UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO **ALL DIRECT ACTION PLAINTIFFS**	:	

[PROPOSED] ORDER

AND NOW, this ___ day of _____, 2019, upon consideration of Defendant United Egg Producer, Inc.'s ("UEP") Motion for Judgment as a Matter of Law, the supporting memorandum of law, and any response thereto, it is hereby **ORDERED** that said Motion is **GRANTED**, and judgment is hereby entered in favor of UEP for all claims against UEP by all Plaintiffs.

BY THE COURT:

_____
Honorable Gene E.K. Pratter
United States District Judge

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DEFENDANT UNITED EGG PRODUCERS, INC.'S
MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(a)

For the reasons set forth in the accompanying memorandum of law, Defendant United Egg Producers, Inc. ("UEP"), by and through its attorneys, moves pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for judgment as a matter of law dismissing all of Plaintiffs' claims.

Dated: December 4, 2019

Respectfully submitted,

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DEFENDANT UNITED EGG PRODUCERS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(a)

I. INTRODUCTION

The Direct Action Plaintiffs ("DAPs" or "Plaintiffs") have brought an antitrust claim under Section 1 of the Sherman Act alleging that Defendant United Egg Producers, Inc. ("UEP") conspired to reduce the supply of eggs for the purpose of raising domestic egg prices. DAPs allege that the conspiracy is overarching and includes three interrelated mechanisms: (1) the UEP Certified Program, (2) UEP's short-term supply measures, and (3) exports through United States Egg Marketers, Inc. ("USEM"). After twelve days of testimony, the evidence presented in DAPs' case-in-chief fails to establish that Defendants or any of the nineteen alleged conspirators knowingly developed and/or participated in the UEP Certified Program for the purpose of restraining trade by reducing egg supply. DAPs' claims against USEM also fail as a matter of law because DAPs have failed to prove any antitrust injury or that the alleged conspiracy produced anticompetitive effects. As such, UEP should be granted judgment as a matter of law because no reasonable jury could find the existence of a single, overarching conspiracy involving the UEP Certified Program.

II. LEGAL STANDARD

"If a party has been fully heard on an issue . . . and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party on a claim or defense that . . . under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 50(a)(1). "A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2). The standard for granting judgment under Rule 50 is whether, viewing the evidence in the light most favorable to the non-movants and giving them the advantage of every reasonable inference, there is insufficient evidence from which a jury reasonably could reach its verdict. *Eddy v. Virgin Islands Water & Power Auth.*, 369 F.3d 227, 230 (3d Cir. 2004).

In that regard, the court must "determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.'" *Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743, 745 (3d Cir. 1990) (quoting *Smollett v. Skayting Dev. Corp.*, 793 F.2d 547, 548 (3d Cir. 1986)). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993) (citations omitted). A "scintilla of evidence is not enough to sustain a verdict of liability." *Id.*

III. UEP IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. No Reasonable Jury Could Find That The UEP Certified Program Was Part of an Overarching Conspiracy To Reduce Supply.

DAPs have failed to show the existence of a single, overarching conspiracy because there is no evidence from which a reasonable jury could find that one of those alleged restraints – the UEP Certified Program – was an agreement to reduce egg supply.

To establish a Section 1 violation, DAPs must prove that Defendants entered into a single "agreement" that "unreasonably restrain[ed] trade." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 n. 11 (3d Cir. 2010) (quoting *Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010)); *In re K-Dur Antitrust Litig.*, No. 01-cv-1653, 2016 U.S. Dist. LEXIS 22982, *64 (D.N.J. Feb. 25, 2015) ("[P]laintiff must prove the existence of a single agreement that unreasonably restrains trade, whether tacit or express.").

"[T]he very essence of a section 1 claim . . . is the existence of an agreement, because section 1 liability is predicated on some form of concerted action." *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003) (citations omitted) (internal quotations omitted); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004). Thus, "[u]nilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005). For that reason, Plaintiffs must present evidence of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 208. In other words, Plaintiffs must demonstrate that the Defendants intended to enter into an agreement, knowing of its unlawful objective. *See In re Wellbutrin XL Antitrust Litigation*, 133 F. Supp. 3d 734, 769 (E.D. Pa. 2015) (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1242–43 (3d Cir. 1993)).

