

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

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

Plaintiffs,)

v.)

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

Defendants.)

Docket No. 5:09-cv-00230-cr

Judge Christina Reiss

**OMNIBUS REPLY OF DONALD RISSER AND LEE
RAMSBURG TO PLAINTIFFS’ AND DEFENDANT DEAN
FOOD COMPANY’S RESPONSE TO MOTION TO INTERVENE**

Donald Risser and Lee Ramsburg (collectively, “Intervener Farmers”) submit this omnibus reply in support of their motion to intervene. As Mr. Ramsburg testified, Plaintiffs have reached an agreement with Dean Food Company (“Dean”) that will pit “farmer against farmer.” Plaintiffs and Dean have now made clear that Plaintiffs – who at one time purported to represent the interests of all dairy farmers – do not represent the interests of farmers, like the Intervener Farmers, who belong to cooperatives that market their milk through Dairy Marketing Services (“DMS”). In fact, named Plaintiffs’ interests are directly adverse to the Intervener Farmers’ interests with respect to the proposed settlement. That conflict is manifested by Plaintiffs’ and Dean’s advocacy for Section 9.2 and the substantial intra-class conflict created by the settlement which sacrifices the Intervener Farmers’ interests in favor of the interests of another portion of the proposed class.

Intervention before the Court makes its preliminary approval decision and before a settlement notice issues that includes Section 9.2 is critical because the interests of farmers who continue to market their milk through DMS are not represented even though they constitute a substantial portion of the class. Any settlement notice that leaves the question of the appropriateness of Section 9.2 unanswered would not be in the interests of the class and would merely create confusion. Further, the ability to opt out of the settlement class will not protect the Intervener Farmers' interests. They will suffer injury in the form of depressed prices for their milk products as a result of Section 9.2's impact on the dairy market whether or not they remain part of or opt out of the class.

I. ARGUMENT

A. Intervention before Preliminary Approval is Timely and Important.

Intervener Farmers filed their motion promptly after learning that the settlement agreement seeks injunctive relief likely to be injurious to their business and their family farms. As such, their motion is timely and Dean does not contest this point. Plaintiffs, who purport to represent Intervener Farmers, ask the Court to apply a new standard to deny intervention on the grounds the harmful effects of Section 9.2 might not be felt immediately. (Doc. 228 at 10-11.)¹ Plaintiffs argue that because Section 9.2 is, essentially, prospective injunctive relief, Intervener Farmers should not be allowed to raise their concerns regarding the negative consequences of that section. Plaintiffs are wrong. Not only is there no authority for Plaintiffs' position, but also Intervener Farmers' interests would be prejudiced if they are not permitted to intervene before this Court makes its decisions regarding preliminary approval and the form of notice.

¹ Under Second Circuit law, courts assess the timeliness of a motion to intervene by measuring the time between when "the applicant had notice of the interest ... [and when] it made the motion to intervene." *N.J. Carpenters Health Fund v. Residential Capital, LLC*, No. 08-cv-8781, 2010 U.S. Dist. LEXIS 135261, at *9

(continued...)

Plaintiffs have abandoned the farmers who continue to want to market their milk through DMS. As such, there is no one to represent the perspective of farmers who benefit from marketing their milk through DMS and want to preserve the economic benefits they receive from participation in their cooperatives and the common marketing agency (DMS) those cooperatives have elected to join.

Intervener Farmers lack the procedural safeguards normally available to class members. They cannot protect their interests simply by opting out of the settlement class because Section 9.2 will impact the market negatively and injure the Intervener Farmers' interests whether they opt out or not. Moreover, the current form of the notice contains no explanation about the proposed settlement's likely impact on the dairy market, and impedes efforts to assess Section 9.2's impact because it states that the settlement may go forward as it now reads, or in a modified form, or without it altogether. (Doc. 160-4 at 4-5.) Without such safeguards, it is critical that the Intervener Farmers be permitted to intervene now so that the Court can have the benefit of their perspective when deciding whether to grant preliminary approval, and, if so, the proper form of notice. *See, e.g., Blair v. Shaver Imports, Inc.*, No. 06-C-398, 2008 U.S. Dist. LEXIS 34991, *7, 9 (N.D. Ill. April 29, 2008) (permitting intervention prior to preliminary approval because, among other things, notice was complicated and no party represented intervener's interests).²

(continued...)

