

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Civil Action
 : No. 99-2496 (GK)
 PHILIP MORRIS INCORPORATED, :
 et al., :
 :
 Defendants. :

MEMORANDUM OPINION

I. Introduction

Plaintiff, the United States of America ("the Government"), has brought suit against a number of companies and organizations involved in the tobacco industry. All Defendants concede personal jurisdiction except B.A.T. Industries p.l.c. ("BAT Ind."), which has moved to dismiss the Complaint for lack of jurisdiction. BAT Ind. owns two other Defendants, Brown & Williamson Tobacco Corporation ("Brown & Williamson") and British-American Tobacco (Investments) Limited ("BATCO"), neither of which contests jurisdiction.

II. Factual Allegations

The Government's Complaint alleges that BAT Ind. participated in the "association-in-fact enterprise" through which Defendants controlled tobacco research and the publication of research results, denied the harmful effects and addictiveness of cigarettes, and

marketed cigarettes to children. BAT Ind. offers evidence that it was not a member of the alleged enterprise.

Attached to BAT Ind.'s Motion to Dismiss is an affidavit by Philip M. Cook, BAT Ind.'s Company Secretary. His affidavit refutes some of the Complaint's allegations based on his personal knowledge. Numerous exhibits are attached. With its Opposition, the Government made a 58-page Proffer of Publicly Available Evidence¹ ("Prof."), with exceedingly voluminous exhibits, attached to an affidavit by DOJ attorney Sharon Eubanks² attesting that all the evidence offered is publicly available. BAT Ind. filed a 35-page Response to the Proffer disputing the accuracy of much of the Proffer's content, and attached a Reply Affidavit of Philip Cook. The following summary of factual allegations identifies the source of each statement.

¹ On April 13, 2000, Defendant Brown & Williamson filed "Objections To Certain Documents Relied Upon By Plaintiff In Its Proffer Of Publicly Available Evidence In Support Of Its Opposition." Brown & Williamson stated in this filing that it wished to "preserve for the record its objections to the use in this litigation of certain documents." The Government filed a response on April 27, arguing that Brown & Williamson's objections should be "overruled or disregarded." Response at 2. Brown & Williamson is not a party to the instant motion and has not asked the Court to take any action, so these two filings have no effect on the disposition of this motion.

² Where affidavits are attached to a motion to dismiss, the plaintiff may respond with its own affidavits. See Caribbean Broad. Sys. v. Cable & Wireless PLC, 148 F.3d 1080, 1090 (D.C. Cir. 1998) (holding that on a motion to dismiss, a plaintiff cannot get jurisdictional discovery where it does not respond to defendant's affidavits with its own affidavit, or at least with good faith belief in grounds for jurisdiction).

A. BAT Ind.'s Corporate Structure and History

Before 1976, BAT Ind. "was an investment company named Tobacco Securities Trust Company Limited ('TST')." Cook Aff. at 1. TST, an investment company incorporated in England in 1928, was partially owned by BATCO, while TST owned "approximately 0.21 percent of [BATCO'S] publicly held ordinary shares." Id. at 2. "No shareholder held a controlling interest in" BATCO before 1976. Id. BATCO "was the ultimate parent company of Brown & Williamson." Id. On July 23, 1976, in a "reverse takeover," "TST became the sole ordinary shareholder of [BATCO]," and "[t]he former public shareholders of ordinary shares of [BATCO] became shareholders of [BAT Ind.]." Id. TST changed its name to B.A.T. Industries Limited, then on July 8, 1981, changed it to B.A.T. Industries p.l.c. Id. "Since July 23, 1976, [BAT Ind.] has been a holding company of both Brown & Williamson and [BATCO]." Id. at 1. In 1979, BATCO went from being a parent company of Brown & Williamson to being its sister company. Id. at 2.

After the July 23, 1976, transaction and continuing through the present time, BATCO has "continued its operations and continued to retain its separate corporate existence and identity," as has BAT Ind. Id. BAT Ind., BATCO and Brown & Williamson have always "scrupulously maintained all corporate formalities." Id. at 4. BAT Ind. is an intermediate holding company of Brown & Williamson and BATCO, whose ultimate parent company is British American Tobacco p.l.c., which was

created in September 1998. Id. at 3-4.

In 1994 Brown & Williamson, not BAT Ind.³, acquired the stock of the American Tobacco Company ("ATC") from American Brands, Inc. Id. at 6.

BAT Ind. has never had more than 185 employees, all of whom are "engaged in administering the company's investment interests as a shareholder directly and indirectly of hundreds of subsidiaries, including its indirectly owned subsidiaries Brown & Williamson and [BATCO]." Id. at 4. BAT Ind. has never "had the resources to dictate or direct the day-to-day internal operations of the hundreds of subsidiaries it has had worldwide." Cook Reply Aff. at ¶18. Most of BAT Ind.'s subsidiaries are tobacco businesses, but during the 1990s it also held many subsidiaries that provided financial services. Cook Aff. at 4.

