mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Exxon Mobil Corporation, et al.,* DOJ Reference No. 90–11–3–09228.

The Consent Decree may be examined at the U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the Consent Decree from the Consent Decree Library, please enclose a check in the amount of $7.25 (25 cents per page production costs), payable to the U.S. Treasury or, if requesting by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Thomas A. Mariani, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

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BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States *et al.* v. Dean Foods Company; Proposed Final Judgment, Stipulation and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Eastern District of Wisconsin in *United States of America, et al.* v. *Dean Foods Company,* Civil Action No. 2:10–cv–00059 (JPS). On January 22, 2010, the United States and its co-plaintiffs filed a Complaint alleging that Dean Foods Company's acquisition of the Consumer Products Division of Foremost Farms USA would likely violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment requires Dean Foods Company to divest its Waukesha, Wisconsin fluid milk plant, along with certain tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the Eastern District of Wisconsin. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Joshua H. Soven, Chief, Litigation I, Antitrust Division, Department of Justice, Washington DC, 20530.

Patricia A. Brink,

Director of Civil Enforcement.

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.

10–C–0059 FILED: January 22, 2010; 1:40PM

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Wisconsin, Illinois, and Michigan, by and through their respective Attorneys General ("Plaintiff States"), bring this civil action for equitable relief against Defendant Dean Foods Company ("Dean") for violating Section 7 of the Clayton Act, 15 U.S.C. 18. The United States and the Plaintiff States allege as follows:

I. Introduction

1. This lawsuit challenges Dean's acquisition of the Consumer Products Division of Foremost Farms USA, consummated April 1, 2009 (the "Acquisition"). Foremost Farms USA ("Foremost") is a dairy cooperative owned by approximately 2,300 dairy farms located in seven states, including Wisconsin. Through the Acquisition, Dean acquired two dairy processing plants owned by Foremost, located in Waukesha and DePere, Wisconsin. Dean's acquisition of these plants violates Section 7 of the Clayton Act because "the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. 18.

2. The Acquisition adversely affects two types of markets. The first are the markets for the sale of school milk to individual school districts located throughout the State of Wisconsin and the Upper Peninsula of Michigan (the "UP"). The second is the market for the sale of fluid milk to purchasers located in Wisconsin, the UP, and northeastern Illinois.[1]

3. The Acquisition eliminates one of Dean's most aggressive competitors—a competitor that engaged in pricing that Dean considered "dangerous" and "irrational." In recent years, Dean and Foremost have been the first and fourth largest sellers of school milk and fluid milk in Wisconsin, the UP, and northeastern Illinois. With the Acquisition, Dean will account for more than 57 percent of fluid milk sales in the region. In the most recent school year, Dean and the two plants it acquired sold more than 50 percent of the school milk purchased in Wisconsin and the UP.

4. Numerous school districts have benefitted from vigorous competition between Dean and Foremost. Dean and Foremost have frequently been the two lowest bidders for school milk contracts at numerous school districts in Wisconsin and the UP and, in some school districts, have been the only two bidders for those contracts.

5. Grocery stores, convenience stores, and other purchasers have also benefitted from vigorous competition between Dean and Foremost for fluid milk contracts. Dean and Foremost have been the only two bidders for some contracts and two of only three bidders for other contracts. The aggressive competition between them has lowered purchasers' costs. For example, in 2006, a retailer with hundreds of stores in northeastern Illinois held an auction for its fluid milk business in which the competition between Dean and Foremost saved the retailer approximately $1.5 million.

6. The Acquisition's elimination of head-to-head competition between Dean and Foremost will hurt school milk and fluid milk purchasers. The loss of this head-to-head competition leads directly

[1] "Northeastern Illinois" is defined as the following counties in the State of Illinois: Cook County, DeKalb County, DuPage County, Grundy County, Kane County, Kendall County, Lake County, McHenry County, and Will County.

to what are referred to as anticompetitive "unilateral effects."

7. In the fluid milk market, the Acquisition is also likely to produce coordination among the remaining competitors. This coordination gives rise to what are referred to as anticompetitive "coordinated effects." The fluid milk business in this region is already conducive to coordination among competitors. Notably, when deciding whether and how much to bid for an account, Dean and other dairy processors often consider the reactions of their competitors. Eliminating Foremost, which Dean describes as an "irrational" pricing competitor, will leave only a few remaining competitors, whose competitive decision-making Dean has described as "more predictable" and "rational." Consequently, the Acquisition will make coordination easier and more durable.

8. As further described below, the Acquisition is likely to substantially lessen competition in the school milk and fluid milk markets at issue here in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Entry is unlikely to restore competition in a timely or sufficient manner. To date, Dean has not integrated Foremost's plants into its operations in light of the pendency of the United States' investigation. The United States and Plaintiff States ask this Court to declare this Acquisition unlawful and require Dean to divest the acquired assets to restore competition in the markets at issue.

II. Jurisdiction & Venue

9. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 4 and 25. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. 26. Plaintiff State of Wisconsin brings this action under its authority in Wis. Stat. § 165.065.

10. Dean and the assets it obtained through the Acquisition produce dairy products for sale in interstate commerce. Accordingly, Dean and the Acquisition assets are engaged in activities affecting interstate commerce under Section 7 of the Clayton Act. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a) and 1345.

11. Dean is present in the State of Wisconsin, and it transacts substantial business and commerce in the State. Accordingly, Dean is subject to personal jurisdiction. Venue is also proper in this District pursuant to Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)(1), (b)(2) & (c). The acquired dairy processing plant in Waukesha is located within the territory of the Milwaukee Division of this Court.

III. Background

A. The Milk Business in Wisconsin, the UP, and Northeastern Illinois

12. Dairy processors purchase raw milk from dairy farms and agricultural cooperatives, pasteurize and package the milk, and distribute and sell the processed product. Fluid milk is raw milk that has been processed for human consumption. It does not include extended shelf life milk, ultra high temperature milk or aseptic milk, which are produced by different processes, generally cost significantly more than fluid milk, and have numerous significant physical differences that, compared with fluid milk, affect shelf stability and taste.

1. Fluid Milk

13. Dairy processors supply fluid milk directly to retailers, distributors, broad-line food service companies, and institutions such as hospitals and nursing homes. The vast majority of fluid milk is sold directly by processors to retailers. The balance of sales is made to distributors, food service companies, and institutions. Distributors and food service companies resell the milk that they purchase from processors to small retailers, restaurants, and institutions. Retailers in Wisconsin, the UP, and northeastern Illinois do not resell fluid milk to other retailers or institutions in any substantial quantity. Retail demand for fluid milk is based directly on consumer demand.

