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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**
13 **FRESNO DIVISION**

14 GERALD CARLIN, JOHN RAHM,
15 PAUL ROZWADOWSKI and BRYAN
16 WOLFE, individually and on behalf of
17 themselves and all others similarly
18 situated,

19 Plaintiffs,

20 v.

21 DAIRYAMERICA, INC. and
22 CALIFORNIA DAIRIES, INC.,

23 Defendants.

Case No. 1:09 CV 00430-AWI (EPG)

CLASS ACTION

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR LEAVE TO
FILE FOURTH AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT**

Date: March 13, 2017

Time: 1:30 p.m.

Ctrm: 2, 8th Floor

Judge: Hon. District Judge Anthony W. Ishii

Action Filed: March 6, 2009

24 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

I. INTRODUCTION 1

II. FACTS 3

 A. Raw Milk Pricing Systems 3

 B. Operative Complaint 4

 C. White Deposition 7

 D. Declaration of [REDACTED] 7

 E. Cooperative Members of DairyAmerica Participated in Reporting the Artificially-Discounted Sales Figures. 10

 F. [REDACTED]'s Documents 11

 G. Cooperative Members of DairyAmerica Participated in Misreporting SMP Sales. 13

 H. Declaration of Candice Bimemiller 15

 I. Broader Conspiracy 16

 J. Proposed Amendment 17

 K. Settlement Negotiations 18

III. LEGAL STANDARDS 18

IV. ARGUMENT 19

 A. Plaintiffs' Motion Complies with Rule 16. 19

 B. Statutes of Limitations Do Not Bar Plaintiffs' Amendment. 22

 1. Delayed Discovery Rule Postponed Accrual of Limitations Period. 24

 2. Fraudulent Concealment Estops Defendants from Asserting Statutes of Limitation Defense. 27

 C. Proposed Claims Are Not Futile. 30

 1. Proposed Claim for Negligent Misrepresentation Is Not Futile 31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- a. Misrepresentations of a Past or Existing Material Fact 31
- b. No Reasonable Ground for Believing Misrepresentation to Be True.
..... 34
- c. DairyAmerica and Member Cooperatives Intended to Induce
Reliance on the Facts Misrepresented..... 34
- d. Plaintiffs Justifiably Relied on the Misrepresentations..... 35
- e. Plaintiffs Suffered Damages from the Misrepresentations. 35
- 2. Proposed Claim for Intentional Misrepresentation Is Not Futile. 35
 - a. DairyAmerica and Cooperative Members Had Knowledge of the
Falsity of their Misrepresentations..... 35
 - b. DairyAmerica and Cooperative Members Intended to Defraud. ... 37
- 3. Proposed Claim for Conspiracy to Violate RICO Is Not Futile..... 38
- D. Addition of Proposed Claims Will Not Cause Undue Delay or Prejudice. 39
- E. Plaintiffs Satisfy Rule 20 Requirements for Leave to Add Parties..... 41

TABLE OF AUTHORITIES

	<u>PAGE(S)</u>
Cases	
<i>AmerisourceBergen Corp. v. Dialysist W., Inc.</i> , 465 F.3d 946 (9th Cir. 2006).....	19, 40
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	30
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	30
<i>Bell v. Pavan</i> , No. 2:14-cv-0965, 2015 U.S. Dist. LEXIS 97024 (E.D. CA July 24, 2015)	40
<i>Brandon G. v. Gray</i> , 111 Cal. App. 4th 29 (Cal. App. 1st Dist. 2003).....	24
<i>Carlin v. Dairy Am., Inc.</i> , 705 F.3d 856 (9th Cir. 2013).....	5
<i>Dominguez v. Crown Equip. Corp.</i> , No. 2:14-cv-07935-SVW-E, 2015 WL 34477079 (C.D. Cal. June 1, 2015)	22
<i>Eclectic Props. E., LLC v. Marcus & Millichap Co.</i> , 751 F.3d 990 (9th Cir. 2014).....	39
<i>Eminence Capital, LLC v. Aspeon, Inc.</i> , 316 F.3d 1048 (9th Cir. 2003).....	18
<i>Fox v. Ethicon Endo-Surgery, Inc.</i> , 35 Cal.4th 797 (2005)	24
<i>Janicki Logging Co. v. Mateer</i> , 42 F.3d 561 (9th Cir. 1994).....	18
<i>Johnson v. Mammoth Recreations</i> , 975 F.2d 604 (9th Cir. 1992).....	19
<i>League to Save Lake Tahoe v. Lake Tahoe Reg'l Planning Agency</i> , 558 F.2d 914 (9th Cir. 1997).....	19
<i>McKelvey v. Boeing N. Am.</i> , 74 Cal. App. 4th 151 (Cal. App. 2d Dist. 1999)	24
<i>Nogart v. Upjohn Co.</i> , 21 Cal.4th 383 (1999)	24
<i>Platt Elec. Supply, Inc. v. EOFF Elec., Inc.</i> , 522 F.3d 1049 (9th Cir. 2008).....	22, 24, 28
<i>Salinas v. United States</i> , 522 U.S. 52 (1997).....	39

1	<i>Snow v. A.H. Robins Co., Inc.</i> , 165 Cal.App.3d 120 (Cal. App. 3d Dist. 1999)	28, 30
2	<i>Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.</i> , 708 F.3d 1109 (9th Cir. 2013)	19
3		
4	<i>Talwar v. Creative Labs, Inc.</i> , No. CV 05-3375 FMC (AJWx), 2007 WL 1723609 (C.D. Cal. Jun. 14, 2006)	22, 40
5	<i>Volk v. D.A. Davidson & Co.</i> , 816 F.2d 1406 (9th Cir. 1987).....	28, 30
6		
7	<i>Wells Fargo Bank, N.A. v. FSI, Fin. Sols., Inc.</i> , 196 Cal. App. 4th 1559 (Cal. App. 4th Dist. 2011)	31
8	Statutes	
9	18 U.S.C. § 1962(c)	39
10	Cal. Civ. Proc. Code § 338(d)	24
11	Fed. R. Civ. P. 12	30
12	Fed. R. Civ. P. 15	3, 18
13	Fed. R. Civ. P. 16	2, 19, 20
14	Fed. R. Civ. P. 20	19
15	Restatement (Second) of Torts § 533	35
16		
17		
18		
19		
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21		
22		
23		
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1 **I. INTRODUCTION**

2 On June 18, 2015, Plaintiffs secured a “smoking gun” declaration from Doug White, the former
3 Sales Director of defendant DairyAmerica, Inc. (“DairyAmerica”). The declaration states that
4 DairyAmerica conspired with its member cooperatives, including California Dairies, Inc. (“California
5 Dairies”), to unlawfully report forward pricing sales to the United States Department of Agriculture
6 (“USDA”) for the purpose of lowering raw milk prices paid to thousands of dairy farmers. Seven
7 months later, on the basis of that powerful declaration, the Court granted Plaintiffs’ motion for leave
8 to amend the complaint to add California Dairies as a defendant and additional claims for intentional
9 misrepresentation and violation of the Racketeer Influenced and Corrupt Organizations Act
10 (“RICO”).

11 Since that amendment, Plaintiffs have obtained *two more* “smoking gun” declarations from
12 former employees of DairyAmerica, who swear that the company engaged in even more startling
13 schemes to fraudulently depress raw milk prices while actively concealing those fraudulent acts
14 from government auditors. On August 21, 2016, [REDACTED], the former Export
15 Documentation Supervisor at DairyAmerica, provided a declaration stating that DairyAmerica
16 systematically reported artificially discounted sales figures to both USDA and the California
17 Department of Food and Agriculture (“CDFA”) and simultaneously concealed the actual higher
18 sales figures from visiting state auditors by hiding invoices and other transactional documents in
19 off-site storage facilities. Moreover, on September 9, 2016, Candice Bimemiller, the former Credit
20 Manager at DairyAmerica, provided a declaration stating that, each week, the CEO instructed her
21 to delay the reporting of handpicked sales figures to both USDA and CDFa in knowing defiance
22 of their explicit reporting instructions.

23 These new declarations – along with critical documents obtained from Supervisor
24 [REDACTED] via subpoena and other corroborating evidence obtained through discovery – prove
25 that Defendants’ conspiracy to misreport data was significantly broader and more injurious than
26 the operative Third Amended Complaint alleges. That operative complaint narrowly alleges that
27 Defendants and co-conspirators conspired to misreport forward pricing sales to USDA in order to
28 reduce payments to farmers. By contrast, the newly uncovered direct evidence demonstrates that

1 the conspiracy involved *multiple* forms of misreporting directed at *two* separate government
2 agencies – USDA and CDFA – for the purpose of reducing payments to a *broader* class of dairy
3 farmers. Specifically, the evidence shows that DairyAmerica and its owners conspired to (1) report
4 forward pricing sales to USDA; (2) report artificially-discounted export prices to both USDA and
5 CDFA; (3) delay the reporting of sales prices to both USDA and CDFA; (4) report sales of
6 unqualified products to both USDA and CDFA; and (5) improperly exclude brokers fees from
7 reports to USDA.

8 In light of the incriminating direct evidence obtained from Supervisor [REDACTED] and
9 Manager Bimemiller, Plaintiffs seek leave to amend their complaint to broaden the class of dairy
10 farmers and to add defendant parties. Specifically, Plaintiffs seek leave to amend the complaint to
11 (1) expand the class definition to include dairy farmers located in the state of California, who were
12 injured by DairyAmerica’s misreporting to CDFA; (2) add the cooperatives Dairy Farmers of
13 America and Land O’Lakes as defendants with respect to claims involving misrepresentations to
14 CDFA, as sales of their products manufactured in California were misreported to the agency; and
15 (3) expand Plaintiffs’ existing claims involving misrepresentations to USDA to account for the
16 additional misreporting methods. Notably, Plaintiffs’ motion does *not* seek to add any allegations
17 that additional laws or statutes were violated; like the operative Third Amended Complaint, the
18 proposed Fourth Amended Complaint (“FAC”), which is attached as Exhibit A, only pleads claims
19 for negligent misrepresentation, intentional misrepresentation and conspiracy to violate RICO.

20 Plaintiffs’ motion should be granted. The motion satisfies the “good cause” requirement of
21 Fed. R. Civ. P. 16, as Plaintiffs exercised diligence to investigate the evidence and file the motion.
22 Statutes of limitations do not bar the proposed claims due to the delayed discovery rule and
23 doctrine of fraudulent concealment. The proposed claims would withstand motions to dismiss, as
24 the newfound evidence of a broader and more damaging conspiracy is credible and forceful.
25 Indeed, parallel claims in the current operative complaint, which allege violations of the same
26 laws, have already survived motions to dismiss and related motions to reconsider. In light of the
27 history and procedural posture of the case, the amendment would cause no undue delay or
28

1 prejudice to Defendants or prospective defendants, and the schedule for remaining discovery in
2 the case would only be minimally impacted.

3 Finally, Fed. R. Civ. P. 15 provides that a “court should freely give leave” to amend
4 pleadings “when justice so requires.” Justice now compels that Plaintiffs be granted such leave.
5 DairyAmerica and its cooperative members systematically lied to USDA and CDFA in order to
6 reduce payments to dairy farmers. By virtue of the current operative complaint, thousands of
7 injured farmers outside of California may recover damages. The additional thousands of farmers
8 located in California who were injured by the conspiracy should also be permitted to do so.

9 **II. FACTS**

10 **A. Raw Milk Pricing Systems**

11 Tens of thousands of dairy farmers in the United States sell raw milk to processors, and
12 those farmers are compensated each month for their sales. Most of those farmers fall under the
13 jurisdiction of USDA’s ten Federal Milk Marketing Orders (“FMMOs”) and, as a result, receive
14 checks each month that contain raw milk prices calculated by the FMMOs.

15 The formulas employed by the FMMOs to calculate raw milk prices factor in market prices
16 for finished dairy products, which are obtained by the National Agricultural Statistics Service
17 (“NASS”), a division of USDA. One of the finished dairy products whose prices are incorporated
18 into those formulas is non-fat dry milk (“NFDM”). During the Class Period, NASS obtained
19 market prices for NFDM by conducting weekly surveys of firms that sell one million or more
20 pounds of NFDM annually. The higher the NFDM prices reported in those surveys, the higher the
21 raw milk prices that FMMOs calculated and that dairy farmers received each month.

22 Some regions of the country fall outside of the geographic scope of the ten FMMOs. In
23 those regions, several states have established their own program to calculate raw milk prices for
24 in-state dairy farmers. One of those states is California. Like USDA, CDFA calculates prices that
25 farmers in the state receive each month for the sale of raw milk. Like USDA, CDFA collects
26 NFDM pricing data through weekly surveys of sellers and plugs those figures into formulas that
27 calculate the monthly prices received by farmers in California. Specifically, CDFA aggregates the
28 sales data obtained from those surveys to determine the California Weighted Average Price

1 (“CWAP”) for NFDM and subsequently uses the CWAP figure to calculate prices received by
2 California farmers each month. CDFA’s surveys only request information about sales of NFDM
3 that were manufactured in California.

4 **B. Operative Complaint**

5 During the Class Period, the weekly surveys conducted by USDA were intended to collect
6 *current* market prices for NFDM so that farmers’ monthly milk checks reflected up-to-date market
7 dynamics. FAC ¶¶ 93, 96. As a result, the instructions on USDA’s surveys required the exclusion
8 of data from forward pricing sales, which contain future prices rather than current prices.¹
9 Specifically, USDA’s weekly surveys directed reporting firms to exclude: “Forward pricing sales:
10 sales in which the selling price was set (and not adjusted) 30 or more days before the transaction
11 was completed. This exclusion does not include sales through the Dairy Export Incentive
12 Program.”

13 During the Class Period, the largest seller of NFDM surveyed by USDA and CDFA was
14 DairyAmerica, a marketing association comprised of nine cooperative members. FAC ¶ 4. Each
15 of those members had substantial processing interests; indeed, the three largest processing
16 cooperatives in the country – Land O’Lakes, Dairy Farmers of America and California Dairies,
17 collectively operating 48 processing plants and earning more than \$34 billion in annual revenue –
18 were members of DairyAmerica during the Class Period. FAC ¶¶ 19-21.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26
27
28 ¹ CDFA, by contrast, permitted the inclusion of forward pricing sales in weekly surveys to the agency.

1 [REDACTED]
2 [REDACTED]

3 DairyAmerica's singular mission was to maximize profits for cooperative members.
4 During the Class Period, DairyAmerica sold approximately 75 percent of the NFDM produced in
5 the United States. FAC ¶¶ 69-70. With control over such a dominant share of the NFDM market,
6 DairyAmerica could shape raw milk prices by modifying its procedures for reporting NFDM.

7 In March 2007, a dairy publication called *The Milkweed* published a story alleging that
8 DairyAmerica was improperly including forward pricing sales in weekly reports to USDA. FAC
9 ¶ 103. The article prompted USDA to launch an investigation. In February 2008, USDA issued a
10 report verifying that DairyAmerica had failed to comply with the instruction to exclude forward
11 pricing sales and that farmers had been deprived of millions of dollars in income as a result. FAC
12 ¶¶ 104-108. Secretary of Agriculture Charles F. Connor described DairyAmerica's misreporting
13 as a "significant lapse" in following "clearly articulated instructions." FAC ¶ 109.

14 In March 2009, Plaintiffs filed the first complaint in this case, alleging various common
15 law torts against DairyAmerica and California Dairies. The case was promptly dismissed on the
16 basis of the filed rate doctrine. ECF No. 83. The Ninth Circuit subsequently granted Plaintiffs'
17 appeal, holding that "permitting the rate-related claims to move forward is the only way to remedy
18 the injuries suffered by the milk producers." *Carlin v. Dairy Am., Inc.*, 705 F.3d 856 (9th Cir.
19 2013). Following another round of motions to dismiss, Plaintiffs were left with a single claim for
20 negligent misrepresentation against a lone defendant, DairyAmerica. ECF No. 141.

21 As a result of the appeal, discovery was stayed in this case until October 2013, when the
22 Court ruled on the post-appeal motions to dismiss. ECF No. 123. Plaintiffs first obtained access to
23 DairyAmerica's hard-copy documents in April 2014 and to DairyAmerica's electronic records in
24 May 2014. Since then, discovery has been repeatedly stayed by the Court due to pending motions
25 and settlement conferences.² The first deposition was taken in this case in June 2015.

26 ² Depositions were stayed from September 25, 2014 until March 19, 2015. ECF No. 189. All
27 discovery was effectively stayed from November 12, 2015 until June 24, 2016. ECF No. 236. Depositions
28 were stayed from June 24, 2016 until October 3, 2016, with the exception of depositions of Sales Director
White and three California Dairies executives. ECF No. 319. All discovery was again stayed from
December 5, 2016 until December 20, 2016. ECF No. 371. Depositions are currently stayed until resolution

1 Through discovery, Plaintiffs uncovered key documents and other evidence that
2 demonstrate a conspiracy to commit fraud. Most importantly, Plaintiffs obtained a severely
3 incriminating declaration from DairyAmerica’s Sales Director Doug White, who reported directly
4 to the CEO and regularly attended board meetings. FAC ¶¶ 110-114. In his declaration, Sales
5 Director White swore that DairyAmerica intentionally misreported forward pricing sales to USDA
6 and that it did so at the explicit direction of its cooperative members. FAC ¶¶ 118-124, 129-135,
7 138-142, 144-146, 155-158. Specifically, Sales Director White swore that: (1) USDA’s instruction
8 to exclude forward pricing sales was “entirely clear”; (2) USDA officials met with him and the
9 CEO to ensure that DairyAmerica was complying with the instruction; (3) he warned the CEO and
10 the Controller that DairyAmerica was failing to comply with the instruction; (3) he advised the
11 CEO and Controller to halt the misreporting of forward pricing sales; (4) in response, the CEO
12 said that forward pricing sales would be reported “regardless of whether doing so contradicted the
13 instruction”; (6) senior executives from member cooperatives knew of and understood the USDA
14 instruction; (7) those senior executives nonetheless repeatedly directed DairyAmerica to misreport
15 forward pricing sales to USDA; (8) member cooperatives instructed DairyAmerica to misreport
16 forward pricing sales in order to reduce payments to dairy farmers and protect their processing
17 plants’ profits; and (9) several cooperatives exited DairyAmerica in part to avoid paying a
18 judgment in this case. *Id.*

19 Armed with such a powerful declaration, Plaintiffs moved to amend their complaint on
20 September 25, 2015 to add eight cooperative members as defendants and to add claims for
21 intentional misrepresentation and violations of RICO. On January 20, 2016, the Court granted the
22 motion in part, permitting Plaintiffs to add California Dairies as a defendant and to add claims for
23 intentional misrepresentation and conspiracy to violate RICO. ECF No. 240. On February 24,
24 2016, pursuant to the Court’s order, Plaintiffs filed the Third Amended Complaint, which alleges
25 that DairyAmerica conspired with California Dairies and other cooperatives to report forward
26 pricing sales to USDA and reduce payments to farmers. On March 23, 2016, Defendants moved

27 _____
28 of this motion for leave to amend, with the exception of depositions of Supervisor [REDACTED], Manager
Bimemiller, and three California Dairies executives. *Id.*

1 to dismiss the Third Amended Complaint, and the Court denied those motions on May 2, 2016.
2 ECF No. 303. Defendants subsequently moved for reconsideration on May 16, 2016, and the Court
3 denied those motions on June 22, 2016. ECF No. 317.

4 **C. White Deposition**

5 Two months after the Court denied Defendants' motion for reconsideration, the parties
6 deposed Sales Director White. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 **D. Declaration of** [REDACTED]

1 [REDACTED] was an employee of DairyAmerica's accounting department from 2000
2 through 2009. During the Class Period, she served as Export Documentation Supervisor,
3 overseeing a staff of five to six employees, and reported to CEO Lewis, Controller Jean McAbee
4 and Office Manager Annette Smith. FAC ¶ 241. She was responsible for the billing and
5 documentation of all export sales, and she catalogued the prices and volumes of export sales. *Id.*

6 On August 21, 2016, Plaintiffs obtained a sworn declaration from Supervisor [REDACTED]
7 – which is attached as Exhibit B – that contains stunning accounts of multiple frauds. The
8 declaration states, “In 2001, [CEO] Richard Lewis and [Controller] Jean McAbee instructed me to
9 assemble an electronic export documentation database that would contain and track figures relating
10 to export sales of NFDM. This export documentation database included two sets of figures. The
11 first set of figures would consist of accurate figures from the actual sale of NFDM in the export
12 market to foreign customers. The second set of figures would consist of fabricated export sales
13 figures that were created internally at DairyAmerica. As instructed by Richard Lewis and Jean
14 McAbee, I assembled a database that contained both the accurate export figures charged to foreign
15 customers and the fabricated export figures created internally at DairyAmerica.” [REDACTED]
16 Decl. ¶¶ 11-12. The declaration explains that the fabricated export prices in the database were
17 consistently lower than the actual export prices charged to foreign customers. *Id.* ¶¶ 8-10, 14.

18 Supervisor [REDACTED]'s declaration explains, “I obtained the fabricated export figures
19 from invoices that were created internally at DairyAmerica. After a foreign customer entered into
20 a contract to purchase NFDM, DairyAmerica's staff would create a corresponding invoice that
21 contained lower prices than those contained in the contract signed by the foreign customer. That
22 invoice, which contained entirely fabricated prices, would be provided to the processing plant that
23 shipped out the NFDM to the foreign customer. Those processing plants belonged to the
24 cooperative members of DairyAmerica, including California Dairies. Whenever an invoice was
25 provided to the processing plant, a copy of that invoice was provided to me. I would regularly
26 input the fabricated and artificially lower sales figures contained in such invoices into the export
27 documentation database.” *Id.* ¶ 14.
28

1 In her declaration, Supervisor [REDACTED] explains that DairyAmerica systematically
2 reported the fabricated export prices, rather than the actual export prices, to three different
3 government agencies from 2001 through at least 2008. Her declaration states, “I witnessed
4 DairyAmerica repeatedly engage in three kinds of fraudulent activity at the direction of
5 Richard Lewis, Jean McAbee and other senior executives.” *Id.* ¶ 7. First, she states that
6 DairyAmerica reported the fabricated export prices in weekly reports to CDFA. *Id.* ¶ 8. Second,
7 she states that DairyAmerica reported the fabricated export prices in weekly reports to USDA’s
8 NASS. *Id.* ¶ 9. Third, she states that DairyAmerica included the fabricated export prices in
9 applications submitted to USDA’s Dairy Export Incentive Program (“DEIP”) to qualify for cash
10 subsidies from the federal government. *Id.* ¶ 10. Her declaration states, “As a result, during the
11 period 2001 through at least 2008, DairyAmerica only reported fabricated, artificially-lower export
12 sales figures to” CDFA and USDA. *Id.* ¶¶ 17-19.

13 Moreover, Supervisor [REDACTED]’s declaration describes how DairyAmerica engaged in
14 a deceptive scheme to conceal accurate export prices from government agencies and their auditors.
15 Each month during the Class Period, CDFA sent auditors to the offices of DairyAmerica to ensure
16 that it was reporting accurately and complying with the agency’s instructions. *Id.* ¶ 20. Supervisor
17 [REDACTED]’s declaration states, “Each month during the period 2001 through at least 2008,
18 approximately one week before CDFA auditors arrived at DairyAmerica’s offices to conduct an
19 audit, [Controller] Jean McAbee and [Manager] Annette Smith would gather boxes of accounting
20 documents, including the invoices and contracts reflecting accurate export prices, and load them
21 into a truck and drive them to an off-site storage facility. Each month, Jean McAbee and Annette
22 Smith transported the accounting documents containing accurate export sales prices to an off-site
23 storage facility so that CDFA auditors would not see or access those documents during their audits.
24 By doing so, Jean McAbee and Annette Smith prevented the CDFA auditors from discovering the
25 substantial discrepancy between the fabricated export sales prices reported to CDFA and the actual
26 sales prices charged to foreign customers.” *Id.* ¶ 21. The declaration further states that “Richard
27 Lewis and Jean McAbee prohibited CDFA auditors from seeing or reviewing paper or electronic
28 documents (including invoices and contracts) that contained the accurate export prices. Instead,

1 the auditors from the CDFA were only permitted to review data from the Navision database and
2 the invoices that were internally created at DairyAmerica, both of which only contained the
3 fabricated export prices.” *Id.* ¶ 22. The declaration also notes that DairyAmerica’s executives
4 instructed Ms. [REDACTED] “to refrain from speaking to any CDFA auditors.” *Id.* ¶ 23.

5
6 **E. Cooperative Members of DairyAmerica Participated in Reporting the Artificially-Discounted Sales Figures.**

7 The cooperative members of DairyAmerica – including California Dairies, Dairy Farmers
8 of America and Land O’Lakes – were fully aware of and participated in the decision to report
9 artificially-discounted export sales figures to USDA and CDFA. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED]. Supervisor

14 [REDACTED]’s declaration explains that the cooperatives routinely received invoices containing
15 the fabricated export prices that were reported to government agencies. FAC ¶ 249. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED]
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[REDACTED]

F. [REDACTED]'s Documents

1 After obtaining Supervisor [REDACTED]'s declaration, Plaintiffs issued a subpoena for
2 relevant documents in her possession on September 23, 2016. Supervisor [REDACTED] produced
3 responsive documents on October 17, 2016. FAC ¶ 255. Because she had often worked from home,
4 Supervisor [REDACTED] was still in possession of a substantial number of accounting documents.
5 Most importantly, Plaintiffs obtained excerpts of the export documentation database that
6 Supervisor [REDACTED] described in her declaration. *Id.* Notably, these documents were *not* part
7 of the production of documents made by DairyAmerica. FAC ¶ 330.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED] The agency does not
22 permit the deduction of commissions in weekly reports. FAC ¶ 280. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] NFDM and

SMP are different powder products that are produced by removing water from pasteurized skim milk.³ FAC ¶ 189. In their weekly surveys, both USDA and CDFA require the reporting of NFDM sales and expressly prohibit the reporting of SMP sales. FAC ¶¶ 191-195. [REDACTED]

[REDACTED] SMP sales prices in the export market were typically lower than NFDM sales prices in the domestic market and their inclusion in weekly reports to the agencies depressed raw milk prices. FAC ¶ 213.

G. Cooperative Members of DairyAmerica Participated in Misreporting SMP Sales.

The cooperative members of DairyAmerica – including California Dairies, Dairy Farmers of America and Land O’Lakes – knew of and participated in DairyAmerica’s misreporting of SMP sales to USDA and CDFA. FAC ¶¶ 202-213. To begin, DairyAmerica and the cooperatives understood the clear instructions from USDA and CDFA to exclude SMP sales from weekly reports. *Id.* [REDACTED]

³ NFDM produced in the United States comes under the jurisdiction of the Food and Drug Administration’s Code of Federal Regulations (“CFR”). The CFR mandates that NFDM be manufactured solely from milk and does not stipulate any minimum protein content. Meanwhile, SMP traded within the international market is subject to the Codex Alimentarius Commission standard. The Codex standard for SMP requires a minimum 34% protein level. To meet the minimum 34% protein level, other dairy products – specifically lactose, milk permeate or milk retentate – are added to the powder.

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[REDACTED]

Moreover, the cooperative members directed DairyAmerica to sell SMP in the export market and participated in the execution of those sales.

[REDACTED]

Additionally, whenever a foreign customer purchased SMP from DairyAmerica, the cooperative member that manufactured the product would receive an invoice reflecting the details of the sales transaction, including the identity of the product. *Id.*

Finally, the cooperatives were aware of and participated in DairyAmerica's decision to report SMP sales transactions to USDA and CDFA.

[REDACTED]

1 According to multiple former Fonterra executives interviewed by Plaintiffs, the vast
2 majority of product exported by DairyAmerica during the Class Period was comprised of SMP,

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 **H. Declaration of Candice Bimemiller**

12 Candice Bimemiller is another former employee of DairyAmerica’s accounting
13 department. While Supervisor [REDACTED] handled billing for exports, Ms. Bimemiller was
14 responsible for billing domestic sales of NFDM. FAC ¶ 221-223. During the period 2003 through
15 2009, Ms. Bimemiller served as Credit Manager and reported to CEO Lewis, Controller McAbee
16 and Manager Smith. She was responsible for providing final domestic sales figures to Controller
17 McAbee and Manager Smith, who reported those figures to USDA and CDFA. *Id.*

18 On September 9, 2016, Plaintiffs obtained a sworn declaration from Manager Bimemiller
19 – which is attached as Exhibit C – that describes yet another method by which DairyAmerica
20 intentionally defied the reporting instructions of USDA and CDFA. FAC ¶ 224. The declaration
21 explains that Manager Bimemiller met with CEO Lewis each week from 2003 until 2007 so that
22 he could review domestic sales figures. Bimemiller Decl. ¶ 7. During those meetings, CEO Lewis
23 regularly instructed Manager Bimemiller to delay, by a week, the reporting of particular
24 handpicked sales to USDA and CDFA. *Id.* ¶ 9. Her declaration states, “The process of delaying
25 the reporting of NFDM sales was clearly inconsistent with, and in defiance of, instructions that
26 were provided each week by USDA and CDFA.” *Id.* ¶ 10.

27 According to her declaration, Manager Bimemiller informed CEO Lewis that she was not
28 comfortable defying USDA and CDFA instructions by delaying the reporting of sales figures. *Id.*

¶ 11. In response, CEO Lewis laughed and agreed to place his own initials next to the specific sales figures that he wanted DairyAmerica to delay in its reporting. *Id.*

On most occasions, the sales prices that CEO Lewis selected for delays in reporting were those priced *above* a specified value. *Id.* ¶ 9. As a result, the net effect of this misreporting was to delay and restrain price increases of raw milk, which negatively impacted dairy farmers.

Notably, Manager Bimemiller’s declaration also states, “Each month while I was employed at DairyAmerica, auditors from the CDFA would visit DairyAmerica to ensure that the company was complying with the agency’s reporting instructions. I was directed by Richard Lewis, Jean McAbee and Annette Smith to not speak with the CDFA’s auditors and, if questioned by an auditor, to merely state that DairyAmerica was complying with the reporting instructions. I was also instructed to not make any comments regarding DairyAmerica’s practices to Deloitte & Touche LLP, which audited DairyAmerica each year.” *Id.* ¶¶ 12-14.

I. Broader Conspiracy

The current operative complaint narrowly alleges that Defendants and co-conspirators conspired to misreport forward pricing sales to USDA and injured farmers outside of California. Newly uncovered evidence described above and in the proposed Fourth Amended Complaint, however, demonstrates that the conspiracy involved multiple forms of misreporting that was directed at two separate government agencies and that injured dairy farmers both in and outside of California. Specifically, the evidence shows that DairyAmerica and cooperative members conspired to (1) report forward pricing sales to USDA; (2) report sales of SMP to both USDA and CDFA; (3) delay the reporting of sales to both USDA and CDFA; (4) report artificially-discounted export prices to both USDA and CDFA; and (5) improperly exclude commissions from reports to USDA. Remarkably, three former employees of DairyAmerica have come forward and provided sworn eye-witness declarations describing various dimensions of the misreporting conspiracy.

The purpose of the conspiracy was to depress raw milk prices paid to dairy farmers, and each of the five misreporting methods implemented by the conspiracy served that purpose. FAC ¶¶ 291-302. Raw milk is the principal cost input for manufacturing NFDM and other dairy products, such as cheese and butter. Accordingly, by implementing the conspiracy,

1 DairyAmerica's member cooperatives (1) reduced their cost of manufacturing NFDM and other
2 dairy products; (2) sold NFDM and other dairy products at prices above the cost of manufacturing;
3 (3) shielded their processing plants from rising raw milk costs during the pendency of forward
4 pricing contracts; and (4) prevented NFDM and SMP prices from rising to a level that would
5 decrease customer demand. FAC ¶¶ 78-91, 303-304. In sum, by misreporting NFDM sales in
6 weekly reports to USDA and CDFA, DairyAmerica and member cooperatives leveraged their
7 dominant market share to depress raw milk prices and maximize their profits from the sale of dairy
8 products.

9 **J. Proposed Amendment**

10 In light of the declarations obtained from Supervisor [REDACTED] and Manager Bimemiller
11 and other circumstantial evidence, Plaintiffs seek leave to amend their complaint to broaden the class
12 and add defendants. First, Plaintiffs seek leave to amend the complaint to broaden the class definition
13 to include dairy farmers located in the state of California.⁴ Three specific methods of misreporting
14 engaged by DairyAmerica and cooperative members – i.e. reporting artificially depressed figures,
15 misreporting SMP sales, and delaying the reporting of figures – were perpetrated on CDFA as well as
16 USDA. As a result, those forms of misreporting caused thousands of farmers in California to receive
17 less money for the sale of raw milk during the Class Period. Second, Plaintiffs seek leave to add two
18 cooperatives, Dairy Farmers of America and Land O'Lakes, as defendants – but only with respect
19 to claims involving misrepresentations to CDFA.⁵ Those two cooperatives, as well as defendant
20 California Dairies, had processing plants in California during the Class Period, and they directed
21 DairyAmerica to misreport sales of powder products manufactured by their California plants to
22 CDFA. Third, Plaintiffs seek to expand their existing claims involving misrepresentations to
23 USDA to account for the additional methods of misreporting.

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26 ⁴ Part of this expansion of the class definition includes a request for leave to add another named
27 plaintiff, Scott Magnuson, a dairy farmer and resident of Cressey, California, who sold raw milk that was
28 priced according to CDFA during the Class Period.

⁵ This Court previously held that Dairy Farmers of America and Land O'Lakes cannot be added as
defendants with respect to claims involving misrepresentations to USDA, despite their evident participation
in those misrepresentations, due to applicable statutes of limitations. ECF No. 240.

