IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA, STATE of WISCONSIN, STATE of ILLINOIS, and STATE of MICHIGAN, *Plaintiffs*, v. DEAN FOODS COMPANY, *Defendant.*	Civil Action No. 10-C–00059 (JPS)

MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

INTRODUCTION

A. Overview

In this civil antitrust action, the United States and the plaintiff States (hereinafter "Plaintiffs") are challenging an April 2009 acquisition by defendant Dean Foods Company ("Dean Foods") of milk processing plants located in DePere and Waukesha, Wisconsin, formerly operated by the Foremost Farms USA dairy cooperative. Plaintiffs claim that this acquisition has resulted in two separate violations of section 7 of the Clayton Act, 15 U.S.C. § 18 (2006)—one violation as to school milk customers (Count 1, the "school milk claim") and one as to all other customers who purchase fluid milk directly from milk processors (Count 2, the "fluid milk claim"). Compl. ¶¶ 54-55. In effect, Plaintiffs have combined two very different cases into one.

The school milk claim (Count 1) is relatively narrow, focused, as it is, particularly on school districts in northeastern Wisconsin and the western portion of the Upper Peninsula of Michigan (the "UP") where Plaintiffs allege the acquisition may lessen competition in annual bids for school milk contracts. *See* Compl. ¶ 35.

The fluid milk claim (Count 2), on the other hand, is far less focused. Despite the fact that Plaintiffs spent more than nine months investigating the potential effects of the acquisition before filing this action, the fluid milk claim broadly implicates thousands of unidentified customers located throughout Wisconsin, the UP, and a nine-county area (including Chicago and its surrounding suburbs) that Plaintiffs define as "northeastern Illinois." *See* Compl. ¶ 2 & n.1. By the allegations in the Complaint, these customers include supermarkets, grocery and convenience stores, distributors, food service companies, and other customers who purchase milk directly from the processor. *See* Compl. ¶ 13. The defense of Count 2 as currently conceived would inevitably necessitate burdensome discovery from a very large number of third parties.

Defendant Dean Foods brings this motion under Fed. R. Civ. P. 12(b)(6) to dismiss Count 2 of the Complaint, the fluid milk claim, for failure adequately to plead an essential legal element of the claim, a properly defined relevant geographic market.

In the alternative, Dean Foods moves under Fed. R. Civ. P. 12(e) for an order requiring Plaintiffs to provide a more definite statement of the alleged facts that must be pleaded to support a proper geographic market. The deficiencies in the pleading of a relevant geographic market are not mere technicalities—they expose the serious flaws at the very heart of Plaintiffs' fluid milk claim.

B. Relevant Geographic Market

To plead a relevant geographic market under section 7 of the Clayton Act, Plaintiffs must allege, at a minimum, that all sellers located in an identified area could impose a significant price increase without causing enough customers to switch to suppliers located outside the area to make the price increase unprofitable.

Alternatively, if Plaintiffs wish to define a relevant geographic market based on price discrimination, they must allege that sellers could impose a significant price increase targeted only at customers in particular locations within an area and that those targeted customers could not defeat the price increase by turning to resellers (*i.e.*, other, non-targeted customers who could engage in arbitrage). (Price discrimination assumes that the costs of serving both the targeted and the non-targeted customers are uniform.)

These requirements are explicitly set out not only in the case law but also in the federal Government's own antitrust enforcement guidelines for analyzing mergers under Clayton Act section 7—U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.2 (1992, revised 1997). Courts have recognized that these Guidelines are "persuasive authority" in applying section 7.

In asserting in paragraphs 40 and 41 of the Complaint that Wisconsin, the UP, and northeastern Illinois constitute a relevant geographic market for the fluid milk claim, Plaintiffs completely ignore the requirements of their own Horizontal Merger Guidelines and conspicuously omit any allegation about the ability of customers to turn to suppliers from outside the area or to resellers in the event of a significant price increase across the area or in any particular identified locations within it. In sharp contrast to their fluid milk claim, Plaintiffs do include these very allegations in pleading their Count 1 school milk

claim, where they allege in paragraph 34 of the Complaint that each individual school district is a relevant geographic market based on the specific requirements set out in the Horizontal Merger Guidelines.