BAT Ind. states that many of the Complaint's allegations do not

³ The Government states in its Proffer that BAT Ind. "undertook judicially enforceable obligations to manage the assets of American Tobacco's cigarette manufacturing facility in Reidsville, North Carolina, and to maintain the viability of certain popular American Tobacco brands, pursuant to an agreement with the United States Federal Trade Commission." Prof. at 55. According to the Government, BAT Ind. acquired ATC, and on the same day merged ATC and B&W. Prof. at 56. Further, BAT Ind. agreed to "take such actions as are necessary to maintain the viability and marketability of [ATC's assets at its Reidsville, North Carolina plant] by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance, or impairment of any of the Reidsville Assets. . . and take such actions as are necessary to maintain the viability and marketability of the ATC Brands." Prof. at 57.

or even cannot apply to it. It has never belonged to the Tobacco Industry Research Committee ("TIRC"), the Council for Tobacco Research - U.S.A. ("CTR"), or the Tobacco Institute ("TI"). Id. at 6. BAT Ind. did not exist in 1954 and did not sign the 1954 newspaper advertisement entitled "A Frank Statement to Cigarette Smokers." Id. BAT Ind. claims that it never received any research documents from Brown & Williamson and never employed any scientists or conducted any research. Id. at 7; Cook Reply Aff. at ¶11 (denying allegations in Compl. at ¶¶ 41 and 51).

The Complaint's allegations regarding a 1962 statement made by Sir Charles Ellis cannot apply to BAT Ind., which did not exist until 1976. Cook Aff. at 7; see Compl. at p.31. Sir Charles Ellis was never an employee of BAT Ind. Cook Aff. at 7. Any scientific research performed by Battelle Laboratories was not performed for BAT Ind., which has never used, contracted with, or directed Battelle Laboratories to conduct research. Id. (denying allegations in Compl. at ¶72). The BAT Board Guidelines were not issued by the BAT Ind. Board, and probably were issued by the BATCO Board. Cook Aff. at 7 (denying allegations in Compl. App. at ¶55). Similarly, the document entitled "Assumptions and Strategies of the Smoking Issues" was not a BAT Ind. document and probably was a BATCO document. Id. at 8 (denying

allegations in Compl. App. at ¶55). A statement⁴ attributed to BAT Ind. CEO Martin Broughton which was published in a 1996 Wall Street Journal article was "made in person in London and [was] not transmitted by [BAT Ind.] to The Wall Street Journal by means of the United States mail." Cook Aff. at 8 (denying allegations in Compl. App. at ¶101).

The Government's Proffer cites no authority for its statements that BAT Ind. "assumed the primary leadership role for coordinating smoking and health policy throughout the BAT Group" and that "BAT took steps to cooperate on smoking and health issues with other defendants named in this case". Prof. at 1 and 2.

B. BAT Ind.'s Relationship With Its Subsidiaries

The Government states that BAT Ind. "has received billions of dollars in profits derived from the sale of cigarettes in the United States by defendants B&W, [BATCO], and, since the mid-1990s, American Tobacco." Prof. at 4-5.

The Government states that there was significant overlap between BAT Ind. and its cigarette-manufacturing subsidiaries. For example, in 1976 the directors of BATCO became the directors of BAT Ind. Sir Patrick Sheehy, who became BAT Ind.'s chairman in 1982, had worked for BAT companies for over thirty years. Prof. at 6. BAT Ind. responds

⁴ The statement was "[w]e haven't concealed, we do not conceal and we will never conceal. We have no internal research which proves that smoking causes lung cancer or other diseases or, indeed, that smoking is addictive." Compl. App. ¶101.

that “[a]part from the brief transition period immediately after the July 23, 1976 transaction, there has been little overlap in membership of the [BATCO] board of directors and the [BAT Ind.] board of directors. Currently, only one person sits on the board of both companies. Similarly, the overlap between the [BAT Ind.] and Brown & Williamson boards of directors has been minimal and currently no member sits on both boards.” Cook Reply Aff. at ¶20.

The Government also states that BAT Ind. created policies for all its tobacco subsidiaries on smoking issues and tobacco research. Prof. at 6-16. The Government alleges that in 1984, BAT Ind. promulgated a document entitled “Legal Considerations on Smoking & Health Policy” that required BAT Ind.’s subsidiaries to take the position “that causation has not been proved and that we do not ourselves make health claims for tobacco products.” Prof. at 18. At the time, according to the Government, BAT Ind. knew of the overwhelming scientific evidence on the health effects of smoking. Id. The Government claims that a few months later a BAT Ind. employee named Keith Richardson wrote a memo to a senior BATCO researcher emphasizing the existence of a genuine scientific controversy and suggesting the publication of a book to continue the controversy. Prof. at 19.

