IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LLOYD D. WHALEY, et al.,

Plaintiffs,

v.

PACIFIC SEAFOOD GROUP, et al.,

Defendants.

No. 1:10-cv-3057-PA

ORDER

PANNER, J.

Plaintiffs in this antitrust action are commercial fishermen who claim defendant Pacific Seafood Group illegally exploits its market power as a wholesale buyer to pay commercial fishermen below-market prices for whiting, groundfish, and shrimp on the West Coast from northern California to the Canadian border. Plaintiffs also claim Pacific Seafood Group illegally conspires with another seafood processor, defendant Ocean Gold Seafoods, to suppress prices paid commercial fishermen for whiting.

Before me is plaintiffs' motion to certify a class consisting of commercial fishing vessel owners and fishermen who delivered whiting for processing onshore; groundfish caught by trawl; or shrimp to seafood processors on the West Coast from Ft. Bragg in northern California to the Canadian border, at any time between June 21, 2006 and December 31, 2011.

Plaintiffs also move to certify a subclass limited to whiting fishermen, consisting of commercial fishing vessel owners and fishermen who delivered whiting to onshore seafood processors during the class period.

I grant the motion to certify the proposed class and deny the motion to certify the proposed subclass.

BACKGROUND

I. Plaintiffs' Allegations

Plaintiffs allege Pacific Seafood Group has a "buyer's monopoly," also called a monopsony, in the three alleged seafood markets. See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007). Just as a monopolist may use its market power as a seller to charge customers above-market prices, so a monopsonist may use its market power as a buyer to pay suppliers lower prices than it would pay in a truly competitive market. See id. ("a monopsony is to the buy side of the market what a monopoly is to the sell side"). "Monopsony power involves the power to lower input prices below competitive levels." Roger D. Blair & Jeffrey L. Harrison, Monopsony ¶ 3.2.2 at 48 (2d ed. 2010).

Plaintiffs claim that Pacific Seafood Group, which includes fifty-four businesses owned by defendant Frank

Dulcich, has illegally gained monopsony power through "an aggressive acquisition strategy" (eighteen seafood processing plants on the West Coast); "a captive fishing fleet" (thirteen fishing vessels that operate off the West Coast); exclusive dealing and tying agreements with fishermen; and its alleged conspiracy with Ocean Gold Seafood to fix the price of whiting processed onshore. Plaintiffs contend that on the West Coast as of 2009, Pacific Seafood Group controlled 53% of the market for trawl-caught groundfish, 65% of the market for whiting processed onshore, and 71% of the market for shrimp.

Plaintiffs allege that Pacific Seafood Group monopsonizes or attempts to monopsonize three distinct seafood "input" markets. Plaintiffs' proposed market for whiting, a plentiful and economically important fish, includes whiting sold to onshore processors, which comprises about 40% of the total annual allowable catch. Plaintiffs do not include whiting sold to off-shore processing vessels. Plaintiffs' proposed market for groundfish includes fish caught by trawl, while excluding fish caught by lines or baited traps. Trawl-caught groundfish include multiple species of flounder, sole, rockfish, and sablefish. Plaintiffs' other proposed market is for Pacific coldwater shrimp, which are harvested mainly off the coasts of Oregon and Washington. For purposes of this motion only, I conclude plaintiffs have sufficiently defined these three seafood input markets.

Plaintiffs claim the proposed class of commercial fishermen suffered a common antitrust injury because defendants and other processors paid all class members below market prices

for the three types of seafood at issue. Plaintiffs allege that other seafood processors "tacitly collude with defendants by adopting the same basic pricing structure."

II. The Plaintiffs

The lead plaintiffs are Lloyd D. Whaley and Todd L. Whaley, father and son, who own and operate four fishing vessels based in Brookings: F/V Miss Sarah, F/V B.J. Thomas, F/V Cape Sebastian, and F/V Dynamik. Another plaintiff, Miss Sarah, LLC, owns the F/V Miss Sarah.

Plaintiff Brian Nolte is captain of the F/V Dynamik and a co-owner of the F/V Dynamik's corporate owner, plaintiff Dynamik Fisheries, Inc. Plaintiff Jeff Boardman, a resident of Newport, Oregon, operates the F/V Miss Yvonne.

LEGAL STANDARDS FOR CLASS CERTIFICATION

Plaintiffs seek class certification under Federal Rule of Civil Procedure 23. Rule 23(a) requires plaintiffs show that (1) the class is so large that joinder of all members in not practical, numerosity; (2) one or more questions of law or fact are common to the class, commonality; (3) the named plaintiffs' claims are typical of the class, typicality; and (4) the class representatives will fairly and adequately protect the interests of other class members, adequacy of representation. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 980 (9th Cir. 2011).

