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Farmers of Am., Inc., 276 F. Supp. 3d 195 (D. Vt. 2017).

<sup>13</sup> 7 U.S.C. § 291 (2022).

<sup>14</sup> See *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 852 (6th Cir. 2005).

<sup>15</sup> See Peter Schmidt, *Bid Rigging Among School Suppliers is 'Pervasive,' Experts Fear*, EdWeek (Sep. 22, 1993), <https://www.edweek.org/education/bid-rigging-among-school-suppliers-is-pervasive-experts-fear/1993/09> (last visited Feb. 21, 2022); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 826 (11th Cir. 1999).

<sup>16</sup> These are Agri Mark's Andover, MA plant, West Lynn Creamery's Lynn, MA bulk tank unit, and DFA's Syracuse, NY plant. See January 2022 – Interstate Milk Shippers List, FDA (2022), <https://www.fda.gov/food/federalstate-food-programs/interstate-milk-shippers-list> (last visited Feb. 16, 2022).

<sup>17</sup> *U.S. v. Country Lakes Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990).

<sup>18</sup> There may be more competition from conventional fluid milk processors in Pennsylvania or upstate New York farmers at the edges of this geographic area, but the vast majority of milk for each portion of this market is

<sup>19</sup> County Population Totals: 2010-2019, U.S. Census Bureau (2019), <https://www2.census.gov/programs-surveys/popest/datasets/2010-2019/counties/totals/> (last visited Feb. 16, 2020).

<sup>20</sup> See Interstate Milk Shippers List: Connecticut, FDA (July 23, 1996), <https://web.archive.org/web/19961120064222/http://vm.cfsan.fda.gov/~ear/milk-ct.html>; Interstate Milk Shippers List: Maine, FDA (July 23, 1996), <https://web.archive.org/web/19961120064408/http://vm.cfsan.fda.gov/~ear/milk-me.html>; Interstate Milk Shippers List: Massachusetts, FDA (July 23, 1996), <https://web.archive.org/web/19961120064427/http://vm.cfsan.fda.gov/~ear/milk-ma.html>; Interstate Milk Shippers List: New Hampshire, FDA (July 23, 1996), <https://web.archive.org/web/19961120064532/http://vm.cfsan.fda.gov/~ear/milk-nh.html>; Interstate Milk Shippers List: New Jersey, FDA (July 23, 1996), <https://web.archive.org/web/19961120064539/http://vm.cfsan.fda.gov/~ear/milk-nj.html>; Interstate Milk Shippers List: New York, FDA (July 23, 1996), <https://web.archive.org/web/19961120064559/http://vm.cfsan.fda.gov/~ear/milk-ny.html>; Interstate Milk Shippers List: Rhode Island, FDA (July 23, 1996), <https://web.archive.org/web/19961120064701/http://vm.cfsan.fda.gov/~ear/milk-ri.html>; Interstate Milk Shippers List: Vermont, FDA (July 23, 1996), <https://web.archive.org/web/19961120064754/http://vm.cfsan.fda.gov/~ear/milk-vt.html>.

<sup>21</sup> *State v. Mid-Am. Dairymen, Inc.*, 1997 WL 669970, at \*1 (Tex. Dist. Sept. 3, 1997).

<sup>22</sup> Healy, *supra* note 5.

<sup>23</sup> Healy, *supra* note 5.

<sup>24</sup> Healy, *supra* note 5.

<sup>25</sup> Kirk Kardashian, *Milk Money: Cash, Cows, and the Death of the American Dairy Farm*, UPNE, at 199 (2012).

<sup>26</sup> *Connecticut v. Suiza Foods Corp.* (D. Conn. 6/25/2001).

<sup>27</sup> Kirk Kardashian, *Milk Money: Cash, Cows, and the Death of the American Dairy Farm*, UPNE, at 199 (2012).

<sup>28</sup> *Id.*

<sup>29</sup> See Welcome to HP Hood, <http://hphoodmanufacturing.com/> (last visited Feb. 16, 2022).

<sup>30</sup> Ronald W. Cotterill, Adam N. Rabinowitz, and Li Tian, *Milk Market Channel Structure: Its Impact on Farmers and Consumers, and the Inadequacies of Antitrust Enforcement as a Foundation for Dairy Policies: Evidence from the Northeast Dairy Industry, Testimony on Monopsony Issues in Agriculture: Buying Power of Processors in Our Nation's Agricultural Markets Judiciary Committee, United States Senate*, Food Marketing Policy Center Department of Agricultural and Resource Economics University of Connecticut Storrs, at 11 (2003).

<sup>31</sup> *Id.*, at n. 11; see *infra* n. 46 and related discussion.

<sup>32</sup> Pete Hardin, *Hanman Explains Antitrust Ills, Cheese Manipulations*, The Milkweed (December 2000).

<sup>33</sup> See Hardin *supra* note 6.

<sup>34</sup> *Id.*

<sup>35</sup> William Kolasky, Deputy Assistant Attorney General, U.S. Dep't of Just., Antitrust Div., Mergers & Acquisitions: Getting Your Deal Through in the New Antitrust Climate, co-sponsored by the American Bar Association Section of Antitrust Law and The Association of the Bar of the City of New York: Sound Economics and Hard Evidence: The Touchstones of Sound Merger Review (June 14, 2002).

<sup>36</sup> *Dean Foods Company Receives Court Approval of "First Day" Motions to Support Normal Business Operations*, Dean Foods (Nov. 14, 2019), <https://www.deanfoods.com/newsroom/news/dean-foods-company-receives-court-approval-of-first-day-motions-to-support-normal-business-operations/> (last visited Feb. 6, 2022).