C. BAT Ind.’s Relationship With Non-Affiliated Defendants

In 1983, BAT Ind. Chairman Sheehy sent a letter to Philip Morris condemning an advertisement that appeared in Dutch newspapers. Sheehy

wrote:

I believe this is the first time a Tobacco Manufacturer has purchased space to promulgate the anti-smoking position. In doing so, Philip Morris not only makes a mockery of Industry co-operation on smoking and health issues, but also appears to inaugurate a free-for-all in which illegal conduct⁵ is condoned provided the commercial stakes are high enough.

Prof. at 17. In the aftermath of this conflict, "Eric Alfred Albert Bruell, in his capacity as a [BAT Ind.] director," warned that it was "essential to ensure that in future no member of the Industry does anything similar." Prof. at 17.

The Government claims that in December 1986, BAT Ind. Chairman Sheehy distributed a memorandum "to principals at tobacco companies worldwide urging their widespread circulation of a paper issued by a controversial scientist which rebutted a study attributing deaths to cigarette smoking." Prof. at 19.

III. Standard of Review

To prevail on a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing of pertinent jurisdictional facts. See Edmond v. United States Postal Serv. Gen. Counsel, 949 F.2d 415, 424 (D.C. Cir. 1991); Naartex Consulting Corp. v. Watt, 722 F.2d 779, 787 (D.C. Cir. 1983). A plaintiff makes such a showing by alleging specific acts connecting the defendant with the

⁵ There was a question as to whether Dutch law prohibited advertisements comparing brands, as Philip Morris's ad did.

forum, and not by making bare allegations of a conspiracy do not suffice. See Naartex at 787.

IV. Analysis

A. The Government's Burden of Establishing Personal Jurisdiction

The parties disagree what weight should be accorded their various factual submissions. According to the Government, in determining whether a basis for the exercise of personal jurisdiction exists, "factual discrepancies appearing in the record must be resolved in favor of the plaintiff." Crane v. New York Zoological Soc., 894 F.2d 454, 456 (D.C. Cir. 1990) (citing Reuber v. United States, 750 F.2d 1039, 1052 (D.C. Cir. 1984)). Under this view, any discrepancies between the Government's Proffer and BAT Ind.'s Response to the Proffer should be resolved in favor of the Government.

BAT Ind. argues that in determining whether the plaintiff has demonstrated that the defendant's contacts with the forum suffice to justify the exercise of personal jurisdiction, "the Court is no longer bound to treat all of plaintiff's allegations as true." Tifa, Ltd. v. Republic of Ghana, Civ. A. No. 99-1513, 1991 WL 179098, at *8 (D.D.C. Aug. 27, 1991) (citing 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1351 (1990), for the proposition that "[w]hen a court is considering a challenge to its jurisdiction over a defendant or a res, it may receive and weigh affidavits and any other relevant

matter to assist it in determining the jurisdictional facts"). Cf. Asociation de Reclamantes v. United Mexican States, 735 F.2d 1517, 1519 n.1 (D.C. Cir. 1984) (holding that on motions to dismiss for lack of subject matter jurisdiction, courts are not required to adopt plaintiffs' versions of controverted jurisdictional facts). BAT Ind. therefore concludes that its Response to the Government's Proffer, which relies on the Affidavits of people with personal knowledge of relevant jurisdictional facts such as BAT Ind.'s Company Secretary, Philip M. Cook, should trump the Government's Proffer, whose only pedigree is the Affidavit of Sharon Eubanks stating that the Proffer is based on publicly available documents. See United States v. Frank, 225 F. Supp. 573, 575 (D.D.C. 1964) (holding that hearsay affidavits are insufficient to overcome uncontradicted affidavits based on direct personal knowledge).

Whatever weight is accorded the various affidavits, the Government must only make a prima facie showing, which is merely "more than a conclusory allegation," and the Government has made many very specific factual allegations. If the Court chooses to rely on more than the affidavits and pleadings alone, e.g. to hold an evidentiary hearing, then the Government must demonstrate jurisdictional facts by a preponderance of the evidence. 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1351 (1990).

B. The Conspiracy Theory of Jurisdiction

The Government argues four alternative theories under which this Court could exercise personal jurisdiction over BAT Ind. pursuant to the District of Columbia long-arm statute, D.C. Code § 13-423(a). That subsection provides:

[a] District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's (1) transacting any business in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

Two of the Government's theories of jurisdiction rest on a "conspiracy theory of jurisdiction" that treats a co-conspirator as an "agent" for purposes of the long-arm statute. BAT Ind. argues that the conspiracy theory of jurisdiction is not available in D.C.; that the conspiracy theory is unconstitutional; and that the Government has not made the requisite prima facie showing that BAT Ind. conspired with other Defendants.

1. The Availability of Conspiracy Theory Jurisdiction Under the D.C. Long-Arm Statute

Judge Aubrey Robinson found that the conspiracy theory of jurisdiction was "not without foundation" in Mandelkorn v. Patrick, 359 F. Supp. 692, 695 (D.D.C. 1973). Judge Robinson noted that "[c]o-

conspirators have long been held to an agency relationship when overt acts are done in furtherance of the conspiracy," citing Hoffman v. Halden, 268 F.2d 280, 295-96 (9th Cir. 1959). Id.

