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Milk Moovement, Inc.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAIRY, LLC, a Delaware Limited Liability
Company,

Plaintiff,

v.

MILK MOOVEMENT, INC., a foreign
Corporation, and MILK MOOVEMENT,
LLC, a Delaware Limited Liability
Company,

Defendants.

MILK MOOVEMENT, INC., a foreign
Corporation,

Counterclaim-Plaintiff,

v.

DAIRY, LLC, a Delaware Limited Liability
Company,

Counterclaim-Defendant.

Case No.: 2:21-CV-02233-WBS-AC

**COUNTERCLAIM-PLAINTIFF MILK
MOOVEMENT, INC.'S [PROPOSED]
SECOND AMENDED COUNTERCLAIMS**

JURY TRIAL DEMANDED

Compl. Filed December 2, 2021
Trial Date: September 19, 2023

REDACTED

Counterclaim-Plaintiff and Defendant Milk Moovement, Inc. alleges as follows:

INTRODUCTION

1. Milk Moovement, Inc. is a small Canadian software company that is trying to enter the U.S. market for data services for milk cooperatives and processors. It brings these Counterclaims to redress Counterclaim-Defendant Dairy, LLC's antitrust violations that have throttled competition and ultimately raised prices for the hundreds of millions of American consumers, who collectively spend more than \$15 billion on milk each year.

2. Dairy admits on its website that over 80% of the 100 largest dairy companies in the country are Dairy customers. Through its monopoly power, Dairy is able to force its customers to sign anticompetitive contracts that lock them into Dairy's services.

3. As it continues to increase its stranglehold on the market, Dairy provides deficient services at supracompetitive prices. Then, when a new market entrant like Milk Moovement tries to break Dairy's monopoly by offering a better service, Dairy intimidates its own customers by threatening action against them if they dare to defect. In the process, Dairy squashes these would-be competitors before they can secure a foothold in the market, thereby unlawfully protecting Dairy's monopoly.

4. Dairy maintains its market power through agreements that improperly restrain its customers from leaving. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This provision is an illegal restraint on trade that has frustrated competition, deterred innovation, and resulted in a dysfunctional market.

5. Dairy also locks in its customers through less overt, but equally wrongful means. Dairy's contracts contain a complex daisy-chain of definitions that purport to convert its customers' data into Dairy's trade secrets. These agreements force customers to agree that even the raw data and information they themselves provide to Dairy regarding the prices they pay, their suppliers and logistics, and all other aspects of their business, including their own user requirements for software services, are subject to oppressive confidentiality restrictions that preclude them from giving their own data to anyone other than Dairy. The purpose and result is to prevent them from acquiring data services from anyone other than Dairy.

6. This tightly woven net of contractual "exclusivity" provisions prevents Dairy's customers from freely moving their business to more efficient competitors, like Milk Moovement.

7. Such restrictions on competition and trade are barred by the federal and California antitrust laws—especially when selectively enforced to control the market by a monopolist such as Dairy.

8. Because Dairy's anticompetitive conduct has warped the market beyond the point where the invisible hand of free enterprise can repair it, Milk Moovement is forced to seek relief from this Court.

JURISDICTION AND VENUE

9. The Court has federal question jurisdiction over Milk Moovement's federal claims asserted herein pursuant to 28 U.S.C. § 1331 because they arise under the federal antitrust laws, and supplemental jurisdiction over Milk Moovement's state law claims pursuant to 28 U.S.C. § 1367.

10. The Court has personal jurisdiction over Defendants because they directed tortious conduct at persons and activities within the State of California.

11. Venue in this District is proper pursuant to 15 U.S.C. § 22 because Defendants transacted business in this District. Venue in this District is further proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

12. Milk Moovement, Inc. is a Canadian corporation organized under the Canada Business Corporations Act. Its principal place of business is located at 1505 Barrington Street, Suite 0100, Halifax, Nova Scotia.

13. Dairy, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business at 3801 Parkwood Boulevard, Suite 300, Frisco, Texas 75034. On information and belief, Dairy has recently undergone a change to its tradename, and is now known as “EverAg” or “Ever.Ag”.

14. Dairy is a monopolist that, on information and belief, controls at least 80% of the market for data services for milk producers and processors.

15. Dairy Farmers of America (“DFA”), the largest milk producer cooperative in the country, was a co-founder of Dairy and, on information and belief, continues to have an ownership interest in Dairy. DFA also owns and operates a number of milk processors. DFA has significant contractual ties to Dairy and is Dairy’s most important customer.

16. Dairy is also partially owned by Banneker Partners, a private-equity firm based in San Francisco, California.

FACTS

I. THE MILK INDUSTRY

A. Data Services for Milk Producers and Processors and Milk Moovement’s Launch

17. Milk is one of the United States’ most important and heavily regulated commodities. Hundreds of millions of consumers buy milk every day and depend on reliable supply and predictable price. Participants in the dairy supply chain, in turn, need to manage a large amount of data, including data on fluctuating milk prices, how much and when milk is picked up from a farm, where the milk and trucks are in transit, when the milk is dropped off at a processing plant, the results of the quality testing (*e.g.*, determining fat, protein, lactose and other solids), payments to producers, and customer invoicing. Historically, systems for tracking the dairy supply chain data were based on pen and paper. These methods were time consuming and prone to error, given the

1 complicated calculations that industry participants were required to make. Modern, computerized
2 data services have substantially streamlined and simplified the tracking process for milk producers
3 and processors, which has been a boon to the industry.

