

ORAL ARGUMENT SCHEDULED FOR DECEMBER 12, 2011

**United States Court of Appeals
for the District of Columbia Circuit**

No. 11-5065

HEIN HETTINGA, ELLEN HETTINGA,
doing business as SARAH FARMS, and GH DAIRY,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

*On Appeal from the United States District Court for the District of Columbia
in Case No.1:06-CV-01637-RJL (Hon. Richard J. Leon, Judge)*

**FINAL OPENING BRIEF OF APPELLANTS HEIN
HETTINGA, ELLEN HETTINGA, AND GH DAIRY**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
PURSUANT TO D.C. Cir. R. 28(a)(1)

Pursuant to Circuit Court Rule 28(a)(1) of the United States Court of Appeals for the District of Columbia Circuit, Appellants Hein Hettinga, Ellen Hettinga, and GH Dairy, by and through undersigned counsel, respectfully submit this Certificate as to Parties, Rulings, and Related Cases:

A. PARTIES:

1. Appellants: Appellants are Hein Hettinga and Ellen Hettinga, a married couple that own and operate a dairy business through an unincorporated proprietorship known as Sarah Farms. Appellant GH Dairy is a partnership that owns and operates a dairy business through an unincorporated proprietorship known as GH Processing. The partners in GH Dairy are Hein Hettinga, Ellen Hettinga, and their son Gerben Hettinga. No publicly held company owns 10 percent or more of these proprietorships. These proprietorships have no parent companies.

Appellants were represented by Alfred W. Ricciardi of Aiken Schenk Hawkins & Ricciardi P.C., Phoenix, Arizona, and John F. Cooney of Venable LLP, Washington, D.C., before the United States District Court for the District of Columbia.

2. Appellee: Appellee in this case is the United States of America.

3. **Amici:** In the case below, United Dairymen of Arizona, Shamrock Foods, Shamrock Farms, Parker Farms, and the Dairy Institute of California appeared as *amici* in support of the United States. Charles M. English, Jr. of Ober, Kaler, Grimes & Shriver represented all *amici*.

B. **RULINGS UNDER REVIEW:** Appellants seek review of Judge Richard J. Leon's Memorandum Opinion dated March 15, 2011, in Civil Action No. 06-1637, dismissing the case under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim. *Hettinga v. United States*, 770 F. Supp.2d 51 (D. D.C. 2011).

C. **RELATED CASES:** Appellants are not aware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Appellants submit the following Disclosure Statement:

GH Dairy is a privately held partnership. The partners in GH Dairy are Hein Hettinga, Ellen Hettinga, and Gerben Hettinga, whose interest in the partnership is held by Gerben Hettinga as Trustee for the Gerben Hettinga Revocable Trust. No publicly held company owns 10 percent or more of GH Dairy. GH Dairy has no parent companies.

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GLOSSARY

AMAA	Agricultural Marketing Agreement Act
MREA	Milk Regulatory Equity Act
USDA	United States Department of Agriculture

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The United States District Court for the District of Columbia had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 28 U.S.C. § 2201 *et seq.* This action arises under the Constitution of the United States, specifically the Bill of Attainder Clause, Article I, § 9, cl.3, and the Due Process and Equal Protection provisions of the Fifth Amendment. This action also arises under the laws of the United States, specifically the Milk Regulatory Equity Act (“MREA”), Public Law No. 109-215, codified at 7 U.S.C. §§ 608c(5)(M)-(O), 608c(11).

On March 15, 2011, the district court dismissed the Complaint. JA74 (Judgment). On March 22, 2011, the Hettingas filed a timely notice, appealing from a final order disposing of all parties’ claims. JA75 (Notice of Appeal).

ISSUES PRESENTED FOR REVIEW

I. Did the district court err in holding that the Complaint did not sufficiently allege a violation of the Bill of Attainder clause of the United States Constitution?

II. Did the district court err in holding that the Complaint did not sufficiently allege a denial of equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution of the United States?

III. Did the district court err in holding that the Complaint did not sufficiently allege a denial of due process as guaranteed by the Fifth Amendment to the United States Constitution?

IV. Did the district court err in denying the Hettingas leave to file a supplemental complaint to add further factual allegations supporting their claim that the MREA was a Bill of Attainder?

STATUTES

The relevant provisions of the Milk Regulatory Equity Act of 2005, both as contained in the public law and as codified at 7 U.S.C. § 608c, along with other statutory provisions at issue in this case, are attached in an Addendum, pursuant to Circuit Rule 28(a)(5).

STATEMENT OF FACTS

This case arises from the efforts of large dairy companies, aided by congressional allies, to limit competition by the Hettingas (“Hettingas” or “plaintiffs”). The Hettingas pose challenges to the large dairy companies because of their independent spirit. Rather than operate according to the standard collectivist model where dairy farmers sell their milk to processors and all revenues are then divided among participating farmers regardless of the use of their milk, the Hettingas operate self-sufficient businesses. The Hettingas produce milk on their own farms and bottle that milk for sale to consumers, milk dealers, and

retailers. One of their plants, Sarah Farms, is known in the dairy industry as a “producer-handler;” i.e., it produces, processes, and sells its own milk and milk products. Producer-handlers do not rely on the protection of the government or the industry collective, and they have historically been exempt from federal price controls. In addition to Sarah Farms, the Hettingas also operate an independent bottling plant in Yuma, Arizona, called GH Processing, which sells all of the milk it processes into California, where milk marketing is governed primarily by state rather than federal regulations. *See* JA13-14, 16-18 (First Amended Complaint (“Complaint”), ¶¶ 1, 1.1, 3, 11-18).

For over a decade, the largest and most powerful dairy processors and milk cooperatives have sought to rein in the Hettingas’ dairy operations. JA18-19 (Complaint, ¶ 19). When the incessant pressure from the large processors resulted in changes to the USDA regulations governing milk marketing under the Arizona-Las Vegas milk marketing order, the Hettingas challenged that rule in court.¹ JA19-21 (Complaint, ¶¶ 20-25). On the evening before the Hettingas’ legal challenge to the new USDA rule was to be heard, Congress enacted the Milk Regulatory Equity Act of 2005 (“MREA”), Sections 608c(5)(M),(N) of which (codified at 7 U.S.C. §§ 608c(5)(M)(N)) punish the Hettingas by imposing direct statutory price controls and mandatory pool contributions on both of their

¹ *Hettinga v. Johanns*, No. 5-06CV0052-C (N.D. Tex., Lubbock Division).

operations. The MREA also effectively eliminated the Hettingas' ability to obtain judicial review of USDA's unlawful rule by codifying the provisions of the rule with respect to Sarah Farms. JA15, 21, 27-29 (Complaint, ¶¶ 6, 26, 40, 43, 45, 46).

The MREA amended the Agricultural Marketing Agreement Act of 1937 ("AMAA") by adding new Subsections (M) and (N). Subsection (M) mandated that a handler located in an area subject to a federal milk marketing order that sells milk into an area subject to state but not federal regulation, make a compensatory payment for the milk processed to the settlement pool of the marketing area in which the handler is actually located. Simultaneously, the MREA enacted a special Paragraph 2(b) which excluded the state of Nevada from the reach of federal milk marketing orders. The effect was to require GH Processing to pay higher prices for the milk it purchased and to pay into the Arizona pool for all milk it sold in California, while at the same time freeing Nevada processors from any such restrictions or obligations. GH Processing is the only handler in the nation known to be directly subject to this statutory requirement.

Subsection "N" subjects producers-handlers in marketing area 131 (Arizona-Las Vegas) to the pooling and pricing requirements if they sell more than 3 million pounds of milk monthly of their own milk production. Subsection (N) applies only to the Arizona-Las Vegas marketing area; and Sarah Farms is the only producer-

handler within Area 131 with sales exceeding this monthly limitation. JA14-15, 21-27 (Complaint, ¶¶ 4, 4.1, 27-39).

Following enactment of MREA, the Hettingas filed the instant case seeking a declaration that the MREA violated the Bill of Attainder Clause and the Due Process and Equal Protection provisions of the Fifth Amendment to the U.S. Constitution. JA32-34 (Complaint, ¶¶ 55, 62, 66).

The Complaint alleged the three required elements of a Bill of Attainder claim. The Hettingas alleged that Congress singled them out with specificity for adverse treatment (JA14-15, 29-31 (Complaint, ¶¶ 4, 48, 52, 52.1, 52.2)); without a judicial determination of the facts (JA29, 32 (Complaint, ¶¶ 49, 56, 57)); that the extreme burdens on the Hettingas' ability to sell their milk in California and Arizona imposed by Subsections (M) and (N) of the MREA constituted legislative punishment that penalized the Hettingas for their past lawful business activities (JA15, 29-32 (Complaint, ¶¶ 5, 6, 49, 50, 51, 52.1, 52.2, 57)); and that the MREA provided them with no judicial process before imposing these onerous penalties. JA27-32 (Complaint ¶¶ 40, 45, 46, 49, 50, 59-62).

The Hettingas alleged that the "specificity" element is satisfied because the MREA creates such a narrow set of circumstances that they apply to no known milk handlers other than the Hettingas, and the burdens and disabilities Congress

imposed apply to the Hettingas and to no other persons.² (*See*, 7 U.S.C. § 608c (5)(M), (N); MREA §2(b); JA21-27, 29 (Complaint, ¶¶ 27, 31, 34-39, 48)). The Complaint specifically identified several parts of the House floor debate in which the Hettingas are identified as the targets of the legislation (JA24, 27-29 (Complaint, ¶¶ 32-33, 40, 45-48)), and also alleged that the MREA provided no judicial process before imposing punishment. JA27-29 (Complaint, ¶¶ 40-46, 49).