14. Milk processors charge different prices to different purchasers for the same product based on a variety of factors, including the number of competitive alternatives available to the purchaser. Large retailers typically request bids from milk processors. Distributors, institutions, and small retailers generally purchase their milk from price lists that dairy processors issue. However, these customers sometimes obtain rebates, discounts, or other forms of price relief, so that two customers covered by the same price list may pay different prices. Bid prices are based on the processor's product, transportation, and service costs, the processor's capacity utilization, and the number and strength of processors likely to offer competing bids, among other factors.

15. Distance between processors and purchasers is an important consideration in fluid milk pricing because fluid milk has a limited shelf life and is costly to transport. These costs result in most customers purchasing fluid milk from nearby processing plants. For example, more than 90 percent of the milk sold to customers in Wisconsin and the UP traveled less than 150 miles from the plant in which it was processed.

2. School Milk

16. School milk is fluid milk packaged and distributed for sale to school districts, typically in half-pint containers. Dean, Foremost, and other school milk suppliers often use distributors to supply and service school districts. Dairy processors generally use one distributor per service area. While school milk contracts occasionally include other products, school milk accounts for the vast majority of the dollar value of these contracts.

17. School milk delivery is not just a matter of dropping product off at the curb. Different school districts specify their individualized service requirements in contracts with processors. For example, some school districts require multiple deliveries per week because they have limited refrigerated storage space; some require guaranteed emergency deliveries. Most school districts require the capability to deliver to all of the schools in the district. Many require early morning or other specific delivery times to avoid conflicts with the arrival of schoolchildren and buses. Other services can include milk reordering, cooler supply, cooler restocking, cooler cleaning and maintenance, carton rotation, retrieval of spoiled and damaged product, and automatic allotment of credit for retrieved product.

18. The number of processors from which a school district can successfully solicit competitive bids is often very small. Given the limited volume of milk delivered to each school, the extensive and highly individualized service requirements, and the seasonal nature of school milk demand, among other considerations, it is almost always uneconomic for a dairy processor to supply a new contract unless the processor already has significant fluid milk distribution in or near the school district's area. Dairy processors that do not already distribute fluid milk locally can rarely bid competitively. This is particularly relevant in sparsely populated areas such as northern Wisconsin and the UP.

19. Individual school districts solicit bids for school milk, although groups of school districts will occasionally solicit bids collectively. However, even school districts involved in collective

solicitations typically award their contracts separately. Consequently, dairy processors tailor their bids to each school district or school district group that solicits collectively. Bid prices are based on the processor's product, transportation, and service costs, the processor's capacity utilization, and the number and competitiveness of processors likely to offer competing bids, among other factors.

B. The Acquisition

20. Dean is one of the largest food and beverage producers in this country, with revenues of $12.5 billion in 2008. Dean's Dairy Group is the country's largest processor and distributor of milk and other dairy products. Dean is a corporation organized under Delaware state law, with its principal place of business in Dallas, Texas.

21. The Acquisition is the latest in a series of acquisitions by Dean of smaller dairy processors across the United States. Since 1996, Dean has made more than 100 acquisitions, which have added to Dean's market share and increased its size substantially.

22. Foremost is a dairy cooperative headquartered in Baraboo, Wisconsin, and formed under Wisconsin state law. Like other agricultural cooperatives, Foremost is a member-owned business association. Foremost is governed by a 21-member Board of dairy farmers. Prior to the Acquisition, Foremost processed its members' raw milk at its DePere and Waukesha plants, as well as at other facilities. The DePere and Waukesha plants were owned and operated by Foremost's Consumer Products Division. On or about April 1, 2009, Dean bought substantially all of the Consumer Products Division's assets for $35 million. The Acquisition was not required to be reported beforehand to Federal antitrust authorities under the Federal antitrust notification statute.

C. Dean's Rationale for the Acquisition

23. While Dean's fortunes have been rising, the same has not been true for Foremost. In 2006 and 2007, Foremost lost some fluid milk customers that preferred a processor with a broader geographic reach. Consequently, Foremost's Waukesha and DePere plants were operating at less than two-thirds of their fluid milk capacity, giving Foremost the most excess capacity in Wisconsin, the UP, and northeastern Illinois.

24. Excess capacity creates an incentive to bid more aggressively for fluid and school milk contracts. Because of its substantial excess capacity, Foremost was pricing aggressively to secure new business. Unlike Foremost, Dean did not have substantial excess capacity and so did not have the same economic incentives as Foremost. As a result of Foremost's aggressive pricing, Dean faced the choice of losing business or cutting its margins. Neither approach was attractive to Dean.

25. The problem that Foremost posed was not unique. Dean saw competitors such as Foremost and other local competitors with excess capacity as posing a serious problem for Dean's profitability. Dean's Chief Executive Officer, Gregg Engles, articulated the competitive issue facing Dean in a September 2008 speech to Dean's top executives:

26.

> "Every one of you has an irrational local competitor story. * * * Why do we have irrational local competitors? Because we have too much capacity in this industry * * * these guys are losing share, * * * they have less volume in their plants, * * * so they default to the same game that gets played in industries that have little volume growth and too much capacity everywhere around the world. People play for share, and in this category, you play for share with price."

27. Dean's own internal documents confirm that Dean viewed Foremost as one of those "irrational" local competitors because of Foremost's excess capacity, among other reasons. In 2008, as part of an effort to develop a strategic growth plan for its fluid milk business, Dean's corporate headquarters asked the group vice presidents in each region to prioritize their key competitive issues. The Vice President for the North Central region (which includes Wisconsin) identified his key concern as "Midwest excess capacity lies with cooperatives with staying power." Cooperatives, such as Foremost, were competitive threats because their "earnings expectations [are] lower than Deans," because the "co-op goal is to move Member milk," and because "their plants are under utilized."

28. The problem this created for Dean was obvious. Competition with these cooperatives was predicted to "lower margins and condition clients [to] the benefits of shopping their business." Along with one other cooperative in the region, Foremost was identified as a particularly "dangerous" competitor because "they need to add volume to maintain their lo[w] cost strategy." In other words, according to Dean, Foremost was more willing to accept lower prices for processed fluid and school milk than Dean found acceptable.

