

CANADA / JUDGMENT

Duryea v. Matsumoto

2023 BCSC 2061

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Supreme Court of British Columbia

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2023 BCSC 2061 Duryea v. Matsumoto

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duryea v. Matsumoto,

2023 BCSC 2061

Date: 20231124

Docket: S229859

Registry: Vancouver

Re: Section 53 of the Evidence Act, R.S.B.C. 1996, c. 124 and

Section 46 of the Canada Evidence Act, R.S.C. 1985, c. C-5

And Re: Request for Judicial Assistance - Letters Rogatory Issued by

the United States District Court for the District of Minnesota

Between:

Wanda Duryea

Petitioner

And

Sumio Matsumoto

Respondent

Before: The Honourable Madam Justice Ker

Reasons for Judgment

Counsel for Petitioner:

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E. Dishart, Articled Student

Place and Dates of Hearing:

Vancouver, B.C.

February 10, 2023

June 7, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2023

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Introduction

- [1] In *GST Telecommunications, Inc. v. Provenzano*, 2000 BCSC 72 [*GST Telecommunications*], Justice B. M. Davies sagely observed:
- [1] The pursuit of international business opportunities often involves the laws and citizens of many countries. When opportunities go awry, the courts of one or more of those countries may have to become involved in the litigation which follows. In those circumstances, the courts called upon to adjudicate the issues may require the assistance of the courts of other countries to obtain evidence.
- [2] This is such a case. The petitioner has applied for an order enforcing a request for international judicial assistance to the Supreme Court of British Columbia (the "Letter Rogatory"), issued by the United States District Court for the District of Minnesota (the "Minnesota Court") on November 18, 2022.[1] The petitioner seeks to compel the respondent to appear to testify at a deposition as identified in the Letter Rogatory.
- [3] The issues to be determined on this petition are whether this Court should enforce the Letter Rogatory as presented, enforce it in a more restricted manner, or refuse to enforce it.

Overview to the Granting of the Letter Rogatory in the US Proceedings

- [4] The Letter Rogatory was issued in the context of a civil proceeding alleging that the defendants therein engaged in a price-fixing conspiracy to artificially constrict the supply of pork products in the domestic market of the United States (the "Minnesota Action").[2]
- [5] The Minnesota Action is the consolidation of a series of class actions and individual actions brought against certain American pork producers in 2018 alleging a price-fixing conspiracy (the "Alleged Conspiracy"). It includes five different classes of plaintiffs[3] and at least eight different groups of defendants.[4] The class period alleged in the Minnesota Action is from 2009 to 2018. The overall import of the plaintiffs' case in the Minnesota Action is founded on an allegation that between at least 2009 and 2018 the defendants to the Minnesota Action conspired to fix, raise, maintain and stabilize the price of pork. The plaintiffs contend that this was accomplished principally by coordinating output and limiting production with the intent and expected result of increasing pork prices in the United States. This price-raising and fixing allegedly caused the various classes of plaintiffs to pay artificially inflated pork prices.
- [6] The petitioner, Wanda Duryea, is a member of the Consumer Indirect Purchase class. In light of the consolidated nature of the Minnesota Action, the petition is brought by all the plaintiffs in the Minnesota Action. Ms. Duryea is the named representative.

- [7] One of the corporate defendants in the Minnesota Action is Tyson Foods Inc. ("Tyson"). The respondent, Sumio Matsumoto, was employed by Tyson from February 2008 to June 2016. From October 2009 to June 2016, Mr. Matsumoto was the Director of Sales International (Pork) for Tyson and therefore an employee during the class period. At the time the petition was served, in late 2022, the respondent was an employee of Tyson Foods Canada Inc., a subsidiary of a subsidiary of Tyson. Mr. Matsumoto retired at the end of 2022 but continues to work for Tyson as a consultant when needed. He is not a party to the Minnesota Action. While he may be a non-party in that proceeding, his knowledge, thought processes and actions for his employer, Tyson, in the context of the Alleged Conspiracy, are of considerable interest and importance to the plaintiffs in that action.
- [8] In the initial discovery phase of the Minnesota Action, evidence obtained by the plaintiffs, through document production and review thereof, as well as the deposition of a variety of witnesses, supports the inference that Mr. Matsumoto authored and reviewed documents and participated in meetings which are said to be part of the Alleged Conspiracy. The petitioner contends that only Mr. Matsumoto can provide evidence as to his thought processes for how he identified competitors from the various sources of information that he reviewed in the documents he was provided or authored and the meetings he had with another Tyson employee, Deborah McConnell, and others said to be involved in the Alleged Conspiracy.
- [9] The petitioner contends the plaintiffs in the Minnesota Action have exhausted all other possible sources of discovery. She further contends that Mr. Matsumoto's evidence is relevant and not otherwise available or obtainable. The affidavit of Shana Scarlett, an attorney in Berkley, California who is part of the petitioner's counsel in the Minnesota Action, details the steps that the plaintiffs in the Minnesota Action undertook to try and obtain the respondent's cooperation to sit for a deposition. Tyson objected. On October 13, 2022, the plaintiffs in the Minnesota Action filed in the Minnesota Court a motion for letters rogatory for the respondent. Tyson opposed the motion.
- [10] On November 18, 2022, the Minnesota Court issued the Letter Rogatory for Mr. Matsumoto to sit for a deposition, over Tyson's strenuous objections. The Letter Rogatory specifically requests that this Court compel the appearance of Mr. Matsumoto, a resident of BC, for a deposition in the Minnesota Action. In the order made on November 18, 2022, the Honourable Judge J.F. Docherty determined that the requested deposition of Mr. Matsumoto is material to the facts at issue in the Minnesota Action and that it cannot be obtained without the assistance of this Court.
- [11] The respondent opposes the petition largely on the basis that it seeks judicial assistance to compel evidence in a manner that would not have been available if this case was being tried in this jurisdiction.