Finally, the Hettingas alleged that Congress punished them for their past lawful operation of Sarah Farms and GH Processing. They pleaded that the MREA “falls within the historical meaning of legislative punishment.” *See Consolidated Edison Co. of New York, Inc. v. Pataki* (hereinafter referred to as “*ConEd*”), 292 F.3d 338 (2d Cir. 2002); JA14-15, 29-30, 32 (Complaint, ¶ 4, 47, 50, 56). They alleged that the MREA cannot “reasonably be said to further nonpunitive purposes.” *Foretich v. United States*, 351 F.3d 1198, 1224-25 (D.C. Cir. 2003) (finding that the law’s extreme narrowness rendered “simply implausible” the asserted nonpunitive purposes); JA30-32 (Complaint, ¶¶ 50, 52.4, 57). The Hettingas also alleged that the legislative record evinces a congressional intent to

² *Amici* argued below that the Hettingas are not the only handlers adversely affected by the MREA. This issue is patently a factual one and therefore cannot be determined on a Rule 12(b) motion. Regardless, as discussed, *infra*, the fact that some other handler *may* be incidentally affected by the MREA does not change the conclusion that the Hettingas were specifically targeted by Congress.

punish. *See Foretich*, 351 F.3d at 1225-26; JA15, 21, 27-30, 32 (Complaint ¶¶ 5, 6, 26, 40-45, 49, 50, 51, 56, 57).

The government never filed an answer formally responding to the substance of the Hettingas' allegations. Instead, it first moved to dismiss the Hettingas' Complaint under Rules 12(b)(1) and 12(b)(6), asserting that the AMAA included a provision for administrative exhaustion, in 7 U.S.C. § 608c (15)(A), and the Hettingas' claims were subject to mandatory Section 15(A) review. JA3 (District Court Docket ("Docket") Entry 4).

On July 31, 2007, the district court concluded that exhaustion of the administrative review process constituted a jurisdictional prerequisite to hearing the Hettingas' claims challenging the constitutionality of the MREA and dismissed the Complaint. *Hettinga v. United States*, 518 F. Supp.2d 61-62 (D.D.C. 2007). The Hettingas timely appealed. JA7, (Docket Entry 33).

On April 3, 2009, this Court reversed the decision of the district court and remanded this case with instructions for the case to proceed. *Hettinga v. United States*, 560 F.3d 498 (D.C. Cir. 2009). Notwithstanding these instructions, and efforts by the Hettingas to proceed to the substance of their Complaint, the district court refused to permit the Hettingas to conduct the discovery conference mandated by Rule 26(f), refused to permit the Hettingas to obtain discovery in this case, and instead permitted the government to renew its Motion to Dismiss. JA9,

(Docket Minute Entry dated November 12, 2009, Entry 44). The district court also denied the Hettingas' request to file a supplemental complaint without specifying any reason whatsoever. JA11-12 (Docket Minute Entry dated January 3, 2011).

On March 15, 2011, the district court granted the government's Renewed Motion to Dismiss and dismissed the case again with prejudice. *Hettinga v. United States*, 770 F. Supp.2d 51 (D.D.C. 2011), JA60-74. The district court held that the Hettingas had standing, but that the Hettingas had failed to state a claim for their asserted constitutional violations. It held that the Hettingas had failed to allege that the MREA targeted them specifically. It further held that the Hettingas had not alleged that the MREA was arbitrary and not rationally related to the government's asserted economic interest in maintaining orderly milk markets. Further, it held that Hettingas failed to plausibly allege that the MREA deprived them of due process.

On March 22, 2011, the Hettingas timely appealed this second decision of the district Court. JA75 (Notice of Appeal). The government did not cross-appeal the district court's holding that the Hettingas had standing to assert their claims.

SUMMARY OF ARGUMENT

This case concerns legislation amending the AMAA to aid larger dairy companies and to penalize the Hettingas. The MREA took the producer-handler status away from the Hettingas, and further required them, out of all handlers in the

country, to statutorily treat sales from their Arizona plant, which actually occurred in the unregulated California market, as if they were sales in the Arizona regulated market; while at the same time exempting handlers in Nevada from the same treatment for sales which were made by them into the same California market.

Hettingas have alleged that the MREA is an unconstitutional Bill of Attainder and violates the Equal Protection and Due Process provisions of the Fifth Amendment to the United States Constitution. The district court dismissed these claims on a Rule 12(b)(6) motion by the government, stating that (1) the Complaint failed to state a Bill of Attainder claim because it had failed to allege that the legislation targeted the Hettingas specifically; (2) the Hettingas failed to allege why the legislation is not rationally related to a governmental interest in maintaining orderly milk markets; and (3) Hettingas' due process allegations failed because they voluntarily withdrew their suit challenging the USDA action after the passage of the legislation. The district court erred for the following reasons:

1. Bill of Attainder.

A statute is a Bill of Attainder if it targets a person or group with specificity, and imposes punishment without judicial process. The district court's dismissal of the Bill of Attainder claim is in error for several reasons. First, the Complaint alleges that the MREA targeted the Hettingas with specificity. Indeed, it specifically alleges that the Hettingas are the only persons in the country statutorily

cabined by the legislation, and that this was Congress' intent. Second, to the extent the district court finds that such a claim fails as a matter of law unless the statute specifically names the person or group targeted, it is in error because all that is required is that the person or group targeted be readily ascertainable. The Complaint factually alleges that comparing the statutory terms to "the facts on the ground", the MREA refers to only one person in the country, the Hettingas. Third, to the extent the district court holds, as a matter of law, that a statute is not a Bill of Attainder if it might in the future refer to some other persons as well, this is also error. Whether the target is one person or a small group - all that is required is that the person, or group, is ascertainable. *See Foretich, supra*, 351 F.3d 1198; *United States v. Brown*, 381 U.S. 437 (1965). That test is clearly met here. Fourth, to the extent the district court decided, as a matter of law, that in order for the target of the legislation to be specified the legislation must refer on its face to the person's past conduct, this is also error. The issue is whether the legislation targets a person. Past conduct is merely one way of analyzing this issue. If the terms of the legislation enable a court to ascertain that a person or group is being targeted by the legislation, as is the case here, and as was the case in *Foretich, supra.*, the specificity requirement is met. Fifth, to the extent the district court decided that the MREA does not target the Hettingas because they can *elect* not to engage in the sanctioned legitimate business conduct in the future, that confuses "specificity"

with “punishment,” and fails to comprehend that the MREA does not offer a way to avoid punishment by future conduct, but only provides the Hettingas with a choice of punishments.

Although the district court did not address it, the legislation also had the purpose of punishing the Hettingas. Whether legislation intends punishment is a three-part inquiry: (1) does the challenged statute fall within the historical meaning of legislative punishment; (2) does the statute, viewed in terms of the type and severity of burdens imposed, reasonably further nonpunitive legislative purposes; and (3) does the legislative record evidence a congressional intent to punish. A positive answer to all three of these elements is not required, and all must be considered together. The last two elements, in particular, are fact based. Thus, because the Complaint contains non-conclusory factual allegations that all three parts of the Bill of Attainder punishment test are satisfied here, it would be error for the Hettingas’ case to be dismissed on a Rule 12(b)(6) motion.

2. Equal Protection.

The equal protection claim factually alleges that the legislation intentionally treats the Hettingas’ differently and more adversely than others similarly situated; and it also alleges that this difference in treatment is not rationally related to a legitimate governmental purpose because the real purpose of the legislation is not legitimate and the MREA does not further the asserted purposes, but only

disadvantages the Hettingas for the benefit of large dairy interests. The district court's dismissal is in error because the Complaint alleged that the provisions of the MREA were not rationally related to a legitimate governmental purpose, and alleged specific facts from which that lack of legitimacy and irrationality might be inferred. To the extent the district court found that, as a matter of law, no equal protection claim can survive a motion to dismiss unless it alleges facts that can be said to plausibly contravene any reasonably conceivable governmental purpose, it again is in error. First, such a rule would render the Equal Protection Clause a dead letter in cases of economic legislation; and in itself, violate the Due Process Clause (because plaintiffs can only address purposes of which they are apprised; they cannot be reasonably required to deal at the initial pleading stage with purposes never asserted, either by the legislature or government counsel). Second, with respect to the governmental purposes actually advanced, Hettingas did factually allege that the MREA did not rationally advance the stated purposes and gave factual instances; this is sufficient to defeat a Rule 12(b)(6) motion to dismiss. Third, the rational basis test requires that the governmental purpose be legitimate. A purpose is not legitimate merely because the government says that it is. Since the Hettingas allege facts challenging the legitimacy of the governmental action, a court must examine that legitimacy. The Complaint alleges that the MREA was motivated by an animus toward the Hettingas, and moreover, that the actual goal of

the legislation had little to do with creating orderly milk markets (which had not been disorderly) and everything to do with eliminating the Hettingas' ability to financially compete with the large dairy companies. Neither animus nor economic protectionism are legitimate governmental interests. *City of Cleburn, Tex. v. Cleburn Living Center*, 473 U.S. 432 (1985); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

3. Due Process

Finally, the district court erred in rejecting the due process claim on the grounds that the Hettingas had allegedly dismissed their administrative proceedings and pending judicial proceedings after the passage of the legislation. Instead, the Complaint actually alleged that the MREA mooted the Hettingas legal challenge which the Hettingas had filed in response to USDA's attempt to regulate producer-handlers, because Congress directed that the USDA implement the statutory provisions for the Arizona–Las Vegas marketing order, and thereafter USDA lacked any authority to modify or exempt the Hettingas from the terms of the MREA. The futility of any administrative proceeding to challenge the MREA was also acknowledged by this Court in the prior appeal, which is the law of this case.