29. In 2007, the general manager at Dean's Verifine plant in Sheboygan, Wisconsin, reported to his boss that he was "seeing alot [sic] of off the wall pricing coming from [Foremost]" and that he was "worried about them coming at us again at [WalMart] not to mention the rest of the market." In 2009, after receiving reports of very low Foremost prices in several grocery and convenience stores in the UP, the general manager of Dean's Marquette, Michigan, plant complained to his boss that "[t]his is the most aggressive pricing the UP has seen since probably the 60's. Our volume is off roughly 15 percent as the effects of this onslaught really kick in * * * I know you're with me on this, so how can we cease/desist and regain some sanity?"

30. As part of Dean's 2008 Strategic Growth Plan, Dean proposed future acquisitions, which included problematic local processors. Ed Fugger, Dean's acquisitions chief, highlighted that fragmentation "[d]rives margin compression," and that a significant part of the fluid milk market "remains highly fragmented." In handwritten notes he wrote in preparation for his speech to Dean's senior management, and later, Dean's Board of Directors, Fugger wrote that the "benefit of acquisition in these m[ar]k[e]ts is *margin expansion*" (emphasis added). In other words, by eliminating this fragmentation Dean could increase its profits.

31. The Strategic Growth Plan included "Potential Acquisition Targets" for each of Dean's regions. The targets for the North Central Region included Foremost, which Dean had identified as one of two "irrational competitors" that are "significantly short on volume."

32. Dean eliminated the competitive threat posed by Foremost by acquiring its two milk processing plants. Any efficiencies Dean may realize from acquiring the two plants are not likely to reverse the anticompetitive impact of eliminating a competitor responsible for the "most aggressive pricing" Dean had seen in 40 years. There was an alternative to this outcome. At the time Foremost accepted Dean's offer to acquire these plants, another potential buyer was pursuing Foremost's plants.

IV. The Competitive Harm in School Milk Markets

A. School Milk Is a Relevant Market

33. School milk is a relevant product market and line of commerce under Section 7 of the Clayton Act. School districts have no reasonable product alternatives to school milk.

34. The United States Department of Agriculture sponsors several programs to reimburse schools for meals served to students from lower-income families. To qualify, schools must offer milk to every student, regardless of family income.

Schools will not substitute other products for school milk even at substantially higher milk prices because they would lose their Federal meal reimbursement.

B. The Relevant Geographic Markets

35. 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).

C. The Acquisition Will Result in Anticompetitive Unilateral Effects

36. School districts in Wisconsin and the UP have only a few choices for school milk suppliers. There are numerous school districts, particularly in northeastern Wisconsin and the western UP, for which the Acquisition merged the two processors that were best situated to serve the district. In many cases, the Acquisition created a "merger to monopoly," leaving Dean as the only likely bidder. These school districts include those where Dean and Foremost were the only two dairy processors to bid in recent years. The elimination of head-to-head competition between Dean and Foremost will likely substantially lessen competition in these school milk markets and enable Dean to raise prices and/or reduce services.

37. In addition, in a separate set of school districts, either Dean or Foremost was the only bidder and the other processor was the next-lowest-cost supplier because of factors such as distance from the processing plant or the presence of an established distribution network. It is likely that prices will rise and/or services will be reduced in these school milk markets, regardless of whether both Dean and Foremost submitted formal bids before the Acquisition. There is also a substantial number of school districts in Wisconsin and the UP for which Dean and Foremost were two of only three recent or likely future bidders. For these school districts, the Acquisition represents a "merger to duopoly."

38. In addition, Foremost was an especially aggressive bidder. This forced its rivals to keep their bid prices as low as possible or risk losing substantial amounts of school milk business.

V. The Competitive Harm in the Fluid Milk Market

A. Fluid Milk Is a Relevant Product Market

39. Fluid milk is a relevant product market and line of commerce under Section 7 of the Clayton Act. Fluid milk is a product with special nutritional characteristics and has no practical substitutes.

40. Consumer demand for fluid milk is relatively inelastic, *i.e.,* fluid milk consumption does not decrease significantly in response to a price increase. Demand by retailers, distributors, and other purchasers of fluid milk is also inelastic because it is based on consumer demand. As a result, a hypothetical monopolist over fluid milk would profitably impose at least a small but significant and non-transitory price increase (*e.g.,* five percent).

B. The Relevant Geographic Market

41. Fluid milk processors are able to charge different prices to buyers in different areas, *i.e.,* they can price discriminate. In the presence of price discrimination, relevant geographic markets may be defined by reference to the location of buyers. In particular, a relevant geographic market for fluid milk refers to a region within which purchasers can be targeted for a 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.

42. Wisconsin, the UP, and northeastern Illinois constitute a relevant geographic market and section of the country under Section 7 of the Clayton Act. As discussed in paragraph 15, most customers purchase fluid milk from suppliers with processing plants located near them because of the costs associated with transportation and shelf life. Prior to the Acquisition, Foremost sold virtually all of its fluid milk to purchasers located in the relevant geographic market. Dean competed to supply fluid milk to purchasers throughout this same area.

C. Market Concentration

43. The Acquisition will result in a substantial increase in the concentration of processors that compete to supply fluid milk to purchasers located in the relevant geographic market. Some of these processors are located outside of Wisconsin, the UP, and northeastern Illinois. Prior to the Acquisition, Dean had the largest share of sales to purchasers within the relevant geographic market. Dean accounted for 44.6 percent of fluid milk sales; Foremost accounted for another 12.6 percent. As a result of the Acquisition, Dean now has more than 57 percent of all fluid milk sales in the relevant geographic market. There are only two other competitors with more than five percent of fluid milk sales in the relevant geographic market, Kemps LLC (a subsidiary of Hood LLC) ("Kemps") and Prairie Farms Dairy, Inc., which have 17 and 15 percent, respectively. Moreover, Dean's post-Acquisition shares are even higher in certain areas within the relevant geographic market: over 85 percent in the UP and over 60 percent in Green Bay, Wisconsin, and in northeastern Illinois (including Chicago).

44. As articulated in the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission, the Herfindahl-Hirschman Index ("HHI") is a measure of market concentration.[2] The Acquisition increases the HHI by 1,127 points to 3,830, indicating a substantial increase in concentration. The change in the HHI is even more pronounced in certain areas within the relevant geographic area. For example, in the UP, the HHI increased by 2,814 points to 7,510, and in Green Bay, the HHI increased by 1,728 to 4,777.

D. The Acquisition Will Result in Competitive Harm

45. The Acquisition will likely substantially lessen competition among fluid milk producers in the relevant geographic market, resulting in higher fluid milk prices to purchasers than would exist in the absence of the Acquisition. The Acquisition will eliminate head-to-head competition that has benefitted and would otherwise continue to benefit purchasers and final

[2] *See* U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997), *available at http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html.* The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches a maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

consumers. The Acquisition will also result in easier and more durable coordinated interaction among Dean and its few remaining competitors.

