UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-81215-CIV-Hurley/Hopkins

Supreme Fuels Trading FZE,

Plaintiff,

vs.

Harry Sargeant III, Mustafa Abu-Naba'a, International Oil Trading Company, LLC and International Oil Trade Center,

Defendants.
_____/

SUPREME'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO COMPEL DISCOVERY FOR THE ENTIRE RELEVANT TIME PERIOD

PRELIMINARY STATEMENT

Supreme's Motion to Compel Discovery from Defendants for the Entire Relevant Time Period Pursuant to Fed. R. Civ. P. 37 (D.E. #92) (the "Motion") showed that defendants must produce documents from the 2003-2005 time period, which are likely to contain highly relevant evidence going to the heart of the formation and operation of the alleged conspiracy. The Motion also showed that defendants must produce post-complaint discovery, because the conspiracy is ongoing and evidence from after the complaint was filed may relate to earlier time periods.

In their Opposition (D.E. #108) to the Motion, defendants admit that "courts may compel discovery pre-dating the alleged conspiracy." Opp. at 2. Defendants also do not dispute that the broad scope of discovery is even more liberal in antitrust conspiracy cases

such as this one. Mot. at 5-6 (citing cases).[1] To oppose such discovery, the Opposition relies on two faulty arguments. First, ignoring both Supreme's allegations and the evidence to the contrary, defendants insist that nothing relevant to this action happened before October 2007 (or perhaps 2005) or after October 2008. Opp. at 2, 5. Second, ignoring that *all* of Supreme's document requests seek relevant evidence to the extent they involve material from 2003-05 or after the complaint, defendants insist that a "request-by-request" approach is appropriate. Defendants fail to carry their burden to show why Supreme's discovery requests should not be enforced. Accordingly, the Motion should be granted.

ARGUMENT

I. DEFENDANTS' ARGUMENTS MISREAD SUPREME'S ALLEGATIONS AND IGNORE EVIDENCE SHOWING THE REQUESTED DOCUMENTS ARE RELEVANT

Defendants oppose Supreme's Motion primarily on the basis of relevance.[2] In doing so, they disregard Supreme's allegations concerning the alleged conspiracy's pre-2006 events. Under the federal rules, a party may take discovery of "any matter, not privileged, that is relevant to the claim . . . of any party," or, for good cause, relevant to the action's subject matter. Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible

[1] Nor do defendants dispute that in January 2010 they agreed to respond to Supreme's document requests "for the time period of January 1, 2004 to October 21, 2008." Defendants later reversed themselves – thus maximizing delay – and now largely refuse to produce any discovery for the 2004-05 period. Mot. at 5 (quoting defendants' responses to Supreme's document requests).

[2] The Opposition also incorporates by reference (i) defendants' motion to stay discovery and toll briefing schedules on this motion to compel and a second motion to compel filed by Supreme (D.E. #94) (Opp. at 1) and (ii) the standing arguments in defendants' Motion to Dismiss & Alternative Summary Judgment Motion (D.E. #98, at 15-18). Opp. at 2. Supreme also incorporates in advance its substantive opposition briefs to these motions, which are due on October 21 and October 22, respectively.

evidence." *Id.* Accordingly, although defendants dispute them, the allegations of the complaint define what is relevant. *See, e.g.*, *Johnson v. Big Lots Stores, Inc.*, 2008 WL 2191305, *3 (E.D. La. Feb. 20, 2008) ("It is the nature of plaintiffs' claims and their theory of [defendant's] alleged wrongdoing that dictates what evidence is relevant.").

Defendants acknowledge that evidence pre-dating the alleged conspiracy is discoverable. Opp. at 2 ("courts may compel discovery pre-dating the alleged conspiracy"); *see, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (upholding admissibility *at trial* of evidence of prior history of defendants' conspiracy and noting "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole"). Defendants struggle to re-cast this case, arguing that the only material events in the conspiracy were defendant IOTC's 2005 formation and the U.S. Defense Energy Support Center ("DESC") 2007 re-bid of the Fourth Contract, a.k.a. "Solicitation 701." Defendants ignore Supreme's allegations of a host of earlier, highly relevant facts that are central to the alleged conspiracy. For example, Supreme alleges that pre-2006 conduct included the formation of IOTC Jordan and IOTC; the establishment of the conspiracy to bribe Jordanian officials; the procurement of the first exclusive Letter of Authorization ("LOA"); the initiation of defendants' pattern of excluding competitors from fuel contracts; and their first procurement of a U.S. fuel contract under the conspiracy. Ex. 1 (Second Amended Complaint) ("SAC") ¶¶ 1, 14, 17, 25-27.

