

FILED

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

MAR 18 2002

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

IN RE:)
)
)
VITAMINS ANTITRUST LITIGATION)
_____)

Misc. No. 99-0197
MDL No. 1285

This Document relates to:

)
BLUE SEAL FEEDS, INC., et al. v. BASF AG,)
et al., Civil Action No. 99-CV-3326 (C.D. Ill.))
)
TYSON FOODS, INC., et al. v. BASF AG, et al.,)
Civil Action No. 99-5134 (W.D. Ark.))
)
THE QUAKER OATS COMPANY, et al v.)
BASF AG, et al., Civil Action No. 99 CV 01972)
(D.C.))
)
MARSHALL DURBIN FARMS, INC., et al.)
v. BASF AG, et al., Civil Action No. 99-CV 0152)
(G.D. Ga.))
)
COUNTRYMARK COOPERATIVE, INC. v.)
BASF AG, et al., Civil Action No. 99-1941)
(S.D. Ind.))
)
CACTUS OPERATING, LTD., et al. v. BASF)
AG, et al., Civil Action No. 99-288j (N.D. Tex.))
)
SOUTHERN STATES COOPERATIVE, INC.,)
et al. v. BASF AG, et al., Civil Action No.)
99-00070 (W.D. Va.))
_____)

Docket No. 99-2683 (TFH)

Docket No. 99-2681 (TFH)

Docket No. 99-1972 (TFH)

Docket No. 99-2682 (TFH)

Docket No. 99-234 (TFH)

Docket No. 99-2684 (TFH)

Docket No. 99-2685 (TFH)

**Memorandum Opinion Re: Motion For Leave To Supplement
and Amend Complaints and To Dismiss Complaint
(~~UNDER SEAL~~)**

Pending before the Court is plaintiffs' Motion for Leave to Supplement and Amend

Complaints¹ and to Dismiss Complaint² pursuant to Rules 15(a) and Rule 41(a)(2) of the Federal Rules of Civil Procedure. Defendants oppose the motion and have filed four Oppositions thereto: Defendants' Opposition to Plaintiffs' Motion for Leave to Supplement and Amend Complaints ("Defs.' Opp."); Opposition of Rhone-Polenc Animal Nutrition, S.A. to Plaintiffs' Motion for Leave to Supplement and Amend Complaints and to Dismiss Complaint ("Rhone-Poulenc Opp."); Defendant Bioproducts Incorporated and Former Bioproducts Incorporated Employee Thomas Sigler in Partial Opposition to Plaintiff's Motion for Leave to Supplement and Amend Complaints ("Bioproducts Opp."); Certain Choline Chloride Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Supplement and Amend Complaints ("Choline Opp."). Having considered Plaintiffs' Motion, Defendants' Oppositions, Plaintiffs' Reply and Plaintiffs' Notice of Substitution of Proposed Amended Complaint³ For the reasons set

¹Plaintiffs request leave to file the following:

1. Second Amended Complaint in Blue Seal Feeds, Inc., et al v. BASF AG, et al. ("Blue Seal Feeds Complaint");
2. First Amended Complaint in Tyson Foods, Inc., et al. v. BASF AG, et al. ("Tyson Foods Complaint");
3. First Amended Complaint in Marshall Durbin Farms, Inc., et al. v. BASF AG, et al. ("Marshall Durbin Complaint.");
4. First Amended Complaint in Countrymark Cooperative, Inc., et al. v. BASF AG, et al. ("Countrymark Complaint");
5. First Amended Complaint in Cactus Operating, Ltd., et al. v. BASF AG, et al. ("Cactus Complaint");
6. First Amended Complaint in Southern States Cooperative, Inc., et al. v. BASF AG, et al. ("Southern States Complaint").

²Plaintiffs seek to dismiss without prejudice The Quaker Oats Company, et al. v. BASF AG, et al. ("Quaker Complaint").

³On March 4, 2002, Plaintiffs' filed a Notice of Substitution of Proposed Amended Complaint which withdraws the "Stay C allegation" as to each of the proposed amended complaints. This withdrawal of the Stay C allegation renders moot the defendants' objections to the amended complaints based on the purported addition of the Stay-C allegation.

forth below, Plaintiffs' Motion is granted.