The Government argues that the legislative history of the D.C. long-arm statute indicates that "Congress' overall intent was to provide the [D.C.] courts, to the greatest extent possible, with essentially identical long-arm jurisdiction as were then available in Maryland and Virginia." Opp'n at 21, n.11, quoting Margoles v. Johns, 483 F.2d 1212, 1215-16 (D.C. Cir. 1973). The Government notes that federal courts in Maryland interpret Maryland's long-arm statute "to allow the exercise of jurisdiction over nonresident defendants who have participated in a conspiracy that was furthered by an overt act by co-conspirators in Maryland." See Opp'n at 21, n.11. In Cawley v. Bloch, 544 F. Supp. 133, 135 (D. Md. 1982), the District Court for Maryland held that under the doctrine of "the conspiracy theory of jurisdiction," when

(1) two or more individuals conspire to do something (2) that they could reasonably expect to lead to consequences in a particular forum, if (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.

In rejecting the conspiracy theory of jurisdiction, BAT Ind.

argues that the theory is not available in the District of Columbia, meaning that this Court may not exercise personal jurisdiction over it under D.C.'s long-arm statute.

BAT Ind. argues both that the plain language of the D.C. long-arm statute does not allow for jurisdiction based on conspiracy, and that District of Columbia courts have not interpreted it to make such an allowance. See Reply at 18. The text of the statute does not mention conspiracies or co-conspirators, and as BAT Ind. notes, the "District's government has addressed the consequences of participating in a conspiracy in other statutes, and obviously knows how to provide such consequences when it so wishes." Reply at 18. Examples of D.C. statutes that explicitly address the consequences of conspiring include D.C. Code § 1-744 (prohibiting members of some types of conspiracies from holding certain positions) and § 4-121 (providing specific penalties for police in conspiracies with certain goals). See Reply at 18, n.14.

BAT Ind. asserts that the absence of any reference to conspiracies in the long-arm statute is sufficient evidence that jurisdiction based on conspiracy is unavailable, citing a number of cases prohibiting courts from looking beyond the plain language of a statute. Ironically, although Certain Defendants' Motion to Dismiss relied on FDA v. Brown & Williamson, 120 S.Ct. 1291 (2000), BAT Ind. does not even mention it. FDA held that "[i]n determining whether Congress has

specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context." Id. at 1300-1301.

BAT Ind. also argues that no District of Columbia court has interpreted the long-arm statute to allow personal jurisdiction on a conspiracy theory. See Eric T. v. National Med. Enterprises, Inc., 700 A.2d 749, 756 n.12 (D.C. 1997) (finding that "there is a substantial question, which we do not attempt to resolve, as to whether the Superior Court has personal jurisdiction" where it would rest "solely or primarily on the allegation that these defendants participated in a conspiracy of which the District was the hub").

The fact that BAT Ind. denies that it participated in a conspiracy significantly weakens the Government's case for conspiracy theory jurisdiction. BAT Ind. correctly notes that Judge Aubrey Robinson explicitly based his decision to exercise conspiracy jurisdiction in Mandelkorn, on which the Government relies, "on the fact that defendant had not challenged the existence of either a conspiracy or an overt act in furtherance thereof." Reply at 19. Mandelkorn qualified its exercise of jurisdiction with the statement that "the situation would be quite different" if the defendants had disputed the allegations that they were members of a conspiracy. 359 F. Supp. at 696-97. Similarly, in Dooley v. United Tech. Group, 786 F. Supp. 65 (D.D.C. 1992), Judge

June L. Green relied on the defendant's failure to challenge the conspiracy allegations against it in deciding to exercise personal jurisdiction under the conspiracy theory. Id. at 79, n.12.

BAT Ind. does not mention that courts that have refused to exercise personal jurisdiction under D.C.'s long-arm statute under a conspiracy theory have done so not because they found that the conspiracy theory would not support jurisdiction, but because of specific flaws in the cases before them. In Junquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997), the Court of Appeals refused to exercise personal jurisdiction over the defendants because of the insufficiency of the plaintiffs' allegations that the defendants conspired with parties who committed overt acts in D.C. that subjected them to jurisdiction. "[B]ald speculation' or a 'conclusionary statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory." Id. at 1031 (citing Naartex, 722 F.2d at 787 (D.C. Cir. 1983)).

