UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 12-12016-RWZ

GROWERS 1-7, *et al.*

v.

OCEAN SPRAY CRANBERRIES, INC., *et al.*

MEMORANDUM OF DECISION

May 10, 2016

ZOBEL, J.

In this putative class action, a group of cranberry growers alleges that Ocean Spray Cranberries, Inc., ("Ocean Spray" or "the cooperative") and Ocean Spray Brands, L.L.C. have manipulated the price of cranberry concentrate. That manipulation, plaintiffs assert, has affected the returns to cranberry growers across the industry, thereby violating the Sherman Act, 15 U.S.C. §§ 1 et seq., and the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A §§ 1 et seq. This matter is before me on plaintiffs' motion to certify a class of "[a]ll domestic independent cranberry farmers and all B-Pool members of Ocean Spray who received payment during the period August 2009 to the present for cranberries delivered to a handler for the purpose of processing the cranberries into concentrate" to pursue those claims. Plaintiffs' motion is denied.

I. Background

The remaining claims in this case concern Ocean Spray's purported manipulation of its cranberry concentrate auction. These claims—and the appropriateness of class certification—hinge on several peculiarities of the cranberry industry, which implicates three relevant groups: growers, handlers, and consumers. Growers produce raw cranberries on farms that generally comprise several bogs. Handlers, such as Ocean Spray, convert these berries into both end-user products, such as cranberry juice or sweetened dried cranberries, and commodity ingredients, such as cranberry concentrate or frozen cranberries. Consumers of the handlers' products are either households, in the case of end-user products, or food processing companies, in the case of commodity ingredients. Just as individual handlers sell products to several different consumers, so do individual growers sell or deliver berries[1] to a number of different handlers, typically committing their fruit to handlers on a bog-by-bog basis.

The industry's largest handler is Ocean Spray, which sells both branded cranberry products and unbranded commodities, including commodity cranberry concentrate. Since July 2009, Ocean Spray has sold commodity concentrate through auctions at which the cooperative offers fixed volumes of cranberry concentrate at fluctuating prices. It sets an opening price for the auction, and buyers submit bids for a given volume at that price. If the aggregate volume of concentrate bid exceeds the

[1] As explained more fully below, Ocean Spray and certain other handlers function as cooperatives, compensating growers with shares of revenue from the handlers' processed cranberry products instead of purchasing growers' berries, making "sell" an inappropriate verb to describe grower-handler transactions across the industry.

volume of concentrate on auction, the auctioneer raises the price, and buyers adjust their bids accordingly. This repeats until the aggregate volume bid equals or is less than the volume of available concentrate at the auction. Each buyer then purchases its bid volume at the auction's closing price.

That closing price partially determines Ocean Spray's payments to its B Pool growers. B Pool growers[2] deliver raw cranberries to the cooperative, which processes them into both concentrate and frozen cranberries—commodity products. No B Pool grower delivers cranberries to Ocean Spray with the expectation that the cooperative will process them into one type of product or the other. Ocean Spray compensates its B Pool growers not by purchasing their raw cranberries, but by paying them a share of revenue from the sale of its commodity products commensurate with the volume of cranberries they deliver to the cooperative. It compensates A Pool growers under an identical regime, although A Pool growers receive a share of revenue from Ocean Spray's branded, value-added products such as Craisins® and Ocean Spray juices, not from commodity products.[3] Like B Pool growers, A Pool growers do not deliver

[2] As mentioned above, growers typically sell or deliver their fruit to many handlers. As such "B Pool growers" refers both to growers who deliver all of their crop to Ocean Spray under a B Pool agreement, as well as to growers who so deliver only part of their crop. "A Pool growers" and "independent growers" have analogous meanings, and a particular grower may well belong to all three categories.

[3] To the extent that this description is at odds with the court's previous opinion, see Docket # 143 at 3–4, the wealth of information, exhibits, and affidavits submitted with the instant motion have clarified the nature of the relationship between the several participants in this industry discussed above. Ocean Spray manufactures branded products for sale to household customers from cranberries delivered by A Pool growers, and it manufactures commodity products for sale to industrial customers from cranberries delivered by the B Pool growers. Ocean Spray does not purchase B Pool commodities to produce A Pool branded products, and the interests of the A and B Pool growers are not structurally opposed as past opinions have stated.

cranberries to Ocean Spray with the expectation that those berries will end up as a particular branded product. Many B Pool growers also deliver some of their crop to the cooperative's A Pool.