(S.D.N.Y. Dec. 22, 2010) (quoting *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003)).

² *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) ("the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings") (internal quotation marks omitted).

B. Intervener Farmers Have a Cognizable Interest in the Action.

Intervener Farmers have a multi-faceted economic interest in their relationships with DMS and their cooperatives. As members of cooperatives that market their milk through DMS, these two long-time dairy farmers rely on that distribution chain and their cooperatives for the prices at which they sell their milk and for services, such as access to balancing plants, transportation, and sampling and testing services, that are crucial to the economic viability of their farms. *See* Excerpts of E. Ramsburg Dep. (Feb. 28, 2011), attached as Exh. A, at 118:5 – 121:2; *id.* at 82:2-11; Risser Aff. at ¶¶ 4-10; Ramsburg Aff. at ¶¶ 4-16.³ Where, as here, the interveners’ interest is economic, the Second Circuit recognizes that it is cognizable under Rule 24(a)(2). *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975); *Commack Self-Service Kosher Meats, Inc., v. Rubin*, 170 F.R.D. 93, 101 (E.D.N.Y. 1996) (“The Second Circuit has held that an economic interest relating to the conduct of the movants’ business constitutes sufficient legal interest for granting intervention.”).

Plaintiffs and Dean both misstate the farmers’ interests. Plaintiffs argue that the “Proposed Interveners have failed to establish *any* valid interest in opposing preliminary approval” (Doc. 228 at 12 (emphasis in original).) Dean argues that “the Movants have no ‘direct, substantial, and legally protectable’ interest in *preventing Dean from offering to purchase raw milk from non-DFA/DMS sources*” and “Movants assert no legally protectable interest in *preventing Dean from offering to purchase, on terms that would be acceptable to Dean, a portion of its raw milk requirements from sources other than DFA and DMS.*” (Doc. 216 at 4 (emphasis added).)

³ The affidavits of Donald Risser and Lee Ramsburg, Jr. are attached to the opening memorandum as Exhibits 1 and 2, respectively. (Docs. 191-2 and 191-5.)

These argument miss the fact that the proposed interveners need only to have an interest in the action, not in any particular phase of the litigation. *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128-29 (2d. Cir. 2001) (movant must “show an interest in the action”). They also fail to recognize that Plaintiffs and Dean included the injunctive relief of Section 9.2 as added value separate from the monetary damages portion of the settlement. As to the Intervener Farmers (and other farmers like them), Section 9.2 does not add any value. In fact it injures the economic benefits that they have in their distribution networks, the price they receive for their products, and the cooperatives that play such an important part in their businesses.⁴ Based on their personal experience and expertise, the Intervener Farmers identified in their affidavits exactly how Section 9.2 will have substantial negative effects on the multi-faceted economic interests they have in their relationships with their cooperatives and DMS, and on the price farmers relying on DMS’s services receive for their milk.

C. Section 9.2 Will Affect Intervener Farmers’ Interests.

As they must, Plaintiffs and Dean diverge when assessing the impact of the proposed settlement agreement on the interests of the Intervener Farmers. In essence, Plaintiffs posit that intervention should be denied because the settlement will have a substantial positive impact on the Intervener Farmers, while Dean asserts intervention should be denied because the settlement will have no impact at all.

