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 States Egg Marketers, Inc.'s ("USEM") 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 USEM for all claims against USEM by all Plaintiffs.

BY THE COURT:

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

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DEFENDANT UNITED STATES EGG MARKETERS, 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 States Egg Marketers, Inc. ("USEM"), 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,

/s/ *Jan P. Levine*

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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)

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 States Egg Marketers, Inc. ("USEM") 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) United Egg Producer's ("UEP") short-term supply measures, (2) the UEP Certified Program, and (3) USEM exports. However, DAPs have failed to present any evidence in their case-in-chief tying USEM to two of the elements of the alleged overarching conspiracy or establishing USEM's awareness of a larger scheme to reduce supply that included UEP's short-term measures or the UEP Certified Program. In the absence of such evidence, USEM cannot be found to have knowingly joined the overarching conspiracy at issue in this case. DAPs' claims against USEM also fail as a matter of law because DAPs have failed to prove any antitrust injury at all, let alone injury resulting from USEM's export activities, or that the alleged conspiracy produced anticompetitive effects. Because no reasonable jury would have a legally

sufficient basis to find that USEM was part of an unlawful overarching conspiracy to reduce the supply of eggs, USEM should be granted judgment as a matter of law.

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. USEM IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. No Reasonable Jury Could Find That USEM Joined An Overarching Conspiracy To Reduce The Supply Of Eggs.

DAPs have failed to prove that USEM knowingly joined an overarching conspiracy to reduce supply that included UEP's short-term measures and the UEP Certified Program.

"[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) (citations omitted). For that reason, Plaintiffs must present evidence of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 208. And Plaintiffs are "required to prove each particular defendant's culpability prior to obtaining relief from that defendant in this action." *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 755 (E.D. Pa. 2011).

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.*, No. 1-

1652, 2016 U.S. Dist. LEXIS 22982, at *64 (D.N.J. Feb. 25, 2016) (citing *United States v. Kelly*, 892 F.2d 255 (3d Cir. 1989)); *United States v. Fattah*, 914 F.3d 112, 168 (3d Cir. 2019).[1]

To demonstrate a single, overarching conspiracy, a plaintiff "must show each Defendant's understanding of the common purpose of the overarching conspiracy." *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2016 U.S. Dist. LEXIS 193193, at *404 (E.D. Mich. Apr. 13, 2016). That is, a plaintiff must not only prove that the various challenged activities were linked to form an overarching conspiracy, but also that *each defendant* saw the challenged activities as part of an overarching conspiracy and that it *consciously committed to joining such an overarching conspiracy*. *See, e.g.*, *id.* ("Only after a defendant agrees to the common purpose [of the overarching conspiracy] may it may be held responsible for the conduct of co-conspirators."); *Precision Assocs., Inc., v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42, 2011 U.S. Dist. LEXIS 51330, at *105 (E.D.N.Y. Jan 4, 2011) (each defendant needs to be aware of and committed to the essential purpose of the overarching conspiracy); *In re Fresh and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1174-75 (D. Idaho 2011) (dismissing complaint against defendant because there was no circumstantial evidence showing that defendant consciously committed to the alleged "overarching conspiracy"). Mere "awareness of a competitor's actions is not enough to create an inference of a conspiracy." *In re K-Dur Antitrust Litig.,* 2016 U.S. Dist. LEXIS 22982, at *80 (finding that a defendant's awareness of its co-defendants' potentially anticompetitive actions did not establish a single conspiracy). Although a coconspirator need not have perfect knowledge of every aspect or act in furtherance of an alleged conspiracy, it must at a minimum know that its actions are part of a larger, broader

[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).

scheme before it will be deemed a participant in a conspiracy that extends beyond its own involvement. *See, e.g.*, *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir. 1985) (finding individual participated in broader conspiracy where Court found "the evidence sufficient to prove [individual] knew he was part of a larger drug operation"). An individual or entity can be held liable only for reasonably foreseeable acts in furtherance and necessary or natural consequences of the conspiracy that the individual or entity knowingly joined. *See, e.g.*, *United States v. Fattah*, 914 F.3d at 169 (quoting *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) and recognizing that a defendant will not be liable for a coconspirator's crime if "the substantive offense committed by one of the coconspirators 'could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement'").

