

**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.,

Defendants.

Case No. 1:20-cv-00442

**BRIEF IN SUPPORT OF DAIRY FARMERS OF AMERICA, INC.'S
MOTION FOR PROTECTIVE ORDER**

NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs Food Lion, LLC (“Food Lion”) and Maryland and Virginia Milk Producers Cooperative Association, Inc. (“MDVA”) have brought a narrowly focused antitrust case seeking only injunctive relief relating to the three fluid milk¹ processing plants located in North and South Carolina that Dairy Farmers of America, Inc. (“DFA”) acquired out of the bankruptcy of Dean Foods Company (“Dean”). Plaintiffs assured this Court that they were aware of the

¹ “Fluid milk” is the term used to denote conventional drinking milk. It encompasses milk sold in various sizes at grocery stores (e.g., gallons and half-gallons), and well as milk sold in schools. It does not include organic milk or milk that is processed and packaged for extended shelf life.

need for “discipline” in discovery to “keep the case moving and make sure that the interests of the various parties are protected.” (ECF No. 29 at 23:17-19.) But the moment the Court denied DFA’s motion to dismiss Plaintiffs’ complaint, Plaintiffs launched wide-ranging discovery, serving an additional forty-six (46) document requests on DFA. It would be impossible for any company to comply with Plaintiffs’ expansive view of discovery under the expedited schedule in this case.

To make matters worse, Plaintiffs have not engaged in reciprocal discovery. As of the filing of this motion, Plaintiffs have produced only a few dozen actual business documents. Moreover, Food Lion has resisted producing information that would allow DFA to understand the data that it has produced, notwithstanding the Court’s order that structured data be provided by August 15, 2020. In contrast, DFA has produced over 18,000 documents, which in turn allowed Plaintiffs to raise specific questions about which custodians DFA should search (something that DFA cannot do as to Plaintiffs’ custodians given the sparsity of Plaintiffs’ productions to date), and to craft, should they so choose, focused follow-up discovery based on perceived gaps in what Plaintiffs received in response to their initial discovery requests (again, something that DFA cannot do as to Plaintiffs given the sparsity of Plaintiffs’ productions to date).

DFA files this Motion to halt Plaintiffs' abuse of the discovery process. DFA requests that the Court intervene to prevent DFA from having to respond to 16 kitchen-sink style discovery requests, most of which have little if anything to do with raw or fluid milk sales or processing in North or South Carolina, the area of the country that Plaintiffs have asserted is the "relevant geographic market."²

BACKGROUND

A. The Discovery Schedule

Plaintiffs initially sought expedited discovery in this case and proposed to serve 18 document requests on DFA. At a June 4, 2020 Status Conference, the Court expressed some concern about the scope of Plaintiffs' proposed requests, observing that "it's one thing when you're just in the middle of a regular ordinary 'ole case to ask for the kitchen sink and say we'll work it all out, but when you're asking for expedited discovery on a 90-day time frame, don't you bear a significant responsibility for proposing narrow, targeted discovery?" (ECF No. 29 at 29:15-20.) The Plaintiffs accepted that responsibility. Subsequently, on June 10, 2020, the Court entered an Order (the "Expedited Discovery Order") (ECF No. 28) allowing Plaintiffs to serve 12

² DFA timely served written objections and responses to all of the Second RFPs on August 26, 2020.

targeted discovery requests on DFA and requiring DFA to serve written responses and objections to those requests by July 17, with DFA's document production to begin at the same time on a rolling basis. Per the limits of the Expedited Discovery Order, Plaintiffs served on DFA on June 17, 2020 eight requests for production of documents (the "First RFPs").

At the Court's suggestion, the parties also negotiated a Stipulated Discovery and Briefing Schedule/Order (the "Scheduling Order"), which the Court entered on July 2, 2020. The Scheduling Order established an expedited 90-day schedule for written discovery and document production. Specifically, the production of structured data by all parties was to be completed by August 15, 2020. The parties had until August 31, 2020 to serve additional written discovery requests, and all document productions are to be completed by October 2, 2020.³

B. The Parties' Document Productions to Date

On July 17, 2020, DFA served its written responses and objections to the First RFPs. (*See* Declaration of Amber L. McDonald ("McDonald Dec.") ¶4.) That same day, DFA produced raw milk sales data for North and South

³ On August 31, Plaintiffs served a Combined Third Set of Requests for Production of Documents containing an additional five requests, including one request that seeks documents responsive to 11 "specifications" contained in a subpoena issued to Southern Foods Group, LLC d/b/a Dean Foods Company, the legacy entity for Dean.

Carolina for the time period from January 2017 to May 2020. (*Id.*) In a show of good faith, DFA produced this data while the parties were still in the process of negotiating a Protective Order and ESI Protocol, and did not use those negotiations as a basis to delay the data production, even though it could have waited until August 15 under the terms of the Scheduling Order. In response to Plaintiffs' RFP No. 1, DFA also produced over 18,000 pages of documents relating to raw milk or fluid milk produced or sold in North and South Carolina that were previously produced to the Department of Justice and/or state Attorneys General. (*Id.* ¶5.)

On August 7, 2020, DFA produced documents responsive to Plaintiffs' RFP Nos. 2 and 6, and, per negotiations between the parties, voluntarily supplemented its raw milk sales data to include data for Virginia, North Carolina, South Carolina, Georgia, and part of Tennessee, for the period from January 1, 2017 through June 30, 2020. (*Id.* ¶6.) On August 10, 2020, DFA produced data responsive to Plaintiffs' RFP No. 8. (*Id.* ¶7.) On August 14, 2020, DFA produced documents responsive to Plaintiffs' RFP Nos. 5 and 8, and produced a copy of DFA's Hart-Scott-Rodino filing with the Justice Department. (*Id.* ¶8.) On August 20, DFA made another significant production, including an expanded production of materials produced to the DOJ, and supplementing the previous raw milk sales data with the now-completed July

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