Moreover, the evidence suggests that REDACTED

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REDACTED defendants granted Al-Saleh a partnership interest in defendant IOTC Jordan and a corresponding entitlement to one-third of its profits from the first U.S. fuel contract.[4] Defendants gave him this interest as "compensat[ion]" for services that he rendered in helping them procure the first contract.[5] Al-Saleh's "assistance" to defendants included obtaining the LOA that enabled them to secure the contract.[6] REDACTED

REDACTED – to secure an exclusive LOA. Ex. 1 (Cmpl.) ¶¶ 1-2. Defendants address none of this evidence. Nor do they dispute the many admissions that they and Al-Saleh have made publicly concerning the events of the conspiracy that occurred in 2004. *See* Mot. at 3-4 (listing bullet points).

Defendants do not dispute that in 2003 they held meetings with each other and Al-Saleh that ultimately led to their "going into business together." Opp. at 3. Supreme alleges that this "going into business together" – the formation of IOTC Jordan – was a key early event in the conspiracy. Ex. 1 (Cmpl.) ¶¶ 23, 50-55. These allegations determine what is relevant. Fed. R. Civ. P. 26(b)(1); *Johnson*, 2008 WL 2191305, *3. Moreover, co-conspirator Al-Saleh, a partner in defendant IOTC Jordan, admits that company was formed in January 2004. Ex. 3 (Al-Saleh Cmpl.) ¶ 20. It is reasonable to assume that defendants

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Mot. to Dismiss and Alt. Summ. J. Mot. (D.E. #98), at 21 (referring to NRDC as a "governmental entity.").

[4] Al-Saleh, Sargeant and Abu-Naba'a formed IOTC Jordan as a "partnership" on January 25, 2004. Ex. 3 (Complaint, *Al-Saleh v. Sargeant, et al.*, No. 2008-CA-010187, Fifteenth Jud. Cir., Palm Beach Co., April 10, 2008) ("Al-Saleh Compl.") ¶ 20; Ex. 5 (Sargeant Decl. to Def. Mot. to Dismiss) ¶ 5 (Al-Saleh had one-third interest in IOTC Jordan). One month later, REDACTED Ex. 2, *supra* n.3.

[5] Ex. 5 (Sargeant Decl.) ¶ 5.

[6] Ex. 3 (Al-Saleh Compl.) ¶ 25(a).

discussed its formation for some period of time before it was formed, and created relevant documents in this period. There is no merit to defendants' claim, therefore, that nothing from 2003 is relevant.[7]

Contrary to all of the above, defendants maintain that Supreme lacks a "scintilla of evidence to conceivably support that a conspiracy occurred, much less that one occurred in 2003." Opp. at 4. But this is a motion to compel discovery, not for summary judgment. The sufficiency of Supreme's evidence is not at issue here. Supreme's complaint and the available evidence are more than adequate to show that 2003-05 discovery is appropriate. Defendants have not met their burden to show otherwise. *Jeld-Wen, Inc. v. Nebula Glass Int'l, Inc.*, 2007 WL 1526649, *2 (S.D. Fla. May 22, 2007).

Moreover, defendants fail to show that post-complaint discovery is not relevant. Defendants make a purely evidentiary argument – that there is "no indication" that the alleged bribery persisted after the filing of this action. But on this motion to compel, all that is to be determined is whether, under the broad discovery standard (which is even more generous in antitrust conspiracy cases), Supreme's *allegations* – not evidence adduced to date – show that bribery continued after the complaint. Even if it did not continue, there is likely to be evidence probative of the conspiracy in documents from this later period. Here, Supreme has alleged that the conspiracy and its effects continue today, including the fact that DESC had no choice but to award defendants a fifth contract after the filing of Supreme's

