

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALICE H. ALLEN AND LAURENCE E. ALLEN,)
d/b/a Al-lens Farm,)
GARRET SITTS and RALPH SITTS, and)
JONATHAN and CLAUDIA HAAR)
on behalf of themselves)
and all others similarly situated,)
Plaintiffs)

FILED UNDER SEAL

v.)

Docket No. 5:09-cv-00230-cr

DAIRY FARMERS OF AMERICA, INC.,)
DAIRY MARKETING SERVICES, LLC, and)
DEAN FOODS COMPANY,)
Defendants)

**PLAINTIFFS' REPLY MEMORANDUM IN RESPONSE TO
DFA/DMS'S OPPOSITION TO PLAINTIFFS' SETTLEMENT WITH DEAN**

Introduction

Discovery has confirmed that Defendants DFA and DMS have entered unlawful agreements to restrain competition for the purchase of milk from farmers in the Northeast. In opposing the proposed settlement with Dean, DFA and DMS's agenda is to prevent this case from proceeding or being settled on a class basis – a result that would make it extraordinarily difficult, if not impossible, for injured parties to challenge their unlawful conduct. DFA/DMS's objections, if accepted, would almost certainly mean that years of litigation and appeals would be required before the putative class could obtain any financial or injunctive relief in this action.

Consistent with the teachings of the Second Circuit, Plaintiffs and Dean have recognized that there is a better path. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001) (discussing policies favoring settlement). [REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

Here, after difficult negotiations, Plaintiffs reached a settlement with Dean that we believe is the largest reported antitrust settlement in the history of this Court. In addition to a substantial financial payment by Dean, the settlement includes injunctive relief that benefits all members of the class by opening up access to the Dean plants in order to spur competition for purchases of milk from farmers. This relief is appropriate in light of evidence establishing DFA/DMS's efforts to restrict the ability of dairy farmers to sell directly to processors as well as unlawful agreements between DFA, DMS and major cooperatives not to approach each other's farmers to solicit their business through better prices and services.

¹ [REDACTED]

I. FACTS RELEVANT TO DFA/DMS'S OPPOSITION.

A. DFA And DMS's Anticompetitive Conduct.

It is important to put DFA and DMS's opposition to the Dean settlement in context. The ongoing discovery has established that DFA and DMS have successfully and unlawfully restrained competition for the purchase of milk from farmers in the Northeast. Indeed, for years they have conspired to reduce the competitive options available to Northeast dairy farmers by reaching agreements in which processors limit access to their plants and agree to refrain from competing for the purchase of raw milk directly from farmers. Defendants' anticompetitive actions have also included agreements among DFA, DMS and major cooperatives in the Northeast not to approach farmers that are members of participating cooperatives to solicit their business through better prices, services or other terms for their milk. If contacted by a farmer member of a co-conspirator, they will alert the co-conspirator before even visiting the farm involved (an action which puts the farmer at risk of retaliation). This is a per se violation of the antitrust laws.²

In recent deposition testimony, Agri-Mark's Senior Vice President of Membership, Robert Stoddart, was asked whether he has "ever told anyone that Agri-Mark has an unwritten agreement with other co-ops not to solicit" and responded "I may have, sure." Ex. C, Jan. 24, 2011, Deposition of Robert Stoddart at 49:15-20. He testified that after learning DFA was soliciting business from farmers supplying milk to Agri-Mark, he contacted Jim Kelleher, head

² See, e.g., Ex. B, Dept. of Justice, Competitive Impact Statement, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 at 6-7 (D.D.C. Sept. 24, 2010). Although there are some circumstances in which the per se rule is not applied, in order to be lawful such an agreement must also be narrowly tailored and a necessary or intrinsic part of precompetitive collaboration. At trial, Plaintiffs will prove that these legal prerequisites are not met here.

of membership for DMS, DFA and Dairylea. These senior executives confirmed that they would not solicit business from members of the other cooperatives and, if approached by farmers in those cooperatives, would alert each other before visiting the farm involved.³ This agreement remains in force today:

- Q: And just to be clear, when farmers have approached you in the past year, you've communicated those approaches to Mr. Kelleher [of DFA, Dairy Lea and DMS]?
- A: Yes.
- Q: And is the same true with St. Albans?
- A: Yes.
- Q: And has Mr. Kelleher made the same communications to you?
- A: Yes.
- Q: And has Mr. Gates [of St. Albans]?
- A: Yes.
- Q: So as far as you know, in terms of non-solicitation and informing the other co-ops when a farmer approaches you, DFA, Dairylea, Agri-Mark and St. Albans are all adhering to this understanding?
- A: I believe so.
- Q: And you believe that in part based on your communications with Mr. Kelleher over the past year?
- A: Yes.⁴

This agreement has been confirmed by one of Agri-Mark's Directors, Merrill Reynolds, who testified that Stoddart disclosed this agreement to him after (mistakenly) being informed