4 18. Dairy is by far the largest and most dominant provider of dairy-supply-chain
5 software, but its systems are clumsy, not integrated, and inefficient. Milk Moovement is a startup
6 company that is trying to emerge as a competitor of Dairy, which has created new and more
7 functional methods for tracking and analyzing production data.

8 19. To help innovate and modernize data services for milk producers and processors,
9 Milk Moovement created a cloud-based software platform to connect all players in the dairy supply
10 chain, with features for transportation monitoring, production tracking, quality monitoring, and
11 producer payments.

12 20. Milk Moovement's software is used, among other things, to keep track of how much
13 and when milk is picked up from a farm, the precise location of tanker trucks while milk is in
14 transit, when the milk is dropped off at a processing plant, results of the quality testing (*e.g.*,
15 determining fat, protein, lactose, and other solids), payments to producers, and customer invoicing.
16 Milk Moovement's software can be accessed by its customers by either computer or mobile app.

17 21. Milk Moovement offers its clients custom portals that permit them to access their
18 raw data—or calculations based on that raw data—in real-time. Those clients can then select, sort,
19 and download their data into custom reports. This data can be further interpreted, sorted, formatted,
20 searched, or analyzed in a number of other ways.

21 22. Milk Moovement's platform can also be used to generate invoices or short forms
22 that pull the client's data from the database and populate specified fields on the invoice or form.

23 23. The reports Dairy claims are "trade secrets"—or from which trade secrets can be
24 inferred—are similar to the reports containing client data that Milk Moovement has been providing
25 to its clients since it was founded. These are standard forms, similar to those used by others in the
26 industry. These reports and the client data reflected in them are often provided to third parties
27 including producers, plants, processors, the market administrator for Federal Milk Marketing
28

Orders (explained below), and customers, among others. As part of their ordinary business, those third parties must be able to easily understand the information contained in those reports.

B. The Federal Milk Marketing Orders (“FMMO”) System

24. The pricing of dairy products in most of the country is subject to Federal Milk Marketing Orders. In the relevant regions, federal statute provides that the USDA will issue FMMOs, which set milk prices across geographic regions established by statute based upon prices paid for milk products in the preceding weeks.

25. Pursuant to the FMMOs, all Class I milk—meaning liquid beverage milk—must be “pooled,” which means they are subject to regulated pricing. With respect to other classes of milk—namely, milk used for soft products like yogurt and cottage cheese (Class II), milk used in the manufacture of spreadable cheese like cream cheese (Class III), and milk used to produce butter, powder milk, and condensed milk (Class IV)—handlers can generally elect whether to participate in the pool.

26. Each week, through mandatory price reporting, dairy manufacturers report to USDA the value and sales volume of wholesale butter, cheddar cheese, nonfat dry milk and dry whey. These prices are used to determine two-week and monthly weighted-average commodity values. The two-week prices are used to determine advanced pricing factors for fluid milk and cultured-milk products.

27. Each month, some milk producers will have to pay into the pool and others will withdraw funds from the pool when they pay producers that month’s uniform price for fluid milk.

28. Typically, milk producers try to obtain the best price for their milk and make pooling decisions based on whether the market price for a particular class of milk is higher or lower than the uniform price.

29. The FMMOs impose an array of rules on whether, or under what conditions, producers can pool milk. Whether milk can be pooled depends on, among other things, the type of plant processing the milk, how much milk the producer “pooled” in the previous month, what kind of product is made using the milk, and whether the producer diverted milk to other plants participating in the pool.

30. Milk processors must submit monthly reports to an FMMO market administrator—an employee of the USDA—detailing their total milk receipts by class and specifying how much milk was pooled. Milk processors must also track and report to producers on a monthly basis (1) the total pounds of milk received from that producer by date, (2) the components (*e.g.*, amount of butterfat and protein) contained in the producer’s milk, (3) the minimum payments required to be made to the producer under the FMMOs, (4) the rate used to make payments to the producer (if not the minimum rate), (5) the amount and nature of any deductions made by the handler, and (6) the net amount of payments to the producer.

31. The USDA then uses these inputs to establish fixed minimum prices for milk and milk products. Thus, at a market-wide aggregate level, milk producers’ choices as to whether to pool their milk, and what kind of milk to pool it as (Class I, II, III, or IV) determines future prices.

C. The FMMO Price-Setting Process Is Vulnerable to Antitrust Abuse

32. Because dairy producers’ choices aggregated across the market affect the price of milk products, the FMMO process is subject to abuse by unscrupulous actors.

33. In general, milk producers—which are often, but not always, organized into cooperatives comprised of member farms—look to avoid “paying into the pool” whenever possible (while at the same time managing multiple other constraints). Doing so avoids a direct cost and allows that milk processor to either (1) pay those funds to member farms of their cooperatives (if any), or (2) retain those funds to improve the profits of their operation.

34. Generally, a cooperative that generates revenue only from marketing the raw milk of its farmers—and does not engage in any other lines of business—will be motivated to secure the highest practical price for its members’ milk.

35. That is not true, however, for DFA—the milk producer that on information and belief, partially owns Dairy. This is because DFA is also heavily invested in the milk processor business. DFA’s “Milk Marketing” segment is distinct from its “Commercial Investments” segment, with the latter involved in an array of dairy-processing operations. These dairy-processing activities benefit from *lower* raw milk prices, because those dairy-processing operations utilize raw milk as an input. This creates an inherent conflict and motivation for DFA to suppress milk prices.

1 And, because DFA has a significant market share in the milk-producer market—and indeed is the
2 largest milk producer in the country—it can manipulate FMMOs to suppress milk prices.

