

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

**IN RE BROILER CHICKEN
ANTITRUST LITIGATION**

Case No. 16-cv-8637

Honorable Thomas M. Durkin

Magistrate Judge Jeffrey T. Gilbert

This Document Relates To All Actions

**MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY
JAYSON PENN'S MOTION FOR LEAVE TO INTERVENE
AND FOR ENTRY OF A PROTECTIVE ORDER**

Jayson Penn respectfully seeks leave to intervene in the above-captioned action for the limited purpose of moving for entry of a protective order temporarily staying his deposition pending the resolution of a related criminal case. Mr. Penn—the former chief executive officer of poultry supplier Pilgrim's Pride Corporation ("Pilgrim's")—is not a party to this action. However, he is a defendant in a criminal antitrust case pending in the District of Colorado, as well as a defendant in a related securities class action pending in that same District, and in a related shareholder derivative action pending in Colorado state court. *See infra* pp. 3-4.

Plaintiffs' counsel in this action notified counsel for Mr. Penn on April 22, 2021 that this Court had entered a sealed order allowing Mr. Penn's deposition to proceed now on certain topics, but not on others, and inquired about Mr. Penn's availability to be deposed. While plaintiffs have not yet served a deposition subpoena on Mr. Penn, the issue of whether Mr. Penn should have to sit for a deposition now is clearly ripe given the Court's recent order and plaintiffs' request to schedule his deposition.

Allowing Mr. Penn's deposition to go forward now would present him with a Hobson's Choice. Mr. Penn would be forced to choose between invoking his Fifth Amendment privilege (thereby exposing him to a potential adverse inference in the two civil cases in which he is a defendant) or waiving his privilege and testifying substantively (thereby prejudicing his defense in the criminal action). Mr. Penn is the only proposed deponent who would be forced to make this choice, as he is apparently the only defendant in the criminal action who is to be deposed under the Court's recent order.

Plaintiffs' counsel has indicated that the Court's order allows the deposition of Mr. Penn to cover "all topics other than bid-rigging," but that limitation does Mr. Penn little good. Mr. Penn's Fifth Amendment rights extend beyond "bid-rigging," *see Hoffman v. United States*, 341 U.S. 479, 486 (1951) (Fifth Amendment privilege extends to any testimony that would "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime"), and he has "reasonable cause" to believe the government would use any testimony he gives in the civil action against him in the criminal case, *see id.* The government has repeatedly made clear that its continuing criminal investigation is active and not limited to "bid-rigging." *See infra* p.3. On the other hand, plaintiffs have many alternative avenues to discover facts about "topics other than bid-rigging" besides deposing Mr. Penn. For example, if plaintiffs seek information about the Georgia Dock price index, they can take the depositions of Georgia Department of Agriculture employees who worked on the Georgia Dock, and Rule 30(b)(6) depositions of the corporate defendants in this action such as Pilgrim's, Mr. Penn's former employer.

The Court should grant leave for Mr. Penn to intervene in this action and issue a protective order staying his deposition pending the resolution of the criminal case against him.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Penn is the former chief executive officer of Pilgrim's. Declaration of Michael F. Tubach in Support of Non-Party Jayson Penn's Motion to Intervene and For a Protective Order ("Tubach Decl."), ¶ 2. In June 2020, a grand jury returned an indictment against Mr. Penn and three other individuals for alleged bid-rigging and price-fixing in connection with the sale of broiler chicken products during the time period from 2012 through 2017. *United States v. Penn et al.*, No. 1:20-cr-00152-PAB (D. Colo. June 2, 2020), ECF No. 1. In October 2020, the government obtained a superseding indictment, which names six additional defendants and identifies additional conduct purportedly violating Section 1 of the Sherman Act. Tubach Decl. Ex. 1 ("Supersed. Ind."). As the government has indicated, its investigation and the indictments overlap substantially with the allegations in this action. *See The United States' Motion to Intervene and Stay Discovery, In re Broiler Chicken Antitrust Litig.*, No. 16-cv-8637, (N.D. Ill. June 21, 2019), ECF No. 2268, at 7 ("Here, there is very substantial overlap between the civil and criminal matters."). The government has also repeatedly stated that its criminal investigation is ongoing and active, and is not limited to bid-rigging. *See Tubach Decl. Ex. 2* (Press Release, U.S. Dep't of Justice, One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and Is Sentenced to a \$107 Million Criminal Fine (Feb. 23, 2021), ("This case is the result of an ongoing federal antitrust investigation into *price fixing, bid rigging, and other anticompetitive conduct* in the broiler chicken industry . . .") (emphasis added)).¹ Earlier this month, the government reiterated in a filing in this case that its criminal investigation is ongoing. Brief in