Growers further deliver berries to a number of independent handlers, who operate under terms very different from Ocean Spray's,[4] and also differ greatly from each other. Unlike Ocean Spray, independent handlers simply purchase cranberries from growers—they do not compensate growers through shares of revenue from future product sales. Independent handlers likewise vary among themselves, purchasing berries from growers through spot negotiations, oral agreements, or written contracts, and each independent handler sets its price according to its own formula. No independent handler explicitly pegs its purchase price for raw cranberries to Ocean Spray's concentrate auction price.

Plaintiffs' proposed class—"[a]ll domestic independent cranberry farmers and all B-Pool members of Ocean Spray who received payment during the period August 2009 to the present for cranberries delivered to a handler for the purpose of processing the cranberries into concentrate"—aggregates growers affiliated with both Ocean Spray and with independent handlers to pursue the two remaining class-action counts in this case. The first of these counts, Count IX, is plaintiffs' Sherman Act monopsonization

[4] One independent handler, Cranberries Limited, Inc. ("CLI"), an Ocean Spray affiliate, also compensates growers with a share of revenue from sales of commodity concentrate proportional to the quantity of berries they deliver. Unique among handlers, CLI's only product is concentrate, although Ocean Spray manufactures CLI's concentrate from berries delivered by CLI growers. CLI sells its concentrate to Ocean Spray—some of which Ocean Spray sells in its concentrate auction—and to industrial customers. CLI has two streams of revenue—sales of concentrate to Ocean Spray and to industrial customers—and its growers receive payments based on these sales.

claim rooted in Ocean Spray's alleged manipulation of the concentrate auction. The second, Count IV, is plaintiffs' Massachusetts Consumer Protection Act claim, stemming from the same conduct.[5] Under the plaintiffs' theory, Ocean Spray has injured each of the putative class members by lowering their returns. The mechanism of this injury is Ocean Spray's concentrate auction, which the cooperative purportedly manipulates by glutting the supply of concentrate on offer, restricting bidder participation, and setting artificially low opening prices.[6] Plaintiffs allege that the auction injures B Pool growers directly by cutting into one of their revenue streams, and allege further that the auction indirectly injures independent growers by creating an

[5] The two counts are distinct, but functionally identical for present purposes. This court has permitted plaintiffs' Chapter 93A claim to proceed under three theories: monopsonization, violation of a consent decree prohibiting cranberry handlers from "artificially rais[ing], depress[ing], or stabiliz[ing] market price levels of fresh or processed cranberries," and breaching contracts with independent handlers. See Docket # 143 at 16–19. Because plaintiffs' monopsonization claim hinges upon Ocean Spray's purported manipulation of the price of fresh and processed cranberries through manipulating its concentrate auction, the first and second theories collapse into one for purposes of class certification, and the parties' briefing makes no effort to disaggregate the two theories either from each other or from the Sherman Act monopsonization claim. The third theory applies only to independent growers, and is therefore incongruent with plaintiffs' much broader proposed class, and plaintiffs' class certification briefing does not address it.

[6] In plaintiffs' view, the January, April, and July 2010 auctions illustrate this mechanism. At the April 2010 auction, Ocean Spray offered 100,000 gallons of concentrate for two three-month contract periods: May through July of 2010, and August through October of 2010. These contract periods overlapped with those on offer at the January 2010 auction—the April auction's immediate predecessor—at which Ocean Spray offered two six-month contract periods: February through July of 2010, and August 2010 through January 2011. Plaintiffs contend that the overlap between the contract periods on offer at the January and April auctions reduced demand for concentrate on offer—and thus depressed its price—at the April auction. Although buyers purchased only 37% of the concentrate offered at the April 2010 auction, Ocean Spray offered 450% of the April volume at the July 2010 auction. That auction covered three contract periods, one of which overlapped entirely with a previously auctioned contract period, one which overlapped only partially, and one which did not overlap at all. Plaintiffs claim that, in these auctions, Ocean Spray attempted to re-sell concentrate for contract periods it already knew to be undersubscribed—i.e., it purposely created a low-demand marketplace—to generate an artificially low signaling price around which the industry would rally. Ocean Spray has offered an alternative explanation for this series of auctions and has pointed to a number of other auctions more ostensibly favorable to its position. For purposes of the instant motion, the court takes no position as to the merits of plaintiffs' theory generally, or as to the merits of plaintiffs'—or Ocean Spray's—characterization of any auction or series of auctions.

artificially low price signal around which "the entire cranberry market" orbits, Third Am. Compl. ¶ 85. This court has previously held that these two groups have antitrust standing to pursue monopsony claims against Ocean Spray, see Docket # 143 at 13, and plaintiffs have moved for certification of a single class comprising both.