3 36. In an October 2000 memo, Rick Smith (then-Dairy CEO and later DFA’s CEO until
4 2022) wrote to Gary Hanman (then-DFA CEO) that “just like in operating fluid plants, there is a
5 conflict of interest in selling your own milk to your own manufacturing facilities.” Smith explained
6 the conflict while giving testimony relating to a lawsuit against DFA. Smith testified under oath
7 that the operator of a fluid-milk plant that also serves as its own processor is incentivized to buy
8 raw milk at the cheapest price, whereas a cooperative acting on behalf of farmers selling raw milk
9 is incentivized to sell that raw milk at the highest price.

10 37. Similarly, Alan Bernon (former owner and operator of milk processor Garelick
11 Farms, former President of milk processor Dean Foods Group, and later DFA’s Senior Advisor of
12 Mergers and Acquisitions) testified that a processor always wants to pay the lowest possible price
13 for the best quality milk. Bernon was also asked about multiple DFA acquisitions from 2010 to
14 2017, including Kemps, Cass Clay, Guida, DairyMaid, Oakhurst, and Cumberland Dairy (all of
15 which are milk processors); for each of these acquisitions, Bernon admitted that it was in the best
16 interest of these DFA-owned entities to pay the lowest price for the best quality of raw milk. He
17 further stated: “I think that’s true of all these transactions that are processing milk.” Thus, DFA’s
18 “Commercial Investments” segment will be more profitable when raw-milk prices are lower.

19 38. A reduction in the raw-milk prices that DFA receives as a seller of raw milk does
20 not reduce DFA’s net income from selling raw milk as a milk *producer* more than it could benefit
21 DFA’s net income as a *processor* of raw milk. This is because DFA’s income statements,
22 according to evidence submitted on summary judgment in *Sitts v. Dairy Farmers of Am., Inc.*, 417
23 F. Supp. 3d 433, 458 (D. Vt. 2019), show that its net income from the sale of members’ raw milk
24 has been relatively fixed over a period of time. Thus, any decreases in raw milk prices paid by
25 processors are passed through to members, and DFA’s financial performance as a raw milk
26 cooperative depends only on the *volume* of raw milk sold by DFA members, not the raw milk
27 prices.
28

39. In contrast, reducing raw milk prices directly increases DFA's profit per unit as a processor. Accordingly, DFA as an entity financially benefits from reducing raw milk prices (which increases its profits per unit as a processor without affecting its profits per unit as a cooperative raw milk seller), while maintaining as much raw milk volume as possible (by driving farmers to have to sell through DFA).

40. Based upon the facts and evidence discussed above, the U.S. District Court for the District of Vermont held that:

[A] rational jury could conclude that DFA management favored growth of its commercial operations and empire building over the interests of its farmer-members, including through executive compensation and benefits which were not fully disclosed to DFA members and improper payments to DFA Board Members and Area Council Members.

Sitts, 417 F. Supp. 3d at 459 (denying summary judgment). That case settled on the eve of trial in 2020.

41. One of the key facts relied upon by the *Sitts* Court in denying summary judgment in DFA's favor was evidence that DFA had data from competing cooperatives regarding their payroll to their members. *Id.* at 471.

42. As discussed in Section III, *infra*, Dairy admits on its own website that over 80% of the 100 largest dairy companies in the country are Dairy.com customers. The fact that DFA is a partial owner of an entity that has access to vast amounts of cooperative payroll data is thus highly problematic from an antitrust perspective.

43. The importance of this data to FMMO price manipulation creates an independent incentive for Dairy and DFA to foreclose upstart competitors like Milk Moovement from the market for data services for milk producers and processors above and beyond the capture of monopoly rents from Dairy customers.

II. THE RELEVANT MARKET FOR DATA SERVICES FOR MILK PRODUCERS AND PROCESSORS

A. Relevant Product Market

44. The markets at issue in this case concern one of the most important agricultural products and dietary staples in the country, which is consumed by millions of Americans every day: milk.

45. The relevant product market is the market for data services for milk producers and processors. Milk Moovement and Dairy are competitors in this market.

46. Additional relevant markets are (i) the market for milk production—in which dairy cooperatives compete, and (ii) the market for milk processing—in which milk processing plants compete. These markets are relevant because DFA, which on information and belief retains an ownership interest in Dairy—is the largest milk producer and one of the largest milk processors in the United States. Because, on information and belief, DFA owns part of Dairy and has deep contractual ties with Dairy (as its most important customer) and seeks out and benefits from access to data held by Dairy, it will not work with competitors of Dairy. This effectively forecloses a large portion of the market for data services for milk producers and processors to Dairy’s competitors.

B. Relevant Geographic Market

47. The United States is the relevant geographic scope of the market for data services for milk producers and processors.

48. In the alternative, the relevant geographic markets for data services for milk producers and processors are the sub-national regions for milk purchasing established by the United States Department of Agriculture: Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Midwest, California, Pacific Northwest, Southwest, and Arizona. *See* USDA, <https://www.ams.usda.gov/sites/default/files/media/ListofFederalMilkMarketingOrderAreas.docx>.

C. Barriers to Entry

49. There are substantial barriers to entering the market for data services for milk producers and processors.

50. First, because the milk industry is heavily regulated, data services software for milk producers and processors must reflect and accommodate those regulations.

51. Second, the ability of new entrants to reach scale is significantly restricted by Dairy's *de facto* exclusive contracts. Dairy admits on its own website that over 80% of the 100 largest dairy companies in the country are Dairy.com customers, and accordingly, on information and belief based on this admission, Dairy's market share exceeds 80% of the market. Because Dairy's *de facto* exclusive contracts effectively foreclose this portion of the market to new market entrants, these exclusive contracts are a significant barrier to entry.

