IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION	**MDL No. 1899** **Master File No. 2:08-md-1000**
THIS DOCUMENT RELATES TO:	**Case No. 2:07-cv-188**
FOOD LION, LLC and FIDEL BRETO, d/b/a FAMILY FOODS, on behalf of themselves and a class of all others similarly situated,	**Judge J. Ronnie Greer** **Magistrate Judge Dennis H. Inman**
***Plaintiffs*,**	
v.	
DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA, INC., NATIONAL DAIRY HOLDINGS, L.P., DAIRY MARKETING SERVICES, LLC, and SOUTHERN MARKETING AGENCY, INC.,	
***Defendants*.**	

RETAILER PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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I. Introduction

This case arises out of a conspiracy to lessen competition for fresh, white, fluid milk in the southeastern United States. At trial, Plaintiffs Food Lion, LLC and Fidel Breto, d/b/a Family Foods, will use common evidence to show that Defendants Dean Foods Co. ("Dean"), Dairy Farmers of America, Inc. ("DFA"), and National Dairy Holdings, LP ("NDH") conspired to set up and operate NDH as an ineffective competitor that did not vigorously compete for the sale of milk, thus enabling Defendants to charge Plaintiffs and other class members higher prices for milk.

Six years ago, Plaintiffs filed their motion for class certification, Dkt. 290 (Motion) & Dkt. 291 (Brief), demonstrating that all the requirements of Federal Rule of Civil Procedure 23 were satisfied and that common questions would predominate at any class trial. Legal and factual developments that have occurred since that time further confirm that class certification is warranted. For example, a senior corporate executive at Dean testified that price changes in the milk market cause a "ripple effect" that affects the price paid by all class members. And Plaintiffs' expert, Professor Ronald Cotterill, completed his econometric model that shows that all class members have been impacted by Defendants' conspiracy.

As demonstrated below, the three elements of Plaintiffs' Section 1 claim—conspiracy, impact, and damages—will all be proven at trial using common evidence. Accordingly, Plaintiffs' motion for class certification should be granted.

II. Background

After two rounds of summary judgment briefing, and twice ruling that Plaintiffs' evidence of a conspiracy to lessen competition is sufficient to create a jury question, the Court is familiar with the facts of this case. *See* Dkt. 863 at 13; Dkt. 1797 at 4. This supplemental

memorandum therefore sets out only the basic facts and describes the most important developments that occurred since the class certification motion was originally briefed.

A. The Illicit Scheme

To obtain approval from the U.S. Department of Justice ("DOJ") for the merger of Dean and Suiza Foods Corporation ("Suiza"), Dean and Suiza recognized that they would need to sell several of their milk plants. Rather than selling plants to an existing company, Suiza persuaded its strategic business partner, DFA, to create an entirely new company, NDH, which would be majority owned and controlled by DFA. Before the merger closed, DFA financed NDH's purchase of several milk plants in an effort to show the DOJ that NDH would be a viable competitor. NDH then agreed to acquire eleven other bottling plants that were to be divested from either Dean or Suiza. Defendants assured the DOJ that NDH would use the plants to become a vigorous competitor for the sale of bottled milk. Based on such assurances, the DOJ approved the merger in December of 2001. The merged entity assumed the Dean name.

The promised "vigorous competition" between Dean and NDH never materialized. Instead, Dean, DFA, and NDH implemented their conspiracy to lessen competition. Dean, DFA, and NDH representatives held a meeting at which all agreed that several of the plants to be divested were not viable and should be closed. NDH admits that it budgeted for closing costs at several of the plants even before taking possession of them and that the others were second-best plants. In return, NDH's majority owner DFA received a commitment from Dean to allow DFA to supply raw milk to Dean bottling plants. When NDH's management wanted to close one of the plants shortly after the merger, its antitrust lawyers told them that it was "too soon" after the merger to close the plant. When a competing bottler attempted to buy that plant, DFA blocked the sale. NDH then demolished the plant and handed over key equipment and customer lists to Dean. Defendants repeatedly ensured that NDH would not vigorously compete, including

through NDH's sale of key bottling plants and NDH not buying other bottling plants that would have made it a stronger competitor. *See generally In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 268-69 (6th Cir. 2014) (summarizing relevant facts). This is just some of the evidence that Plaintiffs will present to prove the conspiracy.

B. Case Developments Following the Class Certification Motion

1. Discovery Developments

The parties continued with fact and expert discovery following the class certification briefing. The most important additional piece of evidence relevant to this motion comes from Plaintiffs' deposition of Rick Fehr, Dean's Chief Operating Officer for the Southeast Region. Mr. Fehr was asked about the different types of customers Dean had, including national, regional, and local. In response to a question about how changes in milk prices to a national customer "may affect prices charged to other customers," Mr. Fehr indicated that there is a highly interconnected pricing structure in the market:

> I would say that there's always a relationship between customers in a market and so whoever is in the market needs to understand the pricing structure for the national customers, for the regional customers that cross over the dairy borders and -- as it relates to the pricing that he has. So every -- it's all interactive.
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> . . .
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> So the complexity of how the pricing model works in a market is -- is pretty intense with -- with all the different factors that hit them. From a national account guy making a concession, you know, let's say in -- for Walmart or Bruno's and how that retail affects the guy down the street where our local guy has to say, I can't let my gig get uncompetitive. **So it's a ripple effect. Somebody throws a rock in the lake and changes the pricing structure of any part of that market and it ripples all the way through.**

See Ex. 1, Rick Fehr Dep. at 186:22-187:13, 188:1-10 (emphasis added).

