

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

FILED: JANUARY 21, 2009

VALLEY GOLD LLC, individually and on
behalf of all others similarly situated;

Plaintiff,

v.

DAIRY FARMERS OF AMERICA, INC.,
GERALD BOS, GARY HANMAN,
GLENN MILLAR and FRANK OTIS,

Defendants.

09CV387

JUDGE HIBBLER

MAGISTRATE JUDGE MASON

No.:

PH

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Valley Gold LLC (“Plaintiff”) on behalf of itself and all others similarly situated, brings this action against Dairy Farmers of America, Inc. (“DFA”), Gerald Bos, Gary Hanman, Glenn Millar, and Frank Otis (collectively identified as “Defendants”) for illegal racketeering and monopolization of the raw milk markets and seeks treble damages and injunctive relief under the Sherman Antitrust Act of 1890 (“Sherman Act”), 15 U.S.C. §2, pursuant to Sections 4 and 16 of the Clayton Antitrust Act of 1914 (“Clayton Act”), 15 U.S.C. §§15, 26, and complains upon information and belief, as follows:

INTRODUCTION

1. Defendant Dairy Farmers of America is the largest dairy cooperative in the world, and its members and all sellers of raw milk benefit when the price of the raw milk they produce and sell is high. This Complaint alleges that DFA and its officers intentionally and unlawfully used its large purchasing power to “corner the market” for the price of spot cheese traded on the Chicago Mercantile Exchange (“CME” or “the

Exchange”) for the purpose of manipulating and raising the price of raw milk and processed dairy products to supra-competitive levels.

2. The price of spot cheese plays a significant role in how the price of raw milk is determined. The cost of raw milk was, and continues to be, based upon the federal milk marketing order plus a premium. The federal milk marketing order is based, in part, on the value of cheese traded on the CME. The DFA purchases of exchange traded spot cheese that are the subject of this complaint were made by Defendants with the full knowledge that, in many instances, the purchased spot cheese would have to be dumped at a loss. Nonetheless, Defendants engaged in the transactions because they knew that any losses on spot cheese caused by their price manipulation scheme would be more than covered by the supra-competitive profits DFA and its members would earn on their related sales of raw milk, which is not sold on the Exchange but is instead sold as business to business transactions.

3. This market manipulation scheme was the subject of a recent \$12 million fine and order issued by the Commodity Futures Trading Commission (“CFTC”). *In the matter of Dairy Farmers of America, Inc., et al.*, CFTC Docket No. 09-02 (December 16, 2008).

4. Through its interventions on the Exchange, DFA was able to reap substantial supracompetitive prices for the sales of raw milk sold through its dominant network of dairy facilities and other nonaffiliated dairy facilities to cheese and milk processors throughout the country.

5. As a direct, foreseeable, and intended result of Defendants' manipulative conduct alleged herein, Plaintiff and the class members were forced to pay artificially high prices for raw milk.

JURISDICTION AND VENUE

6. The CME is located in this judicial district and serves as the primary market for exchange-reported prices of spot cheese transactions in the United States and offers a marketplace where various commodities such as dairy products are traded. The CME is located at 20 South Wacker Drive, Chicago, Illinois.

7. During the Class Period, Defendants transacted business and engaged in numerous trades for cheese on the CME and otherwise engaged in a substantial part of the events giving rise to Plaintiff's claims in this district. This conduct also had a substantial effect upon interstate trade and commerce as further described herein.

8. This Court has original federal question jurisdiction over this action pursuant to Sections 4(a) and 16 of the Clayton Act, 15 U.S.C. §§15(a) and 26, and 28 U.S.C. §§1331 and 1337, and 1367.

9. Venue is proper in this judicial district pursuant to 15 U.S.C. §§15, 22 and 26 and 28 U.S.C. §1391(b), (c), and (d).

PARTIES

10. Plaintiff Valley Gold LLC is a California Limited Liability corporation whose principal place of business was located at 240 North Avenue, Gustine CA 95322. Valley Gold commenced business on May 5, 2003 for the purposes of manufacturing and selling cheese including Italian varieties such as mozzarella and provolone, American varieties such as colby and cheddar and Mexican queso fresco cheese. Valley Gold won

several awards for its cheeses during the time it was in operation. In order to make its award winning and other cheeses, Valley Gold purchased raw milk in bulk, much of it from dairies in California. Valley Gold bought on average \$4 to \$5 million of raw milk per month. Valley Gold ceased manufacturing cheese in November of 2005. It remains a California LLC with a mailing address at 2904 Village Drive, Merced CA 95348.

