BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE:
FRESH DAIRY PRODUCTS
ANTITRUST LITIGATION (NO. II)

MDL DOCKET No. 2463

PLAINTIFFS BRENDA BLAKEMAN AND FIRST IMPRESSIONS SALON, INC.'S MEMORANDUM IN OPPOSITION TO MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED PRETRIAL PROCEEDINGS

Plaintiffs Brenda Blakeman[1] and First Impressions Salon, Inc.[2] ("Plaintiffs"), pursuant to J.P.M.L. Rule 6.1(c), respectfully submit this Response in Opposition ("Response") to Motion of Defendants for Transfer of Action to the Northern District of California Pursuant to 28 U.S.C. § 1407 for Coordinated Pretrial Proceedings ("Defendants' Motion").

BACKGROUND

Presently there are essentially two actions that relate to the legality of Defendants' herd retirement program; two direct purchaser cases in the Southern District of Illinois brought under the federal antitrust laws on behalf of a national class, which are both before Judge Murphy, and three indirect purchaser cases, brought under

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[1] *Brenda Blakeman v. National Milk Producers Federation; Cooperatives Working Together; Dairy Farmers of America, Inc.; Land O'Lakes, Inc.; Dairylea Cooperative Inc.; Agri-Mark, Inc. d/b/a Cabot Creamery Cooperative, Inc.*, 3:12-cv-01246 (S.D. Ill.)(filed December 7, 2012).
[2] *First Impressions Salon, Inc. v. National Milk Producers Federation; Cooperatives Working Together; Dairy Farmers of America, Inc.; Land O'Lakes, Inc.; Dairylea Cooperative Inc.; Agri-Mark, Inc. d/b/a Cabot Creamery Cooperative, Inc.*, 3:13-cv-00454 (S.D. Ill)(filed May 10, 2012).

twenty-seven states' laws on behalf of twenty-seven state classes, which are consolidated in the Northern District of California and proceeding as one case.

Most of the background facts have not changed since the Panel addressed the transfer issue last year. Indirect purchaser antitrust cases were filed in the Northern District of California in the Fall of 2011.[3] These cases allege that Defendants engaged in anticompetitive conduct in violation of the laws of multiple states to unlawfully limit the production of milk through premature "herd retirements" (a kinder way of saying herd slaughter) in order to increase the price of milk and other dairy products. The indirect plaintiffs seek to recover overcharges on behalf of twenty-seven separate state classes for milk and other dairy products purchased *indirectly* from Defendants. An indirect purchase means that the class member did not purchase the product from one of the conspirators, but instead from a purchaser from one or more of the conspirators or from a purchaser even further down the chain of distribution. Since indirect purchasers of milk and other dairy products have no standing to sue for damages under the Clayton Act for a violation of the Sherman Act, indirect plaintiffs must instead, as they have done, allege violations of state antitrust and unfair and deceptive trade practices statutes. Here, the indirect purchasers allege that Defendants violated the statutes of twenty-seven separate states, as well as assert claims under the common law of unjust enrichment, on behalf of twenty-seven different state classes.[4]

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[3] *Edward v. National Milk Producers Federation,* 3:11-cv-04766 (N.D. Cal. Sept. 26, 2011); *Robb v. National Milk Producers Federation,* 3:11-cv-04791 (N.D. Cal. Sept. 27, 2011); and *Boys & Girls Club of East Valley v. National Milk Producers Federation,* 3:11-cv-05253 (N.D. Cal. Oct. 28, 2011).

[4] *See* First Am. Class Action Compl., at ¶ 9-10, 34-37, 120-48, *Edwards*.

In early 2012, a direct purchaser case was filed in the Eastern District of Pennsylvania by Stephen L. LaFrance Holding, Inc. and Stephen L. LaFrance Pharmacy, Inc. (collectively "LaFrance") through counsel now representing Ms. Blakeman and First Impressions.[5] This case was brought under the Clayton Act to recover damages for Defendants' alleged violation of Section 1 of the Sherman Act. Counsel's experience suggested that other direct purchaser cases would soon follow. Anticipating additional direct purchaser cases being filed, on January 10, 2012 LaFrance filed a motion with the Panel for coordination of the then current cases. In the intervening months no additional direct purchaser cases were filed. The Panel hearing on the motion was held on March 29, 2013. At the time of the hearing, there were basically two cases, one indirect purchaser case and one direct purchaser case.[6] Based on this fact, Judge Barbadoro's initial inquiry was "why do we need centralization here given the relatively small number of cases that we have?" JPML Trans., at 5 (MDL Dkt. 2340, March 29, 2013). Mr. Barrett, counsel for LaFrance and Respondents here, replied that centralization was not needed with so few cases.[7] The Panel denied the motion on April 17, 2012 because so few cases were involved, and because the indirect class and direct class did not overlap. Order Denying Transfer, *In re Fresh Dairy Prod. Antitrust Litig.*, MDL No. 2340, April 17, 2012, ECF No. 31 ("Order Denying Transfer").