ARGUMENT

I. STANDARD OF REVIEW

On appeal, this Court conducts a *de novo* review of a Rule 12(b)(6) dismissal by the district court. *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A plaintiff is not required to set out all of the precise facts on which the claim is based in order to survive a motion to dismiss. *Owens v. Republic of Sudan*, 531 F.3d 884, 895 (D.C. Cir. 2008). Instead, a complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing Rule 8(a)(2), *Federal Rules of Civil Procedure* and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). It is not necessary for a plaintiff to plead all elements of his *prima facie* case in the complaint, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511–14 (2002), or to “plead law or match facts to every element of a legal theory,” *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted); and the court must treat the complaint’s factual allegations—including mixed questions of law and fact—as true, and draw all reasonable inferences therefrom in the plaintiff’s favor. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003). However, a court need not accept as

true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004).

“[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). A claim is facially plausible when the pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* In evaluating the allegations, a court must review them *in toto*. *Ocasio-Hernandez v. Fortunoburset*, 640 F.3d 1, 14-15 (1st Cir. 2011); *see also Matrixx Initiatives, Inc. v. Siracusano*, ___ U.S. ___, 131 S.Ct. 1309, 1323-24 (2011) (allegations of a complaint must be “taken collectively” to determine whether they state a claim).

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE HETTINGAS' COMPLAINT FAILED TO STATE A CLAIM THAT THE MREA CONSTITUTED A BILL OF ATTAINDER.

The district court erroneously ruled that the Hettingas did not allege that the MREA targeted them specifically. In fact, Hettingas did factually and adequately allege all elements of a Bill of Attainder claim, including that they were specifically targeted by the MREA.

A. The Elements of a Bill of Attainder Claim.

Article I, Section 9, Cl. 3 of the United States Constitution, states that “[n]o Bill of Attainder or *ex post facto* law shall be passed.” A Bill of Attainder is “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Foretich*, 351 F.3d at 1216, citing *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 468 (1977). The three elements of a Bill of Attainder claim are that a statute: (1) applies with specificity to affected persons; (2) imposes punishment; and (3) does so without the protections of a judicial trial. *See Foretich*, 351 F.3d at 1217. Accordingly, a statute such as the MREA, which does not provide judicial process, violates the constitutional prohibition on Bills of Attainder if it (1) applies with specificity, and (2) imposes punishment. *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998) (“*BellSouth IP*”). These issues are fact-dependent and not readily susceptible to resolution at the pleading stage. *Selective Serv. Sys. v. Minn. PIRG*, 468 U.S.

841, 852 (1984) (each Bill of Attainder case “has turned on its own highly particularized context”).

B. The District Court Erred in Ruling that the Hettingas Failed to Allege that the MREA Applied with Specificity to Them.

In order for legislation to apply with specificity to an individual or group, it is not necessary that the individual or group be specifically named in the legislation. “[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” *United States v. Brown*, 381 U.S. 437, 448-449 (1965), citing *U.S. v. Lovett*, 328 U.S. 303 (1946) (emphasis supplied). As this Court recognized in *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998) (“*BellSouth I*”), “not all Bills of Attainder expressly name their targets; some simply describe them.” The specificity requirement is satisfied if the statute applies to one person, even if that person is not specifically named. *Foretich*, 351 F.3d at 1217 (D.C. Cir. 2003).

The district judge ruled that the Hettingas’ Complaint failed to allege that the MREA targeted Hettingas specifically. This finding is wrong. The Complaint alleges all elements of a Bill of Attainder claim and describes them with particularity. The Hettingas state that: the MREA “singles out plaintiffs for

legislative punishment,” (JA32 (Complaint, ¶55)) “severely punishes plaintiffs for their past lawful operations of Sarah Farms,” (JA32 (Complaint ¶56)) and “the Act summarily punishes plaintiffs...The burdens imposed by the statute constitute legislative punishment, and do not further any nonpunitive legislative purpose,...the legislative history of the MREA demonstrates a congressional intent to punish plaintiffs.” JA32 (Complaint ¶57). The Complaint describes in substantial factual detail additional, specific facts supporting the claim, and in particular that the MREA targeted Hettingas with specificity. The Complaint states that Sarah Farms is a producer-handler in Arizona, and GH Dairy³ is a handler which processes milk and dairy products and sells them into California, an unregulated market. JA13-14, 16-18 (Complaint ¶¶1, 1.1, 11-18). The Complaint also states that before the MREA, that Sarah Farms’ operations were not subject to the minimum pricing and pooling provisions of Federal Milk Marketing Orders promulgated by USDA under the AMAA, and that GH’s processing operations were not subject to minimum federal price regulations. JA14, 15, 18 (Complaint ¶¶3, 4.1, 17.1, 18). It further states that Sarah Farms and GH bore the economic risks of operating outside of the price protections and guaranteed markets of the federal milk marketing orders, but through great effort and efficient operations were able to compete with the giant processors. JA16-18 (Complaint ¶¶11-18).

³ Hereinafter GH Dairy and GH Processing will be referred to as “GH”.

The Complaint alleges that large dairy companies undertook a decade-long campaign to eliminate the Hettingas as competition (JA18-20 (Complaint ¶¶19-22)), and they eventually persuaded USDA to institute formal rule-making in order to impose minimum pricing and pooling obligations on producer-handlers in two marketing areas – Arizona–Las Vegas, and the Pacific Northwest. JA20 (Complaint ¶23). Further, that the USDA, in February 2006, adopted a new final rule purporting to subject producer-handlers in the Arizona–Las Vegas, and the Pacific Northwest marketing areas to the pricing and pooling restrictions, if the producer-handler produced and sold more than 3 million pounds per month of their own milk, and that the USDA rule required producer-handlers meeting this threshold to pay a substantial portion of their monthly revenues into a pool to subsidize their competition. The net effect of the new USDA rule was to eliminate competition from the Hettingas for the large dairy companies because the Hettingas were the only producer-handler in the Arizona–Las Vegas marketing area that exceeded the 3 million pound monthly threshold. JA18, 20-24, 26, 29 (Complaint ¶¶17, 24, 27, 31, 37, 48).

The Complaint further alleges that the Hettingas filed suit to declare the new USDA rule invalid because (1) the USDA lacked any statutory authority to enact the rule and, (2) the USDA had acted arbitrarily and capriciously. *Hettinga v. Johanns*, No. 5:06-cv-00052-C, (N.D. Tex., Mar. 30, 2006) (the “Johanns

Action”). However, on the eve of argument on Hettingas’ motion for an injunction, Congress enacted the MREA targeting the Hettingas and thus mooting the Johanns Action. JA21, 24, 27-28 (Complaint ¶¶25-26, 32-33, 40-45).

The Complaint further factually alleges that the MREA specifically singled out the Hettingas in two respects. First, Subsection (N) of the MREA statutorily applied the new pricing and pooling requirements only to the Arizona-Las Vegas marketing area, and only to producer-handlers with monthly sales of more than 3 million pounds of federal milk of their own production. It further alleges that there is only one producer-handler which met that threshold- Hettingas. Thus, the MREA pricing and pooling requirements were, in intended effect, directed at one producer-handler in the entire country-Hettingas. JA14-15, 21-26, 29 (Complaint ¶¶4, 27, 31, 34-37, 47-49). Second, the Complaint alleges that Subsection (M) of the MREA directly imposed pricing and pooling requirements on all sales into California (which is not subject to federal pricing and pooling regulations) by any handler in a federally regulated marketing area not otherwise required to pay federal minimum prices, but that the MREA went on to specifically exclude handlers located in Nevada. As a result, there was only one handler in the country that met this statutory criterion_GH Dairy, the Hettingas family partnership. JA14-15, 21-22, 24-25, 27, 30-31 (Complaint ¶¶4, 4.1, 27, 34, 38-39, 52, 52.1-52.5).

The Complaint alleges that the MREA was the product of intensive lobbying by the large milk producers, and Congress' motivation in passing the MREA was to target and punish the Hettingas. JA18-24, 26-31 (Complaint ¶¶19-24, 28-33, 36-44, 47-49, 51-52, 52.2). The Complaint further factually alleges several statements made on the House floor, which make it clear that Hettingas were the target of the legislation and that the goal of the bill was to financially paralyze the Hettingas' dairy operations and to short circuit the Johannis Action. JA15, 22-23, 27-28 (Complaint ¶¶5, 6, 30, 40-44).

Thus, the Hettingas amply alleged facts from which it can be readily inferred that the MREA targeted them specifically, both because the legislators admitted that this was their goal in their floor statements, and because the statute was drafted in such a way that it set forth “a combination of facts [that] is so exceedingly narrow and unlikely to coincide that the affected persons are easily ascertainable.” *See Foretich*, 351 F.3d at 1217.

Notwithstanding the fact that the Hettingas plead numerous facts which established that the MREA, in fact, targeted them, the district court ruled that the Complaint was insufficient because: (i) the MREA did not “narrowly delineate” the classes affected, and the affected group was not “easily ascertainable”; (ii) the MREA was “open-ended,” in that it could impact any producer-handler who met

the 3 million pound monthly threshold; and (iii) the statute did not refer to past acts, and was allegedly, facially independent of past conduct.

