**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 19-21551-CIV-ALTONAGA/Louis**

In re:

**FARM-RAISED SALMON AND SALMON PRODUCTS ANTITRUST LITIGATION**
_____/

**ORDER**

**THIS CAUSE** came before the Court on the Direct Purchaser Plaintiffs' Motion for Leave to Amend Complaint [ECF No. 423], accompanied by supporting exhibits [ECF Nos. 423-1–423-2], filed on September 23, 2021. Defendants filed an Opposition [ECF No. 434], along with supporting exhibits [ECF Nos. 434-1–434-5], to which Plaintiffs filed a Reply [ECF No. 442]. The Court has carefully considered the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted.

***Background***. The Court assumes the reader's familiarity with the underlying allegations and claims raised in this case, which are found in the March 23, 2021 Order Denying Defendants' Motion to Dismiss the Second Consolidated Amended Direct Purchaser Class Action Complaint for Failure to State a Claim [ECF No. 307]. (*See id.* 1–15).[1] In the operative Scheduling Order [ECF No. 308], the Court set a deadline of September 23, 2021 for the filing of motions for leave to amend pleadings. (*See id.* 1). The current operative complaint is Plaintiffs' Second Consolidated Amended Direct Purchaser Class Action Complaint ("SCAC") [ECF Nos. 246, 251-1].

Plaintiffs timely submitted the present Motion, seeking leave to file a Third Consolidated

[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

Amended Direct Purchaser Class Action Complaint ("TCAC") that includes the following amendments: "(1) non-substantive changes to reflect that certain plaintiffs have been removed . . . and to delete no-longer-relevant background information regarding Defendants' production of documents; and (2) additional allegations about the relevant production market that have been added following a recent meet and confer with Defendants' counsel." (Mot. 2 (alteration added)). Specifically, given that Defendants recently advised Plaintiffs that they do not believe the SCAC states a rule of reason claim, Plaintiffs would like to amend their pleading to "clarify that they assert a Sherman Antitrust Act claim that can be judged *either* under the *per se* or rule of reason standard[]." (*Id.* (emphasis in original; alteration added)).

***Standards***. Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint "shall be freely given when justice so requires." *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (quotation marks and citation omitted). The district court's discretion under Rule 15(a) is "extensive[.]" *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 761 (11th Cir. 1995) (alteration added; citation omitted). The Supreme Court has directed that leave to amend should be denied only in cases marked by undue delay, bad faith or dilatory motive, futility of amendment, or undue prejudice to the opposing party. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The Eleventh Circuit has further explained that "[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988) (alteration added; quotation marks and citation omitted).

***Discussion***. Defendants raise two *Foman* factors as reasons for the Court to deny Plaintiffs' Motion: undue delay and undue prejudice. (*See generally* Opp'n). The Court addresses each in turn.

*Undue Delay*. Defendants argue Plaintiffs unduly delayed in asserting the rule of reason theory and insist Plaintiffs "did not include any market-definition or harm-to-competition allegations, as required to plead a rule of reason claim." (*Id.* 5). They further contend Plaintiffs' subsequent court filings confirm Plaintiffs' intention to solely litigate a per se theory (*id.* 5–6) and summarize their argument as follows:

> In short, for over two years, Plaintiffs consistently told Defendants (and the Court) that they were pursuing a *per se* price-fixing claim and only a *per se* claim. They went so far as to expressly tell Defendants that they were not pursuing a rule of reason claim to resist discovery that would plainly be relevant to a rule of reason theory. When Defendants sought to confirm Plaintiffs' position, Plaintiffs sat silent for two months, while document discovery of Defendants went forward at a rapid pace.

(*Id.* 7–8).

According to Plaintiffs, Defendants do not cite any on-point case law that compels the denial of a request for leave to amend on the basis of undue delay in a situation such as this one, where the scheduling order deadline for amendments was complied with, discovery is open, and summary judgment motions and trial are over a year away. (*See* Reply 7–8*; see* Opp'n 5–7). Plaintiffs have the better position.