52. Third, Dairy's ownership relationship with DFA also forecloses a significant portion of the market to new entrants. DFA is the largest milk producer and one of the largest milk processors in the country. Because DFA will only work with Dairy, DFA's equity relationship with Dairy is another barrier for new entrants into the market.

53. Fourth, Dairy's expansive view of the confidentiality provisions in its contracts are a significant barrier to new entrants into the market. As explained below, Dairy believes that its customers' data and user requirements are confidential information owned by Dairy. Because any new market entrant must speak to potential customers about their user requirements and process their data in order to provide data services to milk producers and processors, Dairy's assertion of confidentiality restriction over its customers' data and user requirements pose another barrier to new entrants seeking to enter the market.

III. DAIRY'S MARKET POWER

A. Dairy Controls At Least 80% of the Market for Data Services for Milk Producers and Processors

54. There is no economic reason that provision of data services in the milk industry should be a monopoly. The market, however, is overconcentrated and highly dysfunctional due to Dairy's anticompetitive conduct.

55. Dairy admits on its own website that over 80% of the 100 largest dairy companies in the country are Dairy.com customers.

REDACTED

- Dairy.com's acquisition of Mr.Milkman is its first investment in India and the first dairy/agri tech acquisition in India by an international player
- Dairy.com services 80% of the Dairy Foods' Top 100 dairy companies with over 100 billion pounds of milk moving through its systems
- Together, Dairy.com and Mr.Milkman will innovate and accelerate the development of last-mile delivery technology in the dairy business across India, North America and Europe as part of its suite of end-to-end supply chain solutions.

On information and belief, based on this admission, Dairy's market share exceeds 80% of the market.

56. As described in more detail below, Dairy maintains its control of the market via a tightly woven net of contractual "exclusivity" provisions and long-term contracts to prevent its customers from freely moving their business to one of Dairy's competitors, such as Milk Moovement.

57. Under longstanding antitrust principles, "[a] market share of sixty-five percent or more usually establishes a prima facie case of monopoly power in Section 2 contexts." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021). On information and belief, with over 80% of the market unable to stop using Dairy's services, Dairy can, and does, charge supracompetitive prices and wrongly restricts customers' ability to freely choose their service providers.

58. Because Dairy's anticompetitive conduct successfully stifles meaningful competition, Dairy's customers lack any leverage to negotiate against or push back against these onerous terms.

B. Dairy Imposes Anticompetitive Contracts that Prohibit Customers from Providing Their Own Data to Prospective Competitors

59. Dairy has intentionally constructed a tightly woven net of contractual "exclusivity" provisions to prevent its customers from freely moving their business to one of Dairy's competitors, like Milk Moovement.

60. Dairy's contracts with customers force customers to agree that the raw data those customers provide to Dairy regarding their own milk production is subject to Dairy's oppressive confidentiality restrictions. Dairy's contracts accomplish this through a daisy-chain of definitions that purport to convert customers' data into Dairy's trade secrets.

[REDACTED]

65. These provisions appear in all or virtually all of Dairy's contracts with its customers. They are the means by which Dairy purports to appropriate all of its customers' own data as its own trade secrets, which Dairy then weaponizes to try to smother any competitor from even being able to speak to its customers about their user requirements and needs.

66. These provisions mean that any customer that terminates its relationship with Dairy would be forced to leave behind years of its own analytics and production data—information that

Dairy knows forms the lifeblood of strategic decision making in the industry. Indeed, according to Dairy's contracts, a customer's data becomes Dairy's simply by virtue of being uploaded to Dairy's platform.

67. Turning this customer raw data into Dairy's purported propriety information functionally cripples any milk producer trying to engage one of Dairy's competitors for data services.

And, without the ability to synthesize its historical data and systems with its new data and systems, any new platform provided by Milk Moovement or anyone else would be completely hamstrung, as it would not have the functionality necessary to permit an "apples to apples" comparison between different time periods.

68. These improper confidentiality provisions thereby render any would-be competitor flatly unable to provide services to any current Dairy customers—which is exactly why Dairy has devised this regime in the first place.

69. The confidentiality provisions likewise preclude a customer from complying with federal and state law relating to the historical accounting and auditing of its pooling and pricing activities.

70. The confidentiality provisions also prevent a cooperative from accurately calculating the equity of its members over time—which is necessary for the cooperative to distribute profits to its equity holders.

71. These concerns are not hypothetical.

C. Dairy's Anticompetitive Acquisitions

72. Dairy (in collaboration with its private equity owner, Banneker Partners) recently has further entrenched Dairy's monopoly power through strategic acquisitions designed to eliminate competition and further consolidate Dairy's market control.

73. Since its founding, Dairy has aggressively eliminated potential competitors and other industry service providers, expanding its reach in the industry through acquisitions. By eliminating competitors and other entities that had superior software products and services, Dairy has been able to continue charging consumers supracompetitive prices for its inferior software platform and avoid incurring the necessary investment of time and resources to resolve the inherent deficiencies plaguing its product.

74. In September 2019, Dairy announced that it had been acquired by Banneker Partners, a San Francisco-based private investment firm that claims to focus on building long-term value in software businesses through strategic acquisitions. Following its acquisition by Banneker Partners, Dairy increased its acquisition of competing supply-chain software products and services in order to further reduce competition in the market.

