

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

*IN RE BROILER CHICKEN ANTITRUST
LITIGATION*

THIS DOCUMENT RELATES TO:

Movant Direct Action Plaintiffs

Civil Action No. 1:16-cv-08637

Judge Thomas M. Durkin

Magistrate Judge Jeffrey T. Gilbert

**CERTAIN DIRECT ACTION
PLAINTIFFS' MOTION FOR LEAVE
TO AMEND THEIR COMPLAINTS**

Certain Direct Action Plaintiffs (collectively "Movant DAPs") seek leave pursuant to Federal Rules of Civil Procedure 15 and 16 to amend their allegations as follows:

- Certain DAPs seek permission from the Court to assert claims against the following: (1) existing defendant Amick; (2) existing defendant Case; (3) existing defendant Keystone; and (4) Rabobank.
- Certain DAPs seek permission from the Court to add federal and Georgia RICO claims to their existing causes of action.
- DAP Quirch Foods LLC seeks leave to amend its complaint solely to clarify that it is asserting claims in this action that also arise out of direct chicken purchases made by a newly-acquired affiliate, pursuant to an assignment of claims executed between Quirch and its affiliate within the last month.¹

There is good cause to permit these amendments, which will not prevent fact discovery from being completed by the current June 2021 deadline. Granting leave here is consistent with Rule 15(a)(2)'s direction that courts should "freely give leave when justice so requires."²

¹ If permitted, these amendments would be made to the forthcoming Consolidated DAP Complaint (which will be filed on October 23, 2020 in accordance with ECF 3835). Pursuant to Local Rule 26.3, the discovery materials quoted and cited herein are not being filed with the Court. If the Court so wishes, they will be added to the record.

² This motion is made pursuant to Federal Rules of Civil Procedure 15 and 16.

I. APPLICABLE RULES OF CIVIL PROCEDURE

Motions to amend a pleading after the deadline set by a scheduling order are governed by Federal Rules of Civil Procedure 15 and 16.³ Under Rule 16(b)(4), “[a] schedule may be modified only for good cause and with the judge’s consent.” If the moving party demonstrates “good cause” under Rule 16(b), the district court then evaluates whether the movant meets the general standard for amending a pleading under Rule 15. In large or complex cases like this, “[d]evelopments in the litigation may call for subsequent modification of a scheduling order entered early in the litigation.” Manual for Complex Litigation, Fourth, § 11.212 at 39.⁴

Rule 15(a)(2) instructs courts to “freely give leave when justice so requires.” Accordingly, a district court ordinarily should grant leave to amend unless there is “an apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” *O’Brien v. Vill. of Lincolnshire*, 955 F.3d 616, 629 (7th Cir. 2020) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). District courts have broad discretion in making determinations regarding pleading amendment. *Foster v. DeLuca*, 545 F.3d 582, 584–85 (7th Cir. 2008) (reviewing denial of leave to amend for abuse of discretion).

³ The following Movant DAPs are not subject to the Rule 16 standard and analysis, because their cases were transferred to the Broiler Chicken Antitrust Litigation consolidated master docket after the April 15, 2019 amendment deadline: Conagra DAPs (transferred on June 4, 2019); Giant Eagle, Inc. (filed 04/24/19); The Golub Corporation, Latina Boulevard Foods, LLC, and The Distribution Group, Inc. (d/b/a Van Eerden Foodservice Company) (filed 10/22/19).

⁴ See also Fed. R. Civ. P. 16, Advisory Committee Notes – 1983 Amendment (“Since the scheduling order is entered early in the litigation, this [good cause] standard seems more appropriate than a ‘manifest injustice’ or ‘substantial hardship’ test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery.”).

II. BACKGROUND

The last deadline in this case for certain DAPs to amend their pleadings was April 15, 2019. *See* Scheduling Order No. 9 (ECF 1416) (November 19, 2018).⁵ When that amendment deadline was approved by the Court it was reasonably established for approximately *six months prior to the end of fact discovery*—then set for October 14, 2019. *See* Scheduling Order No. 6 (ECF 1230) (September 13, 2018).

The April 2019 deadline is a vestige of a case schedule that has materially changed in almost every respect over the nearly two years that have passed since it was set. Among other things, the U.S. Department of Justice Antitrust Division launched a criminal investigation into the broiler industry, intervened in this case, indicted 10 employees who worked for seven defendants in this case ([REDACTED]) in its “ongoing” investigation, obtained a guilty plea for price fixing and bid rigging⁶ and a \$110,524,140 fine from defendant Pilgrim’s Pride, and secured cooperation from defendant Tyson, which has sought amnesty from the DOJ after admitting to violating federal antitrust law. During this same two-year span since the amendment deadline was set for April 2019, the fact discovery deadline in this case moved *20 months*—from October 2019 to June 2021.

⁵ The April 15, 2019 amendment deadline pertained to DAP complaints then-pending before this Court and DAP complaints “Consolidated Between September 13, 2018 and January 15, 2019.”