³ See Stoddart Dep. at 55:15-22 ("Q: Did you ask Mr. Kelleher to confirm that DFA was not going to solicit Agri-Mark farmers? A: I did that, yeah. Q: And did Mr. Kelleher confirm that that was the case? A: He did."); *id.* at 76:17-22 ("Q: So you agreed that if a farmer from Dairylea approached Agri-Mark, that you would let Mr. Kelleher know that that had happened? A: Yeah, I'd call him and let him know, sure."); *id.* at 78 (testifying that he contacted the Vice President of Membership at St. Albans, who then agreed to follow the same practice); *id.* at 84-85 (testifying that Kelleher of DFA, Dairy Lea and DMS "agreed" to follow this practice); *id.* at 131-32. At his deposition, Stoddart contended that this "unwritten agreement" was consistent with Agri-Mark's own policies. At trial, Plaintiffs will show the actions taken by co-conspirators to reach, confirm and implement agreements on these competitive restraints.

⁴ Stoddart Dep. at 91:16-92:15.

that Reynolds was approaching farmers on Agri-Mark's behalf. Stoddart informed him that "we have an unwritten agreement that we don't approach ... any other members of any other co-ops" and "if anybody approaches you like that, the first thing I want you to do is call me and I will call the co-op." Ex. D, Jan. 27, 2011 Deposition of Merrill Reynolds (Vol. 1) at 49:7-10, 50:13-15.⁵ The existence of this unwritten agreement was disclosed to the Agri-Mark Board of Directors in November 2009, one month after this lawsuit was filed:

- Q: Well, when Mr. Stoddart discussed the unwritten agreement with other co-ops at the November 2009 board meeting was there any discussion about what other co-ops he had reached that agreement with?
- A: I believe all of – I believe all of the co-ops, you know, they – and I don't know. I wondered who made the agreement and who agreed with it or whatever ... I don't know who instigated it but they were all on the deal, you know, or on the agreement ... or whatever you want to say.
- Q: Does that include Dairy Lea?
- A: Correct.
- Q: Does it include DFA?
- A: Correct.
- Q: Does it include St. Alban's?
- A: Correct.
- Q: And you learned that from your dealings with Mr. Stoddart?
- A: Yes.

Reynolds Dep. at 116:14-117:15. Reynolds also discussed the competitive consequences:

- Q: So does that mean that you can't as a member of the Agri-Mark Board of Directors approach a farmer and offer them a better price?
- A: That's right. I'm supposed to – if they instigate it, then I can

⁵ See Reynolds Dep. (Vol. 1) at 52:22-54:3 ("Q: Well ... what was your understanding of the unwritten agreement ... with Mr. Gates and Mr. Kelleher based on what Mr. Stoddart was telling you? A: Well, it was simply like we're saying, you don't go see my farmer, and I won't go see yours. Q: Did you feel like an agreement like that was appropriate? A: No. ... [I]n my opinion, we have free marketing in this country. I believe in it, I believe in competition, so it was not [what] I have been trained to do [in business] or been educated to do [in] business.").

follow it up.

Q: But you're not allowed to initiate [it] yourself?

A: No.

Q: ... Can you initiate contact and offer better services?

A: Not the way the policy's written. They have to come to me first.

Q: And you remember [DFA's counsel] asking you about the various advantages in being associated with Agri-Mark?

A: Yes.

Q: Can you as a member of the Board of Directors, are you allowed to approach a farmer and initiate a discussion about those advantages?

A: Only if he comes to me first.

Q: ... [A]re field representatives allowed to do that?

A: No.

Q: ... [A]re field representatives allowed to approach farmers and offer them better prices?

A: No A field rep would have to be contacted by the office or by myself and tell them to go to a farm.⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

. Similarly,

⁶ Ex. E, Feb. 25, 2011 Deposition of Merrill Reynolds (Vol. 2) at 315:9-316:19. Mr. Reynolds' testimony described a board resolution adopted by Agri-Mark following Mr. Stoddart's presentation that memorialized the non-solicitation policy. *See also* Reynolds Dep. (Vol. 1) at 48:18-21 (Stoddart indicated "that one co-op would not approach another person, another co-op member, that you leave my members alone, I'll leave yours alone"; *id.* at 52:13-21 ("Q: So ... Mr. Stoddart told you that there was an unwritten agreement with – with Mr. Kelleher and with Mr. Gates – that nobody would be soliciting farmers ... that were supplying [milk] to these other co-ops, is that the gist of it? A: Correct."); *id.* at 76 (testifying that this was "collusion"); *id.* at 76:21-22; *id.* at 88:18-89:11; *id.* at 90-96 (discussing the potential "repercussions" and "jeopardy" for a farmer if his or her cooperative is alerted that he or she has approached another cooperative); *id.* at 104:6-105:6.

farmer David Fitch has testified that DFA reached an agreement with independent processor Marcus Dairy that it would not solicit milk from any DFA farmer members. Ex. G, Dec. 21, 2011 Deposition of David Fitch at 41-42. [REDACTED]

[REDACTED] Through these and other actions, DFA and DMS have limited options available to farmers and restrained competition. These restraints are unlawful and decidedly against the best interests of farmers.