[7] Defendants argue that Supreme cannot discover 2003 evidence because it has not yet taken depositions or sought third-party discovery. It is not clear why defendants believe Supreme should take discovery of third parties before taking discovery of *defendants* regarding their 2003 conduct. Moreover, depositions are not possible without meaningful document discovery. Oddly, defendants also argue that neither DESC nor anyone else in 2003 knew that there would be a solicitation in 2007. Defendants cite no authority in support of these arguments.

complaint in October 2008. Ex. 1 (Cmpl.) ¶¶ 88, 95 ("[s]uch violations and the effects thereof are continuing..."), Ex. 4 (Supreme's First Am. Civil RICO Case Statement) at 22.[8]

Defendants attempt to distinguish only a few of Supreme's cited cases. Opp. at 3-4. Their response to one of these cases only underscores Supreme's point. They note that the court in *Centento Supermarkets, Inc. v. H.E. Butt Grocery Co.*, 1987 U.S. Dist. LEXIS 14168 (W.D. Tex. Sept. 2, 1987) allowed discovery pre-dating the challenged conduct because the facts suggested the defendant company had been operating for longer than that alleged conduct. Opp. at 4. That, however, is precisely the case here. Supreme alleges that defendants formed IOTC Jordan in January 2004. But as shown above – *and as defendants do not dispute* – defendants and Al-Saleh held the meetings that culminated in forming IOTC Jordan in 2003.

Defendants also note that in *Federal Trade Commission v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977), the plaintiff sought fewer documents than Supreme seeks here. Opp. at 3-4. However, this merely reflects the obvious fact that different cases call for different discovery. Nothing in *Lukens Steel* suggests the court there would have denied a request by the plaintiff for more discovery. To the contrary, the court properly granted plaintiff all of the discovery sought. As to *King v. E.F. Hutton & Co.*, 117 F.R.D. 2 (D.D.C. 1987), defendants merely point out the court properly confined discovery to relevant issues.

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[8] Defendants also contend that Supreme may not seek documents from a broader time period than it has agreed to produce from its own documents. Opp. at 5. Defendants offer no support for this position, and it defies common sense. Unlike defendants, who undisputedly have performed the DESC fuel contracts from 2004 through today, Supreme never won any of the contracts because of the defendants' conspiracy. Supreme bid for only two solicitations relevant here: Solicitation 700, issued by DESC in December 2006, and Solicitation 701, issued in October 2007. Thus the first event that would have likely caused Supreme to generate relevant documents was DESC's December 2006 solicitation. Supreme's agreement to produce documents dating back five months earlier, to July 2006, is reasonable.

117 F.R.D. at *9; Opp. at 4. Supreme asks that the Court here do no more than that. Defendants make no attempt at all to respond to the thirteen other cases cited by Supreme. Mot. at 6-7.

Finally, defendants argue that they have already "produced and agreed to produce" discovery in the 2004-05 time frame. To date, defendants' productions have been severely inadequate. They have produced only a few hundred documents, which consisted almost entirely of two groups of documents previously collected for two other legal proceedings and which were thus readily available. They have yet to produce the result of any genuine search, collection, and production of documents undertaken specifically for this litigation, as is their discovery obligation. For example, they have not produced a single email message between defendants Sargeant and Abu Naba'a, or between either of them and co-conspirator Al-Saleh (Responsive to Supreme's Document Requests 4, 5, 7, 8, among others) (*see* Ex. 5) (Supreme's Document Requests to Defendants) ("D.R."). Moreover, they have produced few – if any – documents in the following discrete categories:

- internal documents and communications regarding their efforts to obtain the LOAs (Responsive to D.R. 5(a),(e),(h),(i));
- communications with Jordanian officials regarding LOAs (other than the LOAs themselves) – for example, communications showing defendants' efforts to obtain LOAs or communications about Jordan's requirements for eligibility (D.R. 5(e);
- defendants' communications with DESC regarding Solicitation 701 (D.R. 7(f));
- any other documents regarding Solicitation 701, other than the solicitation itself (D.R. 7); or
- the volume of fuel defendants sold under the re-bid (or "Option") term of the Fourth Contract, which post-dates Supreme's filing of its original complaint and is relevant to Supreme's damages, among other things (D.R. 17).

