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2 UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF CALIFORNIA

4
5 DELANO FARMS COMPANY, FOUR
6 STAR FRUIT, INC., and
7 GERAWAN FARMING, INC.,

8 Plaintiffs,

9 v.

10 THE CALIFORNIA TABLE GRAPE
11 COMMISSION, UNITED STATES OF
12 AMERICA, UNITED STATES
13 DEPARTMENT OF AGRICULTURE,
14 TOM VILSACK, SECRETARY OF
15 THE UNITED STATES DEPARTMENT
16 OF AGRICULTURE (IN HIS
17 OFFICIAL CAPACITY),

18 Defendants.

1:07-CV-1610 OWW SMS

MEMORANDUM DECISION AND
ORDER RE CALIFORNIA TABLE
GRAPE COMMISSION'S MOTION TO
INTERVENE IN PLAINTIFFS'
FIRST CAUSE OF ACTION IN THE
SECOND AMENDED COMPLAINT
(DOC. 97).

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I. INTRODUCTION

Plaintiffs Second Amended Complaint ("SAC") includes a cause of action under the Administrative Procedure Act ("APA") challenging exclusive licenses for three patented grape varieties granted by the United States Department of Agriculture ("USDA") to the California Table Grape Commission ("Commission") under the Bayh-Dole Act, 35 U.S.C. § 209. Although the Commission is named as a defendant in other causes of action, it is not named as a defendant in the APA claim. "[T]o the extent it is necessary to permit the Commission to defend the challenged licenses," the Commission

1 seeks to intervene in the APA claim. Doc. 98.

2 Plaintiffs oppose the Commission's intervention in the
3 APA claim. Doc. 107. The Commission replied. Doc. 110.
4

5 II. DISCUSSION

6 The Commission moves to intervene as of right or, in the
7 alternative, to permissively intervene.

8 A. Intervention as of Right.

9 1. Legal Standard.

10 Intervention is governed by Federal Rule of Civil
11 Procedure 24. To intervene as a matter of right under Rule
12 24(a)(2), an applicant must claim an interest, the protection
13 of which may, as a practical matter, be impaired or impeded
14 if the lawsuit proceeds without the applicant. *Forest*
15 *Conservation Council v. United States Forest Serv.*, 66 F.3d
16 1489, 1493 (9th Cir. 1993). The Ninth Circuit applies Rule
17 24(a) liberally, in favor of intervention, and requires a
18 district court to "take all well-pleaded, non-conclusory
19 allegations in the motion as true absent sham, frivolity or
20 other objections." *Southwest Ctr. for Biological Diversity*
21 *v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). A four part test
22 is used to evaluate a motion for intervention of right:
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25 (1) the motion must be timely;

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27 (2) the applicant must claim a "significantly
28 protectable" interest relating to the property or
transaction which is the subject of the action;

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2 (3) the applicant must be so situated that the
3 disposition of the action may as a practical matter
4 impair or impede its ability to protect that
5 interest; and

6 (4) the applicant's interest must be inadequately
7 represented by the parties to the action.

8 *Forest Conservation Council*, 66 F.3d at 1493.

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2. Timeliness.

In assessing timeliness, courts in the Ninth Circuit must consider: (1) the current stage of the proceedings; (2) whether the existing parties would be prejudiced; and (3) the reason for any delay in moving to intervene. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Here, the SAC was filed November 16, 2009. Doc. 87. The parties stipulated to continue the deadline for all Defendants to respond to the SAC, resulting in a final deadline of February 2, 2010. Doc. 92. The Commission moved to intervene on February 2, 2010. Existing parties are not prejudiced when "the motion was filed before the district court made any substantive rulings." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). Here, no substantive rulings have been made with respect to the SAC. The motion to intervene is timely.

