

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT/TEACHER :
STORE, INC. :
 : CIVIL ACTION
 v. :
 : NO. 02-7676
3M (MINNESOTA MINING :
AND MANUFACTURING COMPANY) :

ORDER-MEMORANDUM

Padova, J.

AND NOW, this 10th day of December, 2004, upon consideration of Meijer, Inc. and Meijer Distribution, Inc.'s Motion for Reconsideration (Doc. No. 185) and all documents filed in response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

I. BACKGROUND

The conduct of Defendant which forms the basis of this class action lawsuit was the subject of a prior lawsuit in this Court, LePage's v. 3M, Civ. A. No. 97-3983, 2000 U.S. Dist. Lexis 3087 (E.D. Pa. Mar. 14, 2000). In that suit LePage's, Inc, a competing supplier of transparent tape, sued 3M alleging, *inter alia*, unlawful maintenance of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After a nine-week trial, the jury found in favor of LePage's on its unlawful maintenance of monopoly power claim. See id.

In the instant litigation, Class Plaintiff alleges one count of monopolization in violation of the Sherman Act, 15 U.S.C. § 2. The Complaint states that Defendant unlawfully maintained its monopoly in the transparent tape market and that, as a result of

Defendant's conduct, Class Plaintiff and other members of the Class have "suffered antitrust injury." (Compl. ¶ 27). Class Plaintiff initially sought certification of a class of all persons who directly purchased invisible and transparent tape from Defendant. On March 1, 2004, the Court denied Class Plaintiff's Motion. The Court noted that Class Plaintiff's position as purchaser of 3M branded transparent tape resulted in a conflict of interest between Plaintiff and those class members who purchased "private label" tape. See Bradburn Parent/Teacher Store v. 3M, No. Civ. A. 02-7676, 2004 WL 414047 (E.D. Pa. Mar. 1, 2004). The Court found that these different groups of claimants would be interested in pursuing directly conflicting theories of recovery. See id. Accordingly, Class Plaintiff would be unable to adequately represent the interests of purchasers of "private label" tape from Defendant. See id. Class Plaintiff subsequently filed a Motion for Certification of a Modified Class which includes all persons who directly purchased invisible or transparent tape from Defendant, and who have not purchased for resale under the class member's own label any "private label" invisible or transparent tape from Defendant or any of Defendant's competitors. On August 17, 2004, the Court granted Class Plaintiff's Motion for Certification of a Modified Class.

On September 20, 2004, Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer") filed a Motion to Intervene in the

current action pursuant to Federal Rules of Civil Procedure 24(a)(2) and 24(b)(2) as class representative of those persons who purchased "private label" tape from Defendant. The Court denied Meijer's Motion to Intervene on October 27, 2004. Meijer now moves the Court to reconsider the denial of the Motion.

II. DISCUSSION

A party seeking reconsideration of a court order must demonstrate: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not previously available; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Cafe ex rel. Lou-Ann Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). The threshold to prevail on a motion for reconsideration is high, and such motions should be granted only sparingly. Rottmund v. Continental Assurance Co., 813 F.Supp. 1104, 1107 (E.D. Pa. 1992).

In denying Meijer's Motion to Intervene, the Court noted that it had previously refused to certify as part of the class potential claimants, such as Meijer, who purchased "private label" tape from Defendant or Defendant's competitors, because these potential claimants:

would likely be interested in pursuing a "lost profits" theory of damages, and would accordingly seek to present evidence that maximized a shift in market share from 3M branded to private label tape. . . . [The now certified class], by contrast, [is] solely pursuing an overcharge theory of damages, and therefore [will] attempt to demonstrate that

the price of 3M branded tape would have fallen in the absence of 3M's anti-competitive conduct. . . . [A] conflict arises from the fact that the strategies for maximizing recovery under an overcharge and a lost profits theory of damages under the facts of this case conflict with each other, so that [the now certified class's] decision to pursue an overcharge theory and maximize its profits runs a serious risk of minimizing the recovery of [other claimants].

Court Order of October 27, 2004, Doc. No. 182. Finding no reason "to revisit its decision to exclude from the current litigation potential claimants, such as Meijer, who directly purchased 3M as well as "private label" tape, and who would pursue a dramatically different theory of recovery than the existing Plaintiff," the Court denied Meijer's Motion to Intervene as futile. Id.

In the instant Motion for Reconsideration, Meijer appears to argue that reconsideration of the Court's October 27, 2004 Order is necessary to correct a clear error of law or fact or to prevent manifest injustice. Meijer argues that it was premature for the Court to address class certification issues, and that Meijer, unlike existing Class Plaintiff, would be well positioned to pursue a theory of recovery on behalf of its proposed class members. (Mot. for Reconsideration at 3-6.) In denying Meijer's Motion to Intervene, however, the Court did not rule on whether or not Meijer would be an able class representative for large-volume purchasers of 3M and "private label" tape. Rather, the Court held that intervention would not have been proper because it would have run

a serious risk of limiting the recovery of both Meijer and the existing class.