75. Dairy has acquired at least two enterprises—Data Specialists, Inc., and Ever.Ag—within the past three years. *See Dairy.com acquires Data Specialists, Inc.*, EVER.AG (2022), <https://www.ever.ag/dairy-com-acquires-data-specialists-inc/> (Data Specialists, Inc.); *Dairy.com acquires ever.ag, uniting 30 years of expertise from proven agribusiness innovators*, EVER.AG (2022), <https://www.ever.ag/dairy-com-acquires-ever-ag/> (Ever.Ag).

76. Dairy also purchased competitors or potential competitors with the intent to shut them down so that Dairy would not face competition from them. For example, Dairy purchased a software system developed by a dairy cooperative, United Dairymen of Arizona (“UDA”), which threatened to compete with Dairy’s systems. But Dairy never brought that software to market, effectively terminating a competitor through an “acquire and kill” strategy.

77. These acquisitions are separate and distinct violations of the antitrust laws—specifically, Sections 3 and 7 of the Clayton Act.

78. Because, on information and belief, Dairy controls approximately 80% of the market—and because Dairy controls 80% of the top 100 customers by its own admission—these acquisitions are anticompetitive under the mathematical formula used to determine whether a merger unlawfully concentrates a market under the Clayton Act.

79. The law utilizes a formula known as the Herfindahl-Hirschman Index (“HHI”) to measure concentration in a market. “The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market.” *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001).

80. A post-merger market with an HHI above 2,500 is classified as “highly concentrated.” *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015) (quoting *DOJ/FTC Horizontal Merger Guidelines* § 5.3 at 18). Because Dairy controls at least 80% of the market, its HHI is at least 6,400—and the market is thus highly concentrated as a matter of law. *Id.*

81. On information and belief, Dairy’s recent acquisitions further concentrated its hold over the market, and are thus unlawful and subject to court-ordered divestment and/or other injunctive remedies. *See Optronic*, 20 F.4th at 485 (“This manufacturer consolidation further concentrated the already highly concentrated telescope manufacturing market by causing its Herfindahl-Hirschman Index (‘HHI’)—a widely accepted measure of market concentration—to increase by over 1,000 points.”) (affirming injunctive relief under Clayton Act).

D. Dairy Sought to Continue Its Anticompetitive Acquisition Spree by Acquiring Milk Moovement

82. Milk Moovement completed its first platform installation in January 2018 for Dairy Farmers of Newfoundland & Labrador.

[REDACTED]

84. On September 30, 2020, Milk Moovement received an email from Kyle Hufford, Vice President of Banneker Partners, stating: “I’m with Banneker Partners, we’re a private equity firm in San Francisco and we own Dairy.com. We’ve been impressed with what you guys are building and noticed the recently announced move to open an office in the US. We think that there

might be some interesting overlaps with you on farm product and what Dairy.com does with farm to plant. I'm sure you're busy building the business but it would be interesting to at least kick off a dialogue. Are you guys open for a quick intro call sometime in the next week or so?"

85. In response, Milk Moovement agreed to meet with Banneker Partners on October 7, 2020, and thereafter demonstrated the capabilities of its software platform to Banneker Partners. On information and belief, Banneker Partners arranged the meeting with Milk Moovement and requested a demonstration of Milk Moovement's capabilities to determine whether Milk Moovement posed a threat to Dairy's market share and, if so, eliminate that threat through a strategic acquisition.

86. Following that demonstration and shortly after publishing a press release announcing its \$3.2 million seed funding round, Milk Moovement received another email from Mr. Hufford on May 21, 2021, stating: "I wanted to check in from our initial conversation back in October. I caught up with our CEO, Scott Sexton at Dairy.com [sic], and he thought it would be great if we could set up a follow up call and have him join this time. Do you guys have some time in the next week or two? Thanks."

87. From these emails and conversations, it was apparent to Milk Moovement that, on information and belief, Dairy and Banneker Partners were interested in potentially acquiring Milk Moovement for the principal purpose of protecting Dairy's market position in the U.S.

88. Milk Moovement declined Banneker Partners' invitation to engage in any further discussions.

IV. ANTITRUST INJURY AND STANDING

89. Through the conduct alleged herein, Dairy has damaged competition in the relevant market—the precise type of injury that the antitrust laws are designed to prevent. Dairy's conduct has inhibited Milk Moovement and other competitors from entering the market and deterred customers from freely switching service providers, all of which has increased prices, decreased consumer choice, and resulted in worse services than would otherwise exist. But for Dairy's antitrust violations, more customers would retain Milk Moovement and use its superior services, prices would drop and more competition would occur. As detailed below, Dairy has particularly

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[illegible]

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

99. These are just a few examples of how Dairy's services lacked necessary capabilities and functionalities to meet the needs of its customers, and how Dairy's status as a monopolist meant that Dairy did not need to try to fix these problems. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

100. As alleged in Section III.B, *supra*, Dairy's anticompetitive contracts and confidentiality provisions purport to prevent Dairy customers from even sharing their user requirements with any other data-services provider. Dairy's contracts [REDACTED]

[REDACTED]—further shuttering competition.

101. As set forth above, Dairy used its anticompetitive contracts and confidentiality provisions to specifically target Milk Moovement and restrain Dairy's customers' abilities to freely switch to Milk Moovement's services.

102. As intended, Dairy’s exclusive-dealing contracts substantially foreclose competition in the market and unfairly benefit itself at the expense of competition—including competitors like Milk Moovement—and customers like CDI.