11. Defendant Dairy Farmers of America, Inc. (“DFA”) is a not-for-profit corporation organized and existing under the laws of the State of Kansas with its principal place of business at 10220 North Ambassador Drive, Kansas City, Missouri 64153. DFA is a vertically integrated cooperative that controls raw milk production, and owns and operates its own hauling companies, processing plants and distribution centers for milk and cheese. DFA is the world’s largest dairy cooperative with more than 18,000 farm members in 48 states. DFA owns a majority interest in National Dairy Holdings, LP, Borden, Keller’s, Mid-American Farms, Golden Cheese Co, Flav-O-Rich, Country Fresh Farms, Roberts Dairy Products, Hiland Dairy Foods, Heritage Foods, Wilcox Dairy Farms, and JP Hood. DFA also owns a major interest in Dairy Marketing Services.

12. Defendant Gerald Bos was the acting chief financial officer of Dairy Farmers of America, Inc. between 1998 and December 31, 2005. He resides in Weatherby Lake, Missouri. 13. Defendant Gary E. Hanman was the acting president and chief executive of officer of Dairy Farmers of America, Inc. between 1998 and December 31, 2005. Based upon news articles, it is understood that defendant Hanman provided consulting services to Dairy Farmers of America during 2006. He resides in Platte City, Missouri.

14. Defendant Frank Otis served as Keller's Creamery LP's chief executive officer. He resides in Ambler, Pennsylvania.

15. Defendant Glenn Millar served as Keller's Creamery LP's vice president of procurement and operations. He resides in Las Vegas, Nevada.

16. On information and belief, Defendants DFA, Hanman, Bos, Otis, and Millar acted for themselves and by and through their local agents or commodity brokers, who traded dairy commodities on the CME on their behalf. As such, each Defendant is responsible for all acts or omissions of any of its agents. The acts complained of herein have been within the apparent authority of the Defendants, have been to their benefit, and have been ratified by Defendants.

RELEVANT THIRD-PARTIES

17. Currently, upon information and belief, Defendant DFA owns approximately 87.5 percent of common equity interest and approximately 92 percent preferred equity interest in National Dairy Holdings, LP ("NDH"). NDH is one of the largest dairy processors in the United States. NDH is a limited partnership organized and existing under the laws of the State of Delaware with its principal place of business at 3811 Turtle Creek Boulevard, Suite 1300, Dallas, Texas 75219. NDH is the parent company of Borden Dairy, Meadow Gold, Flav-ORich, and Dairy Fresh. NDH owns subsidiary limited liability companies which own and operate milk processing plants that process DFA's raw milk.

18. DFA also controls at least fifty percent of Dairy Marketing Services, Inc. ("DMS"), a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 5001 Brittonfield Parkway, Syracuse,

New York 13221, and with its southeast regional office located at 10411 Cogdill Road, Knoxville, Tennessee 37932. DMS, which was formed by DFA and Dairylea Cooperative, Inc. in 1999, is a milk marketing organization which markets various grades of milk on behalf of its member farmers.

19. DFA also has partnership arrangements with Land O'Lakes, Inc. for the operation of cheese processing plants. Land O'Lakes, Inc. ("Land O'Lakes") is a national farmer-owned food and agricultural cooperative organized and existing under the laws of the State of Minnesota, with its headquarters at 4001 Lexington Avenue North, Arden Hills, Minnesota 55126. Land O'Lakes produces, markets and sells more than 300 dairy-based food products including butter, spreads, cheese, as well as other related dairy products. It markets its products under the national brand names, including LAND O' LAKES® and Alpine Lace®, as well as under the regional brands such as New Yorker® and Lake to Lake®. Land O'Lakes has a network of 10 dairy manufacturing facilities geographically dispersed around the country. The customer base includes national supermarket and super-center chains, industrial customers, including major food processors, and major foodservice customers, including restaurants, schools, hotels and airlines.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action on its own behalf and as a representative, pursuant to 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure (“FRCP”), on behalf of the following proposed class:

All legal entities that directly purchased raw milk from Dairy Farmers of America and their subsidiaries and affiliates as well as other raw milk providers during the period from April 2004 to the present or when it is determined that Defendants’ anticompetitive conduct no longer results in the extraction of supracompetitive prices for raw milk.

The Class excludes Defendants, and Defendants’ predecessors, subsidiaries, affiliates, and agents.

21. Due to the nature of the trade and commerce involved, Plaintiff believes that Class members number in the hundreds and are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable.

