IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION	No. 1:16-cv-08637 District Judge Thomas M. Durkin
This Document Relates To: Certain Direct Action Plaintiffs	Magistrate Judge Jeffrey T. Gilbert

CERTAIN RESTAURANT DAPS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO ESTABLISH A SEPARATE RESTAURANT DAP TRACK AND APPOINT CERTAIN RESTAURANT DAP LIAISON COUNSEL

The central theme of Defendants' Reply Brief in Support of their Motion to Amend Scheduling Order 14 and Opposition to Certain Restaurant DAPs' Motion for a Separate Restaurant DAP Track, is that the DAPs are a motley crew who "cannot agree, even among themselves, on any reasonable path forward." If by that, Defendants mean to suggest that DAPs have different positions in a complex case involving some of the largest individual chicken purchasers in the country—each claiming tens if not hundreds of millions of dollars of damages—then Certain Restaurant DAPs and Defendants have found a point of agreement.

It is not at all surprising that there is a lack of uniformity among the DAPs regarding how they believe their individual cases should proceed. The DAP group is comprised of several different categories of purchasers—from grocery stores to restaurants to distributors—and the claims of each type of purchaser varies almost as widely as their businesses. In fact, it is a testament to the DAPs' efforts that in a group as diverse as the DAPs, over 100 plaintiffs represented by over two dozen law firms were able to coalesce behind just three positions.

Indeed, for the better part of the past three months, Defendants have repeatedly emphasized in their class certification opposition briefs how unique each individual plaintiff's purchasing relationship is and why individualized proof is necessary to resolve this case. Now, however, Defendants sing the opposite tune, attempting to characterize the DAP group as a monolith with identical claims that are coextensive with the Class and for whom common discovery is more than sufficient.

Defendants cannot have it both ways. The reality is that the DAP group has many common interests, both with each other and with the Class, but that the members of the group also have unique and sometimes even divergent claims and interests that require individualized attention.

Certain Restaurant DAPs are one of the groups that have unique interests in this case. They are victims of the supply restriction and Georgia Dock conduct that has long been at issue in this case, just as the classes and their DAP brethren are. However, after the Department of Justice issued its first criminal Indictment, the case took on a very different complexion. It is now clear from the DOJ's Indictment and Superseding Indictment that Certain Restaurant DAPs are also victims of Defendants' criminal bid-rigging enterprise, which necessarily requires proof that has not been developed fully yet. Indeed, the bid-rigging conduct is paramount to and impacts all aspects of Certain Restaurant DAPs' claims.[1] It is for this reason that a separate track is necessary to address Certain Restaurant DAPs' unique position in this case.

Even with regard to the supply reduction and Georgia Dock allegations that Defendants want this Court to believe are so homogeneous, Certain Restaurant DAPs' theory is different. Like their bid-rigging claims, Certain Restaurant DAPs' supply reduction and Georgia Dock allegations incorporate Defendants' ***direct communications and dealings*** with Certain Restaurant DAPs and other contract purchasers. There is simply no way around the fact that Certain Restaurant DAPs should receive discovery of these direct communications and dealings.

While Defendants try to downplay Certain Restaurant DAPs' uniqueness, the Court need only look at the allegations of the Amended Consolidated Complaint that Defendants claimed they should not have to answer because they constituted "bid-rigging". Indeed, included among these "bid-rigging" allegations are Certain Restaurant DAPs' specific allegations—which do not mention bid-rigging—of how Defendants used a coordinated false supply reduction of small birds to justify price increases in their contract negotiations with Certain Restaurant DAPs.

[1] The same cannot be said of the Class. Indeed, as this Court recognized in its September 22 Order, the Class never even mentioned the word bid-rigging anywhere in its complaint.

Defendants contend that Certain Restaurant DAPs' Motion is a backdoor attempt to reconsider the Court's September 22, 2020 Order, and that Certain Restaurant DAPs' Motion, like "each DAP group's proposal does nothing more than delay this case." Defendants are wrong. Certain Restaurant DAPs were explicitly clear in their Motion that they do not seek to delay or impact in any respect the Class's case schedule. Nor, do they request, again in any respect, to redo any discovery taken in this case regarding the supply reduction and Georgia Dock elements of Defendants' conspiracy.

The real question, though, is why Defendants are so opposed to the relief requested by Certain Restaurant DAPs. Since the bid-rigging aspect of the case must proceed at some point, what difference does it make to Defendants if Certain Restaurant DAPs are permitted to prosecute their supply reduction and Georgia Dock claims at the same time? And what possible justification could Defendants have for not agreeing to allow Certain Restaurant DAPs their own liaison counsel if Certain Restaurant DAPs believe it necessary to represent their interests?

Defendants' Opposition does not address either of these questions, but the answer is self-evident. Defendants are opposed to Certain Restaurant DAPs trying their claims together not because of any legitimate concern regarding case schedule, delay, or duplication. Rather, Defendants realize how interrelated Certain Restaurant DAPs' claims are and that they are much stronger prosecuted together than separately. They also hope that forcing Certain Restaurant DAPs back into the "DAP Class" will blur the differences between Certain Restaurant DAPs' and the other plaintiffs in this case and provide Defendants cover to continue avoiding any type of individualized discovery critical to Certain Restaurant DAPs' claims.

No doubt, this is why Defendants try to dismiss Certain Restaurant DAPs as a smattering of a few restaurants "largely represented by the same law firm." In fact, this smattering of

restaurants includes the five (and seven of eight) largest chicken restaurants in the country that have filed opt out complaints. Indeed, Certain Restaurant DAPs account for over $20 billion of purchases during the conspiracy—or ***more than a quarter of the entire Direct Purchaser Class***. And, the supposed single law firm Defendants reference is actually a group of six of the most respected antitrust law firms in the country.

Defendants and the Class want this Court to still view this case as a class action, with the DAPs just along for the ride on the proverbial train that has become the analogy of choice in both the Class's and Defendants' submissions. Defendants and the Class miss the point. Certain Restaurant DAPs are not trying to hold up the Class train or change its direction. Certain Restaurant DAPs wish to take a different train to a different city.

A. Defendants Know Certain Restaurant DAPs Are Different

In their Opposition, Defendants contend that Certain Restaurant DAPs' allegations are "at most, slight variations on the allegations that have been in this case for almost five years"—"there are supply and Georgia Dock claims at issue in all Plaintiffs' complaints." Opp. at 15, 16. Defendants then argue that the discovery already taken in this case on supply restriction and Georgia Dock should be more than sufficient for Certain Restaurant DAPs.

Defendants' attempt to characterize the supply reduction and Georgia Dock elements of this case as one-size-fits-all. They are not. Certain Restaurant DAPs included in their Complaints the allegations asserted by the Class and other DAPs that Defendants engaged in a coordinated conspiracy to reduce the supply of Broilers and to artificially inflate the Georgia Dock price index. But Certain Restaurant DAPs went further—adding allegations that were unique to Defendants' treatment of Certain Restaurant DAPs and other contract-based customers.

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