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

IN RE SOUTHEASTERN MILK ANTITRUST LITIGATION	)	**Master File No. 2:08-MD-1000**
	)	**Judge J. Ronnie Greer**
THIS DOCUMENT RELATES TO:	)	
***Sweetwater Valley Farm, Inc., et al. v. Dean Foods, et al.*, No. 2:07-CV-208**	)	

DFA PLAINTIFFS' MOTION TO REINSTATE DFA SUBCLASS, APPOINT DFA SUBCLASS COUNSEL, AND JOIN AND REINSTATE PRELIMINARY APPROVAL OF THE SETTLEMENT WITH DEAN
[MOTION AT DKT. 1603]

FILED UNDER SEAL PURSUANT TO 9/22/09 STANDING ORDER

DFA Plaintiffs respectfully move to (1) reinstate the DFA subclass certified on September 7, 2010 for settlement purposes, (2) appoint interim DFA subclass counsel Gary E. Brewer, Esq. as counsel for the DFA subclass, (3) join the pending motion for preliminary approval of the binding July 14, 2011 settlement agreement with Defendant Dean (Dkt. 1603), and (4) reinstate preliminary approval of the settlement with Dean.

On July 14, 2011 the Court found that the Dean settlement with the DFA and independent farmer subclasses certified on September 7 is "sufficiently fair, reasonable and adequate" to warrant preliminary approval. Order, Dkt. 1641 at 1. The Court subsequently vacated preliminary approval, and took the motion for approval under advisement. *See* Order, Dkt. 1681. The basis for vacating the initial preliminary approval was the Court's finding that the same counsel could not continue to represent both DFA and independent farmer subclasses due to a conflict between the subclasses. *See* Order, Dkt. 1732 at 5.

In an attempt to effectuate the binding Dean settlement agreement, the Court appointed the undersigned as interim counsel for the DFA subclass with instructions to review the settlement on behalf of the DFA subclass and to make an independent assessment as to whether the settlement is fair, reasonable and adequate for the DFA subclass. *See* Order at 6-7, Dkt. 1752. For five (5) months the undersigned reviewed pleadings, read documents produced in this case, studied deposition transcripts and video, interviewed DFA members in the Southeast, consulted frequently with DFA Subclass representatives, and thoroughly analyzed the settlement terms. Having now performed a substantial amount of work, the undersigned is prepared to report that the Dean settlement is fair, reasonable and adequate for the DFA subclass.

As a result, we ask that the Court reinstate the DFA subclass certified on September 7 for settlement purposes. The interclass conflict previously identified by the Court has been cured by

appointment of separate counsel (and an additional class representative) for the DFA subclass consistent with Supreme Court guidance. *See, e.g., Ortiz v. Fibreboard Corp.* 527 U.S. 815 (1999) (explaining that conflicts may be cured by dividing class into subclasses with separate counsel). All other Rule 23 requirements for the DFA subclass found satisfied by the Court's September 7 ruling remain met. *See* Order at 6-18, Dkt. 934 (finding that DFA subclass satisfies Rule 23(a) and 23(b)(3)).

We further request that the Court appoint the undersigned as counsel for the DFA subclass for settlement purposes. The Court already found that the undersigned meets Rule 23's requirements for subclass counsel. *See* Order Dkt. 1752 at 6 ("Mr. Brewer has the experience and ability to adequately, aggressively and independently represent the putative DFA class.").

Finally, DFA Plaintiffs join the pending motion for preliminary approval of the Dean settlement and move the Court to reinstate preliminarily approval of the settlement because the Court previously found it to be "fair, reasonable and adequate." Order at 1, Dkt. 1641. In addition, the Court should re-approve the form and distribution of notice of settlements with Dean and Baird/SMA,[1] and re-approve the schedule for effectuating these settlements.