C. Relief Sought

Without alleging that such alternative sources of supply and distribution channels could not defeat a significant price increase in a particular identified region or targeted at buyers in particular locations, Plaintiffs cannot properly plead a relevant geographic market as required by section 7 of the Clayton Act, and Count 2 of the Complaint must be dismissed.

Dean Foods believes that Plaintiffs have omitted these essential factual allegations from the fluid milk claim because Plaintiffs know that such allegations are not supported by the market realities. Indeed, Plaintiffs' Complaint acknowledges (in paragraph 40) that milk processors located outside Plaintiffs' preferred geographic market do supply fluid milk to customers inside this region, even today without any significant price increase.

Moreover, the Complaint acknowledges (in paragraph 13) that some customers in the area (specifically, independent distributors and food service companies) do resell fluid milk to other customers, like retail accounts and institutions.

In the alternative, if Plaintiffs believe that there are facts to support a relevant geographic market for fluid milk sales, Plaintiffs should be required under Rule 12(e) to come forward and provide a more definite statement of those facts so that Dean Foods has an adequate opportunity to respond to Plaintiffs' fluid milk claim. Plaintiffs should be required to allege specific facts showing why the relevant geographic market for fluid

milk sales does not encompass any milk processing plants located outside the identified region (even though their own Complaint acknowledges that such plants do serve customers inside the region today). If Plaintiffs purport to rely on allegations of price discrimination targeted at particular buyers in particular locations, Plaintiffs should be required to allege facts identifying those buyers and locations and showing why other buyers could not engage in arbitrage by reselling fluid milk to the targeted customers (even though they acknowledge that such resale occurs in the market right now).

D. Importance of Judicial Determination of Issue

Dean Foods respectfully suggests that the sufficiency of the allegations offered in support of Plaintiffs' fluid milk claim is a critical threshold issue that should be resolved at the outset of this case.

The resolution of this motion will greatly assist the parties in conducting focused discovery, with far less burden on third parties, and in preparing this case most efficiently for trial. There are thousands of fluid milk customers in the region identified by Plaintiffs, many dozens of independent distributors and other resellers available as alternative sellers for those customers, and numerous competing milk processors in the surrounding regions that can and do supply customers in this area, and that certainly would do so in greater volume in response to any hypothetical significant price increase.

As it currently stands, all of these many third parties are necessarily within the scope of discovery. Thus, the Court's resolution of this motion will necessarily frame the issues for discovery and the remaining litigation of this matter.

ARGUMENT

I. COUNT 2 OF THE COMPLAINT (THE FLUID MILK CLAIM) SHOULD BE DISMISSED FOR FAILURE ADEQUATELY TO PLEAD A RELEVANT GEOGRAPHIC MARKET

A. A Properly Defined Relevant Geographic Market Is an Essential Legal Element of a Claim under Section 7 of the Clayton Act, and Plaintiffs Bear the Burden of Pleading Facts Necessary to Establish the Relevant Geographic Market

A properly defined relevant geographic market is a "necessary predicate" to a Clayton Act section 7 claim. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 618 (1974); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

This essential element flows from section 7's express requirement that a substantial lessening of competition must be shown in a particular "section of the country." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Defining the relevant market is necessary, the Supreme Court has held, because a court can only determine whether a merger has a substantial effect on competition by reference to the affected market. *duPont*, 353 U.S. at 593. Moreover, the relevant geographic market must "correspond to commercial realities of an industry and be economically significant." *Brown Shoe*, 370 U.S. at 336-337 (internal quotation marks and citation omitted).

Like any other plaintiff under section 7, Plaintiffs here have the burden of pleading and proving the existence of a relevant market in which to assess the competitive effects of the merger. *See United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974) ("[T]he burden of producing evidence on [relevant geographic market] is on the Government."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) ("[T]he ultimate burden of persuasion . . . remains with the government at all times.") (quoting *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990)).

