

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALICE H. ALLEN and LAURANCE E. ALLEN,
d/b/a Al-lens Farm, VINCE NEVILLE, GARRET
SITTS, RALPH SITTS, JONATHAN HARR,
CLAUDIA HARR, and DONNA HALL, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

**OMNIBUS REPLY
MEMORANDUM
OF LAW**

- vs -

DAIRY FARMERS OF AMERICA, INC.,
DAIRY MARKETING SERVICES, LLC, and
DEAN FOODS COMPANY,

Case No. 09-cv-0230

Defendants.

INTRODUCTION

Non-parties Dwight R. Houser, Stanley A. Korona, Cabhi Farms, Curtin Dairy LLC, Dairyland LLC, Hathorn Farms LLC, Heritage Hill Farm, Rocky Crest Farm LLC, and Wood Farms LLC (collectively, the “Intervening Farms”) submit this Omnibus Reply Memorandum of Law in further support of their joint motion to intervene for the limited purpose of objecting to the preliminary approval of the proposed settlement agreed to by Plaintiffs and Defendant Dean Foods Company (“Dean”), and in reply to the oppositions filed by Plaintiffs and Dean.

ARGUMENT

The Intervening Farms should be allowed to intervene because they have a legitimate and protectable interest that will be damaged by the proposed settlement agreement (the “Settlement Agreement”): the viability of the multi-generation dairy farms they operate.¹ Section 9.2 of the

¹ See generally Affidavits/Declarations of the Intervening Farms attached to the underlying motion papers as Exhibits 1-9 (Dkt. #190-2 to 190-10). Throughout the remainder of (Footnote continued on next page)

Settlement Agreement (hereinafter, “Section 9.2” or “§ 9.2”) allows Dean to offer to buy up to 60 million pounds of milk per month from dairy farms that are not affiliated with Defendants Dairy Farmers of America, Inc. (“DFA”) or Dairy Marketing Services, LLC (“DMS”) at a price that “in [Dean’s] sole discretion, reflects a competitive market price.”² Each of the Intervening Farms has independently reviewed the Settlement Agreement and concluded that § 9.2 will lower its revenues³ due to the fact that Dean’s unilateral determination of a “competitive market price” for up to 60 million pounds of milk per month will disrupt the milk market, resulting in lower prices for raw Grade A milk and increased costs for farms and cooperatives that market through DFA or DMS.⁴ The disruption of the milk market caused by § 9.2 will endanger the viability of the Intervening Farms and the cooperatives they belong to. For that reason, the Intervening Farms have a right to object to the preliminary approval of the Settlement Agreement.

Plaintiffs and Dean argue that the Court should set aside the concerns of the Intervening Farms, ignore the damaging effect the Settlement Agreement will have on the Intervening Farms, and grant preliminary approval of the Settlement Agreement. The oppositions make a series of unfounded and contradictory arguments to support their position. They argue that, despite the more than 284 years of collective experience that the Intervening Farms have in the dairy industry,⁵ they should not be heard by the Court because they do not understand the Settlement

(Footnote continued from previous page)

this reply, citations to the above-referenced Affidavits/Declarations will be made directly to their respective exhibit numbers as submitted in support of the underlying motion.

² See Settlement Agreement § 9.2 (Dkt. #160-2).

³ See Exhibit 1 ¶ 13, Exhibit 2 ¶¶ 11-12, Exhibit 3 ¶¶ 13-15, Exhibit 4 ¶ 12, Exhibit 5 ¶¶ 14-15, Exhibit 6 ¶ 14, Exhibit 7 ¶ 17, Exhibit 8 ¶ 20, and Exhibit 9 ¶ 13.

⁴ Moving Memo. at 8-9 (Dkt. 190-1).

⁵ Exhibit 1 ¶ 1, Exhibit 2 ¶ 2, Exhibit 3 ¶ 3, Exhibit 4 ¶ 3, Exhibit 5 ¶ 3, Exhibit 6 ¶ 3, Exhibit 7 ¶ 3, Exhibit 8 ¶ 3, and Exhibit 9 ¶ 3.

