

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. _____

In the Matter of Dairy Farmers of America,
Inc.'s Acquisition of the St. Paul Facility

**PETITION FOR ORDER
APPROVING ASSURANCE OF
DISCONTINUANCE**

The State of Minnesota, by its Attorney General, Keith Ellison, hereby petitions the Court, pursuant to Minn. Stat. §§ 8.31, subd. 2 and 325D.59, for an Order approving the attached, fully-executed Assurance of Discontinuance between the State of Minnesota, through its Attorney General, Keith Ellison, and Dairy Farmers of America, Inc.

Dated: November 19, 2019

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ Joseph C. Meyer
JOSEPH C. MEYER
Assistant Attorney General
Atty. Reg. No. 0396814

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2130
(651) 757-1433 (Voice)
(651) 296-1410 (TTY)
joseph.meyer @ag.state.mn.us

ATTORNEYS FOR STATE OF MINNESOTA

In the Matter of Dairy Farmers of America, Inc.'s
Acquisition of the St. Paul Facility

**ASSURANCE OF
DISCONTINUANCE**

FACTUAL BACKGROUND

1. This Assurance of Discontinuance (“Assurance”) is entered into pursuant to Minn. Stat. § 8.31, subd. 2b between the State, as defined below, and Dairy Farmers of America, Inc., as defined below.
2. Keith Ellison is the Attorney General of the State of Minnesota and is authorized by, among other authorities, Minn. Stat. § 8.31, Minn. Stat. § 325D.59, 15 U.S.C. §§ 15c and 26, and common law, including *parens patriae*, to enforce and investigate potential violations of Minnesota and federal antitrust laws.
3. On October 26, 2018, DFA entered into an Asset Purchase Agreement (“Agreement”) with Agropur inc. (“Agropur”) to purchase certain assets from Agropur, including the St. Paul Facility, as defined below. Under the Agreement, Agropur agreed to sell and assign its interests in the St. Paul Facility to DFA.

I. DEFINITIONS

4. As used in this Assurance:
 - A. “State” means the State of Minnesota, by its Attorney General, Keith Ellison.
 - B. “OAG” means the Office of the Attorney General of the State of Minnesota, which is currently operated under the authority, direction, and leadership of Attorney General Keith Ellison.
 - C. “DFA” means Dairy Farmers of America, Inc., a Kansas cooperative marketing association with its headquarters in Kansas City, Kansas, its successors and assigns,

and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

- D. “Kemps” means Kemps LLC, a wholly-owned subsidiary of DFA that is a Delaware limited liability company, with its principal place of business in Saint Paul, Minnesota.
- E. “St. Paul Facility” means the fluid milk processing plant located at 2080 Rice Street, Saint Paul, Minnesota.
- F. “Relevant School District” means each of the Minnesota school districts listed on Exhibit A.
- G. “Raw Milk Cost” means the actual cost of raw milk at the St. Paul Facility, or Kemps, respectively, which is comprised of the regulated price of raw milk, as announced by the United States Department of Agriculture, Milk Market Administrator, pursuant to Federal Order 30 (Upper Midwest Order), plus any then-publically announced and generally prevailing premium for fluid milk processing customers in the area that includes the St. Paul Facility. At the time of the entry of this Assurance, such publically announced and generally prevailing premiums are established by an entity known as the Upper Midwest Marketing Agency (“UMMA”).
- H. “Margin” means the average difference, weighted by monthly volume, between the price per unit charged by the St. Paul Facility or Kemps, as the case may be, for school milk to a particular Relevant School District during the period January 2018 through December 2018 and the Raw Milk Cost in the month in which the school milk was delivered.