To the extent the district court was drawing factual conclusions about whether the Hettingas were easily ascertainable as the target of the legislation, this was legal error. On a motion to dismiss, a court is required to accept the truth of plaintiffs' factual allegations, and to draw inferences therefrom in their favor. The Complaint does allege that the Hettingas are the only persons that fit this specific statutory criteria. To the extent the district court held, as a matter of law, that the facial generality of the MREA prevents it from being a Bill of Attainder, the court is once again in error. The legal conclusion that a statute cannot be a Bill of Attainder if the target is not specifically named in the legislation has been rejected as recently as *Foretich*, in which this Court held that a statute which never mentioned Dr. Foretich by name, and which on its face addressed "any pending case" involving custody or visitation rights of a minor child, nonetheless targeted Dr. Foretich with specificity, because, despite the general statutory language, the facts tailored it to Dr. Foretich and the legislative history also reflected that he was the intended target. *See also, BellSouth I*, 144 F.3d at 62.

Similarly, in this case, the facts plead are that (1) only the Hettingas met the MREA criteria of a producer-handler in the Arizona—Las Vegas marketing area which exceeds the 3 million pound milk sale threshold, and a handler, not in

Nevada, selling milk from a federally regulated area into an unregulated neighboring state, and (2) that this was not accidental, but intentional. Accordingly, the Rule 12(b)(6) standard on this element of a Bill of Attainder claim was more than met by the Hettingas.

The district court's statement that the MREA provisions did not relate to past conduct of the Hettingas is both factually wrong and is also not dispositive of the legal question of specificity. First, the Complaint contains factual allegations that the past legal conduct of the Hettingas in operating their independent dairy businesses was precisely the reason why the MREA was concocted by the large dairy cooperatives and processors and then enacted by their congressional allies, just as Dr. Foretich's alleged past conduct was the reason for the congressional action in *Foretich*. Second, statutory references to past conduct serve merely as additional evidence that the Hettingas are the targets of the legislation; it is not a prerequisite to stating a claim for relief. *See Foretich, supra*, where the statute said nothing at all about Dr. Foretich or his past conduct.

Moreover, nothing in Supreme Court Bill of Attainder cases requires that statutory treatment be based on past conduct in order for the persons affected to be "specified" by the legislation. Describing the affected persons by their past conduct makes it easier to single them out, but other criteria can also identify the person or narrow group that is intended to be disadvantaged by the legislation.

Compare *Cummings v. Missouri*, 71 U.S. 277 (1866) and *Ex Parte Garland*, 71 U.S. 333 (1866), where the statutes disadvantaged thousands of rebels, or *U.S. v. Brown*, 381 U.S. 437 (1965) where the statute disadvantaged members of the Communist Party, with *Foretich*, where a mix of past and current facts disadvantaged a specific person, and this case, where a mix of past and present facts disadvantaged the Hettingas.

In addition, the MREA provisions are not laws of general applicability, and the Hettingas are not merely incidental and unintended economic casualties. Rather, the facts alleged in the Complaint establish that the Hettingas were the intended targets of the legislation. Nor is the designated category a group susceptible of ready enlargement. A dairy farmer cannot wake up one morning and say, “Today I have decided to be a producer-handler, producing milk from my own dairy herd, processing that milk in my processing facility, and then selling that milk to my own customers in the amount of at least 3 million pounds monthly.” Instead, it took an entrepreneur such as Hein Hettinga many, many years to reach that point, and involved a substantial outlay of capital along with a mastery of such disparate skills as dairy farming, manufacturing and processing, and niche marketing.

The Hettingas alleged that they are the only persons that meet these criteria in Federal Milk Marketing Area 131, but, even were the number five times as

great, it would still be a small and completely ascertainable group. Similarly, while the requirement that handlers which sell their milk into unregulated states may appear general on its face, it must be read along with the concurrent exception of Nevada handlers. The result was that other persons that Section (M) might impact were excluded in order to leave the Hettingas as the only business affected. Furthermore, the threshold possibility, that persons subject to the sanctions of the statute might increase, did not concern the Supreme Court in *Brown* from finding specificity, where the statute imposed a loyalty oath on *any* member of the Communist Party, new or old, not just those who were members *before* the legislation was passed.

The district judge also erred in concluding that the specificity requirement cannot be met if the conduct that will be punished is future conduct, which can be avoided by a change in conduct by the affected party. The district court misread the cases, and confused “specificity” with another legal issue that arises in considering whether a particular legislative burden or sanction constitutes punishment. For example, the district court relies upon *Am. Comm. Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950), where the Court upheld a statute which prohibited persons from becoming union officers unless they signed an affidavit stating that they are not members of the Communist Party. However, “specificity” was not an issue in *American Communications*. Indeed, Communist Party members were

already singled out in the plain language of the statute. *Id.* at 384. Instead, the issue before the Court was whether the requirement of a “loyalty oath” constituted “punishment” because the consequences of a failure to swear might be loss of position in a union. *Id.* at 413-414. Neither *American Communications*, nor any other Supreme Court case holds that a person or group has not been specified by legislation, if the legislative sanction imposed is triggered by future events or future conduct. Rather, future events or future conduct is a factor to be examined in considering whether such sanctions are “punishment”.

Whatever the merits of this argument for some other situations, it is not relevant to the present case where all that the statute offers is a choice of financial punishments. There is a difference between a provision, on the one hand, which states that if you do some relatively minor act, then a significant disability will be imposed, but if you do not do this minor act, then no disability will be imposed, and, on the other hand, an act that states that you will be seriously financially penalized unless you agree to accept another serious penalty. The MREA presents the Hettingas with only the opportunity to “elect” among financial punishments. The Hettingas worked for over a decade to establish their dairy operations. The MREA passage then threatened the financing viability of their long-established dairy operations by presenting them with a choice between (i) producing milk at the existing level and being required to make confiscatory payments into the Arizona

pool in order to subsidize direct competitors, who not only did not share their risk, but had been actively attempting to litigate or regulate them out of business, or (ii) to drastically cutting back milk production to economically inefficient levels which threaten at best, substantial economic losses and, at worst, ultimate business failure. This is not a choice of avoiding punishments, it is a choice between *Scylla* or *Charybdis*.

C. The MREA Inflicts Punishment on the Hettingas.

1. What is “Punishment”?

The district court did not address whether the Complaint adequately pled that the MREA constituted legislative punishment. In order to avoid any further preliminary appeals, however, this Court should hold that the Complaint clearly does so. “Punishment” for attainder purposes is a flexible concept. It has advanced beyond the historical scope of “Bills of Attainder” and “Bills of Pains and Penalties” to include deprivations of property, of rights, personal and political, including access to employment and to receive compensation. *Foretich*, 351 F.3d at 1217 “The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.” *Cummings*, 71 U.S. at 320. Most recently, in *Foretich*, punishment was held to include deprivation of visitation rights and injury to reputation, and in *ConEd*, punishment consisted of a monetary penalty imposed on

a publicly traded corporation, a prohibition on taking certain expenditures into account when seeking a rate increase. Indeed, the Supreme Court has specifically held that for Bill of Attainder purposes, “punishment” goes beyond historical punishments to any new burden or deprivation that a legislature might devise with a punitive intent. *Nixon*, 433 U.S. at 476-77.

In determining whether a statute imposes punishment, the Supreme Court considers:

- (1) whether the challenged statute falls within the historical meaning of legislative punishment;
- (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and
- (3) whether the legislative record evinces a congressional intent to punish.

Selective Serv. Sys., 468 U.S. at 852 (citations and internal quotations omitted); *Nixon*, 433 U.S. at 475-480.

These considerations have been given short-hand descriptions as the “historical meaning” test, the “functional” test and the “motivational” test. In essence, all of these “tests” examine whether the legislation evidences a purpose to punish. For example, where the “punishment” is one historically associated with past instances of Bills of Attainder, purpose may be inferred. Similarly, with respect to the “functional test”, the Supreme Court concluded:

Our treatment of the scope of the clause has never precluded the possibility that new burdens and deprivations might be

legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes [citations omitted]. Where such legitimate legislative purpose does not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Nixon, 433 U.S. at 475-76. See also, *BellSouth I*, 144 F.3d. at 65 (the functional test “prevents Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups”); *Trop v. Dulles*, 356 U.S. 86, 94-95 (1958) (whether a statute is a penal law cannot be determined merely by inspection of the labels posted on it.) Finally, with regard to the “motivational” test, even if no historical measure of punishment is involved, and where on its face the statute may have nonpunitive purposes, if the disadvantage to a specified person or group is actually intended as a punishment, then, again, it is a Bill of Attainder. *Nixon*, 433 U.S. at 478.

A statute, “need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim.” *ConEd.*, 292 F.3d at 350 (citing *Nixon*, 433 U.S. at 473-78). In *Nixon*, the Court sequentially reviewed all three elements, thereby suggesting that

satisfaction of any one of the three elements might be enough to establish that legislation is punitive. 433 U.S. at 475-80.

2. The Complaint Specifically Alleges Facts Showing an Intent to Punish.

As noted earlier, paragraphs 55-57 of the Complaint specifically allege that the MREA punishes the Hettingas, that the burdens imposed do not further any nonpunitive legislative purpose, and the legislative history demonstrates a congressional intent to punish. The Complaint elsewhere describes in detail the facts showing that the MREA punishes Hettingas and that it was the intent of Congress to do so. The Complaint outlines the Hettingas' prior operations, and that they were not previously subject to pricing and pooling regulations. JA16-18 (Complaint ¶¶ 11-18). It describes the longstanding campaign by the dairy industry to require producer-handlers in two marketing areas to become subject to those regulations. JA18-21 (Complaint ¶¶19-24). It also describes the effect of the USDA final rule as significantly reducing the Hettingas' ability to compete because the Hettingas were the only producer-handler in the Arizona—Las Vegas marketing area that exceeded the threshold set by the USDA rule. JA20-21 (Complaint ¶¶ 24-25). The Hettingas sought to challenge the final USDA regulation in court, but the large dairy companies went to Congress and ensured

that the MREA would be enacted on the eve of the court hearing, rendering the Hettingas' legal challenge moot. JA21-24 (Complaint ¶¶ 25-26, 28-33).

