





the United States. In such cases, "this Court's subject matter jurisdiction is limited to foreign conduct that was intended to have, and did have, substantial effects on United States commerce." *Id.* at 2 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986)). Additionally, the "injuries which [the plaintiffs] seek to remedy must arise from an anticompetitive effect of the defendants' conduct on U.S. conduct." *Id.* at 3 (citing 15 U.S.C. §6(a) and Kruman v. Christie' Int'l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001)). Applying this test the Court found that the plaintiffs' direct action claims at issue appeared to have the requisite direct, substantial, and reasonably foreseeable effects on U.S. Commerce. *See id.* at 4.

Ultimately, the Court concluded it had subject matter jurisdiction over the direct action plaintiffs claims based on purchases in foreign commerce because the "plaintiffs were substantially injured in United States commerce and that the injuries for which they seek redress were sustained in United States commerce because the purchases, including those of the foreign subsidiaries, were coordinated by the American parent companies and thus affect[ed] the financial status of these American companies." *See Id.* The Court went on to differentiate the direct action at issue from the recently decided Empagran action,<sup>1</sup> by noting that the direct action pertained to "American companies or subsidiaries of American companies that have purchased substantial volumes of vitamins for delivery both in the United States and abroad as part of a global procurement strategy formulated and directed by United States parent corporations whereby these plaintiffs suffered ultimate financial injury in the United States." *Id.* at 3. Having

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<sup>1</sup> Empagran v. Hoffman-La Roche, Ltd., et al. The Empagran action primarily involved foreign plaintiffs seeking recovery for vitamins purchased for delivery outside the United States.

found subject matter jurisdiction for such claims the Court required plaintiffs to amend their complaints to make the subsidiary -parent relationship explicit and to highlight the Court's jurisdiction over the foreign subsidiaries' claims. *Id.* at n. 3.

As a result of the June 7, 2001 Opinion, various plaintiffs submitted claims on behalf of their foreign subsidiaries and affiliates, defendants have requested and received substantial discovery from the subsidiaries and affiliates showing the bases for the claims.<sup>2</sup> The instant motion to compel focuses on the sufficiency of plaintiffs' responses to various document requests and interrogatories seeking more detailed financial records and data concerning plaintiffs' foreign subsidiaries and affiliates.<sup>3</sup> Plaintiffs claim that they have supplied the defendant with all

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<sup>2</sup> Plaintiff Kraft Foods, Inc. is pursuing claims for purchases made by its wholly owned subsidiary, Kraft Canada, Inc. Tyson Foods, Inc. is pursuing claims for purchases made by Provemex, in which Tyson has had and continues to have an ownership interest through its Mexican Subsidiary Tyson de Mexico. *See* Pls. Kraft and Tyson's Opp'n Mem. at 2. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc. and has brought this action on behalf of its divisions and certain Ratifying Entities located outside the United States. Conopco has filed Ratifications on behalf of 20 entities. *See* Conopco's Opp'n Mem. at 1-2.

<sup>3</sup> The specific document requests and interrogatories at issue are:

- Document Request 5: All documents relating to how the amount paid for Vitamin Products by or on behalf of any Ratifying Entity caused ultimate financial injury to [the parent company].
- Document Request 7: All documents relating to any entitlement you have to share in the income generated by any Ratifying Entity, to the amount of income received by you, in the form of dividend or amount that is traceable to the operations of each Ratifying Entity that use Vitamin Products in the production of products sold by such Ratifying Entity.
- Interrogatory No. 5: Describe the financial relationship between you and each and every Ratifying Entity, including, but not limited to: (a) The amount of monies, including profits and losses, transferred from you to the entity, or from the entity to you.
- Interrogatory No. 11(l): State whether or not the profitability of such entity has been affected by the conduct of the Defendants alleged in the complaint and, if so, stat all facts that support that statement as well as the amount of such effect.
- Interrogatory No. 11(m): State whether or not the amount of income received by

information that is relevant under the Court's June 7, 2001 Order. Defendants claim that plaintiffs' responded to defendants' requests with "blanket objections" which precluded defendants from discovery which is "absolutely essential to defendants' ability to test whether and to what extent the [named plaintiffs] have asserted valid claims" in relation to plaintiffs claims on behalf of their foreign subsidiaries and affiliates. *See* BASF AG's Rule 37 Motion ("BASF Motion") at 2. Defendants' further claim that this information is required so that they can determine whether "financial injury" flowed from the foreign affiliates to plaintiffs.