Agreement or its potential impact on their farms.⁶ However, as will be shown below, the Intervening Farms understand the clear terms of the Settlement Agreement and the impact that it will have on their respective farms. The oppositions also contradict themselves by arguing at various times that the Intervening Farms are represented by the Plaintiffs, and then arguing, when it is convenient to them, that the Intervening Farms are represented by two of the defendants, DFA and DMS. Plaintiffs and Dean can't have it both ways, and the attempt to argue that the Intervening Farms are represented by both sides of the caption highlights the fact that the Intervening Farms have unique interests that are not adequately represented by the parties and that they should be allowed to intervene and object to the Settlement Agreement.

I. THE INTERVENING FARMS UNDERSTAND THE LANGUAGE OF § 9.2 AND COMPREHEND ITS POTENTIAL FOR HARM

Dean argues that the objections of the Intervening Farms are unfounded because they do not understand § 9.2. Specifically, Dean argues that the Intervening Farms mistakenly believe that: (1) Section 9.2 “requires” Dean to purchase up to 60 million pounds of milk per month from non-DFA/DMS farms, when the actual language of § 9.2 states that Dean must only “offer” to purchase up to 60 million pounds of milk per month from non-DFA/DMS farms; and (2) Section 9.2 gives Dean the power to “dictate pricing,” when the actual language of § 9.2 states that Dean can “offer to purchase at a price that, in [its] sole discretion, reflects a competitive market price.”⁷ Dean’s argument that the Intervening Farms do not understand § 9.2 should be disregarded because it unfairly characterizes the affidavits, declarations, and moving papers submitted by the Intervening Farms.

⁶ Dean Opp. Memo. at 2-3 (Dkt. #216); Pltfs. Opp. Memo. at 13-15 (Dkt. #228).

⁷ Dean Opp. Memo. at 2-3;

Section 9.2 speaks for itself, and requires Dean, within six months of the effective date of the Settlement Agreement, to offer to purchase up to 60 million pounds per month of non-DFA/DMS milk “at a price that, in [Dean’s] sole discretion, reflects a competitive market price.”⁸ The Intervening Farms have never argued that § 9.2 will force Dean into buying 60 million pounds per month of non-DFA/DMS milk, or that Dean will have the authority to force the sellers of that milk to accept whatever price Dean offers them. Rather, the Intervening Farms have argued that Dean will use § 9.2 to go outside its supply agreements with DFA and DMS and disrupt the milk market by offering to purchase milk from non-DFA/DMS producers at a price that is lower than what Dean currently pays to DFA and DMS.⁹ For its part, Dean never disputes that if it is given the opportunity to offer to purchase milk from non-DFA/DMS farms that it will do so at a lower price than it is currently paying to DFA and DMS. While Dean may disagree with the Intervening Farms’ view of the negative impact of § 9.2 on the Intervening Farms, their respective cooperatives, and the market for raw Grade A milk; there is no basis for Dean’s argument that the Intervening Farms do not understand what § 9.2 will allow Dean to do.

II. THE VIABILITY OF THE INTERVENING FARMS IS A PROTECTABLE INTEREST

In the Second Circuit, a party seeking to intervene must have an interest that is “direct, substantial, and legally protectable.” *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). “[A]n economic interest relating to the conduct of the movants’ business constitutes sufficient legal interest for granting intervention.” *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 101 (E.D.N.Y. 1996). The oppositions do not contest this point, and Plaintiffs acknowledge that “an economic interest in pending litigation

⁸ See Settlement Agreement § 9.2 (Dkt. #160-2).

