**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

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| **IN RE: FRESH DAIRY PRODUCTS ANTITRUST LITIGATION (NO. II)** | : | **MDL NO. _____** |

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED PRETRIAL PROCEEDINGS**

This is Defendants' first Motion for Transfer under § 1407, but it arises from cases that were previously before this Panel in *In re Fresh Dairy Products Antitrust Litigation*, MDL No. 2340, as well as several new cases alleging the same operative facts. In denying the motion to transfer filed by counsel for plaintiffs Stephen L. LaFrance Holding Inc. and Stephen L. LaFrance Pharmacy Inc. in that earlier proceeding, the Panel "acknowledge[d] that the four actions [that were then pending] share certain factual issues," but noted that there were in practical effect only two independent cases proceeding in federal court, and that the classes in those proceedings did not overlap because one involved alleged direct purchasers and the other involved indirect purchasers. *See* Order Denying Transfer 1, *In re Fresh Dairy Prods. Antitrust Litig.*, MDL No. 2340, Apr. 17, 2012, ECF No. 31 ("Order Denying Transfer"). The Panel therefore proposed that efficiency could best be achieved through informal cooperation. *Id.*[1]

Events subsequent to the Panel's Order have changed those considerations significantly. First, the former direct purchaser case, *Stephen L. LaFrance Holding Inc. et al. v. Nat'l Milk Producers Fed'n et al.*, was voluntarily dismissed by plaintiffs' counsel following an Order transferring the case, pursuant to 28 U.S.C. § 1404(a), from the Eastern District of Pennsylvania to the Northern District of California. In its place, the same counsel—none of whom are located

[1] Judge Vratil suggested during oral argument that transfer should instead be pursued under 28 U.S.C. § 1404(a). *See* Tr. 6, *In re Fresh Dairy Prods. Antitrust Litig.*, Mar. 29, 2012, ECF No. 32.

in Illinois—filed a new action in the Southern District of Illinois on behalf of Brenda Blakeman, an individual from Vermont. The facts alleged and proposed class in the new action overlap substantially with those of the cases still pending in California.

Although Ms. Blakeman is in fact an end-consumer of retail milk products identical to those purchased by the plaintiffs in the pending indirect purchaser cases, she styles herself and the class she seeks to represent as "direct" purchasers in order to attempt to establish federal antitrust standing. Ms. Blakeman's theory of direct purchaser standing is incorrect,[2] but regardless whether she is characterized as a direct or an indirect purchaser, the fact that she is a *retail customer* (as opposed to the retail sellers that were the alleged direct-purchaser plaintiffs at the time of the earlier motion to transfer) means that the claims and issues in her case overlap extensively with the claims and issues in the indirect purchaser cases. Plaintiffs in all of these cases exist at the same level of commerce, and do not possess the differences (*e.g.*, different measurements of pass-through pricing) that normally distinguish a direct purchaser class from an indirect purchaser class. Indeed, Ms. Blakeman and members of her putative class *likely already are members of* the proposed classes in the California actions. For that reason, the "overlap" that this Panel previously found wanting is now pervasive.

Second, seven total actions have been filed in four different district courts, the number of cases still pending has increased to five, and that number appears likely to increase further. As part of their procedural maneuvering in the Southern District of Illinois, the same plaintiffs' counsel recently filed a new action (the seventh to date) and proposed an intervenor-plaintiff to

[2] Ms. Blakeman asserts that she is a "direct" purchaser of *raw* milk because she purchased *processed* dairy products "directly" from one particular store in Vermont owned by one of the Defendants. This theory is contrary to established law.

substitute for Ms. Blakeman in the event her claims were found to be moot.[3] Defendants are seeking to have Ms. Blakeman's case dismissed as moot and oppose the motion to intervene on the basis that one cannot intervene in a moot case. The intervenor-plaintiff would in that event almost certainly file his own lawsuit (bringing the total number of filed actions up to eight and the total number of pending actions up to six).

Finally, the recent history in this litigation demonstrates that effective coordination can be achieved only through multidistrict centralization. Counsel for the plaintiffs in the Pennsylvania and Illinois actions have consumed the resources of this Panel and several district courts through their gamesmanship and forum shopping and have forced Defendants to litigate multiple costly proceedings in various parts of the country over the last year and a half only to see their efforts wasted by *LaFrance* counsel's tactical abandonment of their MDL motion and their original case and the repetitive filing of new complaints to avoid any attempts at achieving efficiencies through consolidation. It is manifest that counsel will continue to employ such maneuvers to keep these cases from being coordinated. The only way to achieve the just and efficient resolution of these cases is for the Panel to employ the centralization procedure Congress designed for cases such as these.

These circumstances warrant transfer, and for the reasons explained herein, centralization should be made to the Northern District of California, where the actions have been pending the longest before the judge most familiar with the facts and issues presented by the cases.

