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 14, 2015

ZOBEL, J.

This is a putative antitrust class action brought by a group of cranberry growers. Their suit accuses the largest purchaser and processor of raw cranberries, defendant Ocean Spray Cranberries, Inc. ("Ocean Spray"), and its wholly-owned subsidiary, defendant Ocean Spray Brands, L.L.C. ("OSB"), of violating Section 2 of the Sherman Act, 15 U.S.C. § 2, and the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, by engaging in predatory pricing and price fixing in the cranberry-products industry.

Last year, I allowed defendants' motion to dismiss nine of the thirteen counts in plaintiffs' complaint, including claims for violations of the Capper-Volstead Act, 7 U.S.C. § 291, and Section 1 of the Sherman Act; conspiracy to violate the Sherman Act; and certain derivative actions under Chapter 93A. Docket # 78. Now, the parties both seek summary judgment on the remaining claims. Ocean Spray moves for summary

judgment on all remaining counts, basing its argument on plaintiffs' alleged lack of antitrust standing and the absence of disputed facts on plaintiffs' Chapter 93A claims. Docket # 115. Plaintiffs are less ambitious, seeking partial summary judgment on liability (but not damages) for their Sherman Act monopolization claim and its derivative Chapter 93A claim. Docket # 102. The parties have also filed several motions that are related to their summary judgment motions. See Docket ## 118, 139, 140.

I. Background

The claims in this case all relate to allegedly improper activities in the cranberry-products industry. There are three relevant levels in this industry: the growers, who sit at the origin of the cranberry product supply chain; the handlers, who convert raw cranberries received from the growers into both end-user products (e.g., cranberry juice and dried cranberries) and downstream ingredients (e.g., cranberry concentrate); and the consumers, who are either households (for the end-user products) or food and beverage companies (for the ingredient products).

Ocean Spray, as the largest handler, sits at the center of the industry. It holds itself out as a cooperative of more than 700 cranberry and grapefruit growers in the United States, Canada, and Chile.[1] Ocean Spray has contracts with its growers. Those contracts, broadly speaking, require the growers to deliver the fruit that they

[1] Plaintiffs dispute whether Ocean Spray is a true agricultural cooperative. Docket # 137 ¶ 1. I will refer to it as such because it holds itself out that way and because many other courts have called it a cooperative. See, e.g., Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., 382 F. Supp. 2d 221, 223 (D. Mass. 2004); see also Ocean Spray Cranberries, Inc. v. PepsiCo, Inc., 160 F.3d 58, 59 (1st Cir. 1998). But, because I do not need to make a finding about Ocean Spray's precise business form to decide these motions, I do not do so.

grow to Ocean Spray[2] and Ocean Spray, in turn, to process the fruit into a variety of different products, including shelf-stable beverages, commodity concentrate, puree and powders, and dried cranberries. Ocean Spray must then market and sell those products, returning a percentage of the proceeds to the growers.

According to the allegations in plaintiffs' Third Amended Complaint ("TAC," Docket # 44), historically, all Ocean Spray growers earned returns on their crop based on the returns from sales of Ocean Spray's branded products, like Craisins® and Ocean Spray brand juices. The amount the growers received was proportionate to the volume of fruit delivered to Ocean Spray, less administrative and sales expenses. In early 2006, Ocean Spray divided the cooperative into two classes of growers: the A Pool and the B Pool.[3] Since then, the A Pool growers have delivered their fruit to Ocean Spray for use in Ocean Spray's branded and value-added products, and Ocean Spray has paid them a return based upon its sales of those products. The B Pool growers, on the other hand, have delivered their fruit to Ocean Spray for use as non-value added, commodity products, such as cranberry concentrate and frozen whole and sliced cranberries, for sale primarily to the ingredient market.[4] Ocean Spray has paid the B Pool growers a return based upon its sales of those products. The two groups are at economic cross-purposes: A Pool growers want the price of cranberries to be low so they enjoy a higher profit margin, but B Pool growers want the price to be high so more

[2] The parties dispute whether Ocean Spray purchases or takes title to the fruit. The court does not find this distinction to be relevant to resolving the pending motions.

[3] Ocean Spray alleges that the B Pool consists of former independent growers, including former Ocean Spray growers. Cranberry growers joining Ocean Spray must join as B Pool growers. According to the operative complaint, Ocean Spray's Board of Directors is comprised of only A Pool growers.