Plaintiffs also must satisfy the requirements of Rule 23(b)(1), (2), or (3). Here, plaintiffs seek class certification under Rule 23(b)(3), which requires that "questions of law or fact common to the members of the class

predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

In their complaint, plaintiffs also cite Rule 23(b)(2), which permits class actions seeking declaratory or injunctive relief. See Ellis, 657 F.3d at 986 (Rule 23(b)(2) allows class certification only if "'the primary relief sought is declaratory or injunctive'") (quoting Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1195 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001)). Plaintiffs' renewed motion for class certification, however, cites only Rule 23(b)(3), so I need not address certification under Rule 23(b)(2).

A district court has discretion in ruling on class certification. Id. at 980. The court abuses its discretion if it "relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1171 (9th Cir. 2010) (internal quotation marks and citations omitted)).

APPLICATION OF THE CLASS ACTION STANDARDS

I. The Proposed Class

I commend plaintiffs for narrowing the proposed class in response to ongoing discovery. Plaintiffs now exclude the market for Dungeness crab; the West Coast south of Fort Bragg, California; and crew members who are paid salaries rather than a percentage of proceeds.

A. Rule 23(a) Requirements

1. Numerosity

The proposed class satisfies the numerosity requirement because it would include at least 1,000 members.

2. Commonality

To establish commonality, plaintiffs must show "questions of law and fact that are common to the class." Ellis, 657 F.3d at 981. In other words, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

Courts construe the commonality requirement "'permissively,' and '[a]ll questions of fact and law need not be common to satisfy the rule.'" Ellis, 657 F.3d at 981 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) (brackets in Ellis)). When addressing commonality, the court should not "determine whether class members could actually prevail on the merits of their claims." Id. at 983 n.8.

Here, plaintiffs assert common questions of fact, including whether there are economically distinct markets for trawl-caught groundfish, whiting processed onshore, and coldwater shrimp; whether Pacific Seafood Group has unlawfully maintained a monopoly in the three alleged seafood input markets from 2005 through the present; whether Pacific Seafood Group's alleged monopoly power has injured members of the proposed class by suppressing prices below competitive levels;

whether Pacific Seafood Group conspired with Ocean Gold Seafoods to restrain trade in the buyers' market for whiting processed onshore; and whether defendants' alleged conspiracy damaged members of the proposed class.

Plaintiffs also assert common questions of law, including whether the agreement between Pacific Seafood Group and Ocean Gold Seafoods illegally restrains trade in the market for whiting processed onshore; and whether the court should grant injunctive relief to restore competition in the three alleged seafood markets.

Because the fisheries at issue here are closely regulated, the parties have extensive information about fishing vessels' deliveries to seafood processors, including the type and weight of fish or shellfish and the prices paid by each processor. Plaintiffs' expert, Dr. James Wilen, an economist who specializes in the fishing industry, has interpreted the fisheries data and concluded Pacific Seafood Group suppressed prices below competitive levels in the three alleged seafood buyers' markets. Defendants' expert economist, Dr. Michelle Burtis, contends Dr. Wilen's methods are fatally flawed and cannot show the proposed class members suffered a common injury.

"Numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2)." In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (citing decisions). Defendants will have the

opportunity to challenge Dr. Wilen's methods and conclusions through motions for summary judgment motions and at trial, if necessary. I conclude plaintiffs "satisfied their limited burden under Rule 23(a)(2) to show that there are 'questions of law or fact common to the class.'" Mazza v. American Honda Motor Co., 2012 WL 89176, at *5 (9th Cir. Jan. 12, 2012) ("commonality only requires a single significant question of law or fact").

3. Typicality

"The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

The named plaintiffs allege they participated in each of the three alleged seafood input markets during the class period. Although plaintiffs do not currently sell to defendants, plaintiffs contend they are suffering antitrust damages because other seafood processors follow defendants' lead on prices. Plaintiffs thus rely on the so-called umbrella theory of antitrust damages. "[T]he plaintiff pursuing this theory contends that defendants' successful price-fixing conspiracy created a 'price umbrella' under which non-conspiring competitors of defendants raise their prices to a level at or near the fixed price set by the conspiring defendants." Sun Microsystems Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d 1166, 1205 (N.D. Cal. 2009) (citing In re

Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1341 (9th Cir. 1982)). Although the Ninth Circuit rejected the umbrella theory in an antitrust case involving a multi-level distribution chain, it reserved ruling on the type of single-level distribution alleged here. See In re Petroleum Prods., 681 F.2d at 1340 (reserving ruling whether "in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory"); but see Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 584 (3d Cir. 1979) (rejecting umbrella theory of damages because "it cannot readily be said with any degree of economic certitude to what extent, if indeed at all, purchasers from a competitor of the price-fixers have been injured by the illegal overcharge").