The Complaint also alleges the adverse monetary penalties which the MREA imposed on the Hettingas by making them subject to mandatory pricing and pooling requirements. These requirements mandated prohibitively great monetary payments distributed to their competitors, substantially reduced revenues, and amounted to an enforced subsidy to their competitors, as well as eliminating any ability to challenge these new limitations before the USDA. JA14-15, 21-27, 29-31, 33 (Complaint ¶¶ 4, 4.1, 27, 31, 34-39, 47-50, 52.1-52.5, 60-61). Further, it factually alleges that burdening the Hettingas was the purpose of Sections (M) and (N) of the MREA, including specific instances of congressional statements showing this intent. JA15, 22-24, 26-30 (Complaint ¶¶ 5-6, 29-33, 36-37, 40-44, 48, 51-52). These allegations specifically and factually plead, with particularity, all elements required to establish "punishment". This goes well beyond what is required in order to defeat a Rule 12(b)(6) motion.

3. "Past Conduct" is not a Precondition to Punishment; Nor Does General Applicability of the Statute Prevent it from Constituting Punishment.

Because of the broad scope of the modern view of what burdens and disabilities constitute punishment, Bill of Attainder jurisprudence has moved from a description of "what acts" may constitute punishment, to "under what

circumstances” a statute that burdens a discrete group may be deemed punishment. In this regard, once a burden is shown, the modern cases then look to the purpose of the legislation: is the burden intended to disadvantage (punish) a particular person or discrete group, or is the burden purely incidental to the achievement of a proper government goal? As Justice Harlan inquired in *Flemming v. Nestor*, 363 U.S. 603, 616 (1960), was there a purpose “to reach the person not the calling?” (citing *Cummings*, 4 Wall at 620). An examination of the purpose under any of the three punishment tests is by definition a factual inquiry. It is not a decision which can be resolved simply on the face of the statute. Accordingly, Rule 12(b)(6) dismissal is singularly inappropriate in this case.

Further, given this focus on purpose, the distinctions which the district court drew, relying on *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) and *American Communications, supra*, regarding whether the statute can be said to penalize past conduct, or instead, to merely establish conditions for future conduct, become merely evidentiary of a purpose to punish, rather than a legal precondition to a finding of punishment. This, in fact, was recognized in *United States v. Brown*, 381 U.S. 437 (1965), where the Court held a statute, which made it a crime for a member of the Communist Party to serve as an officer of a labor union, to be an unconstitutional Bill of Attainder. The government there advanced the argument, relying on

American Communications, that there was no punishment because past conduct was not being punished by the statute; that a person could resign or cease to be a party member, and that no crime would ensue if he or she then became a union officer. The Supreme Court in *Brown* rejected that argument. Instead, the Court said that “punishment” can flow not only out of a “desire to visit retribution,” but also out of a wish to prevent recurrence of past or undesired action: “It would be archaic to limit the definition of ‘punishment’ to ‘retribution.’ Punishment serves several purposes: retributive, rehabilitative, deterrent – and preventative.” *Brown*, 381 U.S. at 457-58. The Supreme Court observed that “[a] number of English bills of attainder were enacted for preventative purposes—that is, the legislature made a judgment, undoubtedly based largely on past actions or assertions—that a given person or group was likely to cause trouble...and therefore inflicted deprivation upon that person or group in order to keep it from bringing about the feared event.” 381 U.S. at 458-59. As the Court also stated: “[I]t is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the persons against whom they were directed the option of evading them, by acknowledging their allegiance to the existing governments.” *Id.*, see also *Selective Serv.*, 468 U.S. at 852, (“[p]unishment is not limited solely to retribution for past events but may involve deprivations inflicted to deter future misconduct”), *Nixon*, 433 U.S. at 476, n.40 (“punishment is not restricted purely to retribution for

past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct”).

A more recent example is the legislation in *Foretich* which prohibited Dr. Foretich from obtaining limited custody or visitation in the future. As in *Brown* and *Foretich*, the punishment in this case derives from past events. The Complaint alleges that the reason for the enactment of the MREA was the competitive success of the Hettingas’ dairy operations, just as the enactment of the statute in *Foretich* arose out of Dr. Foretich’s alleged past conduct, and the loyalty oath in *Brown* out of the Communist Party’s past actions. That Dr. Foretich could avoid consequences of the statute in the future, were he not to seek visitation or custody, did not make the statute any less a punishment. The same is true of the choice of financial penalties that the MREA imposes on the Hettingas.

4. The Bill of Attainder Tests Evidence a Purpose to Punish the Hettingas.
 - (a) The First Amended Complaint Alleges Economic Harm that Satisfies the Historical Test.

The historical test is satisfied by the confiscatory nature of the MREA which requires the Hettingas to pay a substantial portion of their revenues into the Arizona pool for distribution to their direct competitors. Confiscation is a historical punishment. *ConEd*, 292 F.3d at 351. The historical test is further

satisfied by the effect of the MREA in denying access to the courts, as it did with respect to the Johanns Action. *See Pierce v. Carskadon*, 83 U.S. 234 (1872).

Further, laws that impose deprivations and disabilities that are disproportionately severe, and inappropriate to the nonpunitive ends allegedly served by the statute, have historically been recognized as Bills of Attainder. *Foretich*, 351 F.3d at 1219. The Second Circuit held that a statute forbidding a utility from recouping from customers certain costs that it had incurred, although cast as economic regulatory legislation, was a Bill of Attainder. *ConEd*, 292 F.3d at 345. In addition, statutes that erect “legislative bars to participation by individuals or groups in specific employments or professions” have historically been found to be Bills of Attainder. *Selective Service System*, 468 U.S. at 852. *See also BellSouth II*, 162 F.3d at 685. Thus, a law that imposes significant economic harm upon a small group of persons may qualify as a Bill of Attainder under the historical test.

The government claimed below that the MREA does not fall within the historical meaning of punishment because it “does not contain any legislative censure or public reprimand.” However, the current case law establishes that monetary harm is sufficient to state such a claim. *ConEd, supra*. Further, *Foretich* held that such a “brand of infamy or disloyalty” is not a required element of a Bill

of Attainder claim, but is instead an aggravating factor that makes such a law “particularly susceptible to invalidation.” 351 F.3d at 1219.

(b) The First Amended Complaint Sufficiently Alleges that the MREA Constitutes Punishment under the Functional Test.

Under the “functional” test, a court must ensure that the statute serves a nonpunitive legislative purpose in order to prevent, “Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups.” *BellSouth I*, 144 F.3d at 65. Accordingly, a court “must consider ‘whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.’” *Foretich*, 351 F.3d at 1220, quoting *Nixon*, 433 U.S. at 475-76.

Courts conduct this inquiry “by examining both the purported ends of contested legislation and the means employed to achieve those ends.” *Foretich*, 351 F.3d at 1221. The functional test is “more exacting than a rational basis test, because it demands purposes that are not merely reasonable but nonpunitive. Punitive purposes, however rational, don’t count.” *BellSouth I*, 144 F.3d at 67. Moreover, even if Congress can articulate some nonpunitive purpose, it must be shown that these alleged nonpunitive actions are sufficiently clear and convincing. *BellSouth II*, 162 F.3d at 686.

Additionally, where a significant imbalance exists between the magnitude of the burden imposed and a purported nonpunitive purpose, the law cannot reasonably be said to further nonpunitive purposes and is an unconstitutional Bill of Attainder. *Foretich*, 351 F.3d at 1221-22, citing *ConEd*, 292 F.3d at 354 (a statute is an unconstitutional Bill of Attainder where “the legislature piled on a burden that was obviously disproportionate to the harm caused”). As this Court stated:

The law is clear that if there exists an extraordinary imbalance between the burden imposed and the alleged nonpunitive purpose, and if the legislative means do not appear rationally to further that alleged purpose, then the statute in question does not escape unconstitutionality merely because the Government can assert purposes that superficially appear to be nonpunitive.

Foretich, 351 F.3d at 1223. The final point is critical. A law may be held to constitute a Bill of Attainder even though the government might be able to articulate a purportedly legitimate purpose “that superficially appears to be nonpunitive.”⁴

⁴ *Accord, Con. Ed.*, 292 F.3d at 350, quoting *Nixon*, 432 U.S. at 482:

Where a statute establishing a punishment declares and imposes that punishment on an identifiable party, however, the Bill of Attainder Clauses undermine the usual solicitude we have for [punishment of wrongdoing]. In such cases, we look beyond simply a rational relationship of the statute to a legitimate purpose for “less burdensome alternatives by which [the] legislature...could have achieved its legitimate nonpunitive objectives.”

Under *Foretich*, once it has been determined that plaintiffs have set forth a *prima facie* case, as the Hettingas have here, the issues presented under the functional test cannot be resolved on a motion to dismiss. First, at the motion to dismiss stage, all that is required are some facts which tend to show that the purpose was punitive and/or that the statute does not promote the alleged nonpunitive purposes. These facts need not make the ultimate legal conclusion advanced by the plaintiff more probable than not. Instead, those facts need only make the probability, as Judge Posner put it, “nonnegligible”. *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011). Second, resolution of the functional test requires balancing the severity of the burden imposed by the law relative to its “purported nonpunitive benefits,” in order to determine whether “a grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness.” *Foretich*, 351 F.3d at 1222. This is true even if the government suggests that “the statute bears some minimal relation to nonpunitive ends,” *Id.*, or if the government asserts the statute merely constitutes permissible economic regulation. “The law is clear that . . . the statute in question does not escape unconstitutionality merely because the Government can assert purposes that superficially appear to be nonpunitive.” *Foretich*, 351 F.3d at 1223.