1 Notably, Plaintiffs' motion for leave to amend does *not* seek to add allegations that
2 additional laws or statutes have been violated. Like the operative Third Amended Complaint, the
3 proposed Fourth Amended Complaint only pleads claims for negligent misrepresentation,
4 intentional misrepresentation and conspiracy to violate RICO.

5 **K. Settlement Negotiations**

6 Plaintiffs were prepared to file this motion soon after obtaining the new declarations and
7 documents and have only been delayed by efforts to settle this case. The Court scheduled a
8 settlement conference for October 3, 2016, approximately one month after Plaintiffs received
9 declarations from Supervisor [REDACTED] and Manager Bimemiller. ECF No. 335. [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED] The settlement conference was unsuccessful, but at the request of Defendants (and with
13 the support of the Court), the parties scheduled a private mediation for December 20, 2016. For
14 the period leading to the mediation, the Court imposed a stay "to facilitate settlement." ECF No.
15 371. Settlement negotiations through the private mediator continued until February 7, 2017, when
16 the parties reached an impasse. This motion was filed two days later.

17 **III. LEGAL STANDARDS**

18 A motion to amend a complaint to add claims is governed by Fed. R. Civ. P. 15. Those
19 terms are "to be applied liberally in favor of amendments and, in general, leave shall be freely
20 given when justice so requires." ECF No. 240 at 2 (citing *Janicki Logging Co. v. Mateer*, 42 F.3d
21 561, 566 (9th Cir. 1994)). Indeed, there "is a presumption in favor of granting leave to amend
22 under Rule 15(a)." *Id.* (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th
23 Cir. 2003)). However, "a district court need not grant leave to amend where the amendment:
24 (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in
25 litigation; or (4) is futile." *Id.* (citing *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946,
26 951 (9th Cir. 2006)). Courts may decline to grant leave to amend "only if there is strong evidence" of
27 undue delay, bad faith, prejudice, or futility. *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708
28 F.3d 1109, 1117 (9th Cir. 2013).

1 Fed. R. Civ. P. 20 applies to motions to add parties and “is governed by the same
2 considerations” as Rule 15. ECF No. 240 at 3. Thus, the requirements to add parties under Rule
3 20 are to be “construed liberally in order to promote trial convenience and to expedite the final
4 determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake Tahoe v.*
5 *Lake Tahoe Reg’l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1997). Rule 20(a) “imposes two
6 specific requisites for the joinder of parties: (1) a right to relief must be asserted by, or against,
7 each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and (2)
8 some question of law or fact common to all the parties will arise in the action.” *Id.*

9 In addition, if a party seeks amendment of a complaint after the deadline set by the court
10 has passed, Fed. R. Civ. P. 16(b)(4) requires that “good cause” be shown by the moving party
11 before leave to amend can be granted. ECF No. 240 at 3. In this context, the “good cause”
12 requirement of Rule 16(b)(4) “primarily considers the diligence of the party seeking the
13 amendment.” *Id.* (citing *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992)).

14 **IV. ARGUMENT**

15 Plaintiffs’ motion seeks to amend the complaint to (1) expand the class to include
16 California farmers; (2) add two defendant parties to claims brought on behalf of those California
17 farmers; and (3) broaden existing claims to account for additional misreporting methods. Plaintiffs’
18 motion satisfies the requirements of Rules 15, 16 and 20. The amendments would survive a motion
19 to dismiss in light of the newly uncovered direct evidence, and none of the amendments are barred
20 by the statutes of limitations or would cause undue delay or prejudice.

21 **A. Plaintiffs’ Motion Complies with Rule 16.**

22 If a party seeks amendment of a complaint after the deadline set by the court, Rule 16(b)(4)
23 requires that “good cause” be shown by the moving party. As this Court explained in its order
24 granting Plaintiffs’ prior motion to amend, “Basically, the ‘good cause’ standard forecloses late
25 amendment of a complaint where the amending party displays ‘indifference’ to the deadlines
26 established by scheduling orders. Conversely, the more stringent good cause standard will not
27 prohibit amendment of the complaint where the deadline set by scheduling conference ‘cannot be
28 reasonably be met despite the diligence of the party seeking the extension.’” ECF No. 240 at 8.

1 The Court set the deadline for amending the complaint as June 30, 2014. ECF No. 151.
2 Plaintiffs were certainly *not* “indifferent” to that deadline. Indeed, Plaintiffs filed a motion to
3 amend on that date that was ultimately denied by the Court. ECF No. 155. Yet, due to significant
4 discovery delays and DairyAmerica’s misrepresentations, it was impossible for Plaintiffs to have
5 discovered the evidence that substantiates this pending motion prior to the Court-ordered deadline.
6 As a result of a Ninth Circuit appeal and subsequent motions to dismiss, discovery was stayed in
7 this case until October 2013. ECF No. 123. During that stay, DairyAmerica was ordered only to
8 disclose “each individual likely to have discoverable information relevant to the subject matter of
9 this litigation.” *Id.* at 2. [REDACTED]
10 [REDACTED]

11 After the stay was lifted in October 2013, Plaintiffs were not provided access to
12 DairyAmerica’s hard copy documents until April 17, 2014 and to its electronic records until
13 May 19, 2014. Thus, Plaintiffs only had six weeks from first accessing DairyAmerica’s electronic
14 records – which comprised hundreds of thousands of documents and emails – to file a motion for
15 leave to amend by the deadline. During those six weeks, it was impossible for Plaintiffs to review
16 the paper and electronic records, identify Ms. [REDACTED] and Ms. Bimemiller as potentially
17 knowledgeable witnesses, and obtain sworn declarations and documents from them. Indeed, when
18 Plaintiffs moved to amend the complaint again on September 25, 2015, fifteen months after the
19 deadline for amendment and after securing a declaration from Sales Director White, this Court
20 held that Plaintiffs had satisfied Rule 16’s “good cause” due to these substantial discovery delays.
21 ECF No. 240 at 9 (“The court finds the record reflects reasonable effort by Plaintiffs to comply
22 with the June 30 deadline for amendment of the complaint but that crucial information upon which
23 the RSAC relies was not and could not have been discovered despite the reasonable efforts of
24 Plaintiffs.”).

25 Moreover, even after the Court-ordered deadline for amending the complaint, Plaintiffs
26 were unable to secure the direct evidence substantiating this motion earlier than they did. To begin,
27 there have been multiple stays of discovery since it commenced in October 2013. Depositions were
28 stayed from September 25, 2014 until March 19, 2015; all discovery was effectively stayed from

1 November 12, 2015 until June 24, 2016; and depositions were again stayed from June 24, 2016
2 until October 3, 2016, with the exception of depositions of Sales Director White and three
3 California Dairies executives. ECF Nos. 189, 236, 319. Due to these discovery stays, not a single
4 deposition was taken in the case until June 2015, a full year after the deadline for amendment. As
5 Plaintiffs were unable to issue deposition subpoenas (or inform prospective witnesses of that
6 possibility), it was difficult for Plaintiffs to obtain evidence from third-party witnesses.

7 Furthermore, it was particularly challenging and time-consuming for Plaintiffs to discover
8 that Supervisor [REDACTED] and Manager Bimemiller possessed relevant knowledge. Unlike
9 Sales Director White, Supervisor [REDACTED] and Manager Bimemiller were not senior
10 executives who negotiated forward pricing contracts. Whereas Sales Director White [REDACTED]
11 [REDACTED] reported exclusively to CEO Lewis and regularly attended board
12 meetings, Supervisor [REDACTED] and Manager Bimemiller were two of the many employees of
13 the Accounting Department and, at times, reported to Manager Smith. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 Due to the positions held by Supervisor [REDACTED] and Manager Bimemiller and the
20 misrepresentations of DairyAmerica, Plaintiffs were unable to determine that they possessed
21 relevant information by reviewing DairyAmerica's documents and deposing their senior
22 executives. Instead, Plaintiffs launched a comprehensive investigation of DairyAmerica's former
23 employees. Plaintiffs' counsel and their investigators contacted several former employees before
24 finally connecting with Supervisor [REDACTED] and Manager Bimemiller. As to be expected of
25 whistleblowers, it was difficult to persuade Supervisor [REDACTED] to share her personal
26 knowledge with Plaintiffs.

27 Finally, once Plaintiffs obtained declarations from Supervisor [REDACTED] and Manager
28 Bimemiller, and received documents from Supervisor [REDACTED] via subpoena, Plaintiffs

1 proceeded as swiftly as possible to file this motion without disrupting ongoing settlements
 2 negotiations. Plaintiffs secured the declarations approximately one month before a settlement
 3 conference scheduled by the Court. After the conference, settlement negotiations continued
 4 through a private mediator until February 7, 2017, and Plaintiffs filed this motion two days later.⁶

5 **B. Statutes of Limitations Do Not Bar Plaintiffs' Amendment.**

6 When Plaintiffs moved to amend the complaint on September 25, 2015, they sought to add
 7 California Dairies and seven other cooperative members of DairyAmerica as defendants. The
 8 Court ruled that Plaintiffs could add California Dairies as a defendant on the basis of the relation
 9 back doctrine (as Plaintiffs had named California Dairies as a defendant in the original complaint),
 10 but the Court rejected the request to add any other cooperatives as defendants because the
 11 applicable statutes of limitations had expired. ECF No. 240. The Court explained that in the context
 12 of fraud-related claims, “a cause of action for fraud under California law accrues when a plaintiff
 13 has inquiry notice, that is, when he or she ‘learns, or at least is put on notice that a representation
 14 is false.’” *Id.* at 16 (citing *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1058 (9th
 15 Cir. 2008)). The Court held that Plaintiffs’ then-pending fraud claims had accrued when *The*
 16 *Milkweed* published a story in March 2007 alleging that DairyAmerica misreported forward
 17 pricing sales, which triggered USDA to launch an investigation that confirmed DairyAmerica’s
 18 misreporting of forward pricing sales. *Id.* at 16-17. Plaintiffs had filed their original complaint
 19 after the publication of *The Milkweed* story and the conclusion of the USDA investigation. That
 20 original complaint alleged that DairyAmerica misreported forward pricing sales and included
 21 California Dairies as a defendant on the basis that DairyAmerica was controlled by a board of
 22

23 ⁶ Even discounting the delays stemming from settlement negotiations, Plaintiffs were diligent in
 24 filing their motion. Less than four months transpired between when Plaintiffs obtained critical documents
 25 from Supervisor [REDACTED] via subpoena and when Plaintiffs filed the motion, and less than five months
 26 transpired between when Plaintiffs obtained the declaration from Manager Bimemiller and when Plaintiffs
 27 filed the motion. A four or five-month time period between the acquisition of evidence and the filing of a
 28 motion to amend does not reflect an absence of diligence. *See, e.g., Talwar v. Creative Labs, Inc.*, No. CV
 05-3375 FMC (AJWx), 2007 WL 1723609, at *6 (C.D. Cal. Jun. 14, 2006) (granting plaintiff’s motion for
 leave to amend six months after learning additional facts); *Dominguez v. Crown Equip. Corp.*, No. 2:14-
 cv-07935-SVW-E, 2015 WL 34477079, at *3 (C.D. Cal. June 1, 2015) (“four month delay between the
 earliest alleged date on which Plaintiff’s should have known of the claim and the date of filing for leave to
 amend is not particularly long or unreasonable”).

1 directors comprised of executives from cooperative members. As a result, the Court concluded
2 that when Plaintiffs drafted the original complaint, they had sufficient information about the
3 misreporting of forward pricing sales to name all cooperative members of DairyAmerica as
4 defendants:

5 Plaintiffs' original complaint expresses a fairly complete understanding of the
6 mechanics of deceit that brought about the harm to Plaintiffs and expresses a
7 complete understanding of the structure and composition of DairyAmerica. In
8 particular, Plaintiffs have known since the filing of the of the original complaint
9 that DairyAmerica was the creation of the Member Defendants and its board of
10 directors was staffed primarily by executive officers of the proposed Member
11 Defendants. The court finds that the situation Plaintiffs described in their original
12 complaint constitutes at least inquiry notice that the Member Defendants, through
13 their executive members sitting on the board of directors of DairyAmerica, could
14 be expected to have some role in the harm Plaintiffs suffered as of the same time
15 they learned of DairyAmerica's misreporting.

16 *Id.* at 17.

17 By sharp contrast, the claims that Plaintiffs now seek to add by amendment are *not* barred
18 by statutes of limitations. *The Milkweed* article and subsequent USDA investigation provide no
19 insight into the misreporting that supports the proposed new claims. *The Milkweed* article and
20 USDA investigation exclusively address DairyAmerica's inclusion of *forward pricing sales* in
21 weekly reports *to USDA* at the expense of *farmers outside of California*. The proposed claims,
22 however, involve different misreporting methods (i.e. reporting artificially-discounted figures,
23 reporting SMP sales figures, and delaying the reporting of sales figures) that were directed at a different
24 government agency, CDFA, and that caused injury to farmers in California. Accordingly, Plaintiffs did
25 not have inquiry knowledge of the proposed claims after *The Milkweed* article was published; rather,
26 due to DairyAmerica's extensive fraudulent concealment, Plaintiffs first had inquiry knowledge of the
27 proposed claims when they spoke to Ms. [REDACTED] and Ms. Bimemiller [REDACTED]
28 [REDACTED] and subpoenaed documents on Ms. [REDACTED]'s home
computer [REDACTED]. FAC ¶¶ 324-338.
Therefore, statutes of limitation do not bar Plaintiffs' proposed claims because the delayed
discovery rule postponed the accrual of the limitations period and, in any event, the fraudulent
concealment doctrine tolled the statutes of limitation.

1 **1. Delayed Discovery Rule Postponed Accrual of Limitations Period.**

2 A plaintiff must bring a cause of action within the applicable limitations period. *Nogart v.*
3 *Upjohn Co.*, 21 Cal.4th 383, 397 (1999). A statute of limitation does not begin to run “until a cause
4 of action accrues.” *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 806 (2005). “Although this
5 ordinarily occurs on the date of the plaintiff’s injury, accrual is postponed until the plaintiff either
6 discovers or has reason to discover the existence of a claim, i.e., at least has reason to suspect a
7 factual basis for its elements.” *Platt Elec. Supply*, 522 F.3d at 1054. Cal. Civ. Proc. Code § 338(d)
8 “codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of
9 action for fraud ‘is not to be deemed to have accrued until the discovery, by the aggrieved party,
10 of the facts constituting the fraud or mistake.’” *Brandon G. v. Gray*, 111 Cal. App. 4th 29, 35 (Cal.
11 App. 1st Dist. 2003).

12 The California Supreme Court held that in “order to rely on the discovery rule for delayed
13 accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his claim would
14 be barred without the benefit of the discovery rule must specifically plead facts to show (1) the
15 time and manner of discovery and (2) the inability to have made earlier discovery despite
16 reasonable diligence.’” *Fox*, 35 Cal.4th at 808 (2005) (citing *McKelvey v. Boeing N. Am.*, 74 Cal.
17 App. 4th 151, 160 (Cal. App. 2d Dist. 1999)). “Plaintiffs are required to conduct a reasonable
18 investigation after becoming aware of an injury, and are charged with knowledge of the
19 information that would have been revealed by such an investigation.” *Platt Elec. Supply*, 522 F.3d
20 at 1054.

21 Like the operative complaint, the proposed Fourth Amended Complaint pleads claims for
22 negligent misrepresentation, intentional misrepresentation and conspiracy to violate RICO. There
23 is a two-year statute of limitations for negligent misrepresentation claims; a three-year statute of
24 limitations for intentional misrepresentation claims; and a four-year statute of limitations for
25 violations of RICO. Accordingly, for statutes of limitations to bar the proposed claims, Plaintiffs
26 must have discovered or had reason to discover the alleged misconduct by February 2013 with
27 respect to the RICO violation, by February 2014 with respect to the intentional misrepresentation
28 claim, and by February 2015 with respect to the negligent misrepresentation claim.

1 Plaintiffs had no knowledge of the misconduct underlying the proposed claims until they
2 communicated with Supervisor [REDACTED] and Manager Bimemiller in August 2016 and
3 obtained Supervisor [REDACTED]'s documents in October 2016. There have been no public
4 disclosures of any of the alleged misconduct. There are no references in any public document,
5 publication or government report to DairyAmerica misreporting data to CDFA or directly injuring
6 farmers in California. No public document, publication or government report suggests that
7 DairyAmerica reported artificially-discounted sales figures, or improperly reported sales of SMP,
8 or delayed the reporting of sales figures. Indeed, *The Milkweed* article and USDA investigation
9 only addressed DairyAmerica's improper reporting of *forward pricing sales* to USDA at the
10 expense farmers *outside of California*; they never addressed the possibility that DairyAmerica was
11 also engaging in three different misreporting schemes that targeted a separate state agency at the
12 expense of California farmers. On the contrary, USDA's investigative report specifically noted
13 that CDFA (unlike USDA) required DairyAmerica to include forward pricing sales in weekly
14 reports to CDFA and, therefore, DairyAmerica made no misrepresentations to CDFA when it did
15 so. Consequently, Plaintiffs had no inquiry knowledge of the proposed claims prior to August
16 2016. FAC ¶¶ 324-338. Plaintiffs only learned – and only could have learned – of the alleged
17 misconduct underlying those claims through their own comprehensive and time-consuming
18 investigation.

19 Moreover, Plaintiffs could not possibly have conducted that investigation prior to February
20 2013, February 2014 or February 2015. To begin, DairyAmerica's reports to CDFA were
21 confidential and concealed from public access or disclosure. Plaintiffs could only learn about how
22 DairyAmerica reported to CDFA and which employees had knowledge about that process by
23 reviewing DairyAmerica's documents and questioning its current and former employees. Yet,
24 discovery was stayed in this case until October 2013 – approximately eight months *after* the date
25 by which Plaintiffs should have known about the misreporting to CDFA for the statute of
26 limitations to bar the proposed RICO conspiracy claim. ECF No. 123.

27 Furthermore, Plaintiffs were not provided access to DairyAmerica's paper documents until
28 April 17, 2014 and to its electronic documents until May 19, 2014 – approximately three months

1 *after* the date by which Plaintiffs should have known about the misreporting to CDFA for the
 2 statute of limitation to bar the proposed intentional misrepresentation claim. Indeed, Plaintiffs did
 3 not even learn the names of DairyAmerica’s former employees (including Supervisor [REDACTED]
 4 and Manager Bimemiller) until May 2014, when Plaintiffs were first provided access to
 5 DairyAmerica’s emails and documents.

6 Yet, even after obtaining the names of former employees, Plaintiffs were precluded from
 7 promptly deposing them, as depositions were stayed by the Court from September, 25, 2014
 8 through March 19, 2015. ECF No. 189. Accordingly, the first deposition was taken in this case in
 9 June 2015 – approximately four months *after* the date by which Plaintiffs should have known about
 10 the misreporting to CDFA for the statute of limitations to bar the proposed negligent
 11 misrepresentation claim. [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

Timeline of Statute of Limitations	
Date by which Plaintiffs should have known about misreporting to CDFA for statute of limitations to bar the proposed RICO conspiracy claim	February 9, 2013
[REDACTED]	April 26, 2013
Date when the Court-ordered stay on discovery was lifted and discovery commenced in the case	October 16, 2013
Date by which Plaintiffs should have known about misreporting to CDFA for statute of limitations to bar the proposed intentional misrepresentation claim	February 9, 2014
Date when Plaintiffs were first provided access to DairyAmerica’s hard copy documents	April 17, 2014
Date when Plaintiffs were first provided access to DairyAmerica’s electronic documents	May 19, 2014
Date by which Plaintiffs should have known about misreporting to CDFA for statute of limitations to bar the proposed negligent misrepresentation claim	February 9, 2015
Date when the Court-ordered stay on conducting depositions was lifted	March 19, 2015
Date when the first deposition was conducted in this litigation	June 8, 2015
[REDACTED]	June 16, 2015

[REDACTED]	
Date when Plaintiffs obtained a declaration from Supervisor [REDACTED]	August 21, 2016
Date when Plaintiffs obtained a declaration from Manager Bimemiller	September 9, 2016
Date when Plaintiffs received documents from Supervisor [REDACTED] after issuing a subpoena	October 17, 2016

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] After securing a declaration from Supervisor [REDACTED], Plaintiffs promptly issued a subpoena instructing her to produce relevant documents. [REDACTED]

In sum, the delayed discovery rule postponed the accrual of the limitations period for the proposed claims. Plaintiffs had no inquiry knowledge of the misconduct underlying the proposed claims prior to August 2016, and despite a diligent investigation, they could not possibly have discovered that misconduct by February 2013, February 2014 or February 2015.

2. Fraudulent Concealment Estops Defendants from Asserting Statutes of Limitation Defense.

The doctrine of fraudulent concealment “is properly invoked only if a plaintiff establishes ‘affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief.’” *Volk v. D.A.*

1 *Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987) (citation omitted). “With respect to actions
2 based on fraud, the statute of limitations is tolled whenever [a] plaintiff is able to show the
3 defendant fraudulently concealed facts which would have led [the plaintiff] to discover his
4 potential cause of action.” ECF No. 240 at 17 (citing *Snow v. A.H. Robins Co., Inc.*,
5 165 Cal.App.3d 120, 127-128 (Cal. App. 3d Dist. 1999)). “In order to establish fraudulent
6 concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances
7 under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it
8 or had no actual or presumptive knowledge of facts sufficient to put him on inquiry.” *Platt Elec.*
9 *Supply*, 522 F.3d at 1055 (citation omitted).

10 The proposed Fourth Amended Complaint pleads a quintessential claim for fraudulent
11 concealment. FAC ¶¶ 323-338. Supervisor [REDACTED] describes in her declaration how
12 DairyAmerica engaged in an elaborate scheme to fraudulently conceal the company’s misreporting
13 from CDFA. FAC ¶¶ 305-309. Each month during the Class Period, CDFA sent auditors to the
14 offices of DairyAmerica to ensure that it was complying with the agency’s reporting instructions.
15 According to Supervisor [REDACTED], “Each month during the period 2001 through at least 2008,
16 approximately one week before CDFA auditors arrived at DairyAmerica’s offices to conduct an
17 audit, [Controller] Jean McAbee and [Office Manager] Annette Smith would gather boxes of
18 accounting documents, including the invoices and contracts reflecting accurate export prices, and
19 load them into a truck and drive them to an off-site storage facility. Each month, Jean McAbee and
20 Annette Smith transported the accounting documents containing accurate export sales prices to an
21 off-site storage facility so that CDFA auditors would not see or access those documents during
22 their audits.” FAC ¶ 307. Supervisor [REDACTED] explains that by transporting important
23 accounting documents to an off-site storage facility, “Jean McAbee and Annette Smith prevented
24 the CDFA auditors from discovering the substantial discrepancy between the fabricated export
25 sales prices reported to CDFA and the actual sales prices charged to foreign customers.” *Id.*
26 Supervisor [REDACTED] also explains in her declaration that DairyAmerica’s executives instructed
27 her not to communicate with any auditors (despite her knowledge of information that would be
28 highly relevant to those audits) and to conceal her electronic databases from them. FAC ¶ 309.

1 Manager Bimemiller also describes efforts by DairyAmerica to conceal relevant
2 information from auditors. Her declaration states that CEO Lewis and Controller McAbee
3 prohibited Manager Bimemiller from speaking with CDFA’s auditors or with the accounting firm
4 Deloitte & Touche LLP, which audited DairyAmerica’s books each year.⁷ FAC ¶310.

5 There can be no doubt that DairyAmerica’s deceptive concealment of documents from state
6 auditors during *each month* of the Class Period prevented Plaintiffs from discovering the proposed
7 claims earlier. Had CDFA auditors been permitted to review the accounting documents that were
8 transported off-site, or the export databases maintained by Supervisor [REDACTED], they would
9 have discovered that DairyAmerica was failing to comply with the agency’s reporting instructions
10 in multiple ways. Specifically, the auditors would have found that DairyAmerica was reporting
11 artificially-discounted export prices rather than actual prices; improperly reporting sales of SMP;
12 and delaying the reporting of sales figures. This discovery would have spurred CDFA to launch
13 an investigation into DairyAmerica’s reporting prices – just as USDA launched an investigation
14 when it learned that DairyAmerica was misreporting forward pricing sales of NFDm. As a result,
15 Plaintiffs would have discovered that DairyAmerica misreported data to CDFA years earlier and,
16 accordingly, would have filed this motion years earlier. Instead, Defendants “fraudulently
17 concealed facts which would have led” California farmers to discover their injuries, *Snow*, 165
18 Cal.App.3d at 127-128, and thus California farmers were led to believe that they “did not have a
19 claim for relief.” *Volk*, 816 F.2d at 1415.

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21
22
23 ⁷ DairyAmerica also fraudulently concealed its misrepresentations to USDA during the Class
24 Period. [REDACTED]

1 **C. Proposed Claims Are Not Futile.**

2 The proposed amendment to the complaint is only futile if such claims “would be subject
3 to dismissal if pled.” ECF No. 207 at 3. To withstand a motion to dismiss pursuant to Rule 12(b)(6),
4 a complaint must set forth factual allegations sufficient “to raise a right to relief above the
5 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The pleading standard
6 “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-
7 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

8 The current operative complaint involves three claims that have already survived motions
9 to dismiss and related motions to reconsider: (1) negligent misrepresentation claim against
10 DairyAmerica and California Dairies for misreporting figures to USDA and injuring farmers
11 outside California; (2) intentional misrepresentation claim against DairyAmerica and California
12 Dairies for misreporting figures to USDA and injuring farmers outside California; and (3) claim
13 for conspiracy to violate RICO against California Dairies for facilitating a conspiracy to commit
14 wire and mail fraud that injured farmers outside California.

15 The proposed Fourth Amended Complaint alleges that California farmers were injured by
16 conduct that violates these *same laws*, and adds three parallel claims to the existing claims: (1) a
17 negligent misrepresentation claim against DairyAmerica, California Dairies, Dairy Farmers of
18 America and Land O’Lakes for misreporting figures to CDFA and injuring farmers in California;
19 (2) an intentional misrepresentation claim against DairyAmerica, California Dairies, Dairy
20 Farmers of America and Land O’Lakes for misreporting figures to CDFA and injuring farmers in
21 California; and (3) a claim for conspiracy to violate RICO against California Dairies, Dairy
22 Farmers of America and Land O’Lakes for facilitating a conspiracy to commit wire and mail fraud
23 that injured farmers in California.

24 Like the claims in the operative complaint, the parallel claims in the Fourth Amended
25 Complaint would survive a motion to dismiss. There is substantial evidence – including the
26 declarations of Supervisor [REDACTED] and Manager Bimemiller and email communications
27 between DairyAmerica and cooperative members – that support each of the elements of the
28 proposed three additional claims.

1 **1. Proposed Claim for Negligent Misrepresentation Is Not Futile.**

2 The elements of negligent misrepresentation are “(1) the misrepresentation of a past or
3 existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to
4 induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the
5 misrepresentation, and (5) resulting damage.” *Wells Fargo Bank, N.A. v. FSI, Fin. Sols., Inc.*, 196
6 Cal. App. 4th 1559, 1573 (Cal. App. 4th Dist. 2011). The proposed additional negligent
7 misrepresentation claim satisfies each of the elements and would withstand motions to dismiss.

8 **a. Misrepresentations of a Past or Existing Material Fact**

9 The proposed additional claims in the Fourth Amended Complaint allege that
10 DairyAmerica misreported sales figures to CDFA in three distinct methods. First, DairyAmerica
11 reported artificially-discounted sales figures to CFDA. This allegation is substantiated by, among
12 other evidence, the powerful “smoking gun” declaration obtained from Supervisor [REDACTED]

13 [REDACTED]
14 [REDACTED] Second, DairyAmerica improperly reported sales of SMP to CDFA. [REDACTED]

15 [REDACTED]
16 [REDACTED]. The allegation is
17 also substantiated [REDACTED]

18 [REDACTED]; by interviews with former Fonterra executives, who explained that the
19 vast majority of product sold on DairyAmerica’s behalf consisted of SMP; [REDACTED]

20 [REDACTED]
21 [REDACTED]. Third, DairyAmerica delayed the reporting of select

22 sales figures to CFDA. This allegation is substantiated by, among other evidence, the highly
23 compelling declaration obtained from Manager Bimemiller, who was regularly instructed to delay
24 the reporting of sales figures that were handpicked by the CEO.

25 Additionally, the above allegations that DairyAmerica engaged in misrepresentations to
26 CDFA is corroborated by the fact that the company regularly and deceptively concealed documents
27 from the agency’s auditors. As Supervisor [REDACTED] explains in her declaration,
28 DairyAmerica’s Controller and Office Manager transported key accounting documents to off-site

1 storage facilities before CDFA auditors visited each month and did so to prevent those auditors
2 from discovering DairyAmerica's misreporting scheme. FAC ¶¶ 305-309.

3 Moreover, there is compelling evidence that California Dairies, Dairy Farmers of America
4 and Land O'Lakes – which had manufacturing plants in California – participated in the above
5 misrepresentations. This Court has already repeatedly held that Plaintiffs have sufficient evidence
6 to allege a conspiracy between DairyAmerica and cooperative members to misreport sales data to
7 USDA for the specific purpose of depressing raw milk prices paid to farmers. That allegation is
8 part and parcel of the operative Third Amended Complaint, which has survived motions to dismiss
9 and related motions to reconsider. ECF Nos. 303, 317. The proposed Fourth Amended Complaint
10 simply expands on those existing conspiracy allegations; in addition to misreporting forward
11 pricing sales to USDA, the conspirators also misreported figures reflecting SMP sales, artificially-
12 discounted sales figures, and delayed sales figures to both CDFA and USDA.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 By extension, these cooperative members also instructed DairyAmerica to misreport sales
2 figures to CDFA. For example, the cooperatives were intimately involved in the reporting of
3 artificially-discounted figures to CDFA. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] states in her declaration that the cooperatives received copies of invoices containing
7 the artificially-discounted sales prices that were reported to CDFA. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 Similarly, the cooperative members were involved in DairyAmerica's unlawful reporting
15 of SMP sales to CDFA. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 ⁸ [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

b. No Reasonable Ground for Believing Misrepresentation to Be True.

DairyAmerica and cooperative members had no reasonable grounds for believing their misrepresentations to be true. The instructions from CDFA clearly and unequivocally prohibit all three methods of misreporting in their respective weekly surveys.

The instructions for completing the CDFA survey prohibited the reporting of SMP: “The report is for disclosing sales of Extra Grade and Grade A Nonfat Dry Milk (NFDM) only, sold for human consumption, regardless of length of storage, container size or sales volume. Do not include any other type of powdered milk, such as instant NFDM or whole milk powder.” FAC ¶¶ 194-195.

The instructions for completing the CDFA survey also clearly required that sales of NFDM be reported during the week in which they were shipped. The CDFA survey specifically states: “Period Covered: The weekly time frame of Saturday through Friday of any given week will be the basis for determining the amounts of reported nonfat dry milk product and sales. Include only the sales shipped during that specific time frame when reporting.” FAC ¶ 218.

The instructions for completing the weekly CDFA survey also made clear that DairyAmerica could not arbitrarily deduct amounts from sales prices in order to report lower values. CDFA’s survey form specified exactly what sales data should be included and excluded and only expressly permitted the deduction of broker fees and hauling costs. FAC ¶ 235.

Moreover, CDFA officials regularly met with DairyAmerica executives during the Class Period to ensure that DairyAmerica complied with reporting instructions. CDFA auditors visited DairyAmerica each month to confirm adherence to CDFA’s reporting instructions. FAC ¶ 305.

c. DairyAmerica and Member Cooperatives Intended to Induce Reliance on the Facts Misrepresented.

DairyAmerica and member cooperatives knew that the prices reported to CDFA were intended to be, and would be, used in formulas to set the amount putative class members received and relied on for the sale of raw milk. Indeed, the sole purpose of collecting NFDM pricing data from DairyAmerica was for CDFA to calculate raw milk prices paid to farmers. For that reason, the Court has repeatedly held that Plaintiffs have satisfied this element when pleading negligent misrepresentation. *See, e.g.*, ECF No. 141.

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d. Plaintiffs Justifiably Relied on the Misrepresentations.

Restatement (Second) of Torts § 533, which has been adopted in California, states: “The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.” Pursuant to § 533, this Court has already held that Plaintiffs have established justifiable reliance with respect to misrepresentations to USDA: “When DairyAmerica represented to NASS that its volume and price reports were properly completed, the substance of that representation was repeated to all parties by the acceptance of the data and the inclusion of the data in the FMMO.” ECF No. 141 at 13. That same logic applies to the misrepresentations to CDFA. When DairyAmerica represented to CDFA that its sales reports were properly completed, the substance of that representation was repeated to farmers in California by CDFA’s inclusion of data from the sales reports in formulas that calculated raw milk prices.

e. Plaintiffs Suffered Damages from the Misrepresentations.

Thousands of farmers in California were damaged by the misrepresentations to CDFA. As a result of those misrepresentations, California farmers received less money for the sale of their raw milk during the Class Period. FAC ¶¶ 291-302.

2. Proposed Claim for Intentional Misrepresentation Is Not Futile.

A claim for intentional misrepresentation is distinct from negligent misrepresentation in that it requires proof of two additional elements: (1) knowledge of the falsity of the misrepresentation and (2) intent to defraud. ECF No. 240 at 4. The Fourth Amended Complaint sufficiently pleads that DairyAmerica and cooperative members – including California Dairies, Dairy Farmers of America and Land O’Lakes – knowingly misreported sales data to CDFA and, further, that they did so to protect their profits by lowering raw milk prices paid to farmers.

a. DairyAmerica and Cooperative Members Had Knowledge of the Falsity of their Misrepresentations.