<sup>37</sup> William Kolasky, Deputy Assistant Attorney General, U.S. Dep't of Just., Antitrust Div., Mergers & Acquisitions: Getting Your Deal Through in the New Antitrust Climate, co-sponsored by the American Bar Association Section of Antitrust Law and The Association of the Bar of the City of New York: Sound Economics and Hard Evidence: The Touchstones of Sound Merger Review (June 14, 2002).

<sup>38</sup> William Kolasky, Deputy Assistant Attorney General, U.S. Dep't of Just., Antitrust Div., Mergers & Acquisitions: Getting Your Deal Through in the New Antitrust Climate, co-sponsored by the American Bar Association Section of Antitrust Law and The Association of the Bar of the City of New York: Sound Economics and Hard Evidence: The Touchstones of Sound Merger Review (June 14, 2002).

<sup>39</sup> Final Judgment, *United States and Plaintiff States v. Dean Foods Co.*, 2011 WL 11544329 (July 29, 2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Hood, national dairy company abandon merger plan*, MyPlainView (May 12, 2003), <https://www.myplainview.com/news/article/Hood-national-dairy-company-abandon-merger-plan-9065987.php> (last visited Feb. 21, 2022).

<sup>42</sup> *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323 (D. Vt. 2010); *Sitts v. Dairy Farmers of Am., Inc.*, 276 F. Supp. 3d 195 (D. Vt. 2017).

<sup>46</sup> *About Guida's Dairy*, <https://guidas.com/about/> (last visited Feb. 6, 2022) (“In early 2012, we became part of Dairy Farmers of America (DFA)”). The complaint in *Allen, supra* note 8 provides a more detailed summary of the market until about this period.

<sup>47</sup> *Oakhurst Acquired By A Farmer Owned Cooperative. Company To Remain In Maine And Operate Independently*, Oakhurst Dairy (January 31, 2014), [https://www.oakhurstdairy.com/press\\_release/oakhurst-acquired-by-a-farmer-owned-cooperative-company-to-remain-in-maine-and-operate-independent/](https://www.oakhurstdairy.com/press_release/oakhurst-acquired-by-a-farmer-owned-cooperative-company-to-remain-in-maine-and-operate-independent/) (last visited Feb. 6, 2022).

<sup>48</sup> Pete Hardin, *Key Language from the January 19, 2017 DMS Letter to Independent Producers*, The Milkweed (Feb. 2017).

<sup>49</sup> Pete Hardin, *Key Language from the January 19, 2017 DMS Letter to Independent Producers*, The Milkweed (Feb. 2017).

<sup>50</sup> Pete Hardin, *Key Language from the January 19, 2017 DMS Letter to Independent Producers*, The Milkweed (Feb. 2017).

<sup>51</sup> St. Alban's Creamery & Supply, <https://www.stalbanscooperative.com/> (last visited Feb. 22, 2022).

<sup>52</sup> Pete Hardin, *Six Co-ops Claim Dean Foods Bankruptcy Process Is Unfair, Seek a Delay*, The Milkweed (March 2020).

<sup>53</sup> *Dean Foods Company Receives Court Approval of "First Day" Motions to Support Normal Business Operations*, Dean Foods (Nov. 14, 2019), <https://www.deanfoods.com/newsroom/news/dean-foods-company-receives-court-approval-of-first-day-motions-to-support-normal-business-operations/> (last visited Feb. 6, 2022).

<sup>54</sup> *Dean Foods Completes Sale of Assets to Dairy Farmers of America*, Dean Foods (May 1, 2020), <https://www.deanfoods.com/newsroom/news/dean-foods-completes-sale-of-assets-to-dairy-farmers-of-america/> (last visited Feb. 6, 2022).

<sup>55</sup> Pete Hardin, *Six Co-ops Claim Dean Foods Bankruptcy Process is Unfair, Seek a Delay*, The Milkweed (March 2020).

<sup>56</sup> *United States v. Dairy Farmers of Am., Inc.*, 2020 WL 7066345, at \*1 (N.D. Ill. Oct. 6, 2020).

<sup>57</sup> *United States v. Dairy Farmers of Am., Inc.*, 2020 WL 8370839, at \*1 (N.D. Ill. Dec. 17, 2020).

<sup>58</sup> Karen Bohnert, *The Nightmare Before Christmas: Plant Informs Hundreds of Producers it No Longer Will Buy Their Milk*, Ag Web (January 13, 2022), <https://www.agweb.com/news/livestock/dairy/nightmare-christmas-plant-informs-hundreds-producers-it-no-longer-will-buy> (last visited February 15, 2022).

<sup>59</sup> Pete Hardin, *MD?VA Co-op Poised to Add Producers Cut Loose by Readington Farms*, The Milkweed (February 2022).

<sup>60</sup> See January 2022 – Interstate Milk Shippers List, FDA (2022), <https://www.fda.gov/food/federalstate-food-programs/interstate-milk-shippers-list> (last visited Feb. 16, 2022).

<sup>61</sup> Letter from John P. McDonough, Interim Superintendent, Boston Public Schools, to Martin J. Walsh, Mayor of Boston (July 14, 2014) (on file with author); Letter from Tommy Chang, Superintendent, Boston Public Schools, to Martin J. Walsh, Mayor of Boston (August 30, 2017) (on file with author); Letter from Laura Perille, Interim Superintendent, Boston Public Schools, to Martin J. Walsh, Mayor of Boston (August 15, 2018) (on file with author); Letter from Laura Perille, Interim Superintendent, Boston Public Schools, to Martin J. Walsh, Mayor of Boston (May 3, 2019) (on file with author).