- [12] Counsel for the respondent further contended at the initial hearing of this petition that the petitioner seeks the respondent's deposition prior to a decision on class certification, and without regard to the respondent's request to provide questions and to receive a responsive statement in writing. The evidence, argues counsel, is sought in the absence of any prospect of a trial in the near future and where its probative value is said to be marginal at best. Accordingly, the respondent contends the petition ought to be dismissed in its entirety. The respondent concedes, however, that there ought to be an express allowance that the petitioner be entitled to apply again at a later stage in the litigation, following Mr. Matsumoto receiving and answering the petitioner's questions in writing. Respectfully, on this last point, the respondent's position invites duplication of costly proceedings, seemingly delays the inevitable--a deposition of the respondent--and potentially contributes to further delay of the Minnesota Action.
- [13] Counsel for the respondent offers an alternative position, should an order enforcing the Letter Rogatory be granted by this Court. In order to minimize the inconvenience and disruption to Mr. Matsumoto caused by a deposition, counsel contends that if an order enforcing the Letter Rogatory is granted, it should be done on the following terms:
- a) any deposition be postponed until after the motions for summary judgment proceedings have been filed;
 - b) the scope of the deposition should be limited to the three topics upon which the petitioner sought the Letter Rogatory;
 - c) the length of the deposition should be limited to three hours, or such time as this Court deems appropriate for the scope of the deposition;
 - d) any documents to be put to Mr. Matsumoto at the deposition are to be provided seven days in advance of the deposition;
 - e) Mr. Matsumoto will be entitled to retain counsel and to recover their costs from the petitioner pursuant to the Supreme Court Civil Rules, as well as reasonable fees and expenses for their own preparation. The petitioner will pay, as an advance against those costs and fees, \$5,000 in trust to counsel for Mr. Matsumoto prior to the deposition taking place; and
 - f) Mr. Matsumoto will be entitled to testify in the language of his choice with the aid of an interpreter at the petitioner's expense.
- [14] Counsel for the petitioner consents to conditions (e) and (f) enumerated above being included in any order enforcing the Letter Rogatory from the Minnesota Court.
- [15] For the reasons that follow, the petition is granted on the terms outlined at the end of these reasons.

Background Facts

- [16] At the hearing of this petition, the Court was taken through the filed petition record which outlines in significant detail the nature of the allegations in the Minnesota Action, the steps in the Minnesota Action thus far, and the general timeline for the Minnesota Action up to the end of September 2024.[5]
- [17] The facts outlined below are drawn largely from the affidavit materials filed as part of the petition record as well as the submissions of counsel which provided a comprehensive overview of the Minnesota Action.

The Allegations in the Minnesota Action

- [18] The Minnesota Action alleges that the defendants colluded to stabilize the price and supply of pork sold to consumers in the United States, including through increased exports. One of the defendants alleged to be central to the conspiracy is Agri Stats, Inc. ("ASI"). ASI is a data benchmarking firm that collected, compiled and distributed certain data amongst the defendant pork processors in an anonymized form, on a plant-by-plant basis. These reports were known as "Kill/Cut Reports".
- [19] The plaintiffs in the Minnesota Action claim that the defendant processors were able to de-anonymize the data provided by ASI, and thereby identify competitors in furtherance of the Alleged Conspiracy, by using:
- personal knowledge possessed by "long-time industry insiders", who were familiar enough with other processors to identify other companies;
 - information and assistance provided by ASI; and
 - personal knowledge possessed by workers moving between different processing companies.
- [20] The plaintiffs in the Minnesota Action allege that the defendants relied on the "de-anonymization" of the ASI reports to facilitate their price fixing scheme, because this allowed the defendants to discern the identity of competitors in the ASI data. The Minnesota Action alleges that the defendants' employees worked to de-anonymize the ASI data. The respondent is one of the Tyson employees believed to have been involved in the de-anonymization process.
- [21] The plaintiffs in the Minnesota Action contend that through the de-anonymization process, the defendants were able to access competitively sensitive and non-public information about their competitors' operations. The plaintiffs allege that the defendants used this data to monitor and enforce adherence to the Alleged Conspiracy.
- [22] Another facet to the Alleged Conspiracy, not necessarily germane to the subject matter of this petition but nevertheless a contextual piece of information, is the plaintiffs' allegation that the conspiracy was furthered through communications at:

- trade group meetings or events held by pork industry trade groups or smaller pork clubs;
- conferences and conventions hosted by meat industry trade associations; and
- at private meetings and through direct correspondence.

[23] There does not appear to be any suggestion that the respondent was involved in this facet of the Alleged Conspiracy.

The Pre-Trial Fact Discovery Phase of the Minnesota Action

- [24] In this type of litigation in the United States, referred to as a single Multi-District Litigation ("MDL"), where numerous actions in various jurisdictions have been consolidated into one action in one jurisdiction, here Minnesota, the court overseeing the litigation orders that discovery in the case conclude by a certain date prior to the filing of the motion for class certification. This period is referred to as the "discovery phase" of the case, or "fact discovery". The evidence collected during the discovery phase is expected to be the evidence upon which the case will be litigated. An order is required to allow for evidence gathered after the discovery phase to be used on a motion or at trial.
- [25] The deadline for the discovery phase in the Minnesota Action was October 31, 2022, and the certification hearing took place on January 31, 2023. On March 29, 2023, the various class actions advanced by three classes of plaintiffs were certified as part of the MDL price-fixing litigation.[6]
- [26] During the course of the discovery phase in the Minnesota Action, the plaintiffs' counsel reviewed nearly four million documents produced by the defendants and took or defended over 150 depositions, including deposing nine fact witnesses for Tyson as of January 2023.
- [27] Pursuant to United States Federal Rule of Civil Procedure 26(a)(1)(A)(i), Tyson was obligated to disclose for fact discovery each individual likely to have discoverable information, and the subjects of that information, but only such that Tyson may have used the witness's information to support its defenses. Under that rule, Tyson disclosed Deborah McConnell, the Division Controller for Tyson, but did not disclose Mr. Matsumoto's existence.
- [28] The plaintiffs in the Minnesota Action were entitled to take depositions of up to ten fact witnesses for Tyson without leave of the Court. As noted above, the plaintiffs have deposed nine fact witnesses for Tyson, including Ms. McConnell and the respondent's supervisor in respect of Tyson's export business, Roel Andriessen. The tenth person they seek to depose is the respondent. They do so based on the following information gained through their comprehensive document review as well as the deposition evidence of Ms. McConnell.[7] In the Minnesota Action, the plaintiffs' theory is that Ms. McConnell spearheaded Tyson's efforts to de-anonymize the ASI data on a monthly basis and that Mr. Matsumoto provided input and assistance on this process.