[4] The parties dispute whether there is any mixing of A and B Pool fruit. That dispute is not material to the resolution of these motions.

money passes through to them.

Since July 2009, Ocean Spray has sold cranberry concentrate through an auction process in which Ocean Spray sets the opening prices. The revenue generated by the cranberry auction determines, in part, the payment that B Pool growers receive for their fruit. Plaintiffs allege that Ocean Spray deliberately manipulated the market price for cranberry concentrate by manipulating the cranberry auction (e.g., by driving the starting price of the auction lower with each auction).

Although Ocean Spray is the dominant handler in the industry, it does not have complete control of the cranberry market. There are some cranberry growers that are not Ocean Spray cooperative members—so-called "independent growers"—and there are independent handlers that can process these independent growers' fruit. Those independent handlers purchase (or take title to) raw fruit from growers at market-determined prices and then use the fruit as raw ingredients for the processing and manufacturing of the handlers' products that they sell to third parties. Ocean Spray competes with these independent handlers to sell finished cranberry products to customers, like food and beverage companies. According to plaintiffs, even though independent handlers do not participate in the cranberry auction, the auction plays a significant role in setting the price that the independent handlers can charge for their products.

II. Standard of Review

Summary judgment will be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.

56(a). The court must view the record in the light most favorable to the nonmovant and draw all justifiable inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The moving party initially bears the burden of demonstrating the absence of a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). If the moving party has carried its burden, to defeat the motion, the nonmovant must then "come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e) (emphasis omitted)). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

III. Defendants' Summary Judgment Motion (Docket # 115)

Defendants move for summary judgment on all remaining claims. They premise their arguments for the antitrust claims on plaintiffs' alleged lack of antitrust standing. They also contend that these deficiencies in the antitrust claims doom the derivative consumer protection claim, and that the consumer protection claim for retaliation is flawed as a matter of law. I will address these issues in turn.

First, however, I address defendants' recent motion to file a seven-page reply brief. That motion (Docket # 139) is denied. The court's order staying class certification proceedings (Docket # 138) instructed the parties that reply briefs for all pending

motions were not necessary. Defendants offer no persuasive arguments for why the court was incorrect in reaching that conclusion. The parties are all reminded that replies may not be filed as of right in this court, and that any arguments they wish the court to consider should be raised in their primary briefs.

A. Antitrust Standing (Counts VIII and IX)

Two of the remaining four claims in this case, those about monopolization and monopsonization, arise under Section 4 of the Clayton Act, 15 U.S.C. § 15(a). Section 4, which says that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained," establishes a private cause of action for damages under the federal antitrust laws. Section 4 imposes certain threshold criteria upon plaintiffs bringing antitrust claims. First, a plaintiff must meet the statutory definition of "person" found in 15 U.S.C. § 12. The plaintiff must also prove not only that it suffered injury in fact, but also that it suffered "antitrust injury." And the plaintiff finally must prove that its antitrust injury is not too remote from the alleged antitrust violation to allow for recovery. This last element, which focuses on "whether the plaintiff is a proper party to bring a private antitrust action," has also been called "antitrust standing." Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters ("AGC"), 459 U.S. 519, 535 n.31 (1983). Defendants' motion contends that this is the missing element in plaintiffs' antitrust claims.[5]

[5] Defendants style their challenge as one to the antitrust injury element, but the case law they cite is about the remoteness element. This confusion comes, in part, from cases that blend the antitrust injury and antitrust standing inquiries. Compare SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 43 (1st Cir. 1995) (suggesting that antitrust injury and standing inquiries are the same), with Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is

The remoteness inquiry is a judicial exception to antitrust liability, premised on the "assum[ption] that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982). Courts use a multi-factor inquiry to probe remoteness, focusing on "(1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims." 1 Am. Bar Ass'n, Antitrust Law Developments 824 (6th ed. 2007); see also AGC, 459 U.S. at 537-44; Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999) (same but breaking first factor into two separate inquiries). These factors are guides from the court's analysis, but "the infinite variety of claims that may arise [in an antitrust case] make it virtually impossible to announce a black-letter rule that will dictate the result [of the antitrust standing inquiry] in every case." AGC, 459 U.S. at 536. But, despite its complexities, the AGC multi-factor test makes one thing clear: a critical threshold question for resolving antitrust standing issues is defining, with particularity, what the alleged antitrust violations are and what the markets where these violations occur look like. I will begin there, then proceed to the multi-factor analysis for

necessary, but not always sufficient, to establish standing under § 4."). Here, I use "antitrust injury" in the narrow sense, i.e., whether an injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), and I use "antitrust standing" to refer to the remoteness inquiry.

each violation.