1. The Anticompetitive Effects From the Loss of Head-to-Head Competition

46. Dean and Foremost often competed head-to-head to win fluid milk contracts because they were the nearest fluid milk processors to many of the purchasers in the relevant geographic market. As discussed in paragraph 15, proximity to the purchaser is an important factor in a processor's competitiveness. Prior to the Acquisition, Foremost competed with Dean throughout the relevant geographic market. The head-to-head competition between Dean and Foremost was most pronounced and pervasive in the UP and northeast and southeast Wisconsin, where the Dean and Foremost plants were the two closest plants to many fluid milk purchasers.

47. As discussed in paragraph 23, Foremost had substantial excess capacity, and as a result, was pricing aggressively to secure new business. The presence of Foremost as an aggressive pricing competitor to Dean and a constraining force on Dean's pricing is reflected in the internal Dean documents discussed in paragraphs 25 to 29. The elimination of this head-to-head competition likely will produce higher prices and/or reduced services for many purchasers in the relevant geographic market. These effects will vary among purchasers because, as discussed previously, different purchasers have different competitive options. Thus, the prices paid and services received will continue to differ among purchasers after the Acquisition, but for many purchasers the prices they pay and/or the services they receive will be adversely affected by the Acquisition.

2. The Acquisition Will Facilitate Anticompetitive Coordination

48. By eliminating Foremost, a significant, disruptive, and aggressive competitor, the Acquisition also will likely substantially lessen competition among the remaining competitors selling fluid milk in the relevant geographic market by facilitating coordination among them. Dean and its few remaining competitors will be more likely to decline to bid aggressively for one another's established customers out of concern for retaliation, thereby allocating customers among one another based on a mutual recognition of what supplier serves what customers. This form of coordination is easier when there are fewer competitors and they can identify one another's customers. With the elimination of Foremost, purchasers in many areas of the relevant geographic market will have only two or three significant suppliers of fluid milk. For example, in Wisconsin, Dean and Kemps, its next-largest competitor, now account for more than 80 percent of sales.

49. Even before the Acquisition, Dean and other dairy processors besides Foremost were at times content not to attack one another's large accounts. In a recent bidding event, Dean refused to bid aggressively for a major supermarket chain that was Kemps's largest account, despite the purchaser's complaint to Dean that Dean's bid was too high. A Dean executive testified that stealing the account from Kemps would have put a Kemps plant "out of business or to its knees" and that "we're not going to do that right now. You pick your fights." In contrast, Foremost was not content to pick its fights. When Foremost was bidding for the same large supermarket chain, it submitted a competitive bid, even though Foremost realized that the "cost" of winning that business could be high, due to the potential for retaliation. The general manager of Foremost's Morning Glory plant estimated that retaliation at five of his larger accounts could cost almost $500,000 per year.

50. Whereas Foremost was routinely labeled as an "irrational" competitor by Dean executives, the Group Vice President for Dean's North Central region labeled two other processors "good competitors" in his 2008 strategic growth planning document. By "good competitor," Dean's Vice President admitted he meant that, unlike Foremost, these competitors were "more predictable" in terms of "where they're going to poke you in the eye and where they're not, whereas the other * * * fellows [are] poking all the time." With this Acquisition, only the so-called "good competitors" will remain.

51. In at least one instance, Dean successfully sent price signals to its competitors. In 2008, Dean announced an upcoming fuel surcharge price increase, and one of its competitors followed suit. In reporting this to his boss, the Group Vice President for the region in which this occurred wrote, "[our competitor] followed us this week with a similar increase. The strategy paid off." His boss then declared that it is a good practice "to signal your intentions early and often." The Vice President for the North Central region, which includes Wisconsin, then instructed his staff to "get out early for July and signal the marketplace."

52. By reducing the number of competitors serving the relevant geographic market and eliminating an aggressive competitor with large amounts of excess capacity, the Acquisition makes coordination easier and more durable.

VI. Entry Is Unlikely

53. Entry is unlikely to be sufficient or timely enough to offset the anticompetitive effects of the Acquisition. Firms currently serving the fluid milk and school milk markets in Wisconsin, the UP, and northeastern Illinois are unlikely to expand their service area or presence sufficiently to substantially mitigate the loss of Foremost's head-to-head competition with Dean in the fluid milk and school milk markets, or to disrupt coordinated interaction by Dean and its remaining competitors in the fluid milk market. Firms not currently serving these markets are unlikely to enter in the foreseeable future.

VII. Violations Alleged

54. The United States and the Plaintiff States hereby incorporate the allegations of paragraphs 1 through 52 above.

A. Count 1

55. The Acquisition likely will substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in that:

a. Actual and potential competition between Foremost and Dean in the State of Wisconsin and the UP in the sale of school milk will be eliminated; and

b. competition in the State of Wisconsin and the UP in the sale of school milk will be substantially lessened.

B. Count 2

56. The Acquisition likely will substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in that:

a. Actual and potential competition between Foremost and Dean in the State of Wisconsin, the UP, and northeastern Illinois in the sale of fluid milk will be eliminated; and

b. competition in the State of Wisconsin, the UP, and northeastern Illinois in the sale of fluid milk will be substantially lessened.

VIII. Relief Requested

57. The United States and the Plaintiff States request that this Honorable Court:

a. Adjudge and decree that the Acquisition violates Section 7 of the Clayton Act, 15 U.S.C. 18;

b. compel Dean to divest all of the assets and interests it acquired as part of the Acquisition;

c. permanently enjoin Dean from further ownership and operation of the assets acquired as part of the Acquisition;

d. compel Dean, including any of its subsidiaries, joint ventures, successors or assigns, and all persons acting on behalf of any of the foregoing, to provide the United States (and any Plaintiff State(s) if commerce in that state(s) is potentially affected) with notification at least 30 calendar days prior to any acquisition, in whole or in part, of any school milk or fluid milk processing operation, notwithstanding the consideration Dean intends to pay for such acquisition; and

e. award to each plaintiff its costs for this action and such other and further relief as may be appropriate and as the Court may deem just and proper.

Dated: January 22, 2010.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

/s/ _____

Christine A. Varney,
Assistant Attorney General, Antitrust Division.

/s/ _____

William F. Cavanaugh,
Deputy Assistant Attorney General, Antitrust Division.

/s/ _____

Joshua H. Soven, *Chief,*
Joseph M. Miller, *Assistant Chief, Litigation I Section, Antitrust Division.*

/s/ _____

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Deputy Director of Operations, Antitrust Division.

