IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FOOD LION, LLC, and MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.,	)	
Plaintiffs,	)	
v.	)	1:20-CV-442
DAIRY FARMERS OF AMERICA, INC.,	)	
Defendant.	)	

ORDER

This matter is before the Court upon Plaintiffs Food Lion, LLC, and Maryland and Virginia Milk Producers Cooperative Association, Inc.'s ("Food Lion and MDVA") first motion to compel and request for expedited consideration. (Docket Entry 46.) For the reasons stated herein, the Court grants in part and denies in part Plaintiffs' motion to compel and orders Defendant Dairy Farmers of America, Inc. ("DFA") to respond to Plaintiffs' discovery requests as set forth below.

I. BACKGROUND

Food Lion and MDVA filed this action against DFA seeking injunctive relief pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. (*See generally* Compl., Docket Entry 1.) Plaintiff Food Lion is a North Carolina limited liability company that operates approximately 600 supermarkets in the Carolinas, making it one of the largest retail purchasers of fluid milk in the region. (Compl. ¶ 1.) Plaintiff MDVA is a dairy cooperative with approximately 950 member farms throughout the Mid-Atlantic and

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Southeast. (*Id.* ¶ 2.) Defendant DFA is the largest dairy cooperative in the United States, and as of May 2020, the largest milk producer and largest milk processor in the United States. (*Id.* ¶¶ 3, 95.) Food Lion and MDVA allege that DFA has engaged in anti-competitive conduct that will enable the monopolization of the dairy supply chain. (*See id.* ¶¶ 135-37.) More specifically, Plaintiffs contend that DFA consolidated the dairy industry through the enforcement of a twenty-year non-compete deal (the "Side Note") made in 2001 with the newly merged Dean Foods Company and subsequent supply agreements. (*Id.* ¶¶ 39-49.) Plaintiffs allege that the most recent manifestation of DFA's market consolidation is its May 1, 2020 acquisition of forty-four milk processing plants from Dean's bankruptcy estate ("Asset Sale"), including three plants in the Carolinas. (*Id.* ¶¶ 86-96.) Food Lion and MDVA seek an injunction requiring DFA to divest at least one of these plants. (*Id.* ¶ 173.)

Food Lion and MDVA filed their Complaint on May 19, 2020. (Docket Entry 1.) They then filed a motion to expedite discovery, which the Court granted. (Docket Entries 20, 28.) Food Lion and MDVA filed Plaintiffs' First Set of Requests for Production on June 17, 2020. (Ex. 1, Docket Entry 56-1.) Plaintiffs subsequently filed a motion to compel the discovery of certain documents responsive to Requests Nos. 1 and 3 of their requests for production. (Docket Entry 46.) The matter came before the Court for a telephone conference on September 21, 2020. (Minute Entry dated 9/18/2020.)

II. DISCUSSION

A. Legal Standard

Federal Rule 26 provides general rules regarding the scope of discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case,

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> considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). District courts generally have broad discretion in managing discovery, including whether to grant or deny a motion to compel. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995); *Erdmann v. Preferred Research, Inc. of Georgia*, 852 F.2d 788, 792 (4th Cir. 1988). "[T]he party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion." *Carter Hughes v. Research Triangle Inst.*, No. 1:11CV546, 2014 WL 4384078, at *2 (M.D.N.C. Sept. 3, 2014) (unpublished) (citation omitted).

B. Food Lion and MDVA's Motion to Compel

Plaintiffs seek document productions relating to two discovery requests served on DFA. Specifically, Food Lion and MDVA seek responses to Plaintiffs' First Requests for Production Nos. 1 and 3. (Docket Entry 46 at 1.) Request No. 1 seeks "[a]ll documents previously produced by DFA or Dean to the U.S. Department of Justice and/or state Attorneys General in connection with their investigation(s) and review(s) of the Asset Sale." (Ex. 1, Docket Entry 56-1 at 8.) Request No. 3 seeks "[a]ll communications between DFA on the one hand and any third party on the other, including Dean, regarding potential antitrust or competition issues associated with the Asset Sale." (*Id.*) Both of these requests exclude documents relating exclusively to milk processing plants outside of the Carolinas. (*Id.*)