2. Development of Expert Economic Model

After discovery was completed, the parties exchanged merits expert reports. Among the reports was the report of Plaintiffs' expert, Professor Cotterill. Professor Cotterill conducted a regression analysis, based on millions of actual milk prices, which showed that price competition between Defendants' milk plants during the conspiracy period was less intense than it had been before the conspiracy. Professor Cotterill's analysis showed that milk prices in the Southeast region had increased approximately 43% during the conspiracy period. *See* Cotterill Report (Dkt. 1128-1) Fig. 17. While most of the difference in milk prices during the period was due to normal changes in supply and demand, *i.e.*, the cost of raw milk, energy, labor, and other factors affecting the cost of production, Professor Cotterill concluded that a portion of the overall increase in milk prices, or approximately 7.9%, was attributable to the lessened intensity of competition for the sale of milk. *See id.* Fig. 27.

3. Motions for Summary Judgment

Defendants moved for summary judgment on all five claims in the Complaint. Dkt. 461. The Court had previously issued an order stating that argument on class certification would not be heard until the summary judgment motion was resolved. Dkt. 426. The Court initially granted Defendants' motion as to Courts II, III, and IV, but denied summary judgment on Counts I and V. Dkt. 863. After the close of discovery, Defendants filed a motion for reconsideration, Dkt. 952, as well as a renewed motion for summary judgment based on several new grounds. Dkt. 1026. The Court granted summary judgment in favor of Defendants as to Count V on reconsideration and as to Count I , in part because it found that Professor Cotterill's analysis of bottled milk prices showed the impact of the Dean-Suiza merger itself, rather than the alleged antitrust violation. *See In re Se. Milk Antitrust Litig.*, No. 2:08-md-1000, 2012 WL 1032797, at *3-6 (E.D. Tenn. Mar. 27, 2012).

Early last year, the Sixth Circuit reversed the grant of summary judgment as to Count 1 and remanded the case to this Court. *See In re Se. Milk Antitrust Litig.*, 739 F.3d 262 (6th Cir. 2014). Of particular relevance to the class certification motion, the Court resolved the "concerns regarding Cotterill's regression analysis" that led this Court to find that Plaintiffs had failed to establish an antitrust injury. *Id.* at 284-85. The Court held that Professor Cotterill's regression analysis was an appropriate model, was designed to prove antitrust injury (also known as "impact"), and, along with the evidence of the conspiracy, provided sufficient evidence of antitrust injury to go to a jury. *Id.*

III. Argument

In the nearly six years since Plaintiffs' initial motion for class certification was filed, the parties completed discovery, Plaintiffs have refined their theory of liability and corresponding damages model, and the Supreme Court and Sixth Circuit have issued several opinions that have significant bearing upon this case. These developments confirm that the proposed class meets all requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3).

A. The Proposed Class Satisfies the Requirements of Rule 23(a).

Rule 23(a) permits representative parties to proceed on behalf of a class where (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. With regard to the first factor, "while there is no strict numerical test, 'substantial' numbers usually satisfy the numerosity requirement." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Defendants' sales data reveals that thousands of purchasers satisfy the proposed class definition, and confirms that the proposed

class is so numerous that joinder of all class members is impractical. Defendants have offered no rebuttal to Plaintiffs' contention that the numerosity prong is satisfied.

1. The proposed class is ascertainable using objective criteria.

An "implied prerequisite" of Rule 23(a) is that there be an ascertainable class of persons who can be readily identified through objective criteria and without the need for individualized determinations. *See Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009); 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1760 (3d ed.) (the class description must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member"). Recent cases in the Sixth Circuit show that ascertainability becomes an obstacle to certification when a merits determination or subjective inquiry will be necessary to determine inclusion within the class.[1] Plaintiffs' proposed class definition suffers from no such deficiencies, as it uses objective criteria—such as geographic location and an easily verifiable "purchaser" requirement—to determine eligibility to participate in the class.

Plaintiffs do, however, propose two minor modifications to the class definition in response to two criticisms raised in Defendants' opposition to Plaintiffs' class certification motion.[2] First, because almost seven years have passed since the filing of the Amended

[1] *See, e.g.*, *Toldy v. Fifth Third Mortg. Co.*, No. 1:09-cv-377, 2011 WL 4634156, at *6 (N.D. Ohio May 24, 2011) (no ascertainability where class definition required inquiry into individuals' motive in refinancing their home); *Schuh v. HCA Holdings, Inc.*, No. 3:11-cv-1033, 2014 WL 4716231, at *13 (M.D. Tenn. Sept. 22, 2014) (no ascertainability where the Court would have to determine whether a purchaser has been damaged in order to ascertain membership); *Givens v. Van Devere, Inc.*, No. 1:11-cv-666, 2012 WL 4092803, at *15 (N.D. Ohio Apr. 27, 2012) (no ascertainability where class membership required a case-by-case determination of application of the U.C.C. to the sales at issue and whether the putative class member complied with the requirements of the U.C.C.).

