UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
STATE OF WISCONSIN,	)	
	)	
STATE OF ILLINOIS, and	)	
	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:10-cv-00059-JPS
	)	
	)	
v.	)	
	)	
DEAN FOODS COMPANY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Dean Foods Company's ("Dean") acquisition of two fluid milk processing plants in Wisconsin from Foremost Farms USA ("Foremost") is likely to substantially lessen competition. Dean viewed Foremost as a "dangerous" and "irrational" competitor in the region in which they competed because Foremost's excess capacity to produce fluid milk at its two plants gave it an incentive to offer lower prices. Complaint ¶¶ 26-27. This acquisition eliminated that competition. The Complaint's fluid milk claim for relief is more than "plausible" – the pleading standard enunciated by the Supreme Court.

Dean moves to dismiss only Count Two of the Complaint, in which Plaintiffs allege that the acquisition is likely to substantially lessen competition in the sale of fluid milk.[1] Plaintiffs allege that the relevant geographic market for fluid milk is Wisconsin, the Upper Peninsula of Michigan (the "UP"), and northeastern Illinois (defined as a nine-county area in Paragraph 2 note 1 of the Complaint), the area in which Dean and Foremost competed for fluid milk sales prior to the acquisition. Complaint ¶¶ 2, 5, 41, 55.

Dean's attack on the geographic market allegations centers on the contention that Plaintiffs failed to plead sufficient facts to satisfy the "hypothetical monopolist test" in the U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines ("HMG") for defining geographic markets because Plaintiffs supposedly failed to address the potential impact of (a) fluid milk suppliers located outside Wisconsin, the UP, and northeastern Illinois, and (b) the possibility that fluid milk purchasers would engage in "arbitrage."

As described below, the allegations relating to the geographic market for fluid milk comport with the relevant legal standard and the HMG test. Further, the Complaint addresses fluid milk sales by suppliers located outside Wisconsin, the UP, and northeastern Illinois in assessing the competitive impact of this acquisition on purchasers within the region. Suppliers located outside the region are not, however, relevant to the hypothetical monopolist test where, as here, the sale of fluid milk is a price discrimination market. Plaintiffs' allegations regarding market shares include all sales to purchasers in the region (Complaint ¶ 42), regardless of whether the supplier is located within or

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[1] Dean does not move to dismiss Count One relating to the sale of milk to school districts in Wisconsin and the UP, the section of the country where Dean and Foremost competed for school milk contracts prior to the acquisition. Complaint ¶¶ 4, 54.

outside of the region. Plaintiffs also directly address the arbitrage issue by alleging that fluid milk purchasers do not resell to other purchasers in substantial quantity. Complaint ¶ 13.

Dean alternatively argues that the description of the geographic market at issue here is "so vague or ambiguous" that Dean is incapable of answering. Fed. R. Civ. P. 12(e). The Complaint sets forth sufficient factual allegations to put Dean on notice of Plaintiffs' claim and the grounds on which that claim rests so that it can adequately respond.

Accordingly, the motion should be denied.

I. THE FLUID MILK CLAIM SHOULD NOT BE DISMISSED

A. Plaintiffs' Geographic Market Allegations Comport with the Case Law and the HMG

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only contain "a short plain statement of the claim showing that the pleader is entitled to relief." An antitrust complaint must demonstrate that plaintiffs' theory is "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).[2] This burden is met by pleading "enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the plaintiff's allegations." *Id.*; *see Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

1. The Purpose of Defining Markets in Antitrust Cases

The purpose of Section 7 of the Clayton Act is to prevent undue aggregation of market power through mergers and acquisitions. In pursuit of this goal, Section 7 of the Clayton Act makes acquisitions by one corporation of another unlawful "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend

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[2] *Twombly* did not change the notice pleading standard set forth in Rule 8. *See Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009).

to create a monopoly." 15 U.S.C. § 18 (2010). The "lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power – the ability of one or more firms to raise prices above competitive levels for a significant period of time." *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

To assess the likely competitive effects of an acquisition, courts define a market along both product and geographic lines. However, "[m]arket definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether [market] power exists." *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) (internal quotation omitted). For example, market definition allows for the calculation of market shares – a barometer for the degree of market power. *See Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration.").

In the present case, there appears to be no dispute over the product market – it is fluid milk. Dean challenges only the sufficiency of the allegations supporting a geographic market consisting of Wisconsin, the UP, and northeastern Illinois. Allegations supporting a relevant product or geographic market are sufficient as long as they are plausible and bear a "rational relation to the methodology courts proscribe to define a market." *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.").