1 There is compelling evidence that DairyAmerica and its cooperative members knew they
2 were defying instructions from CDFA – and thus were aware of the falsity of their
3 misrepresentations – when they misreported sales data to the agency. First, as discussed above, the
4 relevant instructions from CDFA were abundantly clear. Second, CDFA auditors visited
5 DairyAmerica’s offices each month to discuss and ensure compliance with reporting rules.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Fifth, in her declaration, Supervisor [REDACTED] details an elaborate scheme by
24 DairyAmerica executives to fabricate export prices for reporting to CDFA and simultaneously
25 conceal the real export prices from CDFA auditors by transferring accounting documents to an
26 off-site facility. FAC ¶¶ 305-313. Both the fabrication of sales prices and the habitual concealing
27 of documents from auditors clearly demonstrate DairyAmerica’s knowledge of the falsity of its
28 misrepresentations.

1 Sixth, Manager Bimemiller states in her declaration, “The process of delaying the reporting
2 of NFDM sales was clearly inconsistent with, and in defiance of, instructions that were provided
3 each week by USDA and CDFA.” FAC ¶ 226. Her declaration says she informed CEO Lewis that
4 she was uncomfortable defying the agencies’ instructions, and in response, he laughed and agreed
5 to place his own initials next to the specific sales figures that he wanted DairyAmerica to delay
6 reporting. FAC ¶ 227.

7 **b. DairyAmerica and Cooperative Members Intended to Defraud.**

8 Intent to defraud “is the intent to deceive or cheat for the purpose of either causing financial
9 loss to another or bringing about financial gain to oneself.” ECF No. 207 at 5. Thus, intent to
10 defraud may be proven by showing intent to deceive for the purpose of *either* (1) “causing financial
11 loss to another” or (2) “bringing about financial gain to oneself.”

12 With respect to the proposed additional claims, Plaintiffs have alleged facts that show *both*
13 forms of intent to defraud. The Fourth Amended Complaint sufficiently alleges that DairyAmerica
14 and member cooperatives made misrepresentations to CDFA with the intent of maximizing their
15 profits by lowering raw milk prices paid to farmers. Indeed, this Court has already held that facts
16 in the operative complaint “are sufficient to support a finding that Defendant DairyAmerica acted
17 with the intent to enrich itself at the corresponding expense of Plaintiffs.” ECF No. 240 at 12.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 The same is true with respect to DairyAmerica’s misreporting of sales to CDFA; the misreporting to USDA and CDFA was part
24 of the same conspiracy with a singular purpose: to depress raw milk prices paid to dairy farmers.

25 The Fourth Amended Complaint describes four specific financial motivations for
26 DairyAmerica and cooperative members to misreport sales to USDA and CDFA during the Class
27 Period. FAC ¶¶ 78-84. First, raw milk is the principal cost input for manufacturing NFDM and
28 other dairy products, such as cheese and butter. Reducing raw milk prices paid to dairy farmers

1 therefore increased the profits of processing plants owned by the cooperative members, which
2 manufactured and sold a variety of dairy products. FAC ¶ 81.

3 Second, the member cooperatives of DairyAmerica sought to earn profits from the sale of
4 NFDM by selling the product at prices above prevailing NASS and CWAP rates. FAC ¶ 82. Rather
5 than do so lawfully, DairyAmerica and member cooperatives implemented a scheme to sell NFDM
6 at one price and report the sale at a lower price, thus artificially depressing NASS and CWAP
7 rates. By unlawfully creating a differential between transacted and reported prices, DairyAmerica
8 and cooperative members fabricated a profit margin from DairyAmerica's sales.

9 Third, DairyAmerica and member cooperatives misreported sales prices to protect
10 themselves from financial losses during the pendency of fixed-price contracts. FAC ¶ 83.
11 DairyAmerica's sales of powder products often involved fixing a price well in advance of the
12 shipment of the product. The processing plants of member cooperatives would lose money if the
13 prices paid to dairy farmers for the purchase of raw milk climbed during the terms of the fixed-
14 price contracts. Accordingly, DairyAmerica and member cooperatives sought to manage the
15 economic risk of fixed-price contracts by misreporting NFDM sales and artificially depressing raw
16 milk prices. *Id.*

17 Fourth, DairyAmerica and member cooperatives misreported sales prices to prevent
18 wholesale powder prices from reaching levels that would diminish customer demand. FAC ¶ 84.
19 By misreporting sales figures to USDA and CDFA, they sought to restrain raw milk prices and
20 ensure that wholesale powder prices remained at levels that maximized their revenue and profits.

21 3. Proposed Claim for Conspiracy to Violate RICO Is Not Futile.

22 The RICO statute, 18 U.S.C. § 1962(c), sets out four elements to establish a substantive
23 violation: "a defendant must participate in (1) the conduct of (2) an enterprise that affects interstate
24 commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt."
25 *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). The RICO
26 statute, 18 U.S.C. § 1962(d), also provides that "[i]t shall be unlawful for any person to conspire
27 to violate any of the provisions of subsection (a), (b), or (c) of this section." The Supreme Court
28 explained that to "be convicted of conspiracy to violate RICO under § 1962(d), the conspirator

1 need not himself have committed or agreed to commit the two or more predicate acts.” *Salinas v.*
2 *United States*, 522 U.S. 52, 53 (1997). The Court found that “although a conspirator must intend
3 to further an endeavor which, if completed, would satisfy all of the elements of a substantive
4 criminal offense, it suffices that he adopt the goal of furthering or facilitating the criminal
5 endeavor, and he need not agree to undertake all of the acts necessary for the crime’s completion.”
6 *Id.*

7 The operative complaint already alleges a claim for conspiracy to violate RICO against
8 California Dairies that has survived motions to dismiss and motions to reconsider. The claim
9 alleges an underlying substantive violation consisting of the enterprise DairyAmerica engaging in
10 a pattern of racketeering in the form of repeat mail and wire fraud, i.e. misreporting forward pricing
11 sales in weekly reports to USDA. The claim alleges that California Dairies and other cooperative
12 members facilitated the commission of the substantive RICO violations by instructing
13 DairyAmerica to fraudulently misreport sales to USDA. In denying Defendants’ motion to dismiss
14 this claim, this Court held that “while facts are lacking to show that California Dairies actually
15 committed or agreed to commit two predicate acts, they did agree to further the endeavor which,
16 when completed would constitute a substantive RICO violation.” ECF No. 303 at 15.

17 The proposed Fourth Amended Complaint alleges a parallel claim for conspiracy to violate
18 RICO that would similarly withstand a motion to dismiss. The claim alleges an analogous
19 underlying substantive violation: that the enterprise, DairyAmerica, engaged in a pattern of
20 racketeering in the form of repeat mail and wire by misreporting NFDM sales in weekly reports to
21 CDFA. FAC ¶¶ 414-446. The claim further alleges that California Dairies, Dairy Farmers of
22 America and Land O’Lakes facilitated the commission of the substantive RICO violation by
23 instructing DairyAmerica to fraudulently misreport sales data to CDFA. *Id.* As discussed above,
24 there is substantial evidence that DairyAmerica repeatedly misreported sales to CDFA and that
25 California Dairies, Dairy Farmers of America and Land O’Lakes participated in the decision to do
26 so. Accordingly, the proposed claim for conspiracy to violate RICO in the Fourth Amended
27 Complaint would withstand a motion to dismiss.

28 **D. Addition of Proposed Claims Will Not Cause Undue Delay or Prejudice.**

1 “Delay alone . . . will not justify denying leave to amend.” *Bell v. Payan*, No. 2:14-cv-
2 0965, 2015 U.S. Dist. LEXIS 97024, at *2 (E.D. CA July 24, 2015). Indeed, the Ninth Circuit has
3 only affirmed a district court’s denial on the basis of *undue* delay when significant time has elapsed
4 between when the party discovered the factual basis for its amendment and when it moved to
5 amend. *See, e.g., AmerisourceBergen*, 465 F.3d at 953-56 (affirming denial of leave to amend
6 where plaintiffs allowed fifteen months to pass). Here, Plaintiffs moved to amend less than four
7 months after obtaining documents from Supervisor [REDACTED] and less than five months after
8 securing the declaration from Manager Bimemiller. *See Talwar*, No. CV 05-3375 FMC, 2007 WL
9 1723609, at *6 (granting plaintiff’s motion for leave to amend six-months after learning of
10 additional facts). Thus, Plaintiffs’ motion for leave to amend is timely.

11 Moreover, permitting amendment of Plaintiffs’ complaint would not cause undue delay or
12 prejudice. First, within a week of filing their first complaint in this case, Plaintiffs sent letters to
13 Dairy Farmers of America and Land O’Lakes warning that they could be sued at some future point
14 and requesting preservation of documents. As a result, those cooperatives have preserved the
15 evidence necessary to defend against the new claims. Second, in 2013, Plaintiffs served subpoenas
16 on Dairy Farmers of America and Land O’Lakes seeking documents that bear on the proposed
17 claims; both have already produced responsive documents and have already incurred costs
18 associated with document production. Third, Plaintiffs have already served Rule 31 deposition
19 notices on Dairy Farmers of America and Land O’Lakes. Accordingly, they would be deposed
20 regardless of whether they became defendants in this case. Fourth, because there are no deadlines
21 for merits or class discovery involving the proposed additional claims, Defendants and prospective
22 defendants will have sufficient time to complete it. Fifth, California Dairies was added as a
23 defendant in this case only eleven months ago, and since that amendment, only one deposition has
24 been taken. Thus, to the extent any other depositions would be reopened to address the proposed
25 claims, they likely would have already been reopened by virtue of the recent addition of California
26 Dairies to the case. Sixth, the Court has ordered that, despite the filing of this motion, all written
27 discovery involving pending claims must be completed by June 30, 2017, thereby preventing
28 unnecessary discovery delays in the case. ECF No. 371. Seventh, in the event this motion is

1 granted, Plaintiffs will support an expedited discovery schedule regarding both pending and newly
2 added claims, so that this case can more swiftly proceed to trial. Eighth, there are no operative
3 deadlines for the filing of motions for class certification or summary judgment. As a result,
4 Defendants and prospective defendants will have an opportunity to prepare for both motions. In sum,
5 because there is no undue delay or identifiable prejudice to current or prospective defendants, the
6 Court should grant Plaintiffs' motion.

7 **E. Plaintiffs Satisfy Rule 20 Requirements for Leave to Add Parties.**

8 Plaintiffs satisfy the two criteria for the joinder of parties pursuant to Rule 20. First, the
9 proposed claims against Dairy Farmers of America and Land O'Lakes relate to or arise from the
10 same transactions alleged in the operative complaint—a conspiracy to misreport DairyAmerica's
11 sales of NFDM to government agencies in order to depress raw milk prices. Second, there are
12 questions of law and fact common to the proposed and current defendants, including: whether they
13 conspired to misreport NFDM sales data; whether they failed to exercise reasonable care when
14 misreporting NFDM sales data; and whether the misrepresentations injured dairy farmers.

15
16 Dated: February 9, 2017

Respectfully submitted,

BERMAN DeVALERIO

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7

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10 **FRESNO DIVISION**

11
12 GERALD CARLIN, JOHN RAHM, PAUL
13 ROZWADOWSKI, SCOTT MAGNESON
and DIANA WOLFE, individually and on
14 behalf of themselves and all others
similarly situated,

15 Plaintiffs,

16 v.

17 DAIRYAMERICA, INC., CALIFORNIA
18 DAIRIES, INC., DAIRY FARMERS OF
AMERICA INC. and LAND O'LAKES,
19 INC.

20 Defendants.

Case No. 1:09 CV 00430-AWI (EPG)

CLASS ACTION

**[PROPOSED] FOURTH AMENDED
CONSOLIDATED CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

21 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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1 Individual and Representative Plaintiffs Gerald Carlin, John Rahm, Paul Rozwadowski, H.
2 Diana Wolfe and Scott Magneson, on behalf of themselves and all others similarly situated, allege:

3 1. This class action is brought on behalf of a class (the “Class”) of tens of thousands
4 of dairy farmers who sold raw milk during the period January 1, 2002 through April 30,
5 2007 (“Class Period”). The Class is comprised of (1) dairy farmers who sold raw milk during the
6 Class Period that was priced according to a Federal Milk Marketing Order (“FMMO”) governed
7 by the United States Department of Agriculture (“USDA”) (the “USDA Subclass”) and (2) dairy
8 farmers who sold raw milk during the Class Period that was priced according to the California
9 Department of Food and Agriculture (“CDFA”) (the “CDFA Subclass”).

11 2. During the Class Period, Plaintiffs and the tens of thousands of other members of
12 the Class (and Subclasses) received a check each month for the sale of their raw milk. The prices in
13 the monthly milk checks paid to those dairy farmers were calculated by USDA and CDFa using
14 formulas that factor in market prices for dairy products. USDA and CDFa collected the market
15 prices for dairy products that were plugged into the formulas each month.

17 3. Nonfat dry milk (“NFDM”) was one of the dairy products whose prices were
18 collected and used by both USDA and CDFa to calculate the price of raw milk. During the Class
19 Period, both USDA and CDFa obtained NFDM prices by conducting weekly surveys of firms that
20 sell NFDM. The higher the NFDM prices reported in those surveys, the higher the raw milk prices
21 that USDA and CDFa calculated and that dairy farmers received.

23 4. During the Class Period, the largest seller of NFDM surveyed by both USDA and
24 CDFa was Defendant DairyAmerica, Inc. (“DairyAmerica”). DairyAmerica was a marketing
25 association comprised of nine cooperative members [REDACTED]

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[REDACTED]

5. [REDACTED]

[REDACTED] DairyAmerica had a singular mission when selling NFDM: to maximize the profits of its nine member cooperatives.

6. During the Class Period, DairyAmerica marketed and sold approximately 75 percent of the NFDM produced in the United States and also exported NFDM to over 40 countries worldwide. With control over such a dominant share of the NFDM market, DairyAmerica could shape the raw milk prices paid to farmers by modifying the data it reported to USDA and CDFA each week.

7. During the Class Period, DairyAmerica and eight cooperative members conspired to fraudulently report artificially-depressed NFDM prices to both USDA and CDFA. Specifically, they conspired to direct and directed DairyAmerica to (1) report forward pricing sales to USDA; (2) report sales of skim milk powder (“SMP”) to both USDA and CDFA; (3) delay the reporting of sales prices to USDA and CDFA; (4) report artificially-discounted export prices to both USDA and CDFA; and (5) exclude commissions from reports to USDA. Each of these five misreporting methods contravened the reporting instructions provided by USDA and CDFA, and each misreporting method resulted in DairyAmerica reporting lower prices to USDA and CDFA than it should have.

8. DairyAmerica and eight cooperative members conspired to misreport, and intentionally misreported, NFDM prices to USDA and CDFA for the specific purpose of depressing raw milk prices and protecting their profits. Raw milk is the principal cost input for manufacturing NFDM and other dairy products, such as cheese and butter. Thus, by improperly reporting ineligible and artificially-discounted NFDM sales prices, the member cooperatives of DairyAmerica (1) substantially reduced their cost of manufacturing NFDM and other dairy products; (2) sold NFDM

1 and other dairy products at prices above the cost of manufacturing; (3) shielded their processing
2 plants from rising raw milk costs during the pendency of forward pricing contracts; and (4)
3 prevented NFDM and other dairy product prices from rising to a level that would decrease customer
4 demand. In sum, by misreporting NFDM sales in weekly reports to USDA and CDFA,
5 DairyAmerica and its member cooperatives leveraged their dominant market share to depress raw
6 milk prices and maximize their profits from the sale of dairy products.

7
8 9. Defendants engaged in a scheme to conceal their fraudulent misrepresentations from
9 government agencies and auditors. Each month during the Class Period, CDFA sent auditors to the
10 offices of DairyAmerica to ensure that it was reporting accurately and complying with CDFA's
11 reporting instructions. Before the auditors arrived each month, DairyAmerica's Controller and
12 Officer Manager would gather invoices reflecting actual sales transactions and transport them to an
13 off-site storage facility so that the auditors could not find them. Additionally, DairyAmerica
14 concealed electronic databases containing accurate sales prices from CDFA's auditors and
15 prohibited senior accounting staff with knowledge of the company's misreporting from speaking
16 to CDFA's auditors. These deceptions prevented the auditors from discovering that DairyAmerica
17 was reporting ineligible and artificially-discounted sales figures.
18

19 10. As a direct result of DairyAmerica's fraudulent misreporting, the raw milk prices
20 calculated by USDA and CDFA were lower than they should have been during the Class Period,
21 and Plaintiffs and the other members of the proposed Class and Subclasses were deprived of
22 millions of dollars of income. Meanwhile, DairyAmerica and its cooperative members profited
23 substantially from their misreporting.
24

25 11. Compelling direct and circumstantial evidence make clear that DairyAmerica and
26 eight cooperative members intentionally lied to USDA and CDFA and deprived tens of thousands
27 of farmers of income. Those farmers now seek to recover damages stemming from that fraudulent
28 misconduct. In particular, Plaintiffs seek, on behalf of themselves and all others similarly situated,

1 compensatory, consequential, treble and punitive damages, as well as restitution, disgorgement of
2 ill-gotten monies, injunctive relief and reasonable attorneys' fees.

3 12. In the alternative, Plaintiffs allege that DairyAmerica and eight cooperative
4 members negligently misreported NFDM sales data to USDA and CDFA in contravention of clear
5 instructions. For these alternative negligence claims, Plaintiffs seek, on behalf of themselves and
6 all others similarly situated, compensatory and consequential damages, as well as restitution,
7 disgorgement of ill-gotten monies, injunctive relief and reasonable attorneys' fees.
8

9 **THE PLAINTIFFS**

10 13. Individual and representative Plaintiff Gerald Carlin is a dairy farmer and a resident
11 of Meshoppen, Pennsylvania. Mr. Carlin sold raw milk that was priced according to FMMO
12 formulas during the period January 1, 2002 through April 30, 2007 and is a member of the Class
13 and USDA Subclass.

14 14. Individual and representative Plaintiff John Rahm is a dairy farmer and a resident
15 of Versailles, Ohio. Mr. Rahm sold raw milk that was priced according to FMMO formulas during
16 the period January 1, 2002 through April 30, 2007 and is a member of the Class and USDA
17 Subclass.
18

19 15. Individual and representative Plaintiff Paul Rozwadowski is a dairy farmer and a
20 resident of Stanley, Wisconsin. Mr. Rozwadowski sold raw milk that was priced according to
21 FMMO formulas during the period January 1, 2002 through April 30, 2007 and is a member of the
22 Class and USDA Subclass.
23

24 16. Individual and representative Plaintiff H. Diana Wolfe is a dairy farmer and a
25 resident of Rome, Ohio. Ms. Wolfe sold raw milk that was priced according to FMMO formulas
26 during the period January 1, 2002 through April 30, 2007 and is a member of the Class and USDA
27 Subclass.
28

17. Individual and representative Plaintiff Scott Magneson is a dairy farmer and a

1 resident of Cressey, California. Mr. Magneson sold raw milk that was priced according to CDFA
2 during the period January 1, 2002 through April 30, 2007 and is a member of the Class and CDFA
3 Subclass.

4 **THE DEFENDANTS**

5 18. Defendant DairyAmerica is a not-for-profit corporation organized and existing
6 under the laws of the State of California with its principal place of business in Fresno, California.
7 During the Class Period, DairyAmerica marketed and sold approximately 75 percent of all the
8 NFDM produced in the United States and exported NFDM to over 40 countries worldwide.
9

10 [REDACTED]

11 19. Defendant California Dairies is a for-profit corporation organized and existing under
12 the laws of the State of California with its principal place of business in Visalia, California.
13 California Dairies is the second largest dairy processing cooperative in the United States and earns
14 more than \$4 billion in annual sales. California Dairies owns six dairy processing plants that
15 produce NFDM, butter, buttermilk powder and cheddar cheese. California Dairies annually ships
16 over 18 billion pounds of milk to be processed and manufactures approximately 40 percent of the
17 NFDM in the United States. California Dairies sells dairy products in all 50 states and around the
18 world. The predecessors to California Dairies created DairyAmerica, and California Dairies has
19 been a member of DairyAmerica since its inception. [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 20. Defendant Dairy Farmers of America is a non-profit association organized and
25 existing under the laws of the State of Kansas with its principal place of business in Kansas City,
26 Missouri. Dairy Farmers of America is the largest dairy processing cooperative in the United States
27 and earns more than \$17.9 billion in annual sales. Dairy Farmers of America has an expansive
28 manufacturing footprint and owns 33 processing plants throughout the country, producing NFDM,

1 skim milk powder, sweetened condensed milk, and cheeses. It sells dairy products in all 50 states
2 and around the world. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 21. Defendant Land O'Lakes is a cooperative corporation organized and existing under
6 the laws of the State of Minnesota with its principal place of business in Arden Hills, Minnesota.
7 Land O'Lakes is the third-largest processing cooperative in the United States and earns more than
8 \$13 billion in annual sales. Land O'Lakes owns nine processing plants throughout the country,
9 producing NFDM, skim milk powder, butter, whey and cheeses. It sells dairy products in all 50
10 states and around the world. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 **CO-CONSPIRATORS AND AGENTS**

15 22. Five cooperatives not named as Defendants participated as co-conspirators in the
16 violations alleged herein and performed acts and made statements in furtherance thereof. During
17 the Class Period, those five cooperatives were members of DairyAmerica, and their executives
18 served on DairyAmerica's Board of Directors. Those five cooperatives include: Agri-Mark Inc.
19 ("Agri-Mark"), Lone Star Milk Producers, Inc. ("Lone Star"), Maryland & Virginia Milk Producers
20 Cooperative Association, Inc. ("Maryland & Virginia"), O-AT-KA Milk Producers Inc. ("O-AT-
21 KA"), and United Dairymen of Arizona. Those five cooperatives are hereafter referred to as "Co-
22 Conspirators."
23

24 23. Defendants and Co-Conspirators conspired to fraudulently misreport NFDM prices
25 to USDA and CDFA. Specifically, they conspired to direct and directed DairyAmerica to (1) report
26 forward pricing sales to USDA; (2) report sales of SMP to both USDA and CDFA; (3) delay the
27 reporting of sales to USDA and CDFA; (4) report artificially-discounted export prices to both
28

1 USDA and CDFA; and (5) exclude commissions and broker fees from reports to USDA.

2 24. Defendants are jointly and severally liable for the acts of Co-Conspirators whether
3 named or not named as Defendants in this Complaint. Each Defendant and each Co-Conspirator
4 acted as the agent of, and joint venturer for, Defendants and Co-Conspirators with respect to the
5 acts, violations, and common course of conduct alleged herein.

6 **JURISDICTION AND VENUE**

7
8 25. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(d) in that
9 Plaintiffs and Defendants are citizens of different states and the amount in controversy exceeds the
10 value of \$75,000, exclusive of interest and costs. This Court has personal jurisdiction over all
11 Defendants. Both DairyAmerica and California Dairies are incorporated in, and have their principal
12 place of business in, the State of California and they engaged in the misconduct alleged herein in
13 the State of California. Both Land O'Lakes and Dairy Farmers of America have substantial assets
14 in, and regularly conduct business in, the State of California, and they engaged in the misconduct
15 alleged herein in the State of California.

16
17 **CLASS ACTION ALLEGATIONS**

18 26. Plaintiffs seek to bring this case as a class action pursuant to Federal Rule of Civil
19 Procedure 23 on behalf of themselves and all others similarly situated. The proposed Class is
20 defined as comprising: (1) dairy farmers who sold raw milk during the Class Period that was priced
21 according to a FMMO governed by USDA (the "USDA Subclass") and (2) dairy farmers who sold
22 raw milk during the Class Period that was priced according to CDFA (the "CDFA Subclass").
23 Excluded from the Class are Defendants, any entity in which Defendants have a controlling interest,
24 and their legal representatives, heirs, and successors.

25
26 **NUMEROSITY**

27 27. The proposed Class, as well as each Subclass, is so numerous and geographically
28 dispersed that joinder of all of its members is impractical. Thousands of dairy farmers are members

1 of the proposed Class and of each Subclass and sold raw milk at prices set by a FMMO or CDFR.

2 28. The members of the Class and of each Subclass can be readily ascertained. The Class
3 and Subclass definitions encompass a finite membership demarcated with precise criteria, and
4 the identities of Class and Subclass members can be obtained from multiple sources.

5 **COMMON QUESTIONS OF LAW AND FACT**

6 29. Plaintiffs allege an overarching scheme to misreport data and suppress raw milk
7 prices that presents a common core of questions. Virtually all of the issues of law and fact in this
8 class action are common to the Class and include at least the following:
9

- 10 a. whether Defendants and Co-Conspirators misrepresented dairy product prices to
11 USDA and/or CDFR;
- 12 b. whether Defendants and Co-Conspirators intentionally misrepresented dairy
13 product prices to USDA and/or CDFR;
- 14 c. whether Defendants and Co-Conspirators failed to exercise reasonable care when
15 reporting dairy product prices to USDA and/or CDFR;
- 16 d. whether Defendants and Co-Conspirators made misrepresentations for the purpose
17 of lowering raw milk prices paid to dairy farmers;
- 18 e. whether Defendants and Co-Conspirators made misrepresentations to obtain
19 financial gain;
- 20 f. whether Defendants and Co-Conspirators engaged in a pattern of racketeering;
- 21 g. whether Defendants' and Co-Conspirators' misrepresentations of dairy product
22 prices deprived income from dairy farmers; and
- 23 h. the nature of relief available by reason of Defendants' and Co-Conspirators'
24 violations of law.

25 30. Plaintiffs' claims are typical of Class and Subclass members' claims. Plaintiffs and
26

27 all other members of the Class have sustained monetary damages arising out of Defendants' and
28

1 Co-Conspirators' violations of common and statutory law as alleged herein. The interests of the
2 Plaintiffs are aligned with those of the proposed Class and Subclasses and, in vigorously pursuing
3 their own claims, the Plaintiffs will also advance the interests of Class and Subclass members.

4 **ADEQUACY OF REPRESENTATION**

5 31. Plaintiffs can and will fairly and adequately represent and protect the interests of the
6 Class and the Subclasses and have no interests that conflict with or are antagonistic to the interests
7 of Class or Subclass members. Plaintiffs have retained attorneys competent and experienced in
8 class actions.
9

10 **SUPERIORITY**

11 32. A class action is superior to any other available method for the fair and efficient
12 adjudication of this controversy, and common questions of law and fact predominate over any
13 individual questions that may arise. Plaintiffs will use common evidence to prove each element of
14 their claims on behalf of the Class and each Subclass.
15

16 33. It would be enormously inefficient – for both the Court and the parties – to engage
17 in multiple trials of the same claims asserted in multiple individual actions. Proceeding as a class
18 action, rather than a host of separate individual trials, would provide significant economies in time,
19 effort and expense and permit Class and Subclass members to seek damages otherwise too costly
20 to pursue.

21 34. Defendants have acted or refused to act on grounds that apply generally to the Class
22 so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class
23 as a whole.
24

25 **BACKGROUND ON MILK PRICING**

26 A. USDA Pricing of Raw Milk

27 35. Pursuant to the Agricultural Marketing Agreement Act of 1937, USDA oversees ten
28 FMMOs located in ten regions around the country. The ten FMMOs establish minimum prices for

1 the sale of raw, Grade A milk by dairy farmers to processors.

2 36. Approximately 65 percent of all raw, Grade A milk marketed in the United States is
3 marketed under FMMOs, and approximately 50,000 dairy farmers sell raw milk at prices set by
4 FMMOs.

5 37. According to USDA, one of the major objectives of FMMOs is to provide adequate
6 producer prices to ensure an adequate Grade A milk supply.

7 38. FMMOs employ a four-tiered, classified pricing system to calculate monthly raw
8 milk prices based on the intended use of the raw milk. The four classes of milk are: Class I, for
9 beverage products; Class II, for soft manufacturing products such as ice cream, cottage cheese, sour
10 cream, and yogurt; Class III, for hard cheese and cream cheese; and Class IV, for butter and dry
11 milk products.

12 39. FMMO formulas tie the monthly minimum prices for each class of raw milk to the
13 market prices of certain finished dairy products. During the Class Period, the market prices of those
14 finished dairy products were collected by USDA's National Agricultural Statistics Service
15 ("NASS"). NASS obtained the dairy product prices by conducting weekly surveys of dairy firms
16 that sell one million or more pounds of the dairy products. The dairy product prices collected by
17 NASS each week were published in the *Dairy Products Prices* report.

18 40. Class III and Class IV prices were calculated based on FMMO formulas that directly
19 relied on the weekly data collected and published by NASS. The Class III pricing formula
20 incorporated NASS survey prices for cheese, butter, and dry skim whey, and the Class IV pricing
21 formula incorporated NASS survey prices for NFDM and butter.

22 41. Class I prices were determined by adding a differential value to the higher of either
23 an advanced Class III or Class IV skim milk value, plus a multiple of butterfat prices. Class II prices
24 were basically calculated by adding a differential of \$0.70 per hundred pounds of milk to the
25 advanced Class IV skim milk price, plus a multiple of butterfat prices.

1 42. Class II, III and IV prices were the same across each of the ten FMMOs.

2 43. Although the four classes of raw milk were priced differently, dairy farmers were
3 paid a weighted average or “blend” price for the sale of their raw milk. The blend price was derived
4 by pooling all classes of raw milk sold in the same marketing area. Mathematically, this process
5 involved calculating the weighted average value of milk based on the proportion of total milk
6 pooled from each of the four classes. Under this pricing system, each dairy farmer within the same
7 FMMO received an equal share of each class of milk and thus was indifferent to the actual class
8 for which his or her particular milk was used.

9
10 44. In sum, during the Class Period, approximately 50,000 dairy farmers were paid for
11 their raw, Grade A milk according to federal formulas that employ a limited number of inputs, and
12 market prices for NFDN was one of those key inputs.

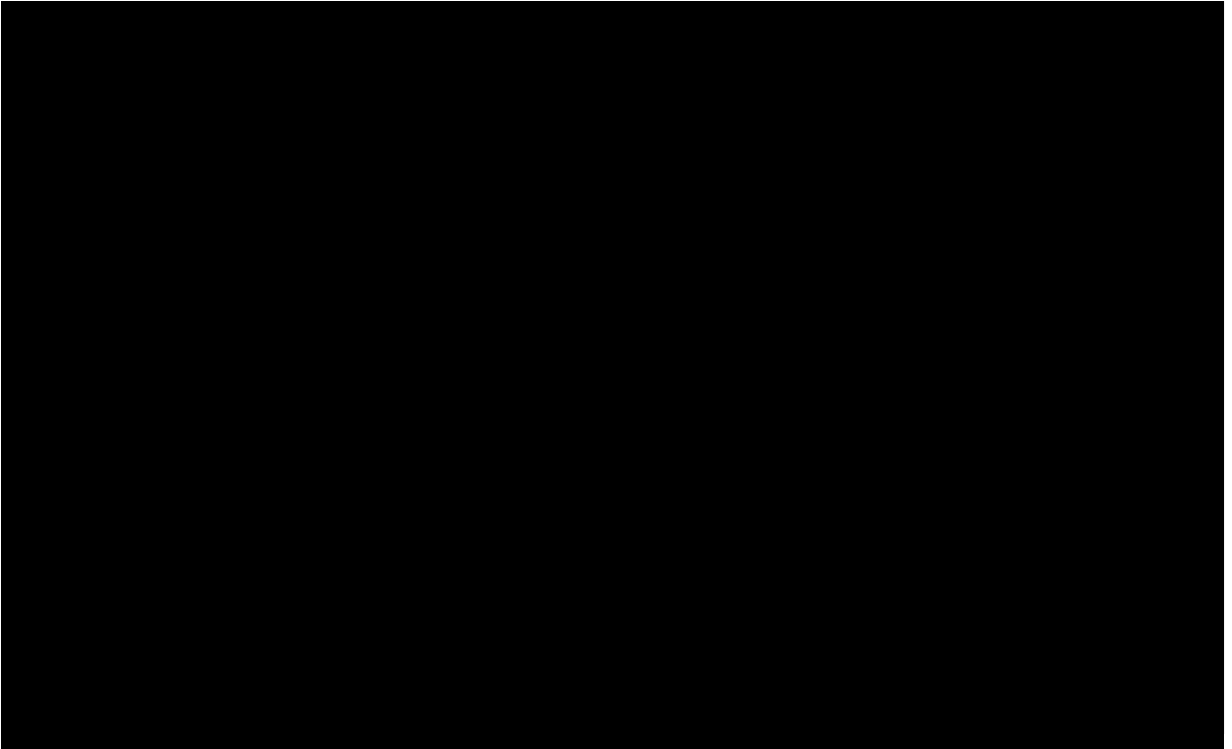
13 B. Weekly NASS Survey

14 45. During the Class Period, on a weekly basis, NASS surveyed dairy firms that
15 annually manufactured one million or more pounds of NFDN. In the surveys, those dairy firms
16 reported the price and volume of the NFDN that they sold during the prior week. Each reporting
17 dairy firm submitted its weekly NASS survey information using either a paper questionnaire or an
18 electronic reporting system.