The Third Circuit uses a three-step test to determine whether activity constitutes a single conspiracy or separate, unrelated conspiracies: (1) "whether there was a common goal among the conspirators"; (2) "the nature of the scheme to find whether the agreement sought to create a result that would require the 'continuous cooperation of the conspirators'"; and (3) "the level to which participants overlap on the various dealings." *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, *64 (citing *United States v. Kelly*, 892 F.2d 255, 529 (3d Cir. 1989)); *United States v. Fattah*, 914 F.3d 112, 168 (3d Cir. 2019).[1] To establish a common goal and that the Defendants worked together and continuously to achieve that goal, DAPs must present evidence that shows that the Defendants' activities were interdependent. *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *76. "In evaluating interdependence, [the Third Circuit] consider[s] how helpful one individual's contribution is to another's goals." *United States v. Kemp*, 500 F.3d 257, 288 (3d Cir. 2007). The inquiry focuses on "the extent to which the success or failure of one conspiracy is independent of a corresponding success or failure by the other." *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *76 (quoting *United States v. Macchia*, 35 F.3d 662, 671 (2d Cir.1994)). *See also United States v. Malik*, No. 08-614, 2009 WL 4641706, at *13 (E.D. Pa. Dec. 7, 2009) ("There must be some interdependence among the members of a single conspiracy so that each member depends upon, is aided by, or has an interest in the success of the others."), *aff'd*, 424 F. App'x 122 (3d Cir. 2011). "In essence, the transactions must have been contingent on each other to establish interdependence." *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *77 (citing *Kemp*, 500 F.3d at 291).

[1] "[C]ourts treat civil and criminal conspiracy alike—apart of course from standard of proof and other respects in which civil and criminal procedure differ—so that the abundant precedents on the meaning of criminal conspiracy are available for use in the civil context." *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *66 (citations omitted).

DAPs failed to establish that the UEP Certified Program was the pretext for an unlawful agreement to reduce supply. Instead, the evidence showed that the UEP Certified Program was a legitimate science-based program that was developed in response to animal activist pressure and customer demand.

Gene Gregory testified that UEP commissioned the Scientific Advisory Committee in response to legislation passed in the European Union that UEP felt was driven by animal activists rather than science. *See* Nov. 12, 2019 Trial Tr. 80:12-81:4. UEP realized that the animal activists were beginning to target UEP members' customers, and changes were needed to address the concerns being raised by activists. *See id.* Lynn Marmer similarly testified that retailers, like Kroger, began to monitor the animal welfare issues taking place in Europe in 1997, and activists began making demands of Kroger in the early 2000s to increase the size of cages for egg-laying hens. *See* Nov. 18, 2019 Trial Tr. 24:11-27:1; D336. Dr. Jill Hollingsworth explained that in 2000, five large members of the Food Marketing Institute ("FMI") – Albertsons, Kroger, Safeway, Walmart, and Ahold – asked FMI to develop a single industry position to address animal welfare issues for the supermarket industry. *See* Nov. 21, 2019 Trial Tr. 94:19-95:11; Nov. 20, 2019 Trial Tr. 106:21-25.

In 2000, the UEP Scientific Advisory Committee issued its formal recommendations for animal welfare guidelines, which suggested space in the range of 67-86 inches, as well as improvements in other areas of production. *See* PX0052. The UEP Producer Committee on Animal Welfare was tasked with taking the Scientific Committee's recommendations and creating an industry program. *See* Nov. 12, 2019 Trial Tr. 83:1-8. UEP worked with FMI and the National Council of Chain Restaurants ("NCCR") to ensure that UEP's Guidelines were acceptable to the trade organizations' members and experts. *See* Nov. 20, 2019

Trial Tr. 128:24-129:10, 138:10-15. FMI and NCCR's expert advisors engaged in an ongoing review of the UEP Guidelines, and fully endorsed the "production, handling, transportation, processing and euthanasia guidelines for layers of shell and breaking eggs" by March 2007. *See* D-0282; D-0291; D-0284.

The evidence presented in DAPs' case-in-chief established that the UEP Guidelines were entirely voluntary, did not place any restrictions on the building of new houses, did not require producer members to reduce their flock size, did not place any restrictions on flock size, did not require producer members to reduce chick hatch, and did not place any restrictions on a producer member's chick hatch. *See* Nov. 12, 2019 Trial Tr. 89:19-91:8; Nov. 7, 2019 Trial Tr. 21:3-6. Further, UEP implemented a phase-in and house average phase-in schedule "to assure no disruption to the market needs." *See* D-0175-013. And UEP rejected recommendations that would have shorted the egg supply and caused undue price increases. *See* Nov. 7, 2019 Trial Tr. 69:19-70:19. Finally, the evidence established that each of the challenged aspects of the UEP Certified Program – the increased cage space allowance, the 100% rule, the backfilling restrictions, and audits – were legitimate and supported by science and/or customer demand. *See, e.g.*, Nov. 20, 2019 Trial Tr. 100:8-101:3 (noting that FMI members were particularly interested in space allocation); D-0284 (FMI-NCCR's endorsement of UEP's guidelines, which included the cage space allowance and backfilling restrictions); Nov. 20, 2019 Trial Tr. 157:21-158:18 (explaining FMI's position in support of the 100% rule); D-0454 (FMI sought assurances that the 100% rule was being followed); D-0190 (Sparboe Farms asked to rejoin the UEP Certified Program despite earlier challenges to 100% rule); D-0665 (letter from Dr. Armstrong expressing the Scientific Advisory Committee's position that the practice of

backfilling compromises bird welfare and should be eliminated); Nov. 18, 2019 Trial Tr. 181:14-182:3, 211:3-4 (FMI and Kroger wanted audits).

