

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

MDL No. 1285
Misc. No. 99-0197 (TFH)

THIS DOCUMENT RELATES TO:)
Hormel Foods Corporation, et al. v. BASF)
A.G., et al., Civil Action No. 99-CV-1780(D. Minn))

FILED

FEB 07 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Memorandum Opinion Re: Motion to Strike Invalid Ratifications

Currently pending before the Court is defendants' Motion to Strike Invalid Ratifications.¹

The ratifications at issue were made by certain plaintiffs² in response to this Court's June 7, 2001 Memorandum Order which required all non-party affiliates to file formal ratifications. Upon careful consideration of defendants' motion, plaintiffs' opposition, defendants' reply, and the entire record herein, the Court will deny defendants' motion to strike. However, in the interest of

¹ The Motion to Strike Invalid Ratifications is brought by defendants F. Hoffmann-La Roche Ltd., Hoffman-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Aventis S.A. (f/k/a Rhone-Poulenc S.A.), Aventis Animal Nutrition S.A. (f/k/a Rhone-Poulenc Animal Nutrition S.A.), Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Inc., Hoeschst Marion Roussel S.A., Takeda Chemical industries, Ltd., Takeda Vitamin & Food USA, Inc., Takeda U.S.A., Inc., Takeda America, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corporation, Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals, Inc., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Bioproducts Incorporated, Chinook Group Ltd., ConAgra, Inc., Degussa AG (f/k/a Degussa-Huls AG), Degussa Corporation (f/k/a Degussa-Huls Corporation), DuCoa, L.P., DCV, Inc., E.I. duPont de Nemours and Company, EM Industries, Inc., Merck KGaA, E. Merck, Lonza AG, Lonza Inc., Mitsui & Co., Ltd., Nepera Inc., Reilly Chemicals, S.A., Reilly Industries, Inc., Sumitomo Chemical America, Inc., Tanabe U.S.A., Inc., UCB Chemicals Corporation and UCB, Inc.

² Defendants' Motion seeks to invalidate the Ratifications of Action brought by plaintiffs Centex Harvest States Cooperatives, Land O' Lakes, Inc., Hormel Foods Corp., The Turkey Store Co. F/K/A Jerome Foods, Inc., and Jennie-O Foods, Inc.

fairness, plaintiffs must clarify their ratifications to clearly establish the corporate affiliation of each of the ratifying affiliates within 7 days of the Order accompanying Memorandum Opinion.

Background

On June 7, 2001, this Court issued an Order and accompanying Memorandum Opinion ("June 7 Opinion") which denied defendants' joint motion to dismiss plaintiffs' claims in the direct action. In re: Vitamins Antitrust Litig., No. 99-197, 2001 WL 75582 (D.D.C. June 7, 2001). Defendants' joint motion was filed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction insofar as the claims were based upon transactions in foreign commerce and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted with regard to plaintiffs' non-party subsidiaries and affiliates claims that had not been assigned to plaintiffs. The Court held that plaintiffs satisfied the requirements for subject matter jurisdiction due to the fact that "these plaintiffs were substantially injured in United States commerce and that the injuries for which they seek redress were sustained in United States commerce because the purchases, including those of the foreign subsidiaries, were coordinated by the American parent companies and thus affected the financial status of these American companies." See June 7 Op. at *1.

In addition, the Court held that plaintiffs had satisfied the requisite standing requirements set forth in Associated General for foreign transaction claims and allowed plaintiffs' affiliate and subsidiary claims to proceed provided all affiliates file formal ratifications with the Court within ten days of the Order. See June 7 Op. at *1 (citing Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-45 (1983)). Thus, the Court ordered that affiliates file formal notices of ratification "in the interests of caution and in order to ensure that defendants are fully protected against the risk of multiple recoveries." See June 7 Op. at *3 n.6. In so doing the Court noted that these ratifications may in fact be unnecessary given that the

affiliates had represented that they agreed to be bound by the instant civil action. Id.