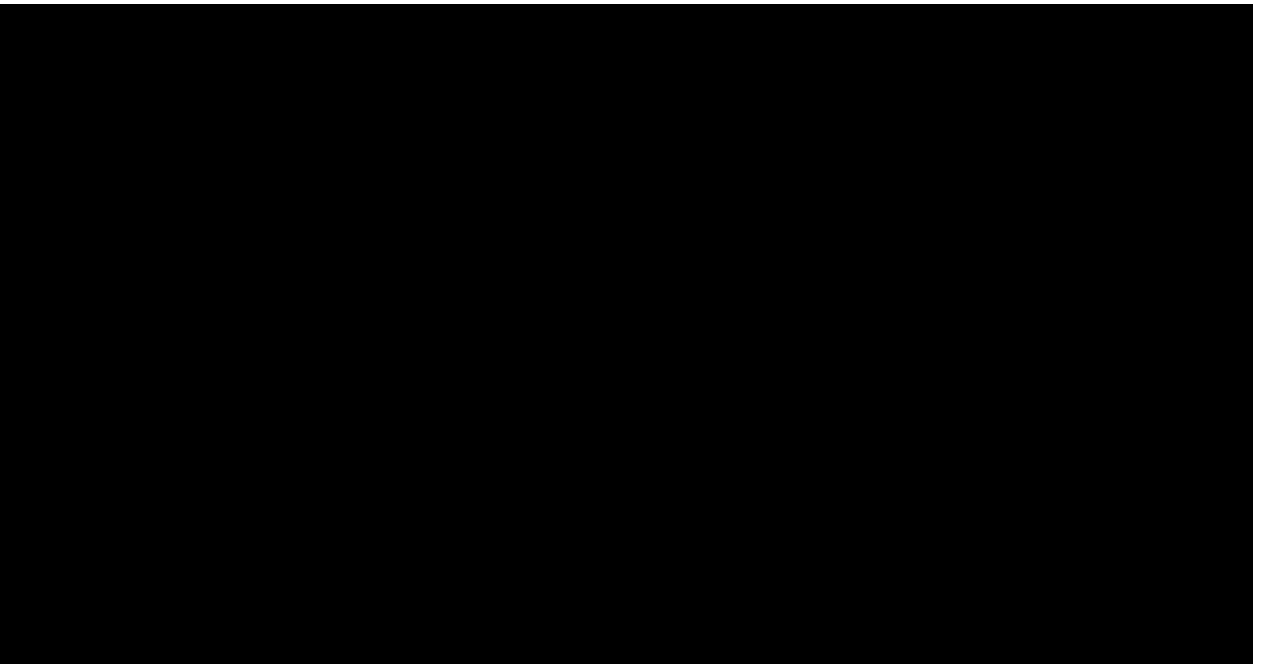
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20 46. Both the paper questionnaire and the electronic reporting system included the
21 following introductory language: “Dear Nonfat Dry Milk Producer: USDA is collecting weekly
22 information on nonfat dry milk sales and prices to be published in the Dairy Products Prices Release
23 every Friday. Your cooperation in filling out this form and returning it is requested. Response to
24 this survey is mandatory under Public Law No. 106-532. The information that you provide is
25 important in estimating U.S. nonfat dry milk prices.”

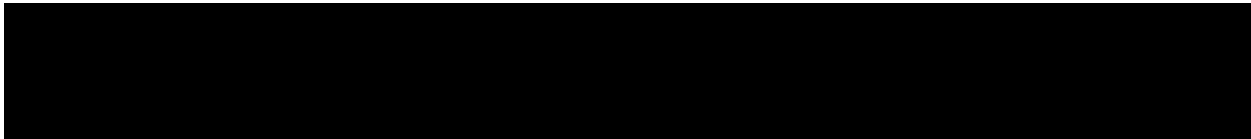
26
27 47. During the Class Period, both the paper questionnaire and the electronic reporting
28 system contained the same set of explicit instructions. The instructions contained a list of items that

1 were to be included and excluded from the weekly surveys:



14 48. During the Class Period, NASS also required firms that report NFDM sales data
15 each week to complete an Annual Validation Worksheet. The Annual Validation Worksheet
16 requires the reporting firms to certify each year that they complied with each of the instructions on
17 the weekly reporting forms:





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C. CDFA Pricing of Raw Milk

49. Some regions of the country fall outside of the geographic scope of the ten FMMOs. In those regions, several states have established their own program to calculate raw milk prices for in-state dairy farmers. One of those states is California.

50. To promote stability in the dairy industry, California's milk marketing program establishes minimum prices that processors must pay for Grade A milk received from dairy farmers based on end product use. These prices are established within two marketing areas where milk production and marketing practices are similar: Northern California and Southern California.

51. Each marketing area has a separate but essentially identical Stabilization and Marketing Plan. Each plan provides formulas for pricing five classes of milk. In general, the classes they contain are: Class 1, for milk used in fluid products; Class 2, for milk used in heavy cream, cottage cheese, yogurt and sterilized products; Class 3, for milk used in ice cream and other frozen products; Class 4a, for milk used in butter and dry milk products, such as nonfat dry milk; and Class 4b, for milk used in cheese (other than cottage cheese) and dry whey products.

52. Like the FMMO program, CDFA ties the monthly prices for each class of raw milk to market prices of select dairy products. Like the FMMO program, one of the key dairy products whose market prices set raw milk prices is NFDM.

53. Since 1973, on both a weekly and monthly basis, CDFA has utilized surveys to collect data from California processing plants that produce NFDM. Using the sales data from the surveys, CDFA computes a weighted average price of NFDM called the California Weighted Average Price (CWAP). The CWAP is one of the key commodity prices used directly in the Class 1 and Class 4a pricing formulas.

1 54. Like the FMMO program, to prevent inequities among dairy farmers, California
2 processors are obligated to a central milk revenue pool when they purchase milk from dairy farmers.
3 The gross value of the pool is determined by multiplying each class usage by its appropriate class
4 price across all processors in the pool and then summing the resulting values. The California
5 pooling system calculates three pool prices – quota, base and overbase – that reflect the pool-wide
6 utilizations of all five classes of milk. Those pool prices are paid to dairy farmers that participate
7 in the California pricing system.
8

9 D. Weekly and Monthly CDFA Surveys

10 55. During the Class Period, each week and every month, CDFA surveyed dairy firms
11 that manufacture NFDM. In the weekly surveys, those dairy firms reported the price and volume
12 of the NFDM that they sold during the prior week. In the monthly surveys, those dairy firms
13 reported the price and volume of the NFDM that they sold during the prior month.
14

15 56. CDFA’s weekly survey forms included the following introductory language: “The
16 prices received by your plant from wholesale customers for sales of Extra Grade and Grade A
17 Nonfat Dry Milk (NFDM) for human consumption are used by this office, together with those
18 received by several other plants, in computing the weekly ‘sales quantity’ weighted average NFDM
19 price for California.”
20

21 57. During the Class Period, both the weekly and monthly survey forms contained a
22 nearly identical set of explicit instructions. The instructions contained a list of items that were to
23 be included and excluded from the surveys.
24

OPERATION OF DAIRYAMERICA

25 A. Governance of DairyAmerica

26 58. One of the entities surveyed by both USDA and CDFA to obtain NFDM prices
27 during the Class Period was DairyAmerica.
28

 59. DairyAmerica was formed in 1995 by two predecessors to California Dairies

1 (California Milk Producers and Danish Creamery Association) to jointly market their powdered
2 milk. In 1999, California Milk Producers and Danish Creamery Association merged to form
3 California Dairies.

4 60. [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 61. During the Class Period, nine cooperatives were members of, and exclusively
11 controlled, DairyAmerica: Agri-Mark, California Dairies, Dairy Farmers of America, Land
12 O'Lakes, Lone Star, Maryland & Virginia, O-AT-KA, St. Albans Cooperative Creamery ("St.
13 Albans") and United Dairymen of Arizona.

14 62. DairyAmerica was an agent of, and a joint venture among, its nine member
15 cooperatives. In comments submitted to USDA on September 4, 2007, DairyAmerica stated,
16 "DairyAmerica operates as a marketing agent on behalf of all of its members." Member Dairy
17 Farmers of America described DairyAmerica as "a joint venture to market non-fat dry milk,
18 domestically and internationally."
19

20 63. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 64. During the Class Period, DairyAmerica was governed by a board of directors. The
25 Board of Directors was comprised exclusively of senior executives and representatives from each
26 of the nine cooperatives that were members of DairyAmerica. [REDACTED]
27 [REDACTED]

28 65. [REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

1 69. [REDACTED]
2 [REDACTED] Even though DairyAmerica was a
3 nonprofit corporation, DairyAmerica’s singular purpose was commercial: to maximize the profit
4 of its nine members. In comments submitted to USDA on September 4, 2007, DairyAmerica wrote
5 that it “owes a duty to its members to maximize overall profit.”

6 70. During the Class Period, DairyAmerica marketed and sold the vast majority of the
7 NFDM produced by its member cooperatives, which amounted to approximately 75 percent of all
8 the NFDM produced in the United States. DairyAmerica also marketed and sold other powder
9 products, such as SMP, that were manufactured by cooperative members and by non-members.

10 71. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 72. The Board of Directors hired Richard Lewis to serve as CEO and CFO of
17 DairyAmerica during the Class Period. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 B. Board of Directors Understood and Regularly Discussed Reporting Instructions

25 73. During the Class Period, the Board of Directors regularly discussed and understood
26 the instructions for completing the weekly reports to USDA and CDFA, and directed DairyAmerica
27 on how to complete those reports. Decisions about what to include in reports to USDA and CDFA
28 were routinely within the scope of the Board’s responsibilities. [REDACTED]

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[REDACTED]

74. [REDACTED]

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76. [REDACTED]

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[REDACTED]

CONSPIRACY AND MOTIVE TO MISREPORT

78. During the Class Period, Defendants and Co-Conspirators conspired to fraudulently misreport NFDM prices to both USDA and CDFA. Specifically, they conspired to direct and directed DairyAmerica to (1) report forward pricing sales to USDA that USDA instructed DairyAmerica to exclude; (2) deceptively report sales of SMP as NFDM to both USDA and CDFA; (3) delay the reporting of sales prices in contravention of instructions from USDA and CDFA; (4) report artificially discounted, rather than accurate, export prices to both USDA and CDFA; and (5) improperly exclude commissions and brokers fees from reports to USDA.

79. Defendants and Co-Conspirators conspired to misreport, and intentionally misreported, NFDM prices and volume to USDA and CDFA for the specific purpose of artificially depressing raw milk prices and maximizing their profits. [REDACTED]

[REDACTED]

[REDACTED] On June 15, 2007, CEO Lewis wrote that reported prices “are critical to processors of nonfat dry milk because this accounting system directly applies the weighted average reported price to calculate its financial obligations.”

80. Defendants and Co-Conspirators had at least four specific financial motivations for misreporting sales to USDA and CDFA during the Class Period. First, raw milk is the principal

1 cost input for manufacturing NFDM and other dairy products, such as cheese, butter and SMP.
2 Reducing raw milk prices paid to dairy farmers therefore increased the profits of processing plants
3 owned by the cooperative members of DairyAmerica, including Member Defendants. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] By misreporting NFDM sales in weekly reports
13 to USDA and CDFA, Defendants and Co-Conspirators leveraged their dominant market share to
14 depress raw milk prices and thus increase their profits from the sale of a variety of dairy products.

15
16 81. Second, the member cooperatives of DairyAmerica sought to earn profits from the
17 sale of NFDM by selling the product at prices above prevailing NASS and CWAP rates. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] Accomplishing this goal is substantially
21 complicated by the fact that sales prices transacted by DairyAmerica are reported to USDA and
22 CDFA and thus set future NASS and CWAP prices. Because NFDM sales prices set NASS and
23 CWAP prices, it is difficult to consistently sell NFDM at prices above NASS and CWAP rates.
24 Rather than do so lawfully, Defendants and Co-Conspirators established a scheme to deceptively
25 report artificially-depressed NFDM prices that were lower than actual sales prices. By unlawfully
26 creating a differential between transacted and reported NFDM prices, Defendants and Co-
27
28 Conspirators fabricated a profit margin from DairyAmerica's sales.

1 82. Third, Defendants and Co-Conspirators misrepresented NFDM sales prices through
2 DairyAmerica to protect themselves from financial losses during the pendency of fixed-price
3 contracts. DairyAmerica’s sales of NFDM and other dairy products often involved fixing a price
4 well in advance of the shipment of the product to the customer. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Accordingly, Defendants and Co-Conspirators
12 sought to manage the economic risk of fixed-price contracts by misreporting NFDM sales and
13 artificially depressing raw milk prices to the detriment of farmers.

14 83. Fourth, Defendants and Co-Conspirators reported ineligible and artificially-
15 discounted NFDM sales prices to prevent wholesale powder prices from reaching levels that would
16 diminish customer demand. [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED] By misreporting sales figures to USDA and CDFA,
20 Defendants and Co-Conspirators sought to restrain raw milk prices and ensure that wholesale
21 powder prices remained at levels that maximized their revenue and profits.

22 84. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

A. Processor Interests and Farmer Interests Diverge

85. It is a fiction that dairy cooperatives are always making decisions that serve the interests of their farmer members. Just as shareholder-owned companies may defraud shareholders, cooperatives may defraud their farmer members.

86. The compensation structure of cooperatives in the dairy industry makes them particularly susceptible to engaging in conduct antagonistic to farmers' interests. Farmers governed by USDA and CDFA prices are paid on a monthly basis for their sale of raw milk, and the values in their milk checks are primarily calculated by USDA and CDFA formulas. Importantly, the revenue earned by cooperatives from processing plants and joint ventures is not included in the monthly payments to farmers. Instead, the managements of cooperatives have the discretion to spend revenue earned from their processing plants on salaries, bonuses, investments, joint ventures, equipment and other expenditures. Even when management distributes revenue from processing plants and joint ventures to members, that distribution – called a patronage dividend – is made annually (rather than monthly) and often in the form of equity (rather than cash) that farmers cannot access until a much later date, typically retirement. For example, Maryland & Virginia provides 20 percent of each patronage refund in the form of cash every year and the remainder is maintained as equity that cannot be retrieved by farmers until retirement, after which the equity is paid over an eight year period.

87. Notably, a substantial percentage of the Class is comprised of farmers who were either independent of any cooperative or members of cooperatives unaffiliated with DairyAmerica during the Class Period. Those farmers had no relationship with Defendants or Co-Conspirators

1 and, thus, were not eligible to receive any patronage dividends associated with DairyAmerica's
2 sales.

3 88. Accordingly, dairy farmers directly benefit from and prefer higher monthly milk
4 prices, rather than lower monthly milk prices that increase profits from processing plants and joint
5 ventures. Meanwhile, cooperative managers may prefer to limit monthly milk prices in order to
6 increase revenue from processing plants and joint ventures and thus increase the funds available to
7 management. This is particularly true for cooperatives with substantial ownership interests in
8 processing plants and joint ventures, such as the members of DairyAmerica. Indeed, the three
9 largest processing cooperatives in the country were members of DairyAmerica during the Class
10 Period: Land O'Lakes, Dairy Farmers of America and California Dairies collectively operated 48
11 processing plants and earned more than \$34 billion in annual revenue from them.
12

13 89. Executives of Member Defendants and Co-Conspirators have acknowledged that
14 the pricing interests of cooperative organizations may substantially diverge from the pricing
15 interests of their farmer members. [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 90. [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 91. Lower raw milk prices for dairy farmers was not a mere consequence of Defendants
3 and Co-Conspirators misreporting sales data, but rather was the motivating purpose behind the
4 misreporting. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 **FIRST TYPE OF MISREPORTING:**
13 **INCLUSION OF FORWARD PRICING SALES**

14 A. NASS Instruction to Exclude Forward Pricing Sales

15 92. During the Class Period, the instructions on the weekly NASS reporting form
16 explicitly required the exclusion of information from sales contracts in which the selling price was
17 set 30 days or more before completion of the sales transaction, except for sales conducted via
18 USDA’s Dairy Export Incentive Program. Specifically, the instructions on the NASS reporting
19 form list the following as an exclusion: “Forward pricing sales: sales in which the selling price was
20 set (and not adjusted) 30 or more days before the transaction was completed. This exclusion does
21 not include sales through the Dairy Export Incentive Program (DEIP).” DEIP is a program
22 maintained by USDA that awards cash bonuses to exporters who apply to sell dairy products in
23 foreign markets where prevailing prices are lower than the cost of manufacturing those products.
24

25 93. The surveys conducted by NASS were intended to collect *current* market prices so
26 that dairy farmers’ monthly milk checks reflected up-to-date market dynamics. As a result, the
27 instructions on the surveys logically required the exclusion of sales data from forward pricing sales,
28

1 which contain future rather than current prices.

2 B. Clarity of Instruction to Exclude Forward Pricing Sales

3 94. The NASS instruction to exclude forward pricing sales was not difficult to
4 understand. USDA's Office of the Inspector General concluded that the instruction "is clear." An
5 April 2007 press release issued by NASS states that the "guidelines explicitly exclude the reporting
6 of forward pricing sales in which the selling price was set 30 days or more before the transaction
7 was completed." [REDACTED]
8 [REDACTED]

9 [REDACTED]
10 95. DairyAmerica Sales Director White stated that the "instructions provided by NASS
11 in the questionnaires during the period 2002 through February 2007 were entirely clear and in plain,
12 understandable English." He also stated that "in clear and unambiguous written terms, the
13 instructions from NASS on how to fill out the weekly questionnaires instructed DairyAmerica to
14 exclude figures from the sale of NFDM in which the selling price was set (and not adjusted) 30 or
15 more days before the transaction was completed, unless those sales were transacted through" DEIP.
16

17 96. Sales Director White also explained that the instruction to exclude forward pricing
18 contracts "was intuitive and logical. NASS prices are designed to reflect current market prices.
19 Accordingly, it made perfect sense that NASS would require the exclusion of inputs from long-
20 term contracts." [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 C. DairyAmerica Misreported Forward Pricing Sales to NASS

25 97. From January 2002 through April 2007, DairyAmerica improperly reported forward
26 pricing sales to NASS. In its weekly reports to NASS, DairyAmerica included prices and volumes
27 from sales of NFDM in which the selling price was set more than 30 days before the completion of
28 the transaction. DairyAmerica included these prices in the weekly reports even though the sales

1 contracts were transacted outside of the DEIP.

2 98. During the Class Period, DairyAmerica included prices and volumes from forward
3 pricing sales in weekly reports to NASS in contravention of the clear instruction on the survey form
4 to exclude such data. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 99. A substantial share of the forward pricing sales that DairyAmerica misreported to
9 NASS were derived from contracts for export. From January 2006 through April 2007, more than
10 90 percent of DairyAmerica's contracts for the export of NFDMM were transacted outside of DEIP
11 and established selling prices more than 30 days before the completion of the transaction.

12 100. The NFDMM prices from forward pricing sales that DairyAmerica improperly
13 reported to NASS were often lower than the NFDMM prices that were properly reported to NASS.
14 As a result, DairyAmerica's improper reporting of forward pricing sales artificially reduced the
15 value of raw milk prices calculated by USDA.
16

17 101. The NFDMM prices reported by DairyAmerica between January 1, 2002 and April
18 14, 2007 were aggregated with data from other dairy firms and published in the weekly *Dairy*
19 *Products Prices* report. Once the data were published by NASS, they were utilized by USDA's
20 Agricultural Marketing Service ("AMS") as a component in its formula for establishing raw milk
21 prices during the Class Period.

22 102. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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D. Government Investigation

103. An article in the March 2007 issue of the dairy publication *The Milkweed* first alleged that DairyAmerica improperly reported forward pricing sales to USDA. The USDA’s Office of the Inspector General concluded that the misreporting of forward pricing sales “was only discovered because of the impact of the article in *The Milkweed* and that the error was not detected by NASS’ existing survey and estimation process.”

104. *The Milkweed* article prompted DairyAmerica CEO Lewis to contact NASS to discuss the company’s reporting of NFDM sales. An April 11, 2007 discussion between CEO Lewis and NASS confirmed that DairyAmerica had improperly included forward pricing sales in its weekly reports to NASS. According to USDA, April 11, 2007 is “the date that [the government] determined that there was in fact a price reporting error.”

105. On April 20, 2007, NASS issued a press release that states, “NASS has determined that one nonfat dry milk plant erroneously included some long-term, fixed prices sales data in its weekly reports. NASS guidelines explicitly exclude the reporting of forward pricing sales in which the selling price was set 30 days or more before the transaction was completed. As part of an annual effort to ensure proper reporting, NASS reiterated these guidelines with all participating plants in October 2006. At that time, the plants indicated they were in compliance.”

106. On May 9, 2007, nine Senators, including Republican Senators Larry Craig and Arlen Specter, and Democratic Senators Hillary Clinton, Bernie Sanders and Joe Biden, wrote a letter to the Secretary of Agriculture and the Inspector General of USDA. The letter states, “Despite the lack of a formal USDA system to verify the accuracy of this data, we understand that the misreported prices so far have only been connected to one plant out of 39 required to report prices.

1 We also understand that this plant was visited by NASS employees in both April and October 2006,
2 where USDA and the firm went over the prohibition against including forward contracted fixed-
3 price NDM in the data they reported.”

4 107. At the requests of the Senators, USDA’s Inspector General subsequently launched
5 an investigation into DairyAmerica’s reporting errors. On February 14, 2008, the Inspector General
6 issued a report that concluded DairyAmerica had failed to comply with the instruction to exclude
7 forward pricing sales and that farmers had been deprived of millions of dollars in income. The
8 report states:
9

10 A large dairy firm inappropriately included long-term forward contracted nonfat
11 dry milk volume and price information in their weekly submissions to NASS. We
12 found that this dairy firm has been including data for sales of this type since 2002.
13 NASS then aggregated the misreported data from this large dairy firm with the
14 weekly data submitted by other dairy firms for the same reporting period. This
15 caused inaccurate nonfat dry milk aggregated volume and price statistics to be
16 published weekly. . . . Given that incorrect nonfat dry milk prices were factored
17 into the FMMO formula, the published FMMO prices were also incorrect. . . . A
18 representative from the large dairy firm has stated that long-term forward contract
19 sales began in 2002 and that they inappropriately included data relating to these
20 sales in their weekly submissions to NASS.

21 108. The Inspector General’s report made five recommendations so that USDA could
22 identify and prevent misreporting in the future. None of those recommendations entailed changing
23 the instruction to exclude forward pricing contracts. Indeed, the report found that “the wording on
24 the data collection instrument is clear.”

25 109. Secretary of Agriculture Charles F. Connor described DairyAmerica’s misreporting
26 as a “significant lapse” in following “clearly articulated instructions.”

27 E. Testimony of Doug White

28 110. Doug White, who served as Sales Director of DairyAmerica from 1998 until 2011,
submitted a sworn declaration in this case about DairyAmerica’s misreporting of forward pricing
sales. [REDACTED]

111. Mr. White is highly knowledgeable about DairyAmerica’s misreporting of forward

1 pricing sales. While employed as Director of Sales, Mr. White’s responsibilities included
2 determining the prices at which to sell NFDM, negotiating and entering into contracts for the sale
3 of NFDM, and arranging transactions for the sale of NFDM through DEIP. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7
8 112. Sales Director White was heavily involved in discussions regarding the reporting of
9 sales data to USDA and its impact on raw milk prices, including the reporting of forward pricing
10 sales. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15
16 113. [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 114. [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24
25 115. In a sworn declaration dated June 18, 2015, Sales Director White admitted that
26 DairyAmerica intentionally misreported forward pricing sale to USDA and that DairyAmerica’s
27 cooperative members instructed it to do so. Sales Director White swore that: (1) the NASS
28 instruction to exclude forward pricing sales was “entirely clear”; (2) USDA officials met with

1 DairyAmerica’s CEO to ensure that the company was complying with the instruction; (3) he warned
2 both DairyAmerica’s CEO and Controller that the company was failing to comply with the
3 instruction; (3) he advised both DairyAmerica’s CEO and Controller to halt the misreporting of
4 forward pricing sales in the weekly reports to NASS; (4) in response, the CEO said that forward
5 pricing sales would be reported “regardless of whether doing so contradicted the instruction”; (6)
6 senior executives from Member Defendants and Co-Conspirators knew of and understood the
7 NASS instruction; (7) those senior executives nonetheless repeatedly directed DairyAmerica to
8 misreport forward pricing sales to NASS; (8) the member cooperatives instructed DairyAmerica to
9 misreport forward pricing sales for the specific purposes of reducing payments to dairy farmers and
10 protecting the profits of their processing plants; and (9) several cooperatives exited DairyAmerica
11 in part to avoid paying a judgment in this case.
12

13 116. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 F. DairyAmerica’s Executives and Board Members Understood the NASS Instructions

19 117. During the Class Period, while DairyAmerica improperly reported forward pricing
20 sales to NASS, the executives and Board members of DairyAmerica, including senior executives
21 of Member Defendants, understood that the instructions for completing the weekly surveys for
22 NASS required the exclusion of forward pricing sales.
23

24 118. According to Sales Director White’s declaration, during the Class Period, he read
25 the instructions supplied by NASS for completing the weekly reports on “multiple occasions.” On
26 each such occasion that he read the instructions, he “understood the instructions to mean exactly
27 what they state,” including that “when submitting weekly reports to NASS, DairyAmerica should
28 exclude figures from non-DEIP sales of NFDM in which the selling price was set (and not adjusted)

1 30 or more days before the transaction was completed.”

2 119. Accordingly, in his declaration, Sales Director White states that “during the period
3 2002 through February 2007, when DairyAmerica filled out weekly reports to NASS and included
4 figures from non-DEIP sales of NFDM in which the selling price was set (and not adjusted) 30 or
5 more days before the transaction was completed,” he believed that “DairyAmerica was not
6 complying with the clear text of NASS’s instructions and was violating the spirit of NASS’s
7 instructions.” [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 120. According to Sales Director White’s declaration, during the Class Period, he had
11 multiple conversations with CEO Lewis, Controller McAbee and Office Manager Annette Smith
12 about the instructions supplied by NASS for completing the weekly reports. Based on those
13 conversations, Sales Director White concluded that CEO Lewis, Controller McAbee and Office
14 Manager Smith read the NASS instructions during the Class Period and “understood those
15 instructions to mean that DairyAmerica should exclude figures from non-DEIP sales of NFDM in
16 which the selling price was set (and not adjusted) 30 or more days before the transaction was
17 completed.”

18 121. During the Class Period, Sales Director White also had multiple conversations with
19 members of the Board of DairyAmerica, including senior executives of Member Defendants, about
20 the NASS reporting instructions. Based on those conversations, Sales Director White concluded
21 that Board Members of DairyAmerica understood “that forward pricing sales were supposed to be
22 excluded from NASS surveys” during the Class Period. Sales Director White specifically
23 concluded that “several members of the board and officers of DairyAmerica – including Keith
24 Gomes, Joe Heffington, Keith Murfield, Joel Clark, David Parrish, William Schreiber, William
25 Neary, Craig Alexander, Richard Mosemann, Jim Baird, and Richard Stammer – understood that
26 the instructions supplied by NASS for the weekly reporting of data from the sale of NFDM required
27
28

1 that DairyAmerica exclude figures from non-DEIP sales of NFDM in which the selling price was
2 set (and not adjusted) 30 or more days before the transaction was completed.” During the Class
3 period, Keith Gomes and Joe Heffington were senior executives of California Dairies; Joel Clark
4 and David Parrish were senior executives of Dairy Farmers of America; and William Schreiber and
5 William Neary were senior executives of Land O’Lakes.

6 122. [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 123. [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 124. According to Sales Director White, during the period 2002 through February 2007,

1 many industry players that regularly interacted with DairyAmerica – including traders of NFDM,
2 competitors of DairyAmerica, customers of DairyAmerica and DairyAmerica’s exclusive export
3 partner Fonterra Cooperative Group (“Fonterra”) – also “understood that the instructions supplied
4 by NASS for the weekly reporting of data from the sale of NFDM required that DairyAmerica
5 exclude figures from non-DEIP sales of NFDM in which the selling price was set (and not adjusted)
6 30 or more days before the transaction was completed.” During the Class Period, DairyAmerica
7 exclusively sold products in the export market through the New Zealand-based broker Fonterra.
8

9 125. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 126. Another document shows that Hoogwegt Dairy, one of DairyAmerica’s largest
14 customers, understood the NASS instruction to exclude forward pricing contracts. Hoogwegt Dairy
15 publishes a monthly newsletter. In the February 2006 issue, the cover article titled “NASS and
16 Product Pricing” states: “Regardless of product, NASS has the following uniform instructions as to
17 what not to include in the price data reported to USDA. The following items are excluded:
18 transportation and clearing charges, intra-company sales, resales of purchased product and forward
19 pricing sales. Specifically any sales in which the selling price was set and not adjusted 30 or more
20 days before the transaction was completed are to be excluded.” [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 127. [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

128.

[REDACTED]

[REDACTED]

[REDACTED]

G. Sales Director White Warned DairyAmerica’s CEO and Controller

129. During the Class Period, Sales Director White warned both CEO Lewis and Controller McAbee to halt the inclusion of forward pricing sales in DairyAmerica’s weekly reports to USDA.

130. During the period 2002 through 2006, Sales Director White had multiple conversations with CEO Lewis in which he “asked Richard Lewis whether DairyAmerica was

1 improperly including figures in the reports from non-DEIP sales of NFDN in which the selling
2 price was set (and not adjusted) 30 or more days before the transaction was completed.” During
3 those conversations, Sales Director White told CEO Lewis that he “did not think we should
4 continue to include those figures in the reports to NASS because DairyAmerica was defying
5 NASS’s instructions and because the figures reported to NASS were intended to reflect current
6 market prices, not future prices derived from long-term contracts.”
7

8 131. In response to Sales Director White’s warnings, “Richard Lewis asserted that
9 DairyAmerica should continue to include in its weekly reports to NASS sales figures from non-
10 DEIP sales of NFDN in which the selling price was set (and not adjusted) more than 30 days before
11 the transaction was completed.” According to Sales Director White, “Richard Lewis stated that
12 sales data from exports should be reported to NASS regardless of whether they were part of long-
13 term contracts and regardless of whether doing so contradicted the instructions from NASS.”
14

15 132. Sales Director White also warned Controller McAbee that DairyAmerica should halt
16 the misreporting of NFDN sales to USDA. During the period 2002 through 2006, Sales Director
17 White had multiple conversations with Controller McAbee in which he discussed “whether
18 DairyAmerica was improperly including figures from non-DEIP sales of NFDN in which the
19 selling price was set (and not adjusted) 30 or more days before the transaction was completed.”
20 Furthermore, Sales Director White told Controller McAbee that he “did not think we should
21 continue to include those figures in the reports to NASS because DairyAmerica was defying
22 NASS’s instructions and because the figures reported to NASS were intended to reflect current
23 market prices, not future prices derived from long-term contracts.”
24

25 133. Sales Director White was not the only person who warned CEO Lewis and
26 Controller McAbee to halt the misreporting to USDA. According to Sales Director White’s
27 declaration, between 2002 and 2006, “several other individuals – including traders, Fonterra
28 employees and other DairyAmerica employees – questioned Richard Lewis about whether

1 DairyAmerica was or was not complying with NASS’s instructions for submitting weekly reports
2 and about whether DairyAmerica was improperly including figures from non-DEIP sales of NFDM
3 in which the selling price was set (and not adjusted) 30 or more days before the transaction was
4 completed.”

5 H. USDA Warns DairyAmerica

6 134. In his declaration, Sales Director White states that USDA also warned
7 DairyAmerica to comply with the instruction to exclude forward pricing sales from the weekly
8 reports. According to Sales Director White, between the period 2002 and 2006, USDA officials
9 met with CEO Lewis “to ensure that it was complying with, and would continue to comply with,
10 NASS’s instructions for completing and submitting weekly reports, including the instruction that
11 requires the exclusion of figures from non-DEIP sales of NFDM in which the selling price was set
12 (and not adjusted) 30 or more days before the transaction was completed.”
13

14 135. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 136. [REDACTED]
21 [REDACTED]
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23 [REDACTED]
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25 [REDACTED]
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[REDACTED]

137. According to Lowell Randel, a director of USDA’s Research, Education and Economics Mission Area, NASS representatives reminded DairyAmerica representatives of “what to include in these reports and what to exclude from these reports” every year.

I. Defendants and Co-Conspirators Instructed DairyAmerica to Misreport

138. Defendants and Co-Conspirators conspired to misreport and intentionally misreported forward pricing sales data to NASS during the Class Period. In his declaration [REDACTED], Sales Director White repeatedly testified that Defendants and Co-Conspirators instructed DairyAmerica to misreport forward pricing sales to USDA.

139. [REDACTED]

140. [REDACTED]

member cooperatives.”

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141. [REDACTED]

142. According to Sales Director White’s declaration, the decision by DairyAmerica “to improperly include, in its weekly reports to NASS, figures from non-DEIP sales of NFDM in which the selling price was set (and not adjusted) 30 or more days before the transaction was completed, and thus limit and prevent the rise of raw milk prices, was taken jointly by Richard Lewis and several executives from cooperatives that were members of DairyAmerica.” Those executives included senior executives from each of the Member Defendants.

143. [REDACTED]

J. Defendants and Co-Conspirators Conspired to Intentionally Misreport NFDM Sales in Order to Lower Raw Milk Prices and Maximize Their Profits

144. In his declaration, Sales Director White explains why the Defendants and Co-Conspirators intentionally misreported forward pricing sales: to lower raw milk prices.

145. Sales Director White states in his declaration that when the executives of Member Defendants and Co-Conspirators decided “to disobey NASS’s instructions and include, in DairyAmerica’s weekly reports to NASS, figures from non-DEIP, long-term contracts,” those executives did so in order “to shield their cooperatives from sizable losses that would stem from the sale of NFDM through the long-term export contracts executed by Fonterra.”

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146. [REDACTED]

147. On August 1, 2007, in response to news reports of DairyAmerica’s misreporting of forward pricing sales, nine United States Senators signed a letter to the Secretary of Agriculture that states, “[I]t appears that this misreporting involved long term fixed price contracts during a period of rapid increases in NDM prices that in turn resulted in higher input prices for the NDM producers through higher milk prices. There seems to have been a potential financial motive to misreport the relatively low NDM prices of the fixed price contracts and therefore lessen the increases in input costs for the NDM producers.”