In Edmond v. United States Postal Serv. Gen. Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991), the Court of Appeals remanded for jurisdictional discovery because the plaintiff had "specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries." The Court of Appeals in Edmond stated

explicitly that “[w]e do not at this stage attempt to address the limits on the use of conspiracy theory to establish personal jurisdiction.” Id. See also Reuber v. United States, 750 F.2d 1039, 1050 & n.14 (D.C. Cir. 1985) (affirming dismissal for lack of personal jurisdiction because of “insufficient evidence” of conspiracy and failure to show an overt act); Dorman v. Thornburgh, 740 F. Supp. 875, 877-78 (D.D.C. 1990) (finding no jurisdiction under D.C.’s long-arm statute due to insufficient allegations that the defendant was a member of a conspiracy and that “an overt act in furtherance of the conspiracy was committed in [D.C.] by any member of the conspiracy and the resulting injury to the plaintiff occurred in [D.C.]”).

Outside of the District of Columbia, at least two courts have noted that “the conspiracy theory of jurisdiction is being rejected by a growing number of courts.” Conwed Corp. v. R.J. Reynolds Tobacco Co., No. 98-1412 (PAM/JGL), slip op. at 10-11 (D. Minn. Apr. 1, 1999), Frawley Aff. Ex. B. See also Jones v. The American Tobacco Co., No. 5:97CV0593, slip op. at 19 (N.D. Ohio July 9, 1997) (Moss Aff., Ex. QQ).

In sum, there is no case explicitly prohibiting the exercise of jurisdiction on a conspiracy theory under the D.C. long-arm statute, but neither is there a case requiring it.

2. Conspiracy Theory Jurisdiction and Due Process

A court may exercise personal jurisdiction over a nonresident

defendant consistent with the constitutional requirement of due process where such jurisdiction "does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). To determine whether the exercise of personal jurisdiction over nonresident BAT Ind. under the conspiracy theory satisfies International Shoe's "traditional notions," this Court must consider two issues: first, whether BAT Ind. has "minimum contacts" with D.C., and second, whether exercising jurisdiction over BAT Ind. would be reasonable. See Opp'n at 39. These two factors are inversely related, such that "the stronger the showing as to one, the weaker the showing necessary to satisfy the other." Simon v. Philip Morris, Inc., 86 F. Supp.2d 95, 126 (E.D.N.Y. 2000) (citing Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)).

A defendant has minimum contacts with a jurisdiction where he has "purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985) (internal quotation marks omitted). Because he purposefully directed his activities towards the forum, the defendant can expect that he may be subject to jurisdiction in that forum. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Once minimum contacts have been established, courts consider

whether the exercise of personal jurisdiction over the nonresident defendant would be reasonable. Reasonableness depends on “the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief.” Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 113 (1987). Courts must also consider “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States⁶ in furthering fundamental substantive social policies.” World-Wide Volkswagen, 444 U.S. at 292. Furthermore, “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” Asahi, 480 U.S. at 114.

BAT Ind. argues both that the exercise of personal jurisdiction under the conspiracy theory is always unconstitutional and that even if the conspiracy theory sometimes is constitutional, applying it here would violate BAT Ind.’s right to due process. See Reply at 21.

First, BAT Ind. argues that conspiracy-based jurisdiction “confuses concepts of liability and jurisdiction,” and thereby violates defendants’ right to due process. See Sher v. Johnson, 911 F.2d 1357,

⁶ The Supreme Court in Asahi broadened this consideration from the “several States” to “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction” in the forum. Id. at 115.

1365 (9th Cir. 1990) (holding that jurisdiction must be established as to each individual defendant because “[l]iability and jurisdiction are independent. Liability depends on the relationship between the plaintiffs and the defendants; jurisdiction depends only upon each defendant’s relationship with the forum”). Conspiracy-based jurisdiction links jurisdiction and liability, making the finding of jurisdiction dependent on the final decision of the case’s merits because jurisdiction can be exercised only after a certain showing is made that a defendant is guilty of conspiring. See Ann Althouse, The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis, 52 Fordham L. Rev. 234, 247 (1983); Stuart M. Riback, Note, The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction, 84 Colum. L. Rev. 506, 527 (1984) (concluding that conspiracy-based jurisdiction leads to an “intermingling of jurisdictional with substantive law” that “can, in a number of distinct ways, lead to a confused and often unconstitutional result”).

Second, BAT Ind. argues that even if personal jurisdiction under the conspiracy theory is both constitutional and available under the D.C. long-arm statute, it cannot be exercised here because the Government’s allegations that it conspired with other Defendants are insufficient and therefore minimum contacts have not been established. See Reply at 23. The strength of this argument depends on the weight the Court places on the Government’s Proffer and on Defendant’s

Affidavits and Response to the Proffer.

BAT Ind. claims that the Government's factual allegations primarily address the relationship between BAT Ind. and its subsidiaries, and that a parent company by law cannot conspire with its subsidiaries. See Reply at 25. Defendant cites Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984), which holds that under the Sherman Act, a wholly-owned subsidiary and its parent company cannot be found to have conspired. BAT Ind. also cites Okasami v. Psychiatric Inst. of Washington, 959 F.2d 1062, 1065-67 (D.C. Cir. 1992), which held that parent companies and their subsidiaries cannot conspire as a matter of law under antitrust acts and common law civil conspiracy.

