UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
SEP 29 2004
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

UNITED STATES OF AMERICA, Plaintiff, v. **SMITHFIELD FOODS, INC.,** Defendant.	Civil Action No.: 2:04CV526 Judge Robert G. Doumar

STIPULATED PROTECTIVE ORDER
GOVERNING CONFIDENTIAL INFORMATION

Pursuant to Fed. R. Civ. P. 26(c)(7), the parties hereby submit this proposed Stipulated Protective Order for the purpose of ensuring that matters raised by this proceeding are open to the public and, at the same time, ensuring that confidential information submitted by Smithfield Foods, Inc. or any third parties in connection with this proceeding, whether pursuant to compulsory process or voluntarily, is not improperly disclosed. Accordingly, the parties, by their undersigned counsel, hereby stipulate, subject to approval and entry by the Court, as follows:

Definitions and Terms

1. As used in this Order, the following definitions and terms shall apply:

   a. "Confidential Information" means any Discovery Material that the producing party or protected person reasonably believes not to be in the public domain and reasonably believes contains any trade secret or other confidential, strategic,

research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(7), that, if disclosed, would materially affect the party's or protected person's business, commercial or financial interests.

b. "Defendant" means Smithfield Foods, Inc.

c. "Smithfield Foods, Inc." or "Smithfield" includes all domestic subsidiaries, affiliates, partnerships and joint ventures, as well as all present and former directors, officers, employees, agents, partners, representatives and attorneys of the foregoing.

d. "Disclosed" is used in its broadest sense and includes, *inter alia,* directly or indirectly shown, divulged, revealed, produced, described, transmitted or otherwise communicated, in whole or in part.

e. "Discovery" is defined as the term is used in the Federal Rules of Civil Procedure.

f. "Discovery Material" means any documents, answers to interrogatories, responses to requests for admission, deposition testimony, deposition transcripts and exhibits, other responses to requests for information and/or other written information, whether produced voluntarily or involuntarily in the course of any pre-complaint investigation by the DOJ of the matters at issue in this action, in jurisdictional discovery in the transferor court, United States District Court for the District of Columbia, or in response to discovery requests in this litigation by any party or protected person.

g. "Document" is defined as the term is used in Rule 34(a) of the Federal Rules of Civil Procedure.

h. "DOJ" means the United States Department of Justice.

i. "Counsel" means the counsel of record in this action and their law firms as well as (i) other attorneys or consultants employed or retained by such law firms; or (ii) any attorney subsequently retained or designated by the Defendant to appear in this action; or (iii) two inside counsel employed by Smithfield, specifically, Richard Poulson and Michael Cole.

j. "Party" or "parties" means the Plaintiff and/or the Defendant in this action.

k. "Plaintiff" means the United States, its branches, departments and agencies, and any person acting on its behalf, including without limitation, officials, employees, consultants, attorneys or agents.

l. "Protected person" means any non-party that furnishes any Discovery Material to any party.

m. "This action" means the above-captioned civil action pending in this Court, including any related discovery, pretrial, trial, post-trial, or appellate proceedings.

Types of Material That May Be Designated Confidential

2. Any Discovery Material may be designated by a producing party or protected person as "Confidential" under this Order. Such designation shall constitute a representation to the Court that counsel for the producing party or protected person believes in good faith that the material so designated constitutes Confidential Information as defined in this Order.

Designation of Discovery Material as Confidential

3. Defendant and protected persons that produced Discovery Material to the DOJ in the course of any pre-complaint investigation by the DOJ of the matters at issue in this action or in jurisdictional discovery in the transferor court shall have 30 days after receiving a copy of this Order to designate any such Discovery Material as Confidential as defined in

this Order. In the meantime, all parties shall treat all such materials as Confidential pursuant to this Order. Such Discovery Material may be designated as Confidential by (i) providing copies of the Discovery Material that are stamped with the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" or (ii) stamping Discovery Material currently in the possession of the DOJ with the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER." If the entire document is not confidential, the party or protected person shall specifically identify the portions of the documents that contain the Confidential Information. Any confidential legend shall be affixed to each page of the document containing such material and shall not interfere with the legibility of designated documents.

4. Any documents, material or information produced in discovery in this action, but not covered by paragraph 3 above, that are to be designated "Confidential" may be so designated by the producing party or protected person by furnishing a separate written notice to the undersigned counsel for the party receiving such documents, material or information at the time of their production specifically identifying the portions of the documents or materials containing the Confidential Information, unless the entire document is designated as Confidential, and by providing copies of the documents, material or information so designated that are stamped with the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER." This legend shall be affixed to each page of the document containing such material and shall not interfere with the legibility of designated documents. With respect to electronic documents, the party or protected person at the time such documents are produced shall specify in writing that the material is designated as Confidential.

5. Inadvertent production of or failure to designate any information as Confidential shall not be deemed a waiver of the producing party's or protected person's claim of confidentiality as to such information, and the producing party or protected person may thereafter designate such information as Confidential as appropriate.