Further, in establishing a single conspiracy, it is not enough that defendants have the *same* goal; rather, plaintiffs must show that the defendants had a *common* goal. *In re K-Dur Antitrust Litig.*, 2016 U.S. Dist. LEXIS 22982, at *75. 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. *Id.* 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).

After twelve days of testimony, the evidence presented against USEM fails to establish USEM's conscious commitment to a broader, UEP-orchestrated conspiracy to reduce supply. DAPs did not offer any evidence to show that USEM participated in any of UEP's short-term measures or the UEP Certified Program. Gene Gregory testified that UEP was never a member of USEM, *see* Nov. 12, 2019 Trial Tr. 119:4-5, and there was no evidence presented to suggest that USEM was ever a member of UEP. While Plaintiffs introduced a copy of the UEP-USEM Management Agreement dated August 21, 2000 (PX0053), that agreement expressly confirms that UEP and USEM maintained separate corporate identities, and USEM did not authorize UEP to function as its agent:

- "USEM Corporate Structure. At all times during the continuation of this agreement USEM shall maintain itself as an active Georgia nonprofit cooperative marketing association." (Section 7).
- "Independence of Parties. Both UEP and USEM are independent Capper-Volstead Cooperatives and shall remain as such. USEM shall not function as a member or agent of UEP in any of its activities. UEP's sole function shall be to provide management services for USEM. UEP shall not participate in or have any responsibility for USEM activities or decisions in connection with its shell egg export or marketing conference call programs." (Section 9).
- "Independent Contractor. USEM and UEP acknowledge and agree that UEP shall be deemed to be an independent contractor in the performance of Services under this Agreement and shall not be considered or permitted to be an agent, servant, employee, joint venture or partner of USEM." (Section 12).

As such, the fact of an arm's length, bona fide Management Services Agreement does nothing to establish USEM's awareness of or participation in an overarching conspiracy to

reduce egg supply through UEP's short-term measures and the UEP Certified Program. Nor can UEP's solicitations of its own members to join USEM demonstrate USEM's knowledge of or agreement to such an overarching conspiracy. *See* PX0051.

While the evidence presented at trial could be construed to show that a purpose of USEM exports was to improve domestic prices (*see* PX0150; PX0367), such evidence – *without additional evidence proving that USEM was aware of a larger scheme to reduce supply* – would only support the existence of a discrete conspiracy independent from the alleged overarching conspiracy that includes UEP's Certified Program and UEP's short-term supply measures. Here, the evidence presented by DAPs against USEM focused entirely on USEM's export activity. The fact that *UEP* may have, at times, attributed price improvements to UEP's short-term measures, the UEP Certified Program, and USEM's exports (*see* PX0189), does not establish that *USEM* was aware of any scheme involving all three elements. USEM's knowledge cannot be implied based on UEP's knowledge because the Management Services Agreement confirms the separateness of the two entities. And even if the evidence could be construed to suggest that UEP orchestrated an overarching conspiracy to reduce supply in or around 2000, USEM cannot be held liable for these acts because DAPs have not presented any evidence to show that USEM was aware that its actions were part of a larger, broader scheme that extended beyond its own involvement in exports, and the additional acts are not reasonably foreseeable consequences of the export program that USEM developed in the 1980s.[2]

[2] USEM recognizes that the Court previously found that such evidence was sufficient to establish the existence of a conspiracy involving USEM for purposes of Fed. R. Evid. 801(d)(2)(E). *See* Oct. 31, 2019 Mem., ECF No. 2034 at 33-37. However, the Court clarified that this ruling applied only to the admissibility of evidence and was not a ruling as to the sufficiency of the evidence in proving liability. *Id.* at 4 n.4.