Plaintiffs and Dean are both wrong. Plaintiffs concede that the proposed settlement will push farmers to sell outside of their cooperatives. (Doc. 229 at 17, 18.) This incentive for farmers to operate outside of their cooperatives is one of the primary negative

⁴ Indeed, Plaintiffs base their claims on the alleged unlawful manipulation of the distribution chain, which allegedly caused them severe economic injury. (*See, e.g.*, Doc. 1 ¶ 2.)

consequences that Messrs. Risser and Ramsburg identified in their affidavits. Risser Aff. at ¶¶ 4, 6, 16; Ramsburg Aff. at ¶¶ 16, 21-22. In fact, Mr. Ramsburg testified about the negative financial consequences:

if this settlement is allowed in total, ... Dean Food will purchase milk from independent farmers. And when they purchase this milk, they will not -- probably will not pay the over-order premium that they're currently paying to DFA as a result of these sole-supply contracts. So they will be purchasing milk at a cost lesser than -- or at a price lesser than what they currently pay to DFA. And my thought is they will use that to ratchet down the -- as I said in my affidavit, they will use that lower price milk to ratchet down the over-order premium that they pay to DFA. . . . Dean Food could use this exemption from the sole-supply contracts to buy milk on the open market at a lesser over-order premium and thereby use that to ratchet down the over-order premium that they subsequently pay to DFA, which would have a ripple effect to other processors in the region. And, therefore, you know, the milk price in the whole region would be less than it would be if everything remains the same as it is now.

Ramsburg Dep., Exh. A, at 118:8 – 120:2.

With their long experience in the dairy market, the Intervener Farmers are qualified to explain the expected effects of the settlement. Plaintiffs concede as much in acknowledging that experience and “basic economics” are necessary to determine whether the settlement will impact the dairy farmers. (Doc. 229 at 16 (“The price increases for sellers resulting from greater competition for their milk are not only supported by experience and DFA/DMS’s own documents, they comport with basic economics.”).) Plaintiffs’ assertion that the proposed settlement will have positive effects does not demonstrate that the harm Interveners

Farmers identified is speculative or that the long-term negative effects do not outweigh the short-term benefit of a cash payment.²

For its part, Dean rejects the possibility that the settlement will have positive or negative effects. It argues that since Section 9.2 only requires it to *offer* to purchase 60 million pounds of milk per month from non-DMS/DFA sources, then the settlement may or may not impact the market. Under Dean's theory, buyers and sellers are on equal grounds such that the sellers can afford to reject any offer Dean makes, so Dean might not actually buy the 60 million pounds. (*See* Doc. 216 at 3 (“The pricing clause in Section 9.2 merely ensures that if Dean purchases raw milk from non-DFA/DMS sources, the purchase and sale transaction will be a price that is acceptable to both the buyer and the seller.”).) Of course, Dean never states that it intends to offer to purchase milk at a price higher than it is currently paying DMS, and why would it? It would be economically irrational for Dean to voluntarily increase its raw milk procurement costs and potentially put itself at a cost disadvantage versus its competitors.

Moreover, in reality, the following characteristics of the dairy market, as well as the language of Section 9.2 itself, put farmers at a severe disadvantage as against Dean:

- Section 9.2 grants Dean the power to *unilaterally* determine the “competitive market price” at which it purchases milk from the non-DFA/DMS farmers, (Doc. 160-2 ¶ 9.2);
- Dean is the largest Grade A milk processor in the Northeast, and has economic power as a result;³

² (Doc. 229 at 14 (“DFA/DMS’s claims of adverse ‘marketplace consequences’ would, even if true, merely establish an injury in fact.”); *id.* at 19 (“For the purposes of preliminary approval, DFA/DMS do not dispute that the Court’s responsibility is not to decide who is right and who is wrong.”).)

³ Plaintiffs allege Dean “controls approximately 70 percent of the Northeast market for bottling fluid Grade A milk.” (Doc. 1 ¶ 5.)

- “Dairy farmers individually are not able to negotiate effectively against the milk processors, which are larger now than they were even ten years ago.” Risser Aff. at ¶ 6;
- Successful collective bargaining through cooperatives is at the heart of Intervener Farmers’ views on the marketplace: “It is important for dairy farmers to join together to negotiate against large dairy processors, like Dean Foods. ... In [Mr. Ramsburg’s] experience the processors will, if they can, pit the farmers against each other and drive prices for raw milk down, and therefore drive more farms out of business.” Ramsburg Aff. ¶ 4; *see* Risser Aff. ¶ 4 (explaining dairy processors are known to “drive prices down by dividing and conquering the farmers.”);
- Because dairy cows produce milk every day and milk is a perishable product, Risser Aff. ¶ 7, dairy farmers take a great risk in passing on opportunities to sell their milk.