Therefore, with concurrence of counsel for the independent farmer subclass, DFA Plaintiffs request that the Court enter an Order providing, *inter alia*:

1. the DFA subclass certified on September 7, 2010 is reinstated for settlement purposes;
2. Gary E. Brewer, Esq. of Brewer & Terry is appointed class counsel for the DFA subclass for settlement purposes;
3. the Dean settlement is preliminarily approved and is sufficiently fair, reasonable and adequate to authorize dissemination of notice of the settlement to the class members;

[1] All Plaintiffs propose to provide notices informing the class of the Dean settlement and the SMA/Baird settlement that was not vacated. *See* Order at 1, fn. 2, Dkt. 1735, consistent with the Court's suggestion to delay the SMA/Baird notice pending resolution of preliminary approval of the Dean settlement. *See* Order at 2, fn. 1, Dkt. 1752.

4. the form and content of the notice and summary notice are approved;

5. the proposed dissemination of the notice and summary notice constitutes the best notice practicable under the circumstances, is due and sufficient notice and complies fully with the requirements of Federal Rule of Civil Procedure 23 and the due process requirements of the Constitution of the United States;

6. no additional opt-out period is warranted or required by Rule 23(e)(4) of the Federal Rules of Civil Procedure;

7. any person who timely requested exclusion from the class may apply to the Court to be reinstated to the class by setting forth the reasons for seeking reinstatement in a document filed through the Court's ECF system at least fourteen (14) days prior to the fairness hearing;

8. any class member who objects to the settlement must do so in writing no less than fourteen (14) days prior to the fairness hearing;

9. any class member who wishes to be eligible for a payment as a result of the settlement shall file a claim form provided with the notice no less than fourteen (14) days prior to the fairness hearing;

10. Class counsel shall file with the Court, and serve upon counsel of record, the necessary papers to show compliance with the notice plan and the Court's Order as well as any other materials class counsel wishes the Court to consider at least seven (7) days prior to the fairness hearing;

11. any class member who seeks to appear and be heard at the fairness hearing shall provide notice to the Clerk of the Court and to counsel of record at least fourteen (14) business days prior to the fairness hearing;

12. the fairness hearing concerning the proposed settlement will occur on [**date**] at [**time**] at James H. Quillen U.S. Courthouse, 220 W. Depot Street, Greeneville, Tennessee;

13. all claims against Dean are severed and all proceedings against Dean except those proceedings provided for or required by the settlement agreement are stayed;

14. the settlement fund as set forth in the Dean settlement agreement is a "Qualified Settlement Fund" pursuant to Treas. Reg. §1.468B-1, and class counsel and their designees are authorized to use up to $50,000 of the Settlement Fund to give notice of the settlement to class members and for settlement administration costs, up to $10,000 of the Settlement Fund for escrow agent costs, and such amount of the settlement fund as is required to pay taxes on income earned on the settlement fund, with prior notice to Defendants;

15. Rust Consulting, Inc. is appointed as claims administrator for purposes of notice and administration of the settlement with Dean, and JPMorgan Chase Bank, National Association shall serve as the escrow agent in connection with the settlement fund

described in Paragraph 7.1 of the settlement agreement, and

16. All plaintiffs and members of the class are preliminarily enjoined from the initiation, commencement or prosecution of any released claim by any of the releasing parties.

I. DFA COUNSEL RECOMMENDS DEAN SETTLEMENT FOR DFA SUBCLASS

After due consideration of the Dean settlement, case record, and well-being of DFA subclass members, the undersigned recommends proceeding with the settlement. The ultimate question is whether the settlement is fair, adequate and reasonable for the subclass in light of the strengths and weaknesses of the parties. *See* Fed. R. Civ. P. 23(e)(2); *UAW v. Gen. Motors Corp*., 497 F.3d 615, 631 (6th Cir. 2007). This does not require that the settlement be "the fairest possible resolution of the claims of every individual class member." *IUE-CWA v. Gen. Motors, Corp.*, 238 F.R.D. 583, 595 (E.D. Mich. 2006) *aff'd* 497 F.3d 615 (6th Cir. 2007). Rather, the settlement is fair, adequate and reasonable when "the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litig.* at § 21.61 (4th ed. 2004).