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[5] *Stephen L. LaFrance Holding, Inc. v. National Milk Producers Federation*, 2:12-cv-00070 (E.D. Pa.).
[6] Judge Vratil stated at the MDL hearing that: "I think we basically only have two cases, one with the indirect purchasers and one with direct purchasers." JPML Trans., at 6 (MDL Dkt. 2340, March 29, 2013).
[7] *Id.* at 3.

In its Order Denying Transfer, the Panel stated that "informal cooperation among the involved attorneys is quite practicable" and is the preferred course. The fact that the direct cases are now in Illinois and not Pennsylvania does not affect the soundness of the reasoning behind the Panel's original decision not to create a multidistrict litigation proceeding and applies equally to the current transfer motion. Coordination among the attorneys (and courts) here is a workable solution, as it once was in the pre-Class Action Fairness Act days when there were concurrent federal and state court antitrust cases arising out of the same conspiracy. Doing so here would likely provide all the efficiencies that Defendants claim to seek. There is still no reason why the direct and indirect cases cannot be efficiently litigated in two courts.

Two months after the Panel's decision, on June 18, 2012 defendants filed a motion to transfer under 28 U.S.C. § 1404(a) with the District Court in the Eastern District of Pennsylvania. LaFrance opposed the motion, but on July 31, 2012 the District Court exercised its discretion and granted the requested transfer. *Stephen L. LaFrance Holdings, Inc. v. National Milk Producers Federation*, 2012 WL 3104837 (E.D. Pa. July 31, 2012). Under the Local Rules of the Eastern District of Pennsylvania, there is supposed to be an automatic twenty-one day stay following a transfer ruling.[8] However, the case was transferred to California before twenty-one days elapsed. Thus, LaFrance was not given the opportunity to ask the Court to reconsider its ruling. Eventually, the *LaFrance* case was voluntarily discontinued for reasons unrelated to the transfer.

[8] E.D. Pa. L.R. 3.2.

The *Blakeman* case was filed in December 2012 in the Southern District of Illinois. Venue is proper in that District. Defendants filed a motion to transfer it to the Northern District of California under 28 U.S.C. § 1404(a).[9] On February 7, 2013, Blakeman filed her opposition to the transfer motion. On April 9, 2013, Blakeman filed a motion for partial summary judgment on the related issues of whether Defendants' Cooperatives Working Together ("CWT") herd reduction program is a *per se* violation of Section 1 of Sherman Act, and whether Defendants have antitrust immunity under the Capper-Volstead Act or Section 6 of the Clayton Act. On May 13, 2013, Defendants responded to the partial summary judgment motion, and filed a Motion to Continue or Deny Plaintiff's Motion for Summary Judgment. On April 18, 2013, Defendants' filed a motion to stay briefing pending a decision on their transfer motion. Blakeman opposed the motion. At the request of Defendants, the District Court held a telephone conference regarding Defendants' stay motion on April 18, and thereafter denied the motion.

On April 24, 2013, the District Court entered an order denying Defendants' motion to transfer. In its order, the District Court weighed all the relevant factors and found that some favored transfer, but that most did not. Based on its assessment of the factors, the District Court concluded, in the exercise of its discretion, that transfer was not warranted.

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[9] Plaintiffs' claim and Defendants' defenses are all based on federal law. Nevertheless, Defendants raise the specter of "forum shopping" in their memorandum. Judge King's comment in her dissent in *In re Volkswagen of America, Inc.*, 545 F.3d 304, 321 (5th Cir. 2008) (citations omitted)(§ 1404 mandamus) is an apt retort here: "although aspersions are often cast on plaintiffs' 'forum shopping,' frequently by defendants also 'forum shopping,' we have explicitly stated that a plaintiffs' motive for choosing a forum 'is ordinarily of no moment….'"

On May 1, 2013, Defendants attempted to "pick-off" the named class representative by making Blakeman an offer of settlement. Defendants gave her until May 13, 2013 to accept the offer, which was less time than the fourteen days Federal Rule of Civil Procedure 68 allows a party to either reject or accept an offer of judgment. Instead of waiting for Blakeman's decision, however, Defendants filed a motion to dismiss for lack of subject matter jurisdiction less than a week later, on May 7, 2013. Defendants argued that at the moment they tendered their offer, the case became moot and the Court lost subject matter jurisdiction. Blakeman disagrees with Defendants' arguments in the motion to dismiss and believes that the filing of a class motion within the fourteen-day period renders Defendants' attempt to moot the case futile. Briefing is not complete on this motion and the District Court has not yet ruled. Defendants have also filed a Motion to Stay Proceedings Pending a Ruling on the Motion to Dismiss.

On Friday, May 10, 2013, within the fourteen days allotted under Rule 68, Blakeman filed: 1) a motion to strike Defendants' motion to dismiss because it was filed prior to the fourteen days under Federal Rule of Civil Procedure Rule 68 (which the District Court denied); 2) a preliminary motion for class certification; and 3) a motion to intervene on behalf of direct purchaser Roy Mattson. That same day, First Impressions filed a direct purchaser antitrust case in the Southern District of Illinois that was related to the *Blakeman* case and assigned to Judge Murphy.[10] First Impressions also filed a

[10] First Impressions also filed a preliminary motion for class certification and supporting memorandum with its Complaint. *First Impressions*, Dkt. 3. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) ("A simple solution to the buy-off problem that [Plaintiff] identifies is available, and it does not require us to forge a new rule that runs afoul of Article III: Class-action plaintiffs can move to certify the class at the same time

Motion for Partial Summary Judgment (identical to the one pending in *Blakeman*) and a Motion to Consolidate the case with *Blakeman* on May 23rd.

On May 23, 2013, Defendants filed their motion with the Panel seeking transfer of the Southern District of Illinois direct purchaser cases to the Northern District of California for coordinated proceedings with the state law indirect purchaser antitrust cases pending there, even though the Panel had already concluded that § 1407 transfer was unwarranted. The only basis for the second MDL motion is that an additional direct purchaser case, *First Impressions*, has been filed and the *Blakeman* case, according to Defendants' own motion, is moot.

The District Court in the Southern District of Illinois has set a status conference for June 18 and a hearing for July 22, 2013 to consider Defendants' Joint Motion to Dismiss.

In addition, on May 31, 2013 Defendants filed a Petition for a Writ of Mandamus and for Stay under the All Writs Act, 28 U.S.C. § 1651(a) with the Seventh Circuit, in which they ask the appellate court to order Judge Murphy to transfer *Blakeman* to the Northern District of California. The Seventh Circuit denied the Petition on June 14.[11]

Because the indirect purchaser actions are at a different stage than the direct purchaser cases, trying to slot the direct purchaser cases into the indirect purchaser schedule could be a recipe for inefficiency. The Northern District of California has denied Defendants' motion to dismiss, Defendants have answered the complaint, a case

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that they file their complaint. The pendency of that motion protects a putative class from attempts to buy off the named plaintiffs.").

[11] The Petition required a third court, as well as the Panel for a second time, to address where the direct purchaser cases should be litigated.

management scheduling order has been set, discovery has commenced and concluded on certain points, and at least eight deadlines in the case management schedule have already lapsed. But even though the indirect purchaser actions and direct purchaser actions are at different points on the litigation spectrum, Defendants have filed what is now the second motion to transfer the same cases before the Panel. Defendants' motion to transfer should be denied.

ARGUMENT

Under the multidistrict litigation statute, the Panel may order the transfer of civil actions involving one or more common questions of fact pending in different districts for consolidated or coordinated pretrial proceedings if it determines that such transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. "[W]here only a minimal number of actions are involved, the moving party generally bears a heavier burden of demonstrating the need for centralization." *In re Transocean Ltd. Sec. Litig.*, 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010). Additionally, where "the just and efficient conduct of the litigation would be promoted by transfer where only a minimal number of actions are involved, the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses." *In re Interstate Medicaid Patients at Good Samaritan Nursing Center*, 415 F. Supp. 389, 391 (J.P.M.L. 1976).

1. Defendants Have Failed To Meet Their Burden To Justify A § 1407

Transfer.

It is Defendants' burden to show that "any common questions of fact and law are sufficiently complex, unresolved and/or numerous to justify Section 1407 transfer." *In re Commonwealth Scientific and Industrial Research Organisation Patent Litig.*, 395 F. Supp. 2d 1357, 1358 (J.P.M.L 2005); *In re Solaia Technology LLC Patent & Antitrust Litig.*, 346 F. Supp. 2d 1373 (J.P.M.L. 2004). Additionally, because there are very few cases before the Panel, Defendants have a heavy burden to show that the common questions are "sufficiently complex" and the associated discovery will be significantly time consuming to justify the transfer. *In re Magic Marker Securities Litig.*, 470 F. Supp. 862, 865-66 (J.P.M.L. 1979) (citing *In re Scotch Whiskey Antitrust Litigation*, 299 F. Supp. 543, 544 (J.P.M.L. 1969); *In re Cessna Aircraft Distributorship Antitrust Litig.*, 460 F. Supp. 159, 161-162 (J.P.M.L. 1978) (there is a "strong burden" to show that "common questions of fact are so complex and the accompanying discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred.").

Defendants have failed to articulate any compelling reason why these cases should be centralized in California. They argue that the cases are based on a common set of facts. Def's Mot. at 12. However, "a mere showing that such [common] questions [of fact] exist is not sufficient, in and of itself, to warrant transfer by the Panel." *In re Cessna Aircraft Distributorship Antitrust Litig.*, *supra*. While discovery requests in both cases may overlap to some extent, the timing for discovery differs significantly. Direct Purchaser Plaintiffs have not yet served discovery requests. In the indirect purchaser actions, the date for commencement of rolling document production was May 1, 2013

and the last day to produce documents for class certification is set for August 1, 2013. Both deadlines will most likely have passed prior to a decision by the Panel regarding transfer, so it will be infeasible to coordinate this discovery.

2. *Plaintiffs' Direct Purchaser Actions Are Distinct From The Indirect Purchaser Actions.*

Defendants argue that, in essence, the direct and indirect cases are the same. Despite their assertions, the classes in the direct and indirect purchaser actions have important differences. First, only direct purchasers can bring claims for damages resulting from violations of Section 1 of the Sherman Act. This tends to limit the number of class members and simplifies the proof of impact and damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Second, here for example, the members of each of the twenty-seven separate indirect purchaser classes may number in the tens of millions, and issues such as pass-on will be present.

Defendants recognize that Blakeman and First Impressions allege that they purchased dairy products directly from a Defendant, but cavalierly dismiss this as a mere technicality. It is not. It provides them standing to pursue federal antitrust claims. The fact that Blakeman and First Impressions may on other occasions have purchased dairy products indirectly does not prevent them from representing a class of persons who purchased directly.

Different laws govern the ultimate resolution of the cases. The direct purchaser actions are brought under federal antitrust law, whereas the indirect purchaser actions are brought under the laws of twenty-seven states. Despite Defendants' contention that

there is minimal difference between these laws, there is actually a significant difference, particularly on the key point of these actions - whether the Defendants' conduct falls within state or federal immunity from antitrust actions provided by state statutes or the Capper-Volstead. Whether federal statutes immunize Defendants from Plaintiffs' claim under the federal antitrust laws is a different question than whether they immunize them from the reach of twenty-seven states' laws. Importantly, certain state statutes explicitly provide an exemption from the state antitrust laws for cooperative activities involving "production" or "harvesting," while the Capper-Volstead Act does not. The state statutes have no application to Plaintiffs' claims. The indirect cases will thus be grappling with numerous issues that do not exist in the direct purchaser cases.

For example, Blakeman's motion for partial summary judgment is unique to the direct purchaser cases under the federal antitrust laws. The indirect purchasers are suing only for violations of the laws of twenty-seven states, not the Sherman Act. Whether Defendants' conduct is a *per se* violation of that Act, and whether they are or are not immune from suit under the federal antitrust laws under the Capper-Volstead Act or Section 6 of the Clayton Act are purely questions of federal law that will not arise under state law.

When the time comes to prove the merits of the different cases, the law that will govern Defendants' liability is not the same. While the direct purchaser plaintiffs will need only to prove their case under the Sherman and Clayton Acts, the indirect purchaser classes will need to prove their respective cases under twenty-seven separate

states' laws. While there is undoubtedly some overlap among those states' and federal law, a separate showing will have to be made for each state.

In addition, class certification proceedings in direct purchaser cases under the Sherman Act should be much more straightforward than those in indirect purchaser cases. The proposed classes in *Blakeman* and *First Impressions* are of direct purchasers who, from December 6, 2008 to the present, purchased one or more of the following: 1) raw milk; 2) fluid milk products and/or manufactured dairy products. The indirect purchaser class will involve indirect purchasers in twenty-seven states (basically anyone who bought milk or other dairy products from a grocery store) back to 2004. Thus, the classes, class periods and the class members are different.

Certification of indirect purchaser actions is "intrinsically [ ] complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge." *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 499 (N.D. Cal. 2008) (citation omitted). Direct purchaser actions, by contrast, stop at the first level of distribution, resulting in direct purchaser classes being more readily certified. *See generally Illinois Brick Co. v. Illinois*, *supra*. The direct purchasers are asserting a federal claim on behalf of all direct purchasers from Defendants, including those that purchased for resale and not just their own use. Thus, Defendants' assertion that both classes are based solely on retail purchasers, and therefore the class certification issues would be the same, is unfounded.

The practical difference for class certification is that indirect purchaser antitrust class actions may require more analysis and often take longer to complete the

certification process. This could result in the direct purchaser class being delayed while the indirect purchaser class certification is litigated. The direct compared to indirect purchaser distinctions that Defendants gloss-over have real consequences.

This Panel's earlier decision, while not dispositive, is informative on the distinctions between the current direct purchaser and the indirect purchaser cases. The Panel previously considered the fact that the indirect purchaser and direct purchaser actions were brought on behalf of proposed classes that do not overlap as a factor in its decision to deny transfer. Order Denying Transfer at 1. ("Moreover, the putative statewide classes in the consolidated actions consist of indirect purchasers of milk products, whereas movants' action is brought on behalf of a putative nationwide class of direct purchasers of such products. The classes thus do not appear to overlap.").

3. ***The Panel Has Already Determined That Centralization Is Not Appropriate For These Actions.***

Defendants argued to the Panel last time that the direct purchaser action should be transferred to the Northern District of California, where the indirect purchaser actions are pending. After briefing and oral argument, the Panel decided that a multidistrict litigation proceeding was unnecessary. The Panel found the following facts determinative:

- That there were really only two actions, as the three in California had been consolidated;
- That the twenty-seven putative statewide classes were brought on behalf of indirect purchasers, whereas the Pennsylvania case was brought on behalf of a single class of direct purchasers, and "[t]he classes thus do not appear to overlap."

Instead of centralizing the actions in one District, the better approach was "informal cooperation among the involved attorneys." *Id*. This preference was clearly expressed at the hearing:

> Judge Barbadoro: [w]hy do we need centralization here given the relatively small number of cases that we have? . . . there are a small number of actions where judges can work together with skilled counsel and cooperate can't they, in managing the discovery?

Despite Defendants' claim that Plaintiffs' counsel have "displayed an unwillingness to cooperate" it is they who have attempted to delay the direct purchaser actions. Defendants have not participated in "informal cooperation among the involved attorneys," to efficiently move either the previous case or the current direct purchaser actions along. It seems that they are focused only on getting the direct purchaser cases transferred to California.

While "[t]he Panel has been willing to grant a successive motion to transfer if subsequent events or changed circumstances 'underscore[] the need' for centralized pretrial management" (Defs' Motion at 11), the "subsequent events or changed circumstances" Defendants recite do not warrant the filing (or granting) of a second motion to transfer. In *In re Fedex Ground Package System, Inc., Employment Practices Litigation, (No. II)*, 381 F. Supp. 2d 1380 (J.P.M.L. 2005), the Panel permitted a second transfer motion because in "the intervening months [since denial of the motion] the litigation [had] grown considerably. Indeed, the number of pending actions [had] nearly quadrupled, which underscores the need for economies of scale that centralized pretrial management of these actions will provide." *Id.* at 1381. Here, the number of

pending actions has only increased by one[12] (and the two direct purchaser cases are before the same District Judge) since this matter was before the Panel in early 2012, hardly a changed circumstance that would "underscore the need for centralized pretrial management."

As there are still essentially only two actions pending – the consolidated indirect purchaser case in California, and the two related direct purchaser cases in the Southern District of Illinois, consolidation by the Panel would not serve to further the just and efficient conduct of this litigation. *In re Sumatriptan Succinate Patent Litig*. 381 F. Supp. 2d 1378 (J.P.M.L. 2005) (denying motion to transfer as "centralization would neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of this litigation, which essentially involves only two actions pending in two districts.").[13]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Panel deny Defendants' Motion to transfer.

Dated: June 18, 2013.

Respectfully submitted,

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[12] And, if First Impressions' Motion to Consolidate is granted, the number of cases will remain the same as it was when the Panel denied the first motion to transfer.
[13] To the extent possible, Plaintiffs are willing to coordinate with the indirect cases.

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PROOF OF SERVICE

I hereby certify that on this 18th day of June, 2013, the forgoing was filed electronically with the Clerk of the Panel using the Judicial Panel on Multidistrict Litigation's CM/ECF system for filing. I further certify that copies of the above-referenced document were served on all parties who have filed a notice of appearance using the CM/ECF system, or as indicated below:

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