2. How a Geographic Market is Defined

In defining the relevant geographic market, "[t]he proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area

of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 357 (1963).[3]

Not surprisingly, "the determination [of a relevant market] is essentially one of fact, turning on the unique market situation of each case." *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989) (citations omitted). The notion that market definition is a pragmatic factual exercise is a theme that runs throughout the cases. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992) ("In determining the existence of market power, . . . this Court has examined closely the economic reality of the market at issue.").[4] Moreover, the geographic market does not have to be alleged or proven with "scientific precision," *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974), or be defined "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.,* 384 U.S. 546, 549 (1966). Instead, the geographic market "must be sufficiently defined so that the Court understands in which part of the country competition is threatened." *FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34, 49 (D.D.C. 1998).

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[3] The exercise in defining a *product* market determines "the reasonable interchangeability of use . . . between the product itself and substitutes for it." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006) (internal quotation omitted).

[4] *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (courts should take a "pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one" so that the definition of the relevant market will "correspond to the commercial realities of the industry") (citations omitted); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1573 (11th Cir. 1991) (the idea of a geographic market is "essentially an economic concept in which the courts should examine supplier-customer relations . . . to determine how economic actors function in terms of where buyers seek supplies and sellers seek purchasers"). The HMG also provides that because "it is not possible to remove the exercise of judgment from the evaluation of mergers . . . the Agency will apply the standards of the Merger Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger." HMG § 0.

The fluid milk claim's relevant geographic market satisfies the relevant legal standards. The Complaint identifies the area in which the effects of the acquisition will be direct and immediate: Wisconsin, the UP, and northeastern Illinois (defined as a nine-county area). Complaint ¶ 2, n.1. Moreover, it states the reasons why competition in this market is threatened by the acquisition: namely, that Foremost made nearly all of its sales into Wisconsin, the UP, and northeastern Illinois (Complaint ¶ 41); that Foremost and Dean were engaged in vigorous competition that benefitted purchasers throughout that same area (Complaint ¶¶ 5, 7, 44-51); and that no firm, whether currently serving the area or not, will likely be able to constrain Dean from raising its prices in Wisconsin, the UP, and northeastern Illinois (Complaint ¶ 52). Therefore, Wisconsin, the UP, and northeastern Illinois is a relevant geographic market because that is the area in which the fluid milk purchasers likely to be directly and immediately affected by this acquisition are located. *See Phila. Nat'l Bank,* 374 U.S. at 357.

3. Plaintiffs have Asserted a Price Discrimination Geographic Market

As Dean acknowledges (Dean Mem. 10), geographic markets can be defined using either of two general methodologies set out in the HMG: (1) by reference to the location of customers or (2) by reference to production facilities. *Compare* HMG § 1.22 with § 1.21. In one Supreme Court case it was noted that a relevant geographic market can be defined based on where customers are located irrespective of the geographic location of the plants that supply those customers. *See Pabst Brewing Co.*, 384 U.S. at 555-56 (noting that government made out a *prima facie* case that relevant geographic market was the sale of beer into the State of Wisconsin even though more than one-third of the beer sold into Wisconsin came from plants outside the state) (Harlan, J., concurring).

In the present case, the Complaint alleges a geographic market based on the location of customers. Complaint ¶ 41. The reason this approach is taken is that the sale of fluid milk is what is known in antitrust law as a "price discrimination market." *See generally* 2B Philip Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law ¶ 534d, at 269-71 (3d ed. 2007). This Circuit has recognized that the ability of a seller to engage in price discrimination allows the seller to exercise market power against targeted customers. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 658 (7th Cir. 2002) (noting presence of large and small buyers in a market does not preclude price fixing because sellers can "engage in price discrimination, giving large discounts to the big buyers and no (or small) discounts to the small ones.") (Posner, J.); *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1030 (7th Cir. 2002) (price discrimination occurs where a "manufacturer [sells] the same product, costing the same to make and sell, at different prices to different customers") (Posner, J.).

In a price discrimination market, the seller can identify the customers to whom it can charge higher prices because those customers are unable to protect themselves by purchasing from other customers who get lower prices (*i.e.*, engage in "arbitrage"). In such cases, the location of customers rather than the location of the suppliers is the relevant inquiry for a geographic market definition, because the customers' location uniquely identifies the area where the competitive harm will be realized. *Cf. Phila. Nat'l Bank*, 374 U.S. at 359-60.