⁹ See Moving Memo. at 8-9.

is sufficient to satisfy the criteria for intervention.”¹⁰ Nevertheless, they attempt to wash away the economic interest that the Intervening Farms have in this action by claiming that their interest is speculative or derivative of theoretical harm to DFA or DMS.¹¹

The oppositions claim that the interests of the Intervening Farms are speculative because there is no guarantee that § 9.2 will result in Dean shifting any of its milk purchases to non-DFA/DMS farms or that any such shift in milk purchases will negatively impact the Intervening Farms.¹² First, the claim that it is pure speculation that § 9.2 will result in Dean shifting a significant portion of its milk purchases to non-DFA/DMS farms challenges reason. Dean is the largest and most powerful purchaser of raw Grade A milk in Federal Milk Order 1.¹³ If the Settlement Agreement is approved, Dean will use § 9.2 to offer to purchase milk from non-DFA/DMS farms at a lower price than it currently pays to DFA or DMS.¹⁴ There is no economic reason for it to voluntarily offer to purchase milk for more than it currently pays to DFA or DMS; indeed, it would be affirmatively irrational for it to do so.¹⁵ Due to Dean’s size and the

¹⁰ Pltfs. Opp. Memo. at 15 n.12 (Dkt. #228).

¹¹ Dean Opp. Memo. at 4 (Dkt. #216); Pltfs. Opp. Memo. at 13-15 (Dkt. #228).

¹² Dean Opp. Memo. at 4 (Dkt. #216); Pltfs. Opp. Memo. at 13-14 (Dkt. #228).

¹³ Pltfs. Reply Memo. in Response to the Opp. Memo. of DFA/DMS at 10 n.12 (“[I]nformation in the public record suggested that Dean’s market share was on the order of seventy percent.”) (Dkt. #229).

¹⁴ Exhibit 1 ¶ 13(a), Exhibit 2 ¶ 11, Exhibit 3 ¶ 14(a), Exhibit 4 ¶ 12(a), Exhibit 5 ¶ 14(a), Exhibit 6 ¶ 14(a), Exhibit 7 ¶ 17(a), Exhibit 8 ¶ 20(a), and Exhibit 9 ¶ 13(a).

¹⁵ The Intervening Farms recognize that Plaintiffs submitted “the testimony, documents and declaration of Dr. Sexton” to the Court along with their reply papers in further support of their motion for preliminary approval. (Dkt. #225.) That “evidence,” however, has not been provided to the Intervening Farms and should be disregarded by the Court for purposes of the underlying motion since the Intervening Farms cannot examine it. Regardless of what that “evidence” may say, it is unreasonable to believe that any business enterprise, such as Dean, would willingly offer to increase the cost at which it purchases the primary commodity necessary for its business activities.

new opportunity for farmers to gain access to such a large buyer, non-DFA/DMS farms will accept Dean's offer, a fact that Plaintiffs and Dean do not contest.

Second, the claim that the interests of the Intervening Farms are derivative of theoretical harm to DFA or DMS ignores the facts set forth in the Affidavits/Declarations of the Intervening Farms. While it is true that the Settlement Agreement will harm DFA and DMS by causing them to have to find new buyers for the milk displaced by § 9.2, the Intervening Farms stand to suffer their own harm. Section 9.2 will allow Dean to put downward pressure on the market price for raw Grade A milk, resulting in lower milk checks for the Intervening Farms.¹⁶ As single commodity producers, there is nothing derivative about the harm that they will suffer when the disruption in the milk market caused by § 9.2 lowers the revenue they receive for their milk.

III. THE INTERESTS OF THE INTERVENING FARMS ARE NOT ADEQUATELY REPRESENTED BY THE PARTIES

Plaintiffs and Dean argue that the underlying motion should be denied because "existing parties adequately represent" the interests of the Intervening Farms. *See* Fed. R. Civ. P. 24(a)(2). Plaintiffs claim that the Intervening Farms are represented by Plaintiffs,¹⁷ and Dean claims that the Intervening Farms are represented by DFA and DMS.¹⁸ Both assertions are wrong.

The interests of an intervenor are not adequately represented by a party when they are adverse to the interests of the opposing party. *See U.S. v. Int'l Bus. Machs. Corp.*, 62 F.R.D. 530, 536 (S.D.N.Y. 1974) ("The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present

¹⁶ Exhibit 1 ¶ 13(a), Exhibit 2 ¶ 11, Exhibit 3 ¶ 14(a), Exhibit 4 ¶ 12(a), Exhibit 5 ¶ 14(a), Exhibit 6 ¶ 14(a), Exhibit 7 ¶ 17(a), Exhibit 8 ¶ 20(a), and Exhibit 9 ¶ 13(a).

