UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ALICE H. ALLEN, et al., Plaintiffs, v. DAIRY FARMERS OF AMERICA, INC., DAIRY MARKETING SERVICES, LLC, and DEAN FOODS COMPANY, Defendants.	Civil Action No. 5:09-CV-00230 FILED UNDER SEAL HIGHLY CONFIDENTIAL— SUBJECT TO PROTECTIVE ORDER

SUR-REPLY OF DEFENDANTS DAIRY FARMERS OF AMERICA, INC. AND DAIRY MARKETING SERVICES, LLC IN FURTHER OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

In order for the three Plaintiff farms to represent a class of almost 10,000 farmers across Federal Order 1 in their case against Dairy Farmers of America, Inc. ("DFA") and Dairy Marketing Services, LLC ("DMS"), they must show (a) that, with proof common to the class, they can establish all of the elements of their antitrust claims, including that all of the farmers in the putative class were commonly impacted by Defendants' alleged scheme to monopsonize the market for raw milk; and (b) that, despite having *sued* DFA and DMS, there is no conflict among the putative class members, who include farmers who own DFA and DMS and sell their milk pursuant to contracts that Plaintiffs want to see terminated, as well as farmers with no ownership stake in DFA or DMS and who may believe they are disadvantaged by those same contracts.

Plaintiffs cannot make either showing. To attempt to persuade the Court otherwise, Plaintiffs recently filed a reply brief, and accompanying lengthy rebuttal expert report, that contain glaring inaccuracies (such as the claim that DFA is only partially owned by its farmer-members); material omissions (such as Plaintiffs' failure to mention that in the *Southeastern Milk* case on which they so heavily rely, the court recently held that the plaintiffs *do not have a per se horizontal conspiracy claim,* which claim was in fact the sole basis for its class certification decision); and entirely new expert analyses to try to justify their position (their expert having effectively abandoned his earlier proposed justifications for class treatment). DFA and DMS respectfully submit this brief sur-reply to respond to the new analyses offered by Plaintiffs' expert, to which DFA and DMS have not previously had any opportunity to respond, and to respond to the Plaintiffs' erroneous argument that, because the Court preliminary approved their settlement with Dean Foods Company, there can be no conflict of interest within the putative class in the continuing case against DFA and DMS.

I. PLAINTIFFS' REPLY BRIEF AND REBUTTAL EXPERT REPORT CONFIRM THAT COMMON ISSUES DO NOT PREDOMINATE.

A. Plaintiffs Cannot Establish Their Claims of Monopsony with Proof Common to the Putative Class.

The Complaint sets forth Plaintiffs' basic theory of their case. They have alleged that Defendants and some number of "co-conspirators" suppressed the prices that farmers in Federal Order 1 received for their for raw milk, and that the Defendants accomplished this price suppression primarily by "secur[ing] control of the raw Grade A milk processing market in the Northeast," with the effect of "forc[ing] independent dairy cooperatives and independent dairy farmers to join DFA or market their milk through DMS." Rev. Consol. Amend. Class Action Compl. ("Compl.") ¶ 84. Among the alleged conspirators are dairy cooperatives (e.g., DFA, Dairylea, St. Albans, and more), which sell raw milk, and dairy processors (such as Dean Foods and H.P. Hood), which buy raw milk and turn into consumable dairy products. *See id.* ¶ 20. The conspiracy alleged in the Complaint is thus a vertical one, involving on its face entities at different levels of the milk supply chain (i.e., both buyers *and* sellers of raw milk). Despite their Complaint, however, Plaintiffs now assert that "this is a horizontal price-fixing case," Pls.' Reply Mem. at 4, and argue that the case should be certified on that basis.

In so doing, Plaintiffs urge this Court to follow the lead of the court in *Southeastern Milk*. *See id.* at 1, 3 n.2, 8. In Plaintiffs' words, "the conclusions reached in *Southeastern Milk* apply with full force here." *Id.* at 8. But as Plaintiffs knew when they filed their Reply brief, the court in *Southeastern Milk* recently issued an order ruling that the plaintiffs there do not have a claim for a horizontal conspiracy that is *per se* unlawful under the antitrust laws, which thereby eliminated the sole basis for that court's prior class certification ruling. *Compare In re Se. Milk Antitrust Litig.*, 08-MD-1000, 2010 WL 3521747, at *10 (E.D. Tenn. Sept. 7, 2010) (certifying class based on plaintiffs' argument that they had alleged a *per se* unlawful price fixing

conspiracy), *with In re Se. Milk Antitrust Litig.*, No. 08-MD-1000, slip op. at 2–3 (May 12, 2011) (Ex. 1) (holding that plaintiffs' conspiracy allegations, even if proven, ***do not*** establish a *per se* illegal, horizontal conspiracy).

In so ruling, the court in *Southeastern Milk* eliminated the sole basis for its prior decision certifying the class, and a motion to decertify is now pending. The court also eliminated the primary basis for *these* Plaintiffs' claim that they can prove that Defendants violated the antitrust laws with proof common to the class. Accepting Plaintiffs' invitation to look to the "conclusions reached in *Southeastern Milk*," it is clear that this case is not a garden-variety, horizontal price fixing case. The Plaintiffs' claims here are more complex, and involve an alleged scheme by dairy cooperatives and dairy processors to "control" the market; funnel dairy farmers into DFA or DMS; and thereby expose them to the exercise of monopsony power and suppressed prices. *See* Compl. ¶¶ 84–135, 161–172. The question presented by Plaintiffs' motion for class certification is whether they can prove that central theory of their case with proof common to all members of the putative class. *See Wal-Mart Stores, Inc. v. Dukes*, --- U.S. ---, 2011 WL 2437013, at *7 (Jun. 20, 2011) (plaintiffs' "claims must depend upon a common contention," and [t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution"). Their own expert's recent analyses confirm that they cannot.

The recent work by Plaintiffs' expert, Dr. Rausser, shows in no uncertain terms that local market conditions (such as access to non-conspiring plants and cooperatives) vary widely across Order 1. *See* Reply Report of Joseph P. Kalt, Ph.D., at 15–21 ("Kalt Reply") (Ex. 2). That means that "the facts of asserted monopsonization that lie at the heart of all of Plaintiffs' claims of unlawful conduct are not common across proposed class members." *Id.* at 15. For example, even using Dr. Rausser's overbroad concept of who the "conspirators" are (e.g., counting as "conspirators" any plant that bought milk from DMS, even though the Complaint contains no

such allegation), the data show that while some putative class members live in areas where the alleged conspirators have a high market share, "as of May 2010, 41% of class milk was being produced within 50 miles of at least 2 'non-conspirator' processors" and "65% of milk was being produced within 50 miles of at least 1 non-conspirator processor."[1] *Id.* at 18 (emphasis added).

The same point is clear from an examination of the named Plaintiffs themselves. While the Allens "have only 1 plant of any kind within 50 miles, and only 19% of the milk in their county is marketed outside GNEMMA," the Haars "have 8 plants within 50 miles, 5 of which are 'non-conspirators,' and 55% of the milk in their county is marketed outside GNEMMA." Kalt Reply at 19. Thus, *even amongst the Plaintiffs*, "the facts pertinent to demonstration of actual unlawful monopsonization are wildly different," *id.* & Figs. IV.6–IV.9, and confirm that Plaintiffs cannot prove with evidence common to all members of the putative class that farmers have to accept lower prices because they are forced to deal with DFA and DMS.[2]

B. Plaintiffs Cannot Show Impact with Common Proof.

Consistent with the data showing that farmers in the proposed class have very different options available to them, the data likewise show that premiums paid to farmers—the component of the price at issue here, which represents the amount over and above the federally-regulated

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[1] In an attempt to explain away the varying local marketplace conditions, Dr. Rausser introduces a new theory in which he asserts "prices throughout Order 1 are spatially integrated." Rausser Rebuttal Decl. ¶ 19 (emphasis omitted). According to Dr. Rausser, spatial integration means that "the price of a homogenous good at any two locations will differ by, at most, the cost of moving the good from the region of lower price to the region of higher price," and he contends that "the prices in different locations throughout Order 1" are "linked" in this fashion. *Id.* ¶ 20. As Prof. Kalt explains, however, "Prof. Rausser's hypothesis is directly rejected by the data he presents in his own Rebuttal Declaration Exhibits 7 and 8." Kalt Reply at 20; *see also id.* at 19–21.

[2] "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. ***Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.***" *Wal-Mart*, 2011 WL 2437013, at *7 (quotation omitted, second emphasis added).

blend price—vary widely. Indeed, the new analyses presented by Plaintiffs' expert in his rebuttal report definitively *confirm* this. It is only by lumping in the regulated component of the price—which makes up 92-97% of the farmers' overall price, but which is *not* alleged to have been affected at all by the alleged conspiracy—that Plaintiffs are able to claim that prices are "the same or virtually the same." Reply Mem. at 13. But this case is about the alleged suppression of *premiums*, and it is with respect to the *premiums* that Plaintiffs must show common impact across the putative class. In that respect they have failed completely, with their own expert having found *massive* variation in premiums—in the range of a $1.00 or more—within the proposed class. As Plaintiffs' expert put it in his original report: "A wide distribution of prices suggests the conspiracy may have been difficult to effectuate, ***and casts doubt that the impact of conspirators' coordinated action was common across individual class members.***" Rausser Decl. ¶ 220 (emphasis added). That is exactly right.

1. Plaintiffs' Expert's New Analyses Confirm the Substantial Variation in the Premiums That Are the Supposed Object of the Conspiracy.

Prof. Kalt explains the significance of price variations to the issue of class certification:

> At this class certification stage, it is critically important to determine whether prices are uniform, or instead are dispersed (i.e., different levels for different farmers) and exhibit churning (i.e., different changes for different farmers over time), because when different farmers have different prices, their prices are changing relative to one another, and some farmers' prices are going up while other farmers' prices are going down, there is reason to believe that the class members have not experienced common impact.

Kalt Reply at 2–3 (footnote omitted). To support his claim that farmers' prices in the Northeast are "uniform," Plaintiffs' expert initially "limited his study to a portion of the price paid to farmers that he has now acknowledged *would not be impacted* by the alleged conspiracy—the nationally regulated component prices of milk." *Id.* at 4. This result was neither surprising (the

"regulatory system is designed to yield such a result," *id.* at 5), nor relevant (since Plaintiffs' case has nothing to do with the regulated component of the price).

To try to salvage his opinion of common impact, Dr. Rausser conducted a new study in his rebuttal report. This time he examined "the *total* price paid to farmers (including the common, nationally-regulated components)." *Id.* at 2 (emphasis added). By including the regulated part of the price, Prof. Rausser's approach "obscures the dispersion and churning in the very premiums above regulated levels that the alleged unlawful conduct purportedly affected commonly." *Id.* For when one scrutinizes Dr. Rausser's analyses, they "clearly show that farmers' prices are *often dollars apart*, and frequently move by substantially different amounts and in opposite directions from class member farmers." *Id.* at 5 (emphasis added, footnotes omitted). Indeed, "Rausser Rebuttal Declaration Exhibit 16b indicates that, over the course of a year, *nearly a thousand farmers* experienced average price changes that were $0.48 per cwt different than the price change experienced by the median farmer in Order 1," and "[o]n average, over 2000 farmers' premiums in any given month change in a direction different than that of the majority of farmers (Figure III.11])." *Id.* at 5–6 & n.19 (emphasis added).

Plaintiffs' answer to this is a statistical sleight of hand: they focus on *percentages* of the *total* price (including the irrelevant regulated portion) instead of actual dollar values of the premiums at issue:

> To see why this can obscure the true magnitude of the dispersion, consider a simple numerical illustration: Expressed as a percentage, dispersion in prices of 50 cents would be 50% of a $1 premium. The same dispersion, if we add a $15 regulated base minimum price to the premium, would be only 3% (50 cents over $16). . . . Therefore, while Prof. Rausser argues that the percentage differences in the full price that he reports are small, the dollar differences underlying them are not. Across Order 1, these differences *conservatively* span a range of $0.75-$1.00 per cwt.

Kalt Reply at 6–7 (footnotes omitted).

To further downplay the price dispersion, Plaintiffs' expert dismisses the variation in premiums as small and immaterial—opining that prices changes "ranging from 44 cents to 55 cents per hundredweight" are "quite modest." Rausser Rebuttal Decl. ¶ 126. "This runs counter to the data, Prof. Rausser's own opinions, and to experience in the industry." Kalt Reply at 8. For example, the "average *total* premium received by farmers in Order 1 . . . was 65 cents per cwt over the 2000–2010 time period," and there is substantial evidence showing that "inter-farmer price differences *much smaller* than 50 cents are regarded by market participants as highly meaningful, and are sufficient to cause farmers to switch their marketing arrangements." *Id.* at 9–10 & nn. 31–32 (citing evidence) (emphasis added). In contrast, there is *no* evidence or support for Plaintiffs' assertion that the $0.50-$1.00 per cwt. differences in premiums paid to farmers within the putative class are small or irrelevant. They plainly are neither.

So, in a final effort to persuade the Court that the price variation here is inconsequential, Dr. Rausser offers a theory in his rebuttal report as to how, using statistical analysis, he can explain the differences in premiums received by farmers without inquiry into the farmers' individual circumstances. But here, again, "[r]ather than examining the relevant market-driven part of the price he says is the playing field of the conspiracy, Prof. Rausser performs his statistical analyses on the *overall* price." Kalt Reply at 11–12 (emphasis added). As a result, "Prof. Rausser's approach introduces commonality that obscures substantial *unexplained* dispersion and churning in class members' prices and the market-driven part of their prices." *Id.* at 12. When Professor Kalt removed the regulated component of the price, and focused exclusively on the premiums that are at issue here, he found that Prof. Rausser's regression model can explain "no more than about half of the dispersion and churning we actually see."[3] *Id.*

[3] The problems with Dr. Rausser's model are highlighted by his use of inappropriate "explanatory" variables such as farmer location and cooperative affiliation that *obscure* rather

at 12. Professor Kalt summarizes what that means: "The model . . . cannot reliably isolate the impacts, if any, of purported conspiracy from facts and circumstances specific to individual class members that, independent of conspiracy, cause various farmers' prices to be so different from each [other] and cause their prices to churn so much relative to each other." *Id.* at 15.

Put differently, Plaintiffs have not come forward with any means of explaining the substantial variation in premiums paid to farmers within the putative class. They *simply cannot say* (a) whether such variations are indicative of the fact that a substantial number of farmers "escaped" the impact of the alleged conspiracy, or (b) whether such variations are a natural part of the marketplace and would have existed even absent the alleged conspiracy (where, Plaintiffs hypothesize, all farmers' premiums would have been even higher still). All they have proven is that one must examine the farmers' individual circumstances to explain why it is that the premiums of literally thousands of farmers in any given month move in a different direction than that of the majority, and why it is that some farmers' premiums are *dollars* apart from others. When that type of individual inquiry is necessary to determine whether the alleged conspiracy impacted the putative class members, class certification is inappropriate.

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than *explain* the extent to which farmers were impacted (if at all) by the alleged conspiracy. *See id.* at 14–15. By using variables such as farmer location and cooperative affiliation, Dr. Rausser's model does not explain why prices in one county are different from another; it simply shows, e.g., that Farmer X in County Y who belongs to Coop Z received higher premiums than her peers. It does not *explain* whether those higher premiums were because Farmer X somehow avoided the effects of the alleged conspiracy (no impact), or whether Farmer X's premiums would have been higher still but-for the alleged conspiracy (impact). Rather, it *assumes* that the answer is the latter and in so doing effectively assumes away whatever the different circumstances were that caused Farmer X to receive different prices from her peers. *See id.* That is methodologically indefensible, and when corrected (i.e., when the improper "explanatory" variables are removed), the predictive power of Dr. Rausser's model unsurprisingly drops even further. *See id.*

2. Nothing about DMS or GNEMMA Changes the Fact of Substantial Price Dispersion that Precludes a Finding of Common Impact.

In the face of undisputed evidence of substantial price dispersion (evidence corroborated by their own expert's analysis), the Plaintiffs nevertheless continue to insist that the existence of two organizations—DMS and GNEMMA—somehow means that all of the farmers in the putative class, *even those with no connection at all to either organization*, were commonly impacted by the alleged wrongdoing. As an initial matter, the substantial dispersion in premiums paid to farmers in the Northeast, discussed above, exists even with DMS and GNEMMA in the marketplace, so any notion that DMS and GNEMMA somehow translate into common pricing across the Northeast is thus *empirically untrue*. What is more, Plaintiffs' descriptions of DMS and GNEMMA are inaccurate and incomplete.

First, Plaintiffs claim that "[t]he pooling process used by DMS virtually ensures that th[e] price suppression impacts the entire class." Pls.' Reply Mem. at 11. Plaintiffs know that to be a facially inadequate explanation, because DMS only markets 53% of the raw milk in Plaintiffs' alleged market.[4] *See* Kalt Reply at 7 n.24. Plaintiffs do not and cannot explain how the DMS pooling process has any impact at all on the 47% of raw milk sold *outside* of DMS; indeed, the Plaintiffs and their expert are conspicuously quiet about how exactly the farmers who make up that 47% are paid and how their premiums are determined.[5]

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[4] Plaintiffs state at one point that DMS has a 60% market share, Pls.' Reply Mem. at 10, but that amount includes raw milk sold outside of the Plaintiffs' proposed market. While DMS markets 60% of the raw milk pooled on Order 1 (which includes milk produced farmers outside of Order 1, Plaintiffs' alleged market is milk produced in *and* pooled on Order 1, and DMS has only a 53% share of that alleged market. Kalt Reply at 7 n.24.

[5] As for the farmers who do market milk through DMS, Plaintiffs tell a conveniently abbreviated version of DMS's "pooling process." Pls.' Reply Mem. at 11–13. The process Plaintiffs describe—[redacted]

Second, Plaintiffs continue to rely on alleged price fixing by GNEMMA, as a basis for concluding there was common impact to all putative class members. But Plaintiffs never acknowledge the fact that GNEMMA came into existence in late 2006, half way into the alleged class period. *See* Wickham et al. Decl. ¶ 30; Compl. ¶ 138. If GNEMMA is somehow integral to Plaintiffs' ability to establish their claims with common proof—and their repeated emphasis of GNEMMA suggests that it is—Plaintiffs never explain how, in the years *before* GNEMMA, the alleged conspiracy commonly impacted all farmers in the Northeast.

Plaintiffs also continue to misdescribe GNEMMA. The evidence is undisputed that GNEMMA was created in late 2006 in connection with the push for hormone-free (rbST-free) fluid milk products, and that it was formed by the leading coops in the Northeast in order to institute a new premium for rbST-free raw milk. *See* Wickham et al. Decl. ¶ 31. Their supposed evidence of "price fixing" reflects nothing more than that the members of GNEMMA *discussed* pricing in the Northeast—something, as agricultural cooperatives, they are perfectly entitled to do, *see Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1038-39 (2d Cir. 1980). But the record is clear that the only premium that they all collectively agreed to charge (something, again, they are permitted to do, *id.*) is the rbST-free premium, which Plaintiffs do not even contend was suppressed.[6] *See* Wickham et al. Decl. ¶ 32; *see also* Ex. 3 (Berthiaume ¶ 1) (Rule 30(b)(6) Response of GNEMMA).

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[6] As DFA and DMS have previously explained, a "subset of GNEMMA's members . . . have continued the practice of an older entity (the Northeast Milk Marketing Agency or 'NEMMA') of announcing a common over-order premium for customers in the old NEMMA territory,"

In the end, DMS and GNEMMA are not the common impact panaceas that Plaintiffs make them out to be, and they do nothing to change the fact that the premiums paid to farmers vary widely across the putative class.

3. Putative Class Members Who Potentially Benefitted from the Alleged Wrongdoing Were Not Commonly Impacted.

Finally, there are the two categories of farmers identified in Defendants' opposition brief—those who own processing plants, and those who at all times have sold their milk outside of the alleged conspiracy—who stood to gain from the conspiracy alleged by the Plaintiffs.

First, with respect to those farmers who made the decision to invest in plants, Plaintiffs and their expert concede the basic economic truth that "farmer members of vertically integrated cooperatives may have stood to benefit from the increase prices of their processed milk." Kalt Reply at 27. Plaintiffs try to explain away the benefits of vertical integration by claiming that *all* farmers in the Northeast who invested in plants failed to realize sufficient returns on their investments to counterbalance the alleged price suppression. But that is no substitute for analysis and evidence. "[H]aving acknowledged the economics which demonstrate farmer members of vertically integrated cooperatives would realize benefits from the alleged conspiracy, Prof. Rausser has not done the study necessary to disregard the fate of class members who have chosen to take part of their compensation for committing their milk to their cooperative in the form of distributed and/or retained earnings for downstream investments." Kalt Reply at 29.

Second, there are the farmers who have at all times sold their raw milk outside of the alleged conspiracy—i.e., have not been associated in any way, shape or form with any defendant

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which is limited to the southeastern part of Order 1. *See* Wickham et al. Decl. ¶ 32. That practice does not extend to the rest of Order 1. *See* Berthiaume Decl. ¶¶ 1, 4.

or co-conspirator.[7] Plaintiffs now suggest that these farmers were somehow the "targets" of the conspiracy, *see* Pls.' Reply Mem. at 15–18, but they cannot explain how that makes any sense. The central theory of Plaintiffs' case is that farmers were forced to deal with DFA and DMS (or other co-conspirators) and thereby to accept suppressed raw milk prices. The farmers at issue here were not forced to do any such thing. As individuals selling raw milk completely outside of the alleged conspiracy, they (a) lack antitrust standing as a legal matter; and (b) would have benefited from the alleged conspiracy as an economic matter. Plaintiffs' answer to the first issue is simply to ignore the applicable case law.[8] And their answer to the second is to claim that *every* non-conspiring processor and cooperative decided to follow along with the alleged conspiracy and subject their farmers to suppressed pricing. That claim is supported neither by the evidence nor basic economic theory. *See* Kalt Reply at 32–37. In the end, Plaintiffs cannot have it both ways: they cannot expand the proposed class to include a group of farmers—who, following the plain economic logic of Plaintiffs' case (*see* DFA/DMS Opp. at 25–28), stood to *benefit* from the alleged wrongdoing and at the same time argue that the alleged wrongdoing commonly impacted all members of the proposed class.

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[7] In their request that this Court follow the lead of *Southeastern Milk*, Plaintiffs do not mention that the class there is limited to farmers who sold raw milk *to or through one of the defendants or co-conspirators*. *Se. Milk*, 2010 WL 3521747, at *1-2. In this respect, that class is distinctly narrower than the class for which these Plaintiffs seek certification.

[8] The weight of *recent* authority applying the nuanced analysis outlined in *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537 n. 33 (1983), have rejected umbrella claims. *See, e.g., Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 245–47 (S.D.N.Y. 1997); *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 WL 855463, at *4 (D.D.C. Jul. 2, 2001). The cases cited by Plaintiffs overwhelmingly either do not involve typical umbrella plaintiffs, or apply outdated principles of antitrust law rejected by *Associated General*. And the one recent case they cite which recognizes umbrella standing (*Gypsum*) did so only in the context of injunctive relief—while expressly indicating that the outcome might be different if the plaintiffs were seeking damages—and did so without even addressing the line of cases rejecting such claims under *Associated General*.

II. THE INTERESTS OF PLAINTIFFS AND THE PROPOSED CLASS ARE FUNDAMENTALLY AND IRRECONCILABLY IN CONFLICT.

To dispute the existence of an intra-class conflict of interest, Plaintiffs focus almost entirely on the fact that this Court granted preliminary approval to Plaintiffs' settlement with Dean Foods, and use that ruling as the basis for arguing that the issue has already been decided in Plaintiffs' favor. *See* Reply, at 1, 19-20. Without ever directly addressing the substantial evidence of a conflict presented in DMS' and DFA's Opposition brief, Plaintiffs argue that DMS and DFA are simply "repeat[ing] arguments they have unsuccessfully urged in the past," *id.* at 1, and assert that "[t]he issue requires little further discussion," *id.* at 20. Plaintiffs then limit their Reply to primarily incorporating by reference excerpts from their preliminary approval briefs, *id.* at 20, 22, or inserting tightly-spaced bullet points that repeat arguments about the "Dean settlement" as if that remained the issue in dispute. *Id.* at 20. The few new arguments that Plaintiffs make in their Reply—among them the false claim that DFA is not wholly-owned by its farmer members, *id.* at 21 n.26—contribute nothing of value to the debate.

These arguments are as revealing as they are incorrect. The conflicts of interest that are fatal to class certification at this juncture in the case arise from the fact that *after the Dean Foods settlement* Plaintiffs' lawsuit seeks damages and injunctive relief exclusively against two organizations that are owned and controlled by a significant portion of the proposed class. Plaintiffs' request for injunctive relief to weaken those organizations threatens harm to the members of the proposed class who *created* DMS to be their marketing arm, and who testify that they are benefitted by its operations and would be harmed if it were enjoined from operating as it now does. *Infra* at 14-16. Likewise, Plaintiffs' request for an award of treble damages against DMS and DFA threatens harm to the members of the proposed class who *own* those entities, and who would themselves *pay* the judgment that Plaintiffs are seeking. *Infra* at 17-18.

Despite what Plaintiffs argue in their Reply, this Court's decision granting preliminary approval to the Dean Foods settlement does not even touch on, let alone resolve, those conflicts of interest. The money to be paid in that settlement came from a non-farmer source, Dean Foods, and the injunctive portions of the settlement in paragraph 9.2 were stricken by the parties before the Court entered its Order. As a result, the Court found that DMS's and DFA's conflict of interest arguments were "moot" as they pertained to the settlement, *see* Opinion & Order (May 4, 2011), Dkt. # 297, at 6, and further held that DMS and DFA lacked standing to raise those or any other arguments in opposition to the settlement, *id.* at 6-7. None of that remains true here, where DMS and DFA inarguably have standing to oppose class certification, and where both the injunctive relief and the possibility of farmers being made to pay damages to their own class are anything but "moot."

A. Plaintiffs' Requested Injunctive Relief Will Harm Putative Class Members.

The declarations of twenty farmers submitted herewith make it unequivocally clear that when it comes to DMS, what the three Plaintiffs perceive as an illegal "monopoly" created in furtherance of a "conspiracy" to harm dairy farmers, *see, e.g.,* Consol. Am. Compl. ¶ 257, is to others, an invaluable organization *that they themselves created* as a counterweight to the large, high volume milk processors (like Dean Foods) that were driving down prices:

> I am particularly proud to have played a role, along with my fellow Board Members in the formation of DMS. It came at a time when there was a critical need in the industry. Several key fluid milk processors were growing rapidly. . . . Individual farmers and small cooperatives were finding it difficult to gain equal traction in the bargaining process with the larger processors. Simply put, many sellers and fewer buyers translated into poor prices for producers. The creation of DMS enabled producers to gain marketing strength. This, in turn, meant the potential of higher prices for producers. Interestingly, all producers in the marketplace ultimately gained because of the increased bargaining strength of DMS. . . . Dairy farmers would lose a lot of marketing clout if we lost DMS.

Ex. 12 (King ¶ 9). Another declarant, David Crowl, echoes these points:

> I understand that the Plaintiffs disagree with that decision [to form DMS], *but in fact, it comes directly from the grassroots governance structure* . . . . As a farmer leader, I was an advocate of this concept from the beginning and continue to support it today. . . . *DMS has allowed us to create efficiencies in hauling and has resulted in increased premiums paid to farms in the Northeast.*

Ex. 6 (Crowl ¶ 7) (emphasis added); *see also* Ex. 14 (Magnan ¶ 5) ("I have been able to see first hand that the DMS marketing arrangement serves the St. Albans cooperative members well, just as it serves several other cooperatives and a number of independent farmers"); Ex. 4 (Baldwin ¶ 7); Ex. 5 (Bikowsky ¶ 5); Ex. 16 (Nop ¶ 7); Ex. 23 (Rutherford ¶¶ 9, 11).[9] Members of small cooperatives, too, trace improvements in their pay price directly to their association with DMS:

> During the time that Cortland Bulk has been a member of Dairylea, and since Dairylea has been an owner of DMS, I have seen first-hand how farmers working together can benefit all of us. Over those years, our quality and volume premiums have increased, and we have managed to get a premium for rBST-free milk that we wouldn't have without DMS's ability to negotiate collectively on all of our behalf. The total premium that we are now able to collect from the marketplace, about $1 /cwt in total, is a substantial amount of money, and the only reason we are able to collect that is because we have worked together through DMS.

Ex. 21 (Wood ¶ 7); *see also* Ex. 4 (Baldwin Decl. ¶ 4) ("By working with Dairylea, we [Oneida Madison] have been able to increase our pay price significantly . . ."); *id.* ¶ 7 ("[I]t was DMS that was able to hold the line on prices . . . when there was excess milk in the marketplace. 2009 and early 2010 were true tests of the DMS model, and it performed well by preserving over order premiums during a time of historically high production and lack of demand").

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[9] The farmers who submitted those declarations represent a wide array of different experiences throughout the Northeast. They are located across the region, from Vermont down to Maryland, and from Delaware across to New York and Pennsylvania. Some are lifelong members of DFA, Dairylea or St. Albans. Others only joined those cooperatives after years of marketing as independents or through small cooperatives. *See* Ex. 5 (Bikowsky ¶ 3), Ex. 12 (King ¶ 5); Ex. 15 (Menard ¶ 4); Ex. 18 (Stauffer ¶ 3). And others still belong to smaller entities that retain their independence but have partnered with larger coops to increase their strength. *See* Ex. 4 (Baldwin ¶ 2 (Oneida Madison)); Ex. 10 (Hardie ¶ 2 (Cayuga)); Ex. 21 (Wood ¶ 4 (Cortland Bulk)).

Other declarants, while agreeing that DMS has improved their pay price, consider its strongest contributions to come from lowering costs, creating efficiencies, and providing the kind of market stability that allows for investment and growth:

> DMS has helped streamline and improve efficiencies in milk marketing, thus providing farmers with a much higher return. . . . I see first-hand how important DMS is to the Northeast, to DFA and to the other cooperatives that are part of DMS. Without it, there would be no market stability. . . . Both sides would suffer without an entity like DMS doing what it does today.

Ex. 9 (Handy ¶ 7); *see also* Ex. 10 (Hardie ¶ 7) ("It seems odd to me that anyone thinks DMS is limiting competition or stymieing innovation. DMS is essential"); Ex. 7 (Diebold ¶ 5) ("DMS is a good thing for farmers and a good opportunity for farmers if for no other reason than the savings in hauling and administrative costs."); Ex. 8 (Grove ¶ 7); Ex. 17 (Ormond ¶ 5); Ex. 20 (Warburton ¶ 4); Ex. 22 (Beeman ¶ 3).

Even if the Plaintiffs' allegations are assumed to be true as to their own experiences, these direct farmer testimonials—from a group that on its own is seven times more numerous than the named Plaintiffs, and that when combined with the farmers who earlier submitted declarations is *fifteen* times more numerous—establish that there are many other farmers within the proposed class for whom DMS is a *benefit*, and a substantial one at that. The injunctive relief Plaintiffs are seeking to weaken DMS and limit its market access—including the termination of supply agreements between DMS and its customers; a prohibition on entering into new such contracts; and a declaration that DMS operates outside the protection of the Capper-Volstead act (*see* Compl., Prayer for Relief §§ d., e., & j.)—will cause immense harm to these farmers and others like them. That is precisely the type of conflict that leaves the Plaintiffs inadequate to represent the interests of the class. *See Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1194 (11th Cir. 2003) ("A fundamental conflict exists where some party members claim to have

been harmed by the same conduct that benefitted other[s]."); *Carroll v. Am. Fed'n of Musicians*, 372 F.2d 155, 162 (2d Cir. 1967), *vacated other grounds*, 391 U.S. 99 (1968) ("diverse and [] conflicting interests within the class are incompatible with the maintenance of a true class action"); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280-81 (11th Cir. 2000).[10]

B. Plaintiffs Are Seeking Treble Damages From Organizations Owned by Putative Class Members.

Plaintiffs make light of the conflict arising from their decision to sue entities that are owned by a subset of Order 1 farmers, repeatedly arguing that the issue is whether "farmers have an interest in securing financial compensation," Reply at 21, and suggesting that those who object to the conflict must simply "prefer not to be compensated," *id.* Plaintiffs thus ignore that the issue is not whether farmers would benefit from *receiving* money, but whether they will be harmed by the obligation to *pay* it. And while Plaintiffs believe that to be an insubstantial and inconsequential worry, the farmers who face that liability firmly disagree: "If DFA or DMS is forced to pay money in this case, then the farmers like me who own those organizations will suffer—after all, our coop's money is our money." *See* Ex. 6 (Crowl ¶ 9).[11]

Plaintiffs' principal response to these arguments is a misrepresentation—they claim that DFA is owned in substantial part by some entity other than its farmer-members, and that this unnamed entity can be the one made to bear the financial consequences of the judgment. *See* Reply at 21 n. 26. The sole apparent basis for that claim is deposition testimony to the effect that

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[10] *Pickett* is indistinguishable: "Plaintiffs could not possibly provide adequate representation to a class that includes producers who willingly entered into [a marketing practice] as well as those who complain of and claim harm from the practice." 209 F.3d at 1280-81.

[11] *See also, e.g.*, Ex. 14 (Magnan ¶ 9) ("Since those of us who are part of DMS will be the ones who have to pay what the Plaintiffs are asking for, if they succeed in the case, we have a very different interest in the outcome of the lawsuit than the other farmers these Plaintiffs claim to represent."); Ex. 11 (Heatwole ¶ 9); Ex. 5 (Bikowsky ¶ 9); Ex. 7 (Diebold ¶ 7); Ex. 9 (Handy ¶ 9); Ex. 15 (Menard ¶ 7); Ex. 18 (Stauffer ¶ 7); Ex. 20 (Warburton ¶ 7); Ex. 21 (Wood ¶ 10).

DFA's "equity"—an accounting term of art that represents a particular type of obligation owed by DFA to its members after their retirement—is less than the total value of DFA's assets as a whole. *Id.* That unremarkable fact has nothing to do with whether the remaining assets are owned by some unidentified third-party instead of the farmers. They are not. As a matter of corporate charter, all of the assets of DFA are owned 100% by its members:

> Upon dissolution . . . the remaining property and assets of the Association will be distributed among the members in the proportion which the aggregate patronage of each member bears to the total patronage of all members, unless otherwise provided by law.

See Dkt. # 188-3 (Bylaws ¶ 6.8).[12] The *Plaintiffs* know this to be the case, even if their counsel claims not to. *See* Ex. 24 (Haar Dep. at 78:1-21). Any payment that DFA would make to satisfy a judgment—whether it comes in the form of a reduction in "equity"; an increase in debt; a deduction from milk marketing proceeds; or through some other means—is a payment that is ultimately made by the farmers who own DFA, and the same is true of Dairylea and St. Albans.

Nor is this case analogous to a "derivative" action. *See* Reply at 22. In a shareholder derivative lawsuit, the only plaintiffs are the shareholders; the lawsuit is brought on behalf of the corporation, not against it; and the action is to restore money *to* the corporation from a third party, a director or an officer of the company. *See Scalisi v. Fund Asset Mgmt.*, 380 F.3d 133, 138 (2d Cir. 2004). Here, Plaintiffs are suing the *cooperatives* directly, seeking to deplete their assets; and, the proposed class is not limited to members of the Defendant coops, but would contain instead both those who have a stake in the coops' future, and those who do not.[13]

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[12] *Id.* ¶ 6.1 ("The Assocation will at all times be operated on a cooperative basis for the benefit of its members [and] is obligated to allocate annually . . . all net earnings realized by business done with or for such patrons."); *see also* Dkt. # 188-14 (Smith ¶ 7) ("There is no 'DFA money'; it's the farmers' money . . . If DFA pays, the farmers pay. It is really as simple as that")

[13] Only a brief response is required to Plaintiffs' claim that *Northeast*-DFA members will not necessarily suffer from the obligation to pay damages because DFA members in other parts

C. The Conflicts Cannot Be Remedied By "Opting Out" of the Lawsuit.

Finally, Plaintiffs' glib suggestion that farmers can "opt out" of the class if "they prefer not to be compensated," *see* Reply at 26, ignores that what these farmers are objecting to is Plaintiffs' attempt to make them *pay* a judgment, not collect one. It of course does not address the conflict problem created by the injunctive relief sought—the consequences of which cannot be escaped by opting out. Moreover, since there is no way to opt out of participating in *paying* the judgment, it is far better for a farmer that is forced into that circumstance to remain in the class and at least receive partial compensation by collecting his or her share of damages. Once again, the farmers plainly understand this dynamic, even if Plaintiffs claim not to:

> I have been told that one option that is available to people that don't want to be part of a class action is that they can "opt out" of being a plaintiff. But that doesn't solve the problem I have with this lawsuit, because the lawsuit isn't just about farmers trying to receive money as Plaintiffs; it's about farmers suing other farmers, leaving some of us on both sides of the equation. As long as these Plaintiffs are trying to sue DMS, the entity that markets my milk and is owned by the members of my coop and other coops, then I will be harmed by this lawsuit. There is no way for me to "opt out" of having that happen.

Ex. 14 (Magnan ¶ 10).

CONCLUSION

For the foregoing reasons, as well as those previously stated, Plaintiffs' Motion for Class Certification should be denied.

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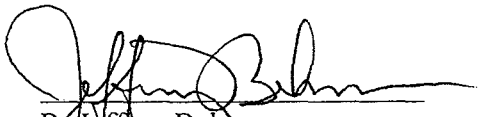
of the country will share in the burden. *See* Reply at 21 n.26. What Plaintiffs do not mention is that the same lawyers at Cohen Milstein and Baker Hostetler who would represent Plaintiffs in this case, *are currently class counsel to some 2,000 DFA members in the Southeastern United States.* Plaintiffs apparently believe it eliminates a conflict here to say that one set of potential clients (Northeast DFA members) may pay less because another set of their clients (Southeast DFA members) will share in the bill. That is plainly not a satisfactory response.

July 8, 2011

Respectfully submitted,



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