The period for filing the ratifications was extended for an additional eight days by a Court approved stipulation,³ and plaintiffs' ratifications were filed on June 29, 2001. On July 9, 2001, defendants advised plaintiffs that the ratifications were deficient because they were executed on behalf of plaintiffs themselves rather than on behalf of the supposedly ratifying entities. In response to a July 9, 2001 letter from defendants, plaintiffs agreed to review the ratifications and attempt to address defendant's concerns. Subsequently, on August 2, 2001, plaintiffs filed amended ratifications, and on August 27, 2001, defendants filed the present Motion to Strike claiming that the ratifications remained invalid.

Discussion

Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). In the June 7 Opinion, this Court ordered plaintiffs to file proper ratifications pursuant to Rule 17(a) in order to resolve controversies over the real party in interest. See June 7 Op. at *3 n. 6; see also Clarkson Co. V. Rockwell International Corp., 441 F. Supp. 792, 797 (N.D. Cal. 1977) ("Ratification, though rare, is an entirely proper method of resolving controversies over real parties in interest"). A proper ratification under Rule 17(a) requires that the ratifying party (1) authorize continuation of the action and (2) agree to be bound by its result. See Icon Group, Inc. v. Mahogany Run Development Corp., F.2d 473, 477 (3rd Cir. 1987) (citing 6 C. Wright & A. Miller, Federal Practice and Procedure §1555, at 709 (1971)).

Defendants contend that plaintiffs' ratifications are invalid because they are signed by the plaintiffs themselves rather than by the ratifying affiliates. Specifically, defendants claim that the ratifications signed by plaintiffs' senior counsel are invalid as the respective senior counsel do not

³ See Order, In re: Vitamins Antitrust Litig., No. 99-197, Amended And Corrected Stipulation (July 13, 2001).

hold positions with the subsidiaries or affiliates. Defendants have offered no support for this argument other than their hollow assertions that the signatories of the ratifications lacked authority to act on behalf of the affiliates. The plaintiffs, however, have offered the affidavits of the signatories asserting such authority. The Court is not persuaded by the defendants argument. The mere fact that an individual is employed by a parent corporation does not preclude the individual's authority to bind a subsidiary corporation. The Court will now address the specific ratifications as challenged by the defendants:

- a. Cenex Harvest States Cooperatives. Plaintiffs have provided an affidavit stating that "Senior Legal Counsel", Malcolm McDonald, has been "duly authorized to bind the entities listed on Attachments 1 and 2 to any judgment resulting from this action and to execute ratifications in furtherance thereof." See McDonald Aff. ¶4.
- b. Land O'Lakes, Inc. Plaintiffs have provided an affidavit stating that "Senior Counsel", John Curran, has been "duly authorized to bind the entities listed on Attachments 1 and 2 to any judgment resulting from this action and to execute ratifications in furtherance thereof." See Curran Aff. ¶4.
- c. Hormel Foods Corporation. Plaintiffs have provided an affidavit stating that "Senior Attorney", Brian D. Johnson, has the authority "to bind the entities listed on Attachments 1,2,3 and 4 to any judgment resulting from this action and to execute ratifications in furtherance thereof." See Johnson Aff. ¶4
- d. The Turkey Store and Jennie-O Foods, Inc. Plaintiffs have provided an affidavit stating that "Senior Attorney", Brian D. Johnson, has the ability "to bind the entities listed on Attachments 1,2,3 and 4 to any judgment resulting from this action and to execute ratifications in furtherance thereof." See Johnson Aff ¶4.

Defendants also argue that the actions of these plaintiffs circumvents the Court's express requirement that "all affiliates file formal notifications of ratifications...." in order to ratify the conduct of the action. June 7 Order at * 8, nn.6 & 9. The Court finds this argument more compelling. However, plaintiffs' assertions, under oath, that they have acted on behalf of the subsidiaries or affiliates does satisfy this requirement. The Court will not elevate form over substances where it finds no undue prejudice to the defendants.