[2] District courts "have broad discretion to modify class definitions" and are "oblig[ed] to make appropriate adjustments to the class definition as the litigation progresse[s]." *Powers v. Hamilton*

Complaint, Plaintiffs propose that the time period for qualifying purchases be modified from "January 1, 2002 until the present" to "January 1, 2002 until December 31, 2009." Defendants cannot have any objection to this, as Plaintiffs understand that they are simultaneously with the filing of this brief moving to limit the damages period for the class to sometime in 2009.

Second, to ensure that the qualifying purchases align with the product market definition used throughout the milk industry and specifically by both Professor Cotterill and Professor Luke Froeb, Plaintiffs propose to substitute the term "Grade A milk" with the term "fresh, white, fluid milk." Thus, Plaintiffs now request that the Court certify a class of:

> All persons, other than schools and school districts, within the Southeast United States who have purchased, at any time from January 1, 2002 until December 31, 2009, from any Defendant, fresh, white, fluid milk which has been pasteurized and processed for human consumption and then packaged into containers which are sold to retail outlets and other customers.

Professor Cotterill's data set and Professor Froeb's product market definition account for these changes.[3] In addition, deponent Tracey Herrmann of Food Lion confirmed in 2009 that four varieties of fresh, white, fluid milk (Whole, 2 percent, 1 percent, and Skim) comprise the "core milk line," as that term is used in the industry. *See* Ex. 2, Tracey Herrmann Dep. at 50:16-51:7.

Cnty. Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007); *see also Daffin*, 458 F.3d at 554 (noting that the "trial judge is free to modify [the] certification order in light of subsequent developments in the litigation"); Fed. R. Civ. P. 23(C)(1)(c) ("An order that grants or denies class certification may be altered or amended before final judgment."). This authority includes *sua sponte* modifications of the class definition, where necessary "to ensure that a certified class is properly constituted." *Powers*, 501 F.3d at 619. Plaintiffs will, however, formally move the Court for modification of the class definition if the Court so desires.

[3] Both Professor Froeb's product market definition and Professor Cotterill's analysis exclude from the category of fresh, white fluid milk: flavored milks, extended shelf life (ESL) milk, organic and hormone-free milk, buttermilk, lactose-free and lactose-reduced milk, and soy and rice milk. The modified definition also clarifies, through the reference to fluid milk, that it does *not* refer to various products made from milk, such as ice cream, yogurt, cheese, or powdered milk.

2. There are questions of law and fact common to the proposed class.

Defendants do not dispute that Plaintiffs have identified questions of law and fact common to the class. Plaintiffs need to identify only one common question of law or fact for purposes of commonality. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011); *see also In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (characterizing a plaintiff's commonality burden as requiring "evidence to demonstrate that a particular contention is common, but not that it is correct" or true); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 ("Although Rule 23(a)(2) speaks of 'questions' in the plural, . . . there need only be one question common to the class."). Commonality is therefore satisfied through proof of "a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397.

Plaintiffs satisfy the commonality prong because their claims, along with those of all other absent class members, depend upon a common contention: that Defendants conspired to, and did, prevent NDH from becoming a strong competitor, and that Defendants agreed not to compete on price as vigorously during the conspiracy period. Determining the truth or falsity of this contention "will resolve an issue that is central to the validity" of all class members' claims "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551; *see also In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 405 (S.D. Ohio 2007) ("Price-fixing conspiracy cases by their very nature deal with common legal and factual questions about the existence, scope and extent of the alleged conspiracy."). These questions are common and critical to the case, in that resolution of all putative class members' claims depend on a single answer provided by a fact finder.

3. Food Lion and Breto's claims are typical of all class members.

Rule 23(a)(3) demands that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." This requirement "insures that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their

own interests, the class representatives also advocate the interests of the class members." *In re Whirlpool Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852-53 (6th Cir. 2013). The class representatives' claims are typical if they "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, [and they] are based on the same legal theory." *Arlington Video Prods., Inc. v. Fifth Third Bancorp*, 515 F. App'x 426, 442 (6th Cir. 2013), *vacated and remanded*, 134 S. Ct. 212 (2013). The concepts of commonality and typicality "tend to merge" in practice because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 131 S. Ct. at 2551 n.5.

The claims of the class representatives in this case, like the claims of all absent class members, are based on the same lessening of competition for wholesale sales of milk. Plaintiffs will show using common evidence that Defendants agreed to and did in fact cripple NDH's ability to become a strong competitor, and that during the period of the conspiracy, Defendants' plants competed less vigorously on price than they had before the conspiracy. The class representatives, Food Lion and Breto, are typical because they have the same interest as the absent class members in showing that this is true.