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Dated: January 21, 2010.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

James L. Santelle,
United States Attorney.

By:

/s/ _____

Matthew V. Richmond,
Chief, Civil Division, United States Attorney's Office, Eastern District of Wisconsin, 517 East Wisconsin Ave., Room 530, Milwaukee, Wisconsin 53202, (414) 297–1747 (direct), (414) 297–1700 (office), (414) 297–4394 (fax), Matthew.Richmond@usdoj.gov.

Dated: January 22, 2010.

Respectfully submitted,

FOR PLAINTIFF STATE OF WISCONSIN

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Attorney General.

By:

/s/ _____

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Dated: January 22, 2010.

Respectfully submitted,

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Dated: January 22, 2010.

Respectfully submitted,

FOR PLAINTIFF STATE OF MICHIGAN

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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. 2:10–cv–00059 (JPS)

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. 25, on January 22, 2010, alleging that the acquisition by Dean Foods Company ("Dean") of two fluid milk processing plants in Wisconsin from Foremost Farms USA ("Foremost") violated Section 7 of the Clayton Act ("Section 7"), 15 U.S.C. 18. The Complaint alleges that Dean's acquisition of the Foremost plants (the "Acquisition") likely would substantially lessen competition in two types of markets: (1) The sale of fluid milk to customers (*e.g.,* retailers and distributors) located in Wisconsin, northeastern Illinois; [1] and the Upper Peninsula of Michigan (the "UP"); and (2) the sale of school milk to school districts located throughout Wisconsin and the UP. On March 29, 2011, the United States filed a proposed Final Judgment designed to remedy the competitive harm caused by the Acquisition. Under the proposed Final Judgment, which is explained more fully below, Dean is required to divest the Waukesha milk processing plant and related assets.

The United States and Dean have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Events Giving Rise to the Alleged Violation

A. Defendant and the Acquisition

Dean is one of the largest food and beverage producers in this country, with revenues of approximately $12 billion in 2010. Dean's Dairy Group is the country's largest processor and distributor of milk and other dairy products. Dean is a corporation organized under Delaware state law, with its principal place of business in Dallas, Texas.

Foremost is a dairy cooperative headquartered in Baraboo, Wisconsin, and formed under Wisconsin state law.

[1] "Northeastern Illinois" is defined as the following counties in the State of Illinois: Cook County, DeKalb County, DuPage County, Grundy County, Kane County, Kendall County, Lake County, McHenry County, and Will County.

Like other agricultural cooperatives, Foremost is a member-owned business association. Prior to Dean's acquisition of the Foremost plants, Foremost processed its members' raw milk at its De Pere and Waukesha plants, as well as at other facilities. On April 1, 2009, Dean acquired the De Pere and Waukesha plants, along with related assets, from Foremost for $35 million. This Acquisition was not required to be reported to Federal antitrust authorities under the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act").

B. Competitive Effects of the Acquisition

1. Fluid Milk

a. Fluid Milk Is a Relevant Product Market

The Complaint alleges that fluid milk is a relevant product market. Fluid milk is a product with special nutritional characteristics and has no practical substitutes. Consumer demand for fluid milk is relatively inelastic, *i.e.,* fluid milk consumption does not decrease significantly in response to a price increase. Demand by retailers, distributors, and other customers of fluid milk is also inelastic because it is based on consumer demand.

b. Wisconsin, Northeastern Illinois, and the Upper Peninsula of Michigan Constitute a Relevant Geographic Market

The Complaint alleges that Wisconsin, northeastern Illinois, and the UP constitute a relevant geographic market for the sale of fluid milk. The Plaintiffs defined this geographic market with respect to the locations of the customers (*e.g.,* grocery stores), rather than the location of the competitors (*i.e.,* fluid milk processing plants) because, as the Complaint alleges, fluid milk processors can price discriminate, in other words, they can charge different fluid milk prices (net of transportation cost) to customers in different areas. This price discrimination is possible because processors individually negotiate prices with many customers, deliver the fluid milk to their customers' locations, and customers cannot eliminate price disparities through arbitrage, due in part to high transportation costs.[2]

The price discrimination analysis underlying the geographic market definition set forth in the Complaint is thus consistent with the 2010 Horizontal Merger Guidelines, which explain that "[f]or price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage." U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 3 (2010). More specifically, when suppliers can profitably charge different prices (net of costs) to different customers in different locations, competition does not occur at the point of production but *at the customers' locations.* Consequently, the relevant analysis focuses on how much a hypothetical monopolist would want to raise price at various points of consumption, and the relevant geographic market is defined around the location of those customers vulnerable to a price increase.[3] If a hypothetical monopolist can identify and price differently to buyers in certain areas ("targeted buyers"), and if arbitrage is unlikely, then a hypothetical monopolist would profitably impose a discriminatory price increase on buyers in that area.

Applying this analysis, the evidence in this case satisfies the conditions necessary to show price discrimination. The evidence shows that fluid milk processors negotiate prices for delivery of fluid milk to individual customers in Wisconsin, northeastern Illinois, and the UP and that prices vary among the customers. The evidence also shows that customers cannot arbitrage because of significant loading and shipping costs incurred in reselling. Moreover, the customers lack the coolers necessary to act as arbitrageurs on a significant scale and could not arbitrage fluid milk labeled with their own trademarks to other customers. Thus, fluid milk customers in Wisconsin, northeastern Illinois and the UP are vulnerable to anticompetitive effects flowing from Dean's acquisition of the Foremost plants. As the Complaint alleges, prior to the Acquisition, Foremost sold virtually all of its fluid milk to customers located in these locations, and Dean competed to supply fluid milk to customers throughout this same area. Fluid milk customers located in Wisconsin, northeastern Illinois, and the UP would not defeat a price increase by a hypothetical monopolist of fluid milk by substituting to other products or by taking advantage of arbitrage.

c. The Acquisition Will Likely Substantially Lessen Competition in the Sale of Fluid Milk to Customers Located in Wisconsin, Northeastern Illinois, and the Upper Peninsula of Michigan

The Complaint alleges that the Acquisition will likely substantially lessen competition in the sale of fluid milk in the relevant geographic market. Indicative of this are the effects of the Acquisition on market shares. In a geographic market defined on the basis of price discrimination, the participants in the relevant market are firms that currently supply customers in the market and firms that could economically begin doing so in the event of a small price increase. Market shares typically are assigned to these firms on the basis of their current (or projected) sales to customers within the geographic market, without regard to the location of the processing plant from which the product is supplied.[4]

Based on current sales, as a result of the Acquisition, Dean increased its share of fluid milk sold to customers in the relevant geographic market from approximately 45 percent to more than 57 percent. There are only two other competitors with more than five percent of fluid milk sales in the relevant geographic market—Kemps LLC (a subsidiary of Hood LLC) accounts for approximately 17 percent of sales and Prairie Farms Dairy, Inc. accounts for approximately 15 percent of sales. The Acquisition will eliminate head-to-head competition that has benefitted, and would otherwise continue to benefit, customers and final consumers. The Acquisition will also likely facilitate easier and more durable coordinated interaction among Dean and its few remaining competitors.