3. Significant Protectable Interests/ Impairment of Interests.

To demonstrate a "significantly protectable interest,"

1 "a prospective intervenor must establish that (1) the
2 interest asserted is protectable under some law, and (2)
3 there is a relationship between the legally protected
4 interest and the claims at issue." *Id.* In addition,
5 applicant must demonstrate that disposition of this action
6 may, as a practical matter, impair or impede Applicants'
7 abilities to protect their interests. This requirement
8 demands only a showing that the applicant "would be
9 substantially affected in a practical sense by the
10 determination made in an action." *Southwest Ctr. for*
11 *Biodiversity*, 268 F.3d at 822.

13 Here, Plaintiffs seek a declaration that the USDA's
14 grant of an exclusive license to the Commission was unlawful
15 and invalid, and request that the Court set aside the action.
16 SAC ¶¶ 81-82. As the licensee, the Commission possesses a
17 significant, protectable interest in the license that would
18 be impeded if Plaintiff prevails on the APA claim.

20 Plaintiff's assertion in its opposition that it merely
21 "seeks a judicial determination regarding whether the license
22 granted to the Commission for the patents-in-suit complied
23 with the requirements of the Bayh-Dole Act, Doc. 107 at 1, is
24 disingenuous, as Plaintiffs concede that the Commission "may
25 be impacted" by any decision regarding the validity of USDA's
26 action. *Id.* Plaintiff's reliance on *Fisher Foods, Inc. v.*
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1 *Ohio Dep't of Liquor Control*, 555 F. Supp. 641 (N.D. Ohio
2 1982), for the proposition that the Commission's interest is
3 insufficient for intervention is without merit. In *Fisher*,
4 the district court determined that an industry association
5 representing small wine and beer dealers did not have an
6 interest sufficient to challenge a statute that applied to
7 all business enterprises because the "applicants' interest is
8 a general economic interest, the same as every seller and
9 distributor." *Id.* at 650. This is a far cry from the
10 present case, in which the APA claim challenges the validity
11 of a license held by the applicant (the Commission).
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14 4. Existing Parties' Ability to Represent Applicants'
15 Interests.

16 The remaining issue is whether Applicant's interests are
17 adequately protected by other defendants. In assessing the
18 adequacy of representation, the Ninth Circuit looks at three
19 factors:

20 (1) whether the existing parties will undoubtedly
21 make all of the applicant's arguments;

22 (2) whether the existing parties are capable of and
23 willing to make the applicant's arguments; and

24 (3) whether the applicant offers a necessary element
25 to the proceedings that otherwise would be
26 neglected.

27 *Id.* at 823. "[T]he requirement of inadequacy of
28 representation is satisfied if the applicant shows that
representation of its interests may be inadequate [T]he

1 burden of making this showing is minimal." *Sagebrush*
2 *Rebellion Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983).

3 Here, although the interests of the Commission and the
4 USDA overlap, in that both have an interest in preserving the
5 license agreements and commercializing the patented
6 varieties, these interests are not identical. For example,
7 even if the licenses were invalidated, the USDA would still
8 hold patents to the varieties, while the Commission would
9 lose its rights with respect to the varieties. Moreover, the
10 USDA, as an agency of the Executive Branch must balance a
11 number of policy considerations in the administration of its
12 patents, including the broad policy goals of the Bayh-Dole
13 Act. See *Southwest Ctr.*, 268 F.3d at 823 (applicants not
14 adequately represented by government agencies whose interests
15 are "not simply to confirm" the applicant's interests, but
16 include a broader "range of considerations"). The
17 Commission's interests are not adequately represented by the
18 Federal Defendants.

21 22 III. CONCLUSION

23 The Commission satisfies all of the requirements for
24 intervention as a matter of right. It is not necessary to
25 address the Commission's alternative request for permissive
26 intervention.

27 Applicants' unopposed motion to intervene as a matter of
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1 right is GRANTED, conditioned upon strictly limiting their
2 participation to issues about which they can provide unique
3 information and/or arguments.
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5 SO ORDERED

6 Dated: July 23, 2010

7 /s/ Oliver W. Wanger
8 Oliver W. Wanger
9 United States District Judge
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