1. The Alleged Antitrust Violations

Plaintiffs assert two separate antitrust claims, both alleging violations of Section 2 of the Sherman Act. Section 2 generally prohibits individual market players from engaging in monopolization in any of its forms. See, e.g., Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). One of plaintiffs' Section 2 claims is styled as "monopolization" and the other as "monopsonization." Monopolization, in the traditional sense, describes the consolidation of a market into one seller. That seller then uses its power to produce at a sub-competitive level, causing fewer goods to be sold at a greater price. This sub-competitive production results in less consumer surplus and greater deadweight loss. Monopsonization is monopolization of a supply market—it is essentially the "mirror image" of traditional monopolization. See, e.g., Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001). Monopsonization describes consolidation of a market into one buyer. See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 32-33 (Aug. 19, 2010). That buyer then uses its power to consume at a sub-competitive level, resulting in fewer goods sold at a lower price. Like a traditional monopoly, a monopsony results in less consumer surplus and greater welfare loss. Both monopolization in the traditional sense and monopsonization are violations of Section 2. See, e.g., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

Because Ocean Spray sits in the middle of the three-tiered cranberry-products industry, it may be the subject of either monopsonization or traditional monopolization

claims. In the first market, the one for raw cranberries, growers are the sellers and handlers, like Ocean Spray, are buyers. This is the market in which Ocean Spray might behave as a monopsonist. In the second market, the one for cranberry products, handlers, like Ocean Spray, are sellers and cranberry product consumers are the buyers. This is the market in which Ocean Spray might behave as a traditional monopolist. Plaintiffs' "monopsonization" claim therefore must refer to the grower–handler market, and their "monopolization" claim must refer to the handler–consumer market.

As to the monopsonization claim, plaintiffs allege that Ocean Spray has a 70-80% share of the grower–handler market. TAC ¶ 67. Although plaintiffs' explanation of the alleged exclusionary conduct in this market is somewhat muddled, it seems to turn on Ocean Spray's decision to form the B Pool. See, e.g., id. at 2 ("Defendants accomplished their illegal scheme, in part, by creating a second-class membership within the cooperative, the 'B Pool,' . . . ."). The B Pool guaranteed growers an outlet for their fruit but did not guarantee them a particular price. If market conditions in the downstream handler–consumer market were to cause independent handlers to decrease their demand for fruit (e.g., because of predatory pricing by Ocean Spray in that market, which forms the basis of plaintiffs' other claim), independent growers would be "force[d] . . . to either join the B Pool or to exit the cranberry market altogether." Id. ¶ 49. By getting more independent growers to join the B Pool, Ocean Spray would enhance its monopsony power. This, plaintiffs allege, is a violation of Section 2.

As to the traditional monopolization claim, the complaint also alleges that Ocean

Spray is a monopolist in the handler–consumer market. Id. ¶¶ 119-23. Plaintiffs allege that Ocean Spray engaged in predatory pricing in that market by artificially depressing the auction price for cranberry concentrate. That predatory pricing, which plaintiffs allege was below Ocean Spray's costs in contravention of Section 2, drove down prices paid to independent handlers.

These are two separate antitrust violations. Because plaintiffs must have antitrust standing to seek recovery for each of them, I will examine them in turn.

2. Antitrust Standing for the Monopsonization Claim (Count IX)

There is a clear causal connection between the lower market price of raw cranberries and the antitrust violation alleged in plaintiffs' monopsonization claim. That violation, price fixing at a sub-competitive level in the market for cranberries, directly affected the price at which the growers could sell their cranberries to handlers. This, in turn, affected the revenue that the plaintiffs could generate and encouraged them to consolidate their sales to only Ocean Spray. Plaintiffs have alleged, and at this point defendants do not contest, that the defendants' conduct was meant to cause the harm that followed. Id. ¶¶ 125, 127. Because the A Pool, representing Ocean Spray's leadership, is at economic cross-purposes with the B Pool, see Docket # 78 at 2-3, plaintiffs' claim that the alleged harm was intentional is reasonable on its face.