22. There are questions of law or fact common to the Class, which predominate over individual issues, including:

- a. Whether Defendants possess the ability to raise prices in the raw milk markets;
- b. Whether Defendants unlawfully engaged in market manipulative conduct that raised, maintained, and/or stabilized CME spot cheese prices resulting in artificially high raw milk prices;
- c. The duration of the unlawful conduct engaged in by the Defendants, and the nature and character of the acts performed by Defendants in furtherance of their illegal monopolization;
- d. Whether Defendants’ conduct violated the Sherman Act;

- e. Whether Defendants' conduct, caused damages to the Plaintiff and the other members of the Class; and
- f. The appropriate measure of damages sustained by Plaintiff and other members of the Class.

23. Plaintiff will fairly and adequately protect the interests of the Class and those interests are coincident with and not antagonistic to those of other members of the Class.

24. Plaintiff is represented by counsel competent and experienced in the prosecution of complex litigation, including antitrust class action litigation.

25. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment is necessary to permit adjudication of claims by many Class members who otherwise could not justify the considerable expense to litigate an antitrust claim such as is asserted in this Complaint. This class action presents no difficulties in management that would preclude maintenance as a class action.

26. The Class is definable and is one for which records of the names and addresses of the members of the Class exist in the files of Defendants or their affiliates and, for entities that purchased from other cheese and milk processors, from the receipts of such purchasers.

SUBSTANTIVE ALLEGATIONS

A. RELEVANT MARKETS.

27. Raw milk is a product with unique attributes and characteristics for which there are no practical substitutes.

28. The market for raw milk in the continental United States is a relevant product and geographic market.

29. The United States dairy industry traditionally references the CME cheese market price when negotiating wholesale raw milk, processed cheese and milk products.

B. SPOT CHEESE PRICES AS REPORTED ON THE CHICAGO MERCANTILE EXCHANGE DIRECTLY CORRELATE TO, AND SIGNIFICANTLY INFLUENCE, THE PRICES OF RAW MILK.

30. Pursuant to federal regulations and similar state regulations, the price of raw milk in the contiguous United States is set by the U.S. Department of Agriculture (“USDA”) using a formula that positively correlates to the price of butter, cheese, nonfat dry milk, and dry whey. The resulting figures are identified pursuant to federal milk marketing orders (“FMMOs”). These prices are the bases upon which minimum prices for fluid raw milk product is established.

31. Raw milk can be processed into milk, yogurt, ice cream, cheeses, butter, as well as other products.

32. Under the FMMO system, prices of dairy products: butter, milk, cheese, and whey are used to establish monthly minimum prices for raw milk used in fluid drinking milk (Class I), used in yogurt and ice cream (Class II), used in cheese (Class III), and used in butter and nonfat dry milk (Class IV). The price of cheese used for purposes of establishing the price of raw milk as set under the FMMO is highly

correlated to the price for cheese reported on the CME spot market. In June 2007, the U.S. General Accounting Office (“GAO”) published a report entitled, *Spot Cheese Market: Market Oversight Has Increased, but Concerns Remain about Potential Manipulation*, GAO-07-707 (“the GAO Report”). The GAO reported that CME cheese spot market prices directly correlate to the federal milk pricing formulas.

33. As a result of the direct correlation between CME spot market cheese prices and the resulting price of raw milk as set under FMMOs, a firm that has market power and the capacity to dominate purchases of spot cheese on the CME will possess similar market power to directly influence, and anticompetitively increase, the corresponding prices of raw milk.

34. Commercial contracts for the sale of raw milk are generally set using the prices of the FMMOs or certain CME dairy product market prices, which positively correlate to the established CME spot cheese prices as the base reference point. These contracts often include a premium on top of the FMMO price.

C. CME SPOT CHEESE PRICES ARE ESTABLISHED ON A THINLY TRADED MARKET THAT IS SUBJECT TO PRICE MANIPULATION BY A FIRM WITH SUFFICIENT MARKET POWER TO DOMINATE PURCHASES ON THE EXCHANGE.

35. The CME spot cheese market is a surplus market on which relatively small amounts of cheese are traded relative to the overall size of the domestic cheese market. The GAO Report stated that, between 1998 and 2005, the volume of cheese traded on the CME generally represented less than 1 percent of all cheese produced in the United States.

36. The GAO Report noted that thinly traded markets such as the CME spot cheese market are susceptible to price manipulation: “in thinly traded markets each

individual participant's activity tends to be more influential than it would be on a market with more transactions and more participants. As a result, it may be easier for a market participant to move prices in a preferred direction over a short period of time with relatively few completed or unfilled transactions.”

37. On October 30, 2003, Peter C. Carstensen of the University of Wisconsin Law School testified regarding the susceptibility of a thinly traded market to manipulation before the United States Senate Committee on the Judiciary: “The basic idea is to manipulate the public price of a commodity where relatively low volumes are traded in order to affect the off-exchange prices where such prices are set in relation to the public market price. The impact on the integrity of the market process is the same whether the manipulation comes from the buyer or seller side.”