Cases decided under RICO, however, tend to hold that a parent can be found to have engaged in a pattern of racketeering with its wholly-owned subsidiaries. See Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384, 402-403 and n.22 (7th Cir. 1984), and Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165-1167 (3rd Cir. 1989), rev'd on other grounds, Beck v. Prupis, 120 S.Ct. 1608 (U.S. Fla. April 26, 2000).

The opposite conclusion was reached in Fogie v. Thorn Americas, 190 F.3d 889, 897-98 and n.4 (8th Cir. 1999), which held that a parent company and its wholly-owned subsidiaries could not be found to have conspired under RICO because they could never be sufficiently distinct

from one another. Fogie, however, is a double-edged sword for BAT Ind., which continually insists on its distinctiveness from its subsidiaries. The Government may be correct that "should [BAT Ind.] now contend otherwise and admit that it and its subsidiaries lack 'distinctiveness or independence,' it must submit to jurisdiction under an 'alter-ego' theory." Opp'n at 28, n.15. Nevertheless, the Government does not make the argument for alter-ego jurisdiction here.

BAT Ind. points out a problem with a finding of conspiracy-based jurisdiction here: the government "seeks an injunction under RICO to prevent defendants from associating with one another. It is difficult to imagine that a court would enjoin a parent from interacting with a wholly-owned subsidiary that it has a fiduciary duty to manage." Reply at 29, n.22. The Court could, however, avoid this "absurd consequence[]" by tailoring the relief it granted.

BAT Ind. argues that the Government's RICO allegations against it are insufficient not only because they focus on its relationship with its subsidiaries, but also because they do not allege a pattern of racketeering activity. To state a RICO claim, the Government must allege that BAT Ind. committed "at least two acts of racketeering activity" within ten years of each other. 18 U.S.C. § 1961(5). According to BAT Ind., the Complaint alleges only four predicate acts against it, two of which actually concern BATCO and not BAT Ind., and

two of which do not describe RICO predicate acts and occurred more than ten years apart.

First, the Complaint alleges that on April 14, 1982, BAT Ind. delivered to Brown & Williamson through the U.S. mails a letter referring to "BAT Board Guidelines" and "Assumptions and Strategies of the Smoking Issues." See Compl. App. at ¶55. Philip Cook attests that these documents were issued by the BATCO Board, not the BAT Ind. Board. See Cook Aff. at ¶31; Response to Proffer at 21-22.

Second, the Complaint alleges that on October 26, 1983, BAT Ind. employee Eric Alfred Albert Bruell agreed in a phone conversation with a Philip Morris vice president "to continue the Cigarette Companies' internal agreement not to compete with one another on issues relating to smoking and health." See Compl. App. at ¶108. The Cook Affidavit states that Bruell was a BATCO employee but never a BAT Ind. employee, although he was a member of the BAT Ind. Board. Cook Aff. at ¶33. If Bruell was a board member of BAT Ind. at the time of the phone call and made the call in that capacity, it may not matter if the Complaint incorrectly identified him as an "employee."

Third, the Complaint alleges that BAT Ind. "transmitted in interstate commerce by means of the mails" the 1996 comments of BAT Ind. CEO Martin Broughton that BAT Ind. didn't conceal and had no internal research proving smoking causes disease or is addictive. See Compl. App. at ¶101. The Cook Affidavit states that BAT Ind. did not

transmit Broughton's "alleged statements" through the United States mails, and therefore that the allegation does not make out a claim of mail fraud. See Reply at 28, n.21.

Fourth, the Complaint alleges that on September 9, 1983, BAT Ind. sent through the United States mails a letter from Chairman Patrick Sheehy to Philip Morris, stating that Philip Morris's advertisement in Dutch newspapers "makes a mockery of Industry co-operation on smoking and health issues." Compl. App. at ¶59. BAT Ind. argues that Sheehy's letter "relates to an overseas dispute" and "contains no evidence of a conspiracy with the U.S. tobacco industry to 'deceive the American public about the health effects of smoking' or 'perpetrat[e] an "open controversy.'" " Reply at 31. Although the letter does not relate to the American public, as the advertisement at issue was published only in Holland, the letter does mention "Industry co-operation" and objects to the use of "the health issue to gain competitive advantage." Prof. at 16; see also Prof. Ex. 57. In short, BAT Ind. acknowledges the existence of "co-operation" in the industry and accuses Philip Morris of raising the health issue and thereby failing to perpetuate the "open controversy." BAT Ind.'s argument that this letter "contains no evidence of a conspiracy" is to no avail.

More persuasively, BAT Ind. points out that the letter to Philip Morris was dated September 9, 1983, while the statements printed in The Wall Street Journal were allegedly made by Broughton in 1996. These

two events are more than ten years apart and therefore cannot by themselves serve to show a pattern of racketeering activity under 18 U.S.C. § 1961(5), so that if the other two allegations do concern BATCO and not BAT Ind., the Complaint does not allege a pattern of racketeering activity by BAT Ind.