II. Standard

In seeking to certify a class under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must meet each of that rule's six demands. First, the class definition must permit the court to ascertain its members under objective criteria. See In re Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015). Plaintiffs must likewise satisfy each of Rule 23(a)'s four requirements: that the class be numerous, that the class present common questions of law or fact, that representatives have claims typical of the entire class's, and that representatives will adequately protect the interests of the entire class. Fed. R. Civ. P. 23(a). Finally, "questions of law or fact common to the class members" must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Plaintiffs must prove each by a preponderance of evidence. See Nexium, 777 F.3d at 27.

III. Discussion

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979). To qualify for this exception, a proposed class must clear the aforementioned hurdles of Rule 23: these determine whether class certification will "save[] the resources of both the courts and the parties" by promoting "economical"

litigation of the issues raised. Id. at 701. Such economies are most readily achieved when putative class members share identical interests and positions. As class members diverge, however, the litigation's focus shifts inappropriately to the interests and positions of particular class members in lieu of those of the class as a whole. Such cases, bogged down by questions concerning individual class members, are inefficient and do not warrant departure from the usual rule.

Plaintiffs bear the burden of demonstrating the efficiency of class litigation—and thus the appropriateness of class certification. They have failed to do so here. Plaintiffs trip at the threshold, offering a proposed class definition that requires individualized inquiries of each grower to determine, as to each, whether or not that grower belongs to the class. Further, several putative class members have sworn their hostility to the goals of the class under penalty of perjury—this leaves the proposed class in open conflict. Finally, plaintiffs' maximally inclusive class definition sweeps in scores of growers who may well have suffered no injury under the plaintiffs' theory of the case. This would require inordinate attention to grower-specific liability questions, thereby inverting Rule 23's requirement that issues common to the class predominate over issues unique to its members.

A. Ascertainability

A court may not certify any class that it cannot ascertain through reliance on "objective" criteria. See Nexium, 777 F.3d at 19; see also Shanley v. Cadle, 277 F.R.D. 63, 67 (D. Mass. 2011) ("stable and objective" factors must identify class members). Objective criteria rely on "externally verifiable phenomena," Objective, Black's Law

Dictionary (14th ed. 2014), whereas subjective criteria reference "an individual's . . . intentions", Subjective, Black's Law Dictionary (14th ed. 2014). Construal of class definitions follows principles of contractual and statutory interpretation, see Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989), and those principles counsel resolving a class definition's ambiguities against its drafter, Nadherny v. Roseland Prop. Co., Inc., 390 F.3d 44, 49 (1st Cir. 2004). If a class's definition requires member-by-member inquiries to determine its composition, it has not identified an ascertainable class. See Crosby v. SSA, 796 F.2d 576, 580 (1st Cir. 1986) (use of "reasonable" in class definition required "individualized fact-finding" and rendered class unascertainable). This follows Rule 23's animating rationale: certify only those classes that economize aggregate litigation.

"Stable and objective" criteria do not define the plaintiffs' class. The proposed class comprises "[a]ll domestic independent cranberry farmers and all B-Pool members of Ocean Spray who received payment during the period August 2009 to the present for cranberries delivered to a handler for the purpose of processing the cranberries into concentrate." That definition does not conform to industry practice. Handlers treat each grower's raw cranberries as commodities, and commingle berries from different growers before processing them into different products. This may include concentrate—Ocean Spray, for instance, processes some of its B Pool berries into concentrate—or it may not—two prominent independent handlers process concentrate only occasionally, and not as a regular part of their business. Contracts between growers and handlers reflect this fact, and do not commit growers' cranberries to any particular use. Objective

criteria—e.g., industry practice and grower-handler contracts—thus shed no light on the purpose for which a given grower delivers her cranberries, and do not help to define the boundaries of the class. Further, in light of the industry practices just described, a grower's membership in the class does not determine Ocean Spray's liability to that grower under plaintiffs' theory of the case. For example, a grower who delivered cranberries to a handler with the purpose that those berries would be used for concentrate would belong to the class. On plaintiffs' theory, however, Ocean Spray could only be liable to that grower if the handler in fact processed those berries into concentrate, but the purpose with which the grower delivered her berries has no effect on how the handler processes those berries.[7]