In short, defendants should receive no credit for producing any 2004-05 documents to date, nor for "agreeing" to produce same at some point in the future. Clearly, a court order is required to compel defendants' production.

II. DEFENDANTS MAKE NO SHOWING THAT COMPLIANCE WOULD IMPOSE AN UNDUE BURDEN

In opposing Supreme's Motion on the basis of undue burden, defendants are required to show that production would be unduly oppressive. Their unsupported claim that Supreme's requests are "harassing and unduly burdensome" does not carry that burden. Opp. at 5. All discovery imposes *some* burden on a party. To prevail on their burden objection, therefore, defendants were required to make a detailed showing of the costs and burdens that compliance would impose on them. *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Caton*, 136 F.R.D. 682, 684-85 (D. Kan. 1991) ("Bare assertions that the discovery requested is overly broad [or] burdensome . . . are ordinarily insufficient, standing alone, to bar production. It is therefore [non-movant]'s burden . . . to clarify and explain how each discovery request is . . . burdensome.") (citations and internal quotations omitted); Fed. R. Civ. P. 26(b)(2)(B) (on motion to compel electronically stored information – which Supreme's document requests encompass – "the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost"); L.R. 26.1(g)(5) (same).

Without any showing of the costs and burdens that compliance would impose, defendants' burden objections amount to no more than "an unsubstantiated claim that the 'sky is falling.'" *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 2010 WL 502721, *15 (D. Colo. Feb. 8, 2010). The Court should reject it.

III. DEFENDANTS' PROPOSED REQUEST-BY-REQUEST APPROACH IS IMPERMISSIBLE BECAUSE ALL OF SUPREME'S DOCUMENT REQUESTS ARE PROPER

Defendants maintain that a request-by-request approach to Supreme's document requests is proper. But *all* of Supreme's requests properly seek at least some information outside the 2006-07 time frame on which defendants insist.[9] To the extent the requests seek documents from 2003-05, they include, for example, documents concerning:

- assistance that Jordanian officials gave defendants in performing the fuel contracts. Ex. 6 (D.R.), request 8. As shown above, the evidence suggests REDACTED
- the LOAs that are at the heart of this conspiracy. *Id.*, request 5. The first of these Letters, obtained by Al-Saleh in 2004, was critical in establishing the conspiracy's early success. Ex. 3 (Al-Saleh Cmpl.) ¶ 25(a); Ex 1 (Cmpl.) ¶ 26.
- defendants' bids for the pre-2007 fuel contracts, including documents showing communications between defendants and NRDC or other Jordanian public offices regarding the contracts. Ex. 6 (D.R.), requests 7(e),(g).
- the formation of the corporate defendants, which were significant conspiracy events. Ex. 6 (D.R.), requests 1, 3. The formation of IOTC Jordan in 2004 allowed defendants to procure their first LOA and their first DESC fuel contract. Ex. 1 (Cmpl.) ¶¶ 17, 21. Moreover, by forming IOTC in 2005, which they did without Al-Saleh's knowledge (and without the need to share their profits with him), Sargeant and Abu-Naba'a were able to increase their illicit payments to Jordanian officials to ensure the conspiracy's continuing success. *Id.* ¶ 35.

Supreme's requests also include a request for documents showing the volume of fuel defendants sold under the re-bid (or "Option") term of the Fourth Contract. Ex. 6 (D.R.), request 17. This information, which partially post-dates the filing of Supreme's original complaint, is directly relevant to Supreme's damages, among other things.

Accordingly, there is no appropriate "request-by-request" approach that would not deny Supreme discovery to which it is entitled. Defendants' proposal to that effect must therefore be rejected.

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[9] Supreme does not move to compel responses to its document requests 18 or 19.

Defendants have run out of excuses. The 2003-05 and post-complaint discovery sought by Supreme in its Motion is plainly relevant. The Motion should be granted.

CONCLUSION

For the reasons set forth above, Supreme respectfully requests that the Court compel defendants to respond to Supreme's discovery requests for the full period specified in the requests – January 1, 2003 to the present.

DATED: October 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2010, the foregoing document was served via electronic mail and U.S. Mail to all counsel of record identified on the attached Service List.

/s/ Adam Nyhan

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