Defendants argue that Plaintiff Food Lion is not representative of the putative class because it is a large purchaser who experienced different competitive conditions than other smaller or local retailers and because it had cost-plus contracts and thus could not have paid higher prices because of the alleged conspiracy. However, like the expert's report deemed admissible in *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1260-63 (10th Cir. 2014),

Professor Cotterill examined the relevant industry and concluded that a price-fixing conspiracy in the industry would affect all buyers, because "any impact resulting from a price-fixing conspiracy would have permeated all [] transactions, causing market-wide impact . . . ." *Id*. at 1251.[4] Moreover, such an argument directly contradicts Dean's own testimony that any change in price had a "ripple effect" that moved through the market just like "throw[ing] a rock in a lake."[5]

Defendants also argue that Plaintiffs had various pricing options and alternatives available during the conspiracy period, which renders them atypical from the majority of class members. However, recent case law indicates that "[w]hether a customer has different [] options goes only to the issue of market power," not typicality. *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 12-mdl-2048, 2014 WL 104964, at *5 (W.D. Ok. Jan. 9, 2014). Plaintiffs' claims still arise from the same law and facts as those of the absent class members, such that "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague*, 133 F.3d at 399.

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[4] Defendants' argument that Food Lion suffered no injury because of formula pricing has already been rejected by the Sixth Circuit, which held that Professor Cotterill's econometric model provides sufficient evidence of antitrust injury for Food Lion to get to the jury. *See In re Se. Milk Antitrust Litig.*, 739 F.3d 26 at 285-86. Moreover, Professor Cotterill's analysis also showed that formula pricing does not insulate buyers like Food Lion from the effects of the alleged conspiracy, Cotterill Report (Dkt. 1128-1) ¶¶ 98-100, a fact confirmed by Defendants' own expert Professor Kalt, who concluded that formulas allow for a profit margin or profit markup above costs and are therefore not a constraint on price increases even in an industry filled with formula pricing customers. *See* Ex. 3, Slide 102, Plaintiffs' December 16, 2010 Hearing Presentation, titled "Response to Defendants' Motion for Reconsideration and Supplemental Motion for Summary Judgment; *see also* Dkt. 1658 at 124 (same).

[5] Ex. 1, Rick Fehr Dep. at 188:1-10.

4. Food Lion and Breto will fairly and adequately protect the interests of all class members.

Finally, to be an adequate class representative, the named plaintiffs must "possess the same interest and suffer the same injury as the class members." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012). The purpose of the adequacy requirement is "to uncover conflicts of interest between named parties and the class they seek to represent." *Arlington Video Prods.*, 515 F. App'x at 442.

Food Lion and Breto are adequate class representatives because, they, like all class members, suffered the same injury—higher prices paid for milk—and they have the same interest in obtaining redress for that injury. Unlike in the dairy farmer case, there are no conflicts of interest and no sub-group of class members who have come forward to allege a different type of injury or to object that the relief sought by the named class representatives would cause them harm or leave them uncompensated for their injuries.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(3).

To obtain certification under Rule 23(b)(3), representative plaintiffs must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." This case is suitable for adjudication on a representative basis because the key elements of Plaintiffs' claims—namely, the existence of Defendants' conspiracy to lessen competition in the milk industry, and the impact of this conspiracy on milk prices throughout the Southeast United States—involve common questions. Moreover, Plaintiffs have a sound methodology for calculating damages on a classwide basis.

1. Common questions of law and fact predominate over questions affecting individual members of the class.

Determining predominance "begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co*., 131 S. Ct. 2179, 2184 (2011). However, proving predominance "does not require plaintiffs to prove that every element of a claim is subject to classwide proof"; representative plaintiffs need only show that "questions of law or fact common to members of the class predominate over any questions that affect only individual members." *In re Whirlpool Corp.*, 722 F.3d at 860 (citing *Amgen*, *Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195-96 (2013)).

To prevail in an antitrust action based on allegations of a conspiracy, a plaintiff must establish (1) a violation of the antitrust laws (*i.e.,* the conspiracy); (2) impact resulting from the violation (*i.e.,* antitrust injury); and (3) damages. *See In re Polyurethane Foam Antitrust Litig.*, No. 1:10-md-2196, 2014 WL 6461355, at *8 (N.D. Ohio Nov. 17, 2014) (citing *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 331 (E.D. Mich. 2001)). In their opposition to Plaintiffs' class certification motion, Defendants predicated their entire argument as to the predominance prong on the impact element of Plaintiffs' claim. Nevertheless, Plaintiffs show below that each of the three elements of their claim is susceptible to common, classwide proof.

a. Proof of a conspiracy is necessarily common.