Furthermore, there is no doubt that an antitrust complaint may be dismissed for failure adequately to plead a relevant geographic market. *See, e.g.*, *Eastern Food Servs. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 7 (1st Cir. 2004) (assessing competitive effects "requires the identification of some economic market in which power can be measured and the consequences of the act or transaction assessed"); *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 628 (5th Cir. 2002) ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted.") (citations omitted); *Tanaka v. Univ. of So. Cal.*, 252 F.3d 1059, 1065 (9th Cir. 2001) (same).

To meet its pleading burden and survive a motion to dismiss, Plaintiffs, like any plaintiff, must plead *facts* sufficient to establish each essential element of their claim; it is not enough to plead "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see also Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (Wood, J.) (plaintiffs may not "merely parrot the statutory language of the claims that they are pleading" but must rather plead "some specific facts to ground those legal claims").

Moreover, where an alleged market definition defies commercial realities commonly known, the district court is permitted—on a motion to dismiss—to reject the plaintiff's definition and dismiss the claim. *See, e.g.*, *42nd Parallel North v. E Street*

Denim Co., 286 F.3d 401, 406 (7th Cir. 2002) (Evans, J.). As the Seventh Circuit said in another context:

> The central business district of Highland Park . . . would have to be something of a consumer's black hole for us to think that trendy shoppers wanting better prices on designer jeans and T-shirts could not venture to other commercial areas to find them. It doesn't take a cartographer to know that Highland Park is located in the densely populated north shore suburbs of Chicago, nor does it take a market researcher to know that "Chicagoland" is home to many shopping venues where consumers could find designer jeans and T-shirts. By any sensible awareness of commercial reality, 42nd was swimming in a much larger competitive sea than the complaint lets on.

Id. See also Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984) ("In considering a motion to dismiss, the court is not required to don blinders and ignore commercial reality.").

B. A Relevant Geographic Market under Section 7 Must Be Defined by Reference to the Alternative Sources of Supply Available to Customers in the Event of a Significant Price Increase, as Reflected in the Federal Plaintiff's Own Merger Guidelines

1. Case Law Support

The relevant geographic market is limited to the "market area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (*quoting Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (emphasis added)).

The "purchasers" whose buying options matter in defining the relevant geographic market are limited to those who purchase directly from the suppliers in question. It is irrelevant whether end users in particular locations who purchase through retail outlets are unable to access the product from alternative suppliers. *See Republic Tobacco Co. v. North Atl. Trading Co.*, 381 F.3d 717, 738-39 (7th Cir. 2004) (because defendant tobacco company sold cigarette papers only to wholesalers and distributors, the

ability or inability of retailers and consumers to purchase from alternative suppliers was "beside the point when it comes to [geographic] market definition").

The market area to which a purchaser can practicably turn must include the areas served by all sellers who are willing to sell to the purchaser at "existing or slightly higher prices." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (Posner, J.) (citing *Tampa Electric* & *Philadelphia Nat'l Bank*). As the Seventh Circuit has explained, the proper scope of the relevant geographic market is a function of price: "a rise in price will expand the market by enabling more sellers to sell profitably to the customers in it." *Id.*; *see also FTC v. Illinois Cereal Mills*, 691 F. Supp. 1131, 1142 (N.D. Ill. 1988) ("The scope of the relevant geographic market includes the area in which sellers of the relevant product can increase price or cut output without triggering a flow of supply into the area from outside it."), *aff'd sub nom. FTC v. Elders Grain, Inc.*, *supra*.