- I. “PMMB Price” means the average minimum retail out-of-store price of half-pints of standard fluid milk, net of the cost of raw milk, set by the Pennsylvania Milk Marketing Board, with a base period of May 2018.
- J. “Adjusted Margin” means the previous year’s Margin adjusted to reflect the percentage change in the PMMB Price since the date of the prior bid.
- K. “Cap Price” means the sum of the Raw Milk Cost in the month in which the school milk was delivered and the Adjusted Margin.
- L. “Producer Milk” shall have the definition set forth in 7 C.F.R. § 1030.13.
- M. “Producer Entity” shall mean an individual producer or a cooperative association of producers, as the case may be.
- N. “CMPC Supply Plant System” means the method of pooling Producer Milk on Federal Order 30 (Upper Midwest Order) that is currently on file and has been approved by the Milk Market Administrator for that Order pursuant to 7 C.F.R. § 1030.7(f) for the system that is currently administered by the Central Milk Producers Cooperative.
- O. “Class I Sales” means the volume of milk that is sold to a distributing plant as defined by 7 C.F.R. § 1030.5 which qualifies as a pool plant pursuant to 7 C.F.R. § 1030.7, but only for those sales that are regulated under Federal Order 30 (Upper Midwest Order) and not by another federal or state milk marketing order.

II. ALLEGATIONS

5. The State alleges that DFA’s acquisition of the St. Paul Facility adversely affects the markets for the sale of school milk to individual school districts in Minnesota as well as the market for Producer Milk in Minnesota. The State alleges that the Acquisition’s elimination of head-to-head competition between Kemps and the St. Paul Facility will hurt school milk

purchasers and Producer Entities. The State also alleges that the Acquisition is likely to substantially lessen competition in the Minnesota school milk market and is likely to substantially lessen competition for Producer Milk in Minnesota. The State alleges that the contract between DFA and Agropur for the purchase of the St. Paul Facility is an unreasonable restraint of trade.

6. DFA denies the State's allegations, including that its acquisition adversely affects any relevant and properly defined product or geographic market or is an unreasonable restraint of trade.

III. SCHOOL BIDDING REQUIRED CONDUCT

7. DFA will bid for school milk sales for the 2020-2021 school year in each Relevant School District. DFA will continue to bid for school milk sales in each Relevant School District for the following nine school years, i.e.: (1) 2021-2022, (2) 2022-2023, (3) 2023-2024, (4) 2024-2025, (5) 2025-2026, (6) 2026-2027, (7) 2027-2028, (8) 2028-2029, and (9) 2029-2030, and will do so pursuant to the terms and conditions set forth in paragraph 8, below.

8. For the period encompassing the 2020-2021 through the 2029-2030 school years, inclusive, in bidding for school milk sales in a Relevant School District, DFA may bid a price for school milk that is no higher than the Cap Price for the successful bidder, where either the St. Paul Facility or Kemps was the successful bidder, during the 2018-2019 school year or the multiyear period that includes the 2018-2019 school year. If neither the St. Paul Facility nor Kemps were the successful bidder to a particular Relevant School District for the 2018-2019 school year, then DFA may bid a price that is no higher than the Cap Price for the lower of the St. Paul Facility's or Kemps' bid for the 2018-2019 school year. In all cases, the bid will clearly and conspicuously explain the Cap Price mechanism and that the Cap Price will change with

changes to Raw Milk Cost. As the Cap Price may produce a variable milk cost to school districts, DFA will advise each Relevant School District that DFA will also bid a school milk price that does not vary, if a district requests a bid for such a non-variable price. This non-variable price is not subject to the Cap Price, and DFA will advise districts accordingly.

IV. POOLING ASSISTANCE REQUIRED CONDUCT

9. DFA shall continue to participate in the CMPC Supply Plant System and will include in such System all Class I Sales that DFA makes during the term of this Assurance.

V. STIPULATED PENALTY FOR VIOLATION OF ASSURANCE

10. If the State has a reasonable basis to believe that DFA has violated any portion of this Assurance, the State may bring an action to seek any and all relief available, including civil penalties, pursuant to Minn. Stat. § 8.31, Chapter 325D, and other applicable laws.

11. The remedies provided for in Paragraph 10 are in addition to all other remedies available to the State in law, in equity, or under the terms of this Assurance.

VI. EXPIRATION OF ASSURANCE

12. This Assurance shall expire ten (10) years after the date of entry of an Order by the Court approving this Assurance.

VII. MODIFICATION OF ASSURANCE

13. Whenever the OAG becomes aware, including by letter petition from DFA, that there have been material changes in the facts or circumstances existing on the date this Assurance becomes effective, the OAG will negotiate in good faith a modification of this Assurance to address the changed facts or circumstances, as appropriate. Whenever DFA becomes aware, including by letter from the OAG, that there have been material changes in the facts or circumstances existing on the date this Assurance becomes effective, DFA will negotiate in good

faith a modification of this Assurance to address the changed facts or circumstances, as appropriate. Changed facts or circumstances include material changes to the CMPC Supply Plant System, material changes to PMMB pricing, material changes in the volume or nature of the milk purchases (including the use dairy alternatives or synthetic dairy products) by a Relevant School District or by the Relevant School Districts, material changes in the costs of production or distribution of school milk that are not included in the Adjusted Margin, material changes to the Federal Order system, or material changes in DFA's ownership of plants in Minnesota or supply of raw milk in Federal Order 30 (Upper Midwest Order), which impact DFA's ability to perform under this Assurance, or which have the effect of reducing DFA's obligations under this Assurance, as perceived or understood by the OAG .

VIII. GENERAL PROVISIONS

14. Except as set forth in Paragraph 15, the State's acceptance of this Assurance is not and shall not be deemed approval or authorization by the State of any of the business practices, acts, or other conduct of DFA. Neither DFA nor anyone acting on DFA's behalf shall state or imply or cause to be stated or implied that the State, by accepting this Assurance, has approved, endorsed, sanctioned, authorized, or otherwise condoned any of DFA's business practices, acts, or other conduct.

15. This Assurance constitutes the full and final resolution of all presently existing claims related to or connected with this Assurance that the State could have brought against DFA under state and federal antitrust laws up to and including the date that the Court approves this Assurance, except for claims related to compliance with this Assurance. The State through this Assurance does not settle, release, or otherwise resolve any other actual or potential claim against DFA or any other person or entity, involving any actual or potential private causes of

action, claims, or remedies, including but not limited to any actual or potential private causes of action, claims, or remedies provided for under Minn. Stat. § 8.31.

16. DFA is entering into this Assurance solely for the purposes of settlement. Nothing in this Assurance constitutes an admission of liability by DFA of any of the allegations set forth in this Assurance. Nothing contained in this Assurance may be taken or construed to be evidence supporting liability on the part of DFA. The parties intend that this Assurance shall not be deemed an admission or denial of fault or liability.

17. Nothing in this Assurance shall relieve DFA of its obligation to comply with all applicable federal, state, and local laws, ordinances, regulations, and agreements.

18. DFA declares and warrants that Andrew M. Brummel, Senior Vice President, Legal, is authorized to enter into this Assurance on behalf of DFA. This Assurance may be executed by the undersigned in counterparts, with the same effect as if the signatures on each counterpart were upon a single instrument, and a facsimile or PDF signature shall be deemed an original signature for purposes of executing this Assurance.

19. DFA has fully read this Assurance, understands the terms of the Assurance, and has had an opportunity to consult with legal counsel regarding the meaning and effect of this Assurance.

20. No representations, warranties, or covenants have been made by the State to DFA, or by DFA to the State, concerning this Assurance other than those representations, warranties, and covenants expressly contained herein.

21. This Assurance contains the entire, complete, and integrated statement of each and every term and provision of the agreement between the Parties arising from or related to the subject matter of this Assurance.

22. The Parties each participated in the drafting of this Assurance, and agree that the

Assurance's terms may not be construed against or in favor of any of the undersigned by virtue of draftsmanship.

23. If any clause, provision, or section of this Assurance shall, for any reason, be held illegal, invalid, or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this Assurance, and this Assurance shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.

24. Any failure by any of the Parties to insist on performance of any provision of this Assurance shall not be deemed a future waiver of any of the provisions of this Assurance, and each of the Parties, notwithstanding such failure, shall have the right to insist upon the performance of any and all provisions of this Assurance.

25. The Parties shall cooperate to implement and facilitate this Assurance, including the exchange of information reasonably necessary for that purpose.

26. The Parties each voluntarily agree that the Court may immediately approve this Assurance's entry in the form of an Assurance of Discontinuance under Minn. Stat. § 8.31, subd. 2b without further notice to the Parties. The Parties waive all right to seek judicial review of this Assurance, or otherwise challenge or contest the validity of this Assurance.

27. This Assurance, including any issues relating to interpretation or enforcement, shall be governed by the laws of Minnesota, and is filed in Ramsey County District Court pursuant to Minn. Stat. § 8.31, subd. 2b. The Court shall retain jurisdiction over the Parties and this matter only for purposes of enforcement of this Assurance.

28. The remedies and relief provided for in this Assurance are in addition to all other remedies and relief available to the State in law or in equity, and nothing in this Assurance shall

be interpreted or construed to limit the power or authority of the State except as expressly set forth herein.

KEITH ELLISON
Attorney General
State of Minnesota

JAMES W. CANADAY
Deputy Attorney General

Dated: 10/25/2019

By: 

JOSEPH MEYER
ERIN R. ELDRIDGE
Assistant Attorneys General
Minnesota Attorney General's Office
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2131

Counsel for State of Minnesota

Dated: 10/25/2019

By: 

ANDREW M. BRUMMEL
Senior Vice President, Legal

Dairy Farmers of America, Inc.

**EXHIBIT A
RELEVANT SCHOOL DISTRICTS**

ST MICHAEL
CAMBRIDGE-ISANTI DISTRICT # 911
CENTENNIAL SCHOOL DIST. #12
CLOQUET
COMMUNITY EDUCATION
EAST CARVER SCHOOL DISTRICT
FRIDLEY SCHOOL DISTRICT
HOWARD LAKE DISTRICT
ROSEMONT-APPLE VALLEY-EAGAN #196
MINNETONKA EXPLORERS CLUB
MINNETONKA SCHOOL DISTRICT
ORONO SCHOOL DISTRICT
PIERZ PUBLIC SCHOOL
PRIOR LAKE PUBLIC SCHOOLS #719
ROSEVILLE FRIENDSHIP CONNECTION
ROSEVILLE SCHOOL DIST. #623
SPRING LAKE PARK DIST #16
ST. ANTHONY DISTRICT
ST. LOUIS PARK DISTRICT
WAYZATA SCHOOL DISTRICT
WHITE BEAR LAKE DIST #624
BLOOMINGTON
ANOKA-HENNEPIN #11
BUFFALO-HANOVER #877
LAKEVILLE #194
MINNEAPOLIS #1
MOUNDS VIEW #621
OSSEO #279
ROBBINSDALE #281
ROBBINSDALE SCHOOL DIST. ADV
ST. ANTHONY-NEW BRIGHTON #282
ST. PAUL SCHOOL DISTRICT #625
STILLWATER # 834
WEST ST. PAUL-MENDOTA HEIGHTS EAGAN #197
SOUTH ST. PAUL #6
INVER GROVE HEIGHTS #199

MAHTOMEDI #832
BURNSVILLE- EAGAN-SAVAGE #191
SOUTH WASHINGTON COUNTY #833
HINCKLEY-FINLAYSON #2165
DISTRICT #287
RUSH CITY PUBLIC SCHOOLS #139
ANOKA-HENN ADVENTURE

ORDER

Having reviewed the terms of the foregoing Assurance of Discontinuance, which is incorporated herein by reference, and which the Court finds reasonable and appropriate, it is SO ORDERED.

Date: _____

Judge of District Court

**LET JUDGMENT BE ENTERED
ACCORDINGLY.**