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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FOUR IN ONE COMPANY, INC, on
behalf of itself and all others
similarly situated,

No. 2:08-cv-03017-MCE-EFB

Plaintiff,

v.

MEMORANDUM AND ORDER

SK FOODS, L.P., INGOMAR PACKING
COMPANY, LOS GATOS TOMATO
PRODUCTS, RANDALL RAHAL,
INTRAMARK USA, INCORPORATED,

Defendants.

BRUCE FOODS CORPORATION, on
behalf of itself and all
others similarly situated,

No. 2:09-cv-00027-MCE-EFB

Plaintiff,

v.

SK FOODS, LP; INGOMAR PACKING
COMPANY, LLC, LOS GATOS
TOMATO PRODUCTS, INTRAMARK
USA, INC. AND RANDALL LEE RAHAL,

Defendants.

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1 DIVERSIFIED FOODS AND
2 SEASONINGS, individually
3 and on behalf of all
4 others similarly situated,

5 Plaintiff,

6 v.

7 SK FOODS L.P., INTRAMARK USA,
8 INC., and RANDALL LEE RAHAL,

9 Defendants.

No. 2:08-cv-03074-MCE-EFB

10 CLIFFSTAR CORPORATION, on
11 behalf of itself and all
12 others similarly situated,

13 Plaintiff,

14 v.

15 SK FOODS, LP, INGOMAR PACKING
16 COMPANY, LLC, LOS GATOS TOMATO
17 PRODUCTS, INTRAMARK USA, INC.,
18 and RANDALL LEE RAHAL,

19 Defendants.

No. 2:09-cv-00442-MCE-EFB

20 -----oo0oo-----

21 These are related class action complaints instituted on
22 behalf of four different purchasers of processed tomato products
23 who allege that defendants improperly engaged in price-fixing and
24 other anti-competitive conduct in violation of antitrust laws.
25 Counsel for Plaintiffs Four In One Company ("Four in One") and
26 Bruce Foods Corporation ("Bruce Foods") filed a Motion for
27 Appointment of Interim Counsel and Liaison Counsel, under Federal
28 Rule of Civil Procedure Rule 23(g),¹ on or about February 10,
2009.

¹ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

1 The third Plaintiff, Cliffstar Corporation ("Cliffstar"),
2 subsequently filed its Complaint on February 13, 2009, and
3 thereafter joined in the Four In One/Bruce Foods Motion. The
4 remaining Plaintiff, Diversified Foods and Seasonings, Inc.
5 ("Diversified Foods"), opposes the Four In One/Bruce Foods Motion
6 and has filed their own Motion for Appointment of Counsel.

7 As indicated above, this Court has already determined that
8 the cases are related in the sense that they involve similar
9 questions of fact and of law stemming from the Defendants' alleged
10 anti-competitive conduct in allegedly manipulating the market for
11 processed tomato products. Additionally, by Order dated March 9,
12 2009, the cases were also consolidated for pre-trial purposes.

13
14 **STANDARD**

15
16 Pursuant to Rule 23(g) (3), the Court may designate interim
17 class counsel to represents the interests of the alleged class in
18 initial proceedings, even before determining whether to certify
19 the class as a whole. As the Manual for Complex Litigation
20 recognizes, where a number of overlapping, duplicative or
21 competing suits are present, a number of lawyers may compete for
22 class counsel appointment. See Manual for Complex Litiigation,
23 Fourth, § 21.11, at 246 (Federal Judicial Center 2004)
24 (hereinafter "Manual"). The Manual states:

25 "In such cases, designation of interim counsel
26 clarifies responsibility for protecting the interests
27 of the class during precertification activities, such
28 as making and responding to motions, conducting any
necessary discovery, moving for class certification,
and negotiating settlement."

1 Id. Courts have held that the same standards applicable to
2 choosing class counsel at the time of class certification apply
3 in choosing interim class counsel. See In re Air Cargo Shipping
4 Services Antitrust Litigation, 240 F.R.D. 56, 57 (E.D.N.Y. 2006)
5 (“Although neither the federal rules nor the advisory committee
6 notes expressly so state, it appears to be generally accepted
7 that the considerations set out in [Fed. R. Civ. P. 23(g) (1) (A)
8 and (B)], which governs appointment of class counsel once a class
9 is certified, apply equally to the designation of class counsel
10 before certification.”).

