

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,

COMMONWEALTH OF
MASSACHUSETTS,

and

STATE OF WISCONSIN,

Plaintiffs,

v.

DAIRY FARMERS OF AMERICA, INC.,

and

DEAN FOODS COMPANY,

Defendants.

Case No. 1:20-cv-02658

Judge Gary S. Feinerman

**DAIRY FARMERS OF AMERICA, INC.’S UNOPPOSED MOTION
TO RETAIN THE FRANKLIN PLANT PURSUANT
TO THE TERMS OF THE FINAL JUDGMENT**

Defendant Dairy Farmers of America, Inc. (“DFA”) files this Unopposed Motion to Retain the Franklin Plant Pursuant to the Terms of the Final Judgment (“Motion”) because the Divestiture Trustee was unable to sell the Franklin Plant to a qualified purchaser and DFA wants to operate, invest in, and improve the Plant. Even though the Franklin Plant has been losing a substantial amount of money, DFA is strongly committed to the success and continued operation of the Franklin Plant because the Plant’s operation is central to DFA’s core purpose as a dairy cooperative.

DFA is the country’s largest dairy cooperative, made up of and owned by approximately

7,500 family-owned dairy farms spread throughout the country. Its fundamental purpose is to market and find a home for the raw milk produced by its member owners; this includes operating plants at which the raw milk is processed into beverage milk (“Fluid Milk”), ice cream, cheese, non-fat dry milk, butter, and other dairy products. At the time of DFA’s acquisition of assets of the then-bankrupt Dean Foods Company (“Dean”), the subject of the instant litigation, Dean was the country’s largest processor of Fluid Milk and DFA’s largest customer.

When Dean filed for bankruptcy in November 2019, DFA knew that it had to act quickly to preserve Dean’s operations in order to protect it as an outlet for DFA member and other dairy farmers’ milk. DFA therefore bid to acquire the substantial majority of Dean’s plants to keep those plants operating for the benefit of dairy farmers, employees, customers, and other stakeholders.¹ Notwithstanding the exigencies of Dean’s bankruptcy, the United States and the other Plaintiffs raised concerns with DFA’s acquisitions of certain plants in areas where DFA already had Fluid Milk operations. Recognizing the urgency of the situation, the dire financial situation of Dean and of certain Dean assets in particular, to avoid plant closures, and, ultimately, to avoid litigation, the parties agreed that DFA would attempt to divest three plants – one in each of Massachusetts, Illinois, and Wisconsin – as reflected in the Final Judgment. The uncertainty of divesting assets of a bankrupt company, particularly where the individual assets may be losing substantial sums of money, among other reasons, resulted in the inclusion of an additional provision that permits DFA to move this Court for permission to retain the plant in order to keep the plant open and operating if a purchaser acceptable to the United States could not be found for one or more of those plants.

¹ *But see* Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, Dkt. No. 42, at p. 2, n.1 (indicating that DFA did not bid for certain plants in Minnesota, South Dakota, and North Dakota because of antitrust concerns expressed by the United States).

That is the situation faced here with regard to the plant located in Franklin, Massachusetts (“Franklin Plant”). No purchaser acceptable to the United States has been forthcoming to purchase the Franklin Plant. This is not surprising given the circumstances. The Franklin Plant was hemorrhaging money at the time of DFA’s acquisition. But, because of its critical importance as an outlet for DFA and other dairy farmers’ raw milk in the Northeast and the value that those farmers receive as a result of having a secure home for their milk, DFA acquired the plant to ensure that it remained operational, and then sought to divest the Franklin Plant as required by the Final Judgment. During the six full months under DFA ownership, the plant has lost over \$3.5 million.

Despite substantial efforts by DFA and the Court-appointed Divestiture Trustee (*see* Dkt. No. 36), no qualified bids were received for the Franklin Plant, either to DFA or to the Divestiture Trustee. Accordingly, consistent with the explicit terms of the Final Judgment (Dkt. No. 53), DFA hereby moves to retain the Franklin Plant and related assets (defined in the Final Judgment as the “Franklin Divestiture Assets”) and to terminate DFA’s obligation under the Asset Preservation and Hold Separate Stipulation and Order, Dkt. No. 13, to hold the Franklin Divestiture Assets separate from DFA’s other operations. This Motion is unopposed by Plaintiffs.

BACKGROUND

Dairy Farmers of America

DFA is a milk marketing cooperative made up of approximately 7,500 family-owned dairy farm member-owners who produce milk throughout the country. Declaration of Greg Wickham, at ¶¶ 4, 5 (“Wickham Decl.”). The majority of these farmers—roughly 6,600—operate small family farms with an average size of 87 cows. About 45% of DFA’s member farms milk less than 50 cows. *Id.* at ¶ 6. Their product, raw milk, is unlike other crude commodities because it is a highly perishable and is the product of 2-3 milkings per day. It must be received, processed, and

made into products within 48 to 72 hours from the milking, or it becomes worthless. *Id.* at ¶ 8. This central fact drives the economics of this industry, and requires that processing and distribution networks exist within economic shipping distances from the farms and are capable of consistent and reliable processing of raw milk. Because the time to get raw milk to a processor is limited, DFA itself owns milk processing plants, including Fluid Milk plants in certain parts of the United States, to ensure that its members have an outlet for their raw milk. *Id.* at ¶ 11.

Dean Foods and Its Bankruptcy

At the time it filed for bankruptcy, Dean was DFA's largest customer and a significant outlet for DFA's member milk. *Id.* at ¶ 14. *See also* Competitive Impact Statement ("CIS") (Dkt. No. 16), at 4 (reciting Dean's bankruptcy filing); *In re Southern Foods Group LLC*, Case No. 19-36313 (Bankr. S.D. Tex. Nov. 19, 2019) (petition). At the time of that filing, Dean was the country's largest processor of Fluid Milk, operating 57 Fluid Milk processing plants in 29 states. (CIS at 3). The bankruptcy court ordered a bidding process and then accelerated that process because of Dean's liquidity condition and a concern that Dean would not be able to pay farmers for raw milk or to continue to process Fluid Milk beyond May 1, 2020, with tremendous adverse consequences for Dean's employees, customers, and suppliers. (CIS at 4).

On March 30, 2020, DFA bid for 44 of Dean's Fluid Milk processing plants and related assets (CIS at 4) because of the critical importance of those plants as an outlet for DFA farmer-member, and other dairy farmers', milk. Wickham Decl. at ¶ 16. No other bidder submitted a bid for as many plants, or anything even close to the number of plants, as DFA did consistent with the process order by the bankruptcy court. (CIS at 4). While there were other bidders for a few of the plants for which DFA submitted a bid (including for the plants in Illinois and Wisconsin), there was no other bidder for the Franklin Plant. Wickham Decl. at ¶ 16. DFA's bid was accepted by

Dean, bids for certain other plants excluded from DFA's bid were also accepted, and Dean began the process of closing plants for which there were no bidders. (CIS at 4).

On April 3, 2020, the bankruptcy court approved DFA's acquisition of certain of Dean's facilities, including the Franklin Plant. At the time, the United States and several State Attorneys General were in the process of investigating DFA's proposed acquisition. To resolve their concerns about the potential elimination of horizontal competition between DFA and the then-Dean plants in the Midwest and the Northeast, the parties to the instant litigation (the United States, the State of Wisconsin, and the Commonwealth of Massachusetts, along with DFA) reached an agreement that required DFA or a Divestiture Trustee to attempt to divest the Franklin Plant, along with two other plants in the Midwest located in Chemung (Harvard), Illinois, and DePere, Wisconsin, but allowed DFA to maintain any of those plants if a suitable purchaser was not located. DFA and the Divestiture Trustee were required to accomplish the divestitures in a manner consistent with the Final Judgment to an Acquirer or Acquirers acceptable to the United States in its sole discretion. This agreement was reflected in the proposed Final Judgment filed with the Court on May 1, 2020 (Dkt. No. 4), which stated that:

[i]f, at the expiration of the initial time period and any extension thereof, the Divestiture Trustee has not secured a definitive agreement for the sale of the Divestiture Assets consistent with this Final Judgment and acceptable to the United States, in its sole discretion, DFA may file a motion with the Court, which the United States will not unreasonably oppose, requesting that, solely with respect to any Divestiture Assets for which the Divestiture Trustee was unable to secure a definitive divestiture agreement, (i) the Asset Preservation and Hold Separate Stipulation and Order be terminated and (ii) this Final Judgment be modified to permit DFA to retain those assets.

Dkt. No. 4 at 22.

In conjunction with the proposed Final Judgment, and also on May 1, 2020, the Plaintiffs filed a civil antitrust Complaint challenging the proposed transaction under Section 7 of the

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