103. In doing so, Dairy violates antitrust laws because the contracts *de facto* exclude the majority of the market from choosing to work with firms competing with Dairy in violation of Section 1 of the Sherman Act. *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 33 (S.D.N.Y. 2016) (“Contracts that foreclose competition in a ‘substantial share’ of the market may be unlawful under Section One of the Sherman Act. . . . [P]laintiffs raise material questions of fact as to whether the effect of these contracts was to ‘substantially foreclose’ rivals from obtaining a toehold in the . . . marketplace.”) (denying summary judgment on Sherman Act Section 1 and Section 2 claims).

104. Dairy's conduct is also an illegal abuse of its monopoly power under Section 2 of the Sherman Act. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 287 (3d Cir. 2012) (affirming verdict finding Sherman Act Section 2 violation despite customers' facial ability to terminate a contractual relationship with a monopolist; "[A] jury could very well conclude that in spite of the legal ease with which the relationship could be terminated, the [customers] had a strong economic incentive to adhere to the terms of the [agreements], and therefore were not free to walk away from the agreements and purchase products from the supplier of their choice." (brackets omitted)).

B. Dairy Uses Its Anticompetitive Contracts to Prohibit Customers from Switching to the Services of Competitors Like Milk Moovement

105. When customers try to leave Dairy, Dairy deploys its unlawful contracts to suppress competition.

[illegible]

REDACTED

107. Dairy's attempt to restrict its customers' ability to use competing services through contract is unlawful under both Section 1 (because it is a naked unreasonable contractual restraint on trade) and Section 2 of the Sherman Act (because Dairy is a monopolist and is unlawfully using its monopoly power to enforce and maintain its monopoly).

109.

110. Dairy's anticompetitive use of its contracts prevents Milk Moovement from fairly competing. For example, Milk Moovement has tried to overcome the restrictive effects of Dairy's lengthy exclusive contract terms by offering to buy out the remainder of these customers' contracts with Dairy. These customers have told Milk Moovement that Dairy's intimidation prevents them from doing so.

C. Dairy Leverages Its Market Power to Limit Milk Moovement's Marketing Opportunities

111. Dairy has also expressly and explicitly used its monopoly power to prevent its would-be competitors from developing their brand and establishing name recognition in the industry. Dairy does this for the sole purpose of unfairly disadvantaging those competitors from competing for the same customers that Dairy already services.

REDACTED

112. For instance, Dairy barred Milk Moovement from attending, sponsoring, or presenting at the milk industry’s major technology conference, known as DairyTech. DairyTech is an annual conference that is organized by the International Dairy Foods Association (“IDFA”). It is the leading industry conference regarding technology in the milk industry.

113. Dairy actively prevents competitors like Milk Moovement from being able to appear on panels at or to “sponsor” the DairyTech conference.

114. When Milk Moovement attempted to become a “sponsor” of DairyTech—a *de facto* gating requirement for appearing and presenting—the IDFA advised Milk Moovement that it had “an agreement” with Dairy (referred to below by its new tradename, “Ever.Ag”) that “competitors [are] precluded as sponsors”:

From: **Melissa Lembke** <mlembke@idfa.org>
Date: Tue, Dec 6, 2022 at 4:47 PM
Subject: RE: Announcing DairyTech 2023!
To: Katherine Alexander <katherine.alexander@milkmovement.com>

Good afternoon, Katherine.

I hope you are well! I am sorry to be writing this, but unfortunately, there is a conflict of interest with our partner Ever.Ag who as you know is a co-host of the DairyTech Conference. We have an agreement with our partners about competitors precluded as sponsors. We are happy to work with you on any other sponsorship, and find avenues that make sense for Milk Moovement. Again, I apologize that we are unable to have you as a sponsor for the DairyTech Conference.

Kind Regards,

MELISSA LEMBKE

Senior Director, Programs & Partnerships

International Dairy Foods Association

(Exhibit 3.)

REDACTED

115. As a result, Milk Moovement was unfairly prohibited from presenting itself to the industry as a viable alternative to Dairy.

* * *

116. In sum, Dairy's anticompetitive contracts and abuse of its monopoly power have forced Milk Moovement to seek relief from this Court. Dairy's conduct, viewed as a whole (as the Court must) warrants relief:

[A]cts which [might] be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under Section 2 [of the Sherman Act] if done by a monopolist." *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). The Ninth Circuit has likewise stated that it is not "proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376, 1378 (9th Cir. 1992) (following *City of Mishawaka*, 616 F.2d 976); *see also Tele Atlas*, 2008 WL 4911230, at *1 ("[C]ourts must consider all of an alleged monopolist's related conduct in the aggregate.").

Free FreeHand Corp. v. Adobe Systems Inc., 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Conspiracy to Monopolize in Violation of Section 2 of the Sherman Act

117. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

118. Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

119. Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."

120. Defendant Dairy, as alleged herein, has monopoly power, or at minimum, a dangerous probability of success in acquiring monopoly power in the market for data services to milk producers and processors in the United States.

REDACTED

121. Defendant Dairy willfully and intentionally engaged in anticompetitive conduct to unlawfully maintain a monopoly in that market in violation of the Sherman Act.

122. Defendant Dairy and its co-conspirator DFA have conspired the market for data services to milk producers and processors in the United States. By engaging in the conduct above, Dairy and DFA are willfully maintaining and abusing a monopoly, and leveraging their monopoly to prevent other market participants, including Milk Moovement, from reaching scale as a viable competitor.

123. Dairy's willful conduct as described above has given Dairy the ability to control and exclude competition.

124. Dairy's ongoing anticompetitive conduct as described above presents a dangerous probability that Dairy will succeed, to the extent it has not already, in its attempt to monopolize the relevant market, and will succeed in accomplishing their unlawful purpose of obtaining monopoly power.