B. DFA And DMS's Response To Negotiation Of The Dean Settlement.

In December 2010 – after fourteen months of litigation, extensive briefing of the legal issues and significant discovery, the Plaintiffs successfully negotiated the settlement with Dean. The settlement is uniformly supported by the class representatives.⁷

⁷ In challenging the involvement of the class representatives, Defendants have simply cherry-picked selected portions of the testimony while disregarding all testimony contradicting their position. For example, Plaintiff Alice Allen explained that the Plaintiffs discussed the potential settlement in early November and “discussed it with our attorneys. They discussed it at length with us, with the plaintiffs.” Ex. H, Jan. 14, 2011, Deposition of Alice H. Allen at 175:7-9. *See also id.* at 175-76 (discussing conference call with Garrett Sitts, Ralph Sitts, Jonathan Haar and Claudia Haar and other telephone calls). Ralph Sitts testified that he and other Plaintiffs participated in a conference call about the potential settlement in early November while it was being negotiated. Ex. I, Jan. 19, 2011, Deposition of Garrett Sitts at 162:15-16. He also participated in extensive discussions about the settlement terms. *Id.* at 161-63, 162:15-16. (discussing calls that “went from anywhere to a half hour to some of them well over two hours”). Jonathan Haar was deposed two months after the November discussion and the context of the questions he was asked concerned actions he took to evaluate the settlement “independent of any discussion that you would have had with your counsel” Ex. J, Jan. 12, 2011 Deposition of Jonathan Paul Haar at 305:15-16. Mr. Haar explained the reasons the settlement is beneficial to all class members. *See id.* at 314:7-12 (“It’s my belief based on the Complaint that the conspiracy suppresses the price of milk across the board. So anything that we can do to break that up will have a benefit to every member of the Class, DFA and otherwise”); *id.* at 324:14-16, 18-21 (explaining that settlement agreement allows farmers to sell to plants through DFA/DMS, that DMS and DFA have “substantial interest[s] throughout the region . . . that would negate or mitigate some of, it not all of” the concerns raised by defense counsel, and “anything that can be done to dissemble the conspiracy would have the added effect of heightening

(continued on next page)

Both before and after filing objections to the Dean settlement, DFA/DMS have pursued a strategy of telling farmers that the allegations in the lawsuit are baseless and warning of purportedly dire consequences from the Dean settlement. This campaign is described in Plaintiffs' Omnibus Opposition to the motions to intervene (filed today). DFA, DMS and Dairylea (one of DMS's owners) have aggressively tried to drum up opposition to the settlement through direct mailings, personal contacts, press releases and other media contacts. For example:

- DMS and DFA have communicated through direct contacts and press releases that – notwithstanding Dean's agreement to pay \$30 million to resolve the antitrust claims against it – the lawsuit “has no merit”; the allegations are “not true”; and there were “no grounds to file the lawsuit ... in the first place.”
- In doing so, DFA and DMS have not disclosed any of the underlying factual record in the case to contacted farmers and, to the contrary, have – as they did in the *Southeastern Milk Antitrust Litigation* – “insisted” on a protective order that “shields a large volume of documents related to the issues ... from public view and from the view of the putative class members.” *Southeast Milk*, 2009 WL 347130, at *4.
- DFA and DMS have repeatedly told farmers that the “per-farmer” award of \$2,500 is “highly exaggerated” and the average farmer will instead receive only \$1,500.” DFA/DMS knows – or have every reason to know – that this misrepresents the settlement and, in fact, the actual recovery for farmers will almost certainly be substantially greater than \$2,500.
- Although the amount and reasonableness of any fee award will be determined by the Court, DFA/DMS have repeatedly led farmers to believe that plaintiffs' counsel are “definitely getting 10 million” (Ex. K, Feb. 25, 2011 Deposition of Reg O. Chaput at 42), and apparently have not disclosed the role of the Court in evaluating and determining the amount of any fee award.
- DFA and DMS have engaged in scare tactics by telling farmers and the media that the

competition among processors and thereby lifting the price” paid to farmers). In view of Defendants' comments about Mr. Haar, the Court should also be aware that counsel has had communications with the Haars about the case on virtually a weekly basis (and often more frequently) for months and both Mr. and Mrs. Haar have driven to and from Washington, D.C. on three separate occasions during that period in connection with the case.

settlement will cause farmers “to incur financial damages”; will cause “price erosion for all dairy farmers”; and this will have a “negative impact on farmers’ wallets.”

See Pls’ Omnibus Opp. to Mots. to Intervene at 4-6 (filed concurrently) (and exhibits cited therein).