BAT Ind. was not a member of TIRC, CTR, or TI, and did not sign the 1954 "Frank Statement." As BAT Ind. points out, the Government's Proffer describes conduct that is similar to that of the other Defendants, but similar conduct is not the same as orchestrated conduct. See Reply at 30. These arguments may seem out of place in a motion to dismiss for lack of personal jurisdiction, but as noted above in the discussion of the conflation of liability and jurisdiction, the conspiracy theory of jurisdiction on which the Government relies inherently depends on the strength of the conspiracy allegations. There is no case law supporting the exercise of conspiracy-based jurisdiction where the plaintiff has not made a prima facie showing that the defendant participated in the conspiracy, so BAT Ind. is justified in challenging the adequacy of the Government's allegations.⁷

The foregoing addresses the question of minimum contacts. BAT Ind. contends that the exercise of personal jurisdiction over it would

⁷ BAT Ind. cites a number of cases holding that parallel conduct does not support an inference of co-operation in the context of antitrust or civil conspiracy law. The Government cites no authority finding that in the RICO context, parallel conduct is more persuasive.

also violate due process because it would be unreasonable. It argues that the burden on it as a foreign firm without any office or employees in this forum is prohibitive. See Reply at 42. The Government contends that defending itself in this forum does not inconvenience BAT Ind., which is "a billion dollar international enterprise." Simon, 86 F. Supp.2d at 134. The Government argues that the District of Columbia has an interest in its resident's ability to obtain convenient relief in one suit, and that the federal interest would not be served by forcing the Government to pay for multiple suits. The Government also asserts that no other country's policies are implicated by the exercise of jurisdiction here. See Opp'n at 47.

C. The Government's Four Theories of Jurisdiction

The Government argues that this Court may choose to exercise personal jurisdiction over BAT Ind. under the D.C. long-arm statute in any of the following four ways.

First, under D.C. Code § 13-423(a)(1), the Government argues that BAT Ind.'s co-conspirators transacted business in D.C. and committed numerous overt acts in furtherance of the conspiracy in D.C. This argument relies on the conspiracy theory of jurisdiction. There is little doubt that the Complaint alleges that some Defendants transacted business and committed overt acts in D.C. that furthered the conspiracy, such as the marketing and sale of cigarettes here. See Opp'n at 30-31. If this Court accepts the conspiracy theory of

jurisdiction and finds that the Government has made a prima facie showing that BAT Ind. conspired with other Defendants, the Court may exercise personal jurisdiction under this theory.

Second, again under D.C. Code § 13-423(a)(1), the Government argues that BAT Ind. acquired and maintained the viability of various brands formerly owned by the American Tobacco Company, and transacted business in D.C. because these brands were marketed and sold in D.C. The strength of this theory turns on the weight the Court accords the various factual submissions. The Government alleges that BAT Ind. acquired ATC and represented to the Federal Trade Commission that it was undertaking legal obligations to maintain the viability of its brands, while BAT Ind. maintains that it was Brown & Williamson that acquired ATC and undertook legal obligations regarding its assets. See Opp'n at 32, n.18.

BAT Ind. also alleges that it never manufactured or marketed any cigarettes, including those of ATC. The Government argues that even so, BAT Ind.'s alleged legal obligation to maintain the viability of ATC's brands constitutes transacting business. The Government maintains that § 13-423(a)(1) "embraces those contractual activities of a nonresident defendant which cause a consequence here." Mouzavires v. Baxter, 434 A.2d 988, 992 (D.C. 1981) (en banc). The Government argues that maintaining the viability of ATC brands means ensuring that these brands would be produced and distributed throughout the United States,

including D.C., and thereby would constitute transacting business in D.C.

Third, under D.C. Code § 13-423(a)(3), the Government argues that BAT Ind.'s co-conspirators committed tortious acts in D.C. in furtherance of the conspiracy that caused tortious injury in D.C. Again, the Complaint specifically alleges tortious acts and resulting injuries throughout the United States, although it doesn't specifically state that they occurred in D.C. Like the Government's first theory, the viability of this theory depends on the Court's view of the conspiracy theory of jurisdiction and the parties' factual allegations as to BAT Ind.'s participation in the alleged conspiracy.

Fourth, under D.C. Code § 13-423(a)(4), the Government argues that BAT Ind. committed tortious acts outside of D.C. which caused tortious injury in D.C., and that BAT Ind. derives substantial revenue from cigarettes marketed and sold in D.C. The tortious acts of which the Government accuses BAT Ind. include publicly denying that nicotine is addictive though it knew the contrary to be true; controlling and directing research on cigarettes in order to perpetuate an "open controversy"; and suppressing the development of a less hazardous cigarette in order to minimize Brown & Williamson's legal liability in the United States. See Opp'n at 36. The Government contends that these acts resulted in tortious injury to some residents of the District of Columbia.