The nature of the harms from the antitrust violation is the type of harm that the antitrust laws are intended to remedy. One of the alleged harms is market consolidation—by its very nature, a competition-reducing effect that prevents the market from allocating resources to their most valued uses. According to plaintiffs (and yet

unchallenged by defendants), the alleged price fixing caused reductions in the price for cranberries across the market. Smaller independent handlers, allegedly unable to sustain their operations at these prices, reduced their demand for cranberries. This made joining Ocean Spray's B Pool a more attractive option for many independent growers, increasing defendants' monopsony power in the cranberry market. In fact, plaintiffs have offered evidence that "[a]t the conclusion of 2009 (the first year of the [alleged] price-fixing), Ocean Spray added 80 new grower-members to the Cooperative" and lost none. TAC ¶ 54, Ex. 14. The plaintiffs are the direct sellers of cranberries to Ocean Spray and other handlers.[6] Although they are not customers or competitors of Ocean Spray, as sellers in a monopsonistic market, they walk in the same shoes as customers in a traditional monopolistic market.[7] See, e.g., Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, 76 Cornell L. Rev. 297, 337 (1991).

Plaintiffs' harms in this case are not speculative. Plaintiffs seek damages to undo the price fixing that Ocean Spray allegedly introduced into the cranberry market to drive

[6] Defendants' argument that one B Pool plaintiff, Stacy Preston Winters, lacks standing because the scheme was designed for her benefit is unpersuasive. The harm that Winters complains of in the monopsony claim is consolidation of the grower–handler market, leading to reduced competition among handlers. This would lead to more allocative inefficiency for all growers not in the A Pool, whether B Pool members or independent. That Winters may have benefited from the other alleged antitrust violation, predatory pricing in the handler–consumer market, does not undermine Winters' monopsony claim.

[7] Defendants contend that they are entitled to summary judgment because plaintiffs are neither consumers nor competitors of Ocean Spray in the relevant markets. They cite a string of First Circuit authority limiting antitrust standing to such groups in traditional monopolization cases. See, e.g., Serpa, 199 F.3d at 10; SAS, 48 F.3d at 44. But defendants' rote recitation of that case law ignores the nature of plaintiffs' claim—it is one for monopsonization, not monopolization. In this context, the proper focus is on sellers, not customers. See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) ("It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damages claim are sellers, not customers or competitors.") (footnotes omitted); cf. Weyerhaeuser, 549 U.S. at 321 (noting "close theoretical connection between monopoly and monopsony" and adopting "mirror image" analytical approach).

independent growers into its B Pool. These damages may be measured, for example, based on past market prices or related yardsticks. For members of the B Pool, no entity is better situated to pursue this antitrust claim. The B Pool members were direct sellers to Ocean Spray at the price that Ocean Spray allegedly set; no intermediaries were involved. Independent growers, though one step removed from Ocean Spray, are also well situated to pursue this antitrust claim. They sold their product to independent handlers, allegedly receiving a lower price because Ocean Spray had fixed prices in its large segment of the market. In theory, either the independent growers or the independent handlers could bring a claim against Ocean Spray for its allegedly anticompetitive tactics. Yet, reality suggests otherwise. There are no allegations that independent handlers suffered harm from Ocean Spray's conduct in the grower–handler market.[8] Indeed, it is plausible that they did not, because they were able to piggyback on Ocean Spray's attempted monopsonization to pay less for their cranberries. Although the independent growers are one step removed from the anticompetitive conduct, this is not a case like Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), where the plaintiffs' harm is derivative of harm to a better situated plaintiff. Here, the independent growers are at least as well situated as the independent handlers to bring an antitrust claim, and they may even be the only plaintiffs that can sustain one. To the extent that there is any overlap in damages claims, apportionment of damages between the independent handlers and independent growers would not be difficult because past

[8] There are, of course, allegations that independent handlers were harmed by Ocean Spray's alleged predatory pricing behavior in the handler–consumer market, but that is not relevant to this inquiry.

dealings between the independent growers and independent handlers provide benchmarks.