Defendants ask that plaintiffs be compelled to provide information concerning: (i) the amount and nature of any economic injury suffered by their foreign affiliates as a result of the alleged conspiracy, and (ii) the extent, if any, to which such economic injury was passed through to the United States parent companies of the foreign affiliates. *See id.*

## **II. Discussion**

### **A. Legal Standard**

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," and that "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." However, Fed. R. Civ. P. 26(b)(2)(iii) states that discovery shall be limited by the court "if it determines that . . . the burden or expense of the proposed discovery outweighs its

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you, in the form of dividends or otherwise, traceable to the operations of such entity that use Vitamin Products in the production of its products has been affected the conduct of the Defendants alleged in the complaint and, if so, state all facts that support that statement as well as the amount of such effect.

likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Therefore, in order to determine whether the defendants are entitled to the discovery requested, the Court must determine if it is relevant and, if relevant, the Court must weigh the benefits of the information to the defendants against the burden to plaintiffs in producing it.

**B. Analysis**

The Court must first consider the relevance of the information sought. The parties to this action disagree as to the relevance of some of defendant's discovery requests. Defendants insist that the requests are necessary to determine whether or not plaintiffs have met the legal standard to establish claims by ratifying subsidiaries as set forth in this Court's June 7, 2001 Opinion: "Plaintiffs must make a special and unique showing of ultimate injury to their United States parent." See BASF Reply at 3. This unique showing justifies the request for information concerning injury suffered by the affiliates and the extent to which this was passed through to the U.S. parent. The requested discovery is, according to defendant, relevant to that issue.

Plaintiffs disagree arguing that the Court's June 7, 2000 Opinion did not "chang[e] the longstanding rule that a purchaser seeking recovery under the federal antitrust laws for overcharges arising from a defendant's price-fixing is injured by the amount of the overcharge it paid." Pls. Kraft and Tyson's Opp'sn Mem at 5 (citing Hanover Shoe, Inc. v. Unite Shoe Machinery Corp., 392 U.S. 481, 494 (1968) and Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.D.C. 1998)). Plaintiffs claim, therefore, that the information on the profits and losses of either plaintiffs or their subsidiaries and affiliates is not relevant. Further, they argue the discovery requests is "not reasonably calculated to lead to the

discovery of admissible evidence" and "discoverable, if at all, through expert discovery." See Pl. Conopco's Opp'n Mem. at 3. Plaintiffs insist that "the instant motion continues to seek burdensome discovery into plaintiffs' profits and losses that is wholly irrelevant and is, in fact, of a nature already disallowed by this Court in its previous ruling on downstream discovery."<sup>4</sup> See Pls. Kraft and Tysons's Opp'n Mem. at 4.

The Court agrees with the plaintiffs. Indeed, this Court affirmed that "causing American companies to pay inflated prices for vitamins clearly qualifies as an antitrust injury." June 7 Mem. Op. at 5. It is well settled law that a purchaser's injury under the federal antitrust laws is based upon the amount of overcharge paid by the purchaser due to the defendant's price-fixing activities. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.D.C. 1998). Injury is not based upon loss or profit, and does not depend upon whether or not the plaintiff subsequently passed the overcharge on to others. See In re Folding Carton Antitrust Litigation, No. MDL 250 (N.D. Ill. May 5, 1978). Nothing in the Court's June 7, 2001 Opinion nor any case law requires that plaintiffs must establish that the ratifying subsidiaries lost profits to prove its injury. Therefore, the defendant's claim that the data is relevant to whether plaintiffs may properly assert claims of their foreign subsidiaries must fail.