The Sixth Circuit has recognized that "'[p]redominance is a test readily met in certain cases alleging . . . violation of the antitrust laws,' because proof of the *conspiracy* is a common question that is thought to predominate over the other issues of the case." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997)) (emphasis in original); *see also Merenda v. VHS of Mich., Inc.*, 296 F.R.D. 528, 548 (E.D. Mich. 2013) ("[C]ommon issues often predominate as to the liability element of

an antitrust conspiracy claim because 'consideration of the conspiracy issue would, of necessity, focus on defendants' conduct, not the individual conduct of the putative class members.'") (quoting *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484 (W.D. Pa. 1999)); *In re Packaged Ice Antitrust Litig.*, No. 08-mdl-1952, 2011 WL 6209188, at *9 (E.D. Mich. Dec. 13, 2011) ("The evidence that will prove a violation as to one member will be sufficient to prove it as to all—the anticompetitive conduct is not dependent on the separate conduct of the individual Class Members."). This is particularly true in price-fixing cases, in which "[c]ourts have fairly consistently found . . . that common issues regarding the existence and scope of the conspiracy predominate over other questions affecting only individual members." *In re Se. Milk Antitrust Litig.*, No. 2:08-md-1000, 2010 WL 3521747, at *9 (E.D. Tenn. Sept. 7, 2010) (Dairy Farmer case); *see also In re Scrap Metal*, 527 F.3d at 536; *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007) (collecting cases).

In this case, the alleged antitrust violation is a conspiracy to lessen competition in the market for fresh, white, fluid milk in the Southeast United States. Proof of this conspiracy will focus on the actions and conduct of Defendants, rather than of any individual class member. *See In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003) ("[C]ommon issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members."). Like the direct purchaser plaintiffs in the recently certified class in *In re Polyurethane Foam Antitrust Litigation*, here Plaintiffs will establish the existence of the conspiracy using (1) direct and indirect evidence of communications between Defendants about competing milk plants; (2) evidence that Defendants repeatedly acted contrary to their best interests absent an antitrust conspiracy; and (3) admissions made by Defendants' representatives in depositions. *See* 2014 WL 6461355, at *14-16 (finding that direct purchases established

predominance with regard to the first element because "Defendants do not succeed in showing liability questions—however answered—cannot be answered through common proof"). Because proof of these facts will establish the existence of the alleged conspiracy (or fail to do so) in "one stroke" for the representative named plaintiffs and all other class members alike, common questions predominate over any individual issues concerning this element of Plaintiffs' claims. *Wal-Mart*, 131 S. Ct. at 2551.

As was the case for the class of dairy farmers that this Court certified in *In re Southeastern Milk Antitrust Litigation*, 2010 WL 3521747, at *9-11, Plaintiffs' conspiracy allegations "are precisely the kind of claims for which class action treatment is appropriate," and "common issues do in fact predominate as to the defendants' liability-*i.e.* the existence, scope, and extent of the alleged conspiracy." *See also Hyland v. Homeservices of Am., Inc.*, No. 3:05-cv-612, 2008 WL 4858202, at *9 (W.D. Ky. Nov. 7, 2008) (holding that common questions predominate over any individual issues where "[t]he nature and scope of the alleged conspiracy is an issue that goes to the heart of this litigation"). Accordingly, class certification is warranted based on the common question of conspiracy alone.

b. Proof of the impact of the conspiracy on class members is shown though common evidence.

It is well-settled in the Sixth Circuit that "the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure." *In re Scrap Metal*, 527 F.3d at 535 (citing *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002) (endorsing regression plus pricing structure study to show classwide impact). A pricing structure exists "when 'prices paid by different purchasers for the same product from a single seller, or for the same product from different sellers tend to move together

over time.'" *In re Polyurethane Foam Antitrust Litig.*, 2014 WL 6461355, at *55, *65 (finding that antitrust injury could be demonstrated on a classwide basis in part because "plaintiffs 'show[ed] actual prices for the same products tended to move together over time, which is indicative of a pricing structure'"); *see also In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (granting certification where the expert's methodology "followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class"). Here, Professor Cotterill's report demonstrates that common impact from the conspiracy can and will be proven.

(i) Professor Cotterill's class certification report established the existence of a price structure in the relevant market

In his declaration in support of class certification (see Dkt. 291, Ex. C), Professor Cotterill opined that there *is* a price structure in the milk market. That opinion has been confirmed by subsequent developments. First, Mr. Fehr candidly admitted that there is highly interconnected price structure (the actual term he used to describe the interdependency of prices among different types of buyers was "pricing structure"). Second, Professor Cotterill's post-merits discovery damages model shows impact to all class members.

Prior to Plaintiff's class certification motion, Professor Cotterill assembled a data set from Defendants' sales records composed of millions of actual sales transaction prices from which he computed volume-weighted prices for each month and zip code in the relevant market before and during the alleged conspiracy. Cotterill Decl. (Dkt. 291, Ex. C) ¶¶ 40-46. His preliminary economic analysis of milk prices showed a common pricing structure, suggesting that if the alleged conspiracy raised prices for some class members, milk prices for other class members were likely to be similarly affected. *See* Dkt. 291, at 39-40. He predicted that, in the

market for milk, "anticompetitive behavior affecting prices of one type of product or geographic area would similarly affect customers purchasing milk across all these dimensions." Cotterill Decl. (Dkt. 291, Ex. C) ¶ 46; *see also id.* ¶ 77 ("Ultimately, the impact of the structural changes due to the anticompetitive conduct is an empirical question. Assessing this impact uses common data, and a common approach applicable to the entire class."); Dkt. 291 at 39-40.