Background

The Court will briefly address the relevant procedural background. On April 28, 2000 this Court issued an Order Establishing Pretrial Schedule and Procedures. In pertinent part, this set May 1, 2000 as the deadline for plaintiffs' counsel to identify all new plaintiffs, and June 30, 2000 as the deadline to serve (or initiate service) on all defendants. These dates as well as many of the other dates in that Order have been modified upon appropriate motion or stipulation - the Court has evaluated each request on the merits presented and decided accordingly. There are a myriad of reasons for granting the modifications, however, from the perspective of hindsight, a common theme underlying each motion and/or stipulation is the sheer magnitude of this case in terms of the number of plaintiffs and defendants involved, and the allegation of a vast international conspiracy, the scope of which has never been the subject of a civil antitrust suit. Thus, it is not surprising that the Court has been "extremely liberal" in granting the requests in the interest of fairness to the overall litigation and in compliance with the Federal Rules of Civil Procedure. Most relevant to the instant motion are the numerous orders granting leave to amend and add plaintiffs and defendants to complaints.

The instant motion requesting leave to amend was initially filed on May 25, 2001, however, by Court approved stipulation, the motion to amend was withdrawn and the deadline to re-file was agreed to be July 2, 2001. The reason for the withdrawal and re-filing of the motion was, in part, due to the Court's June 7, 2001 Order (" June 7 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).⁴ 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 filed 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 required the plaintiffs to "amend their complaints to make these subsidiary-parent relationships explicit and thus to highlight this Court's jurisdiction over the foreign subsidiaries claims" and 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. 3 & 6. The instant motion for leave to amend was filed on July 2, 2001 and appropriate opposition and reply followed. The Court will address seriatim the requested amendments.

II. DISCUSSION

Rule 15(a) of the Federal Rules requires either written consent of the adverse party or

⁴Defendants' 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.

leave of the court to amend a pleading, but provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The grant or denial of a motion for leave to amend is within the Court's discretion, but it is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as "undue delay, bad faith, dilatory motive . . . repeated failures to cure deficiencies by [previous] amendments, undue prejudice to the opposing party . . . [or] futility of amendment." Forman v. Davis, 371 U.S. 178, 182 (1962); see also James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1098 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 737 (1997).

Both the Choline Chloride defendants and the Rhone-Poulenc Animal Nutrition S.A. ("RPAN SA") argue that amendment at this stage of the litigation is only proper upon a showing of "good cause" by the plaintiffs. Specifically, they argue that the motion should be analyzed under Rule 16(b) of the Federal Rules because the Court issued a scheduling order pursuant to Rule 16 on April 28, 2000 (mentioned above). Rule 16(b) states that a schedule "shall not be modified except upon good cause and by leave of the district judge" Fed R. Civ. P 16(b). These defendants claim that the liberal amendment requirements of Rule 15 (a) are not applicable after the Court has entered a Rule 16(b) scheduling order. See e.g., Johnson v. Mammoth Recreations, Inc. 975 F.2d 604, 609 (9th Cir.1992); In re Milk Prod. Antitrust Litig., 195 F.3d 430, 437 (8th Cir.1999), cert denied, 529 U.S. 1038 (2000). The Court does not accept this argument and has not applied a "good cause" standard in analyzing any such requests to amend in this litigation to date. Further, defendants point to no authority which would require this Court to analyze this motion brought pursuant to Rule 15 under a Rule 16(b) standard. Thus, the liberal requirements of Rule 15(a) shall apply to the instant motion.

In this case, plaintiffs seek various amendments which they categorize as: (1) Supplementation required by the June 7 Order; and, (2) Other Proposed Amendments. The Court grants the proposed amendments in the first category pursuant to its order of June 7, 2001. Specifically, the Court will allow:

- Supplementation of the Blue Seal Feeds and Tyson Complaints to allege specifically the relationship between certain United States parent company plaintiffs and their foreign subsidiaries and affiliates.
- Supplementation of the Blue Seal Feeds Complaint, Tyson Complaint, Marshall Durbin Complaint, Cactus Complaint, and the Southern States, Complaint to state that certain of the plaintiffs' subsidiaries or affiliates have ratified the commencement of the action pursuant to Fed. R. Civ. P. 17(a) as listed in Appendix A of the proposed amended complaints.

The second category of proposed amended complaints must be addressed in more detail. First, plaintiffs seek to add three plaintiffs: Sanderson Farms, Inc., T.C. Products Co., Inc. and Pro-Pet L.L.C. Specifically, plaintiffs wish to add Sanderson Farms, Inc. and T.C. Products Co., Inc. to the Blue Seal Feeds Complaint, and Pro-Pet L.L.C. to the Southern States Complaint. In support of this, plaintiffs submit that these proposed plaintiffs have complied with all discovery requests in their respective cases and, therefore, have been acting as plaintiffs. In addition, plaintiffs note that all three have timely opted out of the vitamins and choline chloride settlement classes. Defendants argue that plaintiffs' proposal should be denied because the Court expressly ordered the plaintiffs' counsel to "identify to all new plaintiffs on or before May 1, 2000," and the plaintiffs offer no reason as to why they delayed in actually asserting their claims prior to this point. While the Court is cognizant of the need to finalize pleadings in order to efficiently proceed to trial, the Court does not find sufficient undue delay, bad faith, or dilatory motive to warrant denying plaintiffs' leave to amend, therefore, the Court will allow the addition of the

three plaintiffs.