125. Dairy's conduct described above has caused Milk Moovement antitrust injury, including but not limited to reduced sales, reduced revenues and profits, increased costs, loss of access to markets and channels for distribution, loss of market position, lost goodwill, and other injuries that the antitrust laws are meant to prevent.

126. There are effective barriers to entry into the market for data services to milk producers and processors in the United States.

127. Dairy and DFA's conspiracy violates the Sherman Act.

128. Milk Moovement has suffered an antitrust injury as a direct and proximate result of the conspiracy between Dairy and its co-conspirators, and Dairy is therefore liable for treble damages, costs, and attorneys' fees in an amount to be proved at trial.

SECOND CAUSE OF ACTION

Monopolization and Attempted Monopolization in Violation of Section 2 of the Sherman Act

129. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

REDACTED

130. Section 2 of the Sherman Act makes it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”

131. Section 2 establishes three offenses, commonly termed “monopolization,” “attempted monopolization,” and “conspiracy to monopolize.”

132. Dairy has monopoly power, or at minimum, a dangerous probability of success in acquiring monopoly power, in the market for data services to milk producers and processors in the United States.

133. Dairy willfully and intentionally engaged in anticompetitive conduct to unlawfully achieve and/or maintain a monopoly in that market in violation of the Sherman Act.

134. Dairy’s willful conduct as described above has given Dairy the ability to control and exclude competition.

135. Dairy’s ongoing anticompetitive conduct as described above presents a dangerous probability that Dairy will succeed, to the extent it has not already, in its attempt to monopolize the relevant market, and will succeed in accomplishing its unlawful purpose of obtaining monopoly power.

136. Dairy’s conduct described above has caused Milk Moovement antitrust injury, including but not limited to reduced sales, reduced revenues and profits, increased costs, loss of access to markets and channels for distribution, loss of market position, lost goodwill, and other injuries that the antitrust laws are meant to prevent.

137. There are effective barriers to entry into the market for data services to milk producers and processors in the United States.

138. Milk Moovement has suffered an antitrust injury as a direct and proximate result of the conspiracy between Dairy and its co-conspirators, and Dairy is therefore liable for treble damages, costs, and attorneys’ fees in an amount to be proved at trial.

THIRD CAUSE OF ACTION

**Unlawful Restraint of Trade in
Violation of Section 1 of the Sherman Act**

139. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

140. Dairy entered into contracts, combinations, or conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

141. The acts done by Dairy as part of, and in furtherance of, its contract, combination, or conspiracy were authorized, ordered, or done by their officers, agents, employees, or representatives while actively engaged in the management of their affairs.

142. Dairy entered into exclusive agreements that foreclosed competition in a substantial portion of the market for data services to milk producers and processors in the United States while possessing monopoly power, or at minimum, a dangerous probability of success in acquiring monopoly power, in that market.

143. These acts have caused unreasonable restraints and anticompetitive effects in the market for data services to milk producers and processors in the United States.

144. Dairy's anticompetitive acts were intentionally directed at the market for data services to milk producers and processors in the United States and had a substantial and foreseeable effect on interstate commerce by stabilizing, raising, or fixing prices for data services to milk producers and processors in the United States.

145. Dairy's conduct described above has caused Milk Moovement antitrust injury, including but not limited to reduced sales, reduced revenues and profits, increased costs, loss of access to markets and channels for distribution, loss of market position, lost goodwill, and other injuries that the antitrust laws are meant to prevent.

146. Milk Moovement has suffered an antitrust injury as a direct and proximate result of the conspiracy between Dairy and its co-conspirators, and Dairy is therefore liable for treble damages, costs, and attorneys' fees in an amount to be proved at trial.

FOURTH CAUSE OF ACTION

**Unlawful Restraint of Trade in
Violation of the Cartwright Act (Cal. Bus. & Prof. Code §§ 16700, *et seq.*)**

147. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

148. Dairy entered into contracts, combinations, or conspiracy in unreasonable restraint of trade in violation of the Cartwright Act (Cal. Bus. & Prof. Code §§ 16700, *et seq.*).

149. The acts done by Dairy as part of, and in furtherance of, its contract, combination, or conspiracy were authorized, ordered, or done by their officers, agents, employees, or representatives while actively engaged in the management of their affairs.

150. Dairy entered into exclusive agreements that foreclosed competition in a substantial portion of the market for data services to milk producers and processors in the United States while possessing monopoly power, or at minimum, a dangerous probability of success in acquiring monopoly power, in that market.

151. These acts have caused unreasonable restraints and anticompetitive effects in the market for data services to milk producers and processors in the United States, including California.

152. By virtue of the conduct alleged herein, Defendants have entered into contracts, in concerted action with others, where the effect of such contract was to substantially lessen competition or tended to create a monopoly in a line of trade or commerce in California in violation of Section 16720, *et seq.*

153. Dairy's conduct described above has caused Milk Moovement antitrust injury, including but not limited to reduced sales, reduced revenues and profits, increased costs, loss of access to markets and channels for distribution, loss of market position, lost goodwill, and other injuries that the antitrust laws are meant to prevent.

154. Milk Moovement has suffered an antitrust injury as a direct and proximate result of the conspiracy between Dairy and its co-conspirators, and Dairy is therefore liable for treble damages, costs, and attorneys' fees in an amount to be proved at trial.

FIFTH CAUSE OF ACTION

Violation of Section 7 of the Clayton Act

155. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

156. Section 7 of the Clayton Act provides that “no corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce, 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 to create a monopoly.”