Moreover, DAPs have not established the interdependence of the three aspects of the alleged overarching conspiracy. Even if DAPs' evidence indicates that the goal of the USEM exports was to reduce the supply of eggs in the United States, that goal in no way depends on the success or failure of the UEP Certified Program or UEP's short-term measures. Although multiple, discrete conspiracies "may evidence a widespread problem in the industry," that does not constitute interdependence. *Precision Assocs.*, 2011 U.S. Dist. LEXIS 51330, at *106; *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 546 n.11 (S.D.N.Y. 2017) (noting that the "[c]omplaint d[id] not plausibly allege that these two alleged patterns of manipulation were part of the same conspiracy" because "there is no indication that the two conspiracies were part of one interwoven plot, as opposed to two separate sets of misconduct allegedly committed by the same entities"). At most, DAPs' evidence shows that the USEM exports and other aspects had the similar goal of reducing the supply of eggs. But evidence of a similar goal is not sufficient to prove a *common* goal.

Because DAPs have not proven USEM's awareness of or participation in a UEP-orchestrated conspiracy involving UEP's short-term measures and the UEP Certified Program, DAPs have not carried their burden of proving that USEM made a conscious commitment to join the overarching conspiracy alleged by DAPs.

B. 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); *see Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[T]he issue of fact of damage 'is a

question unique to each particular plaintiff and one that must be proved with certainty.'" (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978))); *accord In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

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.

In addition, DAPs offered no proof that they suffered antitrust injury due to USEM exports or that such exports measurably damaged them. Antitrust injury means "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (quoting *Brunswick*, 429 U.S. at 489). Put differently, "injury . . . will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny . . . ." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)).

Dr. Baye, DAPs' economic expert, testified that USEM's exports were "one off short-term things" with no lasting impact so he could not incorporate them into his econometric model purportedly showing antitrust injury. *See* Dec. 2, 2019 Trial Tr. 127:9-22. Out of the

many exports that took place during the alleged damages period, Dr. Baye only identified six that he claimed he could measure. *See id.* at 129:22-131:18. For this handful of exports that he selectively chose, Dr. Baye testified that the price impact lasted, at most, a single month. *Id.* at 148:18-1491:11.

Moreover, Dr. Baye's analysis of the short-term pricing impact of the select exports is fatally flawed. Dr. Baye based his analysis on an "assumption about what the elasticity of demand was for the eggs that were exported." *Id.* at 128:1-3. His "elasticity of demand," however, did not take into account the only record testimony at trial regarding USEM's exports: that USEM exports were of surplus eggs – that is extra eggs, for which there was no demand generally and certainly no demand from the DAPs. *See, e.g.*, Nov. 14, 2019 Trial Tr. 10:21-25, 11:24, 12:12-15 (Marcus Rust testifying that Rose Acre exported "surplus" eggs); Nov. 12, 2019 Trial Tr. 54:9 (Gene Gregory testifying "[e]xports are taken to try to address a surplus situation").

The Sherman Act does not concern itself with "[r]estraints [of trade] with short durations" like these. *Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246, 1281 (S.D. Fla. 2015) (holding that a restraint on trade that lasted seven months was "far too short as a matter of law to create the required substantial marketwide harm of actual detrimental effects"), *aff'd*, 845 F.3d 1072 (11th Cir. 2016). *See also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (indicating that the Sherman Act is intended to "distinguish robust competition from conduct with long-run anticompetitive effects"); *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) (holding that a "four- to ten-month" effect on competition "is not significant enough to be classified as an injury to competition under the

Sherman Act"). Accordingly, DAPs have not carried their burden of proving antitrust injury flowing from USEM's exports.

IV. CONCLUSION

For the reasons set forth above, Defendant USEM respectfully requests that the Court enter judgment in USEM'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 States Egg Marketers, 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