

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

CHRISTOPHER O’CONNOR, et al.,)	
)	
<i>Plaintiffs</i>)	
)	
v.)	No. 2:14-cv-192-NT
)	
OAKHURST DAIRY, et al.,)	
)	
<i>Defendants</i>)	

ORDER ON MOTION TO SET EXPEDITED BRIEFING SCHEDULE

Following the granting of the plaintiffs’ motion to conditionally certify a class (ECF No. 54) in this collective action, and pursuant to the terms of my Report of Hearing and Order dated June 15, 2015 (ECF No. 63), the parties have submitted a motion (plaintiffs) and a memorandum (defendants) in support of their respective positions (ECF Nos. 64 and 66) on the plaintiffs’ request for a stay of all deadlines set in the agreed amended scheduling order entered by my order on January 21, 2015 (ECF No. 43), in order to address an affirmative defense first pleaded by the defendants in February 2015. The parties also submitted responses to their competing statements, Plaintiffs’ Response in Support of Motion to Set Expedited Briefing Schedule and Amend Scheduling Order (ECF No. 70) and Defendants’ Response to Plaintiffs’ Motion to Set Expedited Briefing Schedule and Amend Scheduling Order (ECF No. 69), as contemplated in my June 15, 2015, order. ECF No. 63 at 2.

The plaintiffs’ submission is styled as a motion (ECF No. 66), and, for the following reasons, the motion is granted.

The affirmative defense at issue is called “the agricultural exemption to all of the state law claims” by the plaintiffs, Plaintiffs’ Motion to Set Expedited Briefing Schedule and Amend Scheduling Order (“Motion”) (ECF No. 66) at 2, and the “perishable foods exemption” by the defendants. Defendants Memorandum Regarding Postponement of Plaintiffs’ Deadline to Submit Motion for Class Certification (“Opposition”) (ECF No. 64) at 2. Counsel for the parties agreed during the telephone conference that preceded my June 15, 2015, report and order that the question presented by this affirmative defense requires no discovery.

The plaintiffs contend that their proposed revision of the schedule is reasonable because their state-law claims “expose [the defendants] to significantly more liability and damages than the federal FLSA claims” that they also raise in this action; because the defense presents a purely legal question that will not require any discovery; because the defense is a complete defense to all of their state-law claims; and because a ruling on this defense will increase the likelihood of settlement. Motion at 2-3.

The defendants speculate that this motion is merely an attempt to postpone the deadline for submission of a motion for class certification. Opposition at 2. They characterize the requested changes in the scheduling order as “one-way intervention, whereby absent class members may choose to remain in the class if the decision on the merits is favorable to them, but may elect to opt out of the class if the decision on the merits is unfavorable.” *Id.* at 2-3 (citation and internal quotation marks omitted). One-way intervention allows class members to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). They assert that they have not yet decided when to file a motion for summary judgment on this issue. Opposition at 3.

While I am sympathetic to the defendants' concern that any further delay of the procedural deadlines applicable to this case will push this case off the trial list for February 2016, I cannot agree that the plaintiffs are requesting one-way intervention. As Judge Hornby of this court noted in *Tardiff v. Knox County*, 567 F.Supp.2d 201 (D. Me. 2008), “[a] principal goal of the 1966 Amendments to Fed.R.Civ.P. 23 was to limit the availability for one-way intervention by assuring that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments through the timing requirement of Rule 23(c)(1) for class certification and the notice and opt-out requirements of Rule 23(c)(2).” *Id.* at 212 n.14 (citation and internal punctuation omitted). Because the affirmative defense at issue addresses only a portion of the claims asserted by the plaintiffs, no trial on the merits will have occurred, in any sense, before the Rule 23 motion for class certification would be due under the contemplated revision of the scheduling order. In addition, if the plaintiffs' position on the affirmative defense prevails, there can be no class as to those claims from which plaintiffs could “opt out.”

Most significant for purposes of my ruling on the current motion is the First Circuit's decision in *Danny B. v. Raimondo*, 784 F.2d 825 (1st Cir. 2015), where the court said the following:

Class certification decisions are context-specific, and each case must be viewed in terms of its own facts. As a general matter, however, Rule 23 permits a district court, in appropriate circumstances, to defer the issue of class certification until after disposing of summary judgment motions. In such a situation, consideration of summary judgment motions is likely to furnish the court the information that it needs to understand the case and the issues it raises.

Id. at 837-38 (citations and internal punctuation omitted).

The instant case presents appropriate circumstances for consideration of a motion for partial summary judgment before the issue of class certification is addressed. However, I am not

willing to make the delay occasioned thereby any longer than absolutely necessary. Accordingly, I will require the plaintiffs to file a motion for summary judgment on the affirmative defense of the agricultural or perishable foods exemption by no later than 21 days hereof. All deadlines set by the scheduling order now in effect are hereby stayed until such a motion is resolved, or, if none is filed, until a conference with counsel is held as soon as practicable after that date.

The plaintiffs' motion is **GRANTED**. The Plaintiffs' Motion to Extend Class Certification Motion Deadline and For Expedited Hearing on This Motion to Extend (ECF No. 80) is, accordingly, **MOOT**.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 21st day of July, 2015.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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