<sup>62</sup> County Population Totals: 2010-2019, U.S. Census Bureau (2019), <https://www2.census.gov/programs-surveys/popest/datasets/2010-2019/counties/totals/> (last visited Feb. 16, 2020).

<sup>63</sup> Ronald Cotterill, et al., *Toward Reform of Fluid Milk Pricing in Southern New England: Farm Level, Wholesale and Retail Prices in the Fluid Milk Marketing Channel: 2003-2006, Report to the Connecticut Legislature Committee on the Environment* (2007).

<sup>64</sup> *Id.*

<sup>65</sup> See *supra* note 2.

<sup>66</sup> See *supra* note 61 and related discussion.

<sup>67</sup> *United States v. Agri-Mark, Inc.*, 1981 WL 2057, at \*1 (D. Vt. Apr. 1, 1981).

<sup>68</sup> *Id.*

<sup>69</sup> The structure of this consent decree in some way mirrors the proposal, *infra*, to regulate conventional fluid milk processing as a utility.

<sup>70</sup> Second Amended Consolidated Class Action Complaint, at 72, *In re: Dairy Farmers of America, Inc. Cheese Antitrust Litigation* (No. 245) (class action alleging that DFA manipulated cheddar cheese futures on the Chicago stock exchange).

<sup>71</sup> *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323 (D. Vt. 2010); *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 60 F. Supp. 3d 914, 920 (N.D. Ill. 2014); *Sitts v. Dairy Farmers of Am., Inc.*, 276 F. Supp. 3d 195 (D. Vt. 2017).

<sup>72</sup> See *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983).

# The Northeast Dairy Dilemma: Solutions for Concentration in a Vertically Integrated Market, con’t

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uation for the 6 million Massachusetts consumers and the farmers that supply milk to processing plants.

Suiza Foods’ consolidation efforts raise the specter of its obtaining sufficient market share to influence the price of milk purchased from dairy farmers producing the milk and the price of retail fluid milk products to consumers. As a result of these ongoing acquisitions, the number of major milk processing enterprises in Massachusetts dwindled from five firms to three firms: Suiza Foods, Stop & Shop, Inc. and H.P. Hood, Inc. I suggest that this is a further deterioration of competitive market conditions.”

“Prior to the . . . consolidation, the five major milk processors accounted for 80% of the milk processing capacity” for the Massachusetts market.<sup>24</sup> At the time Commissioner Healy wrote that letter, Suiza was attempting to purchase another of the three remaining fluid milk processors based in Massachusetts: Stop & Shop’s plant at Readville.<sup>25</sup> The New England states all challenged the Stop & Shop-Suiza merger, and negotiated a Consent Decree that banned Stop & Shop from selling the plant to Suiza.<sup>26</sup> But that Consent Decree did not benefit the market since Suiza and Stop & Shop instead entered an exclusive dealing agreement for \$50 million and Stop & Shop shut down the plant as part of that deal.<sup>27</sup>

This Stop & Shop plant closing directly harmed the St. Albans Cooperative Creamery, then the largest dairy cooperative in Vermont and predominant supplier of raw milk to Stop & Shop.<sup>28</sup> And meanwhile, H.P. Hood (a leading regional competitor, despite being partially supplied with raw milk by DFA) shifted its processing plants in the Northeast to focus on more specialized products, like shelf stable milk or frozen novelties.<sup>29</sup>

A subsequent study by University of Connecticut economists noted that “[a]s a result of Suiza’s plant closings [that followed the late 1990s buying spree], by 2000 there was dramatically less processing capacity in New England and little excess capacity outside of the Suiza plant system.”<sup>30</sup> Guida-Seibert Dairy expanded in response to this decrease in capacity, but was eventually purchased by the largest firm in the market.<sup>31</sup>

In September 2000, DFA’s then CEO/President bragged in an audio tape that was distributed within the co-op that Suiza and DFA had a deal to force independent farmers selling milk to Garelick Farms – then the largest fluid milk processor in New England – to join DFA. But in that audiotape, DFA’s top executive warned that at that time, there was too much scrutiny from antitrust officials.<sup>32</sup>

Around this same time, commentators noticed a concerning lack of competition for school milk contracts even though there were still a number of large firms supposedly competing in other parts of the conventional fluid milk market.<sup>33</sup> This lack of competition meant that Suiza Foods and its successor, Dean Foods, often obtained school milk contracts without a single competing bid.<sup>34</sup>

Since the prescient warning by Massachusetts’ agriculture commissioner in early 2000, the fluid milk processing industry has further consolidated in New England and across major portions of the Northeast. In December 2001, Suiza Foods acquired Dean Foods – a marriage of the nation’s two largest fluid milk processors – in a transaction sanctioned by the Antitrust Division of the United States Department of Justice.<sup>35</sup> That combined firm operated as the “new” Dean Foods until its bankruptcy in November 2019.<sup>36</sup> The DOJ’s Antitrust Division “challenged the proposed merger in 22 metropolitan areas in which [it] concluded that the merger would be likely to result in unilateral prices increases. The merged firm’s combined market shares in these markets ranged from 43 percent to 100 percent, with post-merger HHIs ranging from 2,058 to 10,000.”<sup>37</sup> In that investigation, the DOJ concluded that “[d]airies owned by grocery stores were not a significant constraint on the pricing of Suiza and Dean.”<sup>38</sup> The Justice Department ultimately approved the Dean Foods-Suiza merger, but only after some plants were divested.<sup>39</sup> As part of the federal Antitrust Division’s approval of the Suiza Foods/Dean Foods marriage, the GTL joint venture with DFA was broken up.<sup>40</sup>

In 2002, DFA and its joint venture, National Dairy Holdings (NDH), attempted to merge with H.P. Hood and, following a legal challenge, instead acquired a financial stake in the company.<sup>41</sup> This deal exemplifies the elaborate connections between DFA and other milk processors that potentially limit competition in the industry.