6. The parties shall serve a copy of this Order simultaneously with any discovery request.

7. All transcripts and exhibits shall be treated as if designated Confidential for a period of ten business days after the transcript is available from the court reporter. Any deponent or counsel for that deponent may designate during the deposition or during the ten-business-day period after the transcript is available from the court reporter any portion of the transcript as Confidential by denominating by page and line, and by designating any exhibits, that are to be considered Confidential pursuant to the criteria set forth in this Order. Such designation shall be communicated to all parties. Transcript portions and exhibits designated in accordance with this paragraph shall be disclosed only in accordance with this Order.

Permissible Uses of Discovery Material

8. All persons obtaining access to Discovery Material produced in connection with this action shall use such Discovery Material only for purposes of this action, including any appeal of the Court's ruling, and any subsequent proceedings relating to Smithfield's alleged violations of Section 7A of the Clayton Act, 15 U.S.C. § 18a, and shall not use such Discovery Material for any other purpose, including the furtherance of that person's business interests or in any administrative or judicial proceeding, provided, however, that the DOJ, subject to taking appropriate steps to preserve the confidentiality of such material, may disclose Discovery Material obtained in connection with this proceeding,

including Discovery Material designated as Confidential, to employees of the Executive Branch outside the DOJ, and may use such information for any valid law enforcement purpose pursuant to 15 U.S.C. § 1 *et seq.;* 15 U.S.C. § 1311-1314 *et seq.;* 15 U.S.C. § 12 *et seq.;* or any other applicable law. Unless otherwise prohibited by federal law or regulation, Plaintiff will endeavor to inform promptly the party or protected person who designated the material as Confidential if disclosure pursuant to this paragraph is made.

9. Nothing herein shall impose any restrictions on the use or disclosure by a party or witness of documents, material or information obtained by such party or witness independently of the discovery proceedings in this action, whether or not such documents, material or information are also obtained through discovery proceedings in this action.

10. Nothing herein shall prevent disclosure of Confidential Information with the consent of counsel for the designating party or protected person.

11. Except as otherwise authorized by this Order, Confidential Information may be disclosed only to the following persons:

    a. the Court;

    b. DOJ attorneys and employees, including contract employees;

    c. outside counsel for Smithfield and two designated inside counsel for Smithfield;

    d. associated personnel of any person within categories 11.a. through 11.c. for whom access to Confidential Information is necessary to assist such persons in this action, including any Court personnel assisting the Court, litigation assistants, paralegals, secretarial or other clerical personnel, and stenographers or other persons involved in taking or transcribing testimony in this action;

e. consultants, experts or litigation support services, including outside copying services, retained by a party for the purpose of assisting that party in this action, and principals and employees of the firm with which consultants or experts are associated;

f. authors or recipients of the designated Confidential Information;

g. employees of or counsel for the party or protected person producing such Confidential Information;

h. persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to Confidential Information, or who have been participants in a communication that is the subject of the Confidential Information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated, except that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation; and

i. subject to the terms of paragraph 14, other persons not included in the above subparagraphs who may testify as a witness, either at a deposition or at a court proceeding, for the purpose of assisting in the preparation or examination of the witness or potential witness.

12. Persons described in subparagraphs 11.b. and 11.c. (and their associated personnel) shall be deemed bound by the terms of this Order upon its entry by the Court. Persons

described in subparagraphs 11.b. and 11.c. should advise their associated personnel of this Order and the terms of the above stated agreement prior to providing their associated personnel access to Confidential Information.

13. Each individual described in Paragraph 11 above, to whom Confidential Information is disclosed, shall not disclose that information to any other individual, except as provided in this Order, or use it for any purpose other than in connection with this action. Before any Confidential Information may be disclosed to any person described in subparagraphs 11e., 11.h. and 11.i. above, he or she shall have first read this Order or shall have otherwise been instructed in his or her obligations under the Order by counsel for a party. Additionally, before any Confidential Information may be disclosed to any consultant or expert described in subparagraph 11.e., he or she shall execute a confidentiality agreement stating the following:

> I hereby acknowledge that [name, position of employment], am about to receive Confidential Information. I certify my understanding that such information is to be provided to me pursuant to the terms and restrictions of the Protective Order of [date entered] in *United States v. Smithfield Foods, Inc.* I have been given a copy of and have read this Order and agree to be bound by its terms. I agree to submit to the jurisdiction of the Court for the sole purpose of having the terms of this Order enforced.

The original of such executed confidentiality agreement shall be retained by counsel disclosing Confidential Information to such persons for a period of one year following the final resolution of this matter.

14. Counsel for a party may disclose Confidential Information to any witness or potential witness, provided counsel has obtained consent of counsel for the party or protected person who produced such information.

