

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.)

v.)

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

Defendants.)

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

HIGHLY CONFIDENTIAL -
SUBJECT TO PROTECTIVE
ORDER

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR CLASS CERTIFICATION

[FILED UNDER SEAL]

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DFA and DMS have knowingly and unlawfully conspired to fix prices, allocate markets and suppress competition. In opposing class certification, DFA/DMS now take the position that this unlawful conspiracy can be challenged only on a farmer-by-farmer basis in countless individual lawsuits. The position is not only contrary to prevailing law, it is also directly at odds with DFA/DMS's recent representations to the Court that they are "not saying there can't be any class" or that "there can't be a class against us," but are merely challenging the structure of the class. April 15, 2011 Hr'g Tr. at 66. It is meritless for the following reasons:

First, the case law strongly supports the conclusion that class certification is appropriate in a case challenging an unlawful conspiracy to suppress prices and restrain competition. In trying to compartmentalize the challenged conspiracy and require each farmer to pursue relief in an individual case, DFA/DMS's position is contrary to the great weight of legal authority.

Second, DFA/DMS's efforts to defeat class certification (which they know would effectively preclude farmers from being compensated for their injuries) substantially repeat arguments they have unsuccessfully urged in the past. Notably, DFA/DMS's opposition brief scarcely mentions the rejection of very similar arguments in the *Southeastern Milk* litigation:

- In *In re Southeastern Milk Antitrust Litigation*, 2010-2 Trade Cases ¶ 77,287, 2010 WL 3521747 (E.D. Tenn. 2010), the Court rejected arguments by DFA/DMS about the predominance requirement, finding that the plaintiffs' case raised "common issues" regarding the "existence, scope and extent of the alleged conspiracy, and the predominance requirement is met." *Id.* at *10.
- Defendants then filed an appeal of the class rulings pursuant to Fed. R. Civ. Pro. 23(f). The Sixth Circuit declined to review the class certification rulings. (*Southeastern Milk*, No. 10-0504, 6th Circuit Order, Mar. 11, 2011).
- In this Court, DFA/DMS again raised various class certification challenges in connection with the Dean settlement. The Court certified the class for purposes of the Dean settlement. Dkt. 297 at 12-16.

Third, in trying to force injured farmers to proceed in individual actions, DFA/DMS disregard “the powerful policy considerations that favor certification.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001). As this Court’s preliminary approval ruling explains, “[c]lass action litigation in this case avoids multiple trials on the same claims in multiple forums with the possibility of inconsistent results. Conservation of judicial resources favors class action litigation, both on the questions of liability and damages.” Dkt. 297 at 15. The same considerations support certification here.

I. THE PREDOMINANCE REQUIREMENT IS SATISFIED.¹

The Supreme Court has explained that predominance is a test “readily met” in cases alleging “violations of the antitrust laws.” In its May 4, 2011 decision, this Court explained that the “‘predominance’ requirement is met ‘when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member’s individual position.’” Dkt. 297 at 13 (quoting *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 307 (E.D. Mich. 2001). See also *id.* at 13-14 (ruling that in connection with Dean settlement class, “there are sufficient common questions of fact and law to satisfy the requirements of Rule 23(a)(2) and 23(b)(3)”). The predominance requirement “is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.” *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 515, 517 (S.D.N.Y. 1996).

¹ DFA/DMS’s opposition makes arguments regarding the predominance standard in Rule 23(b) and largely repeats its earlier arguments relating to adequacy of representation under 23(a)(4). It does not dispute that the other requirements for class certification are met (except for a footnote suggesting that its 23(b) and 23(a)(4) arguments are relevant to a superiority analysis).

A. Plaintiffs' Conspiracy Claims Are Based on Common Proof.

This case challenges a conspiracy to fix prices, restrain competition and monopolize/monopsonize the market at issue. *See* Dkt. 297 at 13. This is a quintessential case for certification of a class. As this Court explains, “[n]umerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2).” *Id.* at 13. *See also id.* at 13-14 (finding that these common questions also satisfy predominance standard); 6 *Newberg on Class Actions* § 18.26, at 18-83 to 18-86 (4th ed. 2002) (“in antitrust [cases], the issues of conspiracy, monopolization and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement”).²

All of the evidence to prove Defendants’ antitrust violations will be common to the Class because it focuses on the actions of the Defendants – in particular, the nature, scope and implementation of the conspiracy – rather than the actions of individual Class members. Such evidence “will not vary among class members” and will be substantial in comparison to the evidence presented at trial on the other elements of Plaintiffs’ claims, establishing that common issues predominate and certification is warranted. *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 279 (S.D.N.Y. 1999); *Sebo*, 198 F.R.D. at 314.

² Case law strongly supports this. *In re Southeastern Milk Antitrust Litigation*, 2010 WL 3521747, at *10 (allegations of price fixing conspiracy and other allegations “of a per se violation of the antitrust laws are exactly the kind of allegations which may be proven on a class wide basis through common proof. . . . The same is true with respect to plaintiffs’ monopolization/monopsonization claims.”); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 635 (D. Kan. 2008) (“horizontal price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions”); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 411 (S.D. Ohio 2007) (“the existence, scope, and extent of the alleged conspiracy -- predominate over potential individual damage issues”); *In re Ruber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005); *Sebo v. Rubinstein*, 188 F.R.D. 310, 314 (N.D. Ill. 1999); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993).

DFA/DMS's opposition brief tries to re-characterize the case and minimize the allegations of price-fixing. In doing so, they disregard not only the facts in the record, but the clear teachings of the Supreme Court. It is hornbook law that such "compartmentalization" of the "factual components" of Plaintiffs' conspiracy claims is improper. *Cont'l Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); accord *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002); *In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1563 (8th Cir. 1989).³ Three points bear emphasis:

First, contrary to DFA/DMS's suggestion, this is a horizontal price-fixing case.⁴ Defendants have agreed to suppress the price that will be sought *from processors* as well as the price that conspiring cooperatives pay out to farmers.⁵ For example:

³ In fact, DFA/DMS go a step further than simply trying to compartmentalize the actions taken to implement the conspiracy. They argue that because only one of the legal counts in the complaint is a "price fixing" count (even though every count incorporates the price-fixing allegations) this is not *really* a price-fixing case. This formalistic "claim counting" disregards the importance of this conduct to the conspiracy (and resulting suppression of prices) and is directly at odds with the decisions of the Supreme Court.

⁴ Two other points raised by DFA/DMS require only brief comment. First, DFA/DMS's argument that vertical price fixing is subject to the rule of reason, disregards the fact that the record demonstrates that DFA/DMS have engaged in *horizontal* price fixing both with respect to prices charged to customers (processors) and payments to farmer-suppliers. Second, although it is premature to address issues regarding the Capper-Volstead Act at this juncture, the record clearly shows that DFA/DMS's anticompetitive activities are not protected by the Act.

⁵ Much of the testimony about GNEMMA was completed after the original class certification memorandum. Although defendants trumped the fact that GNEMMA only "announces" an over-order premium for a portion of the market, this is a distinction without a difference for purposes of antitrust analysis.

See Rebuttal Declaration of Gordon Rausser, Ph. D. Regarding Class Certification ("*GR Rept.*") at ¶¶ 90-97 (attached as Ex. A).

- DFA/DMS and the other cooperatives that participate in GNEMMA control approximately 75% of the market for the sale of raw Grade A milk in the Northeast, Ex. C @ 82-90; Ex. D @ 22-23, [REDACTED] Ex. E @ 78.
- [REDACTED]⁶
- GNEMMA members have monthly hour conference calls to “discuss prices for raw milk in the Northeast” and “in particular . . . discuss over-order premiums or handling charges for different classes of milk in the Northeast that they’re charging to their processor customers.” Dep. of Greg Wickham, May 20, 2011 (“Wickham Dep. v.2”) 131:8-17; 136:4-15, Ex. G.⁷
- [REDACTED]⁸
- [REDACTED]⁹ They do so even though senior officials acknowledged that

⁶ See, e.g., [REDACTED]
⁷ See, e.g., [REDACTED]
⁸ See, e.g., [REDACTED]

[REDACTED]; Wickham Dep. v.2 146:11-20, Ex. J (Wickham obtained information from processors and discussed it with GNEMMA members so that they could reach a “final decision . . . directionally and time wise” about whether to increase prices); at 151:12-154:7, Ex. K (GNEMMA members discussed market information in order to reach a “final decision” and a “consensus” regarding pricing); at 169:19-22, Ex. L (GNEMMA members met and “reached a consensus that the timing wasn’t right for a price increase”); *id.* at 170:15-19, Ex. M (admitting that after “GNEMMA , consensus was reached . . . DFA, Dairylea and DMS did not go out in the marketplace and seek a price increase”); Ex. N @ 45.

⁹ See, e.g., [REDACTED]
[REDACTED]; Ex. R; Wickham Dep.

this pricing information is highly confidential and should not be shared with competitors and [REDACTED] make clear that such activities are unlawful. *See, e.g.*, Dep. of Greg Wickham, May 19, 2011 ("Wickham Dep. v.1") 85:9-89:1, Ex. W; Ex. B @ 31.

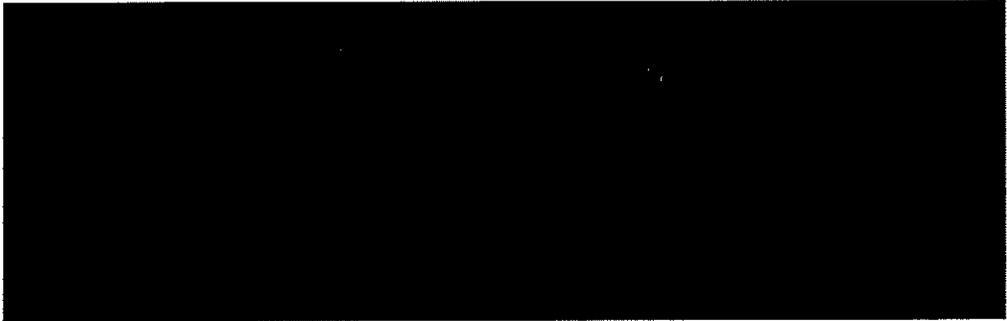
Second, these efforts to fix and suppress prices are part and parcel of Defendants' continuing conspiracy to restrain competition. The record establishes that DFA and DMS have taken numerous steps to implement and enforce this conspiracy, and this will be demonstrated by common proof. For example:

- DFA, DMS and other conspirators have reached unwritten agreements (and, in some cases, confidential written agreements¹⁰) not to solicit each other's members, to alert each other if they are contacted by each other's farmers and, in particular, not to approach each other's farmers and offer more favorable prices. *See* Plaintiffs' Reply Memo. in Response to DFA/DMS's Opposition to Plaintiffs' Settlement With Dean, Dkt. 289 at 3-7.
- DFA and DMS have entered these restrictive agreements even though they know that they are subject to a consent decree that explicitly prohibits this, they have been told by their attorneys that such agreements are unlawful, and the DFA antitrust guidelines include such agreements on a "black list" of legally prohibited activities. Dep. of Rick Smith, Apr. 19, 2011 ("Smith Dep.") 326:20-327:9, Ex. Z; Wickham Dep. v.1 262:10-21; Ex. B @ 21. [REDACTED]
- DFA and DMS have entered unlawful agreements not to compete with major processors throughout the Northeast for the purchase of raw Grade A milk from farmers. [REDACTED]

v.2 272:4-278:2, Ex. S; Dep. of Leon Berthiaume, Apr. 8, 2011 ("Berthiaume Dep.") 117:6-118:22, Ex. T; Dep. of Robert Stoddart, Mar. 21, 2011 ("Stoddart Dep. v.2") 250:3-258:20, Ex. U; Dep. of James Kelleher, Mar. 18, 2011 ("Kelleher Dep.") 105:22-106:22, Ex. V.

¹⁰

See [REDACTED]



- Similarly, while DFA/DMS knew they were subject to a consent decree that explicitly prohibited entering such exclusive dealing agreements for a period of more than one year, DFA/DMS reached a side-agreement that potentially imposed a penalty on Dean of over [REDACTED] if it failed to adhere to their exclusive dealing agreements for a twenty year period.¹¹

Third, despite this evidence, DFA/DMS argue that because farmers in some counties purportedly have greater choice than farmers in others, farmers can only challenge the conspiracy in individual lawsuits. This contention goes to whether *impact* will be shown by common proof (see below), and is based on clearly wrong factual predicates. Specifically:

- DFA/DMS's claims, even if correct (which they are not), would not obviate the importance of common proof. "[I]n no real world conspiracy would the defendants be evenly positioned throughout the relevant geographic market, nor is this necessary for effective collusion as long as the Conspirators' influence is pervasive and the subject commodity is transportable throughout the region." See GR Rept. ¶7.
- DFA/DMS's claims ignore both the scope of the conspiracy and its actual participants. When this artificial restriction is removed, the conspiracy's dominance and pervasiveness throughout the Northeast is far greater than DFA/DMS claim. *Id.* at ¶¶7-8. [REDACTED]

¹¹ See [REDACTED]; Hanman Dep. 60:6-10, Ex. II (admitting that intent was to require that "if Dean didn't maintain . . . the supply agreement for a plant for a 20-year period, it was in effect going to have to pay a financial penalty").

[REDACTED] ¹²

- DFA/DMS's claims disregard the need for farmers to gain access to the pool plants dominated by the conspirators. Because access to pool plants is required to secure the price protection afforded by federal regulation, the availability of non-pool plants does not provide a viable means to avoid the effects of the conspiracy. GR Rept. ¶¶9-10.
- The record also makes clear that the conspirators exercise substantial control over non-pool plants in FMMO 1. *Id.* at ¶¶11-13. This gives the conspirators even more power to control price and restrict competitive options. *Id.* at ¶¶3-23; *see, e.g.,* [REDACTED]; [REDACTED];
- Finally, because of these facts, farmers throughout FMMO 1 are subject to suppressed prices. [REDACTED]

[REDACTED] ¹³

In short, the conclusions reached in *Southeastern Milk* apply with full force here. Proof of liability in this case predominantly turns on common proof and there are compelling reasons to litigate such issues on a class basis, rather than in farmer-by-farmer lawsuits.¹⁴

¹² See, e.g., [REDACTED]

¹³ Ex. FF @ 07. *Accord* GR Rept. ¶¶19-23, 98-111, 112-117 (showing that defendants' price-fixing and other anticompetitive activities suppress prices throughout market).

¹⁴ Defendants assert in a footnote that the issue of fraudulent concealment predominantly involves individualized proof. Although the merits of this issue can be briefed at the appropriate time, several points bear mention here. First, the case law is quite clear that fraudulent concealment is predominantly a matter of *common*, not individual, proof. *See, e.g., In re Magnetic Audiotape Antitrust Litig.*, No. 99 CIV. 1580(LMM), 2001 WL 619305, at * 7 (S.D.N.Y. June 6, 2001); *In re Sumitomo Copper Litig.*, 194 F.R.D. 480, 482-83 (S.D.N.Y. 2000); *In re NASDAQ*, 169 F.R.D. at 515. Second, the record is now replete with examples of misrepresentations DFA made that concealed its anticompetitive activities. *See, e.g.,* [REDACTED]. DFA/DMS officials have also testified under oath that they had no "suspicions" that DFA/DMS were acting unlawfully, and have said that they had far more information available to them than farmers did. *See, e.g., Wickham Dep. v.1 89:2-93:1, Ex. MM; Dep. of Brad Keating, May 11, 2011 ("Keating Dep.") 133:4-137:11, Ex. NN.* Thus, it is extraordinary for DFA/DMS to simultaneously contend that farmers should be foreclosed from

B. Plaintiffs Will Establish Impact by Common Proof.

1. The Conspiracy Suppresses the Prices Received by Members of the Class.

Plaintiffs will also use common proof to establish that the conspiracy has impacted the class members. *See* Rausser Decl. (filed February 1, 2011), Dkt. 206, Ex. 1; GR Rept. ¶¶ 98-141.¹⁵ Plaintiffs can establish impact by showing through common proof that class members sustained *some* injury-in-fact;¹⁶ the *amount* of injury is a damages, not liability, issue and the fact that the amount of damages may be variable does not preclude class certification. Plaintiffs need not prove actual impact at the class certification stage; rather, they “must show that injury-in-fact, or impact, *can be* proven by evidence common to the class.”¹⁷ “If generalized evidence exists which will prove or disprove this injury element on a simultaneous class-wide basis, then there is no need to examine each class members’ individual circumstance ...” *In re Cardizem*, 200 F.R.D. at 307.

pursuing such claims because – notwithstanding DFA/DMS’s own sworn testimony – they should have known of DFA/DMS’s violations of the law.

¹⁵ DFA/DMS have elected to file with their opposition an expert report that is more than 200 pages single-spaced. Obviously space limitations do not permit a point-by-point rebuttal in this reply memorandum. We respond to the principal points herein and Dr. Rausser responds to their expert submission in his Rebuttal Declaration.

¹⁶ Numerous cases have also held that to satisfy the predominance requirement and justify proceeding as a class action, plaintiffs need not show that *every* member of the class was injured. *See, e.g., In re NASDAQ*, 169 F.R.D. at 523 (“Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class.”); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 LEXIS 36719 at **41-42 (E.D. Pa. May 2, 2008) (same); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007) (same).

¹⁷ *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91,107 (2d Cir. 2007). *See also In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 638 (D. Kan. 2008) (certifying antitrust class and holding that “the issue in the common impact analysis is the *fact*, not the amount, of injury”).

The fact that an illegal conspiracy is formed in a complex market, or that conspirators use diverse distribution channels or negotiate prices, does not mean that injured parties can only seek relief on an individual-by-individual basis. As one court has observed, “[a]ntitrust defendants resisting class certification routinely argue that the complexity of their particular industry makes it impossible for common proofs to predominate on the issue of antitrust impact ... but the argument is usually rejected. *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030(WHW), 2006 WL 891362, at *11 (D.N.J. Apr. 4, 2006).¹⁸ In this case, the record is clear that the conspiracy’s competitive restraints and price suppression impact the prices received by farmers in the class. This is clear from the nature of the market, the dominant role played by the conspiracy and the mechanisms that are in place for pooling revenues from processors and limiting price competitions. This is confirmed by defendants’ own documents as well as Professor Rausser’s analysis of market and pricing conditions in the Northeast.

The characteristics of the market ensure that the impact of a conspiracy to suppress prices is class-wide. DMS directly supplies more than sixty percent of milk in the Northeast and, with its co-conspirators, is the primary supplier for processors that account for about eighty percent of milk purchases. GR Rept. ¶14. Because of the conspirators’ dominant role in the marketplace, their coordination of pricing at GNEMMA, and DFA/DMS’s supply agreement provisions that ensure that all processors will receive substantially the same low price, the effects of defendants’

¹⁸ See, e.g., *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 291, 312 (N.D. Cal. 2010); *NASDAQ*, 169 F.R.D. at 523; *In re Polyester Staple Antitrust Litig.*, MDL No. 3:03CV1516, 2007 WL 2111380, at *22-23 (W.D.N.C. July 19, 2007); *In re DRAM Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *9 (N.D.Cal.) Jun 05, 2006); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 266 (D.D.C. 2002); *In re Flat Glass Antitrust Litig.* 191 F.R.D. 472, 484-85 (W.D. Pa. 1999).

conspiracy are felt throughout the Northeast. For example, a senior DMS and DFA official has testified that co-defendant Dean:

[REDACTED] trying to find scenarios to lever down the milk price that we were charging to Dean Foods. If, in fact, that leverage was employed and the milk price drops to Dean Foods, that milk price then because of our obligation to keep HP Hood competitive with Dean Foods would force potential decrease in HP Hood. It then would force potential decrease in Farmland and it could start a process where pricing in the Northeast becomes depressed.

Keating Dep. 242:10-18, Ex. PPP. Defendants' documents make clear that this is exactly what has happened: [REDACTED]

[REDACTED]" Ex. FF @ 07; *see also* Ex. OO @ 48.

Other competitive restraints have had the same effect. [REDACTED]

The pooling process used by DMS virtually ensures that this price suppression impacts the entire class. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Decisions regarding this distribution are made by a small group of common officials at DMS (who simultaneously work for DFA and Dairylea). DMS's CEO has acknowledged that it seeks "to equalize similarly situated farmers for the various cooperatives that supply to DMS" and "to treat similarly, in terms of financial pay outs, independents of a certain farm size with co-op members of a similar size." Wickham Dep. v.2 279:15-284:1, Ex. AAA. [REDACTED]

[REDACTED]

Wickham testified that DMS has a "general management directive" to eliminate any "unexplainable difference" between the prices received by "all the various farms that we manage without regard to what business they come from." Wickham Dep. v.2 283:8-12, Ex. CCC. Another senior DMS official, Brad Keating, testified that "proceeds from the milk marketing

19 [REDACTED]

venture of DMS affect each unit about the same” and the “effect from the milk marketing change up or down comes back and affects each equally.” Keating Dep. 116:22-117:15, Ex. DDD.

[REDACTED]
[REDACTED]
[REDACTED]; see GR Rept. ¶103 nn. 219, 220.

These and other factors (pooling, DMS’s dominant market position, GNEMMA price-fixing, and anticompetitive agreements to stabilize prices and eliminate competition) result in class members receiving the same or virtually the same price for their raw Grade A milk.¹⁹ Dr. Rausser’s analysis demonstrates that milk prices paid to class members are remarkably uniform, which means that the suppression of prices will inevitably have classwide impact. See GR Rept. ¶113 (explaining that even after taking account of critique by defendants’ expert and evaluating additional data, “the conclusion remains the same: prices are highly uniform”); *id.* at ¶116

[REDACTED]
[REDACTED]

[REDACTED] Dr. Rausser also used multiple regression analysis to evaluate the limited variation that does exist. This analysis showed that “between 89% and 94% of individual variation in milk prices paid to farmers can be accounted for using appropriately selected variables. The remaining unexplained variation is small by any standard benchmark” *Id.* at ¶111. The use of multiple regression analysis to control for such variables is a standard scientific technique used in antitrust cases.²⁰

²⁰ See, e.g., *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 410 (S.D. Ohio 2007) (multiple regression models are “reasonable damage methodologies”); *Bulk (Extruded) Graphite*, 2006 WL 891362, at *15 (multiple regression analyses “are widely accepted”).

In short, Dr. Rausser's analysis confirms that impact can be demonstrated by common proof, a conclusion that is strongly supported by defendants' own documents and testimony. That evidence is clearly sufficient to support certification of the proposed class in this case.²¹

2. The Conspiracy Impacted Farmers in Cooperatives That Have Interests in Processing Plants.

Defendants alternatively argue that farmers in cooperatives with interests in processing plants could theoretically benefit from low prices because the suppressed price they receive might be offset by profits from an interest in processing plants. DFA/DMS's supposition that lower prices are actually good for some farmers (a position that directly contradicts its objections to the Dean settlement) would certainly come as a surprise to farmers in the Northeast. It is both legally and factually wrong.

As a legal matter, it is well established that a plaintiff subjected to an overcharge (or, as here in the case of a monopsony, an undercharge) has experienced an antitrust injury and can

²¹ In *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24 (2d Cir. 2006), the Second Circuit discussed the standards applicable to class certification decisions, while also making clear "that a district judge has some leeway as to Rule 23 requirements, *id.* at 41, and "considerable discretion" to avoid turning this inquiry "into a protracted mini-trial of substantial portions of the underlying litigation." *Id.* See also *id.* at 42 (discussing court's discretion "to assure that a class certification motion does not become a pretext for a partial trial of the merits"). Subsequent cases have discussed the proper application of these standards. See, e.g., *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 378 (S.D.N.Y. 2010) (certifying class and explaining that at class certification stage it was sufficient that expert's model was sufficiently developed to permit the conclusion it could be used to demonstrate class-wide liability; plaintiffs were not required to prove merits of case-in-chief or demonstrate that regression captured all the proper variables and reached the "right" answer); *EPDM*, 256 F.R.D. 82, 100-01 (D.Conn. 2009) (for class certification purposes it was sufficient for court to conclude that plaintiffs have established a workable model; defendants "have failed to convince me that it is methodologically impossible to use a single formula to estimate class-wide damages. It is unnecessary to delve further into the merits by going point-by-point through each experts theory to decide who has designed the 'better' multiple regression equation."); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010); *Hnot v. Willis Group Holdings Ltd.*, 241 F.R.D. 204, 208-11 (S.D.N.Y. 2007). See generally Richards & Brown, *Predominance of Common Questions-Common Mistakes in Applying the Class Action Standard*, 41 RUTG. L.J. 163, 165-73 (2009) (one of the authors, Mr. Brown, is a counsel of record here).

recover regardless of whether they somehow received indirect benefits or profits related to the transaction. Since *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the Supreme Court and lower courts have repeatedly held that “a direct purchaser from an antitrust violator suffers injury to the full extent of an illegal overcharge even if it passes on some or all of the overcharge to its customers.” *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 205 (1990). For example, in *In re Wellbutrin SR Direct Purchaser Litig.*, No. 04-5525, 2008 Dist. LEXIS. 36719, at *25-26 (E.D. Pa. May 2, 2008), the Court held that “[r]egardless of whether some class members profited from the alleged activity in this case, the controlling question is whether the class members suffered an overcharge: if an overcharge occurred, all class members are entitled to recover, whether or not some plaintiffs experienced a net benefit while others experienced a net loss.” *Accord In re Hypodermic Prod. Direct Purchaser Antitrust Litig.*, MDL No.: 1730, Master Dkt. No.: 05-CV-1602 (JLL/RJH), 2006 U.S. Dist. LEXIS 89353, at *19 (D.N.J. Sept. 6, 2007); *In re Urethane Antitrust Litig.*, 251 F.R.D. at 641-42 .

Second, as a factual matter, DFA/DMS’s hypothesis that low milk prices help some farmers is simply wrong. When milk prices are suppressed as a result of the conspiracy, any increase in profits that a farmer collects based on his or her cooperative’s interests in a processor are both substantially *less* (and received far later) than the decrease in their proceeds from the sale of their milk. This is true for multiple reasons which are addressed in the GR Rept. ¶¶32-37. Indeed, it is revealing that DFA/DMS fail to cite testimony from a single farmer that even *remotely* supports their unlikely speculation that lower milk prices actually benefit farmers.

3. The Conspiracy Impacted All Farmers in the Northeast Market.

Defendants alternatively claim that farmers who they characterize as “outside of the alleged conspiracy” cannot recover (and therefore should be excluded from the proposed class).

The intended targets of the conspirators’ unlawful actions, however, clearly include farmers who

do not sell milk through DMS and its co-conspirators (as well as farmers who do sell thru the conspirators). For example, the conspirators' acts include: (a) secret "non compete" payments made to processors which precluded them from procuring milk directly from these farmers; (b) exclusive dealing arrangements that foreclosed access to major processors; (c) actions to "blunt" solicitations activities that were providing "significantly positive economics to the marketplace"; and (d) restrictive price agreements that defendants knew were "lowering" prices for "the entire market." Even though many of these actions are *per se* violations of the antitrust laws and both targeted and foreseeably injured farmers who were unwilling to supply milk through DFA/DMS, defendants essentially take the position that such farmers are outside the protection of the antitrust laws and cannot receive compensation for their losses.²²

Revealingly, DFA/DMS's opposition does not even discuss the specific factors listed in *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519 (1983), each of which strongly supports these farmers' standing to recover damages caused by the unlawful conspiracy:

- The injuries at issue – suppression of prices to a supplier and foreclosure from markets – are exactly the type of injuries the antitrust laws were intended to forestall;
- Farmers not supplying milk through DFA/DMS were among the direct targets of the unlawful conspiracy;
- There is nothing speculative about the harm – the exclusion of these farmers and the suppression of prices across "the entire market" is acknowledged in defendants' own documents.

²² Notably, DFA/DMS have never heretofore claimed – in their motions to dismiss or any other motion – that these class members cannot recover for injuries caused by DFA/DMS's unlawful conduct. In *In re Playmobil*, 35 F.Supp.2d 231 (E.D.N.Y. 1998), the court rejected a defendant's effort to raise virtually the same argument regarding a class certification motion.

- These is *no* risk of duplicative recovery. No other plaintiff can recover for the injuries caused to these farmers.
- There is *no* need for apportionment of the damages incurred by these farmers.

See *AGC*, 459 U.S. at 535. Numerous cases, both within the Second Circuit and in other jurisdictions, have permitted injured parties – including but not limited to suppliers who have been foreclosed access to customers – to recover in such circumstances.²³

In this case, these injuries to farmers were an entirely foreseeable (indeed, calculated) consequence of the unlawful conspiracy, they are admitted in defendants' own documents, and this has been corroborated by Dr. Rausser's empirical analysis. The record makes quite clear that defendants acted to preclude major processors from purchasing from these (or other) farmers

²³ See *United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623 (7th Cir. 2003) (where a cartel "elevates prices throughout the market" customers of sellers who have not joined the cartel "pay this higher price, and thus suffer antitrust injury, just like customers of the cartel's members"); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1163-70 (3d Cir. 1993) (steel companies could sue for sums paid to non-conspiring vessel companies); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979) (ranchers had standing to sue for sale of beef to non-conspirators); *ZF Meritor LLC v. Eaton Corp.*, Civ. No. 06-623-SLR, 2011 WL 843928, at *3 (D. Del. March 10, 2011) ("foreclosure of a market is a form of antitrust injury, especially where the foreclosure is by a monopolist"); *In re Arizona Dairy Prods. Litig.* 627 F. Supp. 233, 234-36 (D. Ariz. 1985) (milk purchasers could recover from non-conspiring milk retailers); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 530 F. Supp. 36, 39-40 (W.D. Wash. 1981) (fisherman who sold to non-conspiring seafood processors could recover); *Strax v. Commodity Exch., Inc.*, 524 F. Supp. 936, 940 (S.D.N.Y. 1981) (plaintiffs had standing to bring claims against defendants, even if they did not purchase the relevant contracts from defendants); *Pollock v. Citrus Assocs. of N.Y. Cotton Exch., Inc.*, 512 F. Supp. 711, 719 (S.D.N.Y. 1981) (plaintiff could bring claims on purchases from non-conspiring defendants).

The two cases relied upon by the defendants involve a case in which the plaintiff was not even "a participant in the relevant market," *Ocean View Capital, Inc. v. Sumitomo Corp.*, 98 CIV. 4067 (LAP), 1999 WL 1201701 (S.D.N.Y. Dec. 15, 1999), and a case in which recovery was sought on behalf of every purchaser of New Balance shoes from every retailer in the United States selling those shoes (which would likely include many thousands of retailers). *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242 (S.D.N.Y. 1997). There was no indication that, as here, much of the conduct at issue was aimed at these class members and was designed to restrict their competitive options, nor had the defendants admitted in internal documents that their anticompetitive actions were "lowering the entire market."

and restrict their access to these processing plants. Their activities were explicitly designed to “blunt” competitive activities that would result in “positive economics in the market place” or “escalation of premiums.” And they acknowledged internally that their actions were “lowering the entire marketplace.” Moreover, because the conspirators are the major suppliers for the vast majority of processing in the Northeast, and because of the suppressed prices resulting from the conspiracy, other processors had substantial incentives to conform to that price and the record and Dr. Rausser’s empirical analysis confirms that they did so. *See* GR Rept. ¶¶38-58. In a case where these farmers were targeted, where their internal documents acknowledge market-wide price suppression, and where empirical analysis confirms this impact, farmers can recover for injuries resulting from this price suppression.

C. Plaintiffs Will Prove Damages by Common Proof.

Defendants argue only in passing that damages cannot be shown by common proof, presumably recognizing that “[a]t the class certification stage, antitrust plaintiffs have a limited burden with respect to showing that generalized proof of damages predominates over individual damages.” *In re Foundry Resins*, 242 F.R.D. at 410; *see, e.g., In re Scrap Metal*, 527 F.3d at 535 (“we have never required a precise mathematical calculation of damages before deeming a class worthy of certification”).²⁴ Here, Dr. Rausser has explained that “prices paid for milk in Order 1 are highly uniform both at the plant level and at the farmer level” and “multivariate regression analysis can be used to account for the vast majority of the small variation that does exist in milk pricing, allowing the effects of the conspiracy to be isolated and quantified.” GR Rept. ¶143. As a result, the available “rich data” can be used to “formulate a benchmark against which to

²⁴ *See also In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D 100, 115-16 (SDNY 2010); *American Sales Co., Inc. v. SmithKline Beecham Corp.*, 2010 WL 4644426, at *8 (E.D. Pa. Nov. 12, 2010); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, 2008 WL 1946848, at *9 (E.D. Pa. May 2, 2008); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002).

compare the prices paid in Order 1.” Dr. Rausser has shown that the class’s damages, as well as each class member’s share of those damages, *can* be proven with common evidence, satisfying the Rule 23 standard. *See* Rausser Decl. in Support of Mot. for Class Cert. at ¶¶ 228-242; GR Rept. at ¶142; *see also* Plaintiffs’ Mot. for Class Cert. at 29-30 (discussing law on damages).

II. PLAINTIFFS AND THEIR COUNSEL ADEQUATELY REPRESENT THE CLASS.

DFA/DMS again raise the conflict arguments they unsuccessfully pursued in *Southeastern Milk*. *See* Dkt. 297 at 16 n.7 (“The court notes that another federal court recently rejected an identical conflict of interest claim in *In re Southeastern Milk Antitrust Litig.*, 2010 WL 35321747, at *6-7 (E.D. Tenn. Sept. 7, 2010).”). This Court’s May 11, 2011 Opinion sets forth the standard for evaluating such arguments:

“Only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representation status.” *Dziennik v. Sealift, Inc.*, 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007) (internal quotation marks and citation omitted). “[T]he great weight of authority in price-fixing conspiracy cases, absent special circumstances such as arbitration, holds that the victim of one alleged co-conspirator is adequate to prove liability for victims of all co-conspirators.” *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 112-13 (S.D.N.Y. 2010) (citing cases). To warrant denial of class certification, “it must be shown that any asserted ‘conflict’ is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation.” *NASDAQ*, 169 F.R.D. at 514-15.

Id. at 14-15. This is consistent with Second Circuit law: “‘The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental,’ and ‘*speculative conflict should be disregarded at the class certification stage.*’ Courts have applied these principles with regularity in the area of antitrust.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001) (citations omitted) (emphasis added); *accord In re SCOR Holding (Switzerland) AG Litig.*, 537 F.Supp.2d 556, 571 (S.D.N.Y. 2008). With these principles in mind, we turn to the conflicts asserted by DFA/DMS.

A. The Court Can Properly Certify a Damages Class.

DFA/DMS again argue that that the pursuit of damages remedies against the defendants somehow presents a conflicts issue. Plaintiffs address this assertion in their reply in support of its settlement with Dean, Dkt. 289 at 11-15, and those arguments and materials are incorporated here.²⁵ The issue requires little further discussion, but the following points bear emphasis.

- DFA/DMS's assertion of this conflict is both speculative and wrong. The entire class has an obvious and shared interest in securing the best outcome reasonably achievable against Dean (and the same is true vis-à-vis DFA/DMS) and plaintiffs and their counsel have acted zealously to accomplish this throughout the litigation.
- DFA/DMS do not even dispute the reasonableness of the financial terms in the Dean settlement. They have not offered a shred of evidence to challenge its reasonableness and, to the contrary, acknowledged at the April 15, 2011 Preliminary Approval hearing that "we're not complaining about the number. That's not our issue. We're not saying it's too high. We're not saying it's too low." Tr. of April 15, 2011 Hr'g at 66. *See also id.* at 68 ("We have no objection, respectfully, if they want to pay money to dairy farmers. That's great. These people are happy to take it. We're not trying to stop that.").
- At the hearing, the Court also commented on both the inconsistency of DFA/DMS's position and the hypothetical nature of the conflict they were alleging. *Id.* at 23 ("you cannot both say the claims have no merit and 30 million is too little. Those things don't go together."); *id.* at 69 ("So you are asking me to hypothesize what's going to happen down the road, cure a problem that doesn't exist with regard to the monetary problem now because you aren't even telling me the number would be different.").
- Greg Wickham, who simultaneously acts as a senior official of DMS, DFA, and Dairylea, confirmed that DFA/DMS did not object to the monetary terms of Dean's settlement. When asked if he had "a view of whether the thirty million dollar component of the settlement was in the best interest of the farmers in the class," Wickham testified that if Dean Foods wanted to pay thirty million dollars to resolve the claims against it, "*we had no significant business objection to that.*" Wickham Dep. v.1. 79:19-80:7, Ex. FFF (emphasis added).

²⁵

The cases relied upon by DFA/DMS are discussed at pp. 14 n.20 & 20 n.18 of that reply.

DFA/DMS have not offered any coherent reason that the proposed litigation class cannot proceed against them to recover damages. All members of the proposed class have an interest in securing financial compensation for injuries caused by illegal actions of DFA/DMS. Notwithstanding DFA/DMS's argument that coop members have an equity position, it is well established that cooperative members can pursue class claims to recover for injuries caused by the cooperative's unlawful acts, and DFA/DMS has essentially conceded this. *See, e.g., In re Southeastern Milk Antitrust Litig.* 2010 WL 3521747, at *6-7; *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994); 4/15/11 Hr'g Tr. at 61 ("Are we saying there can't be a class against us? No. . . . We're not saying there can't be any class."). Every member of the class has an interest in being compensated for these injuries (and, to the extent they prefer not to be compensated, they can elect to opt out).²⁶

²⁶ Even putting aside the fact that any class member can choose to opt out, DFA/DMS's suggest that an equity interest in DFA/DMS obviates the benefits of seeking damages – or somehow precludes certification of the litigation class – is factually wrong and contrary to the testimony of its own witnesses. First, the record indicates that DFA has substantial assets that are not owned by its members from which a settlement or judgment can be paid. DFA's total assets are worth approximately \$2.2 billion, whereas the total equity invested in DFA by farmers is only \$650 million. *Wickham Dep. v.1* 100:17-21; 107:18-108:3, Ex. GGG. 

Moreover, even if every penny of a monetary judgment against DFA was paid exclusively from equity, every DFA member in the class would benefit substantially from a financial recovery against DFA/DMS. DFA members in the Northeast account for only 5% of DFA's milk volume (and, in all likelihood, only 5% of DFA's equity). But the 1,577 DFA members in the Northeast (*Wickham Dep. v.1* 99:17-100:16, Ex. JJJ) account for approximately 17% of the class. Thus, for every dollar recovered from DFA, the financial compensation to DFA members in the class will be *substantially greater* than any decline in equity. *See Wickham Dep. v.1* 104:6-107:3, Ex. KKK (equivocating about the numbers but conceding that only 4-12% of DFA's equity is owned by farmers in the Northeast).

For the same reason, courts routinely certify classes in securities cases that include large numbers of investors that have current equity stakes in a company as well as investors that have no continuing equity interest. They also routinely certify securities classes in which the plaintiff class proceeds both against a company in which they have an equity interest and other defendants in which they have no equity interest. Similarly, in derivative shareholder lawsuits involving plaintiffs who hold equity interests in defendants and those who no longer do, courts have routinely rejected the argument that "suing yourself" is a conflict barring certification. *See, e.g., Walsh v. Chittenden Corp.*, 798 F. Supp. 1043, 1054 (D. Vt. 1992); *Herbst v. Int'l Tel. & Tel. Corp.*, 495 F.2d 1308 1314 (2d Cir. 1974). Thus, despite DFA/DMS's claims, certification of a litigation class to pursue damages against them is appropriate.

B. The Court Can Properly Certify a Class for Purposes of Injunctive Relief.

DFA/DMS alternatively claim that even if Plaintiffs establish, as they will, that DFA/DMS's conspiratorial actions are illegal and have suppressed competition and prices, the proposed class cannot be certified for purposes of injunctive relief. The factual record in this case, however, shows that the challenged suppression of competition and prices in the Northeast is harmful to all farmers, it is prohibited in DFA's own antitrust guidelines, and it has had the effect of "lowering the entire marketplace." At trial, Plaintiffs will show that DFA/DMS's claims that their actions benefit some farmers are contrary to fact and their own documents.

These issues are addressed at some length in Plaintiffs' reply in support of their settlement with Dean at 17-22, Dkt. 289, and that analysis and the supporting exhibits are incorporated herein. Several points are germane:

Defendant's own documents and witnesses make clear that restoration of more competitive conditions will be beneficial to farmers in the Northeast. Jim Kelleher, the Senior Vice President for Membership at DFA/DMS and Dairylea has testified that when DFA,

Dairyalea, Dean, and other processors were approaching farmers and engaging in price competition, this was beneficial to farmers:

- Q: Did you think it was advantageous for farmers for you to make that kind of approach to them?
- A: Yes. ... We could – at time we could have offered more money, at times we offered better services.
- Q: Do you think that kind of competition can result in better prices for farmers?
- A: Yes.
- Q: And that's based on your history in this industry over the last ten or twenty years?
- A: Yes.

Kelleher Dep. at 42:16-43:10, Ex. LLL. In his sworn testimony, Kelleher also agreed that “it’s good for farmers to have options on where to sell their milk” and that “having options helps farmers get a fair deal for their milk.” *Id.* at 167:20-168-4.²⁷

Similarly, DFA’s written Antitrust Policy (but not its actual practices) belie any claim that lawful and fair competition is contrary to the interests of its members:

The antitrust laws strive to preserve our free enterprise system by assuring competition on the merits of competing products without collusive agreements among competitors or artificial restraints on normal, healthy competition. DFA’s objective is to vigorously and effectively compete in the marketplace within the spirit and letter of the law. *Any departure from honest and fair competition is a violation of DFA rules and will not be sanctioned.*

Ex. 000 @ 89 (emphasis added). *See also* [REDACTED]

[REDACTED]

[REDACTED]

²⁷ The record also establishes the significant inefficiencies (and costs to cooperative members) that have attended DFA/DMS’s acquisition of a dominant market position. For example, [REDACTED]. Because of these and other inefficiencies, a substantial portion of the over-order premium received from processors is never even paid to farmers. Dep. of Martin Devine, June 2, 2011 (“Devine Dep.”) at 23:14-38:1; 43:2-11; 49:4:19, Ex. NNN.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Thus, it is the height of hypocrisy for DFA/DMS to now argue, [REDACTED] that, injunctive relief determined by the Court based on a complete factual record at trial, to be necessary to comply with the antitrust laws is contrary to the interests of its membership.

Moreover, DFA has repeatedly – and falsely – assured its members that it is competing vigorously to assure them fair prices and it has periodically assured them that its actions have been reviewed and approved by the Justice Department and that it is complying with Justice Department requirements. In reality, the record shows that DFA has entered unwritten agreements to restrict solicitation (and avoid “premium escalation”), has entered agreements that are “lowering” the price “for the enter marketplace,” and has taken actions “to blunt” competition that is causing “significantly positive economics to the marketplace.” As DFA’s own internal antitrust guidelines and policies recognize, farmers have common interests in relief addressing these violations of the law.

In emphasizing “the powerful policy considerations that favor certification,” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 145, 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.” Moreover, courts in the Second Circuit have recognized that “[t]he object of an anti-trust 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 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).

Plaintiffs respectfully request certification of the class for both damages and injunctive relief. The Second Circuit provides that if fundamental and non-speculative conflicts relating to relief subsequently arise in the 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). But, particularly in light of DFA/DMS’s own antitrust guidelines which state that it is DFA’s “core” policy to adhere to the antitrust laws, requiring DFA to adhere to those laws does not raise non-speculative conflicts.

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