

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

JUN 01 2022

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
CENTRAL DIVISION

TAMMY H. DOWNS, CLERK  
By: [Signature]  
PLAINTIFF DEP CLERK

DAIRY FARMERS OF AMERICA, INC.

v.

No. 4:22-cv-501-JM

WES WARD, in his official capacity as Secretary  
of the Department of Agriculture; and  
FREDERIC SIMON, in his official capacity as  
Chairman of the Arkansas Milk Stabilization Board

This case assigned to District Judge Moody  
and to Magistrate Judge Ray  
DEFENDANTS

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Dairy Farmers of America, Inc. (“DFA”), for its complaint, states:

**PRELIMINARY STATEMENT**

1. For nearly a century, the milk industry in the United States has been heavily regulated by the federal government. This extensive federal regulation takes many forms, but perhaps the most important for purposes of this matter is the extensive regulatory program pursuant to which the minimum prices that dairy producers must receive from dairy handlers are established.

2. The sale of raw milk in Arkansas has long been governed by this federal program through the operation of Federal Milk Marketing Order No. 7, which covers Arkansas and other southeastern states.<sup>1</sup> 7 C.F.R. 1007.2. This federal program creates a pool of money whereby the processors of raw milk into consumable products (like beverage milk, cheese, and butter) pay money into the pool based on the intended use of the raw milk and the farmers, or their cooperatives, receive proper payment from that pool based on the average of all receipts, which is overseen and audited by the Federal Market Administrator.

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<sup>1</sup> See USDA Agricultural Marketing Service, *An Overview of the Federal Milk Marketing Order Program* (Oct. 2019), available at <https://www.ams.usda.gov/sites/default/files/media/DairyFMMOBooklet.pdf>.

3. In 2007, Arkansas created the Arkansas Milk Stabilization Board Act to study ways in which to assist Arkansas dairy farmers. ARK. CODE ANN. § 2-10-101 *et seq.* The Milk Board is composed of five gubernatorial appointees: two Arkansas dairy farmers, one Arkansas consumer, one Arkansas milk processor, and one Arkansas retailer. ARK. CODE ANN. § 2-10-103(a). As originally conceived, the Milk Board had a limited role. It was supposed to research how other states support their dairy farmers, investigate ways to support the dairy industry, and—perhaps foreseeing that regulating the dairy industry in light of a comprehensive federal scheme would have legal ramifications—“[c]reate a plan to assist Arkansas dairy farmers that would be equitable to all parties in the state dairy industry and withstand legal challenges.” ARK. CODE ANN. § 2-10-104(a)(2)–(4) (2007 version).

4. Fourteen years later, in 2021, Arkansas purported to directly regulate Arkansas milk prices for the first time by ordering the Milk Board to require that Arkansas milk producers receive prices above those set by the federal program. *See* Ark. Act 521 of 2021.<sup>2</sup> To implement Act 521’s mandate, the Milk Board adopted the Milk Stabilization Rule (the “Rule”) this year,<sup>3</sup> which would require milk “dealers”<sup>4</sup> to pay a so-called “over-market premium” to milk producers, and would require “cooperatives,” such as DFA, to “pass through” the premium to producers as well as make

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<sup>2</sup> In 2009, Arkansas enacted a temporary grant program in 2009 to prop up Arkansas milk prices. *See* Act 968 of 2009. That program, though, was not funded by taking money from one private interest and giving it to another private interest. *See* ARK. CODE ANN. § 2-10-203.

<sup>3</sup> The Rule is attached as Exhibit 1 to this Complaint.

<sup>4</sup> “Dealer” is defined in the Rule as “any person, who purchases or receives or handles on consignment or otherwise milk within the State, for processing or manufacture and further sale, within or without the State . . . .” This definition does not line up with the definitions of the federal regulatory system, which would use terms such as “pool plant,” “distributing plant,” “supply plant,” or “handler.” 7 C.F.R. §§ 1000.5, 1000.6, 1007.7, 1000.9. The Rule’s “dealer” would nonetheless be encompassed, depending on the specific products being processed at the plant, by one or more of the federal definitions.

the calculations to arrive at the premium. By requiring such a payment, the Rule directly conflicts with the pervasive federal regulation of the raw milk market, which establishes the method of calculation for the minimum price to be paid by the processor (milk dealer) and the rules and procedures for the payment for raw milk. *See* 7 C.F.R. §§ 1000.50 et. seq., 1007.51 et. seq. (available at [https://fmmatlanta.com/Misc\\_Docs/Language\\_FO7%20May\\_14.pdf](https://fmmatlanta.com/Misc_Docs/Language_FO7%20May_14.pdf) [accessed May 29, 2022]).

5. The Rule also purports to shield a cooperative's member contracts from interference, providing that "[n]o provision of this rule shall prevent or interfere with, and no provision contained herein shall be deemed or construed to prevent or interfere with, any agreement between producers and milk cooperative agricultural association or corporation organized under the laws of this State, or a similar association or corporation organized under the laws of this or any other state." Rule at § 5.A. However, to the extent that the Rule requires a cooperative to pay Arkansas dairy farmers in a way that substitutes the State's judgment for the cooperative's judgment in determining what that the cooperative pays other farmers in the region, the Rule does indeed interfere with the cooperative's contracts with its members.

6. This interference with contract could have severe impacts. To the extent that the State believes that DFA is responsible for making the payments under the Rule to its Arkansas dairy farmer members, DFA may be required to pay those farmers more than DFA would have received for their milk under the federal regulatory program. In all cases, such a situation would require DFA to take money that would otherwise go to its non-Arkansas dairy farmer members in order to pay its Arkansas dairy farmers consistent with the Rule.

7. DFA therefore seeks a declaration from this Court that Act 521, as implemented by the Rule, is an improper, unconstitutional interference with DFA's contracts with its dairy farmer

members (both in Arkansas and elsewhere). In the alternative, DFA seeks a declaration that the Act 521 and the Rule do not apply to DFA because the Rule makes clear the State's intent not to interfere with a dairy cooperative's contracts with its farmer members, which Act 521 and Rule necessarily would.

8. In the alternative, DFA seeks a declaration that Act 521 and the Rule are preempted by the federal regulatory program because they undermine the very purposes of the federal rules regarding payment to farmers.

9. Additionally, in the further alternative, DFA seeks a declaration that Act 521, and the Rule unduly burden interstate commerce and exceed the state's police powers under the Arkansas Constitution by regulating the price to be agreed upon by two contracting parties solely for the benefit of one of those parties.

10. For these and other reasons, DFA brings this lawsuit seeking the foregoing declarations. DFA further requests an injunction barring enforcement of Act 521 and the Rule.

### **PARTIES**

11. Plaintiff Dairy Farmers of America, Inc. ("DFA") is a Kansas cooperative marketing association with its principal place of business in Kansas City, Kansas. DFA is a cooperative owned by over 6,000 family farms across the country, including Arkansas and its six surrounding states. DFA is governed by a 48-member board of directors who are all farmer members elected by other farmer members.

12. Defendant Wes Ward is the Secretary of the Arkansas Department of Agriculture. In that role, he implements and enforces the challenged legislation and Rule. *See* ARK. CODE ANN. § 25-38-202(b). This suit is brought against him in his official capacity and as the representative of the Arkansas Department of Agriculture.

13. Defendant Frederic Simon is the Chairman and a member of the Milk Board. In that role, he implements and enforces the challenged legislation and Rule. This suit is brought against him in his official capacity and as the representative of the Milk Board.

### **JURISDICTION AND VENUE**

14. DFA's causes of action arise under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the United States Constitution, and the Arkansas Constitution. This Court has supplemental jurisdiction over DFA's claim that the Act and the Rule do not apply to it. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1367.

15. The Declaratory Judgment Act provides that, in a case of actual controversy within its jurisdiction, a United States court may declare the rights and other legal relations of any interested party seeking such declaration. 28 U.S.C. § 2201(a).

16. This Court has inherent equitable powers to enjoin the actions of state officials if they contradict the federal Constitution or federal law. *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *accord, e.g., Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949).

17. Venue is proper in this district because this action challenges an Arkansas law and regulations passed in and administered from Little Rock, which is within the Central Division of this District. 28 U.S.C. §§ 83(a)(1), 1391(b)(1)–(2).

### **BACKGROUND**

#### **A. The Dairy Supply Chain**

18. The regulation and operation of the dairy industry in the United States is complicated. There are three levels of the supply chain at issue. First, dairy farmers operate farms at which raw milk is produced. Second, those farmers may join together to form a farmer cooperative (consistent with several federal and state laws encouraging such joint action to improve the economic interests of their farmer members) like DFA. The farmers are the owners of

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