Professor Cotterill further stated that it would be "feasible" to use a reduced form multiple regression model of the type ultimately validated by the Sixth Circuit to "calculate the price effects," if any, of Defendants' alleged conspiracy. Cotterill Decl. (Dkt. 291, Ex. C) ¶ 62. Professor Cotterill opined that he could measure the geographic nature of competition in the milk market by using competition variables to measure the intensity of price competition between various milk bottling plants. *Id.* ¶¶ 69-72. To filter out the effects of changes in the normal supply and demand factors on milk prices, Professor Cotterill proposed using regression variables to account for changes in input costs (such as the cost of raw milk, energy, labor, and capital), as well as for other factors affecting prices. *See id.* ¶¶ 37-39, 65-66.

In response, Defendants argued that predominance is not satisfied in this case because "the alleged anticompetitive conduct would have impacted individual class members in different ways." Indeed, they devote a substantial portion of their opposition brief to an exposition on putative class members' difference in size,[6] geographic location,[7] and competitive supply

[6] *See* Dkt. 342 at 6 ("The business operations of some class members . . . are national in scope. Others operate on a purely local basis, with just one, or a handful, of locations. Still others are regional.").

[7] *See id.* ("Some class members' regional operations take place entirely *within* Plaintiffs' proposed relevant geographic market . . . Others have operations that also extend to areas outside Orders 5 and 7.").

options.[8] Essentially, Defendants argue that even if a conspiracy is proven, some class members might not have been injured at all, and that each member's individual circumstances makes it impossible to use common evidence to determine that all class members have been injured.

That unsupported assertion, made in Defendants' Opposition to Class Certification filed more than five years ago, has now been flatly contradicted by further developments. First, Dean's own testimony that *any* increase in milk prices moves through the market like "a ripple effect"[9] directly undercuts Defendants' argument. Second, Professor Cotterill's now-completed regression analysis shows higher milk prices for all class members throughout the market. Thus, if the class representatives prove the existence of the alleged conspiracy to lessen competition, and the jury determines that the conspiracy has caused injury to them in the form of higher milk prices, the very same evidence will also prove impact on the prices every other class member paid. The fact that Plaintiffs may not prevail on their claims does not mean that common issues do not predominate. *See Amgen*, 133 S. Ct. at 1199 ("failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class").

The very same argument that Defendants made here against common impact was recently rejected in *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1254 (10th Cir. 2014). In that case, the defendant claimed that "impact involved individualized questions because the class

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[8] *See id.* at 7 ("Depending on their location(s), some purchasers will have several nearby plants from which to choose … Others will have fewer such options.").

[9] Moreover, even if Defendants could show that a small number of class members were uninjured, this cannot defeat class certification. The Supreme Court and the courts of appeals have held that "the presence of a de minimus number of uninjured members at the class certification stage does not defeat class certification." *In re Nexium Antitrust Litig.*, _ F.3d _ (1st Cir. 2015), No. 14-1521, 2015 WL 265548, at *17 (1st Cir. Jan. 21, 2015); *see also id.* at *10 ("The *Halliburton* [131 S. Ct. at 2184 (2011)] court contemplated that a class of uninjured members could be certified if the presence of a de minimus number of uninjured class members did not overwhelm the common issues for the class."), and *11 n.21 (collecting cases from sister circuits).

members experienced varying degrees of injury, with some avoiding injury altogether." *Id.* at 1254. The Tenth Circuit rejected that argument, agreeing with the court below that any impact from the conspiracy "would have permeated all polyurethane transactions, causing market-wide impact despite individualized negotiations." *Id* at 1251. Such a conclusion should likewise be made in this case, where defendants themselves have admitted that any change in price moves through the entire market with a ripple effect, affecting the prices paid by all purchasers.

Numerous other cases have similarly found that differences in actual prices paid do not defeat common impact in pricing structure cases.[10] *See In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 369-70 n.3 (C.D. Cal. July 25, 2011) ("Classes [are] certified in these [pricing structure] cases regardless whether some members of the class negotiated price individually, or whether . . . differences among product type, customer class, and method of purchase existed"); *see also In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 256 F.R.D. 82, 89 (D. Conn. 2009) ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally.'"). This also holds true for promotions and purchasing rebates. *See In re Nexium Antitrust Litig.*, 297 F.R.D. 168, 182 (D. Mass. 2013) (holding that "[v]ariations in the rebates received are not fatal to classwide damages determination," because "even where rebates are calculated into overcharge damages, the price . . . will 'trend together over time because rebate arrangements frequently use list prices as a reference point'").

[10] This makes sense, since the amount of any impact goes to damages. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (a plaintiff's "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage").

(ii) Professor Cotterill's merits expert report confirms that proof of impact on all class members is common.