II. THE FINANCIAL TERMS OF THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.

A. DFA And DMS Lack Standing To Object to Dean’s Financial Payment.

The proposed settlement provides that Dean will pay \$30 million to settle the claims against it. DFA and DMS, as non-settling parties, do not have standing to object to the financial terms of this settlement. *Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir. 1993); see, e.g., *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979) (noting non-settling party’s concession that it lacked standing to challenge the settlement itself or the monetary adequacy of the settlement). Standing is a “threshold determination,” *Warth v. Seldin*, 422 U.S. 490, 518 (1975), and the party asserting standing must prove that it satisfies standing requirements.⁸

It is well established that non-settling defendants ordinarily lack standing to object to a partial settlement of the case by other defendants. *Zupnick* 989 F.2d at 98; accord *Conte & Newberg, Newberg on Class Actions* §11:55 (4th ed. 2002) (“nonsettling defendants in a multiple defendant litigation context *have no standing to object to the fairness or adequacy of the settlement by other defendants*, but they may object to any terms that preclude them from seeking indemnification from the settling defendants”) (emphasis added). “This rule advances the policy of encouraging the voluntary settlement of lawsuits.” *Zupnick*, 989 F.2d at 98

⁸ See, e.g., *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995) (“The burden to establish standing remains with the party claiming that standing exists”).

(quoting *Waller v. Fin. Corp.*, 828 F.2d 579, 583 (9th Cir. 1987); see also *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (adopting this rule and explaining that “[i]n complex litigation with a plaintiff class, ‘partial settlements often play a vital role in resolving class actions’”) (quoting 1-Part A Manual for Complex Litigation Second, Moore’s Federal Practice §30.46 (1986)).⁹

A limited exception has been recognized that permits a non-settling party to challenge a term that causes it “formal legal prejudice.” This narrow exception is inapplicable here:

A settlement that does not divest non-settling parties of their legal claims or prevent the assertion of those claims does not constitute legal prejudice to the non-settling parties. In practice, *such prejudice has only been found to exist in rare circumstances*, such as when the settlement agreement strips a non-settling party of a claim for contribution or indemnification, or invalidates a non-settling party’s contract rights.

Armco Inc. v. North Atl. Ins. Co., 1999 WL 173579, No. 98-6084 at *1 (S.D.N.Y. Mar. 29, 1999) (emphasis added). See also *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, MDL No. 1446, 2008 WL 2566867, at *4 (S.D. Tex. June 24, 2008) (“‘Plain legal prejudice’ is narrowly construed and occurs *only* when a partial settlement deprives a non-party of a substantive right.”). “[C]ourts have repeatedly held that a settlement which does not prevent the later assertion of a non-settling party’s claims, although it may force a second lawsuit against the dismissed parties, does not cause plain legal prejudice to the non-settling party. Mere allegations

⁹ *Accord In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1165 (5th Cir. 1985); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983).

of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice.”¹⁰

There is no plausible basis for DFA or DMS to argue that this standing requirement is met here. The settlement’s financial terms of the Dean settlement do not cause them “formal legal prejudice” or preclude them from raising any legal claim or defense. Accordingly, they lack standing to object to these terms.

B. DFA And DMS’s Claim That There Is A Conflict Regarding The Financial Terms Of The Settlement Is Baseless.

Although DFA/DMS’s lack of standing is a “threshold” issue that is dispositive of their challenge to the financial terms of the settlement, even if one assumed *arguendo* that this were not the case, their assertion of a theoretical conflict is baseless. DFA/DMS’s hypothesis is incorrect and contradicted by the record at multiple levels.¹¹

First, the putative class has a shared interest in achieving the most favorable settlement with Dean that is possible. The entire class will share in the financial payment made by Dean.

¹⁰ *Agretti*, 982 F.2d at 247. See, e.g., *Bass*, 749 F.2d at 1165 (adopting general rule against objections by non-settling defendants and explaining that “[w]e fail to see, however, why a plaintiff should be foreclosed from voluntarily settling with one defendant on mutually agreeable terms simply because those terms remove plaintiff’s economic incentive to settle with the other defendants. That, it seems to us, is a consequence that may well flow from *any* settlement with less than all defendants.”); *Quad/Graphics*, 724 F.2d at 1230.

¹¹ In fact, the theoretical conflict asserted by the Defendants is contradicted by their own actions in having a single set of defense lawyers representing both DFA and DMS. Of course, this creates obligations to both DFA and DMS and Defendants’ counsel might have to consider whether a settlement for one of the Defendants should be pursued or accepted without regard for its impact on the remaining defendant. Defendants clearly do not believe this “power to choose” (to use their terminology) raises any actual conflict in this case.

Maximizing that settlement increases the recovery for the entire class, and reduces both the expenses and uncertainties associated with continued litigation. To assert, as DFA/DMS does, that it is not the goal of the entire class and counsel to secure the best outcome against Dean that is reasonably achievable is nonsensical and simply disregards the zealous efforts that have been made to accomplish this throughout this litigation.

Second, DFA/DMS have not made *any* effort to show that the amount of the financial settlement with DFA/DMS is not fair, reasonable and adequate. In fact, DFA/DMS lengthy submissions do not include any analysis of the facts – Dean’s market share¹²; Dean’s financial circumstances¹³ or other factors – to support a claim that the amount of the financial settlement with Dean is insufficient or unreasonable.

Third, as noted, we believe that the financial terms with Dean are the largest reported antitrust settlement in the history of Vermont. This has been accomplished in a case that DFA/DMS insists “has no merit” (a position that is reiterated in its Opposition to Plaintiffs’ Motion for Preliminary Approval at 17 n.7). There is no basis for DFA/DMS to take the position that this case is meritless and “should never have been filed,” and simultaneously assert that the Plaintiffs are not adequately representing the class in achieving a financial settlement with Dean of historical significance.