Farmers who choose to sell directly to Dean can hardly afford to refuse to sell their milk to Dean at what it determines to be the “competitive market price.” Thus, Intervener Farmers do not need to speculate to reach the conclusion that Dean would use its “unilateral authority” and powerful position within the dairy industry to put substantial pressure on milk premiums. *See* Risser Aff. at ¶¶ 12-15; Ramsburg Aff. at ¶¶ 20-21. Further, Intervener Farmers have the basis both in logic and experience to conclude that incentivizing farmers to abandon their cooperatives to sell milk directly to DMS will threaten cooperative membership and thereby weaken them.

D. The Existing Parties Do Not Adequately Protect the Intervener Farmers’ Interest.

Plaintiffs and Dean concede that no existing party adequately represents the interests of Intervener Farmers. They effectively conceded this point by agreeing to a settlement that would reduce opportunities for farmers marketing through cooperatives and DMS and sacrificing the interests of Intervener Farmers in favor of their own interests. Dean also concedes that Plaintiffs do not represent Intervener Farmers’ interests, but it contends they are protected by its co-defendants DFA and DMS. Contradicting this assertion, Plaintiffs argue that DFA and DMS *also* lack standing to object to the settlement. While the affidavits of Messrs. Ramsburg

and Risser show their support for their cooperatives and marketing their milk through DMS, the adequacy of DFA and DMS's representation of their interest is hardly "assured," *Willis v. Firestone Building Prods. Co.*, 231 F.R.D. 447, 450 (D. Conn. 2005), since the central inquiry in this litigation is whether, as Plaintiffs allege, Dean, DFA, and DMS conspired to depress, fix, and stabilize prices that all dairy farmers were paid for their milk. While Messrs. Ramsburg and Risser do not have reason to believe those allegations are true, nevertheless the point remains that at this stage of the litigation, their rights cannot be assumed to be protected either by the party that is seeking relief that would affirmatively harm them (Plaintiffs), nor by the party that Plaintiffs seek to prove is already harming them (Defendants). Messrs. Ramsburg and Risser are willing and able to protect their own interests in regards to the settlement, and should be allowed the opportunity to appear before the Court to do so.

II. Alternatively, Permissive Intervention Under Rule 24(b) Should be Allowed

Intervener Farmers will significantly contribute to the full development of the underlying factual issues and a just and equitable adjudication. *See Lovely H. v. Eggleston*, No. 05-civ-6920, 2006 U.S. Dist. LEXIS 83424, at *8 (S.D.N.Y. Nov. 15, 2006). Plaintiffs and Dean appear to seek to limit the information available to this Court regarding the effect of the settlement and the propriety of conditional class certification. Plaintiffs go even further to argue that the Court should ignore the perspective of Intervener Farmers because they, like other dairy farmers in the class, are not parties and therefore have not received the discovery produced in the litigation. (Doc. 228 at 3-5, 12.) Plaintiffs and Dean do not appear to understand that Intervening Farmers' objection to the settlement arises from the conflict of interest in having counsel sign away their marketing opportunities to others in the proposed class, while claiming this is a supposed "benefit" to them as class members. No discovery is needed for Messrs.

Ramsburg and Risser to recognize that conflict of interest, and to object to a settlement negotiated on those terms. Thus, the Court should permit intervention under Rule 24(b).

III. Conclusion

For the foregoing reasons, Mr. Risser and Mr. Ramsburg respectfully request that this Court grant its motion to intervene under Rule 24(a)(2) or, alternatively, under Rule 24(b), for the purpose of being heard with respect to the proposed settlement.