The principle that the relevant geographic market must be defined by reference to the alternative sources of supply that would be available to a purchaser in the event of a hypothetical significant increase in price was applied by the district court in *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990), a section 7 case, like the present one, in which the federal Government challenged a merger of milk processors. The court in *Country Lake* rejected (following a bench trial) the plaintiff's alleged geographic market (the Minneapolis-St. Paul MSA) because the alleged market failed to include processing plants outside the area that would be available to serve customers in the area in the event of a "small but significant non-transitory increase in price," or "SSNIP." *Id.* at 675. The court concluded that the plaintiff's proposed geographic

market definition did not "reflect the actual dynamics of the fluid milk market." *Id.* at 676.

2. U.S. Department of Justice and FTC Merger Guidelines

The very same governing legal principles for defining a relevant geographic market under section 7 are reflected in the U.S. Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines (pertinent excerpts of which are appended hereto at Tab A). The Horizontal Merger Guidelines are an official statement of policy issued by the federal antitrust agencies to guide the federal Plaintiff's own analysis in bringing a section 7 case. The Guidelines define a relevant geographic market as follows:

First, in the absence of price discrimination, the relevant geographic market is the region encompassing sellers that, if acting collectively (as a "hypothetical monopolist"), would profitably impose a SSNIP because customers of those sellers could not defeat the SSNIP by turning in sufficient numbers to alternative suppliers located outside that area (the "general hypothetical monopolist test"). *See* Merger Guidelines § 1.21.

Second, if a hypothetical monopolist could target particular locations of customers for price discrimination with a SSNIP, and other buyers could not resell to the targeted customers thereby enabling the customers to defeat the price increase through arbitrage, then the particular locations of those targeted customers may also be a relevant geographic market (the "price discrimination/no-arbitrage test"). *See id.* § 1.22.[1]

[1] For these purposes, "price discrimination" does not simply mean a difference in price offered to different customers. It requires a showing that the seller is able to charge the targeted customer a significantly higher price where the seller's costs of serving both the targeted and the non-targeted customers are uniform. *See, e.g.*, *United States v. Eastman Kodak Co.*, 63 F.3d 95, 106-07 (2d Cir. 1995) ("Even if we accept the government's theory that the relevant geographic market may be defined on the basis of

Although not binding on the courts, the Horizontal Merger Guidelines represent a long-standing interpretation of section 7 of the Clayton Act. They are the authoritative policy guidance of the federal agencies charged with enforcement of section 7. Thus, courts recognize that the Guidelines constitute persuasive authority for analyzing the antitrust implications of mergers. For example, in *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008), the court noted that "[The Horizontal] Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws." *Id.* at 431 n.11. Likewise, in *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999), the court recognized that the Merger Guidelines direct the FTC to utilize the hypothetical monopolist test to define the relevant geographic market, and the court held, in the context of a hospital merger case, that the FTC failed to carry its burden on relevant geographic market because there was evidence of customer proximity to hospitals outside the defined area and the percentage of customers that needed to switch to defeat a hypothetical price increase was small. *Id.* at 1053-54 & n.11.

Not surprisingly, therefore, in other complaints challenging mergers under section 7, the federal Government has followed controlling case law and its own Horizontal Merger Guidelines and has pleaded a relevant geographic market based on alleged facts reflecting the approach set forth in the Horizontal Merger Guidelines. *See, e.g.*, Complaint ¶¶ 28-30, *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D. W. Va. 2008) (No. 2:07-0329) (filed May 22, 2007) (appended hereto at Tab B);

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price discrimination, there simply is no probative evidence in the record to support the assertion that Kodak engages in price discrimination. . . . Absent proof that Kodak's costs are uniform throughout the world, the government's price discrimination argument simply is conjecture.") (rejecting the Government's proposed geographic market based on unsupported allegations of price discrimination) (citing Phillip E. Areeda, *et al.*, Antitrust Law § 522, at 125 (1995)).

Complaint ¶¶ 15-18, *United States v. Alcan, Inc.*, No. 1:03CV02012 (D.D.C. filed Sept. 29, 2003) (appended hereto at Tab C); Complaint ¶¶ 19-20, *United States v. Aetna, Inc.*, 1999 U.S. Dist. LEXIS 19691 (N.D. Tex. Dec. 7, 1999) (No. 3-99CV 1398-H) (filed June 21, 1999) (appended hereto at Tab D).