Having considered all of the AGC factors, I find that the plaintiffs have antitrust standing to pursue their monopsonization claim—i.e., that defendants' formation of the B Pool, coupled with their alleged price fixing in the grower–handler market, enhanced their monopsony power and decreased competition in that market. I also note that allowing the grower plaintiffs to pursue this claim is consistent with scholarly commentary on antitrust standing in the monopsony context. See, e.g., IIA Phillip E. Areeda et al., Antitrust Law ¶¶ 350a & 350b (4th ed. 2014) ("[Where] Defendants are the plaintiff's customers and . . . create an illegal monopsony . . . plaintiff has standing."); Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, 76 Cornell L. Rev. 297, 336-37 (1991). Defendants' motion for summary judgment for lack of antitrust standing on Count IX is denied.

3. Antitrust Standing for the Monopolization Claim (Count VIII)

As with plaintiffs' monopsonization claim, there is a clear causal link between the alleged violation in the handler–consumer market (i.e., predatory pricing) and the harm to plaintiffs (i.e., less competition in the handler market and lower cranberry prices). Predatory pricing "occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business." Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 483 (1st Cir. 1988). If Ocean Spray priced its refined cranberry products, and cranberry concentrate in particular, below its costs, this would cause the quantity of Ocean Spray product demanded to increase to the detriment of the

independent handlers. The independent handlers would then either be forced to lower their prices to compete with Ocean Spray, thereby placing limits on what they could pay independent growers for their raw cranberries, or reduce their output. If they chose the latter course, they would necessarily require a lower volume of raw cranberries, thus shrinking the buyer market for independent growers. Plaintiffs allege, and at this point defendants do not dispute, that this was the intended effect of defendants' conduct. And, because this injury results in less competition in both the grower–handler and handler–consumer markets, it is the type of injury that the antitrust laws were intended to remdy.

Yet, despite successfully satisfying these two factors of the AGC test, the remainder of the analysis weighs against permitting plaintiffs to pursue a claim for this violation. Plaintiffs' injuries are indirect—they are harmed because the independent handlers are harmed. Plaintiffs are neither competitors nor customers of Ocean Spray in the handler–consumer market.[9] Under First Circuit law, this creates a presumption that they are not proper antitrust plaintiffs. See, e.g., Serpa, 199 F.3d at 10 ("Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."); SAS, 48 F.3d at 44. Plaintiffs' damage for Ocean Spray's behavior in the handler–consumer market also present difficult apportionment problems. Plaintiffs would need to show, with respect to

[9] To the extent plaintiffs contend that they are competitors with Ocean Spray because the Ocean Spray cooperative is the same thing as the Ocean Spray growers, the court disagrees. Agricultural cooperatives are generally distinct corporate entities from the growers that have a stake in them. See, e.g., Kuntz v. Lamar Corp., 385 F.3d 1177, 1183 (9th Cir. 2004). Here, that is particularly true because defendants are distinct corporate entities, i.e., a Delaware corporation and a Delaware limited liability company. Plaintiffs have not offered sufficient evidence to allow a reasonable jury to conclude that the cooperative is an alter ego of its members or that any other corporate veil-piercing doctrines apply here.

each independent handler, just how much the handler's demand for raw cranberries decreased as a result of defendants' conduct and how much more the handler would have paid for raw cranberries but for Ocean Spray's predatory pricing. This would require a detailed analysis of the internal cost structures of each of the independent handlers. And, since the independent handlers undeniably would have a claim against Ocean Spray for the alleged predatory pricing, the potential for duplicative recovery from faulty apportionment is high. The independent handlers, the direct victims of defendants' alleged predatory pricing scheme, are better situated to pursue damages claims for that conduct.

As suppliers to Ocean Spray's competitors in the handler–consumer market, plaintiffs's claims are entirely derivative of claims that the competitors themselves could bring. As defendants rightly point out, "[t]he First Circuit has made it clear that suppliers are not preferred plaintiffs." In re Compact Disc Minimum Advertised Price Antitrust Litig., 456 F. Supp. 2d 131, 146 (D. Me. 2006). Again, scholarly commentary supports this approach. IIA Phillip E. Areeda et al., Antitrust Law ¶¶ 350a & 350d (4th ed. 2014) ("[Where] [a]n immediate victim of illegal conduct by the defendant(s) is the plaintiff's customer, who then buys fewer inputs from the plaintiff[,] . . . [t]he plaintiff generally lacks standing unless the plaintiff competes with the defendant."). Having considered the AGC factors here, I conclude that plaintiffs do not have antitrust standing to pursue their monopolization claim—i.e., that defendants' predatory pricing caused anticompetitive harms in the handler–consumer market. The defendants' motion for

summary judgment is therefore allowed on Count VIII of the Third Amended Complaint.[10]

