

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST)
LITIGATION)

THIS DOCUMENT APPLIES TO:)
ALL ACTIONS)

Misc. No. 99-197 (TFH)
MDL No. 1285

FILED

JUL 16 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Re: F. Hoffman-LaRoche Ltd's Motion to Compel Confirmatory Discovery
From Agribrands International, Inc.

Pending before the Court are plaintiff Agribrands International, Inc.'s ("Agribrands") objections pursuant to Fed. R. Civ. P. Rule 53 to the June 17, 2002 Report and Recommendations of the Special Master Respecting F. Hoffman-LaRoche Ltd's ("Roche") Motion to Compel Confirmatory Discovery from Agribrands. ("June 17 Report"). Upon careful consideration of the June 17 Report, the parties' briefs, and the entire record herein, the Court adopts the June 17, 2002 Report as its opinion in this matter report and affirms the recommendations of the Special Master. The Court will grant defendant's motion and order that Agribrands make available for deposition the person(s) most knowledgeable about the steps taken by Agribrands in formulating its responses to Interrogatory No. 12.

This dispute concerns Agribrands' response to defendant's Interrogatory No. 12. The Special Master has documented, in detail, the relevant events leading to the filing of the underlying motion to compel by Roche brought pursuant to Fed. R. Civ. P. 37(a)(2)(B),¹ see June 17 Report at 1-7. Thus, the Court will only provide the following brief review of the facts. By

¹ Fed. R. Civ. P. 37(a)(2)(B) provides that a party may "apply for an order compelling disclosure or discovery . . . [if] a party fails to answer an interrogatory submitted under Rule 33."

Interrogatory No. 12, served in July 2000, Roche asked Agribrands to identify its officers, directors, members, principals, employees, agents or representatives with any knowledge, awareness, or suspicion of the conspiracy alleged in its Complaint prior to the date the Complaint. June 17 Report at 2 quoting Interrogatory No. 12 (Roche Mem., Ex. E.).

Agribrands provided 2 responses: in August 2000, Agribrands stated that responsive information was “still being accumulated” and that the “response would be supplemented when responsive information is available,” and, in May 2001, Agribrands identified an employee responsible for European purchasing, Don Walker, in response to Interrogatory No. 12. June 17 Report at 2. The interplay of these responses and the various other forms of discovery taken by Roche from Agribrands, including depositions and document requests, also bear on the instant Rule 53 objections and underlying motion to compel.

The Special Master accepted Roche’s argument that the requested discovery concerned a critical issue in the lawsuit: whether for the purposes of the four-year limitations period for damage actions under the Clayton Act, 15 U.S.C. § 15b, Agribrands was aware of or suspected during the early or mid-1990s that defendants were engaged in anti-competitive conduct, and that Agribrands’ record with respect to responding to the Interrogatory was sufficient to leave Roche with reasonable concerns that there still may be individuals to be identified as having had suspicions about the existence of the conspiracy. The Special Master found that “Agribrands tardily and, in limited instances, incorrectly responded to Interrogatory No. 12 and that it failed to conduct the investigation required of it to support the responses it made.” June 17 Report at 14. Specifically as to the August 2000 response, the Special Master found that it was incomplete and incorrect because it failed to provide information available to the company at that time.

Agribrands did not disclose that Don Walker had previously told Michael Costello, the company's General Counsel who swore to the correctness of the August 2000, about his suspicions. The August 2000 response, however, implied Agribrands did not have any responsive information at that time. As the Special Master found, this was neither complete nor correct given that the individual who verified the response did have information responsive to Interrogatory No. 12.

As to the May 2001 second response, the Special Master found that it was inadequate because Agribrands failed, before responding, to make the necessary inquiries to determine whether the purchasing personnel at its 15 international operations had any suspicions of the alleged conspiracy. Although Agribrands served its response on May 16, 2001, and its counsel learned at the May 24, 2001 Rule 30(b)(6) deposition of Agribrands' Vice-President responsible for purchasing, Henry N. Eicher, that Agribrands had not polled its international purchasing directors, Agribrands did not in fact undertake such a poll until four months later, in September 2001. In addition, Agribrands failed to follow up until May 2002 with those foreign operations that did not respond to the September 2001 inquiry. Moreover, this follow up did not happen until after the Special Master asked for precise details respecting the polling in May 2002. The May 2001 was also deemed inadequate because it failed to identify any Agribrands employees, other than Mr. Walker, who had suspicions of the conspiracy, despite evidence suggesting that there were others with similar suspicions. Further, the Special Master found that Agribrands failed to adequately investigate whether other individuals had such suspicions. All of this, taken together, suggests that Agribrands did not have a reasonable basis for the final sentence in the May 2001 response stating, "At no time prior to the announcement of the indictments and guilty

please in 1999 did Agribrands or any of its employees have any knowledge or evidence that the defendants were engaged in a conspiracy to violate the antitrust laws of the United States.”

