generated in the District of Columbia is known only to Smithfield at this point; however, based on the number of brands, products and retail outlets identified in the Forquer Decl. (Ex. J), the numbers cannot be insubstantial.[14]

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[13]In cases construing 15 U.S.C. § 22, courts in this district have only declined to base jurisdiction on the activities of subsidiaries in situations in which the parent's involvement was so minimal as to be deemed a "mere investment" in the activities of the subsidiaries rather than an alternative means of transacting business. *See, e.g., Caribe Trailer Sys., Inc. v. Puerto Rico Mar. Shipping Auth.,* 475 F. Supp. 711, 717-18 (D.D.C. 1979).

[14]In any case, the amount of sales is not critical. The sufficient amount is "determined from the viewpoint of the average businessman rather than the corporate giant." *Athletes Foot of Del. v. Ralph Libonati Co.*, 445 F. Supp. 35, 43 (D. Del. 1977) (quoting *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 373 (1927)); *see also Levin v. Joint Comm'n on Accreditation of Hosps.*, 354 F.2d 515, 517 (D.C. Cir. 1965) (per curiam) (venue was proper despite the fact that defendant devoted "considerably less than one per cent" of its total man-hours to activities in the District). Similarly, although information about the means by which the products make their way to the shelves of the D.C. stores is not readily available at this point, such information is not critical either. *See Chrysler*, 589 F. Supp. at 1202 (finding venue proper although defendant Toyota did not maintain a dealership with the District of Columbia, because D.C. residents nevertheless had access to its vehicles through dealerships in the surrounding suburbs, and therefore Toyota had intended to sell its products in this area's market); *cf. Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 205 (D.C. Cir. 1981) (finding jurisdiction proper under "transacting any business" clause of D.C. long-arm statute where the defendant shipped wine to an intermediary, expecting the wine would be distributed in an area including the District of Columbia).

Second, Plaintiff shows that Smithfield exercises control over its subsidiaries, including those whose products are sold in the District of Columbia, by retaining the capacity to influence their major business decisions; supervising their activities; and integrating the family of companies into a functional whole. Plaintiff therefore meets the standards for establishing personal jurisdiction over Smithfield in this district.[15]

1. Smithfield Has the Capacity to Influence Major Business Decisions of Its Subsidiaries

a. Smithfield Selects the Membership of Its Subsidiaries' Boards

That the parent determines the membership of Boards of Directors of its subsidiaries is a strong indication of the parent's control. *See Vitamins,* 2001 U.S. Dist. Lexis 25073, at *28 (noting that executive committee of parent's board determined the membership of boards of each of the subsidiaries in determination of parental control).

Smithfield's bylaws give the officers of Smithfield the authority to vote the shares of stock it holds in each of its subsidiaries. Smithfield Foods, Inc., Bylaws, Section 4.9, (as amended and restated on August 27, 1998) at 19 (Exhibit 3.2 to Smithfield Foods, Inc., Form 10-Q for the

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[15]Assertion of personal jurisdiction on the basis of Smithfield's transacting business through its subsidiaries is well within the requirements of the Due Process Clause of the Fifth Amendment. Moreover, in a federal question case in which jurisdiction is based on a statute providing for nationwide service of process, such as 15 U.S.C. § 22, the relevant forum is the United States. *In re Baan Co. Secs. Litig.,* No. CIV.A.98-2465, 2003 WL 470327, at *6 (D.D.C. Feb. 20, 2003) (considering the relevant forum in a suit filed under the Securities Exchange Act). Defendant has the requisite "minimum contacts" with the judicial forum (the United States) such that assuming jurisdiction over it satisfies the core demand of due process: that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This court's exercise of personal jurisdiction over Smithfield is fair and reasonable under the factors articulated by the Supreme Court. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (considering factors including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief").

Quarterly Period Ended August 2, 1998), www.sec.gov/Archives/edgar (excerpts attached as Ex. L). This authority includes voting the shares for the purpose of electing the directors of its subsidiaries. For example, in 1998, Smithfield authorized its then-CFO to vote the shares of Smithfield at the meetings of the subsidiaries to elect people chosen by Smithfield to be the directors of those subsidiaries. Minutes of Meeting of Board of Directors of Smithfield Foods, Inc., August 27, 1998, at SF5123 (attached as Ex. M).