Second, plaintiffs seek to add plaintiffs The Quaker Oats Company ("Quaker") and Schreiber Foods, Inc. ("Schreiber") to the Blue Seal Feeds Complaint and concurrently to dismiss without prejudice the Quaker Complaint, in which Quaker and Schreiber (together "Quaker Plaintiffs") were the only named plaintiffs. Plaintiffs claim this would streamline the prosecution of the cases and would cause no undue prejudice. Plaintiffs also claim that the amendment would be unlikely to result in the need for new discovery because the Quaker Plaintiffs have stated in discovery responses that they did not but any choline chloride, instead they seek to hold the choline chloride defendants jointly and severally liable for their role in what plaintiffs allege as a single vitamins conspiracy. Certain choline chloride defendants argue that the Quaker Plaintiffs knew about the choline chloride allegations and defendants years ago but delayed amending for no sound reason. Further, defendants argue that the amendment would impose extreme prejudice because certain defendants did not attend or monitor the already-held depositions of the Quaker Plaintiffs, nor did they review the over 21,000 pages of documents already produced by these plaintiffs. If the plaintiffs are added, defendants claim that depositions would have to be re-opened, creating significant inefficiencies.

The Court is not convinced that the addition of the Quaker Plaintiffs to the Blue Seal Feeds Complaint will cause significant inefficiencies or prejudice. Should the choline chloride defendants need to serve additional, non-duplicative discovery as a result of this amendment, these defendants will be afforded the opportunity to do so. Further, the Court does not find the delay in bringing the amendment sufficient to warrant denial, in addition, the Court finds that this may well add efficiency to the proceeding. The Court will allow the Quaker Plaintiffs to be

added to the Blue Seal Feeds Complaint and will concurrently allow the Quaker Complaint to be dismissed without prejudice.

Third, plaintiffs seek to dismiss eight defendant with whom they have settled or otherwise agreed to dismiss and to add one individual Mr. Tom Sigler, a U.S. citizen and former employee of Bioproducts, Inc., who plaintiffs allege actively participated in the alleged conspiracy. The Court has no trouble granting the unopposed motion to dismiss the eight defendants. The question of whether to allow the addition of an individual is a closer issue. Plaintiffs claim that they have only "recently become aware of Mr. Sigler's integral involvement in the conspiracy" through documents produced, his deposition, and other recent depositions. See e.g., Travelers Indemnity Co. of Connecticut v. Losco Group Inc., No. 99 CV 11422, 2001 WL 823601, at * 3 (S.D.N.Y. June 29, 2001) ("When considering motions to amend, federal courts consistently grant motions to amend where it appears that new facts and allegations that were developed during discovery, are closely related to the original claim and are foreshadowed in earlier pleadings."); Litton Indis., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 734 F. Supp. 1071, 1078 (S.D.N.Y. 1990) (allowing amended claim for punitive damages after three years where discovery was still open, little additional discovery was required, and no undue delay would result). Plaintiffs assert that while it is true that Bioproducts did produce documents that ultimately demonstrated Mr. Sigler's involvement, these documents did not identify Mr. Sigler on their face, rather, the documents were apparently authored by him but he was not identified as the author. Lastly, plaintiffs claim that Bioproducts' assertion that the plaintiffs had improper motives is without merit as there is nothing improper about seeking a knowledgeable witness's cooperation, nor is there anything improper about suing a culpable witness who refuses to settle

or cooperate.

Defendant Bioproducts and Former Bioproducts employee Mr. Sigler⁵claim that: (1) there has been undue delay in seeking to add Mr. Sigler; (2) undue prejudice would result in adding him at this late stage because he has not participated in any discovery nor has he had a right to it; and, (3) that plaintiffs seek to add Mr. Sigler in bad faith and based on a dilatory motive. As to prejudice to putative defendant, Bioproducts argues that Mr. Sigler would have to conduct his own discovery and would likely need to re-open several, if not most of the numerous depositions that have already been taken. This would unfairly prejudice Mr. Sigler and other defendants who would also have to participate in the additional discovery. See, e.g., United States v. Midwest Suspension & Brake, 49 F.3d 1197, 1202 (6th Cir. 1995) (untimely amendment would have unfairly prejudiced non-moving party by requiring new and expensive discovery); Semco, Inc.v. Amcast, Inc., 52 F.3d 108, 114 (amendment of complaint after extensive discovery had been conducted was likely to prejudice the non-moving party). Bioproducts further claims plaintiffs' motives are improper because plaintiffs are only hoping to "terrorize an individual into cooperating with plaintiffs against other defendants by holding the threat of personal liability over his head," but have no real intention of seeking redress from a former-employee individual of limited resources.