## BACKGROUND AND PROCEDURAL HISTORY

In September 2011, two putative class actions alleging similar antitrust violations were filed against Defendants in the Northern District of California: one on September 26, 2011, Class

[3] Although Ms. Blakeman's case is moot, it has yet to be adjudged as such. Defendants therefore include it in Schedule A without prejudice to their position that Article III subject matter jurisdiction no longer exists.

Action Compl., *Matthew Edwards et al. v. Nat'l Milk Producers Fed'n et al.*, No. 11-cv-04766 (N.D. Cal. Sept. 26, 2011), and another the next day, Class Action Compl., *Jeffrey Robb et al. v. Nat'l Milk Producers Fed'n et al.*, No. 11- cv-4791 (N.D. Cal. Sept. 27, 2011). The named plaintiffs in those actions are represented by the same two law firms ("California Counsel").

The complaints allege that National Milk Producers Federation, a federation of dairy farmers and agricultural cooperatives (including Defendants Dairy Farmers of America, Land O'Lakes, Dairylea, and Agri-Mark) conspired to reduce the supply and thereby inflate the price of the "raw" farm milk they produced and sold by funding and operating a program called "Cooperatives Working Together" ("CWT"). According to the complaints, CWT paid certain dairy farmers, selected through a voluntary bid process, a subsidy to market their cattle herds for beef instead of continuing to milk them. Plaintiffs, "indirect" purchasers of finished fluid milk and other retail dairy products containing processed raw farm milk, contend that the prices of the products they purchased were artificially inflated by the herd retirement program. Plaintiffs also contend that the immunities from the antitrust laws granted to agricultural producers by Section 6 of the Clayton Act, 15 U.S.C. § 17, and the Capper-Volstead Act, 7 U.S.C. § 291, do not apply to CWT or its activities and that Defendants' conduct therefore violated state antitrust laws and the "common law of unjust enrichment."

On October 27, 2011, a named plaintiff represented by a different law firm ("Minnesota Counsel") filed a third, virtually identical class action against Defendants in the District of Minnesota, Class Action Compl., *Petersen v. Nat'l Milk Producers Fed'n et al.*, No. 11-cv-03186 (D. Minn. Oct. 27, 2011), ECF No. 1, attached as Ex. 1. One day later, a fourth class action was filed in the Northern District of California, Class Action Compl., *Boys & Girls Club of the East Valley et al. v. Nat'l Milk Producers Fed'n et al.*, No. 11-cv-5253 (N.D. Cal. Oct. 28,

2011). The named plaintiffs in that action are jointly represented by California Counsel and Minnesota Counsel. Minnesota Counsel then filed a notice of voluntary dismissal without prejudice on behalf of the named plaintiff in the Minnesota action.[4] On December 19, 2011, the three California actions were consolidated before Honorable Jeffrey S. White.[5]

In January 2012, Stephen L. LaFrance Pharmacy Inc. and Stephen L. LaFrance Holding Inc., through their attorneys, filed a fifth antitrust class action complaint in the Eastern District of Pennsylvania against Defendants and Prairie Farms Dairy, Inc., Turner Dairy Holdings LLC, and Hiland Dairy Foods Company in the Eastern District of Pennsylvania. Class Action Compl., *Stephen L. LaFrance Holding Inc., et al. v. Nat'l Milk Producers Fed'n, et al.*, No. 12-cv-00070 (E.D. Pa. Jan. 6, 2012), attached as Ex. 2. The allegations in the complaint consisted largely of word-for-word reproductions of the allegations in the earlier-filed complaints, except that the Pennsylvania action claimed recovery under federal antitrust law.[6] The LaFrance entities, who were involved in the retail pharmacy business and who allegedly purchased fluid milk for resale from two defendants, sought to represent a class of direct purchasers of fluid milk and other fresh dairy products. The plaintiffs in that action were represented by seven different law firms from Pennsylvania, Mississippi, Tennessee, and Arkansas ("Pennsylvania Counsel").[7]

Four days after filing suit, the Pennsylvania plaintiffs, through Pennsylvania Counsel, moved to coordinate the Pennsylvania action, the California actions, and all other related cases in