The Complaint expressly alleges that the MREA does not “further any nonpunitive legislative purpose.” JA30-32 (Complaint, ¶¶ 50, 52.4, 57). The

Complaint alleges that as producer-handlers who do not participate in the pooling and pricing of milk, the Hettingas do not have a guaranteed market for their product and bear the entire burden and risk of milk production, processing, and sales. Further, it alleges that notwithstanding that the Hettingas receive no financial benefit under Section (N), they are specifically required to make prohibitive confiscatory payments, amounting to hundreds of thousands of dollars monthly, under a statute that on its face provides no protective measures for them.

Under the AMAA, milk handlers are regulated based on sales of milk into a federally regulated area. The location of a handler's plant, absent actual sales into a federal milk marketing area, is not a basis for imposing regulation. But, as to GH, the MREA imposes price control regulation premised solely on the location of its plant, rather than the place where the actual milk sales occur. Subsection (M) imposes upon GH, alone of all handlers of milk in the United States, an explicit statutory obligation to pay money into an Arizona pool for sales that actually occur in California which amounts to a direct subsidy of the Hettingas' competitors in Arizona. The MREA mandates this result even though the California milk producers receive no benefit whatsoever from such payments, and even though the entire alleged purpose of such payments under the AMAA, which the MREA amends, is to protect milk producers in the region in which such milk is sold, i.e., in California, not Arizona. Further, California is not a federally regulated area, so

the federal statute is not intended to protect it, but even if it were, the Complaint alleges that the MREA permits milk producers in Nevada to sell without any limitation into California and without a requirement to pay into a federal pool – only Hettingas are burdened with this financial confiscation.

Notwithstanding the district court’s assertion to the contrary, this is not just a question of “fairness”. Instead, it is a question of lack of a rational relationship between the stated “goal” of the legislation and reality. The government, for example, asserted below that the purpose of requiring producers in areas under regulation, who sell into states not within areas subject to federal regulations, was to promote equity among producers. The AMAA, however, does not establish equal pricing and pooling between, and among, the separate federal marketing areas, but only within marketing areas. Accordingly, pooling is only required under the AMAA for sales within a marketing area. Demanding that GH pay into the Arizona pool of producers based on sales which actually occur in California does not promote equality among producers within the unregulated California pool. Moreover, even if it did, the MREA’s concurrent explicit exception of Nevada dairy companies from the same requirements removes whatever alleged benefit might be conceived, because now, instead of GH, the favored Nevada based dairy companies can take over the market share previously enjoyed by GH. Legislation

which favors the politically connected and decides economic winners based upon which company is politically favored is the antithesis of rationality.

Similarly, with respect to Sarah Farms, the requirement that it be subjected to pricing and pooling requirements offers no benefit to milk producers in Arizona commensurate with the economic burden on the Hettingas. JA21, 29 (Complaint ¶¶25, 47-48). The Complaint alleges, for example, that subjecting the Hettingas to the pricing and pooling requirements might impact one-half of one percent of the sales prices for a hundred weight of milk per month for dairy producers generally in Arizona, and that the direct financial burden on the Hettingas is hundreds of thousands of dollars monthly. In short, the effect on milk production and consumer prices in Arizona is negligible. The economic impact on the Hettingas, however, is considerable. This *de minimus* effect is reduced even further because the Hettingas are the only affected producer-handler in the marketing area. The rest of the country is unaffected by MREA Section (N), and the facts, as alleged, are that producer-handlers both in number and in volume, have been declining as an element of overall dairy production. JA19 (Complaint ¶20). In short, the selectivity of the statute cannot be explained without resort to inferences of punitive purposes. The Hettingas' businesses were singled out for the restrictions imposed by Subsections (M) and (N), *See Foretich*, 351 F.3d at 1224 (finding that the law's extreme narrowness rendered "simply implausible" the asserted

nonpunitive purposes) and make more persuasive the conclusion that the MREA was intended as punishment. At the least, there are facts and inferences from the functional test which mandate further factual development.

Congress passed the MREA on an extraordinary expedited basis, on the night before the Hettingas were to argue their judicial challenge to the legality of the USDA rule. The intent and effect of this action was to moot that case by directly subjecting the Hettingas to a mandatory set of statutory requirements set forth in Subsection (N), that codified and superseded the USDA rule for them alone. JA14-15, 21-28, 30 (Complaint ¶¶4-6, 26, 29-44, 51). The effect of this codification is that the Hettingas cannot change their status by requesting an amendment or revision through USDA, or pursue administrative and judicial remedies. The Hettingas alone are subject to a rule which can only be changed by Congress. All other marketing orders are subject to modification, amendment, or termination. All other market participants except the Hettingas are entitled to the constitutional and procedural protections of the legal process.

It is implicit in the functional test that if a plaintiff has plead facts which if true support the inference of a punitive purpose, the government must present evidence of a nonpunitive purpose, showing a rational relationship between that asserted nonpunitive purpose and the disadvantages created by the statute, and a proportionality between the benefits alleged to be gained, and the burdens

imposed. This cannot be dealt with at the pleading stage on a motion to dismiss because (1) the government has presented no such evidence, (2) the Hettingas have not been allowed to conduct any discovery, and (3) the judge cannot decide this issue on the merits without any evidentiary facts.

(c) The First Amended Complaint Alleges Facts that Satisfy the Motivational Test.

“The final test of legislative punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish.” *Foretich*, 351 F.3d at 1225 (internal citation omitted). Courts conduct this inquiry “by reference to legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation.” *Foretich*, 351 F.3d at 1225 (emphasis added). Evidence of punitive intent in the legislative record is directly relevant, both in its own right, and to confirm other evidence of congressional intent to punish. *ConEd*, 292 F.3d at 354-55. The Complaint specifically identifies several passages in the House floor debate that confirm on their face the allegation that Congress singled out the Hettingas for punishment. JA27-28 (Complaint, ¶¶ 40-44.)

It has been said that to find a purpose to punish solely on congressional history requires “the clearest proof” or “unmistakable evidence of punitive intent.” *Flemming*, 363 U.S. at 617-19. But that is not to say that such evidence cannot be

established; nor does it mean that even evidence which by itself would not be sufficient, is not persuasive when added to an absence of a convincing rational relationship, or gross imbalance, between the statutory sanction and the asserted goal of the legislation. Moreover, the Supreme Court has said: “We, of course, do not suggest that such a formal legislative announcement of moral blameworthiness or punishment is necessary to an unlawful bill of attainder.” *Nixon*, 433 U.S. at 480.

Thus, the Complaint alleges facts, which must be taken as true on a motion to dismiss, which evidence, whether or not they prove by themselves, before discovery, that Congress adopted the MREA with an intent to punish the Hettinas. This is more than sufficient to satisfy the motivational test at the motion to dismiss stage.

D. The Punishment Was Inflicted Without A Trial.

This element of a Bill of Attainder is also met. The enactment of the MREA was not a judicial proceeding, nor did it rely on one. Indeed, the Complaint alleges that the Johans Action was intentionally mooted, and later dismissed by reason of the passage of the MREA. Additionally, the prior USDA rulemaking which was related to Sarah Farms only, and not to GH, does not constitute a trial. The Supreme Court has made clear that a trial must be a judicial proceeding, not an

administrative hearing conducted by an Executive Branch agency. *Selective Serv.*, 468 U.S. at 847, n. 3.

III. THE MREA DENIED THE HETTINGAS EQUAL PROTECTION OF THE LAWS.

The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall be...deprived of life, liberty or property without due process of law....” The Supreme Court has held that the Fifth Amendment Due Process clause “forbids the federal government to deny equal protection of the laws.” *Davis v. Passman*, 442 U.S. 228, 234 (1979).

In order to be constitutional, a statutory classification that treats two groups differently must be rationally related to a legitimate governmental purpose. *City of Cleburn, Tex. v. Cleburn Living Center*, 473 U.S. 432, 446 (1985). A “class of one” will violate the Equal Protection Clause if there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). “A classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational” is unconstitutional. *City of Cleburn, supra*, citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982).

The district court held that the MREA was economic legislation subject to deferential rational basis review, in which the government need not articulate its reasons, and that courts will uphold the government if there is “any reasonably

conceivable state of facts” that could provide a rational basis for the classification. citing *F.C.C. v. Beach Communications*, 508 U.S. 309, 313 (1993). However, deference to legislative choices cannot be confused with abdication of judicial responsibility to safeguard constitutional protections. Moreover, the rational basis standard for Equal Protection analysis is “not a toothless one.” *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 439 (1982), quoting *Matthews v. Lucas*, 427 U.S. 495 (1976). Rather, the classification scheme must “rationally advance a reasonable and identifiable governmental objective.” *Logan*, 455 U.S. at 439, quoting *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). This is true of both the classification itself, and of the manner in which the statute applies the classification to the purported goal. *Logan*, 455 U.S. at 439-442.

Although, in evaluating an equal protection claim a court need not look into motivations and may consider rationales for the legislative action not advanced by the government, *Beach Communications, supra.*, there must, nonetheless, be an articulated purpose against which such a rationality analysis can be made. A court must “insist on knowing the relation between the classification adopted and the object to be attained...[to ensure that] classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

The district court stated that the MREA is a rational means of ensuring orderly milk markets by (1) preventing handlers located in regulated regions, and exporting milk to unregulated regions, from gaining advantages over their rivals, and (2) preventing large producer-handlers in a federally regulated region from undercutting other handlers in that region with unregulated sales. The district court asserted that the allegations of discrimination in the Complaint amount merely to claims that the MREA is unfair, not that it is irrational or arbitrary. Once again, the district court was wrong.