Challenges to Confidential Designations

15. If either party disagrees with the designation by the producing party or protected person of any Discovery Material as Confidential Information, then the parties to the dispute will attempt first to resolve the dispute on an informal basis before presenting the dispute to the Court. All items objected to shall continue to be treated as Confidential pending resolution of the parties' dispute. If the dispute cannot be resolved informally, the producing party or protected person bears the burden of persuading the Court that the information is in fact Confidential Information within the definition of that term set forth above. In the case of material provided by a protected person, the party contesting the confidentiality designation shall provide reasonable notice to the protected person that the matter has been referred to the Court.

16. Entering into, agreeing to, and/or complying with the terms of this Order shall not: (a) operate as an admission by any party or protected person that any particular documents, material or information contain or reflect currently valuable trade secrets or proprietary or commercial information; or (b) prejudice in any way the right of a party at any time: (i) to seek a determination by the Court of whether any particular document, item of material or piece of information should be subject to the terms of this Order; (ii) to seek relief on appropriate notice from any provision(s) of this Order, either generally or as to any particular document, item of material or piece of information; (iii) to object to any discovery request, including the right to assert that no discovery should be had of certain documents or information; or (iv) to seek documents or other information from any source.

Deposition Procedures

17. At any deposition session, when counsel for a party or the deponent deems that the answer to a question will result in the disclosure of Confidential Information, counsel shall have the option, in lieu of taking other steps available under the Federal Rules of Civil Procedure, to request that all persons, other than the reporter, counsel and individuals specified in paragraph 11 hereof, leave the deposition room during the Confidential portion of the deposition. The failure of such other persons to comply with such requests shall constitute substantial justification for counsel to advise the witness that he or she need not answer the question pending.

18. Any deposition testimony concerning a Confidential document produced by a protected person shall be marked by the court reporter as Confidential on the deposition transcript.

19. A copy of this Order shall be identified and marked as an exhibit to any such deposition transcript, and all persons who have actual notice of this protective Order shall be bound by its terms.

Filing Under Seal

20. All Confidential Information contained or discussed in any pleading, motion, exhibit or other paper filed with the Court shall be accompanied by a Motion to Seal in accordance with the requirements set out in Local Rule 5. The Court shall then determine in accordance with Local Rule 5 and governing case law, what, if any, portions of filing shall be filed under seal. ~~filed under seal. Where possible, only confidential portions of filings with the Court shall be filed under seal. The document containing the Confidential Information to be filed under seal shall be endorsed on its face with the words "Filed Under Seal Pursuant To Protective Order Of The Court, Dated _____." The Confidential Information to be filed under seal must be served by mail or by hand delivery, unless counsel have otherwise agreed. The Clerk shall keep such papers under seal until further order of the Court; provided, however, that such papers~~

shall be furnished to the Court, the Plaintiff, and Defendant's outside counsel. As soon as possible after the filing of any paper containing Confidential Information, the filing party shall file on the public record a duplicate copy of the paper with the Confidential Information redacted.

Use of Confidential Information at any Hearing

21. The parties shall confer and attempt to agree, before any hearing, on the procedures under which Confidential Information may be introduced into evidence or otherwise used at such hearing. Upon reaching agreement, the parties shall give notice of the terms of such agreement to each protected person producing any Confidential Information that may be used or introduced at any such hearing. Absent agreement, the Court shall be asked to issue an order governing the use of such Confidential Information at any such hearing upon reasonable notice to all parties and protected persons who have produced such information. The parties shall provide protected persons with notice of potential use at any hearing of any Confidential Information produced by them.

Procedures Upon Termination of Action

22. Within 60 business days following the running of any applicable time to appeal any order or ruling entered in this action, the Defendant shall either (i) return to the person who produced such materials all copies of all Confidential Information obtained through discovery in this action or (ii) certify to that person that all such materials have been destroyed.

23. After the running of any applicable time to appeal any order or ruling entered in this action, the Defendant or protected person may request that Plaintiff return or destroy any Discovery Material the Defendant or protected person has provided. Upon such request,

Plaintiff shall comply subject to its rights, if any, under any applicable law, regulation or DOJ directive to retain such Discovery Material or copies thereof.

Miscellaneous

24. This Order shall not affect the right of any party or protected person to oppose production of Discovery Material on any ground permitted by the Federal Rules of Civil Procedure, including any applicable privilege. Moreover, this Order shall not affect the scope of discovery by any party that is not otherwise proper under the Federal Rules of Civil Procedure.

25. Nothing in this Order shall prejudice the right of any party or protected person to move the Court to broaden or restrict the rights of access to and use of particular Discovery Material, or to seek modifications of this Order upon due notice to all other parties and affected protected persons.

26. All persons governed by this Order, by reviewing Confidential Information, or seeking the protections of this Order for Discovery Material, shall agree to the jurisdiction of this Court over their person for the purpose of any action seeking to enforce the terms and

conditions of this Order, or for any action for contempt for violation of the terms of this Order.

FOR PLAINTIFF
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Dated: 24th day of September, 2004

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Dated: 27th day of September, 2004

SO ORDERED this 29th day of Sept., 2004

By

Robert G. Doumar
UNITED STATES DISTRICT JUDGE

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