D. DEFENDANTS HAVE ENGAGED IN A PATTERN OF ABUSIVE TRANSACTIONS AIMED AT MANIPULATING THE SPOT MARKET PRICE OF CHEESE AND THEREBY ENJOYING SUPRA-COMPETITIVE PRICES IN THE MARKET FOR RAW MILK.

38. The CFTC has disclosed that on April 14, 2004, DFA purchased large quantities of CME cheese with the intent to manipulate the market. The CFTC also disclosed that between May 21 and June 23, 2004, DFA purchased approximately 12,920,000 pounds of cheese off of the CME. The CFTC disclosed that on many days, the DFA was the sole purchaser of surplus cheese sold at the CME.

39. The acquisitions of inordinate quantities of cheese on the CME, and subsequent dumping of that cheese at a loss, makes no economic sense and would be irrational for Defendants unless it resulted in the extraction of supracompetitive prices by Defendants in their subsequent sales of raw milk and processed dairy products.

40. As CME spot cheese market prices spiked, the corresponding FMMO prices for raw milk also spiked accordingly.

41. DFA has generated substantial supracompetitive revenues each time the CME spot cheese market prices spiked, thus, permitting it to enjoy supracompetitive prices for its raw milk that it sells to cheese and milk processors.

42. Defendants' anticompetitive conduct and its abuse of its market power in transactions on the CME have resulted in economic injury to the Plaintiff and the enjoyment of monopolistic profits by the Defendants. As Defendants manipulated the spot price of cheese on the CME, Plaintiff has been damaged through the higher corresponding prices for purchases of raw milk.

43. In addition to the damage that Defendants' anticompetitive conduct has inflicted upon the Plaintiff, the ultimate consumer has been forced to pay higher prices for milk.

44. Defendants' unlawful activities, as described herein, took place within the flow of interstate commerce, and had a direct, substantial, and reasonably foreseeable effect upon interstate commerce.

COUNT I

VIOLATIONS OF THE SHERMAN ACT (15 U.S.C. §2, ET SEQ.)

45. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

46. During the Class Period, Defendants engaged in a continuing pattern of anticompetitive purchases on the CME spot cheese market for the purpose of abusing their market power on the CME and in the raw milk markets, in some instances selling

their purchased spot cheese product at a loss, and extracting supracompetitive prices for the corresponding sales of raw milk in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

47. Defendants' anticompetitive acts and the resulting increased prices attributable to their transactions are direct evidence of their possession and intentional abuse of monopoly power to raise the price of raw milk through their anticompetitive actions.

48. Raw milk were not set by the forces of supply and demand, but were instead established by Defendants' efforts to manipulate the price through practices that were not reflective of supply and demand conditions. As a direct and foreseeable result of Defendants conduct artificially raising the price of spot cheese purchased through the CME, Plaintiff and similarly situated members of the Class were forced to pay supra-competitive prices for raw milk.

49. Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees.

50. The illegal conduct alleged herein had the effect of illegally increasing and/or stabilizing the prices for spot CME cheese and, consequently, the prices for raw milk.

51. During the Class Period, Defendant DFA and its subsidiaries and affiliates sold processed raw milk directly into interstate commerce. DFA received payment for such services across state boundaries. Defendants' activities, and the sale of their

services, have both taken place within, and have had a substantial anticompetitive effect upon, interstate commerce within the United States. Further, Plaintiff's cheeses were sold across state lines and payments were received across state boundaries.

52. Plaintiff and members of the Class seek injunctive relief, treble damages, attorney fees and any other relief that the Court deems necessary and appropriate.

53. During the Class Period, Defendants' manipulative and anticompetitive conduct described herein caused Plaintiff and the members of the Class to pay artificially inflated prices for raw milk. As a result, Plaintiff and the members of the Class have suffered an antitrust injury and been damaged in an amount to be determined according to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that:

A. The Court determine that this action may be maintained as a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure;

B. The Court adjudge and decree that Defendants' actions as alleged herein are an abuse of their monopoly power in violation of Section 2 of the Sherman Act;

C. Judgment be entered against Defendants, jointly and severally, and in favor of Plaintiff and the Class for treble damages as allowed by law in an amount determined to have been sustained by them.

JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of all of the claims asserted in this Complaint so triable.

DATED: January 21, 2009

Respectfully submitted,

**VALLEY GOLD LLC
Class Plaintiff,**

By: /s/George K. Lang
One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby declare that on January 21, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record.

By: /s/George K. Lang
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