B. Chapter 93A Claim (Count IV)

Defendants next contend that plaintiffs[11] lack standing to bring their claims under Massachusetts General Laws chapter 93A ("93A"). Violations of the federal antitrust laws, including Section 2 of the Sherman Act, are cognizable under 93A. F. Ciardi v. Hoffmann-LaRoche Ltd., 762 N.E.2d 303, 307-08 (Mass. 2002). Chapter 93A is in some ways broader than the federal antitrust laws though, so a plaintiff may be able to bring a 93A claim even if it is unable to bring a statutory antitrust claim. Id. at 312. Section 11 of 93A, which applies to business-to-business transactions like the ones here, requires a plaintiff to show that the alleged unfair practice (1) is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers, competitors, or other businesspeople. Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 69 (1st Cir. 2009) (quotation and citation omitted).

As an initial matter, although plaintiffs pleaded their 93A claim broadly, alleging "price-fixing, attempting to monopolize and monopsonize, monopolization and monopsonization of trade in commerce," TAC ¶ 109, defendants contend that the court should construe the claim to be based on three acts: (1) violation of Section 2 of the Sherman Act; (2) violation of the 1957 Final Judgment; and (3) violation of Ocean Spray's contractual obligations to plaintiffs. I am not convinced that plaintiffs have so

[10] Having concluded that no plaintiffs have antitrust standing to bring their monopolization claim, I do not separately consider whether the one B Pool plaintiff, Stacy Preston Winters, is barred from bringing this claim as an intended beneficiary of the anticompetitive conduct.

[11] This count is brought only on behalf of independent growers, not members of the B Pool.

limited their claim. They have alleged numerous facts to support claims for unfair trade practices leading to the monopolization and monopsonization of the cranberry fruit and concentrate markets. Defendants cannot evade those allegations simply by adopting their own narrow construction of the complaint. Yet, even assuming that plaintiffs' 93A claims are based on these three narrow grounds, defendants' summary judgment motion fails.

The survival of one of plaintiffs' Sherman Act claims necessarily means that summary judgment is inappropriate on the 93A claim that is premised upon that Sherman Act claim. See, e.g., RSA Media, Inc. v. Media Grp., Inc., 260 F.3d 10, 16 (1st Cir. 2003). Because I have concluded that plaintiffs have standing to bring a monopsonization claim under the Sherman Act based on defendants' alleged conduct in the grower–handler market, they may also bring a 93A claim based on that conduct. Of course, because I have concluded that plaintiffs do not have standing to bring a monopolization claim under the Sherman Act based on defendants' alleged conduct in the handler–consumer market, plaintiffs may not bring a 93A claim that is premised only upon that alleged violation of the antitrust laws. But even under defendants' narrow reading of plaintiffs' complaint, plaintiffs do not do that—they rest their 93A claim for conduct in the handler–consumer market on additional grounds.

One of those other grounds is that defendants' conduct allegedly contravened the competitive standards set out in the 58-year-old consent decree.[12] In 1957, this court entered a final judgment in an antitrust lawsuit filed by the United States against five

[12] Plaintiffs do not brief this point in their opposition, but they do advance this theory in their own motion for summary judgment, and defendants addressed it in their motion.

defendants, including the National Cranberry Association (which is Ocean Spray's corporate predecessor) and two of its grower-members. See Final Judgment, United States v. Nat'l Cranberry Ass'n, C.A. No. 55-418-3 (D. Mass. Oct. 28, 1957) (TAC Ex. 3) (the "1957 Final Judgment"). The relevant fairness standard, according to plaintiffs, is found in Section VI(A) of that document:

> Defendants ADM, United, Markpeace and Urann are jointly and severally enjoined and restrained from: (A) Purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress or stabilize market price levels of fresh or processed cranberries.