[4] Voluntary Dismissal, *Petersen*, Oct. 28, 2011, ECF No. 2.
[5] Order Consolidating Cases, *Edwards*, Dec. 19, 2011, ECF No. 62. The operative complaint in the California Actions was filed on August 20, 2012. Consol. Am. Class Action Compl., *Matthew Edwards et al. v. Nat'l Milk Producers Fed'n et al.*, No. 11-cv-04766 (N.D. Cal. Aug. 20, 2012) ("*Edwards* Compl.").
[6] As Pennsylvania Counsel previously told the Panel, "[a]ll these cases challenge the same behavior and are based on the same set of operative facts." Pls.' Mot. for Transfer and Coordination of Related Actions to the E. Dist. of Pa. Pursuant to 28 U.S.C. § 1407, *In re Fresh Dairy Prods. Antitrust Litig.*, Jan 10, 2012, ECF No. 1-1, at 4.
[7] The LaFrance Plaintiffs were represented by Dianne M. Nast, Daniel N. Gallucci, and Erin C. Burns of RodaNast, P.C., Michael Roberts of Roberts Law Firm, P.A., Don Barrett of Barrett Law Group, P.A., Charles Barrett of Charles Barrett, P.C., Peter Kohn of Faruqi & Faruqi, LLP, Joseph Kohn and Robert J. LaRocca of Kohn, Swift & Graf, P.C., and Arnold Levin, Michael D. Fishbein, and Frederick S. Longer of Levin, Fishbein, Sedran & Berman.

an MDL in the Eastern District of Pennsylvania. Pls.' Mot. for Transfer and Coordination of Related Actions to the E. Dist. of Pa. Pursuant to 28 U.S.C. § 1407 ("Plaintiffs' Transfer Motion"), *In re Fresh Dairy Prods. Antitrust Litig.*, Jan. 10, 2012, ECF No. 1. In their motion, Pennsylvania Counsel argued that "[c]oordination of the actions before a single court w[ould] conserve judicial resources, reduce litigation costs, prevent potentially inconsistent pretrial rulings, eliminate duplicative discovery and permit the cases to proceed to trial more efficiently." *Id.* ¶ 6. Defendants agreed that coordination was appropriate but submitted that the appropriate forum for MDL proceedings was the Northern District of California, where the three earliest-filed actions already were pending. Interested Party Resp. of Defs., *In re Fresh Dairy Prods. Antitrust Litig.*, Feb. 1, 2012, ECF No. 17. Plaintiffs in the California actions did not respond.

At oral argument, however, Pennsylvania Counsel informed the Panel that, despite having initiated the multidistrict proceedings in the first place, they now believed that centralization was unwarranted. Tr. 3-4, *In re Fresh Dairy Prods. Antitrust Litig.*, Mar. 29, 2012, ECF No. 32. Judge Vratil suggested that, instead of relying on multidistrict centralization, coordination might be better achieved through transfer under 28 U.S.C. § 1404(a). *See id.* at 6.

In an Order issued on April 17, 2012, the Panel declined to coordinate the cases, concluding that although "the four actions share certain factual issues," the "limited number of actions" counseled against use of MDL proceedings, and that coordination likely could be achieved through other means. Order Denying Transfer at 1. The Panel also noted in its opinion that because the Pennsylvania plaintiffs brought a purported direct purchaser action on behalf of entities that purchased fluid milk directly from milk producers, their proposed class did not appear to overlap with the California plaintiffs' proposed class of indirect purchasers of finished fluid milk and other retail dairy products. *Id.*

Consistent with the Panel's guidance, on June 18, 2012, Defendants filed a motion to transfer *LaFrance* to the Northern District of California under § 1404(a).[8] The Eastern District of Pennsylvania granted Defendants' motion, concluding that "California has a greater connection to the factual nexus of this action [than does Pennsylvania]," *Stephen L. LaFrance Holding Inc. v. Nat'l Milk Producers Fed'n*, No. 12-cv-0070, 2012 WL 3104837, at *3 (E.D. Pa. July 31, 2012), attached as Ex. 3; that "the witnesses likely to testify in this matter—largely employees of the defendants—would be inconvenienced by having to travel to Philadelphia to testify in addition to having to testify in the California Actions," *id.*; and that "[s]ubstantial practical considerations, including judicial efficiency and the avoidance of duplicative proceedings, counsel in favor of transfer," *id.* at *4. For these and other reasons, the court determined that "[i]t would be expeditious to transfer [the Pennsylvania action] to the Northern District of California to conserve the resources of the parties, witnesses, and the judiciary." *Id.* at *5. Following transfer, Defendants filed a motion to declare the Pennsylvania action related to the California actions, which Judge White granted.[9] Related Case Order (Aug. 22, 2012).

But, one day later, the Pennsylvania plaintiffs voluntarily dismissed their action without explanation and without prejudice. Dismissal Without Prejudice Pursuant to Rule 41(a)(1)(A)(i), *Stephen L. LaFrance Holding Inc.*, Aug. 23, 2012, ECF No. 82 (N.D. Cal.), attached as Ex. 4.

Pennsylvania Counsel filed a new class action against Defendants, however, this time in the United States District Court for the Southern District of Illinois, Class Action Compl., *Blakeman v. Nat'l Milk Producers Fed'n, et al.*, No. 3:12-cv-01246 (S.D. Ill. Dec. 7, 2012)

[8] Mem. of Law in Support of Defs.' Joint Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), *Stephen L. LaFrance Holding Inc.*, June 18, 2012, ECF No. 43.
[9] Related Case Order, *Edwards*, Aug. 22, 2012, ECF No. 113.