In *Vitamins,* the court asserted jurisdiction over a parent that claimed to give its subsidiaries a broad range of autonomy, reasoning that "even if [the parent] *chooses* not to exercise control, [it] still retains the *power* to do so and ultimately has the last word with respect to [operating] decisions." 2001 U.S. Dist. Lexis 25073, at *36 (emphasis added). The court did not find the claimed autonomy of the subsidiaries sufficient to overcome the fact that the parent retained final authority to affirm or reject the subsidiary's proposals. *Id.* Here, as in *Vitamins*, Smithfield's status as the sole stockholder of most of its subsidiaries, and sole stockholder of the two whose products are known to be sold in the District of Columbia, gives it the capacity to use its voting power to influence the decisions of its subsidiaries.

b. Smithfield Shares Officers and Directors With Its Subsidiaries

Interlocking directorates are also a determinative factor in assessing whether the parent controls the subsidiaries. *Vitamins*, 2001 U.S. Dist. Lexis 25073, at *25. In addition, the presence of high-level employees of the parent on the subsidiary's board may enable the parent to exercise "tremendous influence." *Id.* at *28. In the *Vitamins* case, the court was also impressed with the fact that other directors of the parent's board were on the boards of other subsidiaries. *Id.* at 28-29.

Through its voting control, Smithfield has similarly constructed important lines of authority

between itself and its subsidiaries in the form of interlocking officers and directors. Several members of Smithfield's senior management serve simultaneously as officers and directors of the allegedly "autonomous" operating companies. A sampling of the positions held by key Smithfield officers and directors on the boards of various Smithfield subsidiaries, attached as Ex. N, shows the following:[16]

- **Joseph W. Luter, III**, the Chairman of the Board of Smithfield, is identified from public records as being the Chief Executive Officer, Chairman, President or Director of at least 12 separate active companies, all of which appear to be subsidiaries or affiliates of Smithfield. *See* Ex. N

- **Daniel G. Stevens**, Smithfield's Vice President and Chief Financial Officer, who provided a Declaration in support of Defendant's motion to dismiss describing the "autonomy" and "independence" of Smithfield's operating subsidiaries, asserted that he is "knowledgeable about the financial and business operations of Smithfield and its operating subsidiaries as a result of his positions with Smithfield." Stevens Declaration at ¶ 1. But, Mr. Stevens omitted from his Declaration that he is identified in public records as a Vice President or Chief Financial Officer of at least 30 subsidiaries of Smithfield. For example, Mr. Stevens is identified as a Vice President of Gwaltney and a Vice President of the Smithfield

[16]The list is based on presently available public information. It may not include all Smithfield subsidiaries or associated entities with which senior management of Smithfield is also connected, nor does it reflect any changes in those relationships since the date the public information was disseminated. A complete and fully accurate list can only be compiled through discovery.

Packing, two of Smithfield's meat processing subsidiaries whose products are sold in the District of Columbia. *See* Ex. N; *see also* Forquer Decl. (Ex. J).

- **Michael H. Cole, Esq.**, Smithfield's Secretary and Associate General Counsel, also provided a Declaration in support of Defendant's motion to dismiss. Like Mr. Stevens, Mr. Cole did not disclose that he is also identified as an officer or principal of at least 16 Smithfield subsidiaries, including Smithfield Packing and Gwaltney, whose products are sold in the District of Columbia. *See* Ex. N; *see also* Forquer Decl. (Ex. J).
- **C. Larry Pope**, identified as the President and Chief Operating Officer of Smithfield, is also identified as a vice president, treasurer, director, chairman, or Chief Operating Officer of at least 23 separate Smithfield subsidiaries or affiliated business entities, including Smithfield Packing and Gwaltney, whose products are sold in the District of Columbia. *See* Ex. N; *see also* Forquer Decl. (Ex. J).

A chart demonstrating the connections between three of the four above-listed Smithfield officers and directors and various operating subsidiaries whose products are sold in District food stores is attached as Ex. O.