11
12 **ANALYSIS**

13
14 Rule 23(g) provides the following guidelines for the
15 appointment of class counsel:

16 “In appointing class counsel, the court:

17 (A) must consider:

- 18 (i) the work counsel has done in identifying or
19 investigating potential claims in the
20 action;
21 (ii) counsel’s experience in handling class
22 actions, other complex litigation, and the
23 types of claims asserted in the action;
24 (iii) counsel’s knowledge of the applicable law;
25 and
26 (iv) the resources that counsel will commit to
27 representing the class;

28 (B) may consider any other matter pertinent to
counsel’s ability to fairly and adequately
represent the interests of the class;

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1 (C) may order potential class counsel to provide
2 information on any subject pertinent to the
3 appointment and to propose terms for attorney's
4 fees and nontaxable costs;

5 (D) may include in the appointing order provisions
6 about the award of attorney's or nontaxable costs
7 under Rule 23(h); and

8 (E) may make further orders in connection with the
9 appointment.

10 The most common means of selecting class counsel is the so-
11 called "private ordering" approach, whereby involved counsel
12 jointly come to a representational consensus and submit their
13 recommendation in that regard to the court for approval. See
14 Manual, § 21.272 ("The lawyers agree who should be lead class
15 counsel and the court approves the selection after a review to
16 ensure that the counsel selected is adequate to represent the
17 class interests."). Efforts of plaintiffs' counsel to coordinate
18 activities between themselves should be encouraged. Id. at
19 § 10.22.

20 Here, no such uniform consensus arose as a result of
21 discussion between counsel. An organizational meeting on
22 February 2, 2009 did apparently secure agreement between counsel
23 for Four In One, Bruce Foods and Cliffstar, in which one firm
24 from each lawsuit would serve as proposed co-lead counsel,²
25 with an additional firm associated with the Four in One case,
26 Bernstein Liebhard, LLP, rounding out the fourth proposed member
27 of the lead counsel team.

28 ² In addition to being sole Plaintiff's counsel in the
Cliffstar case, however, the firm of Pearson Simon Warshaw &
Penny LLP ("Pearson Simon") is also included with the eight firms
representing Bruce Foods as a Plaintiff in the Bruce Foods
litigation.

1 The attorneys representing Diversified Foods, however, did not
2 join in that agreement, and claim that the alleged consensus was
3 reached at a point during the meeting where Diversified's counsel
4 had to leave to participate in a lengthy conference call in
5 another case. Diversified Foods consequently urges the Court to
6 not adopt the agreement between counsel for the other three groups
7 of Plaintiffs, and instead advocates the appointment of two lead
8 counsel, one from the consortium of attorneys representing Four in
9 One, Bruce Foods and Cliffstar, and the other from the two counsel
10 representing Diversified Foods in their case. Diversified Foods
11 also proposes the Mennemeier, Glassman & Stroud, LLP firm
12 ("Mennemeier") for liaison counsel, as opposed to the consensus
13 reached in favor of Damrell Nelson Schrimp Pallios Pacher & Silva
14 ("Damrell Nelson") by the attorneys representing the Plaintiffs in
15 the other three lawsuits.

16 In the absence of agreement between all involved counsel,
17 the Court must itself endeavor to select counsel best able to
18 represent the interests of the purported class. See Fed R. Civ
19 P. 23(g)(2).³ Each law firm proposed as either co-lead or
20 liaison counsel appears eminently well qualified to provide such
21 representation. Each has experience as lead counsel in
22 significant nationwide class actions, experience that would
23 afford a suitable case management structure for this litigation.
24 Moreover, the appointment of liaison counsel would help ensure
25 efficient and effective communications with the Court.

26
27 ³ Even had a uniform consensus as to representation has been
28 reached in the present case, the Court must still have reviewed
the agreement to ensure that the proposed representation
adequately served class interests. See Manual, § 21.272.

1 The Court nonetheless believes that the appointment of more
2 than two co-lead counsel, and anything other than a single liaison
3 counsel, would engender duplication of effort not in the best
4 interest of either a focused or efficient class representation.
5 Consequently, while the Court recognizes that other courts have
6 appointed four or more co-lead counsel in other antitrust class
7 action cases, it declines to do so here. The Court therefore
8 faces the unenviable task of selecting class counsel from a
9 preeminent group of proposed firms.