A court cannot draw factual conclusions at the pleading stage, instead it must accept plaintiffs' well-pled facts as true, and draw all reasonable inferences in their favor. The only questions are whether (1) plaintiffs have shown that there are separate groups disparately treated, and (2) there are facts which suggest, by themselves, or as a basis for further discovery, that this disparate treatment may not be rational, or is not for legitimate purposes. The Complaint satisfies this legal standard.

At the outset, any deferential basis for review of governmental action is premised upon the governmental action being legitimate. At this preliminary stage of the case, a court is not required to accept the government's assertion of legitimacy on its face. For example, in *Cleburn*, the Court rejected the government's assertion that the denial of the requested building permit for housing

for the mentally retarded was simply an exercise of zoning power, where there was evidence that the true purpose was invidious, i.e., an animus toward the mentally handicapped. The Complaint alleges that the motive for the MREA was invidious, i.e., resentment of the Hettingas by the large dairy interests and their congressional allies, and that the true goal of the legislators was not to ensure orderly milk markets but to eliminate the Hettingas as competition. JA15, 18-31 (Complaint ¶¶ 5, 6, 19-20, 23-26, 28-30, 32-33, 35-44, 47-52.5.)

Such economic protectionism is not a legitimate government interest. For example, in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit rejected a statute requiring a person to be a licensed funeral director before he could sell caskets. This, was a “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.” 312 F.3d at 229. Similarly, in *St. Joseph Abbey v. Castille*, 2011 WL 1361425 (E.D. La. 2011), the Court held that protecting a discrete interest group from economic competition was not a legitimate governmental purpose, and in *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008), the Ninth Circuit held that “mere economic protectionism for the sake of economic protectionism is

irrational with respect to determining if a classification survives rational basis review.”

While this view is not unanimous, *Cf. Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), nonetheless, where there are factual allegations that Congress is favoring one economic group over another similarly situated solely for purposes of enhancing the favored group’s economic position, then, if the Equal Protection Clause is to mean anything, the government must provide evidence, not mere assertions, that Congress has another legitimate purpose other than economic protectionism of the favored group for this unequal treatment, and that this other purpose is rational. This is a factual, merits based inquiry, and one not suited to resolution on a motion to dismiss; and the Complaint has pled sufficient facts to set out the elements of disparate treatment; illegitimate purpose, and absence of rational relationship between the provisions of the MREA and its asserted purpose of ensuring alleged “orderly milk markets.”

A. The MREA Discriminates Against The Hettingas.

The Complaint alleges that the MREA discriminates against Hettingas and singles them out for adverse treatment not imposed on others similarly situated. It also specifically alleges that these classifications are unrelated to any legitimate governmental purpose, and that, taken collectively, they deny the Hettingas equal protection.

The Complaint factually alleges that MREA Subsection (N) directly subjects the Hettingas to the pricing and pooling requirements of the Arizona Milk Marketing Order for milk that they produce and sell. No other entity in the country that sells only its own produced milk is subject to such a specific statutory price control requirement.

The Complaint factually alleges that MREA Section (M) directly imposed pricing and pooling requirement on sales by a handler in a federally regulated marketing area into a non-regulated area, and that GH was the only handler in the nation that satisfied this statutory criterion by reason of its sales into the California market (which otherwise is not subject to federal pricing and pooling regulations). The Complaint alleges that, at the same time, MREA Section 2(b) removed Nevada from the coverage of any federal milking marketing order. The effect was to impose payment of federal minimum prices only on GH for selling milk into California, while permitting a number of handlers in Nevada to sell milk into California without paying the federal minimum prices.

All producer-handlers other than Hettingas are regulated by the USDA under the general provisions of the AMAA. Before they may be subject to price controls, all other producer-handlers have a right to notice and an opportunity for an administrative hearing, at which they may present evidence concerning whether and how they should be regulated, pursuant to the AMAA's substantive standards.

Each entity also has the right to petition USDA to abolish or modify its Milk Marketing Order, 7 U.S.C. § 608c (5).

The Hettingas' Sarah Farms plant, by contrast, is regulated directly by the MREA. The Hettingas received none of the procedural and substantive protections that all other entities enjoy. They were not permitted judicial review of the substance of the government's decision to regulate them. And, as this Court has previously recognized, the Hettingas cannot meaningfully petition USDA to exclude them from the Arizona order, because such an act would require adoption of another statute by Congress. Thus, the MREA treats the Hettingas differently from any other producer-handler in the nation.

B. The Disparate Treatment Was Irrational And Arbitrary.

The next legal question is whether such disparate treatment is arbitrary or irrational, or whether it is rationally related to a legitimate government purpose. The district court took the position that in order for the Hettingas to state an equal protection claim, that they must negate "any reasonably conceivable state of facts that could provide a rational basis for the classification." At the pleading stage, this would entirely eliminate the Equal Protection Clause from the Constitution for purposes of economic classifications.

Instead, at the pleading stage, all that is required is that the Hettingas plead facts showing their disparate treatment, and that there is a factual basis for the

claim that the disparate treatment is not for a legitimate purpose and/or is arbitrary or irrational. The Complaint accomplishes this goal. For example, the Hettingas allege that the purpose of the MREA provisions in question have nothing to do with maintaining orderly milk markets and everything to do with penalizing the Hettingas. JA14-15, 17-31 (Complaint ¶¶4-6, 14-17, 19-52.5.) The Complaint alleges that the producer-handler exception had existed for many years, and producer-handlers were not increasing in number but decreasing in both number and in terms of total volume of milk handled. It alleges that the economic effect on producer prices was negligible, while the impact on the Hettingas was immense. Thus, the MREA does not advance the alleged purposes of making markets more orderly for milk producers. JA14, 21 (Complaint ¶¶3, 25). The Hettingas further allege that the MREA treatment of GH as a handler in a regulated area, selling milk into an unregulated area, does not benefit producers in the unregulated area because (i) the milk producers in the state of the sales, California, receive no financial benefit from the compelled, confiscatory payment by the Hettingas into the regulated area pool in Arizona, and (ii) the MREA permits Nevada handlers to sell into California (or any unregulated area) without restriction or payments. JA23, 27, 30-31 (Complaint ¶¶31, 38-39, 52.1 – 52.5). It also does not promote orderly markets in Arizona, because the milk being sold by GH was not being sold in Arizona. Thus, the statutory effect is to (i) punish the Hettingas, and (ii) transfer

market share from those more economically efficient (the Hettingas) to the more inefficient, but politically favored, Nevada dairy companies.

IV. THE MREA DENIED THE HETTINGAS DUE PROCESS OF LAW.

A. The Complaint States A Valid Due Process Claim.

A procedural due process claim has two components. The first is whether a liberty or property interest exists which has been interfered with by the government. The second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). The Complaint properly states a claim that the MREA violated the Hettingas' procedural due process rights by foreclosing effective judicial review of the government action that determines how they may operate their dairy businesses. The district court stated that the Hettingas did not plead a protected liberty or property interest, and, even if they did, the Complaint failed to plausibly plead, under *Iqbal*, that they were denied the opportunity to seek judicial review by passage of the MREA. Neither finding by the district court is factually accurate, and these alleged legal conclusions are not premised on the plaintiffs' pleadings, but rather amount to an improper adjudication and acceptance of the government's factual allegations in violation of Rule 12(b)(6).

1. The Hettingas Have Protected Liberty and Property Interests.

There is a constitutionally protected interest in practicing one's profession or occupation. The effect of the MREA is to transfer money (a property interest) from the Hettingas to their competitors in Arizona, and to take away or limit the legitimate business of GH in selling milk into California (a property interest). Similarly, a legal cause of action amounts to a property right, which legislation may not resolve or terminate without offending due process. *Logan*, 455 U.S. at 428-31. This is true of administrative adjudicatory procedures, as well as of rights to proceed in an Article III court. *Id.* Further, under the system established by the AMAA, and the USDA implementing rules, milk handlers and producer-handlers who are adversely affected by government decisions or regulations have a right to judicial review of these determinations. 7 U.S.C. § 608c (15), 5 U.S.C. § 704. The Complaint alleges that the MREA deprived the Hettingas of all these liberty and property interests. JA28-29, 33 (Complaint ¶¶45-47, 60.)

2. The Hettingas Were Deprived of Access to the Courts Without a Hearing.

The Complaint also alleges that the Hettingas were exercising their rights to challenge the USDA's February 2006 rule under the AMAA scheme when Congress passed the MREA, imposing statutory requirements directly upon them, and mooting the pending litigation, thereby denying the Hettingas their right to

legally challenge in court the statutory terms under which their businesses must now be conducted.

The AMAA provides for an adjudicatory proceeding for the determination of the highly fact-specific questions of whether, and under what conditions, a federal milk marketing order should be created and/or amended. These decisions are required to be made by USDA on the record, based on admission of evidence concerning the factual issues of whether disorderly marketing conditions exist and need to be addressed, and under due process procedures that protect the rights of those affected. Thereafter, adversely affected parties have the right to appeal the USDA decision to federal court for review. *See* 7 U.S.C. § 608c(15)(A), (B).

The Complaint specifically and factually alleges that the MREA deprived the Hettingas of their right to the procedural due process guarantees associated with that adjudicatory process, and the opportunity, under principles of judicial review of administrative decisions, to show on the factual record that the USDA regulatory decision was unlawful and should be overturned. The Complaint further identifies floor statements in the House debate which demonstrate that the MREA was intended to short-circuit the ongoing review of the agency action by an Article III court, and further shows that the MREA did in fact have the intended effect of effectively defeating the effort by the Hettingas to obtain judicial review. JA21-24, 27-30, 33 (Complaint, ¶¶ 25-30, 32-33, 40-46, 51, 60).