¹² Although information in the public record suggested that Dean’s market share was on the order of seventy percent, confidential discovery in this case has indicated that Dean’s actual market share is substantially smaller.

¹³ (See Dkt. No 192, Jan. 18, 2011 Mot. to Intervene and for Access to Unredacted Documents at 10 (argument by proposed Maine intervenors regarding Dean’s financial circumstances).)

Fourth, DFA/DMS's theorizing is also contradicted by its own testimony and affidavits. Despite DFA/DMS's considerable effort to prepare those filings, the various declarations submitted by DFA/DMS (or other counsel retained by DFA, DMS or Dairylea for the intervenors) are noticeably absent of any claims – other than a few conclusory statements – that the financial terms of the settlement are too small. In fact, depositions of these affiants revealed little or no concern about the financial amount of the settlement (other than one objection that it was *too much*). See, e.g., Ex. L, Feb. 28, 2011 Deposition of Todd A. Hathorn at 75-77 (indicating that he does not know what an appropriate settlement amount would be and has not considered the matter); Ex. M, Feb. 28, 2011 Deposition of David S. Rudd at 99 (testifying that the dollar amount of the settlement does not concern him); Chaput Dep. at 61 (testifying that he has no opinion regarding whether the cash portion of the settlement is too little or too much); Ex. N, Feb. 28, 2011 Deposition of Everett Lee Ramsburg at 49:8-9 (testifying that he “didn’t really dwell on the cash portion” but believes the amount is too large).

Fifth, DFA/DMS's theory is not only unsupported and contradictory, it would – if accepted – have implications that are squarely at odds with the Second Circuit's strong policy favoring early settlement of litigation, particularly complex class action cases. In essence, DFA/DMS is telling the Court that based on an entirely theoretical conflict (and one that is contradicted both by DFA/DMS's own position and the record), the Court cannot approve any financial settlement with Dean until such time, if any, that DFA and DMS have settled first. DFA/DMS have made no showing that would support such a draconian conclusion, which would undermine both the strong policy favoring settlement and the best interests of the class.

Finally, to the extent DFA/DMS is suggesting – and this is clearly the subtext of its argument – that a class action cannot proceed against DFA/DMS, that argument is both

premature and legally incorrect. Contrary to DFA/DMS's suggestion, there is substantial law holding that plaintiffs with equity interests in a defendant may proceed as part of a class with non-equity plaintiffs and/or proceed against multiple defendants (even though settlement with one of the defendants would always open up the "hypothetical conflict" that DFA/DMS now asserts).¹⁴ This, however, is an issue that can be resolved at the appropriate time in connection

¹⁴ In derivative shareholder suits involving subsets of plaintiffs who hold equity interests in defendant companies, courts have routinely rejected the argument that "suing yourself" is a conflict barring certification, approving settlements where some subset of the class members "owns" a portion of the defendant and could, theoretically, be described as "funding" some portion of the settlement. *See, e.g., Walsh v. Chittenden Corp.*, 798 F. Supp. 1043, 1054 (D. Vt. 1992) (rejecting argument that class plaintiff's ownership of stock in defendant creates a conflict preventing class certification because prevailing against defendant might drive down stock price). In these situations, courts have determined that the personal interest of class members, as a rule, outweighs any concern about damage to the defendant-entity as a whole. *See Herbst v. Int'l Tel. & Tel. Corp.*, 495 F.2d 1308, 1314 (2d Cir. 1974) ("we do not perceive any conflict of interest between those who have retained their ITT shares and those who have since sold them. The personal interest of those who still hold ITT stock in gaining more from the exchange than they did far outweighs their concern that any award could damage ITT").

Although DMS/DFA attempts to shoehorn *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997) here, there are obvious differences. In *Amchem*, the Court's concern was that the settlement at issue posed myriad problems for a class that included "untold numbers" of individuals who had been exposed to asbestos occupationally, had been exposed as a result of a household member's occupational exposure, or whose spouse or family member had been so exposed, but had not manifested any actual illness. *Id.* at 602-03. This group presumably could have included many hundreds of thousands, or more likely millions, of workers, family members and other household members. In agreeing with the Third Circuit that a settlement including this group should not have been certified, the Court recognized the "highly problematic" nature of settling claims for a group that (a) "may not even know of their exposure, or realize the extent of the harm they may incur"; (b) included large numbers of family members that could fall prey to the disease or have claims for loss of consortium as some time in the future, but "could not be alerted to their class membership" and (c) settled these highly uncertain future claims in a manner that "includes no adjustment for inflation," allowed "only a few claimants per year [to] opt out at the back end"; and [extinguished] the loss-of-consortium claims "with no compensation." *Id.* at 627-28. This does not remotely resemble the situation presented here.

with certification of a class against DFA/DMS.¹⁵ The immediate issue is simply whether the financial settlement with Dean is fair, reasonable and adequate, and DFA/DMS have not made *any* showing that would warrant denial of preliminary approval of those terms.

