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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

On May 19, 2020, Plaintiffs Maryland and Virginia Milk Producers Cooperative Association, Inc. ("MDVA") and Food Lion, LLC filed a Complaint under Section 16 of the Clayton Act alleging that Defendant Dairy Farmers of America, Inc. ("DFA")'s continuing course of anti-competitive conduct, including its acquisition of three Dean Foods processing plants in North and South Carolina (the "Carolinas plants") out of bankruptcy, violates the antitrust laws. At an initial June 4th hearing, DFA requested the opportunity to provide a "quick peek" of its defenses through a motion to dismiss before proceeding in earnest on Plaintiffs' request for expedited discovery and preliminary relief. The Court refused DFA's offer to slow the progress of the case, but did afford DFA the opportunity to present its arguments for dismissal. DFA has now done so, and its motion confirms that DFA lacks any viable argument for dismissal.

First, DFA conjures up a new argument not previously mentioned in its papers or at the hearing—antitrust injury—as a way to insulate the Asset Sale from antitrust scrutiny. But DFA's argument badly confuses the relevant legal standards and, if accepted, would turn the Clayton Act on its head. It also ignores controlling Supreme Court precedent directly on point, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as well as numerous detailed allegations in the Complaint establishing the actual injury already incurred by DFA's conduct and the future injury that will result if this conduct is not arrested in its incipiency.

DFA then turns to its "failing company" defense and market definition arguments. Both foreshadow what DFA will argue at trial, but are premature here. Each argument necessarily requires consideration of significant, complex factual and legal issues for which discovery and expert testimony will be necessary. It is well established that neither should be resolved on a motion to dismiss. Indeed, as to its previously ballyhooed "failing company" defense, DFA remains unable to point to a single case in which this defense has been established on a motion to dismiss.

The inescapable reality is that the Clayton Act was designed for precisely this situation, and the only way to resolve the issues presented by DFA is through a trial on the merits. With the benefit of discovery, expert opinions, and trial testimony, the Court will be able to make a judgment based on a fully developed record instead of abstract arguments. At the Court's urging, the parties have now agreed upon an expedited discovery schedule and a consolidated Rule 65(a)(2) proceeding. Plaintiffs respectfully suggest that this is where the parties' efforts should now be focused.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS OF THREATENED INJURY ARE MORE THAN SUFFICIENT UNDER SECTION 16 OF THE CLAYTON ACT.

The primary argument advanced by DFA in support of its motion to dismiss is that Plaintiffs' claims of antitrust injury are speculative because they allege anti-competitive effects that "might" happen in the future. ECF No. 31 ("Br."), at 1. This argument seems to have been manufactured only recently, as it was not included in DFA's claimed "threshold legal issues" that needed to be addressed before expedited discovery could be ordered.[1] Its conspicuous prior absence was for good reason. As explained below,

[1] *See* ECF No. 25, DFA Resp. to Mot. for Expedited Disc., at 8-13.

DFA's argument ignores fundamental principles of antitrust law and is an apparent attempt to insulate the Asset Sale from antitrust scrutiny entirely.

A. The Clayton Act Is Designed to Stop Anti-Competitive Acquisitions in Their Incipiency.

Count I asserts a claim under Section 16 of the Clayton Act to enjoin DFA from violating Section 7 of the Clayton Act, which prohibits mergers and acquisitions whose effect "*may be* substantially to lessen competition, or to tend to create a monopoly." *California v. Am. Stores Co.*, 485 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18) (emphasis in opinion). The Supreme Court has repeatedly recognized that the use of the words "may be" reflect Congress' conscious decision to enact a prophylactic antitrust statute. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 485 (1977). Enacted against the backdrop of "a rising tide of economic concentration in the American economy," Section 7 was designed to "clamp down with vigor" on anticompetitive mergers to arrest "this rising tide towards concentration into too few hands and to halt the gradual demise of ... small business[]." *United States v. Von's Grocery Co.*, 384 U.S. 270, 276 (1966). Congress accomplished this goal by empowering plaintiffs to use Section 7 to "arrest[] mergers at a time when the trend to a lessening of competition … was still in its incipiency" in order "to brake this force at its outset and before it gathered momentum." *Brown Shoe,* 370 U.S. at 317-18.

By its nature, the "incipiency" doctrine is forward looking; it requires "a prediction of [the acquisition's] impact upon competitive conditions in the future." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). In other words, it

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