148. [REDACTED]

149. [REDACTED]

150. [REDACTED]

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[REDACTED]

151.

[REDACTED]

152.

[REDACTED]

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[REDACTED]

[REDACTED]

153. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

154. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

155. In his declaration, Sales Director White describes one of the most injurious examples of DairyAmerica misreporting forward pricing sales to protect the profits of its cooperative members. According to Sales Director White, in 2006, DairyAmerica entered into contracts negotiated by Fonterra to export a “substantial and unprecedented quantity of NFDM at comparatively low prices.” Those contracts “involved the sale of NFDM at prices that were set (and not adjusted) more than 30 days before the transaction was completed.”

156. Sales Director White explains, “Soon after DairyAmerica entered into these long-term export contracts with Fonterra, there were major shortages in the production of raw milk. As a result of these reductions in the supply of raw milk, the prices of raw milk began to rapidly climb. If DairyAmerica had complied with NASS’s instructions and excluded sales figures from long-term non-DEIP contracts from its weekly reports to NASS, then raw milk prices would have

1 continued to climb unabated, and DairyAmerica would have incurred substantial losses for its
2 cooperative members when it sold NFDM via Fonterra.”

3 157. Sales Director White continued, “To avoid incurring substantial losses for its
4 cooperative members, DairyAmerica chose to report these sales to NASS regardless of NASS’s
5 instructions and, when submitting weekly reports to NASS, improperly included sales data from
6 non-DEIP contracts in which prices were set (and not adjusted) more than 30 days before the
7 transaction was completed. By doing so, DairyAmerica reported below market prices for NFDM
8 from long-term contracts to NASS.”

9
10 158. According to Sales Director White, “DairyAmerica knew that the figures it reported
11 to NASS from long-term, non-DEIP contracts were intended to be, and would be, used by the
12 USDA to calculate the prices for raw milk. Consequently, DairyAmerica’s inclusion of sales data
13 from long-term export contracts in its reports to NASS caused raw milk prices to be lowered and
14 thus prevented DairyAmerica and its cooperative members from losing substantial sums of money.”

15
16 K. Defendants and Co-Conspirators Tracked the Effects of their Misreporting on Milk Prices

17 159. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

- 24 • [REDACTED]
25 [REDACTED]
- 26 • [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

[REDACTED]

160. [REDACTED]

[REDACTED]

[REDACTED]:

- [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 L. Defendants and Co-Conspirators Had No Reasonable Basis for Their Misrepresentations

4 161. In the alternative, Plaintiffs allege that Defendants and Co-Conspirators negligently
5 misreported forward pricing sales to USDA during the Class Period, in contravention of clear
6 instructions.

7 162. DairyAmerica had no reasonable grounds for misunderstanding USDA's instruction
8 to exclude forward pricing sales from weekly reports. Sales Director White maintains that "during
9 the period 2002 through February 2007, there was no reasonable grounds for believing that the
10 instructions from NASS for completing and submitting the weekly reports permitted the inclusion
11 of figures from non-DEIP sales of NFDN in which the price was set 30 or more days before the
12 transaction was completed."

13
14 163. Sales Director White further notes that, during the period 2002 through February
15 2007, "when DairyAmerica filled out weekly reports to NASS, the employees, officers and board
16 members of DairyAmerica had no reasonable grounds for believing that DairyAmerica complied
17 with NASS's instructions to exclude figures from non-DEIP sales of NFDN in which the selling
18 price was set (and not adjusted) 30 or more days before the transaction was completed."

19
20 164. Sales Director White's statements are bolstered by the fact that other reporting firms
21 complied with the instruction to exclude forward pricing sales. On January 30, 2008, after
22 conducting an audit of reporting over a 51-week period, Joe Reilly, the Administrator of NASS,
23 wrote, "Our review of resubmitted reports for the earlier 51-week period showed that incorrect
24 reporting was not a widespread problem. The problem was narrowly isolated . . ." Similarly,
25 NASS's Advisory Committee on Agriculture Statistics characterized DairyAmerica's misreporting
26 as "an isolated event."
27
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1 M. USDA Rejected and Revised Misreported NFDM Prices

2 165. As a result of USDA's investigation into DairyAmerica's misreporting of forward
3 pricing sales, the agency rejected and revised previously published NFDM prices as well as the
4 monthly raw milk prices that had been calculated using those NFDM figures.

5 166. On April 12, 2007, AMS requested that DairyAmerica revise its reported data for
6 the previous four-week period by excluding any data from forward pricing sales. The next day,
7 AMS published revised market prices for NFDM for that four-week period.

8
9 167. On or about April 20, 2007, NASS requested that all 39 firms that had previously
10 reported NFDM review their submissions for the period April 29, 2006 through April 14, 2007 and
11 submit revisions within 45 days. A press release issued by NASS stated, "After confirming that one
12 dairy product plant made errors in its weekly reporting of price data for nonfat dry milk, USDA's
13 National Agricultural Statistics Service (NASS) will ask 39 plants to review and revise weekly
14 price data and sales volumes reported over the past 52 weeks. . . . Based on this information, NASS
15 will issue any needed revisions to previously published weekly prices and volumes for nonfat dry
16 milk. This process will provide producers and the marketplace with a clearer understanding of the
17 overall impact of the incorrect reports."
18

19 168. [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED]. In comments submitted to USDA in 2007, DairyAmerica wrote that
24 25 percent of all the NFDM reported to NASS during the revision period was improperly reported
25 as a result of DairyAmerica's inclusion of forward pricing sales.

26 169. On June 28, 2007, primarily based on the revised data received from DairyAmerica,
27 NASS published "revised prices and sales volume" for NFDM for each week during the period
28 April 29, 2006 through April 14, 2007. The revisions supplied by DairyAmerica substantially

1 affected the NFDM values for each week during that time period.

2 170. On August 1, 2007, nine United States Senators issued a press release which stated,
3 “We were concerned to learn that the misreporting of NDM was so significant and long-lasting. In
4 the recent NASS and AMS reports, there was not a single weekly report that did not require
5 correction and for the most part the corrections were significant. Forty-six weeks out of the past
6 year had misreporting of over one million pounds of NDM, with one week’s discrepancy at over
7 13 million pounds. The misreported volume averaged over 22 percent of the originally reported
8 volume and in one week exceeded 40 percent.”
9

10 N. Impact of Misreporting on Dairy Farmers

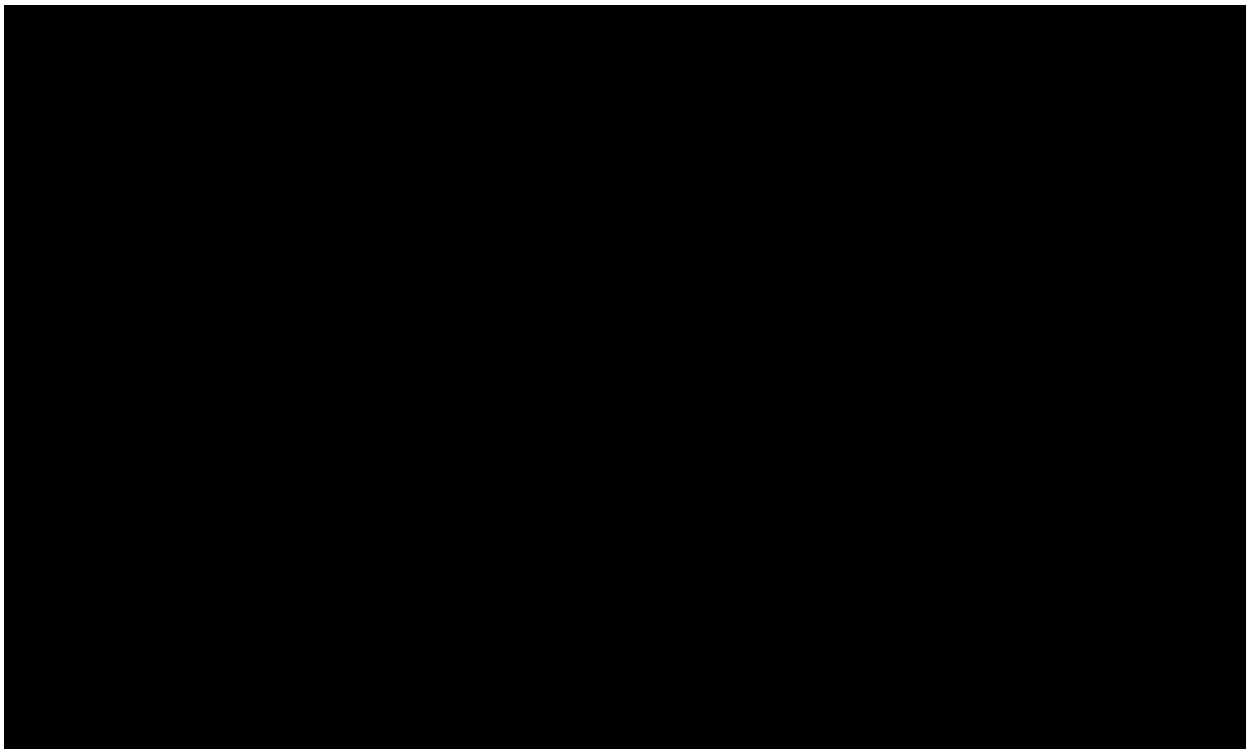
11 171. Defendants’ and Co-Conspirators’ misreporting of forward pricing sales directly
12 resulted in farmers receiving lower payments for the sale of raw milk. The improper inclusion of
13 data from forward pricing sales in weekly reports to NASS resulted in lower prices for Class I, II
14 and IV milk sold by dairy farmers across the country.
15

16 172. Indeed, when DairyAmerica finally halted the misreporting of forward pricing sales
17 in the spring of 2007, the monthly prices of raw milk calculated by FMMOs increased substantially.
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19 [REDACTED]

20 [REDACTED]

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173. On June 28, 2007, the same day that NASS published revised NFDM data, AMS issued a report titled “Impacts of NASS Nonfat Dry Milk Price and Sales Volume Revisions on Federal Order Prices.” In that report, AMS used the revised NFDM data to calculate the impact of the misreporting of forward pricing sales on FMMO prices for the period April 29, 2006 through April 14, 2007. AMS calculated that the misreporting of forward pricing sales had deprived farmers of \$49,782,219 from April 2006 through April 2007.

174. In February 2008, USDA’s Inspector General issued a report verifying that farmers had been deprived of approximately \$50 million during the final year of the misreporting of forward pricing sales. The report states, “NASS’ published nonfat dry milk price statistics are utilized by AMS as a component of its formula for establishing federal milk marketing order (FMMO) prices. Given that incorrect nonfat dry milk prices were factored into the FMMO formula, the published FMMO prices were also incorrect. ... AMS determined that the errors in nonfat dry milk prices for the period of April 29, 2006, through April 14, 2007 had affected 14 months of minimum FMMO prices, resulting in a \$50 million loss to producers.”

1 175. The USDA Inspector General’s report recommended that NASS instruct reporting
2 firms to review their previously submitted data for the period January 2002 through April 2006 and
3 provide necessary revisions. The report states: “NASS should request that all reporting firms review
4 their submitted data, and provide revisions when appropriate for the period covering January 4,
5 2002 through April 22, 2006. NASS should then publish revised weekly nonfat dry milk quantity
6 and price data.” The report explained that “AMS will then be able to utilize accurate information
7 in its milk pricing formulas to calculate corrected FMMO prices for the entire period when
8 misreporting occurred.”
9

10 176. Following the issuance of the Inspector General’s report on March 5, 2008, NASS
11 sent a letter formally requesting that DairyAmerica revise its data submissions for the period
12 January 2002 through April 2006. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED] NASS had planned to calculate
16 the losses incurred by farmers prior to April 29, 2006 in a special report to be released on June 19,
17 2008, [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 177. [REDACTED]
21 [REDACTED]
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23 [REDACTED]
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25 [REDACTED]
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[REDACTED]

178. [REDACTED]

[REDACTED]

179. [REDACTED]

[REDACTED]

O. USDA Lacks Remedy To Compensate Farmers

180. On August 1, 2007, nine Senators issued a press release expressing concern that dairy farmers had not been compensated for DairyAmerica’s misreporting errors. The press release states: “[W]e remain concerned that the financial burden continues to be completely borne by dairy farmers who are not responsible for the erroneous data. . . . Besides noting in one report that the milk marketing orders are unable to provide compensation for this underpayment, USDA has not indicated whether compensation from other funds is being contemplated. With dairy farmers bearing the entire burden of the misreported prices, are there plans to compensate dairy farmers for the underpayments?”

181. USDA did not and does not have a mechanism to compensate dairy farmers who were deprived of income as a result of DairyAmerica’s misreporting of forward pricing sales. The Dairy Marketing Enhancement Act does not provide USDA with the authority to compensate dairy farmers for inaccurate reports to NASS.

182. The February 2008 report issued by the Inspector General states, “All of the funds

1 in the FMMO pools for the 14-month period covered by NASS' revision had previously been
2 disbursed to the milk producers, and corrective disbursements to producers were no longer possible.
3 The FMMO program does not currently include any mechanisms to provide restitution to the milk
4 producers adversely impacted by the reporting error.”

5 P. Establishment Of Verification and Approval Procedures

6 183. The NFDM prices reported by DairyAmerica between January 1, 2002 and April
7 14, 2007 were not verified, approved or audited by NASS, AMS or any other agency of the federal
8 government. The Inspector General of USDA wrote, “AMS did not have the authority to audit a
9 reporting firm's books when this dairy firm's reporting errors occurred.” NASS and AMS were
10 first provided with the authority to verify the accuracy of and audit the dairy product prices reported
11 to NASS on August 2, 2007, several months after the end of the Class Period.

12 184. As a result of, and in the aftermath of, DairyAmerica's misreporting of forward
13 pricing sales, USDA established a system to verify the accuracy of dairy product prices reported to
14 NASS.
15

16 185. On April 20, 2007, Lowell Randel, director of USDA's Research, Education and
17 Economics Mission Area, said, “NASS and other USDA agencies are firmly committed to taking
18 all necessary steps to ensure that the data is reported accurately in the future, and as a part of this
19 process, AMS is moving on the rule-making process to establish data verification for mandatory
20 price reporting program for dairy products.”
21

22 186. On July 3, 2007, AMS published an interim final rule that provided for audits of
23 dairy product price reporting:
24

25 [T]he use of reliable market prices for dairy products will help assure that milk
26 producers are paid an equitable price for their milk and that milk processors are
27 paying a competitive price for their milk supply. . . . AMS is aware that inaccurate
28 reporting of nonfat dry milk price information to NASS in 2007 resulted in a
reduction in prices paid to producers. . . . An audit-based program of dairy price
reporting would substantially reduce the likelihood of such errors in reporting.

1 187. As part of the verification procedure established by USDA in 2007, AMS auditors
2 are required to conduct regular visits of dairy firms that account for 80 percent of the reported
3 NFDM volume, and to visit dairy firms that produce the remaining 20 percent of NFDM volume at
4 least once every two years. During each visit, AMS auditors verify that, consistent with the
5 instructions, eligible sales transactions were reported to NASS and that ineligible sales transactions
6 were excluded from reports to NASS.

7
8 188. On August 6, 2007, AMS auditors began making data verification visits to plants.
9 The first plant visited was DairyAmerica. The February 2008 report issued by the Inspector General
10 states, “Had the audit program been implemented earlier, the misreporting by the large dairy firm
11 would have been discovered during AMS’ annual audit of the firm, reducing the negative monetary
12 impact on producers.”

13 **SECOND TYPE OF MISREPORTING:**
14 **INCLUSION OF SKIM MILK POWDER SALES**

15 A. Skim Milk Powder

16 189. NFDM and SMP are two different powder products that are produced by removing
17 water from pasteurized skim milk. NFDM produced in the United States comes under the labeling
18 and standards jurisdiction of the Food and Drug Administration’s Code of Federal Regulations
19 (CFR). The CFR mandates that NFDM be manufactured solely from milk and does not stipulate
20 any minimum or maximum protein content. Meanwhile, SMP traded within the international
21 market is subject to the Codex Alimentarius Commission standard. The Codex standard for SMP
22 requires a minimum 34% protein level. To meet the minimum 34% protein level, other dairy
23 products – specifically lactose, milk permeate or milk retentate – are added to the powder.
24

25 190. [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 B. NASS Instructions Exclude Skim Powder

2 191. The instructions for completing the weekly NASS survey prohibit the reporting of
3 SMP. The NASS instructions only permit the reporting of “USDA Extra Grade and USPH Grade
4 A, non fortified nonfat dry milk.”

5 192. [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 193. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 C. CDFA Instructions Exclude Skim Powder

19 194. The instructions for completing the weekly CDFA survey also prohibit the reporting
20 of SMP. The instructions on the CDFA reporting form specifically state: “The report is for
21 disclosing sales of Extra Grade and Grade A Nonfat Dry Milk (NFDM) only, sold for human
22 consumption, regardless of length of storage, container size or sales volume. Do not include any
23 other type of powdered milk, such as instant NFDM or whole milk powder.”

24 195. A 2007 Hearing Panel Report prepared by CDFA states: “Presently, the sales reports
25 include all types of Extra Grade and Grade A NFDM sold to wholesale customers for human
26 consumption, regardless of length of storage, container size, or sales volume. The reported types of
27 NFDM include low-, medium-, and high-heat, vitamin-fortified, organic, and rBST-free; however,
28

1 the reports exclude sales of other powdered milks such as instant NFDM, whole milk powder, skim
2 milk powder, and skim milk powder blends.”

3 D. DairyAmerica Improperly Included SMP in Reports to NASS and CDFA

4 196. During the Class Period, DairyAmerica sold substantial quantities of SMP
5 manufactured by its member cooperatives, including Member Defendants. DairyAmerica sold the
6 SMP to foreign customers in the export market.

7
8 197. Despite the clear instructions from USDA and CDFA mandating the exclusion of
9 SMP from weekly reports, DairyAmerica habitually included sales of SMP in its weekly reports to
10 both agencies during the Class Period.

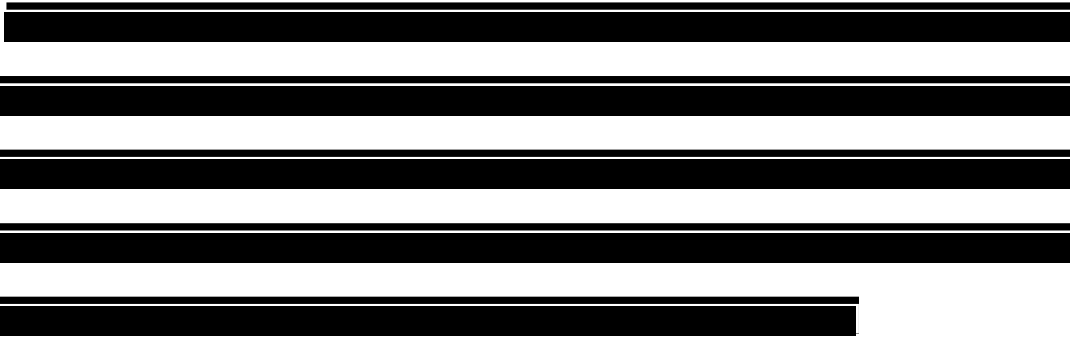
11 198. [REDACTED]
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19 199. [REDACTED]
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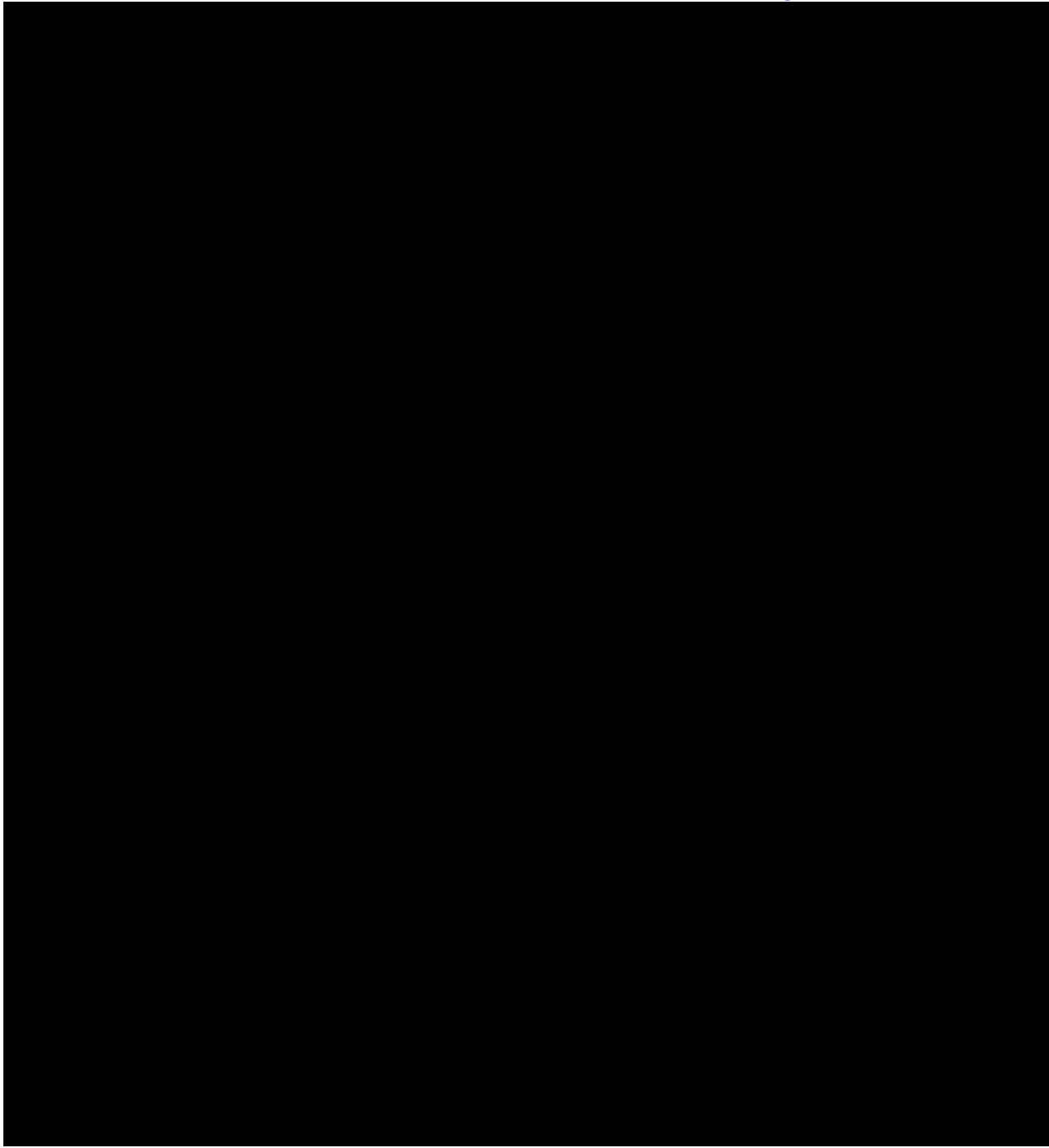
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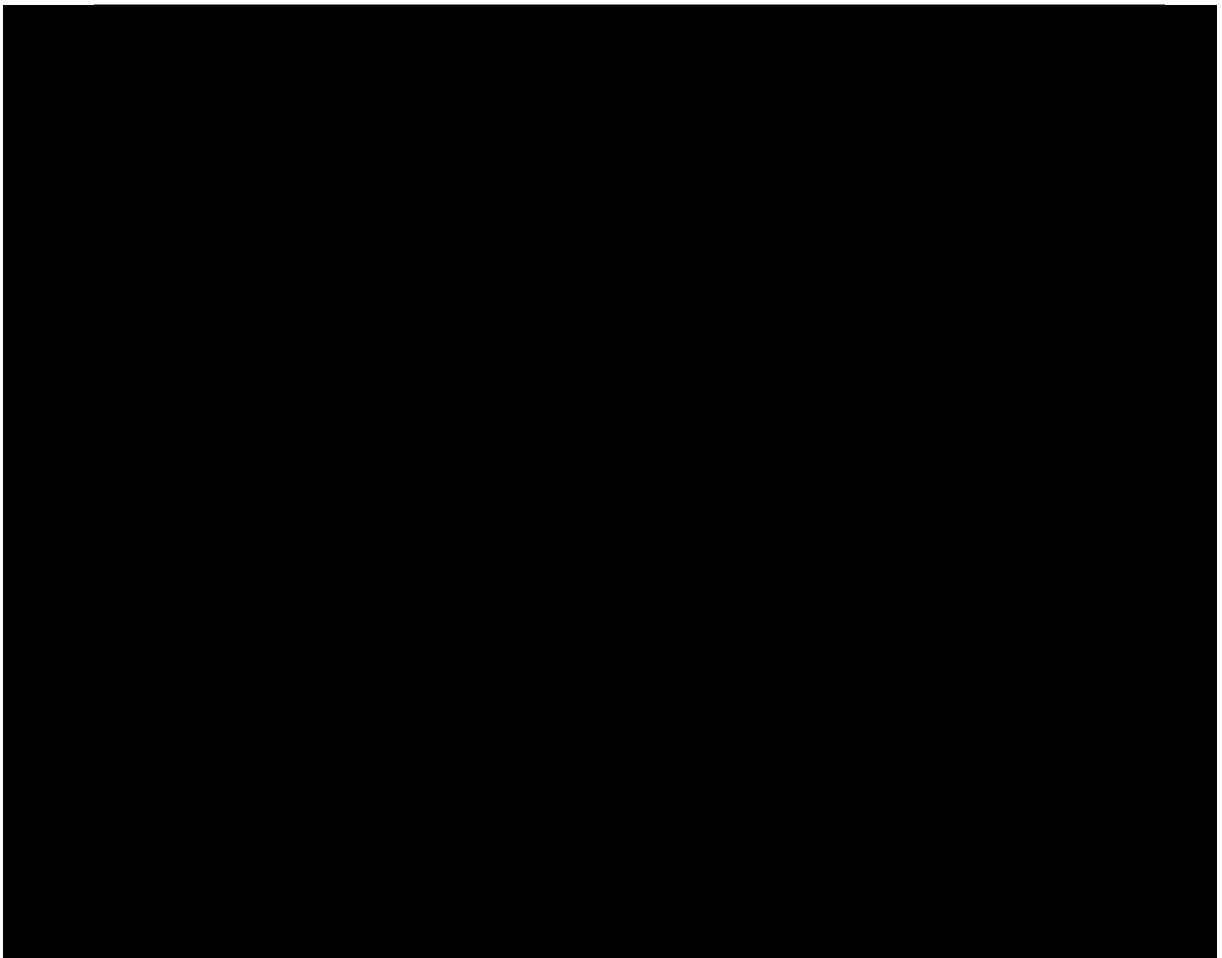


201. [REDACTED]

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E. Defendants and Co-Conspirators Understood the Instruction to Exclude SMP

202. Defendants and Co-Conspirators understood the clear instructions from USDA and CDFA to exclude SMP sales from weekly reports. [REDACTED]



203. [REDACTED]

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[REDACTED]

204. USDA and CDFA officials regularly met with DairyAmerica executives during the Class Period to confirm compliance with the agencies' instructions to exclude SMP sales. CDFA auditors visited DairyAmerica each month to confirm adherence to CDFA's instructions, and USDA officials communicated with DairyAmerica each year to confirm compliance with USDA's instructions.

205. [REDACTED]

F. Defendants and Co-Conspirators Knowingly Misreported SMP to USDA and CDFA

206. Defendants and Co-Conspirators directed DairyAmerica to fraudulently include SMP sales transactions in weekly reports to USDA and CDFA during the Class Period. Defendants and Co-Conspirators understood the clear instructions from USDA and CDFA to exclude SMP sales from weekly reports and, nonetheless, knowingly defied those instructions. [REDACTED]

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[REDACTED]

207.

208. Several former senior executives of Fonterra, who were interviewed by Plaintiffs' counsel, have stated that the vast majority of product sold by Fonterra in the export market on behalf of DairyAmerica was SMP – not NFDM.

209.

[REDACTED] Additionally, whenever a foreign customer purchased SMP from DairyAmerica, the cooperative member that manufactured the product would receive an invoice reflecting the details of the sales transaction, including the identity of the product.

210. Member Defendants and Co-Conspirators were simultaneously aware of, and approved of, DairyAmerica reporting SMP sales transactions to USDA and CDFA. [REDACTED]

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[REDACTED]

211. As noted above, the vast majority of product exported by DairyAmerica through Fonterra during the Class Period was comprised of SMP, [REDACTED]

[REDACTED]

212. [REDACTED]

G. Defendants and Co-Conspirators Misreported SMP Sales to Lower Raw Milk Prices

213. Defendants and Co-Conspirators directed DairyAmerica to report SMP sales in order to depress raw milk prices. SMP sales prices in the export market were often lower than NFDM sales prices in the domestic market. By including SMP sales transactions in reports to USDA and CDFA, DairyAmerica artificially depressed the raw milk prices calculated by USDA and CDFA that were paid to dairy farmers.

H. Defendants and Co-Conspirators Had No Reasonable Basis for Their Misrepresentations

214. In the alternative, Plaintiffs allege that DairyAmerica and Co-Conspirators negligently misreported SMP sales data to USDA and CDFA in contravention of clear instructions.

1 215. During the Class Period, DairyAmerica and its member cooperatives had no
2 reasonable grounds for misunderstanding USDA's and CDFA's instructions to exclude SMP sales
3 from weekly reports. During the Class Period, there was no reasonable ground for believing that
4 the instructions from NASS or CDFA for completing and submitting the weekly reports permitted
5 the inclusion of figures from SMP sales.

6 216. During the Class Period, when DairyAmerica completed and submitted weekly
7 reports to USDA and CDFA, Defendants and Co-Conspirators had no reasonable grounds for
8 believing that DairyAmerica had complied with those agencies' instructions to exclude figures from
9 SMP sales.

11 **THIRD TYPE OF MISREPORTING:**
12 **DELAYING THE REPORTING OF SALES**

13 A. NASS Instruction Regarding When to Report

14 217. During the Class Period, NASS's survey form clearly required that DairyAmerica
15 report all qualified NFDm sales that were transacted during a particular week. The USDA survey
16 form specifically requested: "Nonfat dry milk sales for the week ending Saturday ____."

17 B. CDFA Instruction Regarding When to Report

18 218. During the Class Period, the CDFA survey form also unambiguously instructed
19 DairyAmerica to report all qualified NFDm sales that were transacted during a particular week.
20 The CDFA survey form specifically states: "Period Covered: The weekly time frame of Saturday
21 through Friday of any given week will be the basis for determining the amounts of reported nonfat
22 dry milk product and sales. Include only the sales shipped during that specific time frame when
23 reporting."

24 C. DairyAmerica Intentionally Delayed the Reporting of Select Sales Figures

25 219. Each week during the Class Period, CEO Lewis selected specific sales transaction
26 for DairyAmerica to delay in its reporting to USDA and CDFA. CEO Lewis delayed the reporting
27
28

1 of selected sales figures for the sole purpose of influencing raw milk prices calculated by USDA
2 and CDFA.

3 220. More often than not, the delayed reported prices selected by CEO Lewis were higher
4 than the prevailing NASS and CWAP prices. Accordingly, the effect of DairyAmerica deliberately
5 delaying the reporting of sales prices to USDA and CDFA was to delay and restrain price increases
6 of raw milk, thereby financially injuring dairy farmers.

7
8 221. Candice Bimemiller is a former employee of DairyAmerica's accounting
9 department. From 2003 through 2009, Ms. Bimemiller served as Credit Manager and reported
10 directly to CEO Lewis, Controller McAbee and Office Manager Smith.

11 222. While employed at DairyAmerica, Credit Manager Bimemiller's responsibilities
12 included collecting the bills of lading from processing plants; sending invoices to domestic
13 customers for the sale of NFDN; matching the figures on bills of lading with sales orders and
14 making any necessary adjustments; inputting and maintaining data reflecting domestic sales and
15 shipments in computer databases; determining the pricing level for domestic customers based on
16 the quantity of NFDN purchased; and assisting with the preparation of weekly sales reports to
17 USDA and CDFA.

18
19 223. Credit Manager Bimemiller assisted with the reporting of sales of NFDN to USDA
20 and CDFA by providing final weekly domestic sales figures to Controller McAbee and Office
21 Manager Smith. Each week, Controller McAbee and/or Office Manager Smith entered those sales
22 figures into forms that were provided to USDA and CDFA.

23
24 224. On September 9, 2016, Plaintiffs obtained a sworn declaration from Credit Manager
25 Bimemiller. The declaration states, "From 2003 until approximately 2007, I would meet with
26 Richard Lewis each week so that he could review the domestic sales figures. I would print a report
27 of all shipments and sales that were transacted during the week and bring that document to the
28 meetings. During those weekly meetings, Richard Lewis would review the domestic sales figures

1 on the print-out to determine which of those shipments would be billed out that week to be reported
2 to USDA and CDFA. During the weekly meetings, Richard Lewis would regularly instruct me to
3 delay the reporting of certain sales of NFDM. Specifically, he would instruct me to delay, by a
4 week, the reporting of particular NFDM sales that he selected.”

5 225. Credit Manager Bimemiller’s declaration explains, “The sales prices that Mr. Lewis
6 selected for delays in reporting were typically those priced above a specified value and, less
7 frequently, those priced below a specified value.”

8 226. Credit Manager Bimemiller’s declaration further states, “The process of delaying
9 the reporting of NFDM sales was clearly inconsistent with, and in defiance of, instructions that
10 were provided each week by USDA and CDFA. The agencies required that all NFDM be reported
11 during the week in which it was shipped.”

