UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 03-206-KSF

UNITED STATES OF AMERICA, et al. PLAINTIFFS

V **OPINION AND ORDER**

DAIRY FARMERS OF AMERICA, INC., et al. DEFENDANTS

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This matter is before the Court on the Motion for Partial Summary Judgment filed by Plaintiff, United States of America, with respect to Dairy Farmers of America, Inc.'s Estoppel and Waiver Affirmative Defenses [DE # 24], and on the Cross-Motion for Summary Judgment on Estoppel [DE #28] filed by Defendant, Dairy Farmers of America, Inc. This matter is ripe for review.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The United States brought this action to challenge a February 2002 acquisition by Dairy Farmers of America, Inc. ("DFA") of a controlling interest in the Southern Belle dairy in Somerset, Kentucky.

The DFA is a Kansas milk marketing cooperative organization owned and operated by dairy farmers. As a milk marketing cooperative, DFA's primary purposes is to market the raw, unprocessed milk of its members to dairy processors. DFA currently has an ownership interest in several fluid milk processors, including Hiland Dairy, Roberts Dairy, Wilcox Dairy, Ideal American, Stremicks Heritage Foods, Turners Dairy, and Southern Belle. The United States

alleges that, at the time of DFA's acquisition of the controlling interest in Southern Belle, DFA already owned a controlling interest in Southern Belle's primary (and often only) competitor in the sale of milk to school districts in Southeastern Kentucky and Northeastern Tennessee - the Flav-O-Rich dairy in London, Kentucky ("FOR"). The United States thus herein argues that the effect of DFA's acquisition of control over Southern Belle "may be substantially to lessen competition" in violation of the Clayton Act, 15 U.S.C. § 18.

The DFA alleges as an affirmative defense that the government is estopped or has waived its right to enforce the antitrust laws in this case, basing this argument on the resolution of a similar transaction in 1995. In 1995, the United States investigated the proposed acquisition of dairy plants and other assets of Flav-O-Rich ("FOR") by Land-O-Sun Dairies, Inc. ("LOS") ("the LOS/FOR Transaction"), two dairies that competed in markets similar to the Kentucky and Tennessee markets at issue in this case. The United States knew at the time of the LOS/FOR Transaction that DFA would hold a partial ownership interest in Land-O-Sun Dairies, LLC ("LOS LLC"), the entity to be formed from the acquisition of the FOR assets by LOS. Nonetheless, in order to preserve the competition that the United States alleged would be lost because of the LOS/FOR Transaction, and to specifically resolve a potential violation of Section 7 of the Clayton Act, the United States required that certain milk distribution routes be divested to another competitor in the area, Valley Rich Dairy ("Valley Rich"). Valley Rich was also 50% owned by DFA[1] at that time. DFA asserts that it affirmatively relied on the United States' approval of the LOS/FOR Transaction in structuring the transaction herein at issue, and that the

[1]In 1995, the Dairy Farmers of America cooperative operated under Mid-America Dairymen, Inc. ("Mid-Am). In late 1997, the name was changed to DFA. For ease of reference, we refer to Mid-Am as DFA

United States should thus be estopped from pursuing possible Clayton Act violations arising from DFA's acquisition of Southern Belle.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is

merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

III. DFA's ESTOPPEL DEFENSE[2]

The doctrine of equitable estoppel may be invoked "to avoid injustice in particular cases." *Fisher v. Peters,* 249 F.3d 433, 444 (6th Cir. 2001). A party claiming equitable estoppel against the United States must first establish its traditional elements, which are: (1) conduct or language amounting to a representation of fact; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on such that the party asserting estoppel has the right to believe that it was so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation. *See Heckler v. Community Health Services,* 467 U.S. 51, 59 (1984); *Brown-Graves Co. v. Cent. States, Southeast and Southwest Areas,* 206 F.3d 680, 684 (6th Cir. 2000).

However, "it is well-settled that the government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services,* 467 U.S. 51, 60 (1984); *see also Michigan v. City of Allen Park,* 954 F.2d 1201, 1217 (6th Cir. 1992)("estoppel will seldom apply" against the government). To this end, it has been held that a party asserting estoppel against the United States must show, in addition to the traditional elements of estoppel, "intentional affirmative misconduct" on the part of the government. *See, e.g., City of Allen Park,* 954 F.2d at 1217; *United States v. River Coal Co.,* 748 F.2d 1103, 1108 (6th Cir. 1984)("At the very minimum some affirmative misconduct of a government agent is required."). The party

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[2]DFA has withdrawn its waiver defense.

attempting to estop the government bears a very heavy burden. *See, e.g., Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 422 (1990) (noting that the United States Supreme Court has reversed every finding of estoppel against the government that the Court has reviewed). The "affirmative misconduct" that must be proved requires more than a showing of "mere negligence, delay, inaction, or failure to follow an internal agency guideline." *See Fisher v. Peters,* 249 F.3d 433, 444-445 (6th Cir. 2001). Because the facts, even as viewed in a light most favorable to DFA, cannot herein demonstrate any affirmative misconduct on the part of the United States, DFA's estoppel defense fails as a matter of law.

In fact, DFA does not even contend that the government has engaged in the kind of intentional affirmative misconduct necessary to support DFA's estoppel defense. Rather, DFA points only to the resolution of the LOS/FOR Transaction, a previous merger investigation involving other markets. DFA attempts to establish affirmative governmental misconduct by arguing that the United States is abusing its prosecutorial discretion in this matter, and asserts that after having "specifically negotiated, caused the restructuring of, and approved a corporate acquisition in a virtually identical situation in 1995," taking a different position in this case effectively "single[s] out the DFA for different and 'egregiously unfair' treatment without any explanation therefor."

To hold that a position taken with respect to a complex business transaction almost ten (10) years ago estops the government from asserting an allegedly different position with respect to a similarly complex business transaction today would be illogical. The government's prior resolution does not limit the government's present or future prosecutorial discretion to enforce the antitrust laws against DFA or any other person. The decision regarding whether to bring a

given enforcement action and what kind of relief to seek "generally rests entirely in [the government's] discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978).

The government cannot be estopped from pursuing this case based on an allegation that it may have settled other cases on different terms, or decided not to challenge other conduct. *See, e.g., Fisher v. Peters,* 249 F.3d 433, 444-5 (6th Cir. 2001); *State Bank of Fraser v. United States,* 861 F.2d 954, 961 (6th Cir. 1998)(IRS not estopped from seeking relief that in the past it had not pursued). Given the fact-specific nature of antitrust analysis, wide governmental discretion is necessary. The Sixth Circuit has expressly held in the antitrust enforcement context that the government's "fail[ure] to prosecute civil antitrust actions to divest other industry acquisitions" is not a defense to an action for divestiture, because "the government 'alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.'" *United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 658 (6th Cir. 1976). Likewise, the United States' position with respect to past settlements cannot be held to bind the government such that taking a different position with respect to future transactions amounts to affirmative misconduct.

IV. CONCLUSION

For the foregoing reasons, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that :

1.) Plaintiff United States' Motion for Partial Summary Judgment with respect to Dairy Farmers of America, Inc.'s Estoppel and Waiver Affirmative Defenses [DE # 24], is **GRANTED;** and

2.) Defendant Dairy Farmers of America, Inc.'s Cross-Motion for Summary Judgment on Estoppel [DE#28] is **DENIED.**

This 13th day of April, 2004.

KARL S. FORESTER, CHIEF JUDGE