This points to a corresponding problem with plaintiffs' class definition: by referencing the "purpose" for which growers have delivered their cranberries, plaintiffs have defined their class by subjective, not objective, criteria. This would leave the court with two sets of "individualized fact-finding," Crosby, 796 F.2d at 580. First, the court would have to inquire as to the subjective intentions of each putative class member to determine whether they belong to the class. Second, the court would have to determine Ocean Spray's liability to each class member on an individual basis. As discussed in the preceding paragraph, plaintiffs' theory of liability is too loosely tethered to their class definition, making Ocean Spray potentially liable to only certain class members. By incorporating a subjective criterion, plaintiffs' class definition would force upon the court

[7] Ocean Spray notes that, because a grower's intentions as to a handler's use of the berries do not determine that handler's behavior, growers generally do not deliver their berries to handlers with a purpose for those berries in mind.

a series of grower-by-grower inquiries. Such inefficiencies leaves the proposed class unascertainable and this case ill-suited for class certification. Equally troubling issues with adequacy and predominance compound this concern.

B. Rule 23(a): Numerosity, Commonality, Typicality, and Adequacy

Rule 23(a) requires that a class be numerous, that the class members' claims have common questions of law or fact, that the claims of the representatives be typical of class members' claims, and that representatives will adequately represent all class members. Fed. R. Civ. P. 23(a). Ocean Spray does not dispute that the proposed class satisfies both numerosity and commonality, and its arguments concerning typicality are better addressed under the Rule 23(b) requirement of predominance.[8] Ocean Spray does, however, dispute that the class's representatives will adequately protect the interests of all of its members.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997). Amchem gives "conflicts" its most capacious reading, encompassing mere incompatibility as well as outright antagonism. See id. at 626 (class members made ill from asbestos—interested in immediate payments from settlement fund—cannot adequately represent class members simply exposed to

[8] Ocean Spray argues that the impact of, and damages sustained from, the alleged manipulation differ enough between class members to render any representative's claims atypical of the entire class's. Questions of "common impact . . . and common proof of damages are relevant" not only to Rule 23(a) typicality (and commonality, which Ocean Spray does not here dispute), but to Rule 23(b) predominance as well. In re New Motor Vehicles Can. Export Antitrust Litig., 522 F.3d 6, 19 (1st Cir. 2008). Given this overlap, and because the predominance inquiry is "more demanding" than the commonality or typicality inquiries, Comcast Corp v. Behrend, — U.S. —, 133 S. Ct. 1426, 1432 (2013), the court addresses these concerns under the predominance heading.

asbestos—interested in preserving the settlement fund in case of future illness). This renders certification inappropriate when each class member does not "possess the same interest" as the others. Id. (internal quotations omitted).

Plaintiffs' proposed class comprises members with fundamentally inimical aims and is inappropriate for certification. On behalf of a class of all B Pool and independent growers, plaintiffs seek a judgment of roughly one billion dollars against Ocean Spray. The record establishes that such a judgment would leave the cooperative unable to pay returns to its growers and would perhaps put it out of business permanently. This presents at least two distinct problems. First, many putative class members have A Pool acreage in their farms—indeed, most B Pool growers have acreage in both pools, and many independent growers have A Pool acreage as well. These growers, although part of the plaintiffs' proposed class, have testified that they want the plaintiffs' case to fail, as its success would leave Ocean Spray unable to pay them in full for their A Pool acreage.[9] Second, even growers who farm almost entirely independent acreage have testified that they benefit from Ocean Spray's promotional activities for cranberries generally. These growers, likewise members of plaintiffs' proposed class, have also testified that they want the case to fail, as a judgment against Ocean Spray would leave the cooperative with less to spend on—or unable to engage in—such activity. Plaintiffs' proposed class would thus include members who have sworn that they oppose the aims of its representatives, and this diametric opposition renders representation inadequate

[9] See Exs. 40, 42–46 to Decl. of Margaret Zwisler in Supp. of Defs.' Opp'n to Class Certification (Docket # 208).

and this class uncertifiable.