12 227. Credit Manager Bimemiller’s declaration continues, “I informed Richard Lewis that
13 I was not comfortable with DairyAmerica delaying the reporting of sales in a manner that was
14 inconsistent with the agencies’ clear instructions. Accordingly, I asked Richard Lewis to place his
15 initials on my report near any sales figures that he wanted DairyAmerica to delay in its reporting.
16 In response, he laughed and agreed to do so, and thereafter he would mark his initials next to the
17 specific sales figures that he wanted DairyAmerica to delay in its reporting.”

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20 D. Cooperative Members Knew and Consented to Delays in DairyAmerica’s Reporting

21 228. Member Defendants and Co-Conspirators instructed DairyAmerica to delay the
22 reporting of sales figures in weekly reports to USDA and CDFA in order to depress raw milk prices.

23 229. Member Defendants and Co-Conspirators were aware that DairyAmerica
24 improperly delayed the reporting of certain sales transactions to USDA and CDFA. [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 E. Defendants and Co-Conspirators Had No Reasonable Basis For Their Misrepresentations

2 230. In the alternative, Plaintiffs allege that DairyAmerica and Co-Conspirators
3 negligently delayed the reporting of sales figures to USDA and CDFA in contravention of clear
4 instructions.

5 231. During the Class Period, Defendants and Co-Conspirators had no reasonable
6 grounds for misunderstanding USDA's and CDFA's instructions regarding when to report NFDM
7 sales. During the Class Period, there was no reasonable ground for believing that delaying the
8 reporting of sales figures was compliant with the instructions from USDA or CDFA for completing
9 and submitting the weekly reports.

10 232. During the Class Period, when DairyAmerica completed and submitted weekly
11 reports to USDA and CDFA, Defendants and Co-Conspirators had no reasonable grounds for
12 believing that DairyAmerica had consistently complied with those agencies' instructions to report
13 NFDM sales during the correct week.

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16 **FOURTH TYPE OF MISREPORTING:**
17 **IMPROPER EXCLUSION FROM NAVISION**

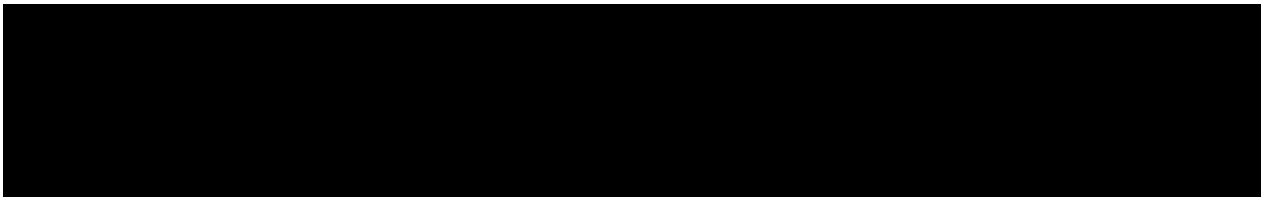
18 A. NASS Instruction Regarding Deductions

19 233. During the Class Period, USDA's weekly reporting form specified exactly what
20 NFDM sales data should be included and excluded from the form. USDA's form provided that
21 DairyAmerica should include: "Total volume sold and total dollars received or price per pound."
22 The form also stated that DairyAmerica should exclude: "Transportation and clearing charges from
23 price." Accordingly, to comply with USDA's instructions, DairyAmerica should have first
24 identified the total value received from the sale of qualified NFDM and subsequently deducted
25 transportation and clearing charges before reporting the net value.

26 234. USDA officials communicated with DairyAmerica each year to confirm compliance
27 with those instructions.
28

1 B. CDFA Instruction Regarding Deductions

2 235. During the Class Period, CDFA’s weekly reporting form specified exactly what
3 sales data should be included and excluded from the form. CDFA’s form provided that
4 DairyAmerica should first list: “Total Dollars Received for the Sales Above.” The next line on the
5 form required DairyAmerica to deduct: “Broker Fees and Hauling Costs.” The next line required
6 DairyAmerica to report the net value. Accordingly, to comply with CDFA’s instructions,
7 DairyAmerica should have first identified the total value received from the sale of qualified NFDM
8 and subsequently deducted transportation and broker charges before reporting the net value.
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13 236. CDFA auditors visited DairyAmerica each month to confirm adherence to those
14 reporting instructions.

15 C. DairyAmerica Made Improper Deductions and Reported Fabricated Prices

16 237. During the Class Period, DairyAmerica maintained an electronic database called the
17 Navision database. It contained substantial information about DairyAmerica’s sales. When
18 DairyAmerica reported sales data to USDA and CDFA each week, it included printouts from the
19 Navision database in those weekly reports.
20

21 238. [REDACTED]
22 [REDACTED]
23 [REDACTED]
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239. [REDACTED]

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240. [REDACTED]

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[REDACTED]

[REDACTED]

241. [REDACTED] was an employee of DairyAmerica's accounting department from 2000 through 2009. During the Class Period, she served as Export Documentation Supervisor and reported directly to CEO Lewis, Controller McAbee and Office Manager Smith. She was responsible for the billing and documentation of all export sales, and she tracked and catalogued the prices and volumes of export sales. While Credit Manager Candice Bimemiller handled billing for domestic sales, Supervisor [REDACTED] was responsible for the billing and documentation of exports of powder products.

242. On August 21, 2016, Plaintiffs obtained a sworn declaration from Supervisor [REDACTED] that recounts recurring commissions of fraud. The declaration explains that CEO Lewis and Controller McAbee instructed Supervisor [REDACTED] to create an electronic database that contained two sets of export prices: (1) actual prices paid by foreign customers for the purchase of NFDM and other dairy products and (2) fabricated prices for those export transactions that were concocted internally by CEO Lewis and other DairyAmerica employees. The declaration explains

1 that the fabricated export prices in the database were consistently lower than the actual export prices
2 charged to foreign customers.

3 243. In her declaration, Supervisor [REDACTED] explains that DairyAmerica reported the
4 fabricated export prices, rather than the actual export prices, to three different government agencies
5 from 2001 through at least 2008. First, she states that DairyAmerica reported the fabricated export
6 prices to USDA in weekly reports. Second, she states that DairyAmerica reported the fabricated
7 export prices to CDFA in weekly reports. Third, she states that DairyAmerica routinely included
8 the fabricated export prices in applications submitted to federal DEIP to qualify for cash subsidies.

9
10 244. Supervisor [REDACTED]'s declaration states, "During the period 2001 through at
11 least 2008, I witnessed DairyAmerica repeatedly engage in three kinds of fraudulent activity at the
12 direction of Richard Lewis, Jean McAbee and other senior executives. First, during the period 2001
13 through at least 2008, each and every week in which DairyAmerica reported prices from export
14 sales of NFDN to the California Department of Food and Agriculture ("CDFA"), those figures
15 were fabricated by Richard Lewis and his staff and did not accurately reflect export sales
16 transactions. Each and every week in which DairyAmerica reported prices from export sales to
17 CDFA, DairyAmerica deliberately reported fabricated prices that were lower than the actual export
18 prices that DairyAmerica charged foreign customers."

19
20 245. Supervisor [REDACTED]'s declaration further states, "Second, during the period
21 2001 through at least 2008, each and every week in which DairyAmerica reported prices from
22 export sales of NFDN to the National Agricultural Statistics Service ("NASS"), a division of
23 United States Department of Agriculture ("USDA"), those figures were fabricated by Richard
24 Lewis and his staff and did not accurately reflect export sales transactions. Each and every week in
25 which DairyAmerica reported prices from export sales to NASS, DairyAmerica deliberately
26 reported fabricated prices that were lower than the actual export prices that DairyAmerica charged
27 foreign customers."
28

1 246. Supervisor [REDACTED]'s declaration further states, "Third, during the period 2001
2 through at least 2008, each and every instance in which DairyAmerica submitted applications to
3 DEIP, DairyAmerica submitted applications containing prices that were fabricated by Richard
4 Lewis and his staff. The fabricated prices submitted by DairyAmerica to DEIP were lower than the
5 actual export prices that DairyAmerica charged foreign customers. DairyAmerica reported the
6 lower fabricated prices for the purpose of qualifying for cash subsidies provided by DEIP."

7 247. Supervisor [REDACTED]'s declaration describes how DairyAmerica engaged in the
8 three forms of fraud. It states, "In 2001, Richard Lewis and Jean McAbee instructed me to assemble
9 an electronic export documentation database that would contain and track figures relating to export
10 sales of NFDm. This export documentation database included two sets of figures. The first set of
11 figures would consist of accurate figures from the actual sale of NFDm in the export market to
12 foreign customers. The second set of figures would consist of fabricated export sales figures that
13 were created internally at DairyAmerica. As instructed by Richard Lewis and Jean McAbee, I
14 assembled a database that contained both the accurate export figures charged to foreign customers
15 and the fabricated export figures created internally at DairyAmerica."

16 248. Supervisor [REDACTED]'s declaration further states, "I obtained the accurate export
17 figures from contracts that were signed by foreign purchasers of NFDm. DairyAmerica's export
18 broker, Fonterra Cooperative Group ("Fonterra"), would facilitate the sale of NFDm to foreign
19 customers. Whenever a foreign customer signed a contract to purchase NFDm from DairyAmerica,
20 a Fonterra employee would send a copy of the contract to me. I would then input the accurate sales
21 figures contained in those contracts into the export documentation database."

22 249. Supervisor [REDACTED]'s declaration explains, "I obtained the fabricated export
23 figures from invoices that were created internally at DairyAmerica. After a foreign customer
24 entered into a contract to purchase NFDm, DairyAmerica's staff would create a corresponding
25 invoice that contained lower prices than those contained in the contract signed by the foreign
26 customer."

1 customer. That invoice, which contained entirely fabricated prices, would be provided to the
2 processing plant that shipped out the NFDM to the foreign customer. Those processing plants
3 belonged to the cooperative members of DairyAmerica, including California Dairies. Whenever an
4 invoice was provided to the processing plant, a copy of that invoice was provided to me. I would
5 regularly input the fabricated and artificially lower sales figures contained in such invoices into the
6 export documentation database.” The declaration notes, “The fabricated figures contained in the
7 invoices provided to processing plants were created by Richard Lewis and DairyAmerica employee
8 Frances Zapanta. Those figures were also contained in pricing worksheets that were created by
9 Richard Lewis and Frances Zapanta and stored in DairyAmerica’s shared electronic files.”

11 250. Supervisor [REDACTED]’s declaration further explains, “The accurate export sales
12 figures contained in the export documentation database that I operated were never inputted into the
13 Navision database maintained by DairyAmerica or into any other accounting or reporting database
14 maintained by the company. By contrast, the fabricated export sales figures contained in the export
15 documentation database that I operated were regularly inputted by other DairyAmerica employees
16 into the Navision database and used for accounting and reporting purposes.”

18 251. Supervisor [REDACTED]’s declaration states, “At the direction of Richard Lewis and
19 Jean McAbee, DairyAmerica only reported the export sales figures contained in the Navision
20 database to CDFA. As a result, during the period 2001 through at least 2008, DairyAmerica only
21 reported fabricated, artificially-lower export sales figures to the CDFA. During that time period,
22 the accurate export sales figures reflecting actual export transactions were never reported to
23 CDFA.”

25 252. Supervisor [REDACTED]’s declaration further asserts, “At the direction of Richard
26 Lewis and Jean McAbee, DairyAmerica only reported the export sales figures contained in the
27 Navision database to NASS. As a result, during the period 2001 through at least 2008,
28 DairyAmerica only reported fabricated, artificially-lower export sales figures to NASS. During that

1 time period, the accurate export sales figures reflecting actual export transactions were never
2 reported to NASS.”

3 253. Supervisor [REDACTED]’s declaration also states, “At the direction of Richard Lewis
4 and Jean McAbee, DairyAmerica only included the export sales figures contained in the Navision
5 database when submitting applications for subsidies to DEIP. As a result, during the period 2001
6 through at least 2008, DairyAmerica only submitted fabricated, artificially-lower export sales
7 figures when submitting applications to DEIP. During that time period, the accurate export sales
8 figures reflecting actual export transactions were never included in applications to DEIP.”

9
10 254. Supervisor [REDACTED] believes she was terminated because of her knowledge of
11 the fraud described in her declaration. Indeed, her declaration states, “In 2009, approximately six
12 months after the filing of the above-captioned lawsuit, I was terminated from my employment at
13 DairyAmerica. My termination was surprising to me, as I had consistently received very positive
14 reviews for my work. For example, in the most recent review immediately prior to my termination,
15 I received a review score of 56 out of 60 – an excellent figure. I believe that I and several of my
16 employees were terminated from our employment at DairyAmerica so that the company could
17 conceal knowledge of its fraudulent activities. I believe concealing such information was important
18 to DairyAmerica after the USDA launched an investigation into DairyAmerica’s misreporting and
19 after the filing of the above-captioned lawsuit.”

20
21 255. Plaintiffs served a subpoena on Supervisor [REDACTED] to obtain accounting
22 documents from her, including excerpts of the export documentation database described in her
23 declaration. [REDACTED]

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[REDACTED]

[REDACTED]

D. [REDACTED]

256. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

257. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

258. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

259. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. [REDACTED]

260. [REDACTED]

[REDACTED]

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261. [REDACTED]

262. [REDACTED]

F. Defendants and Co-Conspirators Conspired to Misreport Artificially-Discounted Figures

263. Defendants and Co-Conspirators conspired to intentionally report artificially-discounted export sales figures in DairyAmerica’s weekly reports to USDA and CDFA, in defiance of clear instructions from both agencies.

264. First, Member Defendants and Co-Conspirators knew which export sales figures were reported to the agencies. As Supervisor [REDACTED]’s declaration explains, Member Defendants and Co-Conspirators received invoices after each export sale of their product, and those invoices contained the artificially-discounted prices that were reported to government agencies.

265. Second, Member Defendants and Co-Conspirators knew that those reported figures were artificially depressed, as the member cooperatives were fully aware that higher sales prices were paid by foreign customers. [REDACTED]

[REDACTED] Thus Member

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Defendants and Co-Conspirators were fully informed of the prices at which their NFDM and SMP were sold in the export market.

266. [REDACTED]

[REDACTED]

[REDACTED]

267. [REDACTED]

[REDACTED]

[REDACTED]

268. [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

269. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

270. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

G. [REDACTED]

271. [REDACTED]

[REDACTED]

272. [REDACTED]

[REDACTED]

273. [REDACTED]

[REDACTED]

274. [REDACTED]

[REDACTED]

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275. [REDACTED]

[REDACTED]

[REDACTED]

276. [REDACTED]

[REDACTED]

H. Defendants and Co-Conspirators Had No Reasonable Basis for Their Misrepresentations

277. In the alternative, Plaintiffs allege that DairyAmerica and Co-Conspirators negligently reported improperly-discounted export sales figures to USDA and CDFA in contravention of clear instructions.

278. During the Class Period, DairyAmerica and its member cooperatives had no reasonable grounds for believing that the instructions from USDA and CDFA permitted the reporting of artificially-discounted NFDM sales figures. During the Class Period, there was no reasonable ground for believing that DairyAmerica was complying with the reporting instructions from USDA or CDFA when it made deductions from total sales figures that were not permitted by

1 those instructions.

2 279. During the Class Period, when DairyAmerica completed and submitted weekly
3 reports to NASS and CDFA, Defendants and Co-Conspirators had no reasonable grounds for
4 believing that DairyAmerica had complied with those agencies' instructions to accurately report
5 export sales of NFDm.

6 **FIFTH TYPE OF MISREPORTING:**
7 **IMPROPER DEDUCTION OF COMMISSIONS**

8 A. USDA Rules Require the Reporting of Commissions and Broker Fees

9 280. During the Class Period, USDA did not permit the deduction of commissions and
10 broker fees from weekly reports. Unlike CDFA's reporting form, USDA's reporting form does not
11 list commissions or broker fees as an excludable charge. A 2007 document prepared by USDA
12 specifically states that broker fees should be included in weekly reports to USDA.
13

14 B. DairyAmerica Charged Commissions to Customers

15 281. [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 282. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
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C. [REDACTED]

283. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

284. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

285. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. [REDACTED]

286. During the Class Period, Defendants and Co-Conspirators consented to the improper deduction of commissions and broker fees from the sales figures that DairyAmerica reported each week to USDA.

287. [REDACTED]

[REDACTED]

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[REDACTED]

E. Defendants and Co-Conspirators Had No Reasonable Basis for Their Misrepresentations

288. In the alternative, Plaintiffs allege that Defendants and Co-Conspirators negligently deducted commissions and broker fees from weekly reports to USDA in contravention of clear instructions.

289. During the Class Period, Defendants and Co-Conspirators had no reasonable grounds for believing that the instructions from USDA permitted the deduction of commissions and broker fees from weekly reports to the agency.

290. During the Class Period, when DairyAmerica completed and submitted weekly reports to USDA, Defendants and Co-Conspirators had no reasonable grounds for believing that DairyAmerica was complying with the reporting instructions when it deducted commissions and broker fees.

**MISREPRESENTATIONS WERE INTENDED TO
LOWER PAYMENTS TO FARMERS**

A. Defendants and Co-Conspirators Intended for their Misrepresentations to be Transmitted to Dairy Farmers in the Form of Lower Milk Prices

291. At the direction of Member Defendants and Co-Conspirators, DairyAmerica fraudulently misreported NFDM sales during the Class Period by (1) including forward pricing sales in reports to USDA; (2) reporting sales of SMP to USDA and CDFA; (3) delaying the reporting of sales prices to USDA and CDFA; (4) reporting artificially-discounted export prices to USDA and CDFA; and (5) deducting commissions and brokers fees from reports to USDA. Each of these five forms of fraud was intended to, and did, depress raw milk prices that were received

1 by dairy farmers.

2 292. The dairy product prices misreported by DairyAmerica to USDA and CDFA were
3 intended to guide dairy farmers in their business transactions. The misreported prices were key
4 components of the USDA and CDFA formulas that determined the price of raw milk for tens of
5 thousands of dairy farmers across the country.

6 293. Defendants and Co-Conspirators conspired to misreport and misreported NFDM
7 prices to USDA and CDFA with the full knowledge and intent that those agencies would, in turn,
8 incorporate those misrepresentations in published raw milk prices relied upon by Plaintiffs.
9 Defendants and Co-Conspirators knew that the NFDM prices reported by DairyAmerica to USDA
10 and CDFA were intended to be, and would be, used in USDA and CDFA formulas to set the prices
11 that were paid to members of the Class and Subclasses for the purchase of raw milk.
12

13 294. The sole purpose of collecting NFDM pricing data from DairyAmerica was for
14 USDA and CDFA to calculate and set raw milk prices paid to farmers. In comments submitted to
15 USDA on September 4, 2007, DairyAmerica wrote, “The issue of what contracts will be reportable
16 to NASS is not academic. Prices reported to NASS are used by AMS to establish and announce
17 minimum prices paid by handlers pursuant to 7 C.F.R. §§ 1000.50 and 1000.53. There is a direct
18 relationship between the NASS prices reported and the prices announced by AMS for regulated
19 minimum price purposes.”
20

21 295. Defendants and Co-Conspirators exploited this direct relationship to protect and
22 maximize their profits by improperly reporting ineligible and artificially-discounted NFDM sales.
23 Defendants and Co-Conspirators intended for DairyAmerica’s misreporting of NFDM data to
24 reduce compensation to members of the Class and Subclasses by incorporation of those
25 misrepresentations into USDA and CDFA formulas that established prices at which members of
26 the Class and Subclasses would sell their raw milk. Defendants and Co-Conspirators made the
27 misrepresentations for the specific purpose of depressing raw milk prices on which Plaintiffs relied.
28

1 296. When introducing the Dairy Market Enhancement Act of 2000, which makes the
2 reporting of dairy product prices to NASS mandatory, Congressman Ron Kind said: “This
3 legislation will foster a more accurate price and inventory reporting system for dairy products and
4 enable farmers to base business decisions on the most accurate information.”

5 B. Defendants and Co-Conspirators Intended for their Misrepresentations to Reduce
6 Payments to Dairy Farmers

7 297. During the Class Period, Defendants and Co-Conspirators understood that lower raw
8 milk prices calculated by USDA and CDFA would injure all dairy farmers who sold raw milk that
9 was priced by FMMOs or CDFA, even if such prices served the interests of cooperative-owned
10 processing plants.

11 298. [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
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24 299. [REDACTED]
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[REDACTED]

300. [REDACTED]

[REDACTED]

301. [REDACTED]

[REDACTED]

302. [REDACTED]

[REDACTED]

IMPACT OF MISREPORTING ON DEFENDANTS AND CO-CONSPIRATORS

303. As a result of misreporting NFDM sales figures, Defendants and Co-Conspirators benefitted financially and maximized their profits. By improperly reporting ineligible and artificially-discounted NFDM sales prices, Defendants and Co-Conspirators (1) substantially reduced their cost of manufacturing NFDM and other dairy products; (2) sold powder products at prices above NASS and CWAP rates; (3) shielded their processing plants from rising raw milk costs during the pendency of forwarding pricing contracts; and (4) prevented NFDM and SMP prices from rising to a level that would decrease customer demand. In sum, by misreporting NFDM

1 sales in weekly reports to USDA and CDFA, Defendants and Co-Conspirators leveraged their
2 dominant market share to depress raw milk prices and maximize their profits from the sale of dairy
3 products.

4 304. During the Class Period, DairyAmerica collected one cent from every pound of
5 powder that it sold. By maximizing the profits of its members, DairyAmerica retained and expanded
6 its membership during the Class Period. Furthermore, by retaining and expanding its membership,
7 DairyAmerica retained and expanded the volume of powder that it sold and thus retained and
8 expanded the revenue that it derived from the one-cent per pound surcharge.
9

10 **HIDING FRAUD FROM AUDITORS**

11 305. Each month during the Class Period, CDFA sent auditors to the offices of
12 DairyAmerica to ensure that it was reporting accurately and complying with the agency's
13 instructions for completing the weekly survey. To prevent those auditors from discovering its
14 fraudulent reporting, DairyAmerica intentionally and systematically concealed documents
15 reflecting actual sales transactions from those auditors. Specifically, each month, before the
16 auditors arrived at DairyAmerica offices, Controller McAbee and Office Manager Smith gathered
17 invoices and other accounting documents reflecting actual sales prices, loaded them onto a truck
18 and drove them to an off-site storage facility. Additionally, CEO Lewis and Controller McAbee
19 concealed the electronic databases maintained by Supervisor [REDACTED] and other accounting
20 staff from the auditors; they also instructed senior accounting staff, including Supervisor
21 [REDACTED] and Credit Manager Bimemiller, not to speak to the auditors. As a result, CDFA
22 auditors were prevented from discovering the discrepancy between the export prices reported and
23 the export prices charged by DairyAmerica.
24
25

26 306. In her sworn declaration, Supervisor [REDACTED] described how DairyAmerica
27 engaged in a scheme to conceal actual export prices from government auditors. Supervisor
28 [REDACTED]s declaration states, "During the period 2001 through at least 2008, CDFA conducted

1 monthly audits of DairyAmerica. Each month, CDFA would send auditors to the offices of
2 DairyAmerica in Fresno, California. Part of the purpose of those audits was to ensure that
3 DairyAmerica was reporting accurate information to CDFA each week and that DairyAmerica was
4 complying with the CDFA's reporting instructions."

5 307. Supervisor [REDACTED]'s declaration further states, "Each month during the period
6 2001 through at least 2008, approximately one week before CDFA auditors arrived at
7 DairyAmerica's offices to conduct an audit, Jean McAbee and Annette Smith would gather boxes
8 of accounting documents, including the invoices and contracts reflecting accurate export prices,
9 and load them into a truck and drive them to an off-site storage facility. Each month, Jean McAbee
10 and Annette Smith transported the accounting documents containing accurate export sales prices to
11 an off-site storage facility so that CDFA auditors would not see or access those documents during
12 their audits. By doing so, Jean McAbee and Annette Smith prevented the CDFA auditors from
13 discovering the substantial discrepancy between the fabricated export sales prices reported to
14 CDFA and the actual sales prices charged to foreign customers."

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17 308. Supervisor [REDACTED]'s declaration further states, "Each month during the period
18 2001 through at least 2008, Richard Lewis and Jean McAbee prohibited CDFA auditors from
19 seeing or reviewing paper or electronic documents (including invoices and contracts) that contained
20 the accurate export prices. Instead, the auditors from the CDFA were only permitted to review data
21 from the Navision database and the invoices that were internally created at DairyAmerica, both of
22 which only contained the fabricated export prices."

23
24 309. Supervisor [REDACTED]'s declaration also notes, "During the period 2001 through
25 2009, Richard Lewis and Jean McAbee instructed me to refrain from speaking to any CDFA
26 auditors.

27 310. Credit Manager Bimemiller was also instructed not to communicate with CDFA
28 auditors. Her declaration states, "Each month while I was employed at DairyAmerica, auditors from

1 the CDFA would visit DairyAmerica to ensure that the company was complying with the agency's
2 reporting instructions. I was directed by Richard Lewis, Jean McAbee and Annette Smith to not
3 speak with the CDFA's auditors and, if questioned by an auditor, to merely state that DairyAmerica
4 was complying with the reporting instructions. I was also instructed to not make any comments
5 regarding DairyAmerica's practices to Deloitte & Touche LLP, which audited DairyAmerica each
6 year."

7
8 311. In her declaration, Supervisor [REDACTED] also describes a scheme by DairyAmerica
9 to deceive auditors from the Mexican government. The declaration states, "During the time I was
10 employed at DairyAmerica, the government of Mexico purchased substantial quantities of NFDM
11 from DairyAmerica. In 2003, the government of Mexico insisted that an audit be conducted of
12 DairyAmerica's export sales. In anticipation of the arrival of auditors from the Mexican
13 government, Richard Lewis instructed me to reconcile the two sets of figures contained in the
14 export documentation database that I operated: the fabricated export sales figures and the accurate
15 export sales figure. Specifically, Richard Lewis instructed me to account for the discrepancy
16 between the fabricated export sales figures and the accurate export sales figures by inventing and
17 adding a non-existent 'administrative fee' to each export sale listed in the database. Richard Lewis
18 told me that I 'had to make the paperwork match.' As a result, in the export documentation database,
19 I added a fake 'administrative fee' to each export transaction, so that each fabricated export sales
20 figure plus the fake "administrative fee" would equal the value of the accurate export sales figure.
21 (Notably, this fake 'administrative fee' was invented and entirely unrelated to the one cent that
22 DairyAmerica retained from each pound of NFDM sold.) Richard Lewis subsequently presented
23 the modified documentation from the export database to the Mexican auditors and persuaded them
24 that the discrepancy between the price charged to the Mexican government and the price reported
25 to the USDA stemmed from an administrative fee – even though no such fee actually existed."

26
27
28 312. DairyAmerica deceived domestic and foreign government agencies by concealing

1 key accounting documents from their official auditors. DairyAmerica did so in order to implement
2 multiple fraudulent reporting schemes without getting caught.

3 313. By concealing documents from auditors, DairyAmerica not only protected itself
4 from regulatory scrutiny, but also shielded its member cooperatives, which had directed
5 DairyAmerica to engage in the fraudulent misreporting. DairyAmerica acted as an agent of those
6 member cooperatives when it concealed documents from government auditors.

7
8 **DEFENDANTS' AND CO-CONSPIRATORS' FRAUDULENT TRANSFER**

9 314. Defendants and Co-Conspirators have already transferred funds, and are planning
10 to fraudulently transfer additional funds, outside of their normal course of business to avoid paying
11 any judgment obtained by Plaintiffs in this case.

12 315. Member cooperatives provided the sole funds for the creation and operation of
13 DairyAmerica. The Articles of Incorporation of DairyAmerica calculates the property rights and
14 interests of its members according to the proportional value of the unrefunded capital contributions
15 they made to DairyAmerica. The Articles of Incorporation further provides that in the event of the
16 dissolution of DairyAmerica, the residual funds shall be distributed to its owners according to their
17 respective shares of property rights and interests.

18
19 316. Soon after the filing of this lawsuit, multiple cooperatives terminated their
20 membership in DairyAmerica. In March 2009, just six days after Plaintiffs filed their first
21 complaint, the largest member of DairyAmerica – Defendant Dairy Farmers of America –
22 submitted its notice of resignation from the organization. In fact, within nine months of the
23 complaint's filing, a total of five of the nine cooperative members of DairyAmerica, including
24 Defendant Land O'Lakes, had terminated their memberships. Notably, when those cooperative
25 members exited DairyAmerica, they were refunded all of their capital contributions to the
26 organization. As members of DairyAmerica, each of those five entities would have paid part of any
27 judgment in this case.
28

1 317. [REDACTED]

2 [REDACTED] According
3 to Sales Director White, the filing of this lawsuit was one of the reasons that at least three
4 cooperatives – Dairy Farmers of America, Maryland & Virginia, and Lone Star – terminated their
5 memberships in DairyAmerica. Sales Director White specifically recalls “statements by several
6 executives from member cooperatives that exited DairyAmerica, including Maryland & Virginia
7 Milk Producers Cooperative Association, Inc. and Lone Star Milk Producers, in which they stated
8 that they were exiting DairyAmerica in part to avoid liability or paying damages in this case. These
9 statements were made at board meetings of DairyAmerica.”
10

11 318. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 319. Despite a duty and capacity of DairyAmerica to retain and allocate resources for the
19 purpose of satisfying a judgment in this case, the remaining four members of DairyAmerica,
20 including Defendant California Dairies, intend to terminate their memberships and thus divest
21 DairyAmerica of all assets in the event Plaintiffs make further progress prosecuting their claims.
22 Those four members of DairyAmerica have repeatedly communicated, through DairyAmerica’s
23 counsel, that they will terminate their memberships for the sole purpose of divesting DairyAmerica
24 of assets to satisfy a judgment in this case, if Plaintiffs make significant progress prosecuting their
25 claims.
26

27 320. The bylaws of DairyAmerica provide the Board of Directors with the discretion to
28 establish three different funds: Revolving Capital Fund, Fixed Capital Fund, and Working Capital

1 Revolving Fund. The bylaws of DairyAmerica state that losses, debts or liabilities can be paid from
2 a Revolving Capital Fund, Fixed Capital Fund, and/or Working Capital Revolving Fund.

3 321. On June 20, 2014, Plaintiffs wrote defense counsel to request that DairyAmerica
4 agree to either 1) create a litigation fund from their capital sufficient to cover the amount of its
5 likely liability in this litigation or 2) refrain from returning to any departing member of
6 DairyAmerica all capital contributions that would otherwise be returnable to such departing
7 member. DairyAmerica rejected both options, thus preserving its capacity to “judgment proof”
8 itself by working with California Dairies and Co-Conspirators to funnel assets out of the
9 organization and avoid an anticipated judgment in this action.
10

11 322. [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 **CONCEALMENT AND TOLLING**

21 323. Throughout the Class Period, Defendants and Co-Conspirators affirmatively
22 concealed from Plaintiffs and Class members the misrepresentations alleged herein and the identity
23 of the entities that made such misrepresentations.
24

25 324. DairyAmerica misrepresented NFDM prices in confidential reports to USDA and
26 CDFA that were concealed from public review, and Defendants and Co-Conspirators concealed the
27 contents of those reports throughout the Class Period.
28

325. Defendants fraudulently concealed its misrepresentations of NFDM sales from

1 CDFA by systematically hiding critical accounting documents and electronic databases from the
2 agency's monthly auditors. Each and every month, before CDFA auditors visited DairyAmerica's
3 offices to ensure compliance with the agency's reporting instructions, the company's Controller
4 and Office Manager transferred invoices and other key accounting documents that contained
5 accurate sales prices to an off-site storage facility. Supervisor [REDACTED] explained that by
6 transporting key accounting documents to an off-site storage facility, "Jean McAbee and Annette
7 Smith prevented the CDFA auditors from discovering the substantial discrepancy between the
8 fabricated export sales prices reported to CDFA and the actual sales prices charged to foreign
9 customers." CDFA auditors were also denied access to electronic databases reflecting actual sales
10 prices, and senior accounting staff with knowledge of fraudulent schemes, including Supervisor
11 [REDACTED] and Credit Manager Bimemiller, was expressly prohibited from communicating with
12 CDFA auditors or the private accounting firm that audited DairyAmerica's books.
13

14 326. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 327. In March 2007, *The Milkweed* published a story alleging that DairyAmerica had
23 improperly included forward pricing sales in weekly reports to USDA. The publication of the article
24 was the first time that allegations of DairyAmerica's misreporting of forward pricing sales were
25 made public. [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 328. The publication of *The Milkweed* article triggered a USDA investigation of
2 DairyAmerica’s reporting practices. During that investigation, USDA requested that DairyAmerica
3 provide revisions of sales data reported during the Class Period in accordance with the NASS
4 reporting instructions. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 329. Other than the misreporting of forward pricing sales to USDA, there have been no
12 public disclosures of any of DairyAmerica’s misreporting. There are no references in any public
13 document, publication or government report to DairyAmerica misreporting data to CDFA or
14 directly causing injury to farmers in California by misreporting. No public document, publication
15 or government report suggests that DairyAmerica reported artificially-discounted sales figures, or
16 improperly reported sales of SMP, or delayed the reporting of sales figures. Indeed, *The Milkweed*
17 article and subsequent USDA investigation only addressed DairyAmerica’s improper reporting of
18 forward pricing sales to USDA at the expense of farmers outside of California; they never addressed
19 the possibility that DairyAmerica was also engaging in four additional misreporting schemes, or
20 that three of those misreporting schemes targeted a California agency at the expense of California
21 farmers. On the contrary, USDA’s investigative report noted that CDFA (unlike USDA) required
22 DairyAmerica to include forward pricing sales in weekly reports to CDFA and, therefore,
23 DairyAmerica made no misrepresentations to CDFA when it did so.