The Court is not convinced that there has been undue delay in seeking amendment as the plaintiffs have made some showing that they only became fully aware of Mr. Sigler's involvement in the alleged conspiracy during the course of on-going discovery. The Court is also

⁵The Bioproducts Opposition makes clear that Mr. Sigler is not a party to this litigation and is appearing specially for the sole purpose of opposing the instant motion.

not convinced that adding an individual defendant at this time will result in undue delay or prejudice to the defendants. It is likely that Mr. Sigler's interests will be aligned with existing defendant Bioproducts' interests and that adding this defendant will not require significant additional discovery. Should additional discovery be required, Mr. Sigler will be afforded to opportunity to timely conduct such discovery. Lastly, the Court finds the argument that plaintiffs sought amendment upon improper motive without merit. There is nothing improper about seeking a knowledgeable witness's cooperation or about suing a culpable individual in an attempt to recover. The Court will allow plaintiffs to amend and add Mr. Sigler as a defendant.

Fourth, plaintiffs "seek ministerial changes," most of which are unopposed and will be granted without discussion. The Court will, however, briefly address two proposed ministerial changes which were contested. The first proposed change seeks to "correc[t] the caption of the Blue Seal Feeds Complaint to include Rhone-Poulenc Animal Nutrition S.A. ["RPAN SA"]which was named as a defendant in the body of the Blue Seal Feeds Complaint but inadvertently omitted from the caption." Another proposed amendment seeks to "make all the complaints consistent with what has become the "lead" case for those filed by the Dickstein, Shapiro, Morin & Oshinsky LLP, [Blue Seal Feeds]." These amendments, taken together, as defendant RPAN SA points out, seeks to add RPAN SA to the other cases being litigated by counsel for Blue Seal Feeds. RPAN SA opposes adding RPAN SA to the caption of Blue Seal Feeds Complaint as untimely and improper. Defendant RPAN SA also claims that plaintiffs have not established "good cause" to excuse their dilatory conduct. RPAN SA point out that plaintiffs have never named RPAN SA in the body or the caption of the First Amended Complaint of Blue Seal Feeds as a defendant and should not be allowed to do so at this late date.

Plaintiffs counter that RPAN SA was indeed identified in the body of the complaint under the section titled "Defendants" and was identified as a co-conspirator. The Plaintiffs also point out that RPAN SA had been attempting to negotiate with plaintiffs for a year to substitute RPAN SA as the named defendant in lieu of defendant Rhone-Poulenc S.A. (RPSA) (this is the parent company to RPAN SA) and that their current opposition is plainly inconsistent with these negotiations.

The Court will allow plaintiffs to add RPAN SA to the caption of the Blue Seal Feeds Complaint and will allow the other identified complaints to be made consistent with the Blue Seal Feeds Complaint. The Court does not find sufficient prejudice to defendant RPAN SA or any other defendants, nor does the Court find undue delay, dilatory motive or bad faith on the part of plaintiffs seeking amendment which would warrant denying the motion for leave to amend.⁶

Lastly, plaintiffs seek to add UCB Chemicals Corporation to the Cactus Complaint, the Countrymark Complaint, the Marshall Durbin Complaint, the Southern States Complaint, and the Tyson Complaint. The Choline Chloride defendants oppose this for the same reasons they opposed the amendment as to the Quaker plaintiffs. The Court rejected those arguments and allowed the addition of the Quaker plaintiffs and again rejects those arguments as to adding UCB Chemicals to the above mentioned complaints.

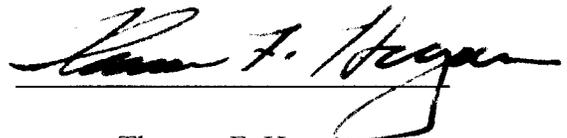
Conclusion

For the foregoing reasons, the Court will grant plaintiffs' Motion for Leave to Supplement

⁶The Court points out that RPAN SA's primary argument rests on their claim that plaintiffs bear the burden of establishing good cause for amendment. As stated above, the Court will not require a showing of good cause and will apply Rule 15(a) to the instant motion.

and Amend Complaints and to Dismiss Complaint pursuant to Rules 15(a) and Rule 41(a)(2) of the Federal Rules of Civil Procedure. An appropriate Order will accompany this Memorandum Opinion.

March 18, 2002

A handwritten signature in black ink, appearing to read "Thomas F. Hogan", written over a horizontal line.

Thomas F. Hogan
Chief Judge