⁶ *United States of America v. Pilgrim’s Pride Corporation*, No. 1:20-cr-00330-RM, Document 1 at ¶ 4 (D. Colo.) (“Beginning at least as early as 2012 and continuing through at least early 2019, the exact dates being unknown to the United States, in the State and District of Colorado and elsewhere, Defendant and its co-conspirators entered into and engaged in a continuing combination and conspiracy to suppress and eliminate competition by rigging bids and fixing prices and other price-related terms for broiler chicken products sold in the United States. The combination and conspiracy engaged in by Defendant and its co-conspirators was a per se unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.”).

On March 5, 2020, the Court ordered that defendants and DAPs should “meet and confer regarding a plan for a consolidated complaint for Direct Action Plaintiffs, and a consolidated answer to that complaint. The meet and confer process should be completed by 4/10/2020.” (ECF 3525). Numerous DAPs, acting in good faith, inferred from that order, and the Court’s order denying the Case motion to dismiss (ECF 3526, at 3 n. 2),⁷ that the consolidated complaint would serve as a vehicle for DAPs to amend their complaints without the need for a motion. In a joint status report filed in response to the March 5 Order, DAPs conveyed to the Court that some among them wished to amend their complaints. *See* July 10, 2020 Joint Status Report (ECF 3700) (“For some DAPs, this may function as an amendment, involving addition of Defendants and claims.”). In an August 29, 2020 Order (ECF 3778), the Court stated that “[i]n general, the parties are prohibited from using the preparation of consolidated pleadings as a vehicle for amending their pleadings. If the Direct Action Plaintiffs (or any other Plaintiffs, for that matter) want to amend their complaints, they must file a motion seeking leave to do so.” The Court’s August 26, 2020 Order also indicated that the Consolidated DAP Complaint should not be filed until the Court ruled on then-pending motions concerning bid-rigging allegations. (ECF 3778). Unsure whether DAPs would need to file a motion in order to include bid-rigging allegations in the Consolidated DAP Complaint, the Movant DAPs waited for the Court’s ruling on that issue before filing a motion to amend. Once the Court ruled on the bid-rigging issue on September 22, 2020 (ECF 3835), the Movant DAPs prepared, and now file, this motion to amend.

⁷ The Order on the Case motion to dismiss states in relevant part: “Additionally, the Court has ordered the parties to meet and confer and propose a plan for filing of a consolidated complaint among the Direct Action Plaintiffs, and a consolidated answer from Defendants. *See* R. 3525. Presumably, that consolidated complaint will contain all the allegations all the Direct Action Plaintiffs make against all Defendants, and *will function as an amendment to some of the complaints* at issue on Case’s motions.” (emphasis added).

III. THE AMENDMENTS SHOULD BE PERMITTED

As explained below, the proposed amendments are not the product of undue delay or dilatory motive. Nor will any of the amendments interfere with fact discovery proceeding consistent with the existing timeline set out in Scheduling Order No. 14. To the contrary, with the exception of adding proposed defendant Rabobank, the amendments will essentially conform the allegations of the Movant DAPs to those of other plaintiffs, and track discovery that is already underway in the case.

A. Leave Should Be Granted to Add Amick as a Defendant

Amick Farms is currently a defendant in numerous cases in these consolidated proceedings. The Amick Movants⁸ have not previously named Amick as a defendant in their actions, but they timely opted out of the Amick settlement with the DPP Class by the March 9, 2020 date set by the Court (ECF 3757-3).⁹

⁸ Affiliated Foods, Inc., Alex Lee, Inc., Merchants Distributors, LLC, Associated Grocers of New England, Inc., Big Y Foods, Inc., Fareway Stores, Inc. Piggly Wiggly Alabama Distributing Co., Inc., Woodman's Food Market, Inc., Action Meat Distributors, Inc., Associated Food Stores, Inc., Bashas' Inc., Certco, Inc., Ira Higdon Grocery Company, Inc., Nicholas & Co., Inc., Pacific Food Distributors, Inc., Troyer Foods, Inc., URM Stores, Inc., and Weinstein Wholesale Meats, Inc., Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., Colorado Boxed Beef Co. and King Solomon Foods, Inc., W. Lee Flowers & Co., Inc., Associated Grocers, Inc., Brookshire Grocery Company and Schnuck Markets, Inc., Giant Eagle, Inc., The Golub Corporation, Latina Boulevard Foods, LLC, The Distribution Group, Inc. (d/b/a Van Eerden Foodservice Company) (collectively, the "Affiliated Foods DAPs" or the "Amick Movants") seek to add Amick Farms, LLC as a defendant.

⁹ The right to opt out of a settlement would be meaningless if the right to sue a Defendant which was a party to the class settlement could not be exercised due to a prior scheduling order deadline. The Advisory Committee Notes to the 1983 amendment to Rule 16 contemplate modification under circumstances in which a schedule deadline cannot reasonably be met, stating that "[a]fter consultation with the attorneys for the parties and any unrepresented parties—a formal motion is not necessary—the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension." (emphasis added). The Amick Movants submit that the good cause standard is met under the circumstances present here, where the opt-out deadline came after the amendment deadline.

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