In defining a geographic price discrimination market, the HMG proposes a hypothetical exercise: assume there is only one supplier (the "hypothetical monopolist") of fluid milk to buyers in a given geographic area and then ask if the hypothetical monopolist can profitably raise prices to purchasers in that area but not raise prices to purchasers elsewhere. HMG § 1.22. The hypothetical

monopolist can only do so if customers are unable to make purchases from other customers located outside of that area who get lower prices (*i.e.*,"arbitrage"). If the hypothetical monopolist would raise prices to targeted purchasers, then the area in which these customers are located is a relevant geographic market for antitrust purposes. Thus, the hypothetical monopolist test in HMG § 1.22 identifies a group of customers that are vulnerable to the exercise of market power.

Dean broadly endorses the HMG methodology for defining a market, which expressly recognizes price discrimination geographic markets. Dean Mem. 3, 11. In addition, Dean does not dispute that the fluid milk market could be a price discrimination market, but rather only challenges the sufficiency of the pleading.

Defining the relevant geographic market based on the location of the customers is appropriate here because sellers can engage in price discrimination. The commercial realities of the fluid milk business are that processors like Dean can charge more for milk in areas where its customers have few nearby processors to choose from, while charging less to customers in adjacent areas that have more competitive options.[5] If processors sold their fluid milk at their plants' loading docks and charged the same price to all customers, the proper application of the HMG hypothetical monopolist test would focus on the locations of the loading docks. But that is not how processors sell their fluid milk.

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[5] Within the relevant geographic market, milk processors can price discriminate based on factors in addition to the proximity of customers to their competitors. Consequently, as a result of the deal, Dean will be able to raise prices to some customers more than to others. This form of price discrimination bears on the degree of competitive harm within the geographic market – an issue not relevant to the geographic market definition.

Where, as here, sellers can price discriminate based on customer location, a geographic market definition based on the locations of the processors would not account for the different prices paid by customers based on, among other things, their varying distances from processors. Therefore, focusing on processor locations would lead to incorrectly assessing the effects on competition in regions in which Dean and Foremost did not compete.

In sum, the acquisition will harm competition in Wisconsin, the UP, and northeastern Illinois because it eliminates the substantial competitive pressure that Dean and Foremost exerted on each other in that region. At the same time, purchasers in other areas, *e.g.*, Indiana and Minnesota, will not be adversely affected by the acquisition because Foremost was not exerting much, if any, competitive pressure in those areas. Thus, Dean can raise its prices to purchasers in Wisconsin, the UP, and northeastern Illinois without changing its prices to purchasers in other areas, like Indiana and Minnesota. Accordingly, Wisconsin, the UP, and northeastern Illinois comprise a relevant geographic market.

B. Dean's Arguments for Dismissal are Without Merit

Dean's line of attack is that Plaintiffs: (1) supposedly failed to satisfy the hypothetical monopolist test; (2) did not address the potential impact of fluid milk suppliers located outside Wisconsin, the UP, and northeastern Illinois; and (3) failed to account for "arbitrage" by fluid milk purchasers. The arguments are without merit.

1. The Complaint Comports With the Hypothetical Monopolist Test

As explained above, in applying the hypothetical monopolist test in a geographic price discrimination market, the question is whether the only processor supplying fluid milk into the

relevant geographic market would likely impose at least a small price increase to a set of purchasers in that geographic market. The Complaint alleges all of the facts necessary to plead that Wisconsin, the UP, and northeastern Illinois constitute a plausible price discrimination market under this test:

- Wisconsin, the UP, and northeastern Illinois comprise the region in which Dean and Foremost competed for fluid milk sales prior to the acquisition (Complaint ¶ 41);

- Milk processors charge different prices to different purchasers for the same product based on a variety of factors, including the number of competitive alternatives available to the purchaser (Complaint ¶ 14);

- Retailers in this region do not engage in arbitrage by reselling fluid milk to other retailers or other purchasers in any substantial quantity (Complaint ¶ 13);

- Fluid milk is delivered, "has a limited shelf life[,] and is costly to transport" (Complaint ¶ 15); and

- The acquisition will cause fluid milk prices in this region to increase (which, *a fortiori,* means that a hypothetical monopolist supplying fluid milk to the region would impose such a price increase) (Complaint ¶ 44).

At most, Dean's argument amounts to a contention that the fluid milk claim should be dismissed because Plaintiffs did not use the "magic words" of the hypothetical monopolist test in paragraphs 40 and 41 when alleging the relevant geographic market. *Cf. Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 675-76 (D.C. Cir. 2005) (Ginsburg, J.) (plaintiffs presenting antitrust claims do not have to plead any magic words). But when ruling on a motion to dismiss under Rule 12(b)(6), the Court should not focus on the adequacy of the Complaint in piecemeal fashion; it should "examine the complaint as a whole." *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1008 (7th Cir. 2002). Viewed as a whole, Count Two is adequate and should not be dismissed.

Dean contends that Plaintiffs have not properly defined a geographic market because the Complaint omits any allegation that a hypothetical monopolist would raise prices in Wisconsin, the UP, and northeastern Illinois without inducing significant numbers of customers to buy milk from suppliers outside the market. Dean Mem. 12-13. There is no dispute that for non-price discrimination markets, application of the hypothetical monopolist test involves consideration of switching to suppliers outside the geographic area. However, to the extent that Dean is suggesting that switching to suppliers outside the geographic area is a relevant factor for a price discrimination market, Dean is wrong. The location of competing plants (and customer switching thereto) is irrelevant to the price discrimination geographic market definition. The hypothetical monopolist described in HMG § 1.22 is assumed to control all supply to the targeted purchasers, and it is constrained only by the possibility of arbitrage.[6]

2. The Complaint Properly Accounts for Suppliers Outside of the Geographic Market

Plaintiffs acknowledge that suppliers located outside the geographic market are relevant in this case. While not relevant to market definition, they are relevant to issues such as market shares, market power, and the ultimate issue of competitive effects. For this reason, the Complaint's allegations properly account for the impact of suppliers outside of Wisconsin, the UP, and northeastern Illinois. In fact, the Complaint recognizes that every dairy processor that sells fluid milk into the Wisconsin, UP, and northeastern Illinois market is included as a participant in that

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[6] In non-price discrimination markets, which are based on supplier locations, suppliers outside the geographic market are relevant in geographic market definition because those suppliers could significantly constrain the hypothetical monopolist's ability to raise price. This constraint may mean that these other supplier locations must be included in the geographic market.

market and is considered a competitor to Dean and Foremost. In Paragraph 42 of the Complaint, the market shares attributed to Kemps and Prairie Farms are based on sales in the geographic market from plants outside of the geographic market in nearby parts of Illinois, Iowa, and Minnesota. Further, the concentration statistics in Paragraph 43 reflect several additional competitors who sell fluid milk in the relevant market from more distant locations. However, the locations of these plants are not "in the geographic market" because fluid milk purchasers in those areas are likely not adversely affected by the elimination of Foremost.

Two recent district court decisions undercut Dean's contention that Plaintiffs have failed to adequately allege facts concerning suppliers outside of the relevant geographic market. In fact, Dean was the losing party in one of those decisions. In *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 946 (E.D. Tenn. 2008), the court denied Dean's motion to dismiss a lawsuit accusing it of conspiring with other dairy processors and large cooperatives to raise prices for processed milk and depress the prices at which processors bought raw milk from certain dairy farmers, based in part on the contention that significant supply came in from outside the alleged relevant geographic market. The district court denied the motion to dismiss, noting that such a dispute was more appropriate for later stages of litigation. *Id.* ("The fact that defendants suggest, at this stage of the litigation, that other relevant markets may . . . exist is of no consequence. . . . These issues are simply not appropriate for disposition on a motion to dismiss given the factual allegations contained in plaintiffs' complaints.").

In a similar case, *Lone Star Milk Producers, Inc., v. Dairy Farmers of America, Inc.*, 2001-2 Trade Cas. (CCH) ¶ 73,509 (E.D. Tex. 2001), the district court declined to dismiss the case merely "because the Complaint fails to allege facts concerning where suppliers . . . can sell their milk or where customers can turn for supply," instead finding that plaintiffs' proposed market definition of

several states and "Southern Missouri" was a properly alleged relevant geographic market and holding that if defendants "want[] to introduce evidence that this is not in fact the relevant market, that is a matter for summary judgment – not a Rule 12(b)(6) motion." *Id.* at 92,228.

The cases on which Dean relies to challenge Plaintiffs' geographic market are inapposite because they did not involve price discrimination markets, nor were any of them decided on the pleadings.[7] Dean Mem. 8-9. *See, e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Republic Tobacco v. N. Atl. Trading Co.*, 381 F.3d 717 (7th Cir. 2004); *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989); and *United States v. Country Lake Foods*, 754 F. Supp. 669 (D. Minn. 1990). *United States v. Country Lake Foods*, 754 F. Supp. 669 (D. Minn. 1990), bears special mention because it superficially resembles this case. Dean cites the case for the proposition that the market must be defined by reference to additional plant locations that would defeat a price increase by the hypothetical monopolist. As Dean admits, however, for price discrimination markets the focus is on customer locations, not plant locations. Dean Mem. 10. Moreover, in *Country Lake Foods*, the court determined that the geographic market proposed by the government – limited to the Minneapolis Metropolitan Statistical Area – was too narrow because in the event of a price increase, processors that were not currently market participants would begin selling milk into that market. *Id.* at 673-74. In the present case, as the Complaint alleges, it is unlikely that any processors not currently participating in Wisconsin, the UP, and northeastern Illinois could profitably enter this much larger market and defeat a price increase by Dean. Complaint ¶ 52.

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[7] In a recent district court opinion from the Eastern District of Virginia granting a motion to dismiss an antitrust claim involving market definition, *E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2009 WL 4927159 (E.D. Va. Dec. 18, 2009), the court failed to consider the possibility of a price discrimination market theory.

3. The Complaint Adequately Addresses the Possibility of Arbitrage

Equally flawed is Dean's position that the Complaint omits a necessary allegation that "buyers in any particular location are unable to find alternative distribution channels." Dean Mem. 13. The issue is whether customers can engage in arbitrage to offset the impact of a price increase to certain targeted customers. The allegations in the Complaint demonstrate that such arbitrage is very unlikely.

The Complaint alleges that (1) "[t]he vast majority of fluid milk is sold directly by processors to retailers," and (2) "[r]etailers in Wisconsin, the UP, and northeastern Illinois *do not* resell fluid milk to other retailers or institutions in any substantial quantity." Complaint ¶ 13 (emphasis added). In other words, most retailers buy fluid milk directly from processors and do not engage in the resale of milk by one retailer to another to any significant degree. Further, the Complaint states that fluid milk is delivered, "has a limited shelf life[,] and is costly to transport." Complaint ¶ 15. These facts are also inconsistent with the ability to engage in arbitrage.

Contrary to Dean's assertion (Dean Mem. 13-14), Paragraph 13 of the Complaint does not concede that significant arbitrage is possible. That Paragraph alleges the unremarkable fact that distributors and food service companies resell milk to small retailers, restaurants, and institutions. It does not follow that distributors can undermine a price increase targeted at customers in Wisconsin, the UP, and northeastern Illinois. In most cases, distributors would have no opportunity to engage in profitable arbitrage in view of, as the Complaint alleges, the high transportation cost of milk and its limited shelf life. In the other cases, the processors could prevent significant arbitrage, for example, by limiting their sales to dealers suspected of arbitrage – (*i.e.* buying excess amounts of milk in one geographic market at a lower price where the processors charge a higher price).

4. The Complaint's Allegations About the Customers in the Geographic Market Are Sufficient

Finally, Dean argues that the Complaint is silent about which purchasers can be targeted for price increases and where they are located. Dean Mem. 12, 13, 16. It is sufficient for Plaintiffs to allege that the customers that are potentially affected by the acquisition are located in Wisconsin, the UP, and northeastern Illinois. Dean knows the fluid milk customers located in this area, and these are the customers that are in the market. In fact, Dean provided much of this information to Plaintiffs in the course of Plaintiffs' pre-complaint investigation.

In addition, Dean's arguments about burden have no bearing on the sufficiency of the Complaint. Further, the discovery burden in this case is far less relative to other antitrust cases, which often involve national and international geographic markets and substantially greater volumes of commerce.

II. DEAN'S ALTERNATIVE REQUEST FOR A MORE DEFINITE STATEMENT SHOULD BE DENIED

Dean contends – pursuant to Fed. R. Civ. P. 12(e) ("Rule 12(e)") – that it is entitled to a more definite statement of alleged facts in order to "focus[] the issues in the case and the scope of necessary third-party discovery." (Dean Mem. 15). Dean's misapplication of Rule 12(e) should be denied.

As this Court has stated, "Rule 12(e) allows a party to seek a more definite statement from an opposing party when a pleading is so vague or ambiguous that the party cannot reasonably respond." *Reassure America Life Ins. Co. v. Isermann*, No. 07-CV-829, 2008 WL 4286531, at *2 (E.D. Wis. Sept. 16, 2008). Rule 12(e) motions are "generally disfavored." *Vician v. Wells Fargo Home Mortg.*,

No. 2:05-CV-144, 2006 WL 694740, at *9 (N.D. Ind. Mar. 16, 2006) (citation omitted). Nor may Rule 12(e) be used as a substitute for discovery motions. *Id.*

As previously discussed, Plaintiffs' Complaint is neither vague nor ambiguous. It provides Dean with sufficient information to formulate a reasonable response. Moreover, Dean is more than capable of securing the information that it seeks through discovery.

Dean's Rule 12(e) request should be denied.

CONCLUSION

For the reasons stated above, Dean's motion should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2010, I electronically filed Plaintiffs' Response to Defendant's Partial Motion to Dismiss or, in the Alternative, for a More Definite Statement with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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