Similarly, the MREA prospectively denied the procedural protections of the AMAA to both of the Hettingas' dairy businesses because they are effectively foreclosed by statutory mandate from petitioning USDA for any exception from, or modification to, the terms of the marketing order that could alter their regulatory status, as specifically contemplated by the AMAA, 7 U.S.C. § 608c (15)(A).

The district court's assertion that the Hettingas later voluntarily dismissed the Johans Action ignores the Complaint's allegations, (JA28-29, (Complaint ¶¶45-46)) that the Johans' court denied the preliminary injunction request on the grounds that the MREA mooted the entire action.⁵ Similarly, the district court's statement that administrative review was voluntarily dismissed ignores this Court's ruling in *Hettinga v. United States*, 560 F.3d 498, 504-505 (D.C. Cir. 2009) that following passage of the MREA the Secretary of Agriculture no longer has authority to provide such an exception or modification to the Hettingas, and also lacks power to declare the MREA unconstitutional.

The district court's ruling did not address the issue of whether there was any rational basis for the government to deny the Hettingas their pre-existing due process rights under the AMAA by reason of passage of the MREA. The

⁵ The fact that the Hettingas later voluntarily dismissed the Johans action after it was clear the MREA had the intended effect on the Johans court is of no importance in deciding whether the Complaint meets the pleading standards for Rule 12(b)(6) analysis.

government below merely argued that the MREA satisfies a "rational basis" standard of furthering legitimate governmental interests. However, if an assertion by the government of a legitimate interest allegedly facilitated by the challenged legislation were sufficient in itself, then no due process claim would ever proceed once the government made such an assertion, and such an assertion would be made by the government in every case.

The Complaint specifically alleges that the actual intent of the MREA was not legitimate, but combined economic protectionism with an intent to punish, and that the means chosen did not forward but actually contradicted, the stated pretextual governmental purpose. Accordingly, the Complaint sufficiently pleaded a due process violation which survives a 12(b)(6) challenge.

V. THE HETTINGAS SHOULD HAVE BEEN PERMITTED TO SUPPLEMENT THEIR COMPLAINT.

The Hettingas sought leave of the district court to file a Supplemental Complaint to supplement their existing claim that the purpose of passing the MREA was to single out and punish them for their past, lawful conduct. The proposed new paragraphs of the Complaint were 5.1, 29.1, 31.1, 52.6, and 52.7. JA38, 46-47, 55-56 ("Proposed Supplemental Complaint"). These new paragraphs describe the role of the Senate Majority Leader, Harry Reid, in the passage of the MREA, and the purpose was to favor Nevada milk handlers at the expense of the

Hettingas. As set out in the proposed supplemental complaint, the new information came to light in September 2010, well after the date of the filing of the Complaint. These proposed new facts directly supplement existing allegations and claims within the Complaint and do not raise any new legal claims nor add any new parties.

Rule 15(d), *Federal Rules of Civil Procedure*, provides:

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

The decision to permit the filing of a supplemental pleading is within the sound discretion of the trial court. *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995). However, permission to supplement should be freely given when the supplemental facts are connected to the original pleading. *Id.* See also *Aftergood v. C.I.A.*, 225 F. Supp.2d 27, 30 (D. D.C. 2002).

The only valid reasons to deny supplementation are when it will result in undue delay, unfair prejudice to defendant's interests, unfair surprise, is the product of bad faith, or would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Aftergood*, 225 F. Supp.2d at 30. Where the supplemented events are but a

continuation of the defendant's conduct (as with Senator Reid's 2010 admissions), such facts are precisely the type of conduct for which Rule 15(d) permits supplementation. *Wells v. Harris*, 185 F.R.D. 128, 133 (D. Conn. 1999).

The requested supplemental facts meet the requirements of the rule. The new allegations arose from a political campaign commercial of Senator Reid which aired for the first time during September 2010, and the Hettingas' Motion to Supplement the Complaint was filed promptly thereafter. These supplemental facts occurred well after the filing of the First Amended Complaint in 2007. Accordingly, the Motion was timely. Further, no prejudice could be suffered by the government if the Hettingas were permitted to supplement their Complaint. This litigation is still in its procedural infancy. The government has not even answered as yet, no discovery has taken place, and there was no dispositive motion deadline approaching. Accordingly, any factors that might have justified the Court to depart from the mandated "freely given" leave to supplement standard of Rule 15(d) were wholly absent.

The district court gave no reason whatsoever for its denial of the Motion for Leave to Supplement. The government below argued that the Bill of Attainder claim should be dismissed, and, therefore, the motion to supplement should be denied. This was presumably the unstated reason for the court's denial of the motion as well. Because, for the reasons set forth above, the judgment of dismissal

should be reversed, so also should the denial of the Motion to Supplement the Complaint.

VI. CONCLUSION.

The decision of the district court dismissing the Hettingas' case should be reversed and remanded with instructions to the district court to allow the Hettingas to supplement their Complaint as requested in Plaintiffs' Motion for Leave to Supplement, dated September 24, 2010; that the case should proceed to consideration of the Hettingas' claims on their merits, and that the district court should not consider any further motions to dismiss or any motion for summary judgment until such time as the parties have both complied with Rule 26, *Federal Rule of Civil Procedure*, and only after the parties have also had an adequate opportunity to conduct complete discovery pursuant to Rules 30-36, *Federal Rules of Civil Procedure*.

Respectfully submitted,

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ADDENDUM

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ADDENDUM: STATUTES

7 U.S.C. § 608c (15)(A) provides in relevant part:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and pray[s] for a modification thereof or to be exempted therefrom. . . .

7 U.S.C. §§ 608c(5)(M) and (N) provide:

(M) Minimum Milk Prices for Handlers.—

(i) Application of minimum price requirements.— Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

(ii) Covered milk handlers.—

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a producer-handler or producer operating as a handler) that—

(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of April 11, 2006);

(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

(iii) Obligation to pay minimum class prices.— For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

(iv) Certain handlers exempted.— Clause (i) does not apply to—

(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on April 11, 2006);

(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

(III) a handler (otherwise described in clause (ii)) for any month during which—

(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or

(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

(N) Exemption for Certain Milk Handlers.— Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131 shall be exempt during any month from any minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

Pub. L. No. 109-215, 120 Stat. 328 (2006), provides:

An Act

To ensure regulatory equity between and among all dairy farmers and handlers for sales of packaged fluid milk in federally regulated milk marketing areas and into certain non-federally regulated milk marketing areas from federally regulated areas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Milk Regulatory Equity Act of 2005.”

SECTION 2. MILK REGULATORY EQUITY.

(a) Minimum Milk Prices for Handlers; Exemption.--Section 8c(5) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, is amended by adding at the end the following new subparagraphs:

“(M) Minimum Milk Prices for Handlers.—

“(i) Application of minimum price requirements. Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

“(ii) Covered milk handlers.

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a producer-handler or producer operating as a handler) that—

“(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of the date of the enactment of this subparagraph);

“(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

“(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

“(iii) Obligation to pay minimum class prices.—

For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

“(iv) Certain handlers exempted.

Clause (i) does not apply to—

“(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on the date of the enactment of this subparagraph);

“(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

“(III) a handler (otherwise described in clause (ii)) for any month during which—

“(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or “(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

“(N) Exemption for Certain Milk Handlers.--Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131 shall be exempt during any month from any minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

“(O) Rule of Construction Regarding producer-handlers.--Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.”

(b) Exclusion of Nevada From Federal Milk Marketing Orders.--Section 8c(11) of the Agriculture Adjustment Act (7 U.S.C. 608c(11)), reenacted with amendments by the Agriculture Marketing Agreement Act of 1937, is amended—

(1) in subparagraph (C), by striking the last sentence; and

(2) by adding at the end the following new subparagraph:

“(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.”

(c) Records and Facility Requirements.—

Notwithstanding any other provision of this section, or the amendments made by this section, a milk handler (including a producer-handler or a producer operating as a handler) that is subject to regulation under this section or an amendment made by this section shall comply with the requirements of section 1000.27 of title 7, Code of Federal Regulations, or a successor regulation, relating to handler responsibility for records or facilities.

(d) Effective Date and Implementation.—

The amendments made by this section take effect on the first day of the first month beginning more than 15 days after the date of the enactment of this Act. To accomplish the expedited implementation of these amendments, effective on the date of the enactment of this Act, the Secretary of Agriculture shall include in the pool distributing plant provisions of each Federal milk marketing order issued under subparagraph (B) of section 8c(5) of the Agriculture Adjustment Act (7 U.S.C. 608c(5)), reenacted with amendments by the Agriculture Marketing

Agreement Act of 1937, a provision that a handler described in subparagraph (M) of such section, as added by subsection (a) of this section, will be fully regulated by the order in which the handler's distributing plant is located. These amendments shall not be subject to a referendum under section 8c(19) of such Act (7 U.S.C. 608c(19)).

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This Brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(i), because it contains **13,975** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Times New Roman 14-point font.

/s/ Alfred W. Ricciardi
Alfred W. Ricciardi

**United States Court of Appeals
for the District of Columbia Circuit**

HEIN HETTINGA v. USA, No. 11-5065

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by AIKEN SCHENK HAWKINS & RICCIARDI, P.C., Attorneys for Plaintiffs-Appellants to print this document. I am an employee of Counsel Press.

On **September 20, 2011**, Counsel for Appellants has authorized me to electronically file the foregoing **Final Opening Brief of Appellants** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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A courtesy copy will also be mailed to the above counsel.

Unless otherwise noted, I caused the original and 8 paper copies to be filed with the Court on the same date via Express Mail.

September 20, 2011

/s/ John C. Kruesi, Jr.
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