III. THE INJUNCTIVE RELIEF IN THE DEAN SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.

DFA/DMS's primary objection to the proposed settlement pertains to a provision in which Dean agrees to open up at least ten percent of its milk purchases to sales from farmers who choose to sell to Dean directly or through entities other than DFA/DMS. This settlement with Dean – which by its nature can only address issues related to the Dean plants – is designed to open up the Dean plants and increase competition for purchasing milk from farmers by Dean.

A. DFA And DMS Do Not Have Standing To Challenge The Injunctive Relief.

For the same reasons set forth above, DFA and DMS – as non-settling parties – do not have standing to challenge the injunctive relief in Section 9.2 of the proposed settlement. To establish standing, DFA and DMS would have to prove the “rare circumstances” where a non-settling party will experience “formal legal prejudice.” They have not remotely met this burden.

¹⁵ There is, in fact, substantial evidence that DFA is a multi-billion dollar organization whose operations include dozens of joint ventures; DFA claims that those joint venture investments have more than \$1 billion in Cash/Value undistributed gains; these joint venture investments did not come from farmer money and any gains from them are not becoming farmer money; DFA has made very large payments to these sources in the past and denied under oath that the use of these funds “came out of the equity of DFA members” or otherwise diminished DFA member monies; DFA has testified that earnings do not belong to members until they are “allocated” at the “discretion of the board” and they are not the farmers’ “entitlement.” See Ex. O, PX 1965 (Herbein Schedule); Ex. P, July 14, 2009 SE Milk Deposition of David Meyer at 198:12-199:15; Ex. Q, Jan. 28, 2010 SE Milk Deposition of Joel Clark at 63:8-22, 64:17-65:5. These are not, however, issues the Court need resolve now.

Revealingly, DFA/DMS do not even address the threshold issue of standing until the very end of their brief. Their brief cites only *three circumstances* in which a non-settling defendant has been deemed to suffer “formal legal prejudice” sufficient to confer standing:

- “[A] partial settlement ... purports to strip [the non-settling defendant] of a legal claim or cause of action ...”
- “[A] partial settlement ... purports to strip [the non-settling defendant] of ... an action for indemnity or contribution ...”
- “[A] settlement invalidates the contract rights of one not participating in the settlement.”

Dkt. No. 188, DFA/DMS Opp. to Pls’ Mot. for Prelim. Approval of Settlement at 23 (citations omitted).

There is **no** evidence that any of these conditions are met here. DFA and DMS have not submitted the barest evidence that Dean is not fully entitled to take the steps it has agreed to. Although DFA/DMS are obviously aware of their contractual rights vis-à-vis Dean, they have submitted nothing that would support the conclusion that any of their contractual rights with Dean have been violated, nor do they even argue that they have been. They also fail to cite a single case that has ever conferred standing outside of the “rare” and specific circumstances set forth above, let alone in circumstances that are remotely similar to those asserted by DFA/DMS here. In short, DFA/DMS have not met and cannot meet their burden to establish standing.

Indeed, the kind of “injuries” asserted by DFA/DMS are precisely the sort that do *not* confer standing on a non-settling party. DFA/DMS’s claims of adverse “marketplace consequences” would, even if true, merely establish an injury in fact. *See, e.g., Agretti*, 982 F.2d at 247 (“Mere allegations of injury in fact ... as a result of a settlement simply do not rise to the level of plain legal prejudice.”); *Quad/Graphics*, 724 F.2d at 1234 (fact that defendant would incur “additional expense” or otherwise suffer injuries in fact did not constitute plain legal

prejudice); *Mayfield v. Barr*, 985 F.2d 1090, 1093 (D.C. Cir. 1993) (plain legal prejudice occurs when “the settlement strips the party of a legal claim or cause of action”). This is not sufficient to confer standing and DFA/DMS fail to cite a single case that has ever found that it does.

B. The Injunctive Terms Are Fair, Adequate And Reasonable.

In the proposed settlement, Dean has agreed to compete for the purchase of milk by agreeing to make offers to purchase at least ten percent of its milk in Order 1 directly from farmers (or other cooperatives), in addition to the milk that Dean purchases through DFA/DMS.¹⁶ In fact, the settlement agreement allows Dean, at its discretion, to continue to purchase up to ninety percent of its milk through DFA/DMS. Nevertheless, DFA/DMS now argue that the introduction of even this level of competition by Dean for the purchase of milk from farmers will cause “price erosion” and have a “negative impact on farmers’ wallets.” Contrary to DFA/DMS’s claims, the competition contemplated by the settlement will benefit farmers in the Northeast in three important ways.

First, there is strong evidence that the introduction of such competition by buyers to purchase milk increases the market price paid to sellers (i.e., farmers). Defendants’ own

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

¹⁶ At its discretion, Dean can purchase larger amounts, but Dean would have that discretion without regard to the settlement.