24
25
26 330. During the course of the litigation of this case, DairyAmerica has concealed
27 evidence that would have allowed Plaintiffs to discover much of the alleged misconduct earlier.

28 When DairyAmerica provided Court-ordered Rule 26 disclosures of individuals “likely to have
[1:09 CV 00430-AWI (EPG)] [PROPOSED] FOURTH AMENDED CONSOLIDATED CLASS ACTION
COMPLAINT

1 discoverable information relevant to the subject matter of this litigation” in April 2013,

2 [REDACTED]
3 [REDACTED] When Plaintiffs inquired as to whether DairyAmerica’s counsel
4 represented Sales Director White, DairyAmerica answered affirmatively on three separate
5 occasions, even though he had refused to retain DairyAmerica’s counsel. Those misrepresentations
6 substantially delayed Plaintiffs’ ability to contact Sales Director White directly and obtain
7 unvarnished evidence from him. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 331. Member Defendants and Co-Conspirators concealed, and continue to conceal, the
16 fact that they made and participated in misrepresentations to USDA and CDFA, claiming they were
17 unaware of the misrepresentations of forward pricing sales until publication of *The Milkweed*
18 article. [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 332. Defendants and Co-Conspirators concealed, and continue to conceal, the fact that
22 they intended to depress raw milk prices through their misrepresentations to USDA and CDFA. To
23 this day, Defendants and Co-Conspirators have attempted to convey the false impression that any
24 misreporting was an innocent mistake and that their interests were solely to increase the price of
25 raw milk for dairy farmers.
26

27 333. As a result of Defendants’ and Co-Conspirators’ fraudulent concealment, any
28 applicable statute of limitations affecting the rights of Plaintiffs and Class members has been tolled.

1 Plaintiffs exercised due diligence to learn of their legal rights and, despite the exercise of due
2 diligence, did not discover and could not have discovered the unlawful conduct alleged herein at
3 the time it occurred.

4 334. Specifically with respect to Plaintiffs' claim of negligent misrepresentation against
5 DairyAmerica for misreporting forward pricing sales to USDA, Plaintiffs did not have an actionable
6 claim until USDA issued a report on June 28, 2007 and rejected FMMO prices that it previously
7 published. Prior to USDA's rejection of FMMO prices on June 28, 2007, any complaint filed by
8 Plaintiffs would have been dismissed on the basis of the filed rate doctrine. As the Ninth Circuit
9 made clear when ruling on Plaintiffs' appeal in this case, Plaintiffs' claims could not have
10 proceeded in the absence of USDA's rejection of FMMO prices. Accordingly, the statute of
11 limitations for causes of action stemming from the negligent misreporting of forward pricing sales
12 was tolled until June 28, 2007.

13
14 335. Specifically with respect to Plaintiffs' claims of intentional misrepresentation and
15 conspiracy to violate RICO against DairyAmerica and/or California Dairies for misreporting
16 forward pricing sales to USDA, Plaintiffs did not have an actionable claim until May 2015, when
17 Plaintiffs were first permitted to speak with Sales Director White. Prior to May 2015, Plaintiffs did
18 not have access to, and could not have accessed, evidence that provides the factual basis for claims
19 of intentional misrepresentation and conspiracy to violate RICO stemming from the misreporting
20 of forward pricing sales. Accordingly, the statute of limitations for causes of action stemming from
21 the intentional misreporting of forward pricing sales was tolled until May 2015.

22
23 336. Specifically with respect to Plaintiffs' claims stemming from DairyAmerica
24 delaying the reporting of sales figures to USDA and CDFR, Plaintiffs did not have an actionable
25 claim until August 2016, when Plaintiffs first learned of the misconduct from Credit Manager
26 Bimemiller. No public or otherwise reasonably discoverable information was available prior to
27 August 2016 regarding allegations that DairyAmerica delayed the reporting of sales figures to
28

1 USDA and CDFA. [REDACTED]

2 [REDACTED]

3 [REDACTED] Accordingly, until August 2016, the statute of limitations was tolled for all causes
4 of action – including negligent misrepresentation, intentional misrepresentation and conspiracy to
5 violate RICO – stemming from DairyAmerica delaying the reporting of sales figures to USDA and
6 CDFA.

7

8 337. Specifically with respect to Plaintiffs’ claims stemming from DairyAmerica
9 reporting artificially-discounted export sales figures to USDA and CDFA, Plaintiffs did not have
10 an actionable claim until August 2016, when Plaintiffs first learned of the misconduct from
11 Supervisor [REDACTED]. No public or otherwise reasonably discoverable information was
12 available prior to August 2016 regarding allegations that DairyAmerica reported artificially-
13 discounted export sales figures. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED] Accordingly, until August 2016, the statute of limitations was tolled for all causes
17 of action – including negligent misrepresentation, intentional misrepresentation and conspiracy to
18 violate RICO – stemming from DairyAmerica reporting artificially-discounted export sales figures
19 to USDA and CDFA.

20 338. Specifically with respect to Plaintiffs’ claims stemming from DairyAmerica
21 reporting SMP sales figures and improperly deducting commissions from reported sales, Plaintiffs
22 did not have an actionable claim until October 2016, when Plaintiffs first learned of the misconduct
23 by obtaining and reviewing documents from Supervisor [REDACTED] via subpoena. No public or
24 otherwise reasonably discoverable information was available prior to October 2016 regarding
25 allegations that DairyAmerica reported SMP sales figures or improperly deducted commissions
26 from reported sales. Accordingly, until October 2016, the statute of limitations was tolled for all
27 causes of action – including negligent misrepresentation, intentional misrepresentation and
28

1 conspiracy to violate RICO – stemming from DairyAmerica reporting SMP sales figures and
2 improperly deducting commissions from reported sales.

3 **FIRST CAUSE OF ACTION**

4 **(Negligent Misrepresentation as to Defendants DairyAmerica and California Dairies**
5 **for Misrepresentations to USDA)**

6 339. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth
7 herein.

8 340. At all relevant times, DairyAmerica reported to NASS the price and volume of
9 NFDM sold in weekly questionnaires. NASS provided explicit instructions for reporting such
10 information. The instructions required DairyAmerica to (1) exclude forward pricing sales; (2)
11 exclude sales of SMP; (3) report sales for the week in which those sales were transacted; (4) report
12 NFDM sales prices accurately; and (5) include commissions and broker fees.

13 341. During the Class Period, Defendants and Co-Conspirators negligently and in
14 violation of the NASS instructions (1) reported data from forward pricing sales in DairyAmerica's
15 weekly reports to NASS; (2) reported sales of SMP in DairyAmerica's weekly reports to NASS;
16 (3) delayed the reporting of select sales prices in DairyAmerica's weekly reports to NASS; (4)
17 reported artificially-discounted export prices in DairyAmerica's weekly reports to NASS; and (5)
18 deducted commissions and brokers fees from DairyAmerica's weekly reports to NASS.

19 342. During the Class Period, Defendants and Co-Conspirators conspired to instruct and
20 instructed DairyAmerica to (1) include forward pricing sales in weekly reports to NASS; (2) report
21 sales of SMP in weekly reports to NASS; (3) delay the reporting of select sales prices to NASS; (4)
22 report artificially-discounted export prices in weekly reports to NASS; and (5) deduct commissions
23 and brokers fees from weekly reports to NASS.

24 343. Defendants and Co-Conspirators failed to exercise reasonable care when
25 DairyAmerica (1) reported forward pricing sales in weekly reports to NASS; (2) reported sales of
26
27
28

1 SMP in weekly reports to NASS; (3) delayed the reporting of select sales prices to NASS; (4)
2 reported artificially-discounted export prices in weekly reports to NASS; and (5) deducted
3 commissions and brokers fees from weekly reports to NASS. Defendants and Co-Conspirators had
4 no reasonable ground for believing that they or DairyAmerica were complying with the NASS
5 reporting instructions to (1) exclude forward pricing sales; (2) exclude sales of SMP; (3) report
6 sales for the week in which those sales were transacted; (4) report NFDM sales price accurately;
7 and (5) include commissions and broker fees.
8

9 344. Defendants and Co-Conspirators intended and knew that the NFDM prices that
10 DairyAmerica reported to NASS would be used in FMMO formulas to set the prices that were paid
11 to USDA Subclass members for the purchase of raw milk. Indeed, the sole purpose of USDA
12 collecting NFDM pricing data from DairyAmerica was for USDA to calculate and set raw milk
13 prices paid to farmers.
14

15 345. The NFDM prices improperly reported by Defendants and Co-Conspirators had the
16 direct effect of lowering the raw milk prices calculated by USDA using FMMO formulas.
17

18 346. Members of the USDA Subclass justifiably and reasonably relied to their detriment
19 on the prices set by USDA under the FMMOs as being accurate prices calculated based on the
20 correct reporting of prices and volumes to NASS. Such reliance was foreseeable and intended by
21 Defendants and Co-Conspirators.
22

23 347. As a direct and proximate result of Defendants' and Co-Conspirators' negligent
24 conduct and statements, USDA Subclass members have suffered and are entitled to compensatory
25 and consequential damages, in an amount to be proven at trial.
26

27 **SECOND CAUSE OF ACTION**

28 **(Negligent Misrepresentation as to Defendants DairyAmerica, California Dairies, Land O'Lakes and Dairy Farmers of America for Misrepresentations to CDFA)**

348. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth

1 herein.

2 349. At all relevant times, DairyAmerica reported to CDFA the price and volume of
3 NFDM sold in weekly questionnaires. CDFA provided explicit instructions for reporting such
4 information. The instructions required DairyAmerica to (1) exclude sales of SMP; (2) report sales
5 for the week in which those sales were transacted; and (3) report NFDM sales price accurately.

6 350. During the Class Period, Defendants and Co-Conspirators negligently and in
7 violation of CDFA's instructions (1) reported sales of SMP in DairyAmerica's weekly reports to
8 CDFA; (2) delayed the reporting of select sales prices in DairyAmerica's weekly reports to CDFA;
9 and (3) reported artificially-discounted export prices in DairyAmerica's weekly reports to CDFA.

10 351. During the Class Period, Defendants and Co-Conspirators conspired to instruct and
11 instructed DairyAmerica to (1) report sales of SMP in weekly reports to CDFA; (2) delay the
12 reporting of select sales prices in weekly reports to CDFA; and (3) report artificially-discounted
13 export prices in weekly reports to CDFA.

14 352. Defendants and Co-Conspirators failed to exercise reasonable care when
15 DairyAmerica (1) reported sales of SMP in weekly reports to CDFA; (2) delayed the reporting of
16 select sales prices in weekly reports to CDFA; and (3) reported artificially-discounted export prices
17 in weekly reports to CDFA. Defendants and Co-Conspirators had no reasonable ground for
18 believing that they or DairyAmerica were complying with CDFA's reporting instructions to (1)
19 exclude sales of SMP; (2) report sales for the week in which those sales were transacted; and (3)
20 report NFDM sales price accurately.

21 353. Defendants and Co-Conspirators intended for and knew that the NFDM prices that
22 DairyAmerica reported to CDFA would be used in formulas to set the prices that were paid to
23 CDFA Subclass members for the purchase of raw milk. Indeed, the sole purpose of CDFA
24 collecting NFDM pricing data from DairyAmerica was for CDFA to calculate and set raw milk
25 prices paid to farmers.

1 354. The NFDM prices improperly reported by Defendants and Co-Conspirators had the
2 direct effect of lowering the monthly raw milk prices calculated by CDFA.

3 355. Members of the CDFA Subclass justifiably and reasonably relied to their detriment
4 on the prices set by CDFA as being accurate prices calculated based on the correct reporting of
5 prices and volumes to CDFA. Such reliance was foreseeable and intended by Defendants and Co-
6 Conspirators.

7
8 356. As a direct and proximate result of Defendants' and Co-Conspirators' negligent
9 conduct and statements, CDFA Subclass members have suffered and are entitled to compensatory
10 and consequential damages, in an amount to be proven at trial.

11 **THIRD CAUSE OF ACTION**

12 **(Intentional Misrepresentation as to Defendants DairyAmerica and California Dairies**
13 **for Misrepresentations to USDA)**

14 357. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth
15 herein.

16 358. At all relevant times, DairyAmerica reported to NASS the price and volume of
17 NFDM sold in weekly questionnaires. NASS provided explicit instructions for reporting such
18 information. The instructions required DairyAmerica to (1) exclude forward pricing sales; (2)
19 exclude sales of SMP; (3) report sales for the week in which those sales were transacted; (4) report
20 NFDM sales prices accurately; and (5) include commissions and broker fees.

21
22 359. During the Class Period, Defendants and Co-Conspirators intentionally and in
23 deliberate defiance of the NASS instructions (1) reported forward pricing sales in DairyAmerica's
24 weekly reports to NASS; (2) reported sales of SMP in DairyAmerica's weekly reports to NASS;
25 (3) delayed the reporting of select sales prices in DairyAmerica's weekly reports to NASS; (4)
26 reported artificially-discounted export prices in DairyAmerica's weekly reports to NASS; and (5)
27 deducted commissions and brokers fees from DairyAmerica's weekly repots to NASS.
28

1 360. During the Class Period, in deliberate defiance of the NASS instructions,
2 Defendants and Co-Conspirators conspired to instruct and instructed DairyAmerica to (1) include
3 forward pricing sales in weekly reports to NASS; (2) report sales of SMP in weekly reports to
4 NASS; (3) delay the reporting of select sales prices in weekly reports to NASS; (4) report
5 artificially-discounted export prices in weekly reports to NASS; and (5) deduct commissions and
6 brokers fees from weekly reports to NASS.

7
8 361. Defendants and Co-Conspirators knew they were defying explicit reporting
9 instructions from NASS when they conspired to instruct and instructed DairyAmerica to (1) include
10 forward pricing sales in weekly reports to NASS; (2) report sales of SMP in weekly reports to
11 NASS; (3) delay the reporting of select sales prices in weekly reports to NASS; (4) report
12 artificially-discounted export prices in weekly reports to NASS; and (5) deduct commissions and
13 brokers fees from weekly reports to NASS.

14
15 362. Defendants and Co-Conspirators knew that DairyAmerica was defying explicit
16 reporting instructions from NASS when DairyAmerica (1) included forward pricing sales in weekly
17 reports to NASS; (2) reported sales of SMP in weekly reports to NASS; (3) delayed the reporting
18 of select sales prices in weekly reports to NASS; (4) reported artificially-discounted export prices
19 in weekly reports to NASS; and (5) deducted commissions and brokers fees from weekly reports
20 to NASS.

21
22 363. Defendants and Co-Conspirators were each aware of the falsity of the
23 misrepresentations when they conspired to instruct and instructed DairyAmerica to (1) include
24 forward pricing sales in weekly reports to NASS; (2) report sales of SMP in weekly reports to
25 NASS; (3) delay the reporting of select sales prices in weekly reports to NASS; (4) report
26 artificially-discounted export prices in weekly reports to NASS; and (5) deduct commissions and
27 brokers fees from weekly reports to NASS.

28 364. Defendants and Co-Conspirators knew that, and intended that, the prices that

1 DairyAmerica reported to NASS would be used in FMMO formulas to set the prices that were paid
2 to USDA Subclass members for the purchase of raw milk. Defendants and Co-Conspirators knew
3 that, and intended that, the prices paid to USDA Subclass members for the purchase of raw milk
4 would be artificially depressed when Defendants and Co-Conspirators conspired to instruct and
5 instructed DairyAmerica to (1) include forward pricing sales in weekly reports to NASS; (2) report
6 sales of SMP in weekly reports to NASS; (3) delay the reporting of select sales prices in weekly
7 reports to NASS; (4) report artificially-discounted export prices in weekly reports to NASS; and
8 (5) deduct commissions and brokers fees from weekly reports to NASS.
9

10 365. Defendants and Co-Conspirators intentionally misreported NFDM sales in weekly
11 reports to NASS for the purposes of lowering the raw milk prices paid to USDA Subclass members
12 and protecting the profits of Defendants and Co-Conspirators. Defendants and Co-Conspirators
13 intended to cause financial loss to USDA Subclass members and to obtain financial gain for
14 themselves when they conspired to instruct and instructed DairyAmerica to (1) include forward
15 pricing sales in weekly reports to NASS; (2) report sales of SMP in weekly reports to NASS; (3)
16 delay the reporting of select sales prices in weekly reports to NASS; (4) report artificially-
17 discounted export prices in weekly reports to NASS; and (5) deduct commissions and brokers fees
18 from weekly reports to NASS.
19

20 366. The NFDM prices improperly reported by Defendants and Co-Conspirators had the
21 direct effect of lowering the raw milk prices calculated by USDA using FMMO formulas.
22

23 367. Members of the USDA Subclass justifiably and reasonably relied to their detriment
24 on the prices set by USDA under the FMMOs as being accurate prices calculated based on the
25 correct reporting of prices and volumes to NASS. Such reliance was foreseeable and intended by
26 Defendants and Co-Conspirators.

27 368. As a direct and proximate result of Defendants' and Co-Conspirators' intentional
28 conduct and statements, USDA Subclass members have suffered and are entitled to compensatory,

1 consequential, and punitive damages, in an amount to be proven at trial.

2 **FOURTH CAUSE OF ACTION**

3 **(Intentional Misrepresentation as to Defendants DairyAmerica, California Dairies, Land**
4 **O'Lakes and Dairy Farmers of America for Misrepresentations to CDFA)**

5 369. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth
6 herein.

7 370. At all relevant times, DairyAmerica reported to CDFA the price and volume of
8 NFDM sold in weekly questionnaires. CDFA provided explicit instructions for reporting such
9 information. The instructions required DairyAmerica to (1) exclude sales of SMP; (2) report sales
10 for the week in which those sales were transacted; and (3) report NFDM sales price accurately.

11 371. During the Class Period, Defendants and Co-Conspirators intentionally and in
12 deliberate defiance of CDFA's instructions (1) reported sales of SMP in DairyAmerica's weekly
13 reports to CDFA; (2) delayed the reporting of select sales prices in DairyAmerica's weekly reports
14 to CDFA; and (3) reported artificially-discounted export prices in DairyAmerica's weekly reports
15 to CDFA.
16

17 372. During the Class Period, in deliberate defiance of CDFA's instructions, Defendants
18 and Co-Conspirators conspired to instruct and instructed DairyAmerica to (1) report sales of SMP
19 in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly reports to CDFA;
20 and (3) report artificially-discounted export prices in weekly reports to CDFA.

21 373. Defendants and Co-Conspirators knew they were defying explicit reporting
22 instructions from CDFA when they conspired to instruct and instructed DairyAmerica to (1) report
23 sales of SMP in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly
24 reports to CDFA; and (3) report artificially-discounted export prices in weekly reports to CDFA.
25

26 374. Defendants and Co-Conspirators knew that DairyAmerica was defying explicit
27 reporting instructions from CDFA when DairyAmerica (1) reported sales of SMP in weekly reports
28

1 to CDFA; (2) delayed the reporting of select sales prices in weekly reports to CDFA; and (3)
2 reported artificially-discounted export prices in weekly reports to CDFA.

3 375. Defendants and Co-Conspirators were each aware of the falsity of the
4 misrepresentations when they conspired to instruct and instructed DairyAmerica to (1) report sales
5 of SMP in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly reports
6 to CDFA; and (3) report artificially-discounted export prices in weekly reports to CDFA.

7
8 376. Defendants and Co-Conspirators knew that, and intended that, the prices that
9 DairyAmerica reported to CDFA would be used in CDFA formulas to set the prices that were paid
10 to CDFA Subclass members for the purchase of raw milk. Defendants and Co-Conspirators knew
11 that, and intended that, the prices paid to CDFA Subclass members for the purchase of raw milk
12 would be artificially depressed when Defendants and Co-Conspirators conspired to instruct and
13 instructed DairyAmerica to (1) report sales of SMP in weekly reports to CDFA; (2) delay the
14 reporting of select sales prices in weekly reports to CDFA; and (3) report artificially-discounted
15 export prices in weekly reports to CDFA.

16
17 377. Defendants and Co-Conspirators intentionally misreported NFDM sales in weekly
18 reports to CDFA for the purposes of lowering the raw milk prices paid to CDFA Subclass members
19 and protecting the profits of Defendants and Co-Conspirators. Defendants and Co-Conspirators
20 intended to cause financial loss to CDFA Subclass members and to obtain financial gain for
21 themselves when they conspired to instruct and instructed DairyAmerica to (1) report sales of SMP
22 in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly reports to CDFA;
23 and (3) report artificially-discounted export prices in weekly reports to CDFA.

24
25 378. The NFDM prices improperly reported by Defendants and Co-Conspirators had the
26 direct effect of lowering the raw milk prices calculated by CDFA.

27 379. Members of the CDFA Subclass justifiably and reasonably relied to their detriment
28 on the prices set by CDFA as being accurate prices calculated based on the correct reporting of

1 prices and volumes to CDFA. Such reliance was foreseeable and intended by Defendants and Co-
2 Conspirators.

3 380. As a direct and proximate result of Defendants' and Co-Conspirators' intentional
4 conduct and statements, CDFA Subclass members have suffered and are entitled to compensatory,
5 consequential, and punitive damages, in an amount to be proven at trial.

6 **FIFTH CAUSE OF ACTION**

7 **(Conspiracy to Violate RICO: Violation of 18 U.S.C. § 1962(d), as to California Dairies,**
8 **involving Misrepresentations to USDA)**

9 381. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth
10 herein.

11 382. At all relevant times, Member Defendants and Co-Conspirators each constituted a
12 "person" within the meaning of 18 U.S.C. § 1961(3), as each was capable of holding a legal or
13 beneficial interest in property.

14 383. At all relevant times, the corporation DairyAmerica constituted an "Enterprise"
15 within the meaning of 18 U.S.C. § 1961(4).

16 384. The Enterprise engaged in and affected interstate and foreign commerce during the
17 Class Period. Among other things, the Enterprise advertised, marketed, and sold NFDM throughout
18 the United States, and it transacted business through the use of the United States mails and interstate
19 telephone wires. The NFDM figures reported by the Enterprise established minimum monthly pay
20 prices for thousands of dairy farmers located around the country, and those figures also guided the
21 terms of domestic and global sales of NFDM.

22 385. Member Defendants and Co-Conspirators are each separate entities, distinct from
23 the Enterprise itself, which unlawfully used the Enterprise as a vehicle through which unlawful
24 activity was committed.

25 386. The common and shared purpose of the Enterprise was to artificially depress raw
26
27
28

1 milk prices regulated by USDA by knowingly and intentionally reporting sales figures to NASS
2 that were ineligible and artificially-discounted.

3 387. The Enterprise had an ongoing organization with a framework for making decisions,
4 functioned as a continuing unit, and had an ascertainable structure and system of authority guiding
5 its operations, separate and apart from the pattern of racketeering in which the Enterprise was
6 engaged.

7
8 388. During the Class Period, Member Defendants and Co-Conspirators each
9 participated in the operation and management of the Enterprise and perpetrated particular
10 racketeering acts in furtherance thereof. Member Defendants and Co-Conspirators participated in
11 the Enterprise through their control of DairyAmerica.

12 389. [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] Through their positions
17 on the Board of Directors, each Member Defendant and Co-Conspirator instructed DairyAmerica
18 to repeatedly misreport NFDM sales data to USDA, which constitutes a pattern of racketeering
19 activity. [REDACTED]
20 [REDACTED]
21 [REDACTED]

22
23 390. California Dairies is a member of DairyAmerica and, in conjunction with Dairy
24 Farmers of America, Land O'Lakes and Co-Conspirators, directed and controlled the activities of
25 DairyAmerica during the Class Period. California Dairies directly participated in the operation and
26 management of the Enterprise, including through the following senior employees and
27 representatives:

28 a) Keith Gomes served as Senior Vice-President and COO of California Dairies and also

- 1 served as President of DairyAmerica and as a member of DairyAmerica's Board;
- 2 b) Gary Korsmeier served as President and CEO of California Dairies and also served as
- 3 President of DairyAmerica and as a member of DairyAmerica's Board;
- 4 c) Richard Cotta served as President and CEO of California Dairies and also served as
- 5 President of DairyAmerica and as chairman of DairyAmerica's Board;
- 6 d) Joe Heffington served as Senior Vice-President and CFO of California Dairies and also
- 7 served on DairyAmerica's Board;
- 8 e) Jim Gomes served as Senior Vice President of Marketing for California Dairies and also
- 9 served on DairyAmerica's Board;
- 10 f) Dave Bush served as Senior Vice President of Operations for California Dairies;
- 11 g) Duane Matheron served as Treasurer of California Dairies and also served on
- 12 DairyAmerica's Board.
- 13
- 14

15 During the Class Period, senior executives of California Dairies attended Board Meetings of the

16 Enterprise and knowingly instructed the Enterprise to repeatedly misreport NFDm sales data to

17 USDA in defiance of the NASS instructions.

18 391. Dairy Farmers of America, Land O'Lakes and Co-Conspirators were also members

19 of DairyAmerica and, in conjunction with California Dairies, directed and controlled the activities

20 of DairyAmerica during the Class Period. Dairy Farmers of America, Land O'Lakes and Co-

21 Conspirators directly participated in the operation and management of the Enterprise. During the

22 Class Period, senior executives of Dairy Farmers of America, Land O'Lakes and Co-Conspirators

23 attended Board Meetings of the Enterprise and knowingly instructed the Enterprise to repeatedly

24 misreport NFDm sales data to USDA in defiance of the NASS instructions.

25

26 392. Beginning no later than January 1, 2002, Member Defendants and Co-Conspirators

27 each knowingly and intentionally conspired to violate 18 U.S.C. § 1962(c). The object of this

28 ongoing conspiracy was to conduct or participate in, directly or indirectly, the conduct of the affairs

1 of the Enterprise through a pattern of racketeering activity. The conspiracy executed a scheme to
2 defraud through a pattern of racketeering consisting of distinct predicate acts.

3 393. During the Class Period, Member Defendants and Co-Conspirators conspired to
4 direct and conduct the Enterprise to knowingly and intentionally transmit to NASS, by mail or wire,
5 fraudulent price information—*i.e.*, by knowingly (1) including forward pricing sales in weekly
6 reports to NASS; (2) reporting sales of SMP in weekly reports to NASS; (3) delaying the reporting
7 of sales prices in weekly reports to NASS; (4) reporting artificially-discounted export prices in
8 weekly reports to NASS; and (5) deducting commissions and brokers fees from weekly reports to
9 NASS. Member Defendants and Co-Conspirators conspired to direct and conduct the Enterprise to
10 knowingly and intentionally transmit to NASS, by mail or wire, fraudulent price information for
11 the common purpose of artificially depressing raw milk prices calculated by USDA. Under the
12 direction and at the express instruction of Member Defendants and Co-Conspirators, DairyAmerica
13 repeatedly and knowingly transmitted misrepresentations of NFDM sales to USDA via mail and
14 wires. These actions constitute mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343,
15 respectively, and serve as predicate acts to a pattern of racketeering activity pursuant to 18 U.S.C.
16 §§ 1961(1) and (5).
17

18
19 394. The “predicate acts” which constitute the alleged “pattern of racketeering activity”
20 pursuant to 18 U.S.C. § 1961(5) involve two categories of “racketeering activity” set out in 18
21 U.S.C. § 1961(1): mail fraud in violation of 18 U.S.C. § 1341; and wire fraud in violation of 18
22 U.S.C. § 1343.
23

24 395. *Mail Fraud.* Each of the acts indictable under 18 U.S.C. § 1341 (mail fraud)
25 involved Member Defendants and Co-Conspirators knowingly causing a matter or thing to be sent
26 or delivered by the Postal Service or a commercial interstate mail carrier with specific intent and
27 for the purpose of executing a scheme or artifice to defraud in that each was material and incidental
28 to an essential element of the scheme. The scheme to defraud included Member Defendants and

1 Co-Conspirators knowingly and intentionally reporting NFDM prices to NASS which were
2 ineligible for submission or artificially discounted, as set out above, for the fraudulent purpose of
3 artificially depressing raw milk prices calculated by USDA and depriving USDA Subclass
4 members of money and property by trick, deceit, chicane, or overreaching.

5 396. *Wire Fraud.* Each of the acts indictable under 18 U.S.C. § 1342 (wire fraud)
6 involved Member Defendants and Co-Conspirators knowingly causing the use of wire
7 communication to transmit with specific intent and for the purpose of executing a scheme or artifice
8 to defraud in that each was material and incidental to an essential element of the scheme. The
9 scheme to defraud included Member Defendants and Co-Conspirators knowingly and intentionally
10 reporting NFDM prices to NASS which were ineligible for submission or artificially discounted,
11 as set out above, for the fraudulent purpose of artificially depressing raw milk prices calculated by
12 USDA and depriving USDA Subclass members of money and property by trick, deceit, chicane, or
13 overreaching.
14

15 397. The scheme to defraud included Member Defendants and Co-Conspirators
16 instructing DairyAmerica to misreport NFDM pricing and volume data to NASS – using either a
17 paper questionnaire delivered through interstate mail or an electronic reporting system transmitted
18 by wire – on each and every week during the period January 4, 2002 through April 22, 2007,
19 including on or about the following dates:
20

21

04/12/07
04/03/07
03/28/07
03/21/07
03/14/07
03/07/07
02/28/07
02/21/07
02/14/07
02/07/07
01/31/07

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01/24/07
01/17/07
01/10/07
01/03/07
12/27/06
12/20/06
12/13/06
12/06/06
11/29/06
11/22/06
11/15/06
11/08/06
11/01/06
10/25/06
10/18/06
10/11/06
10/04/06
09/27/06
09/20/06
09/13/06
09/06/06
08/30/06
08/23/06
08/16/06
08/09/06
08/02/06
07/26/06
07/19/06
07/12/06
07/05/06
06/28/06
06/21/06
06/14/06
06/01/06
06/07/06
05/24/06
05/17/06
05/10/06
05/03/06

398. The pattern of racketeering activity described above is believed to have begun no later than January 1, 2002, and was open-ended and would have continued indefinitely into the

1 future.

2 399. The Enterprise's submission of fraudulent weekly reports to NASS gave rise to the
3 expectation by Member Defendants and Co-Conspirators that mail and wire communications would
4 be employed when executing the scheme to defraud through a pattern of racketeering.

5 400. Member Defendants and Co-Conspirators knew they were defying explicit reporting
6 instructions from NASS, and thus reporting sales figures that were ineligible or artificially-
7 discounted, when they conspired to instruct and instructed the Enterprise to (1) include forward
8 pricing sales in weekly submissions to NASS; (2) report sales of SMP in weekly reports to NASS;
9 (3) delay the reporting of select sales prices in weekly reports to NASS; (4) report artificially-
10 discounted export prices in weekly reports to NASS; and (5) deduct commissions and brokers fees
11 from weekly reports to NASS.
12

13 401. Member Defendants and Co-Conspirators knew that the prices paid to USDA
14 Subclass members for the purchase of raw milk would be artificially depressed when Member
15 Defendants and Co-Conspirators conspired to instruct and instructed the Enterprise to (1) include
16 forward pricing sales in weekly reports to NASS; (2) report sales of SMP in weekly reports to
17 NASS; (3) delay the reporting of select sales prices in weekly reports to NASS; (4) report
18 artificially-discounted export prices in weekly reports to NASS; and (5) deduct commissions and
19 brokers fees from weekly reports to NASS.
20

21 402. Member Defendants and Co-Conspirators agreed, among and between them, to
22 purposefully and intentionally (1) include forward pricing sales in weekly submissions to NASS;
23 (2) report sales of SMP in weekly reports to NASS; (3) delay the reporting of select sales prices in
24 weekly reports to NASS; (4) report artificially-discounted export prices in weekly reports to NASS;
25 and (5) deduct commissions and brokers fees from weekly reports to NASS.
26

27 403. The misreporting constituted a pattern of racketeering activity in the form of repeat
28 violations of the mail and wire fraud statutes; each week for multiple years, at the direction of

1 Member Defendants and Co-Conspirators, DairyAmerica transmitted misrepresentations to NASS
2 by mail or electronically in order to obtain financial gain and cause financial loss to farmers.

3 404. Member Defendants and Co-Conspirators facilitated, engaged in and directed the
4 pattern of racketeering with the knowledge of the falsity of the Enterprise's misrepresentations to
5 USDA, and they operated the Enterprise with the specific intent to deceive and defraud dairy
6 farmers and obtain financial gain.

7
8 405. The predicate acts underlying the pattern of racketeering activity were designed to
9 work in conjunction with each other to assist Member Defendants and Co-Conspirators in
10 artificially depressing NASS prices and lowering their costs of acquiring raw milk.

11 406. The pattern of racketeering activity engaged by Member Defendants and Co-
12 Conspirators substantially affected interstate commerce, as the misreported sales figures were used
13 to set raw milk prices for thousands of farmers around the country.

14 407. Member Defendants and Co-Conspirators received substantial financial benefits
15 from their conducting of the Enterprise. The racketeering activity artificially depressed NASS
16 prices, which: (1) substantially reduced the costs incurred by Member Defendants and Co-
17 Conspirators to manufacture and/or acquire NFDM and other dairy products; (2) allowed Member
18 Defendants and Co-Conspirators to sell powder products at prices above NASS rates; (3) shielded
19 Member Defendants and Co-Conspirators from rising raw milk prices during the pendency of
20 forwarding pricing contracts; and (4) prevented the prices of powder products from rising to a level
21 that would decrease customer demand. As a result, Member Defendants and Co-Conspirators
22 earned more profits from the sale of NFDM and other dairy products during the Class Period than
23 they otherwise would have absent the racketeering activity.

24 408. Member Defendants and Co-Conspirators adopted the goal of furthering or
25 facilitating the criminal endeavor of the Enterprise by agreeing to facilitate some of the acts leading
26 to the substantive offenses, and directly by, as described above, engaging in numerous overt acts to

1 establish the pattern of racketeering activity in furtherance of the conspiracy, including instructing
2 the Enterprise to repeatedly misreport NFDM sales data to USDA in contravention of explicit
3 NASS instructions.

4 409. Member Defendants and Co-Conspirators knew that the weekly misreporting of
5 NFDM sales data to USDA, by mail or wire, constituted a pattern of racketeering activity.

6 410. Based on the foregoing, Member Defendants and Co-Conspirators have violated 18
7 U.S.C. § 1962(d).

8 411. As a direct and proximate result of racketeering activities engaged by Member
9 Defendants and Co-Conspirators, members of the USDA Subclass have been injured in their
10 business and property in an amount to be proven at trial. These injuries are a direct result of Member
11 Defendants' and Co-Conspirators' violations of 18 U.S.C. § 1962. Members of the USDA Subclass
12 were the intended targets of Member Defendants' and Co-Conspirators' violations of 18 U.S.C. §
13 1962, and their injuries were reasonably foreseeable consequences thereof. There are no
14 independent causes which have intervened between the alleged violations of 18 U.S.C. § 1962 and
15 the injuries to USDA Subclass members. NASS does not exercise discretion in setting raw milk
16 prices based on NFDM reports; NASS collects and aggregates data from the weekly reports and
17 mechanistically applies the aggregated results to pre-set formulae that turn out raw milk prices.
18 There is a direct one-to-one relationship between the extent to which the misreporting of sales data
19 lowers the reported price of NFDM and the extent to which the computed USDA price for raw milk
20 is depressed.
21
22

23 412. Pursuant to 18 U.S.C. § 1964(c), California Dairies is jointly and severally liable for
24 three times the damages that USDA Subclass members have suffered, plus the costs of bringing
25 this suit, including attorneys' fees.
26
27
28

SIXTH CAUSE OF ACTION

(Conspiracy to Violate RICO: Violation of 18 U.S.C. § 1962(d), as to California Dairies, Land O'Lakes and Dairy Farmers of America involving Misrepresentations to CDFG)

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2
3
4 413. Plaintiffs reallege each allegation in each of the paragraphs above as if fully set forth
5 herein.

6 414. At all relevant times, Member Defendants and Co-Conspirators each constituted a
7 “person” within the meaning of 18 U.S.C. § 1961(3), as each was capable of holding a legal or
8 beneficial interest in property.

9 415. At all relevant times, the corporation DairyAmerica constituted an “Enterprise”
10 within the meaning of 18 U.S.C. § 1961(4).

11 416. The Enterprise engaged in and affected interstate and foreign commerce during the
12 Class Period. Among other things, the Enterprise advertised, marketed, and sold NFDM throughout
13 the United States, and it transacted business through the use of the United States mails and interstate
14 telephone wires.

15 417. Member Defendants and Co-Conspirators are each separate entities, distinct from
16 the Enterprise itself, which unlawfully used the Enterprise as a vehicle through which unlawful
17 activity was committed.

18 418. The common and shared purpose of the Enterprise was to artificially depress raw
19 milk prices regulated by CDFG by knowingly and intentionally reporting sales figures to CDFG
20 that were ineligible and artificially discounted.

21 419. The Enterprise had an ongoing organization with a framework for making decisions,
22 functioned as a continuing unit, and had an ascertainable structure and system of authority guiding
23 its operations, separate and apart from the pattern of racketeering in which the Enterprise was
24 engaged.

25 420. During the Class Period, Member Defendants and Co-Conspirators each
26
27
28

1 participated in the operation and management of the Enterprise and perpetrated particular
2 racketeering acts in furtherance thereof. Member Defendants and Co-Conspirators participated in
3 the Enterprise through their control of DairyAmerica.

4 421. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Through their positions
8 on the Board of Directors, each Member Defendant and Co-Conspirator instructed DairyAmerica
9 to repeatedly misreport NFDM sales data to CDFA, which constitutes a pattern of racketeering
10 activity. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 422. California Dairies is a member of DairyAmerica and, in conjunction with Dairy
15 Farmers of America, Land O'Lakes and Co-Conspirators, directed and controlled the activities of
16 DairyAmerica during the Class Period. California Dairies directly participated in the operation and
17 management of the Enterprise, including through the following senior employees and
18 representatives:
19

- 20 a) Keith Gomes served as Senior Vice-President and COO of California Dairies and also
21 served as President of DairyAmerica and as a member of DairyAmerica's Board;
22
23 b) Gary Korsmeier served as President and CEO of California Dairies and also served as
24 President of DairyAmerica and as a member of DairyAmerica's Board;
25
26 c) Richard Cotta served as President and CEO of California Dairies and also served as
27 President of DairyAmerica and as chairman of DairyAmerica's Board;
28
d) Joe Heffington served as Senior Vice-President and CFO of California Dairies and also
served on DairyAmerica's Board;

- 1 e) Jim Gomes served as Senior Vice President of Marketing for California Dairies and also
2 served on DairyAmerica's Board;
- 3 f) Dave Bush served as Senior Vice President of Operations for California Dairies;
- 4 g) Duane Matheron served as Treasurer of California Dairies and also served on
5 DairyAmerica's Board.

6 During the Class Period, senior executives of California Dairies attended Board Meetings of the
7 Enterprise and knowingly instructed the Enterprise to repeatedly misreport NFDM sales data to
8 CDFA in defiance of the agency's instructions.
9

10 423. Dairy Farmers of America is a member of DairyAmerica and, in conjunction with
11 California Dairies, Land O'Lakes and Co-Conspirators, directed and controlled the activities of
12 DairyAmerica during the Class Period. Dairy Farmers of America directly participated in the
13 operation and management of the Enterprise, including through the following senior employees
14 and representatives:

- 15 a) David Parrish, served as COO of Dairy Farmers of America's Western Area Council and
16 also as a member of DairyAmerica's Board;
- 17 b) Joel Clark served as Senior Vice-President of Dairy Farmers of America and also as a
18 member of DairyAmerica's Board;
- 19 c) John Wilson as Senior Vice-President of Dairy Farmers of America and also as a member
20 of DairyAmerica's Board;
- 21 d) John Collins as Senior Vice-President of Dairy Farmers of America and also as a member
22 of DairyAmerica's Board;
- 23 e) David Jones served as COO of Dairy Farmers of America's Southwest Area Council and
24 also as a member of DairyAmerica's Board.
25
26

27 During the Class Period, senior executives of Dairy Farmers of America attended Board Meetings
28 of the Enterprise and knowingly instructed the Enterprise to repeatedly misreport NFDM sales data

1 to CDFA in defiance of the agency's instructions.

2 424. Land O' Lakes is a member of DairyAmerica and, in conjunction with California
3 Dairies, Dairy Farmers of America and Co-Conspirators, directed and controlled the activities of
4 DairyAmerica during the Class Period. Land O' Lakes directly participated in the operation and
5 management of the Enterprise, including through the following senior employees and
6 representatives:

- 7
- 8 a) William Schreiber, who served as Vice President of Land O'Lakes and also as a member of
9 DairyAmerica's Board;
 - 10 b) William Neary, who served as Director of Member Relations for Land O'Lakes and also as
11 a member of DairyAmerica's Board.
 - 12 c) Alan Pierson, who served as Vice President of Land O'Lakes and also as a member of
13 DairyAmerica's Board;
 - 14 d) Manuel Maciel, who served as Second Vice Chairman of the Board of Land O'Lakes and
15 also as a member of DairyAmerica's Board.
- 16

17 During the Class Period, senior executives of Land O' Lakes attended Board Meetings of the
18 Enterprise and knowingly instructed the Enterprise to repeatedly misreport NFDM sales data to
19 CDFA in defiance of the agency's instructions.

20 425. Co-Conspirators were also members of DairyAmerica and, in conjunction with
21 Member Defendants, directed and controlled the activities of DairyAmerica during the Class
22 Period. Co-Conspirators directly participated in the operation and management of the Enterprise.
23 During the Class Period, senior executives of Co-Conspirators attended Board Meetings of the
24 Enterprise and knowingly instructed the Enterprise to repeatedly misreport NFDM sales data to
25 CDFA in defiance of the agency's instructions.

26 426. Beginning no later than January 1, 2002, Member Defendants and Co-Conspirators
27
28 each knowingly and intentionally conspired to violate 18 U.S.C. § 1962(c). The object of this

1 ongoing conspiracy was to conduct or participate in, directly or indirectly, the conduct of the affairs
2 of the Enterprise through a pattern of racketeering activity. The conspiracy executed a scheme to
3 defraud through a pattern of racketeering consisting of distinct predicate acts.

4 427. During the Class Period, Member Defendants and Co-Conspirators conspired to
5 direct and conduct the Enterprise to knowingly and intentionally transmit to CDFA, by mail or
6 wire, fraudulent price information—*i.e.*, by knowingly (1) reporting sales of SMP in weekly reports
7 to CDFA; (2) delaying the reporting of select sales prices in weekly reports to CDFA; and (3)
8 reporting artificially-discounted export prices in weekly reports to CDFA. Member Defendants and
9 Co-Conspirators conspired to direct and conduct the Enterprise to knowingly and intentionally
10 transmit to CDFA, by mail or wire, fraudulent price information for the common purpose of
11 artificially depressing raw milk prices regulated by CDFA. Under the direction and at the express
12 instruction of Member Defendants and Co-Conspirators, DairyAmerica repeatedly and knowingly
13 transmitted misrepresentations of NFDM sales to CDFA via mail and wires. These actions
14 constitute mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, respectively, and serve
15 as predicate acts to a pattern of racketeering activity pursuant to 18 U.S.C. §§ 1961(1) and (5).
16
17

18 428. The “predicate acts” which constitute the alleged “pattern of racketeering activity”
19 pursuant to 18 U.S.C. § 1961(5) involve two categories of “racketeering activity” set out in 18
20 U.S.C. § 1961(1): mail fraud in violation of 18 U.S.C. § 1341; and wire fraud in violation of 18
21 U.S.C. § 1343.
22

23 429. *Mail Fraud.* Each of the acts indictable under 18 U.S.C. § 1341 (mail fraud)
24 involved Member Defendants and Co-Conspirators knowingly causing a matter or thing to be sent
25 or delivered by the Postal Service or a commercial interstate mail carrier with specific intent and
26 for the purpose of executing a scheme or artifice to defraud in that each was material and incidental
27 to an essential element of the scheme. The scheme to defraud included Member Defendants and
28 Co-Conspirators knowingly and intentionally reporting NFDM prices to CDFA which were

1 ineligible for submission or artificially discounted, as set out above, for the fraudulent purpose of
 2 artificially depressing raw milk prices regulated by CDFA and depriving CDFA Subclass members
 3 of money and property by trick, deceit, chicane, or overreaching.

4 430. *Wire Fraud.* Each of the acts indictable under 18 U.S.C. § 1342 (wire fraud)
 5 involved Member Defendants and Co-Conspirators knowingly causing the use of wire
 6 communication to transmit with specific intent and for the purpose of executing a scheme or artifice
 7 to defraud in that each was material and incidental to an essential element of the scheme. The
 8 scheme to defraud included Member Defendants and Co-Conspirators knowingly and intentionally
 9 reporting NFDM prices to CDFA which were ineligible for submission or artificially discounted,
 10 as set out above, for the fraudulent purpose of artificially depressing raw milk prices regulated by
 11 CDFA and depriving CDFA Subclass members of money and property by trick, deceit, chicane, or
 12 overreaching.
 13

14 431. The scheme to defraud included Member Defendants and Co-Conspirators
 15 instructing DairyAmerica to misreport NFDM pricing and volume data to CDFA – using either a
 16 paper questionnaire delivered through interstate mail or an electronic reporting system transmitted
 17 by wire – on each and every week during the period January 4, 2002 through April 22, 2007,
 18 including on or about the following dates:
 19

20	04/12/07
21	04/03/07
22	03/28/07
23	03/21/07
24	03/14/07
25	03/07/07
26	02/28/07
27	02/21/07
28	02/14/07
	02/07/07
	01/31/07
	01/24/07
	01/17/07

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08/16/06
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07/26/06
07/19/06
07/12/06
07/05/06
06/28/06
06/21/06
06/14/06
06/01/06
06/07/06
05/24/06
05/17/06
05/10/06
05/03/06

432. The pattern of racketeering activity described above is believed to have begun no later than January 1, 2002, and was open-ended and would have continued indefinitely into the future.

1 433. The Enterprise's submission of fraudulent weekly reports to CDFA gave rise to the
2 expectation by Member Defendants and Co-Conspirators that mail and wire communications would
3 be employed when executing the scheme to defraud through a pattern of racketeering.

4 434. Member Defendants and Co-Conspirators knew they were defying explicit
5 reporting instructions from CDFA, and thus reporting sales figures that were ineligible or
6 artificially discounted, when they conspired to instruct and instructed the Enterprise to (1) report
7 sales of SMP in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly
8 reports to CDFA; and (3) report artificially-discounted export prices in weekly reports to CDFA.

9 435. Member Defendants and Co-Conspirators knew that the prices paid to CDFA
10 Subclass members for the purchase of raw milk would be artificially depressed when Member
11 Defendants and Co-Conspirators conspired to instruct and instructed the Enterprise to (1) report
12 sales of SMP in weekly reports to CDFA; (2) delay the reporting of select sales prices in weekly
13 reports to CDFA; and (3) report artificially-discounted export prices in weekly reports to CDFA.

14 436. Member Defendants and Co-Conspirators agreed, among and between them, to
15 purposefully and intentionally (1) report prices from SMP sales in weekly reports to CDFA; (2)
16 delay the reporting of select sales prices in weekly reports to CDFA; and (3) report artificially-
17 discounted export sales figures in weekly reports to CDFA.

18 437. The misreporting constituted a pattern of racketeering activity in the form of repeat
19 violations of the mail and wire fraud statutes; each week for multiple years, at the direction of
20 Member Defendants and Co-Conspirators, DairyAmerica transmitted misrepresentations to CDFA
21 by mail or electronically in order to obtain financial gain and cause financial loss to farmers.

22 438. Member Defendants and Co-Conspirators facilitated, engaged in and directed the
23 pattern of racketeering with the knowledge of the falsity of the Enterprise's misrepresentations to
24 CDFA, and they operated the Enterprise with the specific intent to deceive and defraud dairy
25 farmers and obtain financial gain.

1 439. The predicate acts underlying the pattern of racketeering activity were designed to
2 work in conjunction with each other to assist Member Defendants and Co-Conspirators in
3 artificially depressing CDFA prices and lowering their costs of acquiring raw milk regulated by the
4 agency.

5 440. The pattern of racketeering activity engaged by Member Defendants and Co-
6 Conspirators substantially affected interstate commerce.

7 441. Member Defendants and Co-Conspirators received substantial financial benefits
8 from their participation in the Enterprise. The racketeering activity artificially depressed CWAP
9 prices, which (1) substantially reduced the costs incurred by Member Defendants and Co-
10 Conspirators to manufacture and/or acquire NFDM and other dairy products; (2) allowed Member
11 Defendants and Co-Conspirators to sell powder products at prices above prevailing CWAP rates;
12 (3) shielded Member Defendants and Co-Conspirators from rising raw milk prices during the
13 pendency of forwarding pricing contracts; and (4) prevented the prices of powder products from
14 rising to a level that would decrease customer demand. As a result, Member Defendants and Co-
15 Conspirators earned more profits from the sale of NFDM and other dairy products during the Class
16 Period than they otherwise would have absent the racketeering activity.

17 442. Member Defendants and Co-Conspirators adopted the goal of furthering or
18 facilitating the criminal endeavor of the Enterprise by agreeing to facilitate some of the acts leading
19 to the substantive offenses, and directly by, as described above, engaging in numerous overt acts to
20 establish the pattern of racketeering activity in furtherance of the conspiracy, including instructing
21 the Enterprise to repeatedly misreport NFDM sales data to CDFA in contravention of the agency's
22 explicit instructions.

23 443. Member Defendants and Co-Conspirators knew that the weekly misreporting of
24 NFDM sales data to CDFA, by mail or wire, constituted a pattern of racketeering activity.

25 444. Based on the foregoing, Member Defendants and Co-Conspirators have violated 18

1 U.S.C. § 1962(d).

2 445. As a direct and proximate result of racketeering activities engaged by Member
3 Defendants and Co-Conspirators, CDFA Subclass members have been injured in their business and
4 property in an amount to be proven at trial. These injuries are a direct result of Member Defendants'
5 and Co-Conspirators' violations of 18 U.S.C. § 1962. Members of the CDFA Subclass were the
6 intended targets of Member Defendants' and Co-Conspirators' violations of 18 U.S.C. § 1962, and
7 their injuries were reasonably foreseeable consequences thereof. There are no independent causes
8 which have intervened between the alleged violations of 18 U.S.C. § 1962 and the injuries to CDFA
9 Subclass members. CDFA does not exercise discretion in setting raw milk prices based on NFDM
10 reports; CDFA collects and aggregates data from the weekly reports and mechanistically applies
11 the aggregated results to pre-set formulae that turn out raw milk prices. There is a direct one-to-one
12 relationship between the extent to which the misreporting of sales data lowers the reported price of
13 NFDM and the extent to which the computed price for raw milk is depressed.

14
15
16 446. Pursuant to 18 U.S.C. § 1964(c), Member Defendants are jointly and severally liable
17 for three times the damages that CDFA Subclass members have suffered, plus the costs of bringing
18 this suit, including attorneys' fees.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Individual and Representative Plaintiffs, on behalf of themselves and all
21 others similarly situated, request of this Court the following monetary and equitable relief:

22
23 A. An order certifying that the action may be maintained as a class action and
24 appointing Plaintiffs and Plaintiffs' undersigned counsel to represent the Class and Subclasses;

25 B. Compensatory and consequential damages suffered by Plaintiffs and members of
26 the Class and Subclasses in an amount to be determined at trial, including any damages as may be
27 provided for by statute;

28 C. Punitive damages;

- 1 D. Treble damages;
- 2 E. Restitution and disgorgement of ill-gotten monies;
- 3 F. Reasonable attorneys' fees;
- 4 G. Costs of suit;
- 5 H. Pre- and post-judgment interests;
- 6 I Preliminary injunctive relief, including but not limited to an order freezing assets
- 7 and an accounting;
- 8
- 9 J. Injunctive relief; and
- 10 K. Such other and further relief as this Court may deem necessary or proper.

11 **JURY DEMAND**

12 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demands a trial by jury on all

13 issues so triable.

14 Dated:

Respectfully submitted,

15 **BERMAN DeVALERIO**

16

17 By: /s/ A. Chowning Poppler
A. Chowning Poppler (SBN 272870)

18 Joseph J. Tabacco, Jr. (SBN 75484)
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EXHIBIT B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

GERALD CARLIN, JOHN RAHM, PAUL
ROZWADOWSKI and DIANA WOLFE,
individually and on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

DAIRYAMERICA, INC. and
CALIFORNIA DAIRIES, INC.,

Defendants.

Case No. 1:09 CV 00430-AWI (GSA)

CLASS ACTION

DECLARATION OF [REDACTED]

I, [REDACTED], declare as follows:

1. I have personal knowledge of all the facts stated herein.
2. From 2000 until 2009, I was employed at DairyAmerica, Inc. (“DairyAmerica”).
3. From 2000 until 2002, I was employed as a staff accountant at DairyAmerica.

From 2002 until 2009, I was employed as the Export Documentation Supervisor at DairyAmerica.

4. From 2000 until 2008, I reported directly to Richard Lewis, who served as Chief Operating Officer and Chief Executive Officer of DairyAmerica, and Jean McAbee, who served as Controller of DairyAmerica. During my final year of employment at DairyAmerica, I reported to Annette Smith, Accounting Supervisor and Office Manager of DairyAmerica, and Steve Gulley, International Sales Manager at DairyAmerica.

5. While employed at DairyAmerica, I handled the billing for DairyAmerica's sales of nonfat dry milk ("NFDM") to the Commodity Credit Corporation and to foreign customers in the export market. My responsibilities included preparing and processing documentation necessary for sales to the Commodity Credit Corporation and to foreign customers in the export market; tracking and cataloguing the prices and volumes of export sales; and at times assisting with applications for subsidies under the Dairy Export Incentive Program ("DEIP").

6. For much of the time that I was employed at DairyAmerica, between five and six employees in the export department reported to me.

7. During the period 2001 through at least 2008, I witnessed DairyAmerica repeatedly engage in three kinds of fraudulent activity at the direction of Richard Lewis, Jean McAbee and other senior executives.

8. First, during the period 2001 through at least 2008, each and every week in which DairyAmerica reported prices from export sales of NFDM to the California Department of Food and Agriculture ("CDFA"), those figures were fabricated by Richard Lewis and his staff and did not accurately reflect export sales transactions. Each and every week in which DairyAmerica reported prices from export sales to CDFa, DairyAmerica deliberately reported fabricated prices that were lower than the actual export prices that DairyAmerica charged foreign customers.

9. Second, during the period 2001 through at least 2008, each and every week in which DairyAmerica reported prices from export sales of NFDM to the National Agricultural Statistics Service ("NASS"), a division of United States Department of Agriculture ("USDA"), those figures were fabricated by Richard Lewis and his staff and did not accurately reflect export sales transactions. Each and every week in which DairyAmerica reported prices from export

sales to NASS, DairyAmerica deliberately reported fabricated prices that were lower than the actual export prices that DairyAmerica charged foreign customers.

10. Third, during the period 2001 through at least 2008, each and every instance in which DairyAmerica submitted applications to DEIP, DairyAmerica submitted applications containing prices that were fabricated by Richard Lewis and his staff. The fabricated prices submitted by DairyAmerica to DEIP were lower than the actual export prices that DairyAmerica charged foreign customers. DairyAmerica reported the lower fabricated prices for the purpose of qualifying for cash subsidies provided by DEIP.

11. In 2001, Richard Lewis and Jean McAbee instructed me to assemble an electronic export documentation database that would contain and track figures relating to export sales of NFDM.

12. This export documentation database included two sets of figures. The first set of figures would consist of accurate figures from the actual sale of NFDM in the export market to foreign customers. The second set of figures would consist of fabricated export sales figures that were created internally at DairyAmerica. As instructed by Richard Lewis and Jean McAbee, I assembled a database that contained both the accurate export figures charged to foreign customers and the fabricated export figures created internally at DairyAmerica.

13. I obtained the accurate export figures from contracts that were signed by foreign purchasers of NFDM. DairyAmerica's export broker, Fonterra Cooperative Group ("Fonterra"), would facilitate the sale of NFDM to foreign customers. Whenever a foreign customer signed a contract to purchase NFDM from DairyAmerica, a Fonterra employee would send a copy of the

contract to me. I would then input the accurate sales figures contained in those contracts into the export documentation database.

14. I obtained the fabricated export figures from invoices that were created internally at DairyAmerica. After a foreign customer entered into a contract to purchase NFDM, DairyAmerica's staff would create a corresponding invoice that contained lower prices than those contained in the contract signed by the foreign customer. That invoice, which contained entirely fabricated prices, would be provided to the processing plant that shipped out the NFDM to the foreign customer. Those processing plants belonged to the cooperative members of DairyAmerica, including California Dairies. Whenever an invoice was provided to the processing plant, a copy of that invoice was provided to me. I would regularly input the fabricated and artificially lower sales figures contained in such invoices into the export documentation database.

15. The fabricated figures contained in the invoices provided to processing plants were created by Richard Lewis and DairyAmerica employee Frances Zapanta. Those figures were also contained in pricing worksheets that were created by Richard Lewis and Frances Zapanta and stored in DairyAmerica's shared electronic files.

16. The accurate export sales figures contained in the export documentation database that I operated were never inputted into the Navision database maintained by DairyAmerica or into any other accounting or reporting database maintained by the company. By contrast, the fabricated export sales figures contained in the export documentation database that I operated were regularly inputted by other DairyAmerica employees into the Navision database and used for accounting and reporting purposes.

17. At the direction of Richard Lewis and Jean McAbee, DairyAmerica only reported the export sales figures contained in the Navision database to CDFA. As a result, during the period 2001 through at least 2008, DairyAmerica only reported fabricated, artificially-lower export sales figures to the CDFA. During that time period, the accurate export sales figures reflecting actual export transactions were never reported to CDFA.

18. At the direction of Richard Lewis and Jean McAbee, DairyAmerica only reported the export sales figures contained in the Navision database to NASS. As a result, during the period 2001 through at least 2008, DairyAmerica only reported fabricated, artificially-lower export sales figures to NASS. During that time period, the accurate export sales figures reflecting actual export transactions were never reported to NASS.

19. At the direction of Richard Lewis and Jean McAbee, DairyAmerica only included the export sales figures contained in the Navision database when submitting applications for subsidies to DEIP. As a result, during the period 2001 through at least 2008, DairyAmerica only submitted fabricated, artificially-lower export sales figures when submitting applications to DEIP. During that time period, the accurate export sales figures reflecting actual export transactions were never included in applications to DEIP.

20. During the period 2001 through at least 2008, CDFA conducted monthly audits of DairyAmerica. Each month, CDFA would send auditors to the offices of DairyAmerica in Fresno, California. Part of the purpose of those audits was to ensure that DairyAmerica was reporting accurate information to CDFA each week and that DairyAmerica was complying with the CDFA's reporting instructions.

21. Each month during the period 2001 through at least 2008, approximately one week before CDFA auditors arrived at DairyAmerica's offices to conduct an audit, Jean McAbee and Annette Smith would gather boxes of accounting documents, including the invoices and contracts reflecting accurate export prices, and load them into a truck and drive them to an off-site storage facility. Each month, Jean McAbee and Annette Smith transported the accounting documents containing accurate export sales prices to an off-site storage facility so that CDFA auditors would not see or access those documents during their audits. By doing so, Jean McAbee and Annette Smith prevented the CDFA auditors from discovering the substantial discrepancy between the fabricated export sales prices reported to CDFA and the actual sales prices charged to foreign customers.

22. Each month during the period 2001 through at least 2008, Richard Lewis and Jean McAbee prohibited CDFA auditors from seeing or reviewing paper or electronic documents (including invoices and contracts) that contained the accurate export prices. Instead, the auditors from the CDFA were only permitted to review data from the Navision database and the invoices that were internally created at DairyAmerica, both of which only contained the fabricated export prices.

23. During the period 2001 through 2009, Richard Lewis and Jean McAbee instructed me to refrain from speaking to any CDFA auditors.

24. During the time I was employed at DairyAmerica, the government of Mexico purchased substantial quantities of NFDM from DairyAmerica. In 2003, the government of Mexico insisted that an audit be conducted of DairyAmerica's export sales.

25. In anticipation of the arrival of auditors from the Mexican government, Richard Lewis instructed me to reconcile the two sets of figures contained in the export documentation

database that I operated: the fabricated export sales figures and the accurate export sales figure. Specifically, Richard Lewis instructed me to account for the discrepancy between the fabricated export sales figures and the accurate export sales figures by inventing and adding a non-existent “administrative fee” to each export sale listed in the database. Richard Lewis told me that I “had to make the paperwork match.” As a result, in the export documentation database, I added a fake “administrative fee” to each export transaction, so that each fabricated export sales figure plus the fake “administrative fee” would equal the value of the accurate export sales figure. (Notably, this fake “administrative fee” was invented and entirely unrelated to the one cent that DairyAmerica retained from each pound of NFDM sold.) Richard Lewis subsequently presented the modified documentation from the export database to the Mexican auditors and persuaded them that the discrepancy between the price charged to the Mexican government and the price reported to the USDA stemmed from an administrative fee – even though no such fee actually existed.

26. In anticipation of the arrival of auditors from the Mexican government, Richard Lewis also instructed Frances Zapanta to add the fake administrative fee to certain pricing worksheets and entries in the Navision database.

27. When DairyAmerica exported NFDM, most foreign governments required that DairyAmerica produce a Certificate of Origin that identified where the NFDM was manufactured. To be acceptable and valid, the Certificate of Origin had to be stamped with a seal from a local Chamber of Commerce. To avoid making regular visits to the local Chamber of Commerce in order to purchase and obtain Certificate of Origin seals, Annette Smith instructed a friend to create four stamps that replicated the Chamber of Commerce seal. DairyAmerica’s

staff were subsequently instructed to use the unauthorized replica of the Chamber of Commerce stamps in order to imprint the seal on Certificate of Origin documents, rather than correctly purchase and obtain the seal from the local Chamber of Commerce.

28. In 2009, approximately six months after the filing of the above-captioned lawsuit, I was terminated from my employment at DairyAmerica. My termination was surprising to me, as I had consistently received very positive reviews for my work. For example, in the most recent review immediately prior to my termination, I received a review score of 56 out of 60 – an excellent figure.

29. I believe that I and several of my employees were terminated from our employment at DairyAmerica so that the company could conceal knowledge of its fraudulent activities. I believe concealing such information was important to DairyAmerica after the USDA launched an investigation into DairyAmerica's misreporting and after the filing of the above-captioned lawsuit. On more than one occasion, Annette Smith and Steve Gulley expressed anger with me when they learned that I was tracking the course of the lawsuit, and I was terminated soon after.

I declare under penalty of perjury under the laws of the United States and the state of California that the foregoing is true and correct. Executed on 8/21/14.

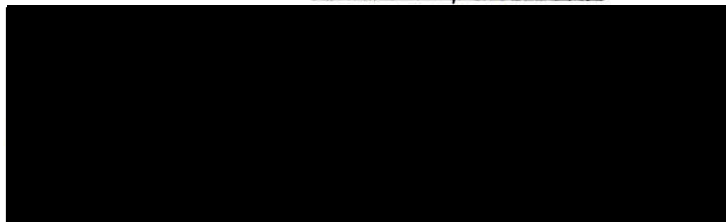


EXHIBIT C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

GERALD CARLIN, JOHN RAHM, PAUL
ROZWADOWSKI and DIANA WOLFE,
individually and on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

DAIRYAMERICA, INC. and
CALIFORNIA DAIRIES, INC.,

Defendants.

Case No. 1:09 CV 00430-AWI (GSA)

CLASS ACTION

DECLARATION OF CANDICE BIMEMILLER

I, Candice Bimemiller, declare as follows:

1. I have personal knowledge of all the facts stated herein.
2. From 2003 until 2009, I was employed at DairyAmerica, Inc. (“DairyAmerica”).
3. From 2003 until 2009, I was employed as a Credit Manager at DairyAmerica.
4. From 2003 until 2009, I reported directly to Richard Lewis, who served as Chief Operating Officer and Chief Executive Officer of DairyAmerica; Jean McAbee, who served as Controller of DairyAmerica; and Annette Smith, Accounting Supervisor and Office Manager of DairyAmerica.
5. While employed at DairyAmerica, I worked on the accounting for DairyAmerica’s sales of nonfat dry milk (“NFDM”) to domestic customers. My responsibilities included collecting the bills of lading that the drying plants would provide daily after shipping;

preparing and sending invoices to domestic customers for the sale of NFDM; matching the figures on the bills of lading regarding the shipment of NFDM against sales orders and making any necessary adjustments; inputting and maintaining data reflecting domestic sales and shipments in computer databases; determining the pricing level for domestic customers based on the quantity of NFDM purchased and the prices set by the United States Department of Agriculture (“USDA”) and the California Department of Food and Agriculture (“CDFA”); determining the credit limits for each domestic customer; and assisting with the preparation of weekly domestic sales reports of NFDM to be sent to the USDA and CDFA.

6. I assisted with the reporting of domestic sales of NFDM to the USDA and CDFA by providing final weekly sales figures to Annette Smith and Jean McAbee. It is my understanding that each week, Ms. Smith and/or Ms. McAbee entered those sales figures into forms that were provided to USDA and CDFA.

7. From 2003 until approximately 2007, I would meet with Richard Lewis each week so that he could review the domestic sales figures. I would print a report of all shipments and sales that were transacted during the week and bring that document to the meetings.

8. During those weekly meetings, Richard Lewis would review the domestic sales figures on the print-out to determine which of those shipments would be billed out that week to be reported to USDA and CDFA.

9. During the weekly meetings, Richard Lewis would regularly instruct me to delay the reporting of certain sales of NFDM. Specifically, he would instruct me to delay, by a week, the reporting of particular NFDM sales that he selected. The sales prices that Mr. Lewis selected

for delays in reporting were typically those priced above a specified value and, less frequently, those priced below a specified value.

10. The process of delaying the reporting of NFDM sales was clearly inconsistent with, and in defiance of, instructions that were provided each week by USDA and CDFA. The agencies required that all NFDM be reported during the week in which it was shipped.

11. I informed Richard Lewis that I was not comfortable with DairyAmerica delaying the reporting of sales in a manner that was inconsistent with the agencies' clear instructions. Accordingly, I asked Richard Lewis to place his initials on my report near any sales figures that he wanted DairyAmerica to delay in its reporting. In response, he laughed and agreed to do so, and thereafter he would mark his initials next to the specific sales figures that he wanted DairyAmerica to delay in its reporting.

12. Each month while I was employed at DairyAmerica, auditors from the CDFA would visit DairyAmerica to ensure that the company was complying with the agency's reporting instructions.

13. I was directed by Richard Lewis, Jean McAbee and Annette Smith to not speak with the CDFA's auditors and, if questioned by an auditor, to merely state that DairyAmerica was complying with the reporting instructions.

14. I was also instructed to not make any comments regarding DairyAmerica's practices to Deloitte & Touche LLP, which audited DairyAmerica each year.

I declare under penalty of perjury under the laws of the United States and the state of California that the foregoing is true and correct. Executed on September 9, 2016

Candice Bimemiller
Candice Bimemiller