In 2007, a civil antitrust action in the Southeast was filed against DFA, Dean Foods, and other defendants, on behalf of dairy farmers in that region.<sup>42</sup> Allegations were that DFA and Dean Foods had conspired to restrict producers’ access to milk plants, and that those producers had been underpaid for their milk.<sup>43</sup> Defendants DFA and Dean Foods ultimately separately settled separately with plaintiffs’ attorneys for \$140 million each.<sup>44</sup> Civil class actions alleging similar anticompetitive actions by DFA and Dean Foods were subsequently filed and settled in the Northeast.<sup>45</sup> By 2012, DFA bought Guida’s Dairy, the processor that expanded in response to the original decrease in competition and which, by that point, was Connecticut’s largest fluid milk processor.<sup>46</sup> In 2014, DFA purchased Oakhurst Dairy, one of only two major milk processors remaining in Maine.<sup>47</sup>

In January 19, 2017, DFA’s joint venture partner, Dairy Marketing Services, LLC, mailed a letter to over 900 non-DFA farmers whose milk the cooperative marketed in the Northeast.<sup>48</sup> That letter demanded that those producers join DFA by April 1, 2017, or lose their markets.<sup>49</sup> At that time, there were virtually no alternate milk markets available in the Northeast.<sup>50</sup>

Facing pressure from DFA, in 2019, St. Alban’s Creamery, the cooperative that was harmed by Stop & Shop’s exclusive dealing agreement with Suiza, “voted to successfully merge with its long-time partner, Dairy Farmers of America (DFA).”<sup>51</sup>

In June 2019, the DOJ’s Antitrust Division *finally* took action on DFA’s legal constraints. All of the binding Consent Decrees that DFA had inherited from its predecessor cooperatives were expunged, thus erasing all prior legal constraints upon DFA.<sup>52</sup>

Dean Foods, suffering from debt acquired in part from its pre-Great Recession stockholder bonuses, filed for Chapter 11 bankruptcy in November 2019.<sup>53</sup> In May 2020, DFA, Dean Foods’ predominant raw milk supplier, took over about 90% of all the bankrupt company’s milk plants in the United States – including all such assets in New England and the Northeast.<sup>54</sup> The Dean Foods bankruptcy process was troubling. Other parties interested in bidding on some of Dean Foods’ facilities formally complained that they had been denied access to critical financial information by the firm appointed by the bankruptcy court.<sup>55</sup>

A Consent Decree engineered by federal and Commonwealth antitrust officials required DFA to sell off Garelick Farms’ plant at Franklin, Massachusetts.<sup>56</sup> That sale never happened due to a lack of potential buyers, and the government permitted DFA to keep the plant.<sup>57</sup>

And most recently, in the first quarter of 2022, the last remaining fluid milk plant in New Jersey that was not owned by DFA, Readington Farms, ceased operations.<sup>58</sup> DFA milk plants assumed that volume, which is distributed to about 350 supermarkets in the region.<sup>59</sup>

No fluid milk processors remain in New York City or Long Island, and most of the other fluid milk processors in the region are small firms that cannot actually compete for large contracts.<sup>60</sup> Indeed, the Boston Public School system has awarded DFA-owned Garelick Farms exclusive school milk contracts since at least 2014 in large part because no competitors were able to submit complete bids for several of those years.<sup>61</sup>

So after starting out at around 80% market share for the top five milk processors around 2000 (as estimated by the Massachusetts agriculture commissioner’s letter), DFA eventually acquired the assets of each of the major remaining competitors in New England other than H.P. Hood. The tables below show DFA’s expansion in the market and the decrease in the number of existing milk processors. However, while these tables do a decent job of showing DFA’s expansion from no market share to a dominant player, the tables drastically undersell DFA’s share of the milk processing by volume since DFA operates the largest plants in the region, but the exact volumes are not publicly disclosed and so the tables do not account for this feature.

Medium-Large Northeast Conventional Fluid Milk Processors				
	1996 Processors		2022 Processors	
	DFA	Other	DFA	Other
Connecticut	0 (0%)	4 (100%)	1 (25%)	3 (75%)
Maine	0 (0%)	3 (100%)	1 (50%)	1 (50%)
Massachusetts	0 (0%)	5 (100%)	1 (50%)	1 (50%)
New Hampshire	0 (0%)	2 (100%)	0 (0%)	3 (100%)
New Jersey	0 (0%)	3 (100%)	1 (100%)	0 (0%)
New York	0 (0%)	1 (100%)	1 (100%)	0 (0%)
Rhode Island	0 (NA)	0 (NA)	0 (0%)	1 (100%)
Vermont	0 (NA)	0 (NA)	0 (0%)	3 (100%)
Total	0 (0%)	18 (100%)	5 (29%)	12 (71%)

  

All Northeast Conventional Fluid Milk Processors				
	1996 Processors		2022 Processors	
	DFA	Other	DFA	Other
Connecticut	0 (0%)	8 (100%)	1 (17%)	5 (83%)
Maine	0 (0%)	5 (100%)	1 (20%)	4 (80%)
Massachusetts	0 (0%)	7 (100%)	1 (25%)	3 (75%)
New Hampshire	0 (0%)	6 (100%)	0 (0%)	6 (100%)
New Jersey	0 (0%)	5 (100%)	1 (100%)	0 (0%)
New York	0 (0%)	3 (100%)	1 (14%)	6 (86%)
Rhode Island	0 (0%)	2 (100%)	0 (0%)	3 (100%)
Vermont	0 (0%)	3 (100%)	0 (0%)	5 (100%)
Total	0 (0%)	39 (100%)	5 (14%)	32 (86%)