Dean and Foremost often competed head-to-head to serve fluid milk customers. Prior to the Acquisition, Foremost competed with Dean throughout the relevant geographic market. Foremost had substantial excess capacity, and as a result, competed aggressively to secure new business. The presence of Foremost as an aggressive pricing competitor to Dean served as a constraining force on Dean's pricing. The elimination of this head-to-head competition likely will produce higher prices for many customers of fluid milk in the relevant geographic market. By eliminating Foremost, a significant, disruptive, and aggressive competitor, the Acquisition also will likely substantially lessen competition among the remaining competitors selling fluid milk in the relevant

[2] Arbitrage occurs when purchasers protect themselves by buying the same product from favored purchasers in other areas.

[3] *See* U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 4.2.2 (2010).

[4] U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines §§ 5.1, 5.2.

geographic market by facilitating coordination among them. The Acquisition will result in a substantial increase in the concentration of processors that compete to supply fluid milk to customers located in the relevant geographic market. With the elimination of Foremost, fluid milk customers in many areas of the relevant geographic market will have only two or three significant suppliers of fluid milk. This increased market concentration and the elimination of Foremost as an aggressive competitor make it more likely that Dean and its remaining competitors will decline to bid aggressively for each other's existing customers to prevent retaliatory bidding. The practical effect of such a strategy likely will be to allocate customers based on existing supplier–customer relationships.

d. Neither Supply Responses Nor Entry Would Prevent the Likely Anticompetitive Effects of the Acquisition in the Fluid Milk Market

The Complaint alleges that neither supply responses from market participants nor entry would likely prevent the anticompetitive effects of the Acquisition in the fluid milk market. Firms not currently serving these markets are unlikely to enter in response to a small, durable price increase. Firms currently selling fluid milk into the relevant geographic market are unlikely to expand their sales sufficiently to substantially mitigate the loss of Foremost's head-to-head competition with Dean or to disrupt potential coordination by Dean and its remaining competitors in the fluid milk market.

2. School Milk

a. School Milk Is a Relevant Product Market

The Complaint alleges that school milk (*i.e.,* fluid milk packaged and distributed for sale to school districts, typically in half-pint containers) is a relevant product market. School districts must provide milk in order to receive substantial funds under Federal school meal subsidy programs. Schools will not substitute other products for school milk even at substantially higher school milk prices because they would lose their Federal meal reimbursement.

b. School Districts Constitute Relevant Geographic Markets

The Complaint alleges that each school district in Wisconsin and the UP constitutes a relevant geographic market. A hypothetical monopolist of school milk could identify and individually target vulnerable school districts in Wisconsin and the UP as school districts solicit school milk contract bids directly from processors. It would not be feasible for an individual school district to defeat a price increase by substituting to other products or by engaging in arbitrage (*i.e.,* by purchasing school milk from favored school districts). A hypothetical monopolist could easily detect and thwart such an attempt to arbitrage, and the attempt, in any event, would be greatly hindered by the significant loading and delivery costs incurred in reselling. Moreover, school districts lack the coolers necessary to act as arbitrageurs on a significant scale. Since the hypothetical monopolist could identify and individually target vulnerable school districts and arbitrage is infeasible, it is appropriate to define geographic markets around the locations of the school districts. Because sellers can price discriminate against individual school districts, it is appropriate to define the geographic markets as individual school districts.[5]

c. The Acquisition Will Likely Substantially Lessen Competition in the Sale of School Milk to Certain School Districts Located in Wisconsin and the Upper Peninsula of Michigan

The Complaint alleges that the Acquisition will likely substantially lessen competition in the sale of school milk to school districts located in Wisconsin and the UP. School districts in Wisconsin and the UP have only a few choices for school milk suppliers. Prior to the Acquisition, Dean and Foremost were the two processors best situated to serve certain districts in Wisconsin and the UP. In many districts, the Acquisition created a "merger to monopoly," leaving Dean as the only likely bidder. These school districts include those where Dean and Foremost were the only two dairy processors to bid in recent years. There are also a substantial number of school districts in Wisconsin and the UP for which Dean and Foremost were two of only three recent or likely future bidders. For these school districts, the Acquisition represents a "merger to duopoly." The elimination of head-to-head competition between Dean and Foremost will likely substantially lessen competition in these school milk markets and enable Dean to raise prices and/or reduce services.

[5] U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 4.2.2 (2010).

d. Entry Would Not Prevent the Likely Anticompetitive Effects of the Acquisition in the School Milk Markets

The Complaint alleges that entry into school milk markets is not likely to prevent the anticompetitive effects of the Acquisition. Firms not currently serving school districts in Wisconsin and the UP are unlikely to begin to do so in the foreseeable future.

III. Explanation of the Proposed Final Judgment

A. Divestiture of the Waukesha Plant

The proposed Final Judgment requires Dean, within 90 days after the filing of the proposed Final Judgment, or 5 days after entry of the Final Judgment by the Court, whichever is later, to divest the Waukesha plant it acquired from Foremost. The divestiture required by the proposed Final Judgment will establish an independent and economically viable competitor to Dean.

The proposed Final Judgment is in the public interest because the divestiture of the Waukesha plant will enable the buyer to compete for business in an area that includes the vast majority of the population in the relevant geographic market. Of the De Pere and Waukesha plants acquired by Dean through the Acquisition, the Waukesha plant currently produces more milk, has a larger capacity to process milk, and is located closer to major population centers, including Chicago, Green Bay, and Milwaukee. Distance between processors and customers is an important consideration in fluid milk pricing because fluid milk has a limited shelf life and is costly to transport. These costs result in most customers purchasing fluid milk from nearby processing plants. For example, more than 90 percent of the milk sold to customers in Wisconsin and the UP travels less than 150 miles from the plant in which it was processed. Ninety-two percent of the population of the relevant fluid milk geographic market is located within 150 miles of the Waukesha plant, and 80% of public school children in Wisconsin and the UP are enrolled in school districts within 150 miles of the Waukesha plant.[6] The Waukesha plant currently serves some of the largest fluid milk customers in Chicago and other areas of the relevant geographic market.