Meijer further argues that it does not seek intervention in order to pursue a different theory of recovery than the Class Plaintiff. Instead, it seeks intervention to pursue, on behalf of large purchasers of "private label" tape, the same overcharge theory as Class Plaintiff. Meijer, however, has nonetheless failed to establish that its Motion to Intervene should have been granted on the basis of either Rule 24(a)(2) or Rule 24(b)(2). To satisfy the test for intervention as of right pursuant to Rule 24(a)(2), a party must establish: (1) timely application; (2) a sufficient interest in the litigation; (3) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (4) inadequate representation of its interests by the existing parties to the action. Donaldson v. United States, 400 U.S. 517, 531 (1971); Kleissler v. United States Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998).

In determining the timeliness of a motion to intervene, courts consider (1) the stage of the proceedings when the movant seeks to intervene; (2) the possible prejudice caused to other parties by the delay; and (3) the reason for the delay. Donovan v. United Steelworkers of America, 721 F.2d 126, 127 (3d Cir. 1983). The length of time that the movant waits before seeking to intervene is measured from the point at which the movant knew, or should have

known, of the risk to its rights. Mountain Top Condo. Assoc. v. Stabbert Master Builder, Inc. 72 F.3d 361, 369 (3d Cir. 1995).

Here, Meijer knew or should have known of a risk to its rights as of March 1, 2004, when the Court denied Plaintiff's motion to certify a class that would have included Meijer. See Court Memorandum and Order of March 1, 2004, Doc. No. 136. Meijer, however, did not file its Motion to Intervene until September 20, 2004 - well over six months after the Court had issued its Memorandum and Order. By that point, the Court had ruled on Class Plaintiff's motion for certification of a modified class, and all class-related discovery had been completed. Even if Meijer were to proceed on the same theory of recovery as Class Plaintiff, allowing Meijer to intervene would require additional discovery into the suitability of Meijer to serve as a class representative and the filing of a second motion for class certification. This would not only delay the current proceedings, but also cause prejudice to the existing parties, especially Defendant, due to the additional costs and expenses involved in the litigation of those issues.

Meijer attributes its delay in filing the instant Motion to its decision to "wait to seek intervention until after the Court ruled on [Plaintiff's] motion for certification of a 'modified class.' Until then, Meijer did not know whether the Court would deny certification on a ground that would have applied equally to the class Meijer seeks to represent." (Mot. to Intervene at 6

n.3.) However, the Court denied certification of the original class on the basis that Meijer and all persons similarly situated formed an separate and distinct group of potential claimants from the now certified class. Indeed, while Meijer seeks to represent those persons who purchased "private label" tape from Defendant, Class Plaintiff represents only those persons who did *not* purchase "private label" tape from Defendant. Accordingly, there is no reason why the Court's later decision regarding the certification of a modified class would have equally applied to Meijer and the class Meijer seeks to represent.

Meijer has cited no other grounds for failing to file its motion in the period of time between March 1, 2004 and September 20, 2004. This is especially significant here because the Court, in its March 1, 2004 Memorandum and Order denying the certification of a class that would have included Meijer, noted that:

placing the onus on members of the proposed class to affirmatively opt out seems particularly unfair in this case given the fact that there is no evidence in the record that any of the largest class members, who alone account for the vast majority of Defendant's transparent tape sales . . . have demonstrated the slightest interest in pursuing this matter.

Brandburn, 2004 WL 414047, at *9. As early as March 1, 2004, Meijer, therefore, was on notice not only of its exclusion from the original class, but also of the particular importance the Court attached to the fact that potential claimants such as Meijer had

not demonstrated any interest in pursuing claims against Defendant. Nevertheless, Meijer remained silent regarding its interest in pursuing class claims against Defendant for an additional six months while the instant litigation continued to press forward. Accordingly, the Court finds that Meijer's Motion to Intervene was not filed in a timely manner.

Even if Meijer's Motion to Intervene were timely, Meijer has nonetheless failed to establish that it has a sufficient interest in the litigation and that there is a threat that this interest will be impaired or affected as a practical matter by the disposition of the action. An interest will be deemed sufficient when the movant has "an interest that is specific to [it], is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated . . ." Kleissler, 157 F.3d at 972. A movant's interest could, as a practical matter, become impaired or affected by the disposition of an action in its absence if there is a tangible threat to the movant's legal interest. Brody By and Through Sugzdinis v. Spanq, 957 F.2d 1108, 1122 (3d Cir. 1992) (citations omitted). In making this determination, courts are required to assess the practical consequences of the litigation, and may consider any significant legal effect on the applicant's interest. Id. The fact that a claim may be incidentally affected is insufficient. Id. Rather, there must be a tangible threat to

the movant's legal interest. Id. at 1123. This factor may be satisfied if, for example, a determination of the action in the movant's absence will have a significant *stare decisis* effect on its claims, or if the movant's rights may be affected by a proposed remedy. Id.