Moreover, discovery of such data is precluded by governing case law and this Court's November 22, 2000 Memorandum Opinion ("November 22, 2000 Opinion") which denied the defendants' motion to compel the production of downstream data from direct action plaintiffs. The November 22, 2000 Opinion addressed the issue of downstream financial data sought by defendants from the direct action plaintiffs and did not address its applicability to downstream

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<sup>4</sup> Nov. 22, 2000 Memorandum Opinion Re: Downstream Data.

data of subsidiaries and affiliates. That Opinion found that the downstream data sought was only marginally, if at all, beneficial to the defendants. The Court went on to find that the burden of production of such data outweighed any potential benefit to the defendants. While the Court recognizes that defendants are seeking the data to test the validity of the claims based on purchases made by subsidiaries, defendants offer no reason why this information sought should now be relevant when it was previously excluded. The discovery requests at issue are aimed at establishing the extent to which the ratifying subsidiaries profits and losses were affected by the overcharges and not at showing that the purchases of the plaintiffs and their foreign subsidiaries were coordinated by the American parent companies.

The Court does not agree with defendant's contention that this Court's Opinion of June 7, 2001, set forth a new standard pertaining to discovery related to purchases by foreign subsidiaries in the instant action. The Court has not created a special jurisdictional and standing requirement for the ratifying subsidiaries requiring plaintiffs must to make "a special and unique showing of ultimate injury to their United States parent companies." *See* BASF Reply at 3. Rather, in order to satisfy subject matter jurisdiction requirements, plaintiffs must demonstrate that the injury was such that "these plaintiffs suffered ultimate financial injury in the United States." June 7, 2001 Mem. Op. at 3. See also, Carribean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998). When addressing standing issues, this court held that "causing American companies to pay inflated prices for vitamins clearly qualifies as an antitrust injury and, unlike the Empagran plaintiffs, these direct action plaintiffs are seeking to recover for injuries to United States companies and closely controlled subsidiaries of United States companies and are thus injuries sustained in American commerce." *Id.* at 5. Thus, while plaintiffs are not required to meet a heightened standard, they must show that they did in fact

suffer harm from the payment of inflated prices for vitamins products by their ratifying subsidiaries, and that the harm did have an effect on the United States parent company in the United States through ownership of the affiliated company.

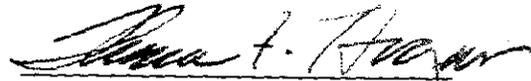
The Court finds that the information provided by plaintiffs regarding corporate structure, purchasing orders and invoices is adequate to satisfy the discovery requests of defendants. To the extent that the discovery requests at issue in this action seek to obtain detailed individual information regarding profits, gains and losses of each affiliate, such discovery requests were deemed inappropriate and non-discoverable by this Court's November 22, 2000 Opinion. *See* November 22, 2000 Op. at 9 (stating "no court has ever allowed production of individualized downstream data"). Consequently, consistent with the above mentioned ruling, the Court finds no reason to grant the defendants' motion to compel the discovery requests pertaining to profits and income of the affiliates and parent companies.

Provided the information sought is at least marginally relevant to the action, the Court must also determine if the benefit accrued by the defendant exceeds the burden to plaintiffs of producing the information. Fed. R. Civ. P. 26(b)(2)(iii). As the Court just discussed, the defendant's purported reason for seeking discovery fails, the information sought is not relevant on these facts, however, even assuming marginal relevance, the burden on the plaintiffs in production outweighs this benefit. As this Court held in its November 22, 2000 Opinion, the marginal benefit gained by the production of such information is outweighed by the substantial burden imposed on plaintiffs to produce such data. *See* November 22, 2000 Op. at 11-12.

### III. Conclusion

For the reasons stated above, the Court will deny Defendant's Rule 37 Motion to Compel Discovery Responses from Certain Plaintiffs Asserting Foreign Purchaser Claims. An order will accompany this Opinion.

January 8, 2001



Thomas F. Hogan  
Chief Judge