In addition, Smithfield has a Management Board at the parent company level, separate and apart from its own Board of Directors. At the time of its creation in 2000, the members of this Management Board were the presidents of six of Smithfield's operating companies (including Smithfield Packing and Gwaltney) and three key officers of Smithfield, including Smithfield's

Chairman and Chief Executive Officer, Joseph W. Luter, III, who was named Chairman.[17] *See* 1/20/00 Smithfield Press Release (attached as Ex. Q); Smithfield Foods, Inc., Minutes of Meeting of Board of Directors, January 20, 2000 at SF5175 (attached as Ex. R). Although public information does not enable Plaintiff to describe the precise activities of the Management Board, its mere existence reveals Smithfield's desire and ability to exercise influence over its subsidiaries. *See Vitamins,* 2001 U.S. Dist. Lexis 25073, at *25. Here, as in *Vitamins*, the overlapping officers and directors among Smithfield and its subsidiaries makes it "hard to believe that [the subsidiaries] do not base their decisions on what is ultimately beneficial for [the parent]." *Id.* at 35.

c. Smithfield Is Contractually Bound To Its Creditors To Exercise Control Over The Business Decisions Of Its Subsidiaries

Another major factor in assessing the parent's control over its subsidiary for purposes of Section 12 of the Clayton Act is whether the parent has power to influence decisions that lead or could lead to violations of the antitrust laws. *MCI Communications Corp. v. AT&T*, 1983-2 Trade Cas. ¶65,562 at 69,344 (citing *Flank Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357, 365 (D.D.C. 1967)). Here, Smithfield has committed to exercise such control over its subsidiaries.

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[17]Before the formation of the Management Board, Smithfield had a practice of placing the senior officers of its subsidiaries on its own Board of Directors. *See, e.g.,* Smithfield 1998 10-K at 11-12 (list of Smithfield's executive officers that includes Lewis R. Little, President and Chief Operating Officer of Smithfield Packing, and Timothy A. Seely, President and Chief Operating Officer of Gwaltney) (Ex. E) and *compare* to Smithfield Foods,. Inc., Minutes of Meeting of the Board of Directors August 27, 1998 at SF5121-5125 (lists Board members in attendance, including Lewis R. Little and Timothy A. Seely) (Ex. M). Apparently in an effort to avoid claims of an insider-dominated Board, Smithfield created its Management Board so that the practice of monitoring and controlling the subsidiaries from the parent company level could be continued. Smithfield Foods, Inc., Minutes of Meeting of Board of Directors, September 2, 1999 at SF 5143-5157 (attached as Ex. P).

In 1999, Smithfield executed a $650 million revolving credit facility that is secured by the assets and inventories of Smithfield's subsidiaries, including Smithfield Packing and Gwaltney, whose products are sold in the District of Columbia. *See* Second Amended and Restated Multi-year Credit Agreement dated December 3, 1999 at 64-77, 91-92 ("Smithfield Credit Agreement") (Exhibit 4.6(A) to Smithfield 2000 10-K) (excerpts attached as Ex. S).

By its terms, the agreement obliges Smithfield to ensure that its subsidiaries do not exercise independent authority in ways that might degrade their value as security. Smithfield Credit Agreement at 67 (Ex. S). For example, Smithfield promised that it would not permit any of its subsidiaries to engage, to any material extent, in any business "other than the business of the type conducted by the borrower and its subsidiaries" on the effective date of the agreement. *Id.* at 66. In addition, Smithfield agreed not to permit any subsidiary to create, incur, or assume any additional indebtedness or liens on any property or assets now owned by the subsidiary, with certain limited exceptions. *Id.* at 63-64. More to the point, Smithfield promised that it would not permit any subsidiary guarantor to effect any "fundamental changes" that might have antitrust consequences, such as a merger with or acquisition of any entity other than Smithfield or another Smithfield subsidiary. *Id.* at 64-66.

2. Smithfield Establishes "Clear Lines Of Accountability and Communication From the Top of the Organization Down Through Each Subsidiary"

Courts have consistently recognized that where there is evidence that a parent monitors and supervises its subsidiaries' activities, a certain degree of "control" is present. *See, e.g., Vitamins,*

2001 U.S. Dist. Lexis 25073, at *24 ("Despite a formal separation between parent and subsidiary, 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 *Chrysler,* 589 F. Supp. at 1200).