[REDACTED]

• [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. As explained in the expert declaration of Dr. Richard Sexton, a Professor of Agricultural and Resource Economics at the University of California, Davis, added competition from buyers trying to secure milk from farmers should be expected to increase the prices offered to farmers. *See* Ex. U, Sexton Decl. at ¶¶ 9-14. And, of course, if Dean does not offer better prices than farmers are currently receiving for their milk, no farmer is required by the settlement to accept such an offer and none would be expected to. In fact, defendants' own affiants have acknowledged this.¹⁷ There is nothing in the settlement that compels any farmer to sell to Dean.

¹⁷ *See* Rudd Dep. at 75:12-18 (“Q: If the price that Dean sets is lower than the price it is currently paying, is it your opinion that that will attract farmers who are willing to sell at a lower price? A: No.”); Ex. V, Feb. 22, 2011 Deposition of Edwin Robert Schoen at 93:11-17 (“Q: If Dean Foods offers a lower price for milk to independent farmers would you expect the independent farmers, who don’t market their milk through DMS, to shift their volume to Dean
(continued on next page)

It simply requires Dean to make an offer – an offer than in all likelihood will result in higher prices being paid to farmers but, should it fail to do so, will not require any farmer to accept.

Second, the injunctive provision benefits farmers by offering them greater choice in a market that has been constrained by anticompetitive activities. The settlement agreement does not prevent DFA/DMS from selling the vast majority of milk to Dean plants (and the market in general). But it allows any farmers to pursue a new competitive option – selling directly to Dean – should they choose to do so.

Third, while DFA/DMS may not like competition for their members – and their agreements with other cooperatives not to solicit each other’s members reflects this – such competition is, in fact, highly beneficial to members of the cooperatives. *See, e.g.*, Chaput Dep. at 53:1-4 (testifying that “I don’t think it would harm at all to have more competition ... I mean, that’s Business 101. Competition is good.”). Not only does it afford them greater choice and improved prices, it incentivizes cooperatives to provide better and more efficient services – in short, to compete for farmer business and loyalty. Sexton Decl. at ¶¶ 15-19. [REDACTED]

[REDACTED] While DFA/DMS might prefer to avoid a competitive marketplace, there can be no legitimate dispute that increased competition for their milk is beneficial to dairy farmers.

Foods at this lower price? A: I don’t know that.”); Ex. W, Mar. 1, 2011 Deposition of Bryan E. Davis at 57 (same).

These are benefits to all farmers, whether they are members of DFA/DMS or not.¹⁸ In objecting to this, DFA/DMS elevates the interest of its management (and its desire to be free

¹⁸ Thus, while DFA/DMS rely on the Fifth Circuit's decision in *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000), this case presents a fundamentally different situation. First, in *Pickett*, it was undisputed that the challenged practice benefitted some members of the class (*id.* at 1280); here, the practices at issue *harm* the entire class by suppressing prices. Second, in that case, class members had a choice of whether to benefit from the challenged practice or forego that practice; here, class members have no choice because DFA/DMS have restricted access to the Dean plants and taken other actions to limit farmer options. Third, in that case, the Plaintiffs were seeking to prohibit a practice that benefitted members of the class; under the settlement here, Dean can still purchase the vast majority of its milk from DFA/DMS, if it chooses to do so, but all dairy farmers can alternatively pursue direct sales to Dean. In other words, they are given a choice that is not available to them now. In the other Fifth Circuit case relied upon by DFA/DMS, *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 316 (5th Cir. 2007), the Court did *not* rule that a class could not be certified, but instead indicated that “[i]f a class is certified, the court may have to consider certifying subclasses ...”).

DFA/DMS disregards the teachings of the Second Circuit and other instructive case law. In emphasizing “the powerful policy considerations that favor certification,” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001), the Second Circuit has made clear that “not every potential disagreement between a representative and the class members will stand in the way of a class suit.” “The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisites must be fundamental,” and “*speculative conflict should be disregarded at the class certification stage.*” Courts have applied these general principles with regularity in the area of antitrust.” 280 F.3d at 145 (emphasis added) (citations omitted). *Accord In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556 (S.D.N.Y. 2008). Defendants’ own testimony makes clear that the “conflict” they assert here is, at most, entirely speculative. *See, e.g., supra* note 16 (citing testimony that farmers will not accept offer if Dean’s prices are lower); Chaput Dep. at 102:13 (testifying that “[n]o one knows” what price effect will be).

Courts in the Second Circuit have also recognized that “[i]n actions predicated on the antitrust laws the central issue is the existence of the alleged conspiracy. The object of an antitrust action is the restoration of competition in the industry involved: the fact that some members of the class may differ as to the desirability of a particular remedy for the antitrust violation, or even desire the maintenance of the status quo,” does not preclude class certification. *Jacobi v. Bache & Co.*, No. 70-3152, 1972 WL 560, at *2 (S.D.N.Y. Feb. 8, 1972); *accord Richards v. FleetBoston Fin. Corp.*, 235 F.R.D. 165 (D. Conn. 2006). Numerous courts have
(continued on next page)

from competition) over the interests of farmers. Indeed, this is reflected in the fact that DFA/DMS is opposing the settlement *with or without* the injunctive relief. In other words, even if this relief was severed as Section 9.3 allows, and the settlement simply distributed tens of millions of dollars to farmers, DFA/DMS would still apparently oppose it.