¹ *See also* Tubach Decl. Ex. 3 (Press Release, U.S. Dep't of Justice, Six Additional Individuals Indicted On Antitrust Charges In Ongoing Broiler Chicken Investigation (Oct. 7, 2020) (same)); *Id.*, Ex. 4 (Press Release, U.S. Dep't of Justice, Senior Executives at Major Chicken Producers Indicted on Antitrust Charges (June 3, 2020) (same)).

Support of United States' Motion for Limited Deposition Stay, *In re Broiler Chicken Antitrust Litig.*, No. 16-cv-8637, (N.D. Ill. Apr. 5, 2021), ECF No. 4520, at 1, 2, 8.

After the initial indictment was returned against Mr. Penn in June 2020, certain purported Pilgrim's shareholders filed a civil class action complaint in Colorado federal court under the Securities Exchange Act of 1934, in which they named Mr. Penn and others as defendants.² The gravamen of the claim in the Securities Action is that executives at Pilgrim's, including Mr. Penn, participated in an unlawful antitrust conspiracy; that Pilgrim's failed to disclose material facts about that conspiracy; and that the class suffered damages as a result of that omission. Tubach Decl. Ex. 5 ¶ 6 ("Securities Compl."). The antitrust conspiracy alleged in the criminal indictment is a critical predicate of that claim. *See, e.g., id.*, Ex. 5, ¶¶ 41-48.

A week after the superseding indictment was returned on October 7, 2020, a separate group of purported Pilgrim's shareholders filed a shareholder derivative action in Colorado state court naming Mr. Penn and others as defendants.³ The plaintiffs in the Derivative Action allege, *inter alia*, that Mr. Penn and others at Pilgrim's conspired to rig bids, fix prices, restrict supply, and manipulate the Georgia Dock price index. *E.g.*, Tubach Decl., Ex. 6, ¶¶ 5, 6, 19-20, 26, 94-98 ("Derivative Compl."). Their complaint incorporates the allegations at issue in the actions pending in this Court as well as those set forth in the original and superseding indictments. *See, e.g., id.*, Ex. 6, ¶¶ 160-271, 377-78, 424-43.

In a telephone call with prosecutors on March 29, 2021, undersigned counsel learned that certain plaintiffs in this action sought to depose Mr. Penn and that the

² *U.F.C.W. Int'l Union Local 464A v. Pilgrim's Pride Corp.*, No. 1:20-cv-01966-RM-MEH (D. Colo. July 6, 2020) (the "Securities Action").

³ *In re Pilgrim's Pride Corp. Derivative Litig.*, Case No. 2017CV30207 (Weld Cty., Colo. Dist. Ct.) (the "Derivative Action").

government intended to oppose their request. *Id.* ¶ 6. Undersigned counsel represented to the government that Mr. Penn agreed with the government’s position. *Id.* ¶ 6. On April 22, 2021, counsel for all plaintiffs in this action emailed undersigned counsel and counsel for Pilgrim’s. *Id.*, Ex. 7. Plaintiffs’ counsel stated that this Court had entered a sealed order on April 19, 2021 in which it permitted plaintiffs to depose Mr. Penn “on all topics other than bid-rigging, which remains stayed.” *Id.* Plaintiffs asked that Mr. Penn agree to sit “for a 14-hour deposition given his importance to the case.” *Id.* Undersigned counsel contacted plaintiffs’ counsel on April 26, 2021, to inform them that Mr. Penn intended to file a motion to intervene for the purpose of moving for a protective order to stay the deposition of Mr. Penn until the conclusion of the criminal case. Plaintiffs’ counsel responded on April 27, 2021 that they had no objection to the motion to intervene, but that they objected to the motion for a protective order. *Id.* ¶ 7.

LEGAL STANDARDS

Federal Rule of Civil Procedure 24 governs motions to intervene. Rule 24(a) directs courts to “permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P. 24(a)(2). “The rule is straightforward: the court must permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case. A proposed intervenor who satisfies these three elements is *entitled* to intervene *unless* existing parties adequately represent his interests.” *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020).

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