In addition, the Waukesha plant has significant excess capacity. This excess

[6] The State of Michigan and Dean have entered into a separate settlement agreement with respect to school milk sales in the UP. That agreement includes a pricing mechanism that sets a maximum school milk bid price based on prices Dean charged for school milk during 2010.

capacity will allow it to serve additional customers of all sizes and will give the purchaser of the plant the incentive to compete aggressively for new business.

The proposed Final Judgment requires Dean to divest all tangible assets that comprise the Waukesha plant business and all intangible assets used in the development, production, servicing, and sale of fluid milk and other dairy products for the Waukesha plant. These assets will give the acquirer a distribution network, an established customer base, and a brand (Golden Guernsey) with strong brand equity. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the divested assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Dean must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Dean does not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Dean will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

B. Notification of Future Acquisitions

In addition to the divestiture of the Waukesha plant, the proposed Final Judgment requires Dean to provide advance notification of certain future acquisitions of fluid milk processing plants to the Antitrust Division. The notification provision of the proposed Final Judgment is intended to avoid the difficulties associated with remedying the harms of a consummated anticompetitive acquisition by permitting the United States to assess the competitive effects of Dean's future acquisitions before the acquisitions are consummated, and if necessary, to seek to enjoin any transaction pursuant to Section 7.

The proposed Final Judgment provides that Dean shall not directly or indirectly acquire any assets of or interest in any fluid milk processing plant located in the United States, where the value of the acquisition is $3 million or greater, without prior notification to the United States. Transactions otherwise subject to the reporting and waiting period requirements of the HSR Act are excepted from the notification provision of the proposed Final Judgment. This provision will significantly broaden Dean's pre-merger reporting requirements because the $3 million amount is significantly less than the HSR Act's "size of the transaction" reporting threshold.

The proposed Final Judgment requires that such notification shall be provided to the Antitrust Division in the same format as, and in accordance with the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about fluid and school milk processing. Notification shall be provided at least 30 calendar days prior to acquiring any such interest. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Dean shall not consummate the proposed transaction or agreement until 30 calendar days after responding consistent with 15 U.S.C. 18a(e)(2). Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

IV. Remedies Available to Potential Private Litigants

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. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Dean.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Dean have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to:

Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered various proposals for settlement offered by Dean that would have provided less relief than is contained in the proposed Final Judgment. Those proposals involved the divestiture of a single dairy with less capacity and a smaller service area than the Waukesha dairy. The United States determined that the divestiture of the Waukesha dairy was far superior given its location, size, and excess capacity.

The United States also considered, as an alternative to the proposed Final Judgment, incurring the time, expense, and risk of a full trial on the merits in

order to attempt to force Dean to divest both of the plants that it acquired. The United States is concerned that the competitive harm from the Acquisition will be ongoing, and may become harder to remedy, as time passes.[7] The proposed Final Judgment will provide immediate relief and will avoid possible degradation of the Waukesha plant's business or the Golden Guernsey brand. The United States recognizes that the divestiture of the Waukesha plant, while addressing the vast majority of harm alleged in the Complaint, likely will have little effect on competition for fluid milk and school milk consumers in the northernmost section of the affected region. However, the proposed Final Judgment avoids the time, expense, and uncertainty of a full trial on the merits. Moreover, the United States is satisfied that the divestiture of the Waukesha plant described in the proposed Final Judgment is in the public interest because it will create an independent competitor able to compete for business in an area that includes the vast majority of the population in the relevant geographic market.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.DC 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.DC Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").[8]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[9] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer–Daniels–Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be

[7] Plaintiffs have been concerned about the deterioration of the Foremost assets since filing the action. *See* Joint Rule 26(f) Conference Report (Docket No. 31, filed May 21, 2010). This settlement eliminates the risk of asset deterioration that would have occurred prior to the entry of a judgment after trial.

[8] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[9] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[10]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 29, 2011.

Respectfully submitted,

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Karl D. Knutsen,
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for James L. Santelle,
James L. Santelle,
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[10] See *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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, Civil Action No. 2:10-cv-00059 (JPS) Plaintiffs,
v.
Dean Foods Company, Defendant.

[Proposed] Final Judgment

Whereas, Plaintiffs filed their Complaint on January 22, 2010, and Plaintiffs and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendant to assure that competition is not substantially lessened;

And Whereas, Plaintiffs require Defendant to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, Defendant has represented to Plaintiffs that the divestitures required below can and will be made and that Defendant will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now Therefore, before any testimony is taken, without trial of any issue of fact or law, and upon consent of the parties, it is *Ordered, Adjudged and Decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states claims upon which relief may be granted against Defendant under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

(A) "Acquirer" means the person or entity to whom Defendant divests the Divestiture Assets.

(B) "Dean Foods" means Defendant Dean Foods Company, a Delaware corporation with its headquarters in Dallas, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

(C) "Divestiture Assets" means the Waukesha Plant, as defined below, and all related assets for the Waukesha Plant (except for those specified in Section II(C)(3) below), including:

(1) All tangible assets that comprise the Waukesha Plant business, including all property and contract rights, research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, vehicles and other rolling stock, and other tangible property and all assets used in connection with the plant; all licenses, permits and authorizations issued by any governmental organization relating to the plant; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the plant, including agreements with suppliers and with distributors; all customer lists and related customer information, contracts, accounts (including accounts receivable), and credit records; and all repair and performance records and all other records relating to the plant; and

(2) All intangible assets used in the development, production, servicing, and sale of Fluid Milk and other dairy products for the Waukesha Plant, including, but not limited to, all patents, licenses and sublicenses, copyrights, trademarks, trade names (including the Golden Guernsey and La Vaca Bonita brands and all related materials), service marks, service names, and other intellectual property; technical information, computer software and related documentation; know-how and recipes; trade secrets; drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances; quality assurance and control procedures; design tools and simulation capability; all manuals and technical information Defendant provides to its own employees, customers, suppliers, agents, or licensees; and all research data concerning historic and current research and development efforts relating to the Divestiture Assets, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

(3) The term "Divestiture Assets" does not include: (a) The right to purchase raw milk from Foremost Farms USA Cooperative for processing at the Waukesha Plant obtained under the Milk Supply Agreement entered into on April 1, 2009 between Foremost Farms

USA Cooperative and GG Acquisition, LLC; (b) any ice cream mix filler equipment used at the Waukesha Plant or any other equipment at that Plant dedicated solely to the manufacturing of ice cream mix; or (c) the Dean and Farm Fresh brands and all related materials.