10 Applying the standards enunciated by Rule 23(g), the Court
11 believes that the firm of Quinn Emanuel Urquhart Oliver & Hedges,
12 LLP ("Quinn Emanuel") has both far-reaching experience and
13 expertise, as well as the trial experience necessary to litigate
14 a case of this potential magnitude. Quinn Emanuel points to a
15 91.6 percentage of victory in some 1250 cases tried, as well as
16 some \$10 billion in judgments and settlements reached in
17 representing plaintiffs. Significantly, too, the firm, and in
18 particular Stephen Neuwirth, one of the attorneys proposed as a
19 member of its representational team for this litigation,
20 currently serves as co-lead interim counsel for direct purchase
21 plaintiffs in both In re Rail Fuel Surcharge Antitrust Litigation
22 (MDL 1869 (D.D.C.) (which involves purported anticompetitive
23 conduct in connection with fuel surcharges assessed by the
24 nation's four largest railroads) and Universal Delaware Inc., et
25 al. v. Comdata Corp., Civ. No. 07 1078 (JKG (HSP (E.D. Pa.)), an
26 action alleging antitrust violations in the market for credit
27 cards utilized by truck fleets at truck stops.

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1 Quinn Emanuel's combination of significant trial experience,
2 experience in representing class action plaintiffs in analogous
3 antitrust litigation, and its nationwide resources make it stand
4 out in this Court's estimation after application of the
5 Rule 23(g) factors enumerated above. Similarly, the Hausfeld LLP
6 firm appears to also possess the breadth of experience, resources
7 and talent necessary to navigate a case of this import. Michael
8 Hausfeld, who is being proposed to lead the team on behalf of
9 Hausfeld LLP, has been described by Chief Judge Edward Korman of
10 the Eastern District of New York as one of the two "leading class
11 action lawyers in the United States." The New York Times has
12 referred to Mr. Hausfeld as one of the "most prominent antitrust
13 lawyers" in the country. Even more significantly, Hausfeld LLP
14 is currently serving as co-lead counsel in some 17 major national
15 antitrust class action cases.

16 Although there is no question that the other firms proposed
17 as co-lead counsel are also well qualified, in the Court's
18 estimation both Quinn Emanuel and Hausfeld LLP stand out from the
19 rest with regard to qualifications particularly applicable to
20 this case. That assessment, as well as the Court's view that the
21 appointment of more than two co-leads would be counterproductive,
22 causes it to appoint Quinn Emanuel and Hausfeld LLP as co-lead
23 interim counsel to represent Plaintiffs in this consolidated
24 litigation.

25 With respect to liaison counsel, the Damrell Nelson firm,
26 aside from offering substantial experience within the Eastern
27 District, also has considerable experience in the management of
28 major class actions in federal court.

1 It has served as co-lead counsel in at least three such cases in
2 California district courts, and is currently involved in five
3 antitrust class actions at varying stages of litigation.

4 In selecting Quinn Emanuel and Hausfeld LLP as co-lead
5 interim counsel and Damrell Nelson as liaison counsel, the Court
6 also notes that those firms were approved by the majority of
7 counsel involved in three of the related cases- a total of eight
8 different firms listed as counsel on the Bruce Foods Complaint,
9 four firms for Four in One, as reflected by the Complaint in that
10 case, and another firm representing Cliffstar. That reflects a
11 stronger overall consensus on representation than the proposal
12 advocated on behalf of Diversified Foods and Seasonings, and its
13 three listed counsel. While not dispositive, the stronger
14 consensus in favor of the representational structure proposed on
15 behalf of Bruce Foods/Four in One/Cliffstar, as opposed to the
16 single dissenting voice of Diversified Foods, also figures into
17 the Court's decision in appointing counsel.

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1 **CONCLUSION**

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3 For all of the foregoing reasons, the Motion for Appointment
4 of Interim Counsel brought on behalf of Four in One and Bruce
5 Foods (and later joined by Cliffstar) is GRANTED in part inasmuch
6 as Quinn Emanuel and Hausfeld LLP are hereby appointed as co-lead
7 interim counsel in this consolidated litigation, and Damrell
8 Nelson is appointed liaison counsel.

9 The Court, however, denies said Motion to the extent it also
10 seeks appointment of two additional firms, Pearson Simon and
11 Bernstein Liebhard, as additional co-lead counsel. Plaintiff
12 Diversified Foods' concurrent Motion for Appointment of Counsel
13 is DENIED.⁴

14 IT IS SO ORDERED.

15 Dated: March 19, 2009

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18 MORRISON C. ENGLAND, JR.
19 UNITED STATES DISTRICT JUDGE
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27 ⁴ Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefing. E.D.
Local Rule 78-230(h).