BAT Ind. responds that the Government does not pick out any specific conduct that had a specific effect in the District of Columbia. It argues that some of the conduct the Government considers tortious, such as the issuance of guidelines to subsidiaries, is irrelevant because it was not expressly targeted at the District of Columbia. See Calder v. Jones, 465 U.S. 783, 788-789 (1984) (personal jurisdiction over a non-resident defendant is proper where the focal point of the defendant's conduct and the resulting injury was in the forum). Calder v. Jones has been interpreted narrowly, so that the mere foreseeability of injury in another state is insufficient to establish minimum contacts. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). BAT Ind. also argues that any revenue its subsidiaries derived from the District of Columbia cannot be attributed to it because their decisions did not need to be approved by it. See Translation Sys., Inc. v. Applied Tech. Ventures, 559 F. Supp. 566, 567-68 (D. Md. 1983) (holding that mere fact of ownership of subsidiary does not suffice to attribute revenue to parent where parent does not subject subsidiary's decisions to its approval).

D. If the Motion to Dismiss Is Not Denied, Should This Court Grant Jurisdictional Discovery?

The Government asks for jurisdictional discovery in the event that the Court does not find the exercise of personal jurisdiction proper based on the papers before it. "[I]t is an abuse of discretion to deny

jurisdictional discovery where the plaintiff has specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries." Edmond, 949 F.2d at 425.

BAT Ind. finds the Government's request "simply astonishing" because BAT Ind. has voluntarily provided the Government with jurisdictional documents and transcripts of jurisdictional depositions. See Reply at 43. BAT Ind. claims that the Government did not request any further jurisdictional discovery, serve any jurisdictional discovery requests, or include jurisdictional discovery provisions in Case Management Order #6. It is indeed clear from the volume of the exhibits appended to the Government's Proffer that it has access to a great deal of jurisdictional material regarding BAT Ind. Therefore, BAT Ind. casts the Government's request as one for additional discovery, and concludes that this Court is under no obligation to grant it. Where a plaintiff has already had "ample opportunity" for jurisdictional discovery, it is not an abuse of discretion to deny further discovery. See Naartex, 722 F.2d at 788. BAT Ind. has the better of this argument -- it is hard to believe that the Government could dig up anything more than what it has already filed in this Court. See Caribbean Broad. Sys. v. Cable & Wireless PLC, 148 F.3d 1080, 1090 (D.C. Cir. 1998) (holding that "in order to get jurisdictional discovery a plaintiff must have at least a good faith

belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant").

V. Conclusion

The Government has made a prima facie showing that BAT Ind. conspired with its subsidiaries, if that is legally possible (which it appears to be under RICO). It does not appear to have made a prima facie showing that BAT Ind. conspired with other Defendants, which, if true, has two consequences: first, any conspiracy-theory jurisdiction could be based only on the contacts of BAT Ind., Brown & Williamson, and BATCO with this forum; second, if a parent cannot be found to have engaged in a pattern of racketeering activity with its wholly-owned subsidiary under RICO, the Government has not stated a claim against BAT Ind. under RICO.

The conspiracy theory of jurisdiction is a viable doctrine in the District of Columbia. For the most part, opposition to it in this forum has been academic or has been in dicta. It would be reasonable to exercise personal jurisdiction over BAT Ind. under the conspiracy theory. Whether the Government has made the necessary prima facie showing of minimum contacts, however, is discussed in the previous paragraph.

The Government has made a prima facie showing that BAT Ind. transacted business in D.C. through its relationship with ATC, but just barely. It will not be able to show a preponderance of the evidence

should this claim proceed beyond this motion. Furthermore, the exercise of personal jurisdiction over BAT Ind. on this basis would not comport with due process because BAT Ind. did not purposefully direct its activities to this particular forum. The same is true of the Government's argument that BAT Ind. committed tortious acts outside of the forum that caused injuries inside it.

The Government should not be permitted any further jurisdictional discovery.

Gladys Kessler
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. :
 :
 :
 :
PHILIP MORRIS INCORPORATED, :
 et al., :
 :
 :
 Defendants. :

O R D E R

This matter is before the Court on Defendant British American Tobacco Industries p.l.c. to dismiss the Complaint for lack of personal jurisdiction. For the reasons discussed in the accompanying Memorandum Opinion, it is this _____ day of September 2000 hereby

ORDERED, that the Motion To Dismiss of Defendant British American Tobacco Industries p.l.c. is **granted**.

Gladys Kessler
U.S. District Judge

Copies to:

Sharon Eubanks
Department of Justice
Civil Division, Torts Branch
P.O. Box 340
Ben Franklin Station
Washington, DC 20044

Timothy M. Broas
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Fred W. Reinke
Clifford, Chance, Rogers & Wells
607 14th Street, NW
Washington, DC 20005

Michael A. Schlanger
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East Tower
Washington, D.C. 20005