¹⁷ Pltfs. Opp. Memo. at 15 n.13 (Dkt. #228).

¹⁸ Dean Opp. Memo. at 5 (Dkt. #216).

parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented.”) (citing 7A C. Wright & A. Miller § 1909, at 524). Here, the interests of the Intervening Farms are not adequately represented by Plaintiffs because they are adverse to Plaintiffs’ interests. Plaintiffs are trying to use the Settlement Agreement to disrupt the market for milk marketed by DFA or DMS.¹⁹ In this regard, the Intervening Farms and Plaintiffs are directly adverse to each other because the Intervening Farms want to protect their ability to market milk to Dean via DFA and DMS, and Plaintiffs want to destroy it.

Likewise, the Intervening Farms are not adequately represented by DFA or DMS. If the interest of an intervenor is “similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.” *Id.* The burden of showing inadequate representation is minimal and is met when the intervenor shows that “representation of its interest by existing parties *might* be inadequate.” *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (emphasis added). Here, the interests of the Intervening Farms and the interests of DFA and DMS are similar, but not identical.²⁰ The Intervening Farms are all separate and distinct dairy farms. Their primary concern is to ensure that their milk checks do not decrease and that they continue to have access to the benefits provided to them by their cooperatives. DFA and DMS,

¹⁹ See generally Settlement Agreement § 9.2 (Dkt. #160-2).

²⁰ Dean argues that the interests of the Intervening Farms are identical to the interests of DFA and DMS because they both seek the same outcome, the defeat of the Settlement Agreement. (Dean Opp. Memo. at 5 (Dkt. #216).) However, that argument fails because an intervenor can still be granted intervention when its rights are identical to those of a party if there is evidence of collusion, and a significant portion of the Amended Complaint alleges that Dean colluded with DFA and DMS to keep down milk prices. (Rev. Am. Compl. ¶ 23 (Dkt. #117).)

however, are regional and national companies that, among other things, market milk to processors. Moreover, it is important to remember that this action is based upon an allegation that DFA and DMS have conspired to lower milk prices. While the Intervening Farms do not believe there's truth to that allegation, it should not be assumed that DFA and DMS adequately represent the interests of the Intervening Farms. As a result, the interests of the Intervening Farms are not adequately represented by the parties and they should be allowed to intervene.

IV. DELAYING THE OBJECTION OF THE INTERVENING FARMS UNTIL THE FAIRNESS HEARING WILL WASTE JUDICIAL RESOURCES AND CONFUSE PURPORTED CLASS MEMBERS

Plaintiffs argue that the underlying motion should be denied because the Intervening Farms will be able to voice their objections to the Settlement Agreement at the fairness hearing.²¹ That argument is unsupported by the law and, if adopted by the Court, will waste judicial resources and confuse purported class members. Intervention by purported class members at the preliminary approval of a settlement agreement is not novel. *See Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001); *Cohen v. Viray*, 622 F.3d 188 (2d Cir. 2010). That is because courts prefer to allow intervention so that they may consider all facts that will “significantly contribute to full development of the underlying factual issues in the suit.” *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986). It would be a waste of judicial resources for the Court to consider granting preliminary approval of the Settlement Agreement, only to then consider the significant and substantive problems with the Settlement Agreement after the process of class notification has been completed. Similarly, the proposed notice will likely confuse purported class members because it does not explain the potential damaging effects of the Settlement Agreement, as viewed by the Intervening Farms. As a result, it is in the best interests of the purported class members to have the objections of the

²¹ Pltfs. Opp. Memo. at 11 (Dkt. #228).

Intervening Farms heard now, when the Court can consider them prior to the time and expense of class notification, as opposed to waiting to hear the objection of the Intervening Farms until the fairness hearing.