DFA initially raised multiple objections to these requests but did produce 2,500 responsive documents from the DOJ investigation. (Ex. 2, Docket Entry 56-2 at 8-11;

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McDonald Decl. ¶ 6, Docket Entry 56 at 2.) However, from the DOJ productions, DFA withheld settlement communications between DFA and the Department of Justice ("DOJ") and thirty-two documents from *In re Southeastern Milk Antitrust Litigation*, 739 F.3d 262 (6th Cir. 2014) ("*Southeastern Milk*"). (McDonald Decl. ¶ 7.) It is these two sets of documents that Plaintiffs now seek through their motion to compel. (Docket Entry 47 at 4, 7.)

C. Plaintiffs are not entitled to the settlement communications.

DFA contends that Federal Rule of Evidence 408 creates an outright privilege or otherwise bars Plaintiffs from discovering documents relating to the settlement negotiations between DFA, the DOJ and state Attorney Generals following the DOJ's antitrust review of the Asset Sale. (Docket Entry 55 at 8.) In support of this argument, DFA relies on *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003). In *Goodyear*, the Sixth Circuit Court of Appeals recognized a settlement privilege in the context of discovery based in part on the public policy that underlies Rule 408. 332 F.3d at 980-81 ("The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist."). In the alternative, DFA urges this Court to adopt a heightened relevancy standard for discovery related to confidential settlement agreements. (Docket Entry 55 at 13.) *See also Reist v. Source Interlink Co.'s*, 2010 WL 4940096, at *3 (M.D. Fla. Nov. 29, 2010) (unpublished).

District courts in the Fourth Circuit have consistently declined to recognize a settlement privilege, based on the policy underlying Rule 408 or otherwise, in discovery disputes. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, No. CIV. CCB-03-3408, 2012 WL 628493, at *3 (D. Md. Feb. 24, 2012) (unpublished) ("[T]he Fourth Circuit, like the

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majority of courts, has declined to recognize a federal settlement privilege, and courts in this district have declined to apply a settlement privilege in discovery disputes."); *Polston v. Eli Lilly & Co.*, No. 3:08-3639, 2010 WL 2926159, at *1 (D.S.C. July 23, 2010) (unpublished) ("The Fourth Circuit has never recognized a settlement privilege.").

This Court has also declined to apply Rule 408 to discovery requests, holding instead that relevance, not admissibility, is the proper inquiry. *Volumetrics Med. Imaging, LLC v. Toshiba Am. Med. Sys., Inc.*, No. 1:05CV955, 2011 WL 2470460, at *11 n. 7 (M.D.N.C. June 20, 2011) (unpublished) ("[Federal] Rule [of Evidence] 408 does not warrant protecting settlement negotiations from discovery. On its face, [Federal Rule of Evidence 408] applies to the admissibility of evidence at trial, not to whether evidence is discoverable.") (*citing Phoenix Sol.'s Inc. v. Wells Fargo Bank, N.A.,* 254 F.R.D. 568, 584 (N.D. Cal. 2008)); *Kaplan Co.'s v. Peoplesoft USA, Inc.*, No. 1:03CV1014, 2006 WL 8447846, at *1 (M.D.N.C. Mar. 15, 2006) (unpublished) ("Plaintiff relies heavily on Fed. R. Evid. 408 to support its contention that settlement agreements should remain confidential. That rule, however, does not protect documents from discovery, but only determines whether such matters are admissible into evidence.").

Accordingly, when considering the admissibility of the settlement negotiations at issue here, the correct initial inquiry considers their relevance. The question remains, however, whether policy favoring the confidentiality of negotiations nonetheless warrants a heightened showing of relevance for disclosure. Several courts in the Fourth Circuit have expressly declined to impose "any special form of burden" on parties seeking disclosure of final settlement *agreements*. *See Volumetrics*, 2011 WL 2470460 at *4 n.5; *Polston*, 2010 WL 2926159, at *1. *But see Kaplan*, 2006 WL 8447846, at *2 (closely scrutinizing discovery requests for

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