C. Rule 23(b)(3): Predominance of Common Questions

To certify a class under Rule 23(b)(3), the court must "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Supreme Court, echoing scholarly commentary, has described Rule 23(b)(3) as "the most adventuresome innovation" in aggregate litigation, noting that it covers "situations in which class-action treatment is not as clearly called for." Amchem, 521 U.S. at 614–15 (1997) (quotations omitted). Proposed certifications under Rule 23(b)(3) thus demand a "close look." Id. at 615 (quotation omitted). When certification turns on "a novel or complex theory of injury," that close look requires "a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed." New Motor Vehicles, 522 F.3d at 26. For cases presenting a complex theory of liability, certification is improper when plaintiffs fail to explain precisely how they can establish—through common evidence—that each class member suffered injury according to the theory advanced. See id. at 27–28. This requires "not . . . hard factual proof, but a . . . thorough explanation of how the pivotal evidence behind" the theory of liability "can be established." Id. at 29.

The factual context in which the New Motor Vehicles court applied these rules bears such striking resemblance to this case that New Motor Vehicles controls its outcome. First, both rely on multi-step liability theories that invoke a complex

counterfactual. In New Motor Vehicles, the plaintiffs alleged that the weakening of the Canadian dollar allowed exporters to sell Canadian cars in the United States for lower prices than identical U.S. cars. 522 F.3d at 9–10. In response, manufacturers collectively acted to restrict the flow of the cheaper Canadian cars into the United States. Id. at 10. By keeping the cheaper cars out, manufacturers affected two price indices that "define[d] bargaining parameters" between consumers and salespeople, ultimately leading to higher prices. Id. Plaintiffs make analogous allegations here: their theory is that Ocean Spray manipulates its concentrate auction, and that this concentrate auction defines industrywide bargaining parameters between growers and handlers. Second, the plaintiffs in each case rely on broad inferences about atomistic market participants to serve as the connective tissue to their theories. The New Motor Vehicles plaintiffs assumed that higher price indices would necessarily lead to higher prices for each consumer without accounting for the idiosyncracies of dealership haggling—i.e., a market with uncoordinated negotiations between many buyers and sellers. Id. at 29. Similarly, the plaintiffs in this case have assumed that a manipulated concentrate auction would lead to higher prices across the cranberry industry, even though most of the putative class members negotiate their respective compensation without any apparent reference to that auction. Independent growers sell their berries to independent handlers under a variety of arrangements, and CLI compensates its growers with revenue generated by sales of concentrate—that may or may not be used at auction—to Ocean Spray. Only the B Pool growers' returns have a direct link to the Ocean Spray auction.

Faced with such a gap in its plaintiffs' theory of causation, the New Motor Vehicles court held that, while the theory had "intuitive appeal . . . intuitive appeal is not enough." Id. To certify the class, it required "not . . . hard factual proof, but . . . a more thorough explanation of how the pivotal evidence behind plaintiffs' theory can be established," reasoning that "[i]f there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win." Id. The plaintiffs' claim to certification here suffers from the same deficiencies. The putative class contains hundreds of growers delivering berries to dozens of handlers under terms that vary from handler to handler. Some handlers reference concentrate price to some degree, but others do not. Nor do handlers necessarily use the same terms for each grower: some opt instead for grower-by-grower, or even purchase-by-purchase, negotiations. Industry price trends reflect this variability. Although B Pool price-per-barrel has fallen over the time at issue, several handlers have increased their per-barrel payments to growers. Plaintiffs simply have not explained how they, through common evidence, can and will explain how Ocean Spray, as a monopsonist payor to B Pool growers, has injured every grower throughout the entire cranberry industry. Plaintiffs have offered nothing[10] to show that industry prices necessarily would, or in fact did, follow Ocean Spray's concentrate auction price—an indispensable component of their theory of the case—and have thus not carried their burden.

[10] To the extent that plaintiffs' briefing addresses this issue at all, it merely cites an excerpt from an internal Ocean Spray presentation suggesting Ocean Spray's belief that certain segments of the cranberry market may have followed its concentrate pricing. Plaintiffs appear to treat this as actual evidence of price convergence, which it decidedly is not: their theory depends on the actual movement of prices in response to the concentrate auction, not on Ocean Spray's beliefs.

Finally, while a certifiable class may contain some de minimis number of uninjured plaintiffs, this is so only when class certification offers economies of scale sufficient to outweigh this inefficiency. See Nexium, 777 F.3d at 21–22 (1st Cir. 2015). That is not so here. As discussed above, plaintiffs' theory of liability does not simply sweep in a handful of uninjured class members. Rather, it asserts that Ocean Spray has injured each putative class member without explaining how it has done so for a plurality of them. Outstanding questions of liability particular to many putative class members thus overwhelm this case, making it a very poor vessel for class litigation.

IV. Conclusion

The plaintiffs' Motion to Certify Class (Docket # 195) is DENIED.

May 10, 2016
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE