

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	Civil Action No.1:03-CV-00434 (HHK)
v.)	
)	
SMITHFIELD FOODS, INC.,)	[ORAL ARGUMENT REQUESTED]
)	
<i>Defendant.</i>)	
)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR LEAVE TO CONDUCT DISCOVERY
LIMITED TO THE ISSUE OF PERSONAL JURISDICTION**

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I. INTRODUCTION

Plaintiff, the United States of America (“Plaintiff” or the “United States”), respectfully submits this memorandum of points and authorities in support of its Motion for Leave to Conduct Discovery Limited to the Issue of Personal Jurisdiction. On the record now before the Court, the United States has proffered facts to show that Defendant, Smithfield Foods, Inc. (“Defendant” or “Smithfield”), through its wholly-owned and controlled subsidiaries, is, and has been, transacting business in the District of Columbia and that the Court can exercise personal jurisdiction over Defendant. Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction (“Plaintiff’s Opp. Memo”).¹ If any doubt remains after consideration of Plaintiff’s Opp. Memo, and Defendant’s Reply thereto (“Defendant’s Reply Memo”), the United States requests that, consistent with the law in this Circuit, it be allowed to conduct jurisdictional discovery before the Court decides Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction.

II. ARGUMENT

A. The Law Is Well-Settled That Plaintiff Is Entitled To Jurisdictional Discovery

Whenever a defendant raises lack of personal jurisdiction as an affirmative defense and the plaintiff demonstrates that its jurisdictional allegations can be supplemented through

¹On April 16, 2003, Plaintiff filed a motion, and supporting memorandum of points and authorities, requesting leave to file a Supplemental Memorandum in Support of its Opposition to Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction (“Supplemental Opposition Memo”), which was attached to the supporting memorandum. The Court has not yet ruled on that motion, but if the Court permits the United States to file the Supplemental Opposition Memo before the Court decides the instant Motion, Plaintiff respectfully requests that the Court also consider the evidence that was provided therein as part of Plaintiff’s Opp. Memo.

discovery, the law in this Circuit is well-settled that Plaintiff has the right to conduct jurisdictional discovery. “A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.” *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996); *see also GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000); *Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991); *Crane v. Carr*, 814 F.2d 758, 760 (D.C. Cir. 1987).

Relying primarily on public sources, the United States put considerable evidence before the Court demonstrating Smithfield’s control over its subsidiaries, including those that transact business in the District of Columbia. Plaintiff’s Opp. Memo. As described below, through jurisdictional discovery, Plaintiff, if necessary, can supplement the existing factual basis supporting the Court’s exercise of personal jurisdiction over Defendant. *GTE*, 199 F.3d at 1351-52 (finding that jurisdictional discovery was warranted even though “[t]he record [currently] before th[e] court [wa]s plainly inadequate.”). *See also Edmond*, 949 F.2d at 425 (holding that, given the plaintiff’s specific allegations, “it [w]as an abuse of discretion to deny jurisdictional discovery”); *Crane*, 814 F.2d at 760 (vacating, in part, the lower court’s decision, because the plaintiff’s “case was dismissed with no opportunity for discovery on the issue of personal jurisdiction”).

B. Through Jurisdictional Discovery, Plaintiff Can Supplement The Factual Basis Supporting The Court’s Personal Jurisdiction Over Defendant

In its Opp. Memo, the United States proffered evidence, which taken together, strongly suggests that Smithfield is not a mere passive investor, but rather an active umbrella corporation

that conducts its business through its captive subsidiaries. This evidence includes Smithfield's obligation to exercise control over major business decisions of its subsidiaries (Plaintiff's Opp. Memo at 14-15, 18), Smithfield's CEO's responsibility for monitoring and supervising the subsidiaries (Plaintiff's Opp. Memo at 16-17), and devising national strategies (Plaintiff's Opp. Memo at 20). Plaintiff seeks to supplement this evidence by conducting discovery of Smithfield and at least three of its subsidiaries;² this discovery should elicit more detailed information about the pervasiveness of Defendants' financial and operational control over its subsidiaries.