- [29] Ms. McConnell was deposed by the plaintiffs in the Minnesota Action starting on June 23, 2022. During the deposition she was asked to explain the process for Tyson's de-anonymizing the ASI reports. Ms. McConnell's evidence was that one source for her work de-anonymizing the data was "Sumio's estimates," referring to Mr. Matsumoto. She testified that she would send Mr. Matsumoto spreadsheets with her best estimates of the identities of companies in the ASI data. She would ask him to review the data to see "if they had any different estimate for some of these names" of competitors. However, in her deposition Ms. McConnell was unable to explain the methods employed by Mr. Matsumoto to estimate the identities of the companies. Indeed, the transcript from Ms. McConnell's deposition establishes that when asked about the respondent's methods for determining the identity of competitors in the ASI data and reports, she answered: "I guess I don't know the source of his guesses, but he gave me guesses to use as some indicator to come up with an estimate." When asked to explain Mr. Matsumoto's logic in de-anonymizing the reports, Ms. McConnell said she could not do so because that process would require her to speculate about "what [the respondent] knows and believes from the market, the world, his connections, his thoughts."
- [30] Documentary evidence reviewed by the plaintiffs in the Minnesota Action supports the inference that Ms. McConnell and Mr. Matsumoto met in person in the United States to discuss the ASI data. Documents produced by Tyson include a meeting invitation from Ms. McConnell to Mr. Matsumoto entitled "Agristats competitor review". Within the body of the meeting invitation there is text that includes a request from retail and processor sales for input "to help with the identification process" and to "review the competitor information".
- [31] Another document in the possession of the plaintiffs in the Minnesota Action, referred to in Ms. Scarlett's first affidavit, is an email thread, dated August 23 and 24, 2012, wherein Mr. Matsumoto appears to be communicating with other connections about pork exports, which is a key component of the Alleged Conspiracy. This inference is supported by the following excerpts from this email thread, where Mr. Matsumoto appears to be instructing another connection to "keep monitoring on Smith's movements and their offer/sales actions in China." Farther up the email thread with the same individuals, he advises that the "US should face a big challenge to sell pork due to big supply of hogs. SFD[8] may dump products with very cheap price to China just to help to reduce US inventory."
- [32] The plaintiffs in the Minnesota Action first learned of Mr. Matsumoto's involvement in the de-anonymization process during Ms. McConnell's deposition. Following the mention of Mr. Matsumoto in Ms. McConnell's deposition, plaintiffs' counsel had to comb through more than a million documents provided by Tyson to learn about Mr. Matsumoto's role in the de-anonymization process. Upon the discovery of Mr. Matsumoto's identity and role, on September 9, 2022 the plaintiffs requested that Mr. Matsumoto be the tenth Tyson witness to be deposed. Tyson objected. Efforts were made to provide accommodations to have Mr. Matsumoto sit for a deposition but the parties reached an impasse in their negotiations. As a result, the plaintiffs' counsel were required to make the application for the Letter Rogatory in the Minnesota Court.

- [33] Ms. Scarlett's affidavits, which include the plaintiffs' motion brief filed in support of the motion for the Letter Rogatory in the Minnesota Action, supports the inference that Mr. Matsumoto was involved if not central to the efforts to de-anonymize the ASI data, a critical component of the Alleged Conspiracy in the Minnesota Action.
- [34] Although the respondent points out that the plaintiffs in the Minnesota Action never "offered" him an opportunity to receive and answer questions in writing when they first sought to have him volunteer to be deposed prior to the motion for the Letter Rogatory, I am satisfied from the evidence provided by Ms. Scarlett in her second affidavit that such a procedure is rarely resorted to where the witness to be deposed is a purported participant in the Alleged Conspiracy. Viva voce evidence, in the form of a video taped deposition, is preferable from a credibility and reliability assessment, particularly for the trier of fact in the trial venue. As well, while Mr. Matsumoto would not be a compellable witness in the Minnesota Action given his residency in Canada, his video taped deposition, if ruled admissible, could be used in the trial of the Minnesota Action.
- [35] Furthermore, in light of Tyson's unwavering position in the Minnesota Action that the respondent would not voluntarily sit for a deposition, the suggestion now advanced by counsel for the respondent that interrogatories or written questions and answers should have been pursued first rings hollow in the circumstances. While the respondent, through his counsel, "offered" to receive and answer the questions of the plaintiffs in the Minnesota Action, this offer was not provided until well past the close of the discovery phase in the Minnesota Action. It was not until January 24, 2023, approximately six weeks after the petitioner's materials were filed in this Court and eight days after the respondent's response to petition was filed in this Court, and a week before the certification hearing in the Minnesota Action, that the "offer" was made. In light of the timing, I conclude that this "offer" to provide written responses appears to be more of a strategic or tactical decision than a sincere expression of cooperation.
- [36] That Mr. Matsumoto was not deposed prior to the certification hearing was highly unusual according to Ms. Scarlett.
- [37] The totality of the materials filed in support of this petition concretely establish that the motion for the Letter Rogatory to have the respondent sit for a deposition filed by the plaintiffs in the Minnesota Action was not a pro forma motion. It was robustly and vigorously contested by Tyson. In the end, the motions judge in the Minnesota Action, having heard the motion arguments and reviewed the evidence in support of the motion, granted the motion for the Letter Rogatory. By so doing, and in issuing the request for international assistance, the reasons for the order for the Letter Rogatory from the Minnesota Court include the following observations and conclusions:
- a) The evidence requested is to be used in a civil proceeding and is "necessary in the interests of justice";

- b) The requested deposition is material to the facts at issue in the Minnesota Action;
- c) Documents and deposition testimony presented to the Court indicate that Mr. Matsumoto was involved in Tyson's attempts to de-anonymize the ASI reports to identify competitors;
- d) Only Sumio Matsumoto can testify to his process for identifying competitors in the reports;
- e) The Minnesota plaintiffs intend to take the deposition of Mr. Matsumoto to ask him about his role in the alleged conspiracy; and
- f) If the Minnesota Court had jurisdiction over Mr. Matsumoto, it would compel him to appear for a deposition.

[38] While points (a), (b), and (e) enumerated immediately above may well be largely standard language included in any letters rogatory from an American court, points (c), (d) and (f) are directly tied to an assessment of the evidence before the Minnesota Court and relate specifically to the Minnesota Action and the issues the plaintiffs in that action are endeavouring to litigate.

Next Steps in the Minnesota Action

[39] As outlined previously, the plaintiffs' Minnesota Action was certified by the Minnesota Court on March 29, 2023.

[40] The next major step in the Minnesota Action will be the filing of motions for summary judgment on the merits of the entire case. If the defendants in the Minnesota Action file a motion for summary judgment, the plaintiffs therein anticipate relying upon the respondent's deposition evidence to address contested issues of fact related to the existence and impact of the Alleged Conspiracy. Counsel for the plaintiffs in the Minnesota Action intend to rely upon the respondent's anticipated evidence to support their position that factual issues remain that cannot be resolved at the summary judgment stage, necessitating that the case proceed to trial. Thus, according to counsel for the plaintiffs in the Minnesota Action, delaying any deposition of the respondent until after the summary judgment phase will limit them in their ability to resist any defence motion for summary judgment by foreclosing them from having in hand evidence that they expect will confirm their allegations about de-anonymization of the ASI data and how that was a central feature of the Alleged Conspiracy.