157. The transactions discussed in Paragraphs 36 by Dairy substantially lessened competition in the market for data services to milk producers and processors in the United States, in violation of Section 7 of the Clayton Act.

158. Dairy’s conduct described above has caused Milk Moovement antitrust injury, including but not limited to reduced sales, reduced revenues and profits, increased costs, loss of access to markets and channels for distribution, loss of market position, lost goodwill, and other injuries that the antitrust laws are meant to prevent.

159. As a result of Defendants’ actions in violation of 15 U.S.C. § 18, Dairy is required to divest its equity, ownership stake, and all other tangible and intangible assets it acquired in the unlawful transactions.

160. Milk Moovement has suffered an antitrust injury as a direct and proximate result of Dairy’s violation of Section 7. These Defendants are therefore liable for treble damages, costs, and attorneys’ fees in an amount to be proved at trial.

SIXTH CAUSE OF ACTION

Violation of Cal. Bus. & Prof. Code § 17200 *et seq.* (Unfair Competition)

161. Milk Moovement repeats and realleges the allegations of the Paragraphs above as if fully set forth herein.

162. As set forth above, Dairy’s actions violated the Sherman Act and Clayton Act. Such unlawful acts are actionable under Section 17200. *See Cel Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999) (“[T]he word “unfair” in [Section 17200] means

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conduct that threatens an incipient violation of an antitrust law.”); *see also California v. Valero Energy Corp.*, No. C 17-03786 WHA, 2017 WL 4122830, at *5 (N.D. Cal. Sept. 17, 2017) (“[T]he analysis under Section 17200 proceeds along the same lines as the analysis under the Clayton Act.”); *In re Apple iPod iTunes Anti-Tr. Litig.*, No. C 05-00037 JW, 2010 WL 2629907, at *5 (N.D. Cal. June 29, 2010) (“Defendant moves to dismiss Plaintiffs’ UCL claim on the ground that it is premised on Plaintiffs’ Section 2 claim. In light of the Court’s finding that Plaintiffs have adequately stated a Section 2 claim, Plaintiffs have also adequately stated a UCL claim under the ‘unlawfulness’ prong.”); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1143 (2003) (“Section 17200 ‘borrows’ violations from other laws by making them independently actionable as unfair competitive practices.”) (holding that violations under federal Foreign Corrupt Practices Act are actionable under UCL).

163. As a result of Dairy’s unfair, unlawful, and fraudulent competition, Milk Moovement has lost money and customers, and continues to do so.

PRAYER FOR RELIEF

WHEREFORE, Milk Moovement prays that this Court enter judgment against Dairy and in favor of Milk Moovement and issue the following relief:

- A. equitable relief, including without limitation an injunction prohibiting Dairy from continuing its illegal practices;
- B. compensatory damages;
- C. treble damages;
- D. restitution;
- E. punitive damages;
- F. attorneys’ fees and costs; and
- G. all such other and further relief as the Court may deem just, proper, and equitable.

Dated: January 13, 2023

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ J. Noah Hagey

J. Noah Hagey

*Attorneys for Counterclaim-Plaintiff
and Defendant Milk Moovement, Inc.*

REDACTED

DEMAND FOR JURY TRIAL

Milk Moovement demands a jury trial as to all claims for which a jury trial is available.

Dated: January 13, 2023

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ J. Noah Hagey
J. Noah Hagey

*Attorneys for Counterclaim-Plaintiff
and Defendant Milk Moovement, Inc.*

EXHIBIT 1

**Filed Conditionally Under Seal
Pursuant to LR 141**

EXHIBIT 2

**Filed Conditionally Under Seal
Pursuant to LR 141**

EXHIBIT 3

From: Katherine Alexander [katherine.alexander@milkmoovement.com]
Sent: 12/6/2022 6:13:18 PM
To: Robert Forsythe [robert@milkmoovement.com]
Subject: Fwd: Announcing DairyTech 2023!

See below!

----- Forwarded message -----

From: **Melissa Lembke** <mlembke@idfa.org>
Date: Tue, Dec 6, 2022 at 4:47 PM
Subject: RE: Announcing DairyTech 2023!
To: Katherine Alexander <katherine.alexander@milkmoovement.com>

Good afternoon, Katherine.

I hope you are well! I am sorry to be writing this, but unfortunately, there is a conflict of interest with our partner Ever.Ag who as you know is a co-host of the DairyTech Conference. We have an agreement with our partners about competitors precluded as sponsors. We are happy to work with you on any other sponsorship, and find avenues that make sense for Milk Moovement. Again, I apologize that we are unable to have you as a sponsor for the DairyTech Conference.

Kind Regards,

MELISSA LEMBKE

Senior Director, Programs & Partnerships

International Dairy Foods Association

1250 H St. NW, Suite 900

Washington, DC 20005

P: 202.220.3512

www.idfa.org

Making a Difference for Dairy

From: Katherine Alexander <katherine.alexander@milkmoovement.com>
Sent: Thursday, October 27, 2022 1:16 PM
To: Melissa Lembke <mlembke@idfa.org>
Subject: Fwd: Announcing DairyTech 2023!

Hi Melissa,

Excited to have this hit my inbox!

Is it possible to secure a silver sponsorship + lanyards? Milk Moovement is excited to have a presence at this year's event in a meaningful way. I'll be submitting a proposal for a speaker as well, so keep an eye out for that!

Cheers,
Katherine

----- Forwarded message -----

From: **International Dairy Foods Association** <info@idfa.org>

Date: Thu, Oct 27, 2022 at 11:40 AM

Subject: Announcing DairyTech 2023!