(D) "Fluid Milk" means raw milk that has been processed for human consumption as a beverage, but does not include organic milk, soy milk, extended shelf life milk, ultra-high temperature milk, or aseptic milk.

(E) "Plaintiff States" means the States of Wisconsin, Illinois, and Michigan.

(F) "School Milk" means Fluid Milk produced, marketed, distributed, or sold for use by schools.

(G) "Waukesha Plant" means Defendant's dairy processing plant located at 2101 Delafield Street, Waukesha, Wisconsin 53188–2299.

III. Applicability

(A) This Final Judgment applies to Dean Foods, as defined above, and all other persons in active concert or participation with Dean Foods who receive actual notice of this Final Judgment by personal service or otherwise.

(B) If, prior to complying with Section IV or V of this Final Judgment, Defendant sells or otherwise disposes of all or substantially all of its assets or of lesser business units that include the Divestiture Assets, it shall require the purchaser to be bound by the provisions of this Final Judgment. Defendant does not need to obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestitures

(A) Defendant is ordered and directed, within ninety (90) calendar days after the filing of the Proposed Final Judgment or five (5) calendar days after entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion, after consultation with the Plaintiff States. The United States in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of this time period not to exceed thirty (30) calendar days in total, and shall notify the Court in such circumstances. Defendant agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

(B) In accomplishing the divestiture ordered by this Final Judgment, Defendant promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendant shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendant shall make available such information to Plaintiffs at the same time that such information is made available to any other person.

(C) Defendant shall provide the Acquirer and Plaintiffs with information relating to the personnel involved in the operation and sale of the Divestiture Assets to enable the Acquirer to make offers of employment. Defendant will not interfere with any negotiations by the Acquirer to employ any Defendant employee whose primary responsibility relates to the Divestiture Assets.

(D) Defendant shall permit prospective Acquirers of the Divestiture Assets to have reasonable (1) access to personnel and to make inspections of the physical facilities of the Waukesha Plant; (2) access to any and all environmental, zoning, and other permit documents and information; and (3) access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

(E) Defendant shall warrant to the Acquirer that the Divestiture Assets will be operational on the date of sale.

(F) Defendant shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

(G) Defendant shall warrant to the Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendant will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

(H) Unless the United States in its sole discretion, after consultation with the Plaintiff States, otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that the Divestiture Assets can and will be used by the Acquirer as part of viable, ongoing Fluid Milk and School Milk processing businesses. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

(1) Shall be made to an Acquirer that, in the sole judgment of the United States, after consultation with the Plaintiff States, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the sale of Fluid Milk and School Milk; and

(2) shall be accomplished so as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer and Defendant give Defendant the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee

(A) If Defendant has not divested the Divestiture Assets within the time period specified in Section IV(A), Defendant shall notify Plaintiffs of that fact in writing. Upon application of the United States in its sole discretion, after consultation with the Plaintiff States, the Court shall appoint a trustee selected by the United States, after consultation with the Plaintiff States, and approved by the Court to effect the divestiture of the Divestiture Assets.

(B) After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States in its sole discretion, after consultation with the Plaintiff States, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of Defendant any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

(C) Defendant shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendant must be conveyed in writing to Plaintiffs and the trustee within ten (10) calendar days

after the trustee has provided the notice required under Section VI.

(D) The trustee shall serve at the cost and expense of Defendant, on such terms and conditions as the United States in its sole discretion, after consultation with the Plaintiff States, approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendant and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

(E) Defendant shall use its best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendant shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendant shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

(F) After its appointment, the trustee shall file monthly reports with Plaintiffs and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

(G) If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent the report contains information that the trustee deems confidential, the report shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to Plaintiffs, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States in its sole discretion, after consultation with the Plaintiff States.

VI. Notice of Proposed Divestiture

(A) Within two (2) business days following execution of a definitive divestiture agreement, Defendant or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify Plaintiffs of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendant. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

(B) Within fifteen (15) calendar days of receipt by Plaintiffs of such notice, the United States, after consultation with the Plaintiff States, may request from Defendant, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendant and the trustee shall furnish to the United States, which will share that information with the Plaintiff States upon any Plaintiff State's request, any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

(C) Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendant, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States in its sole discretion, after consultation with the Plaintiff States, shall provide written notice to Defendant and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendant's limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendant under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendant shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Asset Preservation

Until the divestiture required by this Final Judgment has been accomplished, Defendant shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendant shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

(A) Within twenty (20) calendar days of the filing of the Proposed Final Judgment in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendant shall deliver to Plaintiffs an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendant has taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Provided that

the information set forth in the affidavit is true and complete, any objection by the United States in its sole discretion, after consultation with the Plaintiff States, to information provided by Defendant, including any limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

(B) Defendant shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

(A) For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant, be permitted:

(1) Access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

(B) Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendant shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

(C) If at the time information or documents are furnished by Defendant to the United States, Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

(D) The United States may share information or documents obtained under Section X with the Plaintiff States.

XI. Treatment of Confidential Information

No information or documents obtained by the means provided in this Final Judgment shall be divulged by the United States or the Attorney General of Wisconsin, Illinois, or Michigan to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States or the Attorney General of Wisconsin, Illinois, or Michigan is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII. Notification of Future Transactions

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), Defendant, without providing advance notification to the Antitrust Division and to any Plaintiff State in which any of the assets or interests are located or whose border is less than 150 miles from any such assets or interests, shall not directly or indirectly acquire any assets of or interest, including any financial, security, loan, equity or management interest, in any Fluid Milk processing plant located in the United States, where the value of the acquisition is $3 million or greater.

Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about Fluid Milk and School Milk processing. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest. Within the 30-day period after notification, representatives of the Antitrust Division may make a written request for additional information or documentary material relevant to the proposed acquisition as though 15 U.S.C. 18a(e) were applicable ("Second Request"). In the event of a Second Request, Defendant shall not consummate the proposed transaction or agreement until thirty (30) calendar days after responding consistent with 15 U.S.C. 18a(e)(2). Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

All references to the HSR Act in the proposed Final Judgment refer to the HSR Act as it exists at the time of the transaction or agreement and incorporate any subsequent amendments to the Act.

XIII. No Reacquisition

Defendant shall not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XVI. Public Interest Determination

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to those comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

Dated at Milwaukee, Wisconsin, this ____th day of ____, 2011.

By the Court:

J.P. Stadtmueller,

U.S. District Judge.

[FR Doc. 2011–7938 Filed 4–04–11; 8:45 am]

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