Professor Cotterill's initial analysis provided the Court with sufficient evidence to conclude that milk prices were likely to have behaved similarly in response to a conspiracy to lessen competition, and that Plaintiffs can use common evidence to show the impact of Defendants' antitrust violations. *See In re Cathode Ray Tube Antitrust Litig.*, No. c-07-5944, 2013 WL 5391159, at *3 (N.D. Cal. Sept. 19, 2013) (granting class certification where the plaintiffs' expert "concluded that it is more probable than not that the cartel's price increases impacted all, or nearly all, direct purchasers in a common way"). But Plaintiffs now come to this Court with more than Professor Cotterill's initial opinion about a common pricing structure in the market. In his merits expert report, Professor Cotterill further expanded on his initial findings, refined his economic model, and then used transaction sales data to compute the actual effect of Defendants' conduct. Professor Cotterill's analysis, which uses the same model and the same data set for the entire class, shows that class members throughout the Southeast were impacted by Defendants' conspiracy to lessen competition for the sale of milk.[11]

Professor Cotterill employed what is known as a "spatial" regression model to capture the price effects of nearby plants competing to sell milk. As Professor Cotterill explained, "in a competitive market, having an additional firm operating nearby, holding all else equal, would presumably indicate lower prices to a customer due to the presence of an additional large

[11] A class certification decision made before full discovery has been completed "is necessarily more predictive" than one that comes after the plaintiffs have had, as here, "additional time to work out their [damages] models and formulas." *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 27-29 (1st Cir. 2008) (noting that "at the time of class certification, more work remained to be done in the building of plaintiffs' damages model and the filling out of all steps of plaintiffs' theory of impact"); *In re Urethane Antitrust Litig.*, 768 F.3d at 1259 ("district court did not need to predict what would predominate at trial because by the time [defendants] raised this issue, the trial had already taken place").

competitor vying for customers in that area." *See* Cotterill Report (Dkt. 1128-1) ¶ 130 (explaining that if Plaintiffs' allegations are correct, the price effect of nearby competitors would be lowered to the extent that Defendants were competing less vigorously). Using a data set of transaction prices containing almost 7 million price observations, *id*. at ¶ 116, Professor Cotterill was able to calculate the impact on milk prices of nearby bottling plants, both in the period prior to the alleged conspiracy and in the period during the alleged conspiracy. For example, during the pre-conspiracy period, Professor Cotterill calculated that "the presence of a Suiza plant within 200 miles of a zip code indicates prices were about 5% *lower*" than for customers who were not within 200 miles of a Suiza plant. *Id*. ¶ 140 (emphasis in original). Professor Cotterill's regression analysis generated a numerical value, referred to as a competition coefficient, which represents the impact on actual prices from nearby plants.[12] *Id*. ¶ 131. During the conspiracy period, the price effects of nearby plants were substantially lower, which is consistent with Plaintiffs' theory that Defendants' milk plants were competing less vigorously during the conspiracy period than before. *Id*. ¶¶ 140-43.

Although the plant coefficients are rolled up into an overall, market-wide average change in milk prices, Professor Cotterill's model estimates, in the first instance, the actual effect of changes in the intensity of competition on milk prices separately for every zip code throughout the Southeast. As a result, the model shows varying degrees of overcharges for class members, depending on their location, and more importantly, depending on their relative distance from differing sets of Defendants' milk plants. In other words, a class member who is near several of

[12] By using multiple regression, Professor Cotterill was able to control for differences in plant and product costs and dozens of other "fixed effects" thus isolating the effect of plant location on price. Doing so allows the model to determine what portion of the change in price is attributable to the lessened intensity of actual competition for milk sales and what portion is attributable to normal supply and demand factors.

Defendants' plants might have experienced a relatively greater increase in price due to the Defendants' conspiracy to lessen competition than a class member who is located near fewer of Defendants' plants.

Professor Cotterill's model shows that prices for 99.9% of the milk sold by Dean and NDH in zip codes located within 200 miles of a Dean or NDH plant included an overcharge attributable to decreased competition. *See* Ex. 3, Slide 93, Plaintiffs' December 16, 2010 Hearing Presentation, titled "Response to Defendants' Motion for Reconsideration and Supplemental Motion for Summary Judgment." He then supplemented his initial computation with alternative specifications that computed competition coefficients for plants that were geographically further apart than initially tested. Using an alternative 300-mile radius, Professor Cotterill confirmed that 100% of Dean and NDH customers in the Southeast region experienced an overcharge as a result of decreased competition. Cotterill Report (Dkt. 1128-1) ¶ 172. Used in conjunction with the proof of a common pricing structure and Defendants' own testimony, such data confirms that Defendants' antitrust violation had *some* impact on all class members. Thus, the second element of Plaintiffs' claims—impact—is suitable for class treatment.

c. Professor Cotterill's damages model uses a formulaic method to compute damages for all class members.

Plaintiffs' damages model also meets the requirements for class treatment. Professor Cotterill's model is fully consistent with Plaintiffs' theory of antitrust impact as required by the Supreme Court's recent opinion in *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (concluding that even though damage "[c]alculations need not be exact," a "model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation'"); *see also In re Skelaxin Antitrust Litig.*, 299 F.R.D. 555, 573 (E.D. Tenn. 2014) ("In class certification, the damages model must be consistent

with the theory of liability.") (citing *Comcast*, 133 S. Ct. at 1433). That is because Plaintiffs' theory of impact is that Defendants conspired to operate NDH as part of a conspiracy to lessen competition. And that is exactly what Professor Cotterill's model measures, *i.e.*, through the competition coefficients, it measures the impact on prices of lessened competition between nearby milk plants.