Most importantly, the evidence demonstrated that DAPs demanded Certified eggs during the entire history of the Certified Program – from the start of the Program, when the Program was implemented, and as the Program evolved. *See, e.g.*, D-0016; Nov. 19, 2019 Trial Tr. 48:24-49:7 (Publix demanded Certified eggs in 2002); D-0056 (Publix agreed to pay additional costs associated with producing Certified eggs); D-0463 & Nov. 19, 2019 Trial Tr. 58:8-59:9 (Publix demanded Certified eggs in 2004); DCX-083 (Publix's website states it sells eggs only from producers that are complying with the UEP Certified Program); Nov. 19, 2019 Trial Tr. 10:22-24 (Publix only solicits bids for shell eggs from UEP Certified companies); D-0033 (Kroger demanded Certified eggs in 2003); D-0024 (Kroger demanded Certified eggs in 2003); D-0042 (Kroger demanded Certified eggs in 2004-2005); D-0151 (Kroger demanded Certified eggs in 2010); DCX-0081 (Kroger's June 2019 Animal Welfare Policy requires suppliers to meet or exceed the UEP standards); D-0012 (Giant Eagle demanded UEP compliance in 2002); D-0020 & D-0066 (Giant Eagle required suppliers to indicate UEP certification number and make quotes based on the UEP Certified Program in 2003 and 2005); D-0116 (Giant Eagle demanded Certified eggs in 2007). And producers testified that they joined the UEP Certified Program precisely because their customers demanded that they supply Certified eggs. *See, e.g.*, Nov. 13, 2019 Trial Tr. 81:4-5 ("Well, the retailers that we had demanded [Rose Acre] get into the program."); Nov. 20, 2019 Trial Tr. 43:1-12 (Ohio Fresh was required to join the UEP Certified program due to customer demand); Nov. 22, 2019 Trial Tr. 122:15-123:6 (Weaver Brothers joined the UEP Certified Program "because customers were demanding certified eggs"); Nov. 22, 2019 Trial Tr. 142:17-145:1 (Michael Foods joined the

UEP Certified Program in 2006 because customers began "suggesting that if we could not give them . . . ACC certified [eggs] . . . that we would be out").

In light of this overwhelming evidence, no reasonable jury could conclude that UEP developed and producers joined the Certified Program for the purpose of reducing supply. Accordingly, DAPs' single conspiracy claim must fail as a matter of law.

B. No Reasonable Jury Could Find That Any Defendant or Alleged Conspirator Joined the Alleged Conspiracy.

To establish a violation of Section 1 of the Sherman Act, DAPs must prove the "the existence of a contract, combination, or conspiracy between or among *at least two separate entities*." ABA Model Jury Instructions in Civil Antitrust Cases B-2. As set forth more fully in the Memorandum in Support of Defendant Rose Acre Farms' Motion for Judgment as a Matter of Law and the Defendant United States Egg Marketers, Inc.'s Memorandum of Law in Support of Motion for Judgment as a Matter of Law Pursuant to Rule 50(a), which are incorporated by reference herein, DAPs have failed to present evidence establishing that either Rose Acre or USEM made a conscious commitment to join an overarching conspiracy to reduce supply. *See* Mem. in Supp. of Def. Rose Acre Farms' Mot. for J. as a Matter of Law, Section IV, ECF No. 2070; USEM's Mem. of Law in Supp. of Mot. for J. as a Matter of Law Pursuant to Rule 50(a), Section III(A) (contemporaneously filed herewith). Similarly, as discussed below, there is no evidence that any of the nineteen alleged conspirators identified by DAPs during opening statements agreed to the alleged supply reduction scheme.