Respectfully submitted,

Dated March 28, 2011

s/ *Brian P. Downey*
Brian P. Downey
PEPPER HAMILTON LLP
200 One Keystone Plaza
North Front and Market Streets
P.O. Box 1181
Harrisburg, PA 17108-1181
Phone: (717) 255-1155
Fax: (717) 238-0575
Email: downeyb@pepperlaw.com

Jacqueline A. Hughes
Storrow Buckley Hughes LLP
26 State Street, Suite 8
Montpelier, VT 05602
Phone: (802) 778-0303
Fax: (802) 229-5110
Email: jhughes@kimbell-storrow.com

CERTIFICATE OF SERVICE

I, Brian P. Downey, hereby certify that on March 28, 2011, a true and correct copy of the foregoing document was filed through the Court's Electronic Case Filing (ECF) system and that the following individuals who have entered their appearance are registered to receive electronic notice of same:

GRAVEL AND SHEA

Andrew D. Manitsky
76 St. Paul Street
P. O. Box 369
Burlington, VT 054020
(Attorney for Plaintiffs)

**COHEN MILSTEIN SELLERS
& TOLL PLLC**

Benjamin D. Brown
Brent W. Johnson
Daniel A. Small
Emmy L. Levens
George F. Farah
Kit A. Pierson
1100 New York Avenue, N.W.
Washington, DC 20005
(Attorneys for Plaintiffs)

HOWERY, LLP

Craig D. Minerva
Danyll W. Foix
Gregory J. Commins
Robert G. Abrams
Robert L. Green
Terry L. Sullivan
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(Attorneys for Plaintiffs)

BAKER & MILLER PLLC

Amber L. McDonald
Kimberly N. Shaw
W. Todd Miller
2401 Pennsylvania Avenue, N.W., Suite 300
Washington, DC 20037
(Attorneys for Defendant Dairy Farmers of America, Inc.)

WILLIAMS & CONNOLLY LLP

Carl R. Metz
Christopher R. Looney
Greg S. Hillson
Kevin Hardy
Lauren Collogan
Shelley J. Webb
Steven R. Kuney
725 Twelfth Street, N.W.
Washington, DC 20005
(Attorneys for Defendant Dairy Farmers of America, Inc.)

SPINK & MILLER, PLC

Elizabeth Hawkins Miller
Mary N. Peterson
One Lawson Lane, 3rd Floor
Burlington, VT 05401
(Attorneys for Defendant Dairy Farmers of America, Inc. and Dairy Marketing Services, LLC)

**SHEEHEY FURLONG
& BEHM, P.C.**

Ian P. Carleton
R. Jeffrey Behm
P. O. Box 66
30 Main Street, 6th Floor
Burlington, VT 05402-0066
*(Attorneys for Defendant Dairy Farmers of
America, Inc. and Dairy Marketing Services,
LLC)*

PAUL FRANK COLLINS PC

John T. Sartore
1 Church Street
P. O. Box 1307
Burlington, VT 05402
*(Attorneys for Defendant Dean Foods
Company)*

**PRIMMER PIPER EGGLESTON
CRAMER PC**

Gary L. Franklin
Kevin M. Henry
150 S. Champlain Street
P. O. Box 1489
Burlington, VT 05402-1489
*(Attorneys for Interveners Bryan Davis, Reg
Chaput, Rendell Tullar, John Gorton, Harold
Howrigan, Jr., Louis Aragi, Jr., Clark Hinsdale
III, Thomas Quint and Clement Gervais)*

DECHERT LLP

Carolyn H. Feeney
Paul T. Denis
Paul D. Frangie
Paul H. Friedman
1775 I Street, NW
Washington, DC 20006
*(Attorneys for Defendant Dean Foods
Company)*

MARKSPOWERS LLP

Michael J. Marks, Esquire
1205 Three Mil Bridge Road
Middlebury, CT 05753
(Attorneys for Defendant ENE Evaluator)

NIXON PEABODY LLP

W. Scott O'Connell
900 Elm Street
Manchester, NH 03101
*(Attorneys for Interveners 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)*

s/ Brian P. Downey

Brian P. Downey