Here, Meijer argues that it has a sufficient interest in the litigation so as to justify intervention because it has the same basic monopolization claim against Defendant that Class Plaintiff asserts. (Mot. to Intervene at 7.) Meijer further argues that its interest is threatened because it no longer is represented in the current class. However, when Meijer was excluded from the current class, it ceased to have a direct interest in the outcome of this litigation. Even if Meijer had a sufficient interest in this action, Meijer has not established the requisite threat to that interest. Meijer does not argue that the disposition of the present action would have any *stare decisis*, *res judicata* or collateral estoppel effect on any action which it might bring separately or individually. In any event, many of the underlying legal issues were already decided in LePage's, Inc. v. 3M, 324 F.2d 141 (3d Cir. 2003) (en banc), the lawsuit upon which the current litigation is based. Thus, the likelihood that the disposition of this action could, as a practical matter, have a significant *stare decisis* effect on Meijer's interests is small. Accordingly, the Court finds that Meijer does not have a sufficient interest which

is threatened, as a practical matter, by the disposition of the action in their absence.

Meijer has also failed to demonstrate that the representation of its interests in the existing litigation may be inadequate. Kleissler, 157 F.3d at 969. This burden is satisfied by a showing that: (1) although the movant's interests are similar to those of one of the parties, they diverge sufficiently that the existing party cannot devote proper attention to the movant's interests; (2) there is collusion between the existing parties; or (3) the representative party is not diligently prosecuting its suit. United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 n.15 (3d Cir. 1994). Here, Meijer does not argue that there is collusion between the existing parties or that the representative party is not diligently prosecuting its case. Thus, the only question before the Court is whether Class Plaintiff's and Meijer's interests diverge sufficiently that Class Plaintiff cannot devote proper attention to Meijer's interests.

Meijer argues that its interests are not adequately represented because (1) "the Court has certified a 'modified' class that excludes Meijer;" and (2) "the Court has already held that there is a conflict of interest between [Class Plaintiff] and purchasers of 'private label' tape." (Mot. to Intervene at 8, 9). The mere fact that Meijer was excluded from the current class, however, does not mean that its interests in the present litigation

are inadequately represented. Furthermore, the Court based its finding of conflict of interest between Class Plaintiffs and Meijer on the assumption that Meijer would pursue a lost-profits rather than overcharge theory of recovery. Meijer, however, argues that it would pursue the same theory of recovery as Class Plaintiff. The Court necessarily found that Class Plaintiffs and its counsel would adequately represent the interests of persons seeking to recover on the basis of an overcharge theory when it granted class certification in the current litigation. Accordingly, the Court finds that the representation of Meijer's interest in the current litigation is adequate to the extent that Meijer seeks to pursue an overcharge theory. The Court, therefore, did not err in denying Meijer's Motion to Intervene pursuant to Rule 24(a)(2).

Meijer also moved for permissive intervention pursuant to Rule 24(b)(2). Under Rule 24(b)(2), permissive intervention may be granted upon timely application of the movant if the movant can demonstrate that intervention would not result in prejudice or undue delay in the adjudication of the rights of the original parties. See Fed. R. Civ. P. 24(b)(2). Whether or not to grant permissive intervention lies in the sound discretion of the district court. In re Safeguard Scientifics, 220 F.R.D. 43, 49 (E.D. Pa. 2004). As discussed *supra*, Meijer here did not file its Motion in a timely manner. Moreover, if Meijer were granted leave to intervene, the matter of class certification would have to be

reopened, additional discovery would have to be conducted, and a further motion for class certification would have to be filed. This would necessarily result in undue delay in the adjudication of the rights of the original parties. See id. The Court, therefore, did not err in declining to exercise its discretion to grant Meijer permissive intervention.

The Court finally notes that there is nothing which would prevent Meijer from filing its own individual or class-action lawsuit against Defendant and presenting its claims in that forum. See id. at 48-49. Indeed, another purchaser of "private label" tape from Defendant has done just that. See Public Super Markets, Inc. v. 3M, No. Civ. A. 2:04-4394 (E.D. Pa. filed Sept. 17, 2004).

For the foregoing reasons, Meijer has failed to demonstrate that reconsideration of the Court's October 27, 2004 Order is necessary to correct a clear error of law or fact or to prevent manifest injustice. Accordingly, the instant Motion is denied.

BY THE COURT:

John R. Padova, J.