Although Smithfield has made repeated conclusory statements that its subsidiaries operate "autonomously" and that it is just a holding company, Plaintiff is entitled to examine the basis for these statements. *See, e.g.*, Defendant's Reply Memo at 19; Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 3. For example, Defendant states that Gwaltney and Packing each "formulates and executes its own business plans [and] negotiates its own collective bargaining agreements." Declaration of Timothy A. Seely, Gwaltney's President, at ¶ 7; Declaration of Lewis R. Little, Packing's President, at ¶9, attached as Exhibits to Defendant's Reply Memo. Nowhere does Defendant mention whether Smithfield reviews, approves or influences these plans and agreements. Plaintiff would also probe, among other things, Defendant's assertions that the roles of the several officers of Gwaltney and Packing, who are also Smithfield officers, are only "ministerial." Defendant's

²Defendant does not dispute that Gwaltney of Smithfield, Ltd. ("Gwaltney") and The Smithfield Packing Company, Incorporated ("Packing") transact business in the District of Columbia, so Plaintiff would not need to conduct discovery into that issue. Smithfield's inclusion of the declaration of the president of John Morrell in Support of its Reply Memo implies that Smithfield concedes that its subsidiary John Morrell also transacts business in the District of Columbia.

Reply Memo at 12. Plaintiff would also examine the function of Smithfield's Management Board, which, at the time of its creation, included the presidents of six of Smithfield's operating companies (including Smithfield Packing and Gwaltney). Further, discovery would permit Plaintiff to explore how the funds from the Second Amended and Restated Multi-year Credit Agreement dated December 3, 1999 at 64-77, 91-92 (excerpts attached as Exhibit S to Plaintiff's Opp. Memo), which Smithfield does not dispute requires it to control major business decisions of its subsidiaries, are distributed to the subsidiaries. Other topics Plaintiff would explore in jurisdictional discovery include, but are not limited to:

- The reporting to, approval from and accountability to Smithfield that the subsidiaries' presidents, or any of their employees, owe to Smithfield officers, directors or employees.
- Smithfield's involvement in, and approval of, its subsidiaries' decisions relating to, for example:
 - business plans;
 - budgets;
 - capital expenditures;
 - collective bargaining agreements;
 - general policies;
 - salaries and bonuses;
 - the hiring and firing of the subsidiaries' officers; and
 - the election and removal of the subsidiaries' directors.
- The roles played by Smithfield executives whose job descriptions suggest a managerial and coordinating role relating to the subsidiaries, such as:
 - transportation logistics;
 - advertising campaigns;
 - marketing;
 - sales;
 - accounting; and
 - legal counsel.
- The integration of the internal operations of Smithfield and its subsidiaries, such as:

- pension plans;
- stock option plans;
- workers' compensation;
- health and life insurance; and
- other employee benefits.

C. Plaintiff's Pre-Complaint Investigation Does Not Limit Its Entitlement To Jurisdictional Discovery

It is well-established that pre-complaint investigation by enforcement agencies does not preclude their right to subsequent civil discovery. "Attaching 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." *SEC v. Saul*, 133 F.R.D. 115 (N.D. Ill. 1990) (citing *Hannah v. Larche*, 363 U.S. 420 (1960)). See also *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) (noting that "discovery should not have been foreclosed to the [SEC] merely because of its pre-filing investigation . . ."). Post-complaint civil discovery, notwithstanding a pre-complaint investigation, is particularly appropriate to investigate an affirmative defense raised for the first time after the complaint has been filed. See *Caribbean Broad. Sys. v. Cable & Wireless*, 148 F.3d 1080, 1090 (D.C. Cir. 1998) (noting that lack of personal jurisdiction is an affirmative defense).

III. CONCLUSION

Plaintiff has a "good faith belief that . . . discovery will enable [it] to show that the court has personal jurisdiction over the defendant." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1998). Accordingly, Plaintiff respectfully requests that the

Court grant Plaintiff's motion for leave to conduct discovery limited to the issue of personal jurisdiction.

Dated: April 25, 2003

Respectfully submitted,

Plaintiff, United States

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