The DFA subclass stands to receive enormous financial benefit from the Dean settlement. Dean agreed to pay class members up to $140,000,000 over approximately four years.[2] *See* Ex. A, Settlement Agreement at ¶ 7.1. Dean also agreed not to oppose preliminary approval of the agreement, *see id*. at ¶ 2.1, and to use its "best efforts to effectuate this Agreement," *see id*. at ¶ 13.1. In return, class members will release Dean from claims that were or could have been asserted relating in any way to any conduct alleged in this case.[3] *See id*. at ¶¶ 6.1, 6.2.

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[2] Dean agreed to make an initial payment of $60,000,000 into an escrow account within five business days of the date of the Court's preliminary approval order, and agreed to pay up to $20,000,000 each year for four years within five business days of the anniversary of the Court's final approval of the settlement and entry of judgment and dismissal of claims as to Dean. *See* Ex. A, Settlement Agreement at ¶ 7.1.

[3] The settlement agreement does not release any claims against the non-settling Defendants, or release claims of class members who timely and validly requested exclusion from the class, unless they are allowed to opt back in by order of the Court. *See id.* at ¶¶ 1.2 and 9.2.

One hundred and forty million dollars is a large settlement in absolute terms. It is probably the largest settlement of any antitrust case litigated in this district. The DFA subclass would be eligible to receive proportional shares of the settlement, estimated to be, on average, $13,000 per subclass member (some members may receive more or less depending on the milk volume they produced). *See, e.g.,* Order at Ex. A, Dkt. 1641-1. Moreover, $140 million is approximately one-third of the single damages as of August 2011. *See, e.g.,* Supp. Report of Dr. Rausser at 9 (calculating class damages). Settling with just one of many Defendants for one-third of damages is a substantial recovery in any circumstance.

These settlement terms are fair, adequate and reasonable for the DFA subclass in light of the strengths and weaknesses of the parties. As with any complex antitrust case, the outcome of continuing this litigation against Dean is uncertain. *See, e.g., In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523-24 (E.D. Mich. 2003) (explaining "significant risks" of litigating complex antitrust cases). In light of this uncertainty and the parties' positions, the settlement terms are fair and beneficial for the DFA subclass as a whole. *See UAW*, 497 F.3d at 632. The undersigned, therefore, agrees with the Court's assessment that "all parties face enormous risk if the case is tried," Order at 2, Dkt. 1735, and the settlement terms "appear[] to be fair and reasonable" in light of this risk, *id*.

Consideration of the DFA subclass's alternatives to the Dean settlement further demonstrates that it is in the best interests of the subclass. One alternative is declining the settlement, in which case the subclass would receive nothing and be worse off. Another possibility is proceeding to trial where the subclass could litigate for years and face substantial risk. None of these alternatives would be better than the subclass receiving its share of $140 million.

II. THE COURT SHOULD REINSTATE THE DFA SUBCLASS CERTIFIED ON SEPTEMBER 7, 2010 AND APPOINT MR. BREWER AS SUBCLASS COUNSEL

The Court should reinstate the DFA subclass certified on September 7, 2010 so that the settlement agreement, which specifically references the September 7 subclass, can be effectuated. The Court previously found that the DFA subclass satisfies all but one Rule 23 requirement. The Court's September 7 ruling held that Rule 23(a)(1) is met because subclass members are numerous and joinder is impracticable, *see* Order at 6, Dkt. 934; Rule 23(a)(2) is met because there are questions of law or fact common to the subclass, *see id.* at 7; Rule 23(a)(3) is met because the antitrust claims of the representative parties are typical of the claims of the subclass, *see id.* at 8-10; and Rule 23(a)(4) was met (until the Court found an interclass conflict) because the subclass was adequately represented, s*ee id.* at 10-13. The Court also found that the subclass satisfies Rule 23(b)(3) because common questions predominate, *see id.* at 16-19, and a class action is superior to other available methods for adjudication of claims, *see id.* at 22-23.

The sole basis for the subsequent decertification of the DFA subclass was the Court's conclusion that Rule 23(a)(4) was no longer satisfied for that subclass. As the Court explained, the subclass was decertified because the same counsel could not represent both DFA and independent farmer subclasses due to a conflict between the subclasses. *See* Order at 5, Dkt. 1732. Importantly, the Court's decertification decision did not change the Court's September 7 finding that the DFA subclass satisfies all other Rule 23 requirements. *See* Order, Dkt. 934. That finding and ruling remains binding. *See, e.g., Rolland v. Patrick*, 2008 WL 410448, at *1 (D. Mass. Aug, 19, 2008) (explaining that class certification findings are binding "law of the case" absent changed circumstances).

Rule 23(a)(4) is now satisfied. The Court appointed the undersigned as interim counsel for the putative DFA subclass on October 5, 2011. The Court found that the undersigned met

Rule 23's requirements: "Mr. Brewer has the experience and ability to adequately, aggressively and independently represent the putative DFA class." Order at 6, Dkt. 1752. This appointment of separate counsel cures the interclass conflict identified by the Court consistent with Supreme Court precedent. *See, e.g., Ortiz,* 527 U.S. at 815 (conflicts may be cured by dividing a class into subclasses with separate counsel); *see also In re Literary Works in Elect. Databases Copyright Litig.*, 2011 WL 3606725, at *5 (2d Cir. Aug. 17, 2011) (instructing district court to cure interclass conflict by establishing subclasses with separate counsel).

For extra measure, DFA Plaintiffs obtained Payne Dairy as another DFA subclass representative, even though decertification was not based on the inadequacy of class representatives. *See* Order at 5, Dkt. 1732 ("the order decertifying the DFA subclass was not based on the inadequacy of Craig Frazier and Branson McCain of McCain Dairy as class representatives"). The Court appointed Payne Dairy as a class representative on November 11, 2011, on the condition that it respond to Dean's discovery requests.[4] *See* Order at 1, Dkt. 1758. Defendants' deposition of Payne Dairy further confirmed it is an adequate representative: Payne Dairy has been a DFA member since 1998, *see* Ex. B, Payne Depo. at 21; DFA has marketed Payne Dairy's milk to Dean's Winston-Salem and Wilkesboro plants, *see id.* at 26-27, 30-31 ([redacted], *see* Ex. C, supply agreement excerpts); Payne Dairy understands and accepts its responsibility to represent the interests of absent members of the DFA subclass, *see, e.g., id.* at 34-36; and Payne Dairy reviewed the Dean settlement

[4] On December 8, 2011 Payne Dairy responded to more than 100 document requests, interrogatories and requests for admissions that Dean claimed it needed to "determin[e] whether Payne Dairy is an adequate representative under Federal Rule of Civil Procedure 23." Dean Response to Motion to Appoint Payne Dairy at 1, Dkt. 1757. Defendants also deposed Payne Dairy on December 20, 2011.

agreement, along with other materials, and concluded that it is in the best interests of Southeast DFA members, *see, e.g., id.* at 40, 50-54.

Reinstatement of the DFA subclass is proper here because it is not necessary for the Court or the parties to redo the analysis of all Rule 23 requirements when the decertification was based on a single, identified class deficiency, and all other Rule 23 requirements previously found satisfied remain met. *See, e.g., Behrend v. Comcast Corp*., 655 F.3d 182 (3d Cir. 2011) (affirming district court's recertification of class limited to the consideration of the particular deficiency that led to decertification); *Sheinberg v. Sorensen*, 606 F.3d 130 (3d Cir. 2010) (ordering district court to reconsider the single deficiency that led to decertification).

With reinstatement of the DFA subclass, the Court should appoint the undersigned as counsel for the subclass. *See* Rule 23(g)(1) ("a court that certifies a class must appoint class counsel"). This Rule requires that counsel have the experience and ability to represent the class fairly and adequately. *See* Rule 23(g)(4); *see also Manual for Complex Litig.* at § 21.27. The Court already determined that the undersigned satisfies Rule 23(g). *See* Order at 5-6, Dkt. 1752 (finding that the undersigned is retained by existing DFA subclass representatives, performed considerable investigation, has extensive experience in complex civil litigation, and possess sufficient time and resources to represent the subclass vigorously). Accordingly, the undersigned requests appointment as counsel for the DFA subclass for settlement purposes.

III. THE COURT SHOULD REINSTATE PRELIMINARY APPROVAL OF THE DEAN SETTLEMENT

In light of the undersigned's conclusion that the Dean settlement agreement is in the best interest of the DFA subclass, DFA Plaintiffs join the pending motion for preliminary approval and ask that the Court reinstate approval because the Court already analyzed the settlement and concluded that it merits preliminary approval. *See* Order at 1-2, Dkt. 1641. The Court's

subsequent order vacating preliminary approval did not alter the Court's conclusion. In fact, that order further recognized that the settlement appears to be fair and reasonable. *See* Order at 2, Dkt. 1735.

A. The Dean Settlement Merits Preliminary Approval Again

If the Court were to re-analyze the Dean settlement, preliminary approval should be granted again. Preliminary approval generally is appropriate when (1) the settlement was reached by arm's-length negotiations, (2) absent collusion, and (3) the terms are reasonable. *See, e.g., Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989) ("In evaluating a proposed settlement of a class action, the district court is required to examine the terms of the settlement and the process by which the settlement was arrived at, to make sure that the terms are reasonable and that the settlement is not the product of fraud, overreaching, or collusion."); *see also In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99 (S.D.N.Y. 1997). The Court previously found that these factors are met, and the undersigned's review confirms the Court's findings.

First, the Court determined that the Dean settlement was reached by arm's-length negotiations. *See* Order at 2, Dkt. 1735 ("The settlement agreement was arrived at through 'arms length' negotiations."). The undersigned's review confirms the Court's finding. Indeed, the agreement was reached after extended discovery and negotiations involving the mediator while the parties were represented by experienced counsel with a deep understanding of the case. These facts favor settlement approval. *See, e.g., Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818 (E.D. Mich. 2008) (negotiations by informed counsel supports presumption that settlement is reasonable and desirable); *In re Cardizem CD*, 218 F.R.D. at 526 (extensive discovery conducted by counsel weighed in favor of approving settlement).

Second, the Court found the absence of collusion. *See* Order at 2, Dkt. 1735 ("There certainly is no evidence of any collusive negotiations."). The undersigned's review confirms the

Court's finding. The settlement was reached only after extensive discovery, mediation and negotiations. Such circumstances protect against collusion, and resulting settlements are entitled to a presumption of absence of fraud. *See, e.g., Thacker v. Chesapeake Appalachia, LLC*, 695 F. Supp. 2d 521, 531 (E.D. Ky. 2010) ("Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary.")

Third, the Court concluded that the terms of the Dean settlement are reasonable. *See* Order at 1-2, Dkt. 1641; Order at 2, Dkt. 1735. Although the Sixth Circuit has articulated a non-exclusive list of possible factors to consider for final approval of settlements,[5] reasonableness is implied for settlements recommended for preliminary approval by experienced and informed counsel. *See, e.g., IUE-CWA*, 238 F.R.D. at 597 (judgment of parties' counsel that settlement is in the best interest of the settling parties "is entitled to significant weight, and supports the fairness of the class settlement"). The Court recognized that the Dean settlement was recommended by experienced and informed counsel. *See* Order at 2, Dkt. 1735 ("The settlement was negotiated by able, experienced counsel"). The undersigned confirms that the settlement was reached by counsel experienced in antitrust and class action litigation, and reflects their informed assessment of the weaknesses and strengths of the parties' claims and defenses. In any event, the settlement terms are fair, adequate and reasonable for the DFA subclass for the reasons explained in Section I.

[5] *See, e.g., UAW*, 497 F.3d at 631-32 (listing likelihood of success on the merits weighed against the amount and form of the relief from settlement; risks, expense and delay of further litigation; judgment of experienced counsel; amount of discovery completed and character of the evidence uncovered; fairness to unnamed class members; objections by class members; whether settlement is the product of arm's length negotiations; and whether settlement is consistent with the public interest). The Dean settlement agreement meets all such relevant factors for the reasons explained in Sections I and III.

B. The Court Should Re-Approve the Form and Distribution of Notice of Settlement Sought by the Pending Motion for Preliminarily Approval

The Court previously approved the form of class notice of the Dean, SMA and Baird settlements, finding that they fully comply with Rule 23 and the due process requirements of the United States Constitution. *See* Order at 1, Dkt. 1641; Order at 1, Dkt. 1680. All Plaintiffs propose to inform the class of the Dean, SMA and Baird settlements by sending the same notices previously-approved by the Court, with minor revisions to reflect: (1) the decertification of the DFA subclass for litigation and reinstatement of it for settlement; (2) the appointment DFA subclass counsel; and (3) the appointment of Payne Dairy as an additional DFA class representative. These revisions are depicted in "redline" to the attached notices previously-approved by the Court. *See* Exs. D and E, Long and Summary Notices, respectively.[6] All Plaintiffs submit that these previously-approved notices as revised continue to satisfy Rule 23 and due process requirements.

All Plaintiffs also propose to disseminate notice according to the same plan previously approved by the Court: (1) sending notice by U.S. Mail to the 7,000-plus addresses of class members compiled by Plaintiffs and refined by Rust; (2) publication of summary notice in next available issue of *Hoard's Dairyman*; and (3) posting notices on *www.SoutheastDairyClass.com*, the website maintained by Rust and referenced in the notices. *See* Order at 1-2, Dkt. 1641; Order at 1-2, Dkt. 1680. All Plaintiffs submit that this previously-approved distribution plan continues to satisfy Rule 23 and due process requirements.

C. The Court Should Re-Approve the Schedule for Effectuating Settlement Sought by the Pending Motion for Preliminary Approval

In connection with preliminary approval, the Court should set dates for disseminating class notice, opting back in to the class, objecting to the settlement, submitting claims, and

holding final approval hearing. *See, e.g., Manual for Complex Litig.* at § 21.633. All Plaintiffs propose that the Court re-approve the same schedule of events previously ordered by the Court as follows:

Notice to class by U.S. Mail	10 days after entry of the order granting preliminary approval
Summary notice published	As soon as practicable given publication deadlines
Last day for potential class members to request permission to opt back in to the class	14 days before fairness hearing
Last day for class members to object to the settlement	14 days before fairness hearing
Last day for class members to return claims forms (including those potential members seeking permission to opt back in)	14 days before fairness hearing
Class counsel file motion for final approval and response to any objections filed	7 days before fairness hearing
Fairness hearing	A date at the Court's convenience, approximately 75 days after entry of the preliminary approval order

IV. CONCLUSION

For all the foregoing reasons, DFA Plaintiffs respectfully request that the Court issue an Order that (1) reinstates the DFA subclass certified on September 7, 2010 for settlement purposes, (2) appoints the undersigned as counsel for the DFA subclass for settlement purposes (3) joins DFA Plaintiffs with the pending motion for preliminary approval of the Dean settlement, and (4) reinstates preliminary approval of the Dean settlement.

Dated: December 27, 2011

Respectfully submitted,

[6] ""Clean" versions of the revised Long and Summary Notices are attached as Exhibits F and G.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of December 2011, a true and correct copy of DFA PLAINTIFFS' MOTION TO REINSTATE DFA SUBCLASS, APPOINT DFA SUBCLASS COUNSEL, AND JOIN AND REINSTATE PRELIMINARY APPROVAL OF THE SETTLEMENT WITH DEAN were served by operation of the electronic filing system of the U.S. District Court for the Eastern District of Tennessee upon all counsel who have consented to receive notice of filings in the matters styled *In re Southeast Milk Antitrust Litigation*, MDL No. 1899. True and correct unredacted copies of the Motion and Memorandum were served via Hand Delivery on the 27th day of December 2011, on the U.S. District Court for the Eastern District of Tennessee.

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