Legal Principles Governing Letters of Request

[41] In this jurisdiction, requests for the enforcement of letters rogatory, also known as letters of request, issued by a foreign court are governed by the provisions of s. 53 of the Evidence Act, R.S.B.C. 1996, c. 124 and s. 46 of the Canada Evidence Act, R.S.C. 1985 c. C-5. Both require the exercise of judicial discretion: GST Telecommunications at para. 15.

- [42] In exercising such discretion, Canadian courts have recognized that international comity and the desire to have their own requests enforced by foreign courts require that letters rogatory issued by foreign courts will be given full force and effect unless it would be contrary to public policy in Canada to do so or would otherwise be prejudicial to Canadian sovereignty or to its citizens: *Zingre v. The Queen et al.*, [1981] 2 S.C.R. 392 at 401, 127 D.L.R. (3d) 223; *GST Telecommunications* at para. 16.
- [43] The legal principles governing the determination of whether to enforce letters rogatory from another jurisdiction are comprehensively summarized in a number of authorities in this province.
- [44] Recently, in *The National Association of Boards of Pharmacy v. Solaris Pharmaceuticals Inc.*, 2022 BCSC 1237 [Boards of Pharmacy], Justice Skolrood (as he then was) succinctly set out the governing legal framework:
- [10] Section 53 of the Evidence Act, R.S.B.C. 1996, c. 124 authorizes the Supreme Court to make an order requiring a person within its jurisdiction to attend for an examination and to produce documents upon proper process being issued by a foreign court. Some provisions are found in the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 46.
- [11] Both parties cite *Monster Energy Company v. Craig*, 2016 BCCA 290 [Monster Energy], as a leading authority in BC for the principles governing letters rogatory. There, Justice Fenlon for the court said at paras. 11- 12:
- [11] In responding to a letter of request, the starting point is the presumption that the request from the foreign court will be granted unless it would be contrary to Canadian public policy to do so or would otherwise be prejudicial to Canadian sovereignty or to Canadian citizens: *R. v. Zingre*, 1981 CanLII 32 (SCC), [1981] 2 S.C.R. 392; *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225.
- [12] *Halsbury's Laws of Canada, Extradition and Mutual Legal Assistance* (2015 Reissue) describes letters rogatory and their purpose this way:

Letters rogatory are letters submitted by a court seeking the assistance of a foreign court. The enforcement of letters rogatory is a matter within the discretionary power of the courts and is based upon international comity or courtesy proceeding from international law. Inherent in the idea of international comity is a mutuality of purpose and power: *Westinghouse Electric Corp. v. Duquesne Light Co.*, [1977] O.J. No. 2287, 16 O.R. (2d) 273 at 290 (Ont. H.C.) ("[a]s a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries"). See also *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] S.C.J. No. 41, (S.C.C.); *National Telefilm Associates Inc. v. United Artists' Corp.*, [1958] O.J. No. 275,

14 D.L.R. (2d) 343 (Ont. H.C.).

[Emphasis in the original.]

[12] Justice Fenlon went on to list a number of factors identified by Justice L. Smith in *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225, that inform the analysis of whether to give effect to letters rogatory, including:

1. Relevance;
2. Whether the evidence is necessary for trial and will be adduced at trial if admissible;
3. Whether the evidence is otherwise obtainable;
4. Whether the order sought is contrary to public policy;
5. Whether the documents sought are identified with reasonable specificity; and
6. Whether the order sought is unduly burdensome having in mind what the witness would be required to do and produce were the action to be tried locally.

[13] Both *Monster Energy* and *EchoStar* were cited with approval by the Court of Appeal in the more recent decision in *Liu v. Zhi*, 2019 BCCA 427, where Justice Griffin made a number of important observations in connection with the governing principles:

- a) Relevance and the burden of the proposed witness are related factors. The more specific and narrow the request and the stronger the link between the requested evidence and the issues in the litigation, the greater the argument in favour of enforcing the letter of request (para. 15);
- b) In contrast, the more general and wide the request and the weaker the link between the requested evidence and the issues in the litigation, the less compelling the argument in favour of enforcing the letter of request (para. 17);
- c) In the spirit of international comity, considerable weight is to be given to the foreign court's issuance of letters of request. The foreign court is entitled to respect. It is presumed to have acted reasonably and responsibly (para. 18); and
- d) However, despite this presumption, the mere fact that the foreign court issued an order in the form necessary to support letters of request, does not on its own prove that the underlying requirements for enforcing the request exist. The court receiving the request is entitled and indeed obliged to look beyond the mere form of the foreign letters of request (para. 20).

- [45] The decision in *Boards of Pharmacy* at para. 15 makes it clear that an enforcement application is not simply a rubber stamp exercise. A court that is asked to enforce a letter of request issued by a foreign jurisdiction must engage in a substantive analysis of the request as guided by the factors set out in *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225 at paras. 38, 46 [*EchoStar*].
- [46] The legal principles governing the enforcement of letters of request from foreign jurisdictions are not in issue on this petition. Rather it is their application to the circumstances that ground this petition that is in issue.

Analysis

- [47] I will consider the petitioner's application for enforcement of the Letter Rogatory by reference to the factors set out in *EchoStar*, as endorsed by the Court of Appeal in *Monster Energy Company v. Craig*, 2016 BCCA 290 at para. 13 [*Monster Energy*] and confirmed in *Liu v. Zhi*, 2019 BCCA 427.

Relevance

- [48] As noted by Skolrood J. in *Boards of Pharmacy* at para. 25, when considering the relevance criterion, "it is not for this Court to decide if the requesting court was wrong in finding that the evidence sought is relevant": see also *B.I. Incorporated v. Au*, 2017 BCSC 2476 at para. 17; *Club Exploria, LLC v. Moore*, 2021 BCSC 816 at para. 12 [*Club Exploria*]. Rather, the role of this Court is to satisfy itself that there is some probative value to the proposed evidence: *B.I. Incorporated* at para. 19.
- [49] In this case, the requesting court's determination of relevance is set out in the excerpts from the Letter Rogatory issued by Judge Docherty in the Minnesota Court:

Defendants allegedly implemented the conspiracy in part by exchanging detailed, competitively sensitive, and closely guarded non-public information about prices, capacity, sales volume, and demand through their co-conspirator, Defendant Agri Stats a company that each of the Defendants worked with; it gathered detailed financial information from the Defendants, which it then standardized and made accessible to each Defendant. Id. Through the "benchmarking" reports generated by Agri Stats, Defendants were able to decipher data which belonged to each Defendant, thereby allowing them to monitor one another's pork production "and hence control supply and price[.]" The Agri Stats information was not publicly available.