Defendants further contend that the ratifications at issue are invalid due to the fact that

the supposed ratifying entities do not exist as separate legal organizations and it is the plaintiffs burden to establish the existence of the entities. As stated above, the purpose of Rule 17(a) is to ensure that the action is prosecuted in the name of the real party in interest and to preserve the proper res judicata effect of the judgment. See Fed. R. Civ. P. 17(a) advisory committee's note. The fact that some of the entities listed by plaintiffs are corporate subdivisions and departments rather than distinct legal entities does not invalidate the ratifications filed by plaintiffs. Plaintiffs have merely listed all current and prior departments, organizations, and subdivisions that agree to be bound by this action, and this in itself does not invalidate the ratifications at issue. See American Jerex Co. v. Universal Aluminum Extrusions, Inc., 340 F. Supp. 524, 527 - 28 (E.D.N.Y. 1972). ("Defendant contends the foregoing conclusively establishes plaintiff's lack of capacity to sue (an affirmative defense raised in defendant's answer), since a division of a corporation is not a legal entity. The court disagrees and considers defendant's contention captious.")

The Court is concerned that defendants have not been given a clear identification of the entities that have ratified the assertion of their claims in this case. However, it does not find the ratifications are so lacking so as to warrant dismissal.⁴ The Court notes defendants' claims that some of the affiliate ratifiers no longer exist. Thus, with respect to the ratifications at issue, the plaintiffs will be ordered to serve on the defendants clarification of the ratifications showing the corporate affiliation of each of the ratifiers with each of the plaintiffs.

Lastly, defendants argue that at least some of the ratifications were not timely filed because they were added in the "amended ratifications" after the Court's initial deadline. The

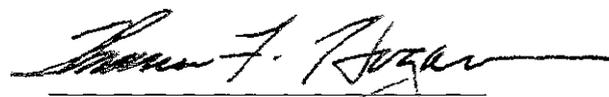
⁴ According to Rule 17(a)(1), " No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action...." Fed. R. Civ. P. 17(a)(1).

Court finds that in the interest of fairness and because the defendants suffer no surprise or undue prejudice due to the clarification of the participating affiliates, the amended ratifications should be allowed. Rule 17(a) advocates a policy of fairness and allows for a "reasonable time" in addressing the real parties in interest after an objection has been made. Thus, the Court finds the parties added by the amended ratifications to be valid and timely filed. See e.g., Link Aviation, Inc. v. Downs, 325 F.2d 613, 615 (D.C. Cir. 1963).

Conclusion

The ratifications required by the June 7, 2001 Order were to insure that the present action be prosecuted in the name of the real party in interest pursuant to Rule 17(a). The Court was concerned that the purpose and intent of Rule 17(a) be met in order "to protect the defendant against a subsequent action by the party actually entitled to recovery, and to insure generally that the judgment will have its proper effect as res judicata." June 7 Op. at *4 n. 6. The Court does not find that the ratifications are so lacking in validity as to warrant dismissal. The ratifications along with the affidavits submitted by Counsel are sufficient to satisfy Rule 17(a), therefore, the Court denies defendant's Motion to Strike Invalid Ratifications. However, in the interest of fairness, plaintiffs must clarify their ratifications to clearly establish the corporate affiliation of each of the ratifying affiliates within 7 days of the Order accompanying this Memorandum Opinion.

February ⁵7, 2002


Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST
LITIGATION

)
)
) MDL No. 1285
) Misc. No. 99-0197 (TFH)
)

THIS DOCUMENT RELATES TO:
Hormel Foods Corporation, et al. v. BASF
A.G., et al., Civil Action No. 99-CV-1780(D.Minn.)

FILED

FEB 07 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER Re: Motion to Strike Invalid Ratifications

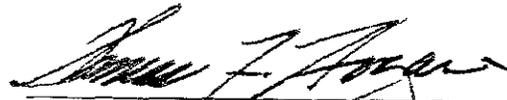
In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Motion to Strike Invalid Ratifications is **DENIED**. It is further hereby

ORDERED that Plaintiffs, in accordance with the accompanying Memorandum Opinion, will clarify their ratifications to clearly establish the corporate affiliation of each of the ratifying affiliates within 7 days of this Order.

So **ORDERED**.

February 7, 2002



Thomas F. Hogan
Chief Judge

2721