Unlike the damages model in *Comcast* that "did not isolate damages resulting from any one theory of impact," Professor Cotterill's damages model directly links Plaintiffs' sole remaining theory of liability—*i.e.*, that Defendants refrained from engaging in vigorous competition for milk sales—with the classwide injury suffered by class members. It uses competition coefficients to measure the price impact of lessened competition between nearby bottling plants, based on the theory that in a competitive market, having an additional bottling plant nearby would result in lower prices. It also measures the extent to which that was true in the period before the conspiracy was implemented compared to the same price effects in the class period.

Like the plaintiffs' expert model in *In re High-Tech Employee Antitrust Litigation*, No. 11-cv-2509, 2014 WL 1351040, at *18 (N.D. Cal. Apr. 4, 2014), Professor Cotterill's model also "expressly controls for many other variables that impact [price] in an effort to ensure that the estimated damages result only from the challenged conduct." *See also In re Se. Milk Antitrust Litig.*, 739 F.3d at 285-86 (recognizing that a regression must control for independent variables and holding that Professor Cotterill presented a valid regression). His nineteen alternative specifications establish that the damages resulting specifically from the lessened intensity of competition between Defendants can be separately measured from other factors that may have contributed to increases in milk prices during the class period. Sixteen of these alternative

specifications produced results within 10% of the estimated damages in Professor Cotterill's primary model, and the average overcharge across all nineteen specifications was within 1% of his primary damages estimate. Cotterill Report (Dkt. 1128-1) ¶ 176.

Because Professor Cotterill's model measures the impact of the change in the competition coefficients separately for each zip code, and because class members purchased different products and in different amounts, the actual amount of each class member's damages will be different. But the actual amount of damages for any specific class member can be determined in a formulaic way using Professor Cotterill's model. It can do so by applying the change in competition coefficients for each class member's respective zip code (which gives an overcharge percentage) to the quantity and types of products purchased, as reflected in Defendants' sales data.[13] As a result, the computation of damages will not overwhelm the commonality employed in that computation.

Judge Posner recently explored the implications of differing amounts of damages for individual class members:

> It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortuous harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.

Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013).

[13] Professor Cotterill's merits report gave two examples of such a formulaic computation of damages, separately calculating damages for both Breto and Food Lion, based on applying different overcharge percentages to their actual milk purchases. Cotterill Report (Dkt. 1128-1) ¶¶ 159-62.

The Sixth Circuit has "never required a precise mathematical calculation of damages before deeming a class worthy of certification." *In re Scrap Metal*, 527 F.3d at 535. Instead, "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate." *In re Whirlpool Corp.*, 722 F.3d at 860 (quoting *Comcast*, 133 S. Ct. at 1437); *see also Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) ("[C]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damages issues."); *In re Nexium*, 2015 WL 265548, at *8 (same). The court in *Whirlpool* concluded that, "[b]ecause '[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal,' in 'the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'" 722 F.3d at 861.

Applying these principles to the facts at hand, it is clear that the common questions of whether and how Defendants refrained from engaging in vigorous competition, and what impact their actions had on purchasers of milk, predominate over any individual issues that may arise.

2. A class action is superior to any other method of adjudicating the claims of all class members.

The purpose of Rule 23(b)(3) is to "select the method best suited to adjudication of the controversy fairly and efficiently." *Amgen*, 133 S. Ct. at 1191 (internal quotations omitted). Use of the class mechanism is warranted here because, as Defendants themselves admit, the putative class includes hundreds of independent, local, and regional purchasers, most of whom are unlikely or unable to file individual actions. *See id.* at 1202 (class actions designed to overcome problem of lack of incentives to pursue small recoveries); *see also Amchem*, 521 U.S. at 617

(finding that in drafting Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"). In addition, for most members of the putative class, the cost and risk of individual litigation against several of the largest dairy companies in the country would dwarf any potential recovery. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (noting that "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits" because of litigation costs) (emphasis in original).

The class mechanism also shields Defendants and the Court from identical individual antitrust actions. If Food Lion and Breto, proceeding as individual plaintiffs, fail to prove the existence of an illegal conspiracy, "nonnamed class members would not be bound by that decision" and "would be free to renew the fray" in another forum. *Amgen*, 133 S. Ct. at 1201. Simultaneously resolving the antitrust claims of the class representatives and all other absent class members would preserve significant judicial and party resources.

IV. Conclusion

Because Plaintiffs have established that common issues as to the antitrust violation, antitrust injury, and antitrust damages predominate over any individual issues in this case and are capable of determination on a classwide basis, they respectfully request that the Court grant their motion for class certification.

Respectfully submitted,

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Dated: February 17, 2015

CERTIFICATE OF SERVICE

I certify that, on the 17th day of February, 2015, a true and correct copy of Retailer Plaintiffs' Supplemental Memorandum in Support of Their Motion for Class Certification was served by operation of the electronic filing system of the U.S. District Court for the Eastern District of Tennessee upon all counsel of record.

/s/ Max W. Holland III
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