

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,

COMMONWEALTH OF MASSACHUSETTS

and

STATE OF WISCONSIN

Plaintiffs,

v.

DAIRY FARMERS OF AMERICA, INC.

and

DEAN FOODS COMPANY,

Defendants.

No. 20 C 2658

Judge Feinerman

**UNITED STATES' RESPONSE TO THE MOTION OF DEFENDANT, DAIRY
FARMERS OF AMERICA, INC., TO RETAIN THE FRANKLIN PLANT PURSUANT
TO THE TERMS OF THE FINAL JUDGMENT**

The United States submits its response to the Motion of Defendant Dairy Farmers of America, Inc. ("DFA") to Retain the Franklin Massachusetts Dairy Plant, including, the Franklin Divestiture Assets as defined in the Final Judgment (Docket No. 4-2) ("Franklin Plant"). For the reasons stated below, the United States supports Defendant DFA's motion because the United States and the Divestiture Trustee have not been able to identify a buyer who will competitively operate the Franklin Plant. Under these circumstances, DFA's retention of the Franklin Plant

provides the Franklin Plant the best chance to continue operating and supplying fluid milk to retailers and schools as the country continues to work through the pandemic.¹

I. BACKGROUND

On May 1, 2020, the United States, along with the State of Wisconsin and the Commonwealth of Massachusetts (“Plaintiffs”), filed a civil antitrust Complaint seeking to enjoin DFA’s proposed acquisition of Dean Foods Company (“Dean”). The Complaint alleges that DFA and Dean compete head-to-head to sell fluid milk in (1) northeastern Illinois and Wisconsin and (2) New England and that the merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18. (Docket No. 1). At the same time the Complaint was filed, the United States also filed a proposed Final Judgment (Docket No. 4-2) and a Competitive Impact Statement (Docket No. 16) describing the events giving rise to the alleged violation and how the proposed Final Judgment remedies the competitive problems identified in the Complaint. After the parties completed the requirements of the Tunney Act and a hearing was held, the Court entered the Final Judgment on October 6, 2020 (Docket No. 53). The Final Judgment requires DFA to divest three Dean fluid milk processing plants—the “Harvard Plant,” located in Harvard, Illinois, the “De Pere Plant,” located in Ashwaubenon, Wisconsin, and the Franklin Plant, located in Franklin, Massachusetts — and provides for the appointment of a Divestiture Trustee. The Final Judgment afforded DFA 60 days to sell the Divestiture Assets on its own.

When DFA did not sell the Divestiture Assets within the time allotted under the Final Judgment, the Court appointed Jerry Sturgill as the Divestiture Trustee on July 17, 2020. (Docket No. 36). Under the Final Judgment, “the Divestiture Trustee will have the power and

¹ The Divestiture Trustee executed a signed APA for the sale of the Harvard Plant and the DePere Plant on November 27, 2020.

authority to accomplish the divestiture(s) to Acquirer(s) acceptable to the United States.” *Id.*, § V.B. Following his appointment, the Divestiture Trustee worked closely with the United States as he designed the sales process, identified potential buyers, and facilitated the sale and transition of the Divestiture Assets process. The Divestiture Trustee filed with the Court his Report of the Divestiture Trustee (Docket No. 45-48), made formal reports of his progress to the United States, and communicated with the United States informally on an almost daily-basis to keep it appraised of his efforts to sell the Divestiture Assets.

Due to Plaintiffs’ concerns that the Franklin Plant was losing money and might not be saleable to a qualified operator, the plaintiffs included a provision in the Final Judgment to allow DFA to move this Court to retain the Franklin Plant if the Divestiture Trustee could not sell the Franklin Plant to a buyer acceptable to the United States. *See* Final Judgment, § V.G.; *see also* Competitive Impact Statement at 22; United States Motion For Extension of Term For the Court’s Divestiture Trustee at 2 (Docket No. 49). This provision is intended to maintain the Franklin Plant in the market during a pandemic, even if a qualified, competitive buyer will not buy the Franklin Plant. This approach is based upon principles of the “failing firm” defense. *See* United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 11.

II. THE DIVESTITURE TRUSTEE’S EFFORTS TO SELL THE FRANKLIN PLANT DURING A PANDEMIC

The dairy industry is distressed. Fluid milk consumption has declined and the two largest dairy processors filed for bankruptcy last year. Complaint, ¶ 30. The Franklin Plant is particularly distressed. It has lost money for years and requires significant capital improvements. A potential buyer of the Franklin Plant must therefore be able and willing to invest a significant amount of capital to cover losses, make capital improvements, and implement a turn-around of

the plant so that it can improve its performance and compete. Exhibit 1 (Declaration of Jerry Sturgill), ¶ 8.

The Divestiture Trustee has worked diligently, creatively, and aggressively to identify a qualified buyer who will operate the Franklin Plant competitively. The Divestiture Trustee conducted an extensive search for buyers. Sturgill Declaration, ¶ 6. When no qualified buyer bid for the Franklin Plant, he redoubled his efforts. The Divestiture Trustee discussed forming a joint-venture between or among potential qualified buyers who could not provide the capital to pay for operating losses and capital improvements in the plant by themselves, but may have been able to do so jointly. *Id.*, ¶¶ 6-9. Despite all of his efforts, the Divestiture Trustee was not successful in identifying a qualified buyer for the Franklin Plant who would operate the plant in a competitive manner.

The Divestiture Trustee advised the United States that he had been unable to locate a suitable buyer that he was confident would operate Franklin in a competitive manner consistent with the Final Judgment and who would be acceptable to the United States. In light of this situation, and the poor financial condition of the plant and continuing pressures imposed by the pandemic on the plant, the Divestiture Trustee recommended that the Franklin Assets remain with DFA. Based upon its oversight of the Divestiture Trustee and experience reviewing conduct, transactions, and divestitures in the dairy industry, the United States agreed with the Divestiture Trustee's conclusion and accepted his recommendation.

III. THIS COURT SHOULD ALLOW DFA TO RETAIN THE FRANKLIN PLANT.

Under § V.G. of the Final Judgment, the United States has “sole discretion” to determine if a buyer is qualified. Based on the Divestiture Trustee's exhaustive and unsuccessful efforts to find a qualified buyer and his subsequent recommendation, and the United States' involvement

in the Divestiture Asset sales process, the United States, exercising its sole discretion, has accepted the Divestiture Trustee's recommendation and determined through this process that no qualified buyer exists to operate the Franklin Plant.² Permitting DFA to retain the Franklin Plant is in accord with the terms of the Final Judgment. First, despite his best efforts, the Divestiture Trustee was unable to locate a qualified buyer who would operate the Franklin Plant competitively. Second, the Final Judgment contemplates that the Franklin Plant should be retained by DFA in circumstances such as this where a qualified buyer could not be found and the asset was generating large losses in a financially challenged industry. Permitting DFA to retain the asset in these circumstances, and in the midst of a pandemic, helps to ensure that the plant will continue to produce processed fluid milk. If the plant closed now or if an unqualified buyer failed, the plant would exit the market. Allowing DFA to operate the Franklin Plant under these circumstances is consistent with the "failing firm" defense.

Significantly, DFA is committed to operating the Franklin Plant. DFA is committed to making investments which will make it possible to operate the Franklin Plant in a competitive manner. DFA Motion to Retain the Franklin Plant Under the Terms of the Final Judgment, at 1. Despite the Divestiture Trustee's best efforts to find a qualified, competitive buyer to operate the Franklin Plant, it is better for consumers that DFA operate the Franklin Plant rather than the

² A bidder for the Franklin Plant has expressed dissatisfaction with the Divestiture Trustee's reaction to its bid for the Franklin Plant. The Divestiture Trustee, as set forth in the attached declaration, found that the bidder neither had the operational background nor capability to operate a large-scale fluid milk processing plant. The bidder also did not offer a plan for operating the plant. The Divestiture Trustee believed this bidder was not a qualified buyer of the Franklin Plant. The United States was aware of the potential buyer's attempt to acquire Franklin on a contemporaneous basis and reached an independent conclusion consistent with the Divestiture Trustee that the potential buyer was not qualified to operate the Franklin Plant. The United States fully agrees with the Divestiture Trustee's conclusion that this bidder was not qualified.

Franklin Plant closing in the absence of such a buyer —particularly during a pandemic when the food supply is particularly important. In addition, selling the Franklin Plant to an unqualified buyer would interject risk that the plant could close, resulting in a loss of supply of fluid milk to consumers. Permitting the Franklin Plant, under these circumstances, to remain with DFA will afford the plant the opportunity to continue processing milk for sale to consumers in New England rather than to exit the market.

IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court grant DFA's motion and allow it to retain the Franklin Assets.

Dated: December 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karl D. Knutsen, hereby certify that on December 3, 2020, I caused a copy of the foregoing United States' Response to the Motion of Defendant Dairy Farmers of America to Retain the Franklin Plant Pursuant to the Final Judgment to be served on Defendants by mailing the document electronically to their duly authorized legal representatives as follows:

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