Subsequent to May 2001 response, Agribrands did poll its overseas purchasing directors and they responded “no” to the inquiry as to whether any employees had suspicions about the conspiracy. Also, the evidence which seemed to suggest that other employees may have had suspicions was addressed in depositions of various Agribrands employees. Despite these post-May 2001 response events, the Special Master determined that Agribrands’ “record of tardiness, inadequate or nonexistent investigation and, in limited instances, incorrect responses is sufficient to leave Roche with reasonable concerns that there still may be individuals to be identified as having had suspicions.” June 17 Report at 17. The Special Master thus recommends that the Court grant defendant’s motion and order that Agribrands make available for deposition the person(s) most knowledgeable about the steps taken by Agribrands in formulating its responses to Interrogatory No. 12.

Agribrands argues that this recommendation be reversed because (1) “the record utterly refutes the lynchpin for the relief granted”; and (2) “the record establishes that the interrogatory answer in question was accurate, that Agribrands took appropriate steps to verify the accuracy of its interrogatory answer, and that Agribrands satisfied its obligations under Rule 26(e).” Pl. Obj. at 1. The Court is not persuaded by Agribrands’ arguments. As a preliminary matter, the Court does not agree with Agribrands’ characterization of the issue raised by Roche’s motion.

According to Agribrands the issue was “whether Agribrands gave a complete answer on August 23, 2000 to Interrogatory 12 . . . and whether the alleged incompleteness created any prejudice to defendants.” Roche’s motion seeks limited confirmatory discovery respecting the adequacy of

Agribrands response to Interrogatory No. 12. The Special Master found that Agribrands' actions with respect to responding to this request were sufficiently defective so as to raise legitimate concerns by Roche that there may still be individuals to be identified as having had suspicions. Of course, the answer may be that there are not but that is not clear at this point. Roche has not claimed that it was prejudiced by Agribrands' failure to identify - specifically in an Interrogatory response - employees with suspicions (and acknowledges that others were in fact identified through document requests), instead Roche is claiming that it should be allowed to confirm whether Agribrands' investigation may have failed to identify other individuals who had suspicions because Agribrands actions call into doubt whether defendants have received all the discovery information to which they are entitled. Thus, even if Roche was not prejudiced by its tardy identification of Walker or by the non-inclusion of certain employees with known suspicions in the May 2001 Interrogatory response, Agribrands' actions in responding to the discovery request justify granting defendant's motion.

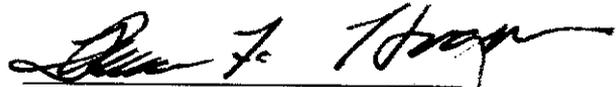
Agribrands also claims that the Special Master's conclusion - that the record is unclear as to whether Agribrands made a reasonable investigation in responding to Interrogatory No. 12 - is erroneous. It claims that it took good faith and adequate steps to verify that the answer to Interrogatory was in fact correct as evidenced by the May 21, 2002 affidavit of Glynn W. Freeman and the emails sent to its foreign purchasing directors. The Court is not persuaded and accepts the Special Master's findings. Agribrands actions with respect to responding to this discovery request do cast suspicion as to whether it provided adequate discovery. The confirmatory discovery will clarify Agribrands' actions.

Lastly, Agribrands argues that the Special Master erroneously based his discovery order

on the conclusion that Agribrands did not have a reasonable basis for stating that it had no “knowledge or evidence” of the conspiracy. Agribrands points out that the Special Master, in footnote 7, erroneously asserted Agribrands did not argue that statement was correct because it references only “knowledge or evidence” and not suspicions. This error does not require a reversal of the Special Master because whether or not the response was accurate insofar as it stated that none of its employees had knowledge or evidence, the response was still incomplete insofar as it failed to identify individuals with suspicions. As the record shows, it is unclear whether Agribrands’ investigation, both before responding and in conjunction with the instant motion, were sufficient or whether there is a risk that other employees and potential witnesses were not identified.

For the foregoing reasons, the Special Master’s June 17 Report is confirmed. The Court will thus grant Roche’s motion to compel confirmatory discovery. An appropriate Order will accompany this Opinion.

July 16, 2002



Thomas F. Hogan
Chief Judge