A plaintiff may rely on direct or circumstantial evidence in proving the existence of a single agreement. *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *64. "Direct evidence 'is explicit and requires no inferences to establish the proposition or conclusion being asserted.'" *InterVest, Inc.*, 340 F.3d at 159. In the absence of direct evidence, the jury

may make certain inferences based on circumstantial evidence. *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *64. However, the Supreme Court has limited the inferences that may be drawn from circumstantial evidence to prove antitrust claims because "'[m]istaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws were designed to protect'—procompetitive conduct." *Id.* at *65 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Indeed, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *InterVest*, *Inc.*, 340 F.3d at 160. Thus, Plaintiffs must present evidence "that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*

DAPs presented a summary exhibit which showed that each of the nineteen alleged conspirators joined the UEP Certified Program. *See* PX0769. However, a producer's unilateral decision to join the Certified Program cannot constitute direct evidence that it knowingly and intentionally agreed to participate in a single, overarching conspiracy to reduce the supply of eggs. *See* Mem. Op. at 5-6, ECF No. 1550 (Sept. 29, 2017). As discussed above, the evidence showed that that Certified Program did not contain any supply restriction mechanism, such as restrictions on flock size, egg output, or chick hatch, and therefore cannot serve as direct evidence of an unlawful conspiracy. Moreover, even if the Certified Program could be used anti-competitively, DAPs did not present any evidence that these nineteen alleged conspirators joined the Certified Program for the purpose of reducing supply. Indeed, testimony from Garth Sparboe expressly refuted that Sparboe Farms – an alleged conspirator – "agreed with its competitors to reduce egg supply in order to raise prices." Nov. 6, 2019 Trial Tr. 68:6-14.

There was similarly no circumstantial evidence that any of the nineteen alleged conspirators agreed to reduce supply. DAPs did not present any evidence tending to exclude the possibility that the alleged conspirators acted independently and consistent with its own economic interests when it joined the UEP Certified Program. To the contrary, testimony showed that three of the alleged conspirators joined the Certified Program to meet customer demand. *See* Nov. 20, 2019 Trial Tr. 43:1-12 (Ohio Fresh was required to join the UEP Certified program due to customer demand); Nov. 22, 2019 Trial Tr. 122:15-123:6 (Weaver Brothers joined the UEP Certified Program "because customers were demanding certified eggs"); Nov. 22, 2019 Trial Tr. 142:17-145:1 (Michael Foods joined the UEP Certified Program in 2006 because customers began "suggesting that if we could not give them . . . ACC certified [eggs] . . . that we would be out").

DAPs introduced a summary exhibit showing that all of the alleged conspirators were members of UEP, and some – but not all –served on the UEP Board of Directors and/or the UEP Producer Committee for Animal Welfare. *See* PX0769. However, merely attending UEP meetings or serving on a UEP board or committee does not, as a matter of law, constitute evidence an unlawful agreement. *See* Mem. Op. at 18, ECF No. 562 (Sept. 26, 2011) ("[P]articipation in a trade group association and/or attending trade group meetings, even those meetings where key facets of the conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of agreement to the conspiracy."); Mem. Op. at 16, ECF No. 744 (Oct. 3, 2012) (allegations that a defendant "belonged to the UEP, served in leadership positions within the UEP, and attended various meetings in which the conspiracy was discussed . . . are not enough, in and of themselves, to support an inference that [the defendant] joined the conspiracy. . . .").

As detailed in Section III(A) *supra* and in Section IV(A)(2)(b)(i) of Rose Acre's Memorandum, the evidence demonstrated that joining the Certified Program was not against any of the alleged conspirators' self-interest, and instead, was prompted by a desire to meet customers' and end consumers' demand for more humanely produced eggs. Accordingly, no reasonable jury could find the existence of a conspiracy involving one or more entities.

C. No Reasonable Jury Could Find That DAPs Suffered Any Injury Or That the Alleged Conspiracy Had Anticompetitive Effects.

In addition to proving the existence of an agreement, DAPs must prove that the concerted action produced anticompetitive effects within the relevant product and geographic markets and that DAPs were injured as a proximate result of the concerted action. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1229 (3d Cir. 1993). As set forth more fully in the Memorandum in Support of Defendant Rose Acre Farms' Motion for Judgment as a Matter of Law and incorporated by reference herein, DAPs have failed to present evidence establishing that any plaintiff was injured or that the alleged conspiracy produced anticompetitive effects. *See* Mem. in Supp. of Def. Rose Acre Farms' Mot. for J. as a Matter of Law, Section III, ECF No. 2070. As a result, UEP is entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons set forth above, Defendant UEP respectfully requests that the Court enter judgment in UEP's favor as a matter of law with respect to DAPs' claim under Section 1 of the Sherman Act.

Dated: December 4, 2019

Respectfully submitted,

/s/ *Jan P. Levine*

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CERTIFICATE OF SERVICE

On December 4, 2019, I hereby certify that United Egg Producers, Inc.'s Motion for Judgment as a Matter of Law Pursuant to Rule 50(a) was served on counsel of record via filing with the Court's CM/ECF system.

/s/ Whitney R. Redding
Whitney R. Redding