V. THE INTERVENING FARMS HAVE NOT BEEN MISLED OR COERCED BY DFA OR DMS

A consistent message throughout Plaintiffs' opposition is that the Court should not allow the Intervening Farms to intervene and object to the Settlement Agreement because they are agents of DFA and DMS that have been misled and coerced by DFA and DMS into filing the underlying motion and repeating the arguments of DFA and DMS.²² Plaintiffs could not be further from the truth.

Throughout their opposition Plaintiffs make wide sweeping allegations challenging the integrity and competency of the Intervening Farms based upon the "facts" that they believe they developed through discovery. However, Plaintiffs only requested discovery from two of the nine Intervening Farms, so it is disingenuous for them to paint the remaining seven farms with the "facts" that they believe they obtained from the other two farms. Simply put, Plaintiffs have no evidence to claim that the seven Intervening Farms from which they did not request discovery were influenced in any way by DFA or DMS.

With regards to Hathorn Farms LLC and Heritage Hill Farm, Plaintiffs did depose the principals of the two farms, Todd Hathorn (Hathorn Farms LLC) and David Rudd (Heritage Hill Farm). Messrs. Hathorn and Rudd both testified at their depositions that their views of the Settlement Agreement were formed by independently reviewing the Amended Complaint and the

²² Pltfs. Opp. Memo. at 3 (arguing that "discovery has made clear that the proposed intervenor briefs are a product of an orchestrated effort by the remaining Defendants, DFA and DMS, to generate opposition to Dean's settlement ... [by] reach[ing] out to a select group of farmers [and] repeatedly mischaracterize[ing] the case as meritless without providing any of the factual information revealed in discovery ... and provid[ing] information that was inaccurate, misleading and confusing.") (Dkt. #228).

Settlement Agreement and that no one from their respective cooperatives ever influenced, or attempted to influence, the formation of their views of the Settlement Agreement or the statements they submitted to the Court in support of the underlying motion.²³

Similarly, there is no evidence that Messrs. Hathorn and Rudd were provided “inaccurate, misleading and confusing” information as Plaintiffs allege.²⁴ Rather, both Messrs. Hathorn and Rudd testified that the only information they reviewed when forming their views of the Settlement Agreement were the Amended Complaint and the Settlement Agreement, both of which were prepared by Plaintiffs.²⁵ To suggest that the Intervening Farms have been misled or coerced by DFA and DMS just because they believe – as do DFA and DMS – that the Settlement Agreement has been negotiated by class counsel for the benefit of non-cooperative farmers and at the expense of cooperative farmers ignores the evidence and the obvious fact that the Intervening Farms would likely have the same view of the Settlement Agreement as DFA and DMS because they are, for all intents and purposes, the owners of DFA and DMS. Plaintiffs have no evidence to support their claim that the Intervening Farms have been misled or coerced by DFA and DMS or that their Affidavits/Declarations are anything but their independent knowledge and belief.

CONCLUSION

For the foregoing reasons, the Intervening Farms respectfully request that the Court grant their motion to intervene for the limited purpose of objecting to the preliminary approval of the proposed settlement agreement between Plaintiffs and Dean.

²³ Hathorn Depo. 15:6-18:18, 33:14-34:8, 44:14-45:2, 49:3-12 (Exhibit A); Rudd Depo. 32:4-38:5, 55:3-56:9, 61:16-19 (Exhibit B).

²⁴ Pltfs. Opp. Memo. at 3 (Dkt. #228).

²⁵ Hathorn Depo. 39-6-9 (Exhibit A); Rudd Depo. 37:6-38:5 (Exhibit B).

Dated: March 28, 2011
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, I caused to be served the foregoing *Omnibus Reply Memorandum of Law* upon the following individuals by email through the CM/ECF filing system:

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I also certify that on March 28, 2011, I caused to be served the foregoing *Omnibus Reply Memorandum of Law* upon the following individuals by depositing the same properly enclosed in a First Class postpaid wrapper, in the post office box regularly maintained by the United States Postal Service, in the City of Rochester, Monroe County, New York, at Clinton Square, Rochester, New York 14604.

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