During the conspiracy period, Sumio Matsumoto worked for Defendant Tyson and worked in the United States. Mr. Matsumoto is now an employee of Hillshire Canada (a Tyson subsidiary). Documents and deposition testimony presented to the Court indicate that Mr. Matsumoto was involved in Tyson's attempts to deanonymize the Agri Stats reports to identify competitors. Mr. Matsumoto served as a source for deanonymizing the reports and a check on the other Tyson employees' own deanonymization attempts. Only Sumio Matsumoto can testify to his process for identifying competitors in the reports.

[Emphasis added.]

- [50] There is nothing conclusory or pro forma about this statement. It is a finding of the Minnesota Court, made after a thoroughly contested application where the defendant Tyson argued that the deposition evidence sought was irrelevant. The Minnesota Court disagreed and concluded that the deposition of the respondent was material to the facts at issue in the Minnesota Action.
- [51] Counsel for the respondent now contends that while Mr. Matsumoto's evidence is "marginally relevant" this is still insufficient as he is a non-party witness. The respondent further contends that the petitioner must establish that a non-party witness has material evidence in relation to a matter in question in the Minnesota Action, citing Rule 7-5(1) of the Supreme Court Civil Rules.
- [52] While the threshold for relevance in the United States may be lower as compared to Canadian courts, as noted in *Aker Biomarine AS et al. v. KGK Synergize Inc.*, 2013 ONSC 4897 at para. 27, cited with approval in *Liu* at para. 14, the circumstances of this case can hardly be described as running the risk of a Canadian citizen being required to participate in a "fishing expedition" that may be of no assistance to the foreign litigation.
- [53] To the contrary, the connection between the acts that make up the Alleged Conspiracy of the Minnesota defendants and the alleged conduct of Mr. Matsumoto and his role with Tyson is clear and obvious. Some of the documents relied upon by the Minnesota plaintiffs were either authored or received by Mr. Matsumoto. Ms. McConnell could not speak to Mr. Matsumoto's thought processes as to how he assisted Tyson in the de-anonymization of the ASI data. The Minnesota Court concluded that the respondent's evidence on his thinking and conduct--his "process"--in respect of these documents is highly relevant and material to the facts at issue in the Minnesota Action.
- [54] As the authorities make clear, it is not my function to determine if the requesting court was wrong. The Letter Rogatory clearly connects the information sought to issues in the Minnesota Action. Specifically, the respondent's own knowledge and thought processes that he used for his employer, Tyson, in the de-anonymization process of the ASI data in furtherance of the Alleged Conspiracy.
- [55] I am satisfied that there is some probative value to the proposed evidence sought and that it is relevant to the issues arising in the Minnesota Action. The areas to be canvassed during the deposition, specifically Mr. Matsumoto's knowledge, thought processes and input into the de-anonymization processes on behalf of his employer, Tyson, a defendant in the Minnesota Action, are directly relevant to the proposed issues in the Minnesota Action. I am satisfied that the factor of relevance is amply met.

Whether the Evidence is Necessary for Trial and Will be Adduced at Trial if Admissible

- [56] The issue of whether the evidence is necessary for trial and will be adduced at trial if admissible has evolved over the past few decades. Justice Davies comprehensively reviewed the evolution of the jurisprudence on the extent to which letters rogatory should be enforced in the pre-trial discovery period in *GST Telecommunications* at paras. 16-30. Historically, letters rogatory were only enforced for the purposes of the taking of evidence for the trial. The principles of international comity and reciprocity have modified that approach such that letters rogatory will be enforced where there is also a significant exploratory or discovery element to the evidence sought. Indeed, as Justice Lyster noted in *Club Exploria* at para. 13, citing *Maverick LNG Holdings Ltd. v. Teekay Shipping (Canada) Ltd.*, 2009 BCSC 1538 at paras. 28-29 [Maverick], the fact that the evidence is, at this stage, for discovery purposes is not an impediment to the enforcement of letters rogatory. Notably, in *Maverick* at para. 27, Justice Russell observed that the Supreme Court of Canada decision in *Zingre* indicated "that even where evidence is sought by letters rogatory for discovery purposes, the letters could still be enforced."
- [57] In this case, it cannot be forgotten that Mr. Matsumoto is a non-compellable witness in the sense that he cannot be subpoenaed to testify in the Minnesota Action given that he does not live in the United States. And so, the Letter Rogatory in this case is primarily to procure evidence otherwise unavailable for the purpose of trial: *GST Telecommunications* at para. 31. To be sure, there is also a significant exploratory or discovery element to the Letter Rogatory in respect of Mr. Matsumoto's knowledge and thought processes of the de-anonymization process of the ASI data done in furtherance of the Alleged Conspiracy. However, as noted by Lyster J. in *Club Exploria*, that does not pose an impediment to enforcement.
- [58] A further purpose to obtaining Mr. Matsumoto's evidence, assuming it develops the way the plaintiffs in the Minnesota Action expect it to do so, is to have some evidence to resist anticipated summary judgment motions by the defendants in the Minnesota Action. While counsel for Mr. Matsumoto points to Ms. Scarlett's second affidavit as to the uncertainty of whether the Minnesota Court would permit admission of Mr. Matsumoto's deposition at the summary disposition stage, I do not interpret Ms. Scarlett's affidavit in that manner. Her evidence on this point is as follows:
7. Up until the start of trial, the decision to allow plaintiffs to rely on Mr. Matsumoto's testimony in the Minnesota Action will be left to the court's discretion, as the deposition will have taken place outside of the discovery phase. But once trial has commenced, the rules applicable to the Minnesota Action will bar the plaintiffs from using any new evidence not already in the record. Because the plaintiffs do not have the power to subpoena Mr. Matsumoto to testify at trial, the only avenue available to the plaintiffs to ensure that he will provide admissible testimony is through the pre-trial deposition.

[59] Of course, it must be recalled that the reason why the proposed deposition of Mr. Matsumoto falls outside the discovery phase of the process is due in no small measure to Tyson's refusal to have him sit voluntarily for a deposition. This resulted in the plaintiffs in the Minnesota Action being required to schedule the motion for the Letter Rogatory at the proverbial eleventh hour of the discovery phase, which has now closed. Counsel for Mr. Matsumoto's alternative suggestion that if the Letter Rogatory is enforced it should not be done so until after motions for summary judgment have been filed in the Minnesota Action appears to once again place the plaintiffs in the Minnesota Action in a precarious position deadline wise for the MDL process.