C. The Complaint Fails to Allege the Minimal Facts Necessary to Establish the Properly Defined Relevant Geographic Market Essential to the Fluid Milk Claim

The Complaint in this case is fatally flawed in its pleading of a relevant geographic market for purposes of the fluid milk claim. Plaintiffs have failed to plead any facts whatsoever that satisfy the governing case law on geographic market definition, and they have totally disregarded their own Horizontal Merger Guidelines. This critical deficiency is thrown in starkest relief by the contrast with the corresponding paragraphs of the Complaint that plead relevant markets for the school milk claim.[2]

The Complaint merely asserts that "Wisconsin, the UP, and northeastern Illinois constitute a relevant geographic market" for purposes of the fluid milk claim based only on allegations that this region was the area served by the two acquired Foremost Farms plants before the merger and that most customers in this area currently purchase milk from processing plants located within 150 miles. Compl. ¶ 41 (cross-referencing ¶ 15). No other facts are pleaded to support this gerrymandered market.

Critically, the Complaint omits any allegation that a hypothetical monopolist controlling all sellers in the area could profitably impose a significant non-transitory price

[2] Counts 1 and 2 of the Complaint constitute separate putative claims for purposes of Rule 12 because they involve separate alleged violations of Clayton Act section 7 and each depends upon a different set of alleged operative facts. *See Bennett v. United States*, 119 F.3d 470, 471-72 (7th Cir. 1997) (a "claim" is a "set of facts giving rise to a right to a legal remedy").

increase (that is, without inducing significant numbers of customers in the area to buy milk from processing plants located outside the area).

Indeed, paragraph 40 of the Complaint actually concedes that, even today in the absence of such a hypothetical price increase, "[a] portion of the fluid milk supplied to the relevant geographic market comes from plants located outside of Wisconsin, the UP, and northeastern Illinois." Compl. ¶ 40 (emphasis added).

Paragraph 40 of the Complaint does allege that fluid milk processors are able to price discriminate to certain unidentified buyers in different locations, and it asserts the legal conclusion that in the presence of price discrimination, "relevant geographic markets may be defined by reference to the location of [those] buyers." Compl. ¶ 40. However, the Complaint is silent about who such buyers purportedly are and where they are located, and it fails to allege that the costs of serving targeted and non-targeted customers are uniform. Moreover, the Complaint omits any allegation that buyers in any particular location are unable to find alternative distribution channels to engage in arbitrage through resale to circumvent a hypothetical price increase.

This latter omission is understandable in light of paragraph 13 of the Complaint, which expressly concedes that there are direct-purchaser customers of milk processors (distributors and food service companies) who do resell fluid milk to other customers who may purchase directly from the processor, including retailers. Paragraph 13 alleges that "[d]airy processors supply fluid milk directly to retailers, distributors, broad-line food service companies, and institutions such as hospitals and nursing homes," and that "[d]istributors and food service companies resell the milk that they purchase from processors to small retailers, restaurants, and institutions." Compl. ¶ 13. Thus, it is

conceded on the face of the Complaint that at least some retail customers do have alternative distribution channels and are able to arbitrage through resale. The geographic market allegations of the fluid milk claim therefore defy not only commercial realities commonly known but also the commercial realities pleaded elsewhere in the Complaint.

Remarkably, in alleging in this very same Complaint that each individual school district in Wisconsin and the UP constitutes a separate relevant geographic market for purposes of the school milk claim (Count 1), Plaintiffs plead essential facts that they leave out of the fluid milk geographic market paragraphs:

> Each school district in Wisconsin and the UP constitutes a relevant geographic market or section of the country within the meaning of Section 7 of the Clayton Act. As alleged in paragraph 19, individual school districts solicit school milk contract bids from processors. In response, processors engage in "price discrimination," *i.e.*, charging different prices to different customers. Processors develop individualized bids based on both cost and non-cost factors (*see, e.g.*, paragraph 14). **School districts are unlikely to engage in arbitrage, i.e., reselling among customers, to offset the processors' ability to engage in price discrimination among school districts. Therefore, a hypothetical monopolist supplying school milk to any particular district would impose (at least) a small but significant non-transitory price increase (e.g., five percent).**

Compl. ¶ 34 (emphasis added).