1957 Final Judgment at 5. Although Ocean Spray's predecessor was not bound by this provision, it indisputably had notice of the consent decree. A consent decree involving Ocean Spray's predecessor and prohibiting the "class of conduct" of which plaintiffs complain—"[p]urchasing cranberries from others and reselling . . . them to artificially . . . depress . . . market price levels of fresh or processed cranberries"—may undoubtedly form the basis for a claim under section 11 of 93A. See In re TJX Cos. Retail Sec. Breach Litig., 564 F.3d 489, 497 (1st Cir. 2009) (relying on "a substantial body of FTC complaints and consent decrees focus[ing] on a class of conduct" to find that conduct unfair within the meaning of 93A).

Another ground on which plaintiffs base their 93A claim is that defendants engaged in unfair trade practices by breaching contracts with independent handlers to which the independent growers are third-party beneficiaries. The record at this stage shows that genuine issues of material fact remain about whether the independent growers are in fact third-party beneficiaries to these contracts. For that reason alone,

summary judgment is inappropriate. But, even if the independent growers are not third-party beneficiaries of those agreements, they still may have a claim under 93A because defendants' alleged breach of their contracts with independent handlers may result in competitive harms to plaintiffs within the meaning of 93A. In other words, plaintiffs need not necessarily be third-party beneficiaries of the contracts to sustain a claim under 93A for their breach. See, e.g., Cooper v. Charter Commc'ns Entm'ts I, LLC, 760 F.3d 103, 112 (1st Cir. 2014). Defendants do not address such a claim at all in their briefs and therefore have not shown that they are entitled to summary judgment.

C. Retaliation Claim (Count XIII)

Plaintiffs Barry K. Winters and Paul D. Sogn individually entered into a three-year cranberry marketing agreement with Ocean Spray. TAC ¶¶ 147-48. In a separate count, they claim that after the complaint was filed, Ocean Spray sent them a letter terminating the agreements because they are named plaintiffs in this action. Id. ¶ 150. The termination letters state:

> This Notice of Termination is based on the fact that you and BKW Farms are named plaintiffs in a lawsuit recently filed against Ocean Spray in the United States District Court for the District of Massachusetts (C.A. No. 1:12-CV-12016-RWZ). Because you have elected to participate in this action against Ocean Spray, we are no longer interested in doing business with you or with BKW Farms.

Id. Exs. 22 & 23. These plaintiffs claim that defendants terminated their contracts to intimidate and coerce them, frustrate the pending litigation, and discourage other "B Pool" members from joining the suit.

I declined to dismiss this count last year, concluding that plaintiffs had stated a

93A claim within the "penumbra" of the established standard of unfairness for breach of contract. Docket # 78 at 16-17. Now, on summary judgment, defendants offer facts to support their framing of the events as "declining to renew" the contracts, in a non-breaching manner, rather than "terminating" them. Regardless of which framing is correct, plaintiffs' claim still survives. Non-breaching termination of an at-will contract or non-renewal of a contract may, under some circumstances, constitute a 93A violation. See, e.g., 52 Mass. Practice § 9.1; cf. Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1374-78 (Mass. 1980). A finding that the termination or non-renewal is lawful under the contract does not end the 93A inquiry. The critical question is whether the circumstances surrounding the termination or non-renewal demonstrate unfair trade practices as determined by the three-part test described above. See Mass. Eye & Ear Infirmary, 552 F.3d at 69. For example, unfair trade practices in this context may include breaches of the implied covenant of good faith and fair dealing, Anthony's Pier Four, Inc. v. HBC Assocs., 583 N.E.2d 806, 820 (Mass. 1991), motives contrary to public policy, Buster v. George W. Moore, Inc., 783 N.E.2d 399, 412 (Mass. 2003) (finding 93A violation where lawful foreclosure auction was retribution for the refusal of a witness to testify), or stringing along that causes detrimental reliance, Lambert v. Fleet Nat'l Bank, 865 N.E.2d 1091, 1098 (Mass. 2007). Because defendants' motion is premised upon the legality of the termination or non-renewal being dispositive, and it does not address plaintiffs' broader unfairness allegation, which I have already once found sufficient to support their 93A claim, Docket # 78 at 16-17, it is denied.

IV. Plaintiffs' Summary Judgment Motion (Docket # 102)

Plaintiffs move for summary judgment on liability for their monopolization and 93A claims (Counts IV and XIII). Their motion is denied with respect to the monopolization claim (Count XIII) because I have concluded that they lack standing to pursue it. I therefore address only their 93A claim on the merits.