[60] In *Maverick*, Justice Russell made the following observations:

[27] In *Campbell Estate v. Stenhouse*, [1995] B.C.J. No. 2304 at paras. 10 and 11, Saunders J., as she then was, stated:

... the question of whether the examination proposed is ""for a discovery or trial purpose is one factor, but not necessarily the determining factor in the exercise of the court's discretion.""

... It is not a complete answer for respondents to an application such as this to say the purpose of the deposition is discovery of the deponents.

[28] In *GST Telecommunications Inc. v. Provenzano*, 2000 B.C.S.C. 72, 73 B.C.L.R. (3d) 133, Davies J. adopted this more flexible approach with the following comments, at para. 29:

In my view, the approach which must now be taken to the enforcement of letters rogatory which may contain a discovery component is preferable to the earlier more restrictive approach. It will not only foster international comity but will focus upon the competing considerations of burden and prejudice from the perspective of the proposed deponent. Such an approach will generally result in a useful enquiry into the importance of the evidence sought and allow consideration of competing public policy interests. In my view, that inquiry better serves the purposes of international comity than does the mere categorization of the nature or purpose of the evidence sought.

[29] It seems apparent that in any examination which occurs before trial, there must be some element of the examination which is discovery, for the reason that all the evidence is not known at the point at which this examination takes place.

[61] The same can be said for the case at bar and I adopt Russell J.'s observations in respect of this factor in the analysis. I am satisfied that the primary purpose of the Letter Rogatory in this petition is to obtain evidence for the purpose of trial. That the purpose also includes an element of pre-trial discovery does not weigh against the enforcement of the Letter Rogatory. Indeed, to conclude otherwise is seemingly contrary to the well-accepted law in British Columbia that a request for assistance from a foreign court should be honoured wherever possible since to do otherwise would have serious effect on the ability of our courts to ask for help from foreign courts and would interfere with the full and fair trial of matters within our own and foreign courts: *Maverick* at para. 20.

- [62] It is clear from the materials in the petition record that only Mr. Matsumoto can provide his knowledge and thought processes on the de-anonymization process engaged in with respect to the ASI data, as well as the documents generated or reviewed by him in the course of meetings with Ms. McConnell and others. I am satisfied that the factor of whether the evidence is necessary for trial has been met; that there is also a discovery purpose to the deposition does not militate against enforcement of the Letter Rogatory in this case.

Whether the Evidence is Otherwise Obtainable

- [63] Counsel for Mr. Matsumoto contends that the petitioner has failed to establish that Mr. Matsumoto's evidence is not otherwise obtainable and suggests that this is fatal to the petition to enforce the Letter Rogatory, citing passages from *N2 Packaging Systems LLC v. Nitrofin, Inc.*, 2020 BCSC 1719 [N2 Packaging] and cases cited therein. N2 Packaging is distinguishable on its facts, which involved seeking large scale documentary disclosure which, on the facts of that case, the petitioner had failed to establish could not otherwise be obtained.
- [64] The circumstances of this case very clearly establish that Tyson did not disclose Mr. Matsumoto's existence at all, notwithstanding an obligation under Rule 26 of the United States Federal Rules of Civil Procedure to disclose each individual likely to have discoverable information. Rather, Mr. Matsumoto's role in the Alleged Conspiracy was discovered through the deposition of Ms. McConnell, another Tyson employee, and the subsequent review of approximately one million documents.
- [65] Once Mr. Matsumoto's identity was discovered by the plaintiffs in the Minnesota Action, Tyson repeatedly refused to have Mr. Matsumoto sit for a deposition, even though he was an employee of a Tyson subsidiary, Tyson exerted control over him and he was represented by Tyson's counsel.
- [66] Counsel for Mr. Matsumoto contends that Mr. Matsumoto's offer to respond to written questions and answers from the plaintiffs in the Minnesota Action demonstrates that his evidence is "otherwise obtainable". This position is a variation on what occurred in *B.I. Incorporated*, where the employer of Mr. Au argued that the petitioners in that case should have asked questions of another individual about the evidence they sought from Mr. Au before they filed their petition in this Court. Justice Gropper rejected that argument and found that Mr. Au was the only person who knew what steps he took in the tests he conducted and he had direct knowledge of the work he performed for the defendant company: *B.I. Incorporated* at paras. 21-24.
- [67] In light of the chronology outlined in para. 35 above and my finding that the offer to provide answers to written questions was a tactical offer advanced almost on the eve of the hearing of this petition, I am not prepared to conclude that Mr. Matsumoto's evidence is otherwise obtainable. Moreover, I accept that the plaintiffs in the Minnesota Action require viva voce evidence, particularly here where Mr. Matsumoto cannot be subpoenaed to testify at the

trial of the Minnesota Action. While he is not a compellable witness, given his residency outside of the United States, his video taped testimony from his deposition is admissible under the rules applicable to the Minnesota Action. Seeing Mr. Matsumoto testify by means of a video taped deposition will permit the trier of fact in the Minnesota Action to more effectively assess the reliability of his evidence: *Monster Energy* at para. 29. Furthermore, a video taped deposition captures Mr. Matsumoto's own individual responses to the questions, which are not necessarily filtered through corporate channels for responding to written questions.

- [68] In the unique circumstances of this case, the offer to respond to written questions with written answers is not a satisfactory alternative for obtaining Mr. Matsumoto's evidence.
- [69] Finally, given that the evidence sought is Mr. Matsumoto's own knowledge and thought processes in the de-anonymization exercises that Tyson allegedly engaged in, the evidence sought relates to his knowledge of the nature and extent of the Alleged Conspiracy and therefore is not otherwise obtainable from others: *EchoStar* at para. 47. Indeed, Ms. McConnell's evidence in her own deposition underscores and serves to reinforce this point.
- [70] Accordingly, I am satisfied that Mr. Matsumoto's evidence is not otherwise obtainable in the circumstances and therefore this factor has been met.

Whether the Order Sought is Contrary to Public Policy

- [71] It was not contended that public policy bars enforcement of the request and so this factor plays no role in the assessment to be conducted.

Whether the Documents Sought are Identified with Reasonable Specificity

- [72] No submissions were made on this factor and so this factor plays no role in the assessment to be conducted.

Whether the Order Sought is Unduly Burdensome to Mr. Matsumoto

- [73] In *Liu* at para. 11, Justice Griffin, citing *Monster Energy* at para. 28, noted that the question of whether the order is unduly burdensome reduces to this: the burden of being examined on a deposition is comparable to the burden, if the trial was local, of being required to attend trial and give evidence. In 2023, with advances in video conferencing technology and post-COVID, the limited burden of being required to attend to give evidence in a trial is further attenuated for many witnesses through the ability to appear virtually instead of in person.
- [74] The context of Mr. Matsumoto's role as an employee of Tyson at the material time of the Alleged Conspiracy is important to this factor. While not named as a defendant in the Minnesota Action, he is not someone who knows nothing about the subject matter of the litigation. The evidence in the Minnesota Action pre-trial discovery phase has revealed that Mr. Matsumoto either authored or reviewed documents that Tyson, his former employer,

produced in the document production phase of the Minnesota Action and which the Minnesota plaintiffs contend comprise evidence of the Alleged Conspiracy. Additionally, Ms. McConnell appears to have relied upon Mr. Matsumoto's thought processes and knowledge to assist in the de-anonymization process of the ASI data. To that end, Mr. Matsumoto's seemingly direct involvement in the issues material to the Minnesota Action weighs heavily in favour of enforcing the Letter Rogatory issued by the Minnesota Court: Liu at para. 15.

[75] The respondent is not being asked to review or produce a large number of documents in advance of the proposed deposition and so his situation is not akin to that of the non-party witnesses in N2 Packaging at paras. 2 and 22, where Justice Wilkinson found that the extensive document and testamentary disclosure obligations were unduly burdensome.

[76] The only evidence that Mr. Matsumoto has provided that addresses the unduly burdensome factor as it pertains to him personally is as follows:

- He is 66 years of age;
- He is retired;
- English is not his first language, although he does speak English (and seemingly conducted his interactions in his employment in English); and,
- He is concerned that in an oral deposition he will misunderstand counsel's questions and inadvertently provide answers that are not accurate or otherwise do not give a complete picture of his evidence.

[77] Respectfully, Mr. Matsumoto's age and retirement status do not raise concerns that a deposition would be unduly burdensome. There is no evidence that he is infirm or too busy with other employment commitments to sit for a deposition. If anything, these two points weigh in favour of establishing that the enforcement of the Letter Rogatory would not be unduly burdensome.

[78] Insofar as Mr. Matsumoto's language and comprehension skills are concerned, if comprehension is an issue, then potentially a similar issue arises in respect of conducting the discovery by means of written questions and answers. Moreover, the petitioner's agreement to provide an impartial interpreter neutralizes any comprehension concerns.

[79] Respectfully, the burden in the current case is not onerous in any sense of the word. Counsel for the petitioner concedes:

- the respondent can testify through video conferencing technology or in a city of his choice;
- the respondent can retain counsel and recover their costs from the petitioner pursuant to the Supreme Court Civil Rules;
- they are prepared to pay a \$5,000 advance against the costs and fees to retain counsel; and

· the respondent is entitled to testify in the language of his choice with the aid of a neutral interpreter at the petitioner's expense.

[80] Finally, as Justice Gropper noted in *B.I. Incorporated* at para. 27, citing the passage from *Halsbury Canada* that is contained in *Boards of Pharmacy*, cited above, the Court's task is to address the notion of comity:

in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries.

[81] There is nothing in the evidence contained in the petition record that supports a finding that the order sought is unduly burdensome to Mr. Matsumoto. I am satisfied that the deposition sought of the respondent will not be unduly burdensome, particularly in light of the fact that he is not being required to produce any documents, to review any documents in advance of the deposition and will have an interpreter to assist him should he elect to have one.

[82] Insofar as the suggestion that any deposition should be for a shorter period of time (three hours as advanced by the respondent) or a longer period of time (14 hours as advanced by the petitioner), my view is that seven hours as set by Judge Docherty is sufficient in light of the focussed nature of the inquiry and the respondent's concerns about the need for an interpreter to assist him.

[83] Similarly, I am not inclined to include in the order that the counsel for the plaintiffs in the Minnesota Action should provide Mr. Matsumoto any documents seven days in advance of any deposition hearing. Of course, they can if they wish to but it is not a term of this order that they must do so.

Conclusion and Order

[84] In conclusion, I am satisfied that the request for assistance issued by the United States District Court for the District of Minnesota in the form of the Letter Rogatory should be granted. I therefore make the following orders:

1. The request for international judicial assistance ("Letter Rogatory") issued by the United States District Court for the District of Minnesota on the 18th day of November 2022, in Case No. 18-CV-01776 under the style and proceeding of *In re Pork Antitrust Litigation* (the "Minnesota Action"), and attached as Schedule "A" to this Order be enforced in British Columbia on the terms set out in this Order and subject to any further order pronounced by this Court.
2. The respondent, Sumio Matsumoto, shall attend before a commissioner on a date and at a time to be agreed upon between counsel for the petitioner and counsel for the respondent (the "Deposition") for the purpose of being examined under oath or affirmation in relation to the matter specified in the Letter Rogatory.

3. The Deposition shall take place either by remote means through video conferencing technology, or in a city of Mr. Matsumoto's choice.
4. The petitioner may depose the respondent for up to seven hours.
5. Counsel for any party to the Minnesota Action may attend the Deposition.
6. Counsel attending and conducting the Deposition may include members of the bar of a state of the United States of America.
7. The Deposition will be conducted in accordance with the US Federal Rules of Civil Procedure and the case management orders made in the Minnesota Action, except to the extent that such rules are incompatible with the laws of British Columbia and Canada or this Order.
8. If there is an objection to questions asked during the Deposition, the respondent shall answer the question unless the laws of Canada or British Columbia protect him from doing so, and the objection shall be preserved until the hearing of the Minnesota Action for ruling by the United States District Court for the District of Minnesota.
9. The testimony will be recorded by video and audio, as well as taken down by an official court reporter and transcribed. Any documents produced at the Deposition will be marked for identification by the official court reporter. The official court reporter shall authenticate the transcript and any documents produced, or certified copy thereof, and have the same returned by registered or certified mail addressed to counsel of record for the plaintiff in the Minnesota Action.
10. The parties are prohibited from disclosing the transcript of the Deposition, or information obtained as a result of the Deposition, to any party outside of the Minnesota Action, except that a party to the Minnesota Action will be entitled to disclose the transcript to experts or advisors retained by it in connection with the Minnesota Action, on the condition that these experts or advisors agree to be bound by the respective confidentiality provisions set out in the amended protective order dated January 31, 2022 issued therein. The amended protective order also applies to counsel for the parties, the commissioner, the official court reporter, and any others involved in the taking of the evidence, production or copying of transcripts of the Deposition.
11. The evidence given will be deemed to be compelled and subject to the protections of compelled testimony contained in the Canada Evidence Act, the BC Evidence Act, and the Charter.
12. The evidence of the respondent given at the Deposition is to be used only in the Minnesota Action, and not for any other purpose. In particular, no testimony given, and no evidence derived from any such evidence shall be used in subsequent proceedings against the party who produced the document or gave the testimony, except as proof of a prior inconsistent statement or in a prosecution for perjury.