Smithfield has charged its Chief Executive Officer with responsibility for monitoring and supervising its subsidiaries. In 1999, Smithfield's Board directed its Chief Executive Officer to ensure that Smithfield itself and its subsidiaries were in compliance with the law. At its September 9, 1999 meeting, Smithfield's Board unanimously passed a resolution stating that:

> WHEREAS, it is the policy of Smithfield Foods, Inc., and its subsidiaries (collectively the "Company") that the Company and all of its directors, officers and employees, and any agents, representatives or other persons acting for or on behalf of Company, fully comply with all applicable laws, rules and regulations and adhere to the highest ethical standards in the conduct of the Company's business."
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> RESOLVED FURTHER, that the Chief Executive Officer is directed to implement such practices and procedures as are appropriate to ensure full and effective compliance with this policy.

Smithfield Foods Inc., Minutes of Meeting of the Board of Directors, September 2, 1999 at SF5155 (Ex. P).

Smithfield implemented this directive at least in one area – compliance with environmental laws and regulations. The nature of Smithfield's business – hog production, slaughtering and processing – necessarily involves environmental issues. In 2000, Smithfield embarked on a restructuring of its so-called Environmental Management System, establishing a senior management level Environmental Compliance Committee chaired by two Smithfield officers, Lewis Little and Robert Urell. The Smithfield board charged the committee with responsibility for

"developing and monitoring the environmental policies of the company and for the continued development and implementation of the company's Environmental Management System." Smithfield Foods, Inc., Minutes of Meeting of the Board of Directors, January 20, 2000, at SF5175-5176 (Ex. R). By 2002, Smithfield was able to report that it had "established clear lines of accountability and communication from the top of our organization down through each subsidiary." Smithfield Environmental Report at 5 (Ex. A). According to the Report, there is a Smithfield level Environmental Affairs Group that reports directly to Smithfield's president and Chief Operating Officer. *Id.* at 21. The Group's priority is "[s]etting the foundation for managing and measuring the environmental performance of Smithfield's combined U.S. operations." *Id.* at 23.

3. Smithfield and Its Subsidiaries Are An Integrated Enterprise

In *Scophony*, the Supreme Court explained that in applying Section 12, a court should not

> atomiz[e] [a defendant's enterprise] . . . into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct by the process sometimes applied in borderline cases involving manufacturing and selling activities; . . . there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one. . . .

333 U.S. at 817. Accordingly, courts look to the extent of the vertical integration and coordination among subsidiaries to determine whether there is a "unified hierarchy of . . . corporations" that "have but one ultimate master." *Chrysler*, 589 F. Supp. at 1201; *Vitamins,* 2001 U.S. Dist. Lexis 25073, at *31 (citing as a factor supporting jurisdiction over a parent that the family of entities were "organized according to business lines rather than separate corporate entities"); *see also Tiger Trash v. Browning-Ferris Indus.*, 560 F.2d 818, 824 (7th Cir. 1977) (finding jurisdiction proper

where the parent "pursued the goal of building a nationwide waste system company primarily through the means of acquiring existing businesses with a history of successful operation.").

a. Smithfield's Finances Are Interdependent With Its Subsidiaries

In examining the extent of vertical integration, courts consider subsidiaries' ability to utilize the parent's resources. *See Chrysler*, 589 F. Supp. at 1201. The court in *Vitamins* found it notable that the subsidiaries obtained their working capital from the parent and that "profits from the . . . subsidiaries do not stay with the subsidiaries, but rather are funneled to [the parent]." 2001 U.S. Dist. Lexis 25073, at *31, 32. *See also Tiger Trash*, 560 F.2d at 823 (giving weight to the fact that parent had allocated financial resources, provided finances, systems accounting, and set standards for return on capital investment from subsidiary). Courts also consider evidence that a parent prepares consolidated financial statements, provides loans or incurs expenses on the subsidiaries' behalf. *See MCI Communications Corp.*, 1983-2 Trade Cas. ¶ 65,652, at 69,344.

Here, Smithfield arranges for financing and capitalization of its subsidiaries. The stated purpose of Smithfield's shared credit facility is to "finance the working capital needs and for other general corporate purposes of [Smithfield] *and its subsidiaries* in the ordinary course of business." Smithfield Credit Agreement at 1 (emphasis added) (Ex. S). Another example of Smithfield's close financial ties with its subsidiaries comes from its use of investment profits. Indeed, the $70 million in profits from the purchase and sale of IBP stock – the very subject of the instant case – were made by a subsidiary, SF Investments, Inc. *See* Ex. B. The profits, however, were used to help retire long-term debt capital lease obligations as well as to repurchase some Smithfield common stock. *See* SMITHFIELD FOODS, INC., 2001 ANNUAL REPORT 49, 29 (2001)

www.smithfieldfoods.com/invest/pdf/2001/complete.pdf (last visited Apr. 7, 2003) (excerpts attached as Ex. T).

Smithfield's financial statements provide further evidence of financial interdependence. In 1998, 1999 and 2000, in addition to filing consolidated financial statements reporting on the results and operations of itself and the subsidiaries, Smithfield filed a separate parent company financial statement. These parent company statements show that Smithfield furnished corporate services (general and administrative expenses) to its subsidiaries and then allocated those expenses to each of the operating subsidiaries. *See* Smithfield 1998 10-K at Schedule I, Condensed Financial Information of Registrant at F-25 (Ex. E); Smithfield 1999 10-K at Schedule I, Condensed Financial Information of Registrant, at F-26 (Ex. F); Smithfield 2000 10-K at Schedule I, Condensed Financial Information of Registrant at F-25 (Ex. D). Second, the same statements also show that Smithfield's subsidiaries, at least for three consecutive years, paid dividends to their parent in the following amounts: $76,700,000 in 1997, $43,400,000 in 1998, $65,316,000 in 1999, and in 2000, $37,800,000. Smithfield 1998 10-K at Schedule I, Condensed Financial Information of Registrant at F-27 (Ex. E); Smithfield 1999 10-K at Schedule I, Condensed Financial Information of Registrant at F-28 (Ex. F); Smithfield 2000 10-K at Schedule I, Condensed Financial Information of Registrant at F-28 (Ex. D).

b. Smithfield Has Created a Single Corporate Image

Another factor courts consider is whether the subsidiary and its parent are partners in "world-wide business competition" and seek to present "a common marketing image." *Vitamins*, 2001 U.S. Dist. Lexis 25073, at *25 (citing *Chrysler,* 589 F. Supp. at 1201). In *Vitamins*, the court

concluded that the marketing image presented to the public was one of an integrated corporation with various departments around the world rather than of separate corporate entities that function independently of one another. *Id.* at *33; *see also Tiger Trash*, 560 F.2d at 823 (noting that both parent and subsidiary conducted their advertising and promotional activities in such a manner so as to give the appearance of one company operating nationwide).

As the Smithfield family of subsidiaries has grown, Smithfield has devoted increasing effort to creating and promoting a single corporate image through its marketing of the Smithfield family of brands. For example, on June 25, 2001, in a Smithfield announcement of the appointment of Robert A. Slavik as corporate vice president of sales and marketing, Mr. Slavik stated that his goal was to take "a leadership role in devising a national brand strategy at Smithfield Foods." *See* 6/25/01 Press Release (attached as Ex. U). In the same press release, Smithfield's chairman and CEO, Joseph W. Luter, III, added that the company had "made a strategic decision to commit substantially more marketing funds to support *our* brands." *Id.* (emphasis added). Smithfield's Website, described *supra* at p.5, reveals a similar effort to convey the partnership between Smithfield and its meat processing subsidiaries working together to provide the customer with the best products possible. Ex. I.

c. Smithfield Executives Are Responsible for Coordinating and Assisting the Operations of the Subsidiaries

Evidence that a parent assists the activities of the subsidiaries is yet another factor that courts consider in determining whether there is sufficient parental control to impute the subsidiaries' activities to the parent. *Tiger Trash*, 560 F.2d at 823 (finding jurisdiction proper where parent's officers, some of whom were officers of subsidiary, assisted subsidiary through

national marketing programs, signing up customers, making basic market development decisions, and assisting in supervising subsidiary).

Smithfield has taken an active role in coordinating the activities of its subsidiaries. Starting in 1999, with its acquisitions of hog production subsidiaries, Carroll's and Murphy Family, Smithfield embarked on a supply strategy of vertical integration to protect and improve its meat processing subsidiaries' profitability. SMITHFIELD FOODS, INC., 2000 ANNUAL REPORT 3-4 (2000), www.smithfieldfoods.com/invest/pdf/complete.pdf (last visited Apr. 7, 2003) (excerpts attached as Ex. V). In the Annual Letter to Shareholders, Smithfield's President and Chief Executive Officer, Joseph W. Luter, III, explained that, by supplying its meat processing subsidiaries with raw materials, Smithfield's hog production subsidiaries could "insulate" them from "much of the cyclicality common to our business" and "provide a more predictable earnings stream." *Id.* at 4.

The effort to integrate has apparently been successful. The following year, Smithfield's President and Chief Executive Officer, Joseph W. Luter, told shareholders that "through its hog raising and pork processing subsidiaries, the company can exercise complete control over its products – from their genetic lines and nutritional regimen to how they are processed, packaged and delivered to customers." 2001 ANNUAL REPORT at 7 (Ex. T). Lewis Little, former president and chief operating officer of Smithfield and current president and chief operating officer of Smithfield Packing, added, "We like to say that vertical integration gives us control over our pork products from squeal to meal." *Id.*

Smithfield has extended the integration effort to other areas. In October 2001, Smithfield announced that Joseph W. Luter IV, the chairman's son, would be heading "a major new corporate

initiative to invoke a closer relationship between the operating subsidiaries to maximize the available synergies within the Smithfield Foods family of companies." *See* 10/19/01 Smithfield Press Release (attached as Ex. W). According to the press release, Mr. Luter would "be responsible for coordinating corporate sales and marketing programs, as well as transportation, logistics and information technology affecting the entire organization." *Id.* Similarly, Smithfield announced that it had named two "food industry veterans to fill important positions" to take "advantage of the synergies among our operations through logistical and information technology advancement." *See* 1/3/02 Press Release (attached as Ex. X).

C. Subsidiaries' Adherence To Corporate Formalities Does Not Imply An Absence of Control

All that Defendant offers the Court about its relationship with its subsidiaries is that they maintain "corporate formalities," such as their own books and bank accounts, their own tax liabilities, and their own headquarters and employees. Defendant's Memo at 4. But these "corporate formalities" do not imply an absence of control by the Defendant. *See Chrysler*, 589 F. Supp. at 1200 ("[d]espite a formal separation between parent and subsidiary, 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 *Scophony*, 333 U.S. at 814)).

Defendant also asserts that its subsidiaries are "responsible for their own day-to-day operations," operating independently and autonomously from the parent. Defendant's Memo at 4. But, again, that characterization is not inconsistent with Defendant controlling its subsidiaries for purposes of personal jurisdiction. *See Chrysler*, 589 F. Supp. at 1202. The test is not day-to-day

control – it is the more practical, business concept approach, based on *Scophony's* reasoning, looking to the confluence of factors described above to determine whether "there is [an] underlying unity of purpose and direction sufficient to find that these corporations though separate, are all members of the larger [parent] family." *Chrysler*, 589 F. Supp. at 1201 (citations omitted).

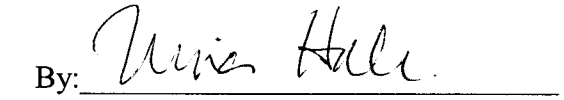
IV. CONCLUSION

Based primarily on publicly available information, Plaintiff has proffered sufficient evidence of Smithfield's control over its subsidiaries to justify imputing their activities in this district to Smithfield. Smithfield has the capacity to influence the major business decisions of its subsidiaries, supervises and monitors their activities, and operates its family of companies as an integrated whole. Because the subsidiaries undeniably transact business in this district, this Court has personal jurisdiction over Defendant. Accordingly, Plaintiff respectfully requests that Defendant's motion to dismiss for lack of personal jurisdiction be denied.

Finally, pursuant to Local Rule 7.1(f), Plaintiff respectfully requests oral argument.

Dated this 7th day of April, 2003.

Respectfully submitted,
Plaintiff, United States of America

By: 

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