("Blakeman Compl.").[10] Although the named plaintiff in that action, a resident of South Royalton, Vermont, claims to be a "direct" purchaser of dairy products from a retail store owned by Defendant Agri-Mark, she alleges that (like the plaintiffs in the California actions) she purchased finished dairy products at the retail level. The allegations of that complaint are substantially identical to the allegations in all of the other complaints referred to herein.

Defendants promptly filed a motion to transfer under section 1404(a).[11] On April 24, 2013, however, the district court in the Southern District of Illinois denied Defendants' motion. Mem. and Order, *Blakeman*, Apr. 24, 2013, ECF No. 63, attached as Ex. 5. The court reached the precise opposite conclusion from that reached by the Eastern District of Pennsylvania on almost every section 1404(a) factor. *See id.*

On April 9, 2013, while the motion to transfer was pending and before any discovery had been taken, Ms. Blakeman moved for partial summary judgment.[12] Defendants offered to settle the case by satisfying in full Ms. Blakeman's requested relief, and the case therefore is now moot under Seventh Circuit precedent, *see Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011); *cf. Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). Defendants filed a motion to dismiss for lack of subject matter jurisdiction on May 7, 2013, and in an abundance of caution responded in opposition to Ms. Blakeman's motion for summary judgment shortly thereafter.[13]

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[10] Named plaintiff Brenda Blakeman is represented by Don Barrett of Barrett Law Group, P.A., Charles Barrett of Charles Barrett, P.C., Dianne M. Nast, Daniel N. Galucci, and Erin C. Burns of NastLaw LLC, Michael Roberts, Debra Gaw Josephson, Stephanie Egner Smith, and Jana K. Law of Roberts Law Firm, P.A., Joseph Kohn and Robert J. LaRocca of Kohn, Swift & Graf, P.C., and Arnold Levin, Michael D. Fishbein, and Frederick S. Longer of Levin Fishbein, Sedran & Berman.

[11] Mem. Of Law in Supp. of Defs.' Joint Mot. Transfer Venue Pursuant to 28 U.S.C. § 1404(a), *Blakeman*, Jan. 22, 2013, ECF No. 34, attached as Ex. 9.

[12] Pl.'s Mot. for Partial Summary Judgment and Supporting Mem. of Law, *Blakeman*, Apr. 9, 2013, ECF No. 52.

[13] *See* Defs.' Joint Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Mem. of Law in Supp., *Blakeman*, May 7, 2013, ECF No. 65; Defs.' Joint Resp. in Opp. to Pls. Mot. for Summary Judgment, *Blakeman*, May 13, 2013, ECF No. 75.

On May 10, 2013, another complaint was filed in the Southern District of Illinois by Pennsylvania Counsel on behalf of First Impressions Salon, Inc., a beauty salon in Woodstock, Vermont whose president and registered agent is Ms. Blakeman, Class Action Compl. *First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n*, No. 3:13-cv-00454 (May 10, 2013) ("First Impressions Compl."). In addition, another resident of Woodstock (a town of 3,000), filed a motion to intervene in *Blakeman*, appending thereto a third complaint, captioned Class Action Complaint in Intervention, *Mattson v. National Milk Producers Federation et al*. *See* Roy Mattson's Mot. and Mem. to Intervene Pursuant to Fed. R. Civ. P. 24 Ex. 2, *Blakeman*, May 10, 2013, ECF No. 67, attached as Ex. 6. Mr. Mattson also is represented by Pennsylvania Counsel. First Impressions and Mr. Mattson both allege—like Ms. Blakeman—that they purchased finished fluid milk and other retail dairy products from the Vermont retail store owned by Agri-Mark, and neither alleges that they purchased raw milk directly or purchased finished dairy products for resale. These cases all have been assigned to the Honorable G. Patrick Murphy, who has announced his retirement effective December 1, 2013.

In the meantime, the California actions have been proceeding (though they still remain in the early stages of discovery) before Judge White: the court has issued several orders relating to the pleadings and has denied a motion to dismiss filed by Defendants; Defendants have answered the complaint; and the parties are engaged in document review and production. No depositions have taken place or been noticed, and no class certification or merits motions have yet been filed.

Defendants National Milk Producers Federation aka Cooperatives Working Together, Dairy Farmers of America, Inc., Land O'Lakes, Inc., Dairylea Cooperative Inc., and Agri-Mark, Inc. now return to ask the Panel to exercise its power under section 1407 to centralize these cases for coordinated pretrial proceedings in the Northern District of California.

## SUMMARY OF ARGUMENT

There are three principal reasons the Panel should grant this motion. First, the actions listed in Schedule A involve virtually identical factual allegations and claims for relief under state and federal antitrust law, discovery will overlap substantially, if not completely, and all of the actions present the core threshold issue of the applicability of Section 6 of the Clayton Act and the Capper-Volstead Act, which grant agricultural producers immunity from antitrust liability when combining in cooperative form to engage in collective activity. Thus, coordination under section 1407 will conserve the resources of the parties and the judiciary, prevent duplicative discovery, and avoid the risk of inconsistent rulings.

Second, the actions filed since the Panel denied the Pennsylvania plaintiffs' motion render the need for transfer more acute. There now have been filed seven actions in four different district courts, with an eighth action waiting in the wings. Notwithstanding the complaints' characterizations of named plaintiffs as "direct" purchasers, the newly filed actions in the Southern District of Illinois involve—like the California actions—retail purchaser named plaintiffs, and they and many of the class members they seek to represent likely are already members of the putative classes sought to be certified in the California actions. Accordingly, the putative classes in all pending actions now overlap, as they all seek to certify in part classes of plaintiffs who are purchasers not of raw milk, the allegedly price-fixed product, but of retail dairy products *containing* processed raw milk. As such, centralization is necessary to avoid duplicative class certification proceedings and potentially inconsistent determinations regarding similar and overlapping classes and issues.

Third, centralization is necessary because it now is clear that no other means can effectively or reliably manage the proceedings in a just and efficient manner. Defendants have

been forced to litigate several proceedings in various parts of the country over the last year and a half only to see their efforts—and the efforts of several courts—wasted by the targeted abandonment of motions and cases and the repetitive filing of complaints by the same counsel in an inappropriate effort to forum shop and to avoid coordination. The courts and the parties now are faced with the prospect of costly and duplicative pretrial proceedings, inconsistent rulings, substantial delays, and uncertainty about whether these or subsequently filed actions ever can be coordinated. The Panel can rectify these problems by ordering transfer.

## ARGUMENT

### I. THE ACTIONS SHOULD BE COORDINATED FOR PRETRIAL PROCEEDINGS

Actions involving one or more common questions of fact may be transferred and coordinated under section 1407 to "serve the convenience of parties and witnesses" and to "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. The purpose of centralization under section 1407 is to eliminate duplicative discovery, avoid conflicting rulings and schedules, reduce litigation costs, and conserve the time and effort of the parties, attorneys, witnesses, and courts. *Manual for Complex Litigation (Fourth)* § 20.131 (2004) (citing *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968)); *see also In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536 F. Supp. 2d 1380, 1381 (J.P.M.L. 2008) (holding centralization "necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary").

The Panel has been willing to grant a successive motion to transfer if subsequent events or changed circumstances "underscore[] the need" for centralized pretrial management. *In re Fedex Ground Package System, Inc., Employment Practices Litigation (No. II)*, 381 F. Supp. 2d 1380, 1381 (J.P.M.L. 2005). These actions meet the predicate standards for transfer under

section 1407, and they also satisfy the rationale for granting a successive transfer motion: The character of the actions has altered in a manner favoring transfer, and subsequent events since the Panel's denial of plaintiffs' motion underscore the need for centralized management.

### A. Transfer Will Promote the Just and Efficient Resolution of These Virtually Identical Actions

In support of their motion before this Panel, Pennsylvania plaintiffs stated of these actions:

- "The claims of each case will require virtually identical discovery and pre-trial work." Plaintiffs' Transfer Motion at 4.

- "Transfer under § 1407 is therefore necessary to avoid duplication of discovery and will permit discovery to be effectively and efficiently completed without depleting the resources of the parties, their attorneys and the judicial system." *Id.* at 5.

- "Centralization of these cases will also facilitate the orderly and efficient acquisition, analysis, and storage of the myriad documents that will be produced in the actions. This can be achieved through centralized management by the transferee court of all document discovery." *Id.* at 6.

- "Transfer to a single forum will avoid repetitive resolution of disputed issues and pretrial rulings on identical issues of fact and law. Centralization under § 1407 is necessary to 'prevent inconsistent pretrial rulings (especially with respect to class certification matters), and conserve the resources of the parties, their counsel and the judiciary.' *In re Methyl Methacrylate*, 435 F. Supp. 2d at 1347 . . . ." *Id.*

- "[I]n view of the common issues identified above, coordination in one district before one court assures one decision for issues that affect each action listed for transfer. Otherwise, conflicting orders may result." *Id.*

- "Transfer to a single forum will eliminate the potential for disruption, confusion, and prejudice created by the pendency of numerous actions seeking class-wide relief, all effectively seeking judicial determination as to the definition, certification and notice to members of a class." *Id.* at 6-7.

Defendants entirely agree. These cases involve largely similar plaintiffs (retail consumers of dairy products), the exact same defendants, arise out of common facts, and there will be significant overlap—if not complete unity of identity—with respect to documents,

deponents, and legal issues. Centralization will advance the interests of fairness and judicial economy by avoiding duplicative proceedings and inconsistent rulings and reducing the overall burden on the parties and the judicial system. As the Eastern District of Pennsylvania held:

> Substantial practical considerations, including judicial efficiency and the avoidance of duplicative proceedings, counsel in favor of transfer. These factors are particularly important here because each of the three cases consolidated in the Northern District of California was filed before the instant one and involve substantially the same subject matter. The California Actions allege the same behavior on the part of the defendants and will therefore require similar discovery.

*LaFrance*, Ex. 3, 2012 WL 3104837, at *4 (footnote omitted). In addition to the close identity of the factual allegations and legal claims lodged in the cases, the applicability of the Clayton Act and the Capper-Volstead Act is a significant threshold legal issue in every case, plays a central role in all of the complaints, and raises a number of intricate questions that would be more efficiently and consistently resolved by a single court.

### B. The Proposed Classes in the California and Illinois Actions Overlap

As Pennsylvania Counsel noted, "[t]he Panel consistently has held that when the risk of overlapping or inconsistent class determinations exists, transfer of actions to a single district for coordinated or consolidated pretrial proceedings is necessary to eliminate the possibility of inconsistent pretrial rulings, especially concerning class issues." Plaintiffs' Transfer Motion at 7 (citing *In re Hydrogen Peroxide Antitrust Litig.*, 374 F. Supp. 2d 1345, 1346 (J.P.M.L. 2005); *In re Hotel Telephone Charge Antitrust Litig.*, 374 F. Supp. 1402, 1403 (J.P.M.L. 1974)).

In this case, the Panel stated in its prior ruling that, because the Pennsylvania action was an alleged direct purchaser action, while the California actions are indirect purchaser actions, the classes "do not appear to overlap," a factor weighing against centralization. Order Denying Transfer at 1. Now, by contrast, plaintiffs in the Illinois actions actually are members of the

putative classes proposed in the California actions, and the proposed class definitions in the Illinois actions overlap with the proposed class definitions in the California actions. Unlike the Pennsylvania plaintiffs, who allegedly directly purchased milk from a processor for re-sale to customers, the named plaintiffs in the Illinois actions and the class members they hope to represent are end consumers of finished dairy products at the retail level—just like the California indirect purchaser plaintiffs:

| Action | *Edwards* (California) Compl. ¶137 | *Blakeman* (Illinois) Compl. ¶114 |
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| Class Definition | "All persons [in 27 jurisdictions throughout the United States][14] who purchased for their own use and not for resale milk and/or fresh milk products (including cream, half & half, yogurt, cottage cheese, cream cheese, and sour cream) from 2004 through to the present." | "All persons or entities in the United States who purchased directly from one or more Defendants, or their subsidiaries or joint-ventures, fluid milk products, and/or fresh dairy products (including, but not limited to, processed milk, cream, half & half, yogurt, dry milk, cottage cheese, cream cheese, sour cream, and ice cream) from December 6, 2008 to the present." |

Indeed, although the plaintiffs in the Illinois actions bring their claims under federal antitrust law rather than state antitrust law, presumably because they are attempting to claim applicability of the possible "ownership or control" exception to the rule denying federal antitrust standing to indirect purchasers, they are not direct purchasers of raw farm milk, the allegedly price-fixed product. Instead, they are purchasers of downstream dairy products at the retail level who hope to establish federal antitrust standing because they allegedly purchased those products from a store owned by Agri-Mark, an alleged co-conspirator.[15] Thus, whether or not they have standing, their proposed class definitions and many of the retail purchasers (like

[14] Plaintiffs propose to represent purchasers in Arizona, California, the District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. Edwards Compl. ¶137(a)-(aa).

[15] *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (U.S. 1977) ("Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer."). The Supreme Court has never explicitly recognized the exception. *See California v. ARC America Corp.*, 490 U.S. 93, 97 n.2 (1989).

plaintiffs) included within them will overlap with the class definitions of retail purchasers (from stores owned by conspirators or by others) in twenty-six states and the District of Columbia proposed in the California actions.

Moreover, discovery likely will show that the plaintiffs cannot establish a "direct" link with respect to several of the products identified in their complaints in the first place. The Vermont Cabot Store owned by Agri-Mark, from which plaintiffs attempt to derive their standing as "direct" purchasers, does not even sell several of the products that plaintiffs claim to have purchased, and Agri-Mark does not bottle its own milk, produce ice cream, or sell retail cream, half & half, or dry milk. *See* Affidavit of Laurie Callahan ("Callahan Aff.") ¶¶6-12, *Blakeman*, May 13, 2013, ECF No. 74-2, attached as Ex. 7; Affidavit of Robert D. Wellington ("Wellington Aff.") ¶¶7-8, May 13, 2013, ECF No. 74-3, attached as Ex. 8.

The ramifications of these distinctions between the Pennsylvania action and the Illinois actions are twofold. First, the class certification inquiry in the California and the Illinois actions will overlap substantially, involving core issues related to whether retail purchasers of dairy products can prove antitrust impact and damages on a class-wide basis. The transaction data and other evidence pertinent to the class certification inquiries thus will be similar, the expert analyses likely will cover the same ground, and the legal and factual analyses required of the courts considering the issues will coincide extensively.

Second, the named plaintiffs in the Illinois actions and many of their absent class members likely *already are members of the proposed class* in the California actions. One of the proposed subclasses in the California actions, for example, consists of the following: "Vermont: All persons who purchased for their own use and not for resale milk and/or fresh milk products (including cream, half & half, yogurt, cottage cheese, cream cheese, and sour cream) from 2004

through to the present)." *Edwards* Compl. ¶137(y). Plaintiffs in the Illinois actions are citizens of Vermont who allegedly purchased "finished fluid milk products and other manufactured dairy products, which contained the price-fixed raw milk" at the retail level, and they do not allege that they resold the dairy products they purchased. *See, e.g.*, *First Impressions* Compl. ¶1. For the reasons explained above, the plaintiffs in the Illinois actions could not have purchased many of these products, including fluid milk, without an intermediary distributor purchaser (which would make them indirect purchasers). And in any event, because those plaintiffs allegedly "purchased for their own use and not for resale milk and/or fresh milk products . . . from 2004 through to the present" in Vermont, their purchases unquestionably are included within the proposed California class.

These ramifications obviate one of the reasons the Panel previously denied transfer and show that determination of class certification in a single forum will offer significant economies of scale and avoid the risk of inconsistent determinations regarding overlapping classes. Indeed, virtually every piece of the cases presented in the California and Illinois Actions coincide. The facts are precisely the same. The Defendants are identical. The actions of the Defendants that are alleged to be anticompetitive are the same. Liability will arise under either state or federal antitrust law based on nearly identical considerations. The core legal issue in the Illinois actions—the statutory immunities enjoyed by agricultural cooperatives under both the Clayton Act and the Capper Volstead Act—also is central to the California actions. And now the class certification inquiries will largely coincide.

Even to the extent there are differences between the federal and state antitrust claims alleged in the actions, the different legal bases of the claims do not stand in the way of transfer where the elements of the claims overlap (as they do in antitrust law) and the evidence and proof

are substantially the same. *See In re Skelaxin (Metaxalone) Antitrust Litig.*, 856 F. Supp. 2d 1350 (J.P.M.L. 2012) ("The Panel has frequently centralized antitrust cases involving direct and indirect purchaser claims that arise from common factual allegations, particularly where multiple related actions are pending.").

### C. Multidistrict Centralization Is the Only Reliable Way to Coordinate These Actions and Prevent Undue Waste, Delay, and Duplication of Effort

Section 1407 was enacted to formalize and make compulsory centralized pretrial proceedings in multidistrict litigation to conserve the resources of the judiciary, parties, and witnesses, to eliminate duplicative discovery, and to avoid inconsistent and conflicting pretrial rulings regarding similar factual and legal issues. *See* S. Rep. No. 454, 90th Cong., 1st Sess. 3-4 (1967); H. R. Rep. No. 1130, 90th Cong., 2d Sess. 2 to 3 (1968). Prior experience had shown that other mechanisms for transfer and coordination often were of limited utility in providing for efficient administration of large multidistrict cases. *See* Report of the Coordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (1965), *reprinted in In re Plumbing Fixture Cases*, 298 F. Supp. at 498-502; S. Rep. No. 454, at 6-7 (one purpose of § 1407 is to end the necessity of relying on voluntary cooperation in massive litigation).

"Since no single judge rules on all 1404 transfer motions," for instance, "it is possible that the results will not be consistent. Some cases arising out of the same facts may not be transferred and, even if transfers are ordered, the cases may not be sent to the same district." Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 44 (1971). "It was made apparent by the Electrical Equipment Cases that, because of these deficiencies, the existing statutes did not provide a consistently reliable method of administering massive multidistrict litigation." *Id.*

In this case, Pennsylvania Counsel have displayed an unwillingness to coordinate and a commitment to using tactical dismissals and the filing of multiple actions to forum shop and to evade transfer to the Northern District of California. Their choices already have imposed substantial delay and unnecessary expense on the courts and Defendants, raised the specter of duplicative discovery, and facilitated inconsistent rulings on transfer motions. Fortunately, however, discovery remains in its early stages in the California actions, and centralization now can ensure that the actions are placed on the same track for further depositions, class certification, and other proceedings.

To be sure, the Panel has noted that when only a limited number of actions have been filed, informal coordination can be a practicable alternative to multidistrict centralization. *See* Order Denying Transfer at 1-2. And in some instances, it is prudent to trust that coordination among courts and parties (through such efforts as transfer under 1404(a) where appropriate, or voluntary coordination of discovery) can be achieved without the Panel's authority. But where experience shows that those other means cannot be relied upon because of deliberate manipulation of the judicial system by counsel, the Panel has not hesitated to exercise its powers in order to promote justice and efficiency regardless of the number of actions pending. In *In re Value Line Special Situations Fund Litigation*, 334 F. Supp. 999, 1000 (J.P.M.L. 1971), for example, the Panel ordered the transfer of one action to another district where only two actions were pending after noting a party's unwillingness to coordinate voluntarily.

Moreover, there now have been seven actions filed in the Northern District of California, the District of Minnesota, the Eastern District of Pennsylvania, and the Southern District of Illinois, with an eighth action likely to be filed shortly. Efforts such as those of the California and Minnesota Counsel to voluntarily coordinate in the Northern District of California and of

Defendants to reduce duplication and expense through transfer under section 1404(a), though partially successful, only mask the true number and scope of these actions and have failed to reliably provide for efficient administration, because they cannot account for the ability of a recalcitrant party to resist coordination. The only remaining method to manage these cases justly and efficiently now is through transfer under section 1407.

## II. THE NORTHERN DISTRICT OF CALIFORNIA IS THE APPROPRIATE VENUE FOR CENTRALIZATION

Should the Panel order transfer, Defendants respectfully renew their suggestion that the appropriate forum is the Northern District of California, where the first-filed actions are pending. The location of the first-filed suit is an important factor in the transfer analysis. *See, e.g.*, *In re Mattel, Inc., Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007) (centralizing, in part, because first filed action had been pending in the transferee court); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006).

The three California actions have been pending far longer than the Illinois actions, *see, e.g.*, *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 746 F. Supp. 2d 1359 (J.P.M.L. 2010) (citing the forum in which cases have progressed the furthest as a relevant factor in choosing a transferee court), and Judge White has a solid track record of handling MDL litigation expeditiously, *see, e.g.*, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (expertise of a particular judge).[16]

[16] Judge White has completed two MDL litigations in his career: *In re Bank of America Corp. Auction Rate Securities Marketing Litigation*, MDL No. 2014, and *In re Ditropanxl Antitrust Litigation*, MDL No. 1761. He brought his first multidistrict litigation to completion in approximately 34 months, and the second case was completed even more efficiently in just 19 months. Indeed, this Panel has explicitly praised Judge White's competency in handling MDL matters. *See* Transfer Order, *In re Bank of Am. Corp. Auction Rate Secs. Mktg. Litig.*, MDL No. 2014 (J.P.M.L. Feb. 12, 2009) ("By centralizing this litigation before Judge Jeffrey S. White, we are assigning this docket to a seasoned jurist who has the experience and caseload conditions to steer this litigation on a prudent course.").

Judge White also has gained familiarity with the facts, issues, and administrative needs of these particular cases and has issued numerous procedural orders, an order regarding the sufficiency of the *Edwards* Complaint's allegations related to the Capper Volstead-Act,[17] and an order denying Defendants' motions to dismiss.[18] Permitting Judge White to apply that familiarity to the coordinated actions would offer significant efficiencies. By contrast, the experienced district judge in the Southern District of Illinois presiding over the Illinois Actions, Hon. G. Patrick Murphy, has announced his intention to leave the bench in December of this year. Thus, if these actions were centralized in the Southern District of Illinois, they would be assigned to Judge Murphy only temporarily and then re-assigned to a different district judge without any experience in the litigation.

Other case and court-specific conditions render the Northern District of California the forum best suited to handle these actions, including the centrality of the dairy industry to California, the fact that the events at issues in these cases have a much greater connection to California than to Illinois, the convenience of San Francisco as a host forum, relative docket conditions, and the complete lack of connection of the plaintiffs or their counsel to Illinois. *See* Interested Party Resp. of Defs. at 7-9, *In re Fresh Dairy Prods. Antitrust Litig.*, ECF No. 17; Mem. of Law in Supp. of Defs.' Joint Mot. to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), *Blakeman*, Jan. 22, 2013, ECF No. 34, attached as Ex. 9.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Panel grant its motion for transfer and coordination of these actions for pretrial proceedings under 28 U.S.C. § 1407 and transfer the actions to the Northern District of California.

[17] *See* Order re Am. Compl., *Edwards*, July 19, 2012, ECF No. 105.
[18] *See* Order re Mot. to Dismiss Consol. Compl., *Edwards*, Oct. 30, 2012, ECF No. 123.

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