13. Mr. Matsumoto will be entitled to retain counsel and to recover their costs from the petitioner pursuant to the Supreme Court Civil Rules, as well as reasonable fees and expenses for their own preparation. The petitioner will pay as an advance against those costs and fees \$5,000 in trust to counsel for the petition respondent prior to the Deposition taking place.
14. Mr. Matsumoto will be entitled to testify in the language of his choice with the aid of a neutral interpreter at the petitioner's expense.

"Ker J."

APPENDIX 'A'

PROCEDURAL CHRONOLOGY AND CURRENT LITIGATION PLAN

Date

Event

June 2018

First plaintiffs file suit in the federal District Court for the District of Minnesota followed by a number of class actions.

September 2018

Related actions are consolidated for the purposes of pretrial proceedings in the District of Minnesota.

October 13, 2022

The plaintiffs file a motion seeking the sworn testimony of respondent Sumio Matsumoto.

October 31, 2022

Contemplated close of the fact discovery phase.

November 18, 2022

The Minnesota Court issues the Letter Rogatory.

January 31, 2023

Scheduled class certification hearing.

June 5, 2023

Disclosure of plaintiffs' expert reports.

November 30, 2023

Disclosure of defendants' expert reports.

March 10, 2024

Disclosure of plaintiffs' rebuttal reports.

May 17, 2024

Filing of dispositive motions (including summary trial) and expert admissibility motions.

August 16, 2024

Responses to dispositive motions and expert admissibility motions.

September 30, 2024

Replies in support of dispositive motions and expert admissibility motions, and motions to exclude evidence on summary judgement, if any.

Unknown

Trial.

On June 1, 2023, Judge Docherty of the Minnesota Court modified the above deadlines for events relating to merits expert discovery, dispositive motions and certain evidentiary issues in the following manner:

Date

Event Relating to Merits Expert Discovery or Dispositive Motion Briefing

June 16, 2023

Identification and Rule 26(a)(2)(B) and 26(a)(2)(C) disclosures for any plaintiff expert who may testify at trial.

December 11, 2023

Identification and Rule 26(a)(2)(B) and 26(a)(2)(C) disclosures for any defendant affirmative and/or rebuttal expert who may testify at trial.

March 21, 2024

Expert reports from plaintiffs' experts rebutting defendants' affirmative expert reports.

May 31, 2024

Dispositive motions and merits expert Daubert motions.

August 26, 2024

Responses to dispositive motions and merits expert Daubert motions.

October 11, 2024

Replies in support of dispositive motions and merits expert Daubert motions, and motions to exclude evidence on summary judgment, if any.

Judge Docherty further ordered that "[a]ll remaining provisions in the Order on Proposed Schedule for Merits Expert Discovery, Dispositive Motions, and Certain Evidentiary Issues (Dkt. No. 1651) remain in effect."

- [1] It should be noted that in the jurisprudence the term "letters rogatory" and "letters of request" are used interchangeably and mean the same thing. In the case at bar, the document from the Minnesota Court is referred to as a Letter Rogatory. These reasons refer to it in this singular fashion.
- [2] Consolidated In Re Pork Antitrust Litigation, No. 18-cv-01776 (D. Minn. 2021) on November 12, 2021 by Chief Judge J. Tunheim of the United States District Court for the District of Minnesota.
- [3] Shana Scarlett, one of the American attorneys acting for the plaintiffs in the Minnesota Action, outlines in her Affidavit #1 that the Minnesota Action has five different categories of plaintiffs that initially brought claims. The Direct Purchaser Class (sometimes called DPPs) refers to the group of plaintiffs who bought pork directly from a defendant--such as a wholesaler or large grocery store. The Consumer Indirect Purchaser Class (sometimes called Consumer IIPs) refers to the group of plaintiffs who bought pork from a grocery store for their own consumption. The Commercial and Institutional Indirect Purchaser Class (sometimes called Commercial IPPs) refers to the group of plaintiffs who bought pork from a wholesaler to sell or use commercially, such as a restaurant. In addition to these class cases, several large pork buyers--grocery stores such as Kroger--have brought their own individual cases. This group of plaintiffs is referred to as the Direct Action Plaintiffs, or DAPs. The Commonwealth of Puerto Rico also has brought claims on behalf of its residents.
- [4] The defendants as enumerated and defined in the Minnesota Court decision granting the Letter Rogatory include: Agri Stats, Inc. ("Agri Stats"); Clemens Food Group, LLC and The Clemens Family Corporation (together and separately, "Clemens"); Hormel Foods Corporation and Hormel Foods, LLC (together and separately, "Hormel"); JBS USA Food Company ("JBS"); Seaboard Foods LLC and Seaboard Corporation (together and separately, "Seaboard"); Smithfield Foods, Inc. ("Smithfield"); Triumph Foods, LLC ("Triumph"); and Tyson Foods, Inc., Tyson Fresh Meats, Inc. and Tyson Prepared Foods, Inc. (together and separately, "Tyson").
- [5] A procedural chronology and current litigation plan included in the respondent's written submissions is substantively reproduced as Appendix 'A' to these reasons.
- [6] Chief Judge Tunheim of the Minnesota Court heard the certification motion and the defendants' application to exclude the expert testimony of three of the plaintiffs' experts (one expert per plaintiff class). On March 29, 2023, Chief Judge Tunheim released a comprehensive "Memorandum Opinion and Order Granting Class Plaintiffs' Motions for

Class Certification and Denying Defendants' Motions to Exclude Expert Testimony". In that Memorandum, Chief Judge Tunheim refers to only three categories of class plaintiffs who purchased, either directly or indirectly, pork products from the defendants: the DPPs, the Consumer IIPs and the Commercial IIPs.

- [7] Included in the first affidavit of Ms. Scarlett found in the petition record at Tab 3, Ex. C, pp. 63-65; 80-81.
- [8] SFD is alleged to be Smithfield, one of the named defendants in the Minnesota Action.
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Prepared on 27 October 2026 · Esheria