Why are these two key factual allegations (the general hypothetical monopolist test and the price discrimination/no-arbitrage test) conspicuously absent from the paragraphs of the Complaint that purport to plead a relevant geographic market for fluid milk sales, when they are both included just six paragraphs earlier in alleging relevant geographic markets for school milk? Dean Foods believes that these omissions are not inadvertent; rather it believes Plaintiffs know that the actual market facts do not support the general hypothetical monopolist test or the price discrimination/no-arbitrage test for fluid milk customers in the area identified.

The complete absence of any allegation of the minimal facts necessary to support a properly defined geographic market for Plaintiffs' fluid milk claim (Count 2) requires that that claim be dismissed. If Plaintiffs cannot plead these facts (as is suggested by other provisions of the Complaint), Dean Foods should not have to answer to the fluid milk claim and should not be required to conduct the unfocused and wide-ranging third-party discovery that it will entail, and this claim should not occupy the time and resources of this Court.

II. IN THE ALTERNATIVE, PLAINTIFFS SHOULD BE REQUIRED TO PROVIDE A MORE DEFINITE STATEMENT OF ALLEGED FACTS NECESSARY TO SUPPORT A PROPER GEOGRAPHIC MARKET FOR THE FLUID MILK CLAIM

In the alternative, Plaintiffs at a minimum should be required under Rule 12(e) to come forward and state the facts essential to establish a relevant geographic market for fluid milk sales to which Dean Foods can properly respond. Requiring Plaintiffs to do so as a threshold matter at the outset of this litigation is appropriate, because such clarification will substantially assist in focusing the issues in the case and the scope of necessary third-party discovery.

"A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e); *see also Taurus IP, LLC v. Ford Motor Co.*, 539 F. Supp.2d 1122, 1126-27 (W.D. Wis. 2008) (granting motion for more definite statement in patent infringement action requiring plaintiff to list allegedly infringing products).

The Complaint as currently pleaded does not include sufficient facts forming the basis for Plaintiffs' assertion of a relevant geographic market for fluid milk sales to give

Dean Foods a reasonable opportunity to respond. In the absence of an allegation of the general hypothetical monopolist test, the basis for asserting that Wisconsin, the UP, and northeastern Illinois constitute the relevant geographic market is unclear. While Plaintiffs acknowledge that milk processing plants located outside this area supply fluid milk to customers within the area, no fact is alleged from which it could be concluded that the relevant geographic market should not include such out-of-area plants.

Furthermore, if Plaintiffs believe that particular locations within this area exist where Dean Foods as a result of the merger (or a hypothetical monopolist) could allegedly price discriminate to particular customers without those customers having the ability to source from more distant plants or engage in arbitrage to circumvent a significant price increase, Plaintiffs should be required to allege specific facts to satisfy the price discrimination/no-arbitrage test and to identify those particular locations and those customers, so that Dean Foods may respond.

Without such specific allegations, Dean Foods will be severely hampered in its ability to take efficient and focused discovery in response to the fluid milk claim, and a large number of third parties will inevitably be burdened by intrusive Rule 45 discovery.

CONCLUSION

For the foregoing reasons, Count 2 of the Complaint, the fluid milk claim, should be dismissed.

In the alternative, Plaintiffs should be required to provide a more definite statement of the facts necessary to support a properly defined relevant geographic market for the fluid milk claim.

Dean Foods respectfully submits that the resolution of this motion will have a fundamental and defining impact on the overall scope of the case and, in particular, on the scope of discovery, including the burden of discovery on third parties.

Dated this 18th day of February, 2010.

Respectfully submitted,

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