In the context of undue delay, the "mere passage of time, without anything more, is an insufficient reason to deny leave to amend." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1490 (11th Cir. 1989) (citations omitted), *rev'd on other grounds*, 499 U.S. 530 (1991). By contrast, "[p]rejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) (alteration added; citation omitted). Moreover, "[a] district court may find undue delay when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings."

*Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1186 (11th Cir. 2013) (alteration added; citations omitted), *abrogated on other grounds by CSX Transp., Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333 (11th Cir. 2017); *see also id.* at 1187 (holding the district court did not abuse its discretion in denying a motion for leave to amend brought after the close of discovery where the movant knew "the basis for [the amendment] for almost a year[,]" "amendment would prejudice [the opponent]," and amendment "would require additional discovery and further delay the trial" (alterations added)).

Defendants fail to cite any analogous precedent where a court has found undue delay, likely because the Eleventh Circuit's decisions affirming district courts' denials of leave to amend are radically distinguishable from the present case. (*See* Opp'n 5–8). *See, e.g.*, *Nolin v. Douglas Cnty.*, 903 F.2d 1546, 1551 (11th Cir. 1990) (affirming district court's denial of leave to amend for undue delay where "both the parties and the court were fully prepared for trial and the addition of a new claim would have re-opened the pretrial process and delayed the trial, and [the plaintiff's] attorney had sufficient opportunity to request a timely amendment before the pretrial order had been submitted" (alteration added)), *overruled on other grounds by McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994); *Rhodes v. Amarillo Hosp. Dist.*, 654 F.2d 1148, 1154 (5th Cir. 1981) (same result where a party moved for leave to amend 30 months after the original complaint and only three weeks before trial, and the only justification offered for the delay was plaintiff's retention of a new attorney); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th Cir. 1999) (same result where "forty months had passed since the filing of the original counterclaim, the new counts would require proof of different facts, and the only apparent reason for the new claims was [defendant's] retention of new counsel" (alteration added)).

Here, Plaintiffs timely seek leave to amend. The class certification discovery deadline is not until March 23, 2022; discovery does not close until December 2, 2022; the dispositive motions deadline is not until January 3, 2023; and trial is set to occur during the Court's two-week trial calendar beginning May 22, 2023. (*See* Sched. Order 1–2).

Defendants also cite two antitrust cases where parties sought leave to amend; both are unpersuasive in this context. (*See* Opp'n 8 (citing *In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481, 2016 WL 1629350, at *8 (S.D.N.Y. Apr. 25, 2016); *Kelsey K. v. NFL Enters., LLC*, 757 F. App'x 524, 527 n.3 (9th Cir. 2018))). The first, *In re Aluminum Warehousing*, dealt with a request for leave to amend brought after the scheduling order deadline had passed and was thus subject to the Rule 16(b)(4) good cause standard, which the court held the parties failed to meet. *See* 2016 WL 1629350, at *1, 4–8. The good cause standard does not apply here because Plaintiffs timely moved for leave to amend before the expiration of the Scheduling Order deadline.

The second case, *Kelsey K.*, is likewise inapt. *See* 757 F. App'x 524. There, the court denied leave to amend where the plaintiff failed to sufficiently plead a rule of reason claim because she provided "no explanation" for her failure to allege facts relevant to a rule of reason analysis, and "the amendments that [she] propose[d] would not cure the[] defects." *Id.* at 527 & n.3 (alterations added; citation omitted). Here, Plaintiffs' SCAC survived a motion to dismiss, and Plaintiffs provide a justification for why they now seek to amend their claims — namely, that Defendants, after previously stating they "'were unable to locate any limitation to a per se case in Plaintiffs' pleadings'" (Reply 8 (quoting Opp'n, Ex. 2, Email from Ryan W. Marth [ECF No. 434-2] 2)), later implied during a conferral that they viewed the SCAC as only asserting a per se claim, to the exclusion of a rule of reason claim (*see* Reply 8; *see also* Mot. 2, 7).

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