DFA/DMS's claim that if some of Dean's milk is purchased from sources other than DFA/DMS (including any DFA/DMS members who prefer to sell directly to Dean), this will disrupt the market and impose significant costs on DFA/DMS farmers is not only grossly overstated, it is contrary to the facts. If DFA/DMS members choose to sell their milk directly to Dean, there is no need to find a new "home" for this milk. If other farmers supply milk to Dean (instead of their existing purchasers) this frees up locations for DFA/DMS to supply. Because of DFA/DMS's market dominance and the web of locations it supplies, the proposed settlement is unlikely to have any adverse impact on DFA/DMS (let alone their members) other than the incentives it creates to offer *better* prices and services to farmers. *See* Sexton Decl. at ¶¶ 20-26.

In essence, DFA/DMS's position amounts to a claim that opening up Dean's plants to competition for farmers, even to a modest degree, is unacceptable and cannot be a basis for relief. It amounts to a claim that even if competition has been restrained, the Court can take no steps vis-à-vis Dean to address this. At this juncture, the Court need not decide whether such a

also rejected conflict and adequacy of representation arguments where it is clear that the position of any class members who would "prefer to maintain the status quo" will be vigorously asserted by the defendants. *See, e.g., Groover v. Michelin N. Am., Inc.*, 192 F.R.D. 305 (M.D. Ala. 2000); *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982). The Second Circuit has made clear that if fundamental and non-speculative conflicts later arise in litigation, the Court has ample means, such as subclassing, to address any such conflicts. *Visa Check/MasterMoney*, 280 F.3d at 145; *accord In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 37 (2d Cir. 2009).

draconian view is correct. For purposes of preliminary approval, DFA/DMS do not dispute that the Court's responsibility is not to decide who is right and who is wrong. The issue is whether the proposed settlement "falls within the range of possible approval." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).¹⁹ Preliminary approval allows the settlement to move forward – and notice to be sent to all farmers as well as relevant antitrust enforcement authorities – so that the appropriateness of the injunctive term can be evaluated at the fairness hearing. That result is dictated not only by public policies favoring settlement, but also by the historical facts, sound principles of economics and the strong belief – at the heart of the antitrust laws – that greater competition is beneficial.

C. Even Assuming *Arguendo* The Injunctive Terms Were Not Approved, The Proposed Settlement Explicitly Provides That Those Terms Are Severable.

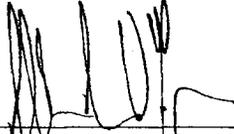
As we have explained, there is substantial reason to conclude that opening up the Dean plants to greater competition is beneficial to all farmers in the Northeast. The proposed settlement further protects the class, however, by including a severability provision to make clear that if the injunctive relief is not approved for any reason, the proposed settlement is still agreed

¹⁹ See also *Torres v. Gristede's Operating Corp.*, No. 04-3316, 2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010) (preliminary approval "is the first step in the settlement process" and "allows notice to be issued [in the case] and for class members to object to or opt-out of the settlement"; in exercising discretion regarding approval "courts should give 'proper deference to the private consensual decision of the parties' and their unique ability 'to assess the potential risks and rewards of litigation'"; preliminary approval should be granted if settlement "appears to fall within the range of possible approval"); *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 125786 (S.D.N.Y. Mar. 12, 2010) ("Preliminary approval of a class action settlement 'is not tantamount to a finding that the settlement is fair and reasonable.' In fact, 'a full fairness analysis is neither feasible nor appropriate' when evaluating a proposed settlement agreement for preliminary approval.") (citations omitted).

to by the parties and should go forward based on the settlement's financial terms.²⁰ This provision, not even mentioned in DFA/DMS's opposition, protects the class in the following way. Plaintiffs believe the competition introduced by Section 9.2 benefits the entire class. But if the Court were to reach a contrary conclusion, this should not defeat the policies favoring class settlements or deny the class the financial benefits the settlement provides.

As we have explained above, even the affidavits submitted by DFA/DMS (or the associated intervenors) do not seriously take issue with the amount of the financial settlement (and, if anything, suggest it is *too large*). Instead, DFA/DMS argue – incorrectly – that the value of this \$30 million settlement will be offset by purported costs associated with Section 9.2. Even if that were correct, and it is not, the appropriate course would be to permit the proposed settlement to go forward on the basis of its financial terms, which further the strong public policy favoring settlement and provide a very substantial financial recovery for the class.

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²⁰ Section 9.3 of the agreement provides that “[t]he term in Section 9.2 of this agreement regarding Settling Defendant’s procurement of milk are severable from the other consideration provided in this agreement. If those terms are modified or abrogated in any manner by agreement of the Parties, or order of any Court, including being held to be invalid, illegal or unenforceable in any respect the Parties have agreed that the settlement can otherwise go forward and all other terms of this settlement shall remain in effect, and such modification, abrogation, invalidity, illegality or unenforceability shall not affect any other provisions of this agreement.”