A. Chapter 93A Claim (Count IV)

Plaintiffs contend that summary judgment should enter in their favor on liability for their 93A claim because (1) defendants' conduct runs afoul of the concept of fairness established by the 1957 Final Judgment and the best efforts rule of contract law; (2) the conduct was oppressive to growers; and (3) it caused injury to growers, as competitors of Ocean Spray. From the showing in plaintiffs' motion and defendants' opposition, however, a reasonable jury may conclude that defendants' conduct did not violate an established concept of fairness or that it did not cause plaintiffs' harms.

Whether particular conduct constitutes an unfair practice under Chapter 93A is a question of fact. James L. Miniter Ins. Agency v. Ohio Indem. Co., 112 F.3d 1240, 1251 (1st Cir. 1997). Conduct that is unfair in one market may not be fair in another. Baker v. Goldman Sachs & Co., 771 F.3d 37, 50 (1st Cir. 2014). Plaintiffs' allegations of unfairness are reasonable on their face and supported by facts in the record. Defendants, however, also offer credible evidence, in the form of an expert declaration from an economist, that purports to show that the type of auction that Ocean Spray uses is common in commodities markets. See Docket # 117. A genuine dispute of fact exists, therefore, about whether the Ocean Spray cranberry concentrate auction is unfair.

Similarly, "causation [is] a necessary element of a successful 93A claim." RSA Media, 260 F.3d at 16. Plaintiffs must also demonstrate the absence of genuine fact disputes about causation to be entitled to summary judgment. Although plaintiffs have credibly alleged and produced documents to show that the price of cranberry concentrate would have been higher if Ocean Spray had conducted the concentrate auction differently, Ocean Spray's economics expert has offered evidence to the contrary. Because the conflicting causation evidence offered by each party tells a plausible story, summary judgment is inappropriate. Plaintiffs' motion is denied.

B. Defendants' Motion to Defer Under Rule 56(d) and to Strike New Evidence and Argument in Plaintiffs' Reply (Docket ## 118 and 140)

Defendants move the court under Rule 56(d) to defer considering plaintiffs' summary judgment motion until more discovery is complete. They also move to strike allegedly new evidence and argument in plaintiffs' reply brief, including a new theory of liability, an expert declaration, and several fact declarations. Having now considered the merits of plaintiffs' summary judgment motion and found them wanting even with the allegedly improper evidence, both of these related motions (Docket ## 118 and 140) are DENIED AS MOOT.

V. Stays

Throughout this litigation, the court has allowed numerous requests for stays. Although those requests may have been supported by good cause at the time, they no longer are. All stays that are in place are hereby vacated.

Of particular note is the court's recent stay of plaintiffs' motion for class certification (Docket # 138). Because this summary judgment order has affected the issues remaining in the case, the class certification motion (Docket # 130) is DENIED AS MOOT. Within two weeks of this order, plaintiffs shall either re-file that motion or, if appropriate, file a revised version that accounts for the court's rulings on the summary judgment motions.[13] Defendants shall file their opposition within two weeks of plaintiffs' motion, and plaintiffs may file a three-page reply within one week of defendants' opposition. The court expects to schedule a hearing on the motion promptly.

The court will schedule a status conference by separate order. To help get this now three-year-old case moving, all counsel of record shall participate in that status conference.[14]

VI. Conclusion

For reasons explained above, defendants' motion for summary judgment (Docket # 115) is ALLOWED IN PART with respect to Count VIII and DENIED IN PART with respect to Counts IV, IX, and XIII. Plaintiffs' motion for partial summary judgment (Docket # 102) is DENIED, and defendants' motions to defer consideration (Docket # 118) and to strike parts of plaintiffs' reply (Docket # 140) are DENIED AS MOOT. All stays currently in place are HEREBY VACATED. Class certification briefing shall proceed as outlined above.

[13] The court is concerned that the class certification motion, as last filed, is not in final form. For example, it includes a significant amount of yellow highlighting, and is written, in part, in the first person. See Docket # 129 at 13-15. Given the inherently complex nature of this antitrust case, the court expects the parties to make efforts to ensure that their arguments are complete and efficiently presented.

[14] Likewise, all counsel who intend to appear in this case are instructed to check the docket and ensure that they have entered a notice of appearance or motion for pro hac vice admission.

May 14, 2015 /s/Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE