

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

Food Lion, LLC, and Maryland and Virginia
Milk Producers Cooperative Association, Inc.,

Plaintiffs,

v.

Dairy Farmers of America, Inc.,

Defendant.

Case No. 1:20-cv-00442

**DEFENDANT DAIRY FARMERS OF AMERICA, INC.’S MOTION TO DISMISS
FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Dairy Farmers of America, Inc. (“DFA”), by and through its undersigned counsel, hereby move to dismiss Plaintiffs’ Complaint (ECF No. 1) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Plaintiffs have attempted to state claims under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2, but have alleged only highly speculative future injury that is insufficient to confer standing under Article III of the U.S. Constitution. Plaintiffs’ speculative injuries also show that Plaintiffs have not alleged injury of the type the antitrust laws were intended to prevent. Further, Plaintiffs have pleaded an implausibly narrow relevant geographic market that cannot support their antitrust claims.

Plaintiffs’ claims are also foreclosed by the Failing Company Doctrine, a complete defense to a Section 7 case. For that doctrine to apply, a defendant must show that the

acquired corporation faced the grave probability of a business failure and that it conducted a good faith effort to seek offers from other potential purchasers. In this case, those elements are established by the factual findings of the United States Bankruptcy Court for the Southern District of Texas, which conducted the bankruptcy proceeding that resulted in DFA's bid for and acquisition of the dairy plants at issue in this case. *See In re: Southern Foods Group, LLC*, Case No. 19-36313-H2-11 (Bankr. S.D. Tex.) (the "Dean Bankruptcy Case").

DFA submits the following exhibits in support of its Motion:

1. Attached as **Exhibit A** is the Declaration of Anthony Magro in Support of Debtor's Reply in Support of Motion to Approve Sales of Debtor's Assets and Related Relief, which is publicly filed as ECF No. 1514-1 in the Dean Bankruptcy Case.¹
2. Attached as **Exhibit B** are excerpts from the transcript of the March 12, 2020 Motion Hearing in the Dean Bankruptcy Case, which is publicly filed as ECF No. 1145 in the Dean Bankruptcy Case.
3. Attached as **Exhibit C** is an excerpt from the Reply in Support of Emergency Motion of Food Lion LLC and Maryland and Virginia Milk Producers Cooperative Association, Inc. for Relief from the Automatic Stay to Allow Commencement of Antitrust Action, which is publicly filed as ECF No. 1816 in the Dean Bankruptcy Case.

¹ This Court may take judicial notice of documents filed in the Dean Bankruptcy Case, as well as other matters of public record, and may consider those documents on a motion to dismiss. *See Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). This Court may also consider documents attached to DFA's motion that are "integral to the complaint and authentic." *Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

4. Attached as **Exhibit D** is the Dean Bankruptcy Court's April 5, 2020 Order (A) Authorizing Sale of Certain of Debtors' Assets to Dairy Farmers of America, Inc. Free and Clear of All Claims, Liens, Interests, and Encumbrances, (B) Authorizing the Debtors to Enter into and Perform their Obligations Under the Asset Purchase Agreement and Related Documents, and (C) Granting Related Relief, excluding the voluminous attached Asset Purchase Agreement, which is publicly filed as ECF No. 1572 in the Dean Bankruptcy Case.

5. Attached as **Exhibit E** is an excerpt from the transcript of the April 28, 2020 Telephonic Hearing in the Dean Bankruptcy Case, which is located at ECF No. 1883 in the Dean Bankruptcy Case and should be publicly available on the docket on July 30, 2020.

6. Attached as **Exhibit F** is a May 1, 2020 Press Release issued by the United States Department of Justice regarding the conclusion of its investigation into DFA's acquisition of Dean's plants out of bankruptcy, which is publicly available at <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa> (last retrieved June 16, 2020).

7. Attached as **Exhibit G** is the Proposed Final Judgment publicly filed by the U.S. Department of Justice at ECF No. 4-2 in *United States of America, et al. v. Dairy Farmers of America, Inc., et al.*, Case 1:20-cv-02658 (N.D. Ill.).

8. Attached as **Exhibit H** is the Dean Bankruptcy Court's March 19, 2020 Order (i) Approving Bidding Procedures For Sale of Debtors' Assets, (ii) Scheduling Hearing to Approve Sale of Debtors' Assets, (iii) Approving Form and Manner of Notices

of Sale and Sale Hearing, (iv) Approving Assumption and Assignment Procedures, and (v) Granting Related Relief, which is publicly filed as ECF No. 1178 in the Dean Bankruptcy Case.

9. Attached as **Exhibit I** is a print-out from the U.S. Department of Agriculture's Agricultural Marketing Service website regarding the Federal Milk Marketing Order system, which is available at <https://www.ams.usda.gov/rules-regulations/moa/dairy> (last retrieved June 16, 2020).

Date: June 16, 2020

Respectfully submitted,

/s/ Brent F. Powell

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**Special Appearance Forthcoming*