At this point in the litigation, I will not categorically reject the umbrella theory of damages. Professor Areeda's treatise accepts the umbrella theory, while noting a plaintiff may have difficulty establishing causation in fact and the amount of damages. See IIA Phillip E. Areeda, Herbert Hovenkamp, Roger D. Blair & Christine Piette Durrance, Antitrust Law ¶ 347, at 198, 200 (3d ed. 2007) (when non-conspiring competitors of a monopolist charge higher prices, consumers are injured "regardless of whether they purchased from the conspirators or from their innocent rivals") (italics omitted). "Damages for the umbrella plaintiff are based on the same excess over the price that would have prevailed in the absence of the illegal activity, which is the same computation

that must be made in suits by purchasers from cartel members." Id. at 200 (footnote omitted).

I conclude plaintiffs have satisfied the typicality requirement.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." Hanlon, 150 F.3d at 1019-20. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Id. "'[T]he adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative.'" Rodriguez v. West Publishing Co., 563 F.3d 948, 961 (9th Cir. 2009) (quoting Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 n.2 (9th Cir. 2001) (brackets added in West)).

Here, defendants contend that because the named plaintiffs do not sell to defendants, the interests of named plaintiffs conflict with class members who do sell to defendants. Defendants also argue that the named plaintiffs, who own fishing vessels, do not have the same interest as crew members or captains paid based on a percentage of proceeds. I conclude the alleged conflicts, at this stage of the litigation, are not

sufficient to prevent plaintiffs from adequately representing the proposed class. See Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975) ("courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit").

I am satisfied that plaintiffs and their counsel will vigorously prosecute this action for the entire class. Plaintiffs' counsel has extensive experience in similar antitrust litigation.

B. Rule 23(b)(3) Requirements

1. Predominance

"The predominance inquiry of Rule 23(b)(3) asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' The focus is on 'the relationship between the common and individual issues.'" Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg. Overtime Pay Litig.), 571 F.3d 953, 957 (9th Cir. 2009) (citations omitted). The predominance inquiry overlaps with the Rule 23(a) factors, including commonality and adequacy of representation. "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." Messner v. Northshore Univ. Healthsystem, 2012 WL 129991, at *8 (7th Cir. Jan. 13, 2012) (citing Wal-Mart, 131 S. Ct. at 2558 ("individualized monetary claims belong in Rule 23(b)(3)")).

Plaintiffs here have adequately shown common issues

predominate, including whether Pacific Seafood Food's alleged market power has suppressed prices in the three alleged seafood input markets for the entire proposed class. To measure class-wide damages, Dr. Wilen uses the benchmark approach, "examining the profits of a business comparable to the plaintiff's business which was not affected by the anticompetitive activity." Dolphin Tours, Inc. v. Pacifico Creative Service, Inc., 773 F.2d 1506, 1511 (9th Cir. 1985). Dr. Wilen opines that in a competitive market, defendants' gross profit margin should have been no more than 12 to 15%. To calculate the benchmark gross profit margin, Dr. Wilen used "the average gross profit margins earned by 18 publicly held companies in reasonably comparable agricultural input markets including agricultural products, beef, and chicken." Wilen 2d Suppl. Decl. ¶ 17, at 11.

Defendants attack Dr. Wilen's use of the benchmark method on several grounds. They argue Dr. Wilen did not look to comparable businesses. See Areeda ¶ 392, at 339 ("For the yardstick [i.e., benchmark] approach to be viable, it is essential that the plaintiff and the yardstick operate in the same product market but in distinct geographic markets."). Defendants argue a gross profit margin does not accurately measure antitrust injury because it excludes fixed and variable costs. Defendants also claim plaintiffs are improperly taking a "one size fits all" approach. See Kochin Decl. at 9 ("Dr. Wilen's theory necessarily assumes that the value (and the indirect costs of adding that value) a seafood processor adds to the end-product is identical for all species . . . .

Comparing the costs of the intricate process of preserving, cooking, peeling, and freezing 100 pounds of shrimp with the costs of processing a 100-pound halibut illustrates the point.").

Defendants' challenges to Dr. Wilen's methods and opinions go to the merits of plaintiffs' claims, but do not show individual issues predominate over common issues. The common question is whether defendants have illegally suppressed prices below competitive levels. The potential complexity of determining antitrust injury does not preclude certification. See Messner, at *12-14 (despite price variations in class members' hospital bills, plaintiffs met predominance requirement in antitrust action against merged hospitals).

2. Superiority of Class Action

I conclude that plaintiffs have shown that a class action would be superior to separate individual actions. The proposed class would include more than a thousand members, and plaintiffs have raised common issues of law and fact.

II. Proposed Subclass

Defendants present evidence that the proposed subclass of whiting fishermen would include fewer than twenty members. Generally, a class of twenty "would be too small to meet the numerosity requirement." Gen. Tel. Co., 446 U.S. at 330. Plaintiffs' proposed subclass of commercial fishermen who sell whiting for onshore processing is not sufficiently numerous to support certifying a subclass.

CONCLUSION

Plaintiffs' renewed motion for class certification (#289)

is granted as to the proposed class and denied as to the proposed subclass.

IT IS SO ORDERED.

DATED this 31 day of January, 2012.

OWEN M. PANNER
U.S. DISTRICT JUDGE