DFA’s market power in fluid milk processing means that it is not only able to depress the prices it pays to farmers, but also to possibly increase prices it charges its buyers, which pass those costs on to consumers. As mentioned above, DFA employs this market power over a geographic market containing 38 million people.<sup>62</sup> Those 38 million consumers’ demand for conventional milk is dramatically captive to a single, vertically-integrated, farm-to-retailer colossus. Besides being the largest fluid milk processor in those areas of the Northeast, Dairy Farmers of America is the largest dairy farmers’ cooperative in the Northeast.

## IV. Cleaning Up the Dairy Case: Restoring Balance in a Broken Market

As mentioned above, the primary goal of this paper is to suggest solutions to competitively rebalance the Northeast’s dairy market. Many of these tasks can and should be adopted simultaneously.

### Form a Multi-State, Regional Dairy Antitrust Task Force.

This problem of concentration and anti-competitive behavior in the conventional fluid milk processing industry overlaps state borders. State Attorneys General offices for the New England states, New Jersey and New York should form a Dairy Industry Antitrust Task Force. The New England state AGs participated in this type of multi-state investigation in challenging the Stop & Shop-Suiza merger, and now simply need to come seeking stronger remedies.

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This task force should conduct a forensic audit of the relationship between DFA and its subsidiaries and joint ventures.

### Study the History of Farm-to-Retail Margins

At each step of the path from farm to retail, what are the margins? Exactly this type of analytical research was conducted years ago by Dr. Ronald Cotterill, now a *Professor Emeritus* at the University of Connecticut’s Department of Agriculture and Resource Economics.<sup>63</sup> This example from Cotterill’s analysis of Connecticut’s farm-to-retail price margins during November 2006 can readily serve as a model for studying such regional data over several years. Cotterill noted that the Connecticut Attorney General’s office assisted collecting that data.<sup>64</sup> As the graph of beef prices referenced above<sup>65</sup> shows, data on pricing and margins can be vital to identifying the true extent of damages caused by anticompetitive conduct.

### Study the History of School Milk Contract Bidding Within the Region

Once upon a time, school milk contracts’ bids were the quick check on competition among dairy processors. School milk contracts are most often bid annually, generally in the summer prior to the start of the school year. That historic data is publicly available, and reveals patterns among bidders as well as the margins they bid. As referenced above, the authors obtained several years of school milk bid data from Boston Public Schools that show the dire lack of competition for even some of the most lucrative contracts in the region.<sup>66</sup> School milk comprises about six to seven percent of total fluid milk sales and can be defined as a separate product market due to the processing volume needed to establish contracts with large school districts.

### Seek a Consent Decree Binding DFA’s Raw Milk Sales, Akin to the Agri-Mark/H.P. Hood Consent Decree of the Early 1980s

In the early 1980s, Agri-Mark, the newly-formed and then-largest dairy cooperative in New England, attempted to purchase what was then the region’s single-biggest fluid milk processor, H.P. Hood. Following widespread complaints from the region’s competing fluid milk processors, the DOJ Antitrust Division intervened and forced a Consent Decree upon Agri-Mark, Agway (another co-op involved in the proposed Hood purchase), and H.P. Hood.<sup>67</sup> That Consent Decree required Agri-Mark to sell farm milk to all other dairy processors on the same terms as Agri-Mark sold farm milk to H.P. Hood, Agri-Mark’s in-house fluid processing business.<sup>68</sup> The 1981 Consent Decree provides an historic example of federal antitrust intervention in New England’s milk industry.

There are compelling, relevant parallels between Agri-Mark-Hood from 40 years ago, and DFA’s current control of farm milk and fluid milk processing in the Northeast. However, DFA’s control of both regional farm milk supplies and milk processing capacity is far greater today than anything Agri-Mark-H.P. Hood held four decades ago. In the fluid milk industry, it’s critical that fluid processors’ raw milk costs are close. That’s one fundamental purpose of USDA’s federal milk order system: to equalize fluid milk processors’ raw product costs. In the fluid milk business, contracts to supply retail, school, and institutional contracts may be won or lost on the basis of cents, even mills per unit.

If imposed upon DFA in the Northeast, a Consent Decree parallel to the Agri-Mark-Agway-H.P. Hood Consent Decree from the early 1980s would protect the interests of dairy farmers, consumers, the few competing milk cooperatives that remain, and the few competing fluid milk processors in the Northeast. If DFA were legally mandated by a Consent Decree throughout its Northeast operating region to offer farm milk to processors on the same basis as DFA sells milk to its own dairy processing plants, that would stabilize competition and serve the wide-ranging public interest.<sup>69</sup>

### Once an Investigation Confirms DFA’s Misconduct, Break Up DFA Across and Within Regions

As described, DFA and its predecessors have a long history of anti-competitive conduct. This article cites only a handful of the antitrust cases that DFA or the milk processors it has acquired have been involved in over the past half-century. Even before its most recent string of antitrust cases, DFA was described as “a serial violator of . . . laws prohibiting anticompetitive activities.”<sup>70</sup> Several class actions have achieved hundreds of millions of dollars in settlements from DFA, for cases involving alleged denial of market access in the Northeast and Southeast, to manipulations of Cheddar prices at the Chicago Mercantile Exchange.<sup>71</sup>

Pending the results of an investigation, federal antitrust regulators should seek a “Ma Bell Solution.”<sup>72</sup> Like the Bell System, DFA should be broken into its seven operating regions. Unlike the telephone lines required by the Baby Bells, milk processing plants can be run profitably even when there are multiple processors in a region, as evidenced by the approximately 15% market share of non-DFA processors in the Northeast and the larger non-DFA market share throughout the rest of the country. So, DFA should also be broken into competitors within each region to prevent the sort of dominance and market-splitting that constitutes much of DFA’s misconduct over the past several decades. For example, divesting DFA’s Florence, New Jersey plant would help make up for the recent loss of competition in New Jersey. Selling off DFA’s Guida-Seibert milk processing plant in Connecticut could similarly improve competition in New England.

Further, as terms of that dissolution, the individual regions should be permitted no common directorships, no common management, no common financial obligations, and no common ownership of joint ventures or subsidiaries. To prevent future backroom deals from leading to strategic exit and acquisition of market share by the DFA progeny, a Consent Decree may also seek to limit the market share (under a pre-defined market definition) so that no one of the new firms can become dominant.

### In USDA’s Northeast Regional Milk Order, Terminate Class I Pooling Requirements

The federal milk order program is designed to assure consumers of an adequate supply of fresh and wholesome milk by regulating prices paid by processors and imposing rules upon firms marketing Grade A farm milk within a given region. In the Northeast region (federal order #1), firms procuring farm milk are required to sell a minimum of 10% of their raw milk per month to Class I (fluid) processors. This requirement may be accomplished either through direct sales, or by arranging for another party to cover an individual marketer’s Class I requirements. However,

with DFA controlling so great a percentage of Class I processing in the Northeast region, competing buyers of farm milk are often forced to deal with DFA to gain required access to the Class I market. In the Southeast and Northeast civil antitrust class actions, restricted access to Class I plants was a major issue. By eliminating Class I milk sales requirements in the Northeast, USDA would remove an administrative requirement that cements DFA’s market power over competing handlers.

### At the 100-Year Mark, Review Capper-Volstead

The federal Capper-Volstead Act was created in 1922, one hundred years ago. Capper-Volstead attempted to address a rural economic Depression brought about by the complete collapse of U.S. farm prices in late summer/early fall 1920 and provided agricultural cooperatives with limited exemptions from the federal antitrust laws as discussed above. However, agriculture and cooperatives have changed dramatically over 100 years and behemoths like DFA have come to dominate markets in ways not possible for standard firms. A thorough review of Capper-Volstead is likely to conclude that limiting cooperatives’ antitrust exemptions only to the procurement, transportation, and marketing of raw agricultural products is sufficient to protect small-scale farmers from financial downturns while maintaining competitive marketplaces.

### If All Else Fails, Regulate the Northeast Fluid Milk Industry as a Utility

The only scenario worse than this suggestion may be the status quo. It may be the case that barriers to entry from the start-up costs of setting up a plant and distribution network are too high and that there is not political or judicial will to break DFA up into competing units. If all else fails and regulators decide that it is either impossible or too costly to monitor and confront DFA’s anti-competitive actions, then setting price or margin caps and floors and mandating that DFA accept milk from non-DFA members may be the only way to prevent DFA’s abuse of market power from sinking the Northeast dairy market and imposing large externalities on the farmers and communities it leaves behind.

## V. Conclusion

By progressively buying out rival milk processors and squeezing smaller cooperatives and independent farmers, DFA has come to dominate the milk processing market in the Northeast. DFA has paid out multiple settlements and divested some processors due to a string of antitrust litigation against it. But DFA has continued its march towards dominance over the region. After acquiring Dean Foods in 2020, DFA has nearly unfettered power to distort purchase prices and force the remaining independent farmers and cooperatives in the Northeast to go out of business or join the fold. Similarly, DFA could exercise its market power to raise prices for millions of households. Fortunately, regulators and private plaintiffs have been successful within the limited scope of their prior cases against DFA. This article has explained several remedies that might help achieve the broader ambition of rebalancing the Northeast milk market. Armed with these possibilities, state and federal regulators must do the work to investigate DFA and select appropriate legal remedies and constraints based on their findings.

### Footnotes:

<sup>1</sup> Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain (January 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> (last visited Feb. 6, 2022).

<sup>2</sup> Bill Bullard, Beef Checkoff-Funded Packer Trade Group Attempts to Derail Effort to Address Food Crisis, R-CALF USA (May 26, 2021), <https://www.r-cal-fusa.com/beef-checkoff-funded-packer-trade-group-attempts-to-derail-effort-to-address-food-crisis/> (last visited Feb. 16, 2022).

<sup>3</sup> This Article defines the region as Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, New York City and Long Island, plus the counties lining both sides of the Hudson River Valley up to north of Albany.

<sup>4</sup> The DOJ’s complaint in *United States v. Dairy Farmers of Am., Inc.* suggests a market share closer to 51%. 2020 WL 7066345 (N.D. Ill. Oct. 6, 2020). This share alone is remarkably large, but it is likely an underestimate as discussed *infra*.

<sup>5</sup> Letter from Jonathon Healy, Comm’r, Mass. Dep’t Food and Ag., to Kenneth Becker, Exec. Dir., Ne. Dairy Compact Comm’n (February 9, 2000) (on file with author).

<sup>6</sup> Pete Hardin, *Suiza’s Stranglehold Yields No Competition for Massachusetts School Milk Bids*, *The Milkweed* (September 2000).

<sup>7</sup> *Dairy Farmers of America Keeps Top World Ranking*, *Dairy Global* (Sep. 27, 2018), <https://www.dairyglobal.net/industry-and-markets/market-trends/dairy-farmers-of-america-keeps-top-world-ranking/> (last visited Feb. 16, 2022).

<sup>8</sup> *See, e.g.*, *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323 (D. Vt. 2010); *United States v. Dairy Farmers of Am., Inc.*, 2020 WL 7066345, at \*1 (N.D. Ill. Oct. 6, 2020).

<sup>9</sup> UHT milk has a long shelf-life without refrigeration, and is widely distributed to fast-food outlets over supply chains that may stretch one-thousand miles.

<sup>10</sup> 7 U.S.C. § 291 (2022).

<sup>11</sup> David Volkin, *Understanding Capper-Volstead*, U.S. Department of Agriculture, Rural Business and Cooperative Development Service, Cooperative Information Report 35, at 3 (1985), <https://www.rd.usda.gov/files/cir35.pdf> (last visited Feb. 21, 2022). This article also provides a thorough history of the Capper-Volstead Act and its interaction with antitrust litigation.

<sup>12</sup> Donald A. Frederick, *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act*, U.S. Department of Agriculture, Rural Business and Cooperative Development Service, Cooperative Information Report 59 (2002), <https://www.rd.usda.gov/files/CIR59.pdf> (last visited Feb. 21, 2022); *and see* Statement of Interest on Behalf of the United States (Docket No. 285), *Sitts v. Dairy*

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# The Northeast Dairy Dilemma: Solutions for Concentration in a Vertically Integrated Market

by Pete Hardin & Zachary R. Shelley

**How can one firm accumulate an estimated 85% market share of conventional fluid milk processing in a region encompassing 38 million consumers? Here's that historic analysis ... with suggested remedies.**

**This article was written in conjunction with Pete Hardin's presentation at March 12, 2022 conference titled "Reforming America's Food Retail Markets," which was held at Yale University. The conference was sponsored by the Thurman Arnold Project, the Information Society Project, and the Yale Sustainable Food Program.**

**Co-author Zachary R. Shelley is a third-year student at the Yale Law School. He contributed valuable research and analysis to this paper.**

## I. Introduction

Public alarm concerning agriculture and food antitrust issues has focused on concentration in the beef processing industry, where four firms control 85% of United States' slaughter capacity. These beef processors operate to the detriment of both cattle producers and consumers.<sup>1</sup> That fact is substantiated by nearly a decade's data that shows both ranchers' down-trending market prices for cattle and consumers' ever-increasing retail beef costs.<sup>2</sup> These concerns are long overdue. However, another staple – milk – faces even more alarming concentration in New England and other major parts of the Northeast.<sup>3</sup> An estimated 85% of the market for conventional fluid milk processing is likely controlled by just *one* firm.<sup>4</sup>

Twenty-two years ago, the Commissioner of the Massachusetts Department of Food and Agriculture warned that a joint venture controlled 80% of milk processing capacity in Massachusetts.<sup>5</sup> Later that year, a company representative boasted that the venture had an 80% market share of school milk contracts in the Commonwealth and that this level of control meant that the company had no interest in renegotiating prices with Commonwealth procurement officials.<sup>6</sup> During the past two decades, the fluid milk processing industry in the Northeast has further concentrated.

Dairy Farmers of America (DFA), a dairy farmers' cooperative, has integrated both vertically and horizontally to dominate the Northeast milk industry from farm to the supermarket and school lunchroom. DFA acquired numerous rival milk processors and aggressively pressured independent farmers and other cooperatives to join DFA. Such actions, in the Northeast and elsewhere, have propelled DFA to be the largest dairy processor not only in the Northeast, but globally.<sup>7</sup> Dairy farmers, states' Attorneys General, and the federal Department of Justice have all filed and settled antitrust suits related to various aspects of DFA's conduct.<sup>8</sup> However, prior legal actions have not detailed the cumulative effect of DFA's anticompetitive actions. Prior litigation has not provided the structural remedies needed to restore a competitive equilibrium in the milk market.

This article will briefly summarize DFA's history of anticompetitive conduct and suggest remedies to protect both farmers' and consumers' interests. In particular, the Article recommends a menu of overlapping potential solutions, including:

- i) Forming a regional Dairy Antitrust Task Force of State Attorneys General to investigate anticompetitive acts in the region;
- ii) Investigating and making publicly available reports on historic farm-to-retail margins;
- iii) Investigating school milk contract bids in the region;
- iv) Breaking DFA into competing units both within and across regions;
- v) Entering into and actually monitoring consent decrees with DFA and other processors that have participated in anticompetitive conduct;
- vi) Terminating Class I pooling requirements in the USDA Northeast milk order;
- vii) Amending the Capper-Volstead Act to reflect the modern reality of farming cooperatives;
- viii) And if other remedies fail, regulating the Northeast milk processing industry as a utility.

Section II explains the structure of the fluid milk processing market, and the role of farmers' cooperatives permitted under the Capper-Volstead Act. Section III explains how predatory practices and anticompetitive mergers have driven consolidation in the Northeast's conventional fluid milk industry. Section IV provides the primary contribution of this paper, recommending a number of remedies that could establish a competitive equilibrium that eliminates excess milk processor profits – to the benefit of consumers and farmers. Section V concludes by encouraging state and federal regulators to use the tools proposed in this paper to confront DFA's conduct head-on and establish a long-term fix for the market.

## II. Dynamics in the New England and Northeast Fluid Milk Market

Conventional fluid milk is either pasteurized milk or raw milk for pasteurization. This definition excludes niche products and brands such as organic, kosher, Lact-Aid, Fairlife, A2, and Ultra-High Temperature (UHT) milk.<sup>9</sup> Farmers sell their raw milk to milk processors. Processors then pasteurize the milk and sell packaged products to wholesalers, grocery stores, restaurants, and schools.

This regional market structure is complicated by the fact that farmers' cooperatives are provided limited exemptions from antitrust laws. Further, some

cooperatives have vertically integrated so that they in part compete with and in part sell to the milk processors. The Capper-Volstead Act permits dairy farmers to form cooperatives for "collectively processing, preparing for market, handling, and marketing" their milk.<sup>10</sup> Without the Act, cooperatives would otherwise violate the Sherman Act as blatant horizontal restraints of trade. And the Capper-Volstead Act only provides a *limited* exemption from antitrust liability. Any cooperative, "as an entity engaged in business transactions, is as answerable to the antitrust laws as any other firm engaged in business transactions."<sup>11</sup> "Even with the exemption, agricultural producers are not free to unduly enhance the prices they charge, consolidate with or collaborate in anticompetitive conduct with nonproducers, or engage in conduct with no legitimate business purpose that is intended to reduce competition."<sup>12</sup>

With the limited Capper-Volstead Act in mind, the Northeast supply chain for conventional fluid milk can be split into:

- (1) producers, including independent farmers and farmer cooperatives, that sell to
- (2) processors, which includes privately owned processing companies (e.g., H.P. Hood), vertically integrated farmer's cooperatives (e.g., DFA), and producer-handlers (independent farmers that also process a limited volume of milk), that sell to
- (3) downstream retailers, that finally sell to
- (4) end consumers.

Farmer cooperatives that process conventional fluid milk may still sell some of their milk to other processors and may process milk from independent farmers or cooperatives as long as that milk does not make up more than half of their processing volume.<sup>13</sup>

Previous antitrust cases have split the product market for fluid milk into separate product markets for school milk contracts and the general consumer milk market.<sup>14</sup> In the late 1980s, Florida investigators uncovered a school milk bid-rigging scandal that spread across the state line into Georgia.<sup>15</sup> The DOJ and state Attorneys General filed criminal complaints. By the time those investigations concluded, about 100 convictions and guilty pleas were gained in about two dozen states. At that point, the history of bids for local school milk contracts became the crucial measure of competition among fluid milk processors by the Antitrust Division of the Department of Justice. In the years since, anticompetitive behavior in the dairy industry has taken on additional forms, including monopolization and anticompetitive mergers, so the market for conventional fluid milk (as separate from the market for school milk contracts) has received increasing attention.

Since milk is perishable, market definitions must have a sharply limited geographic scope. Only three suppliers of farm milk – two from Massachusetts and one from New York – currently ship out-of-state milk into Connecticut.<sup>16</sup> Because of this reality, at least one previous DOJ dairy antitrust case defined the appropriate geographic market as individual metropolitan areas with a 100 mile radius.<sup>17</sup> While cases will be able to define a larger number of narrow geographic markets, this Article defines the Northeast dairy market as New England, New Jersey, New York City and Long Island, plus the counties lining both sides of the Hudson River Valley up to north of Albany. This region tracks the areas from which most conventional fluid milk is shipped to the New England states and also to which milk from the New England states is shipped.<sup>18</sup> According to data from 2019, this geographic region includes over 38 million people.<sup>19</sup>

## III. Growing Concentration and Anti-Competitive Acts

Since the late 1990s, DFA's rise to dominance in the Northeast evolved from the eventual combination of DFA, Suiza Foods, and Dean Foods, some anti-competitive agreements with competitors, and DFA's abuse of market power to coerce competing farmers and cooperatives.

DFA's predecessor cooperative, Mid-American Dairymen, did not have any conventional fluid milk processing capacity in the Northeast as of 1996.<sup>20</sup> But the cooperative had already entered a Consent Decree that prohibited it – and its successors – from forcing independent dairy farmers selling milk to a fluid processor acquired by the co-op to join the co-op for a period of one year following acquisition.<sup>21</sup> However, as time passed, DFA violated that Consent Decree provision and DOJ antitrust regulators failed to take action.

In the late 1990s, DFA entered into GTL, a joint venture with Suiza Foods. DFA and GTL subsequently swept up many of the remaining independent New England fluid milk processors: Cumberland Farms, Garelick Farms, West Lynn Creamery, New England Dairies, Nature's Best, Grant's Dairy, and Fairdale Farms. At the same time, "Guida Dairy . . . lodged a complaint [with] the Attorney General's office in the state of Connecticut . . . that Suiza Foods entered into an exclusive agreement with a major supermarket chain to exclude competitor's milk, i.e., Guida Dairy milk, from its shelves."<sup>22</sup> DFA later acquired Guida-Siebert Dairy in Connecticut and Oakhurst Dairy in Maine.<sup>23</sup>

In February 2000, Massachusetts Agriculture Commissioner Jonathan Healy warned in a letter to the Northeast Dairy Commission that one firm – GTL – controlled 80% of the fluid milk processing capacity in the Commonwealth. GTL was a joint venture owned by Suiza Foods and Dairy Farmers of America. As noted previously, in the late 1990s and early 2000s, those firms aggressively acquired fluid milk plants in the region. Healy wrote:

"I am writing to express serious concern with Suiza Food Corporation's consolidating activities regarding various fluid milk processing facilities in the Northeast. Suiza Foods has maintained an aggressive program to acquire fluid processing capacity and to shut down capacity in Massachusetts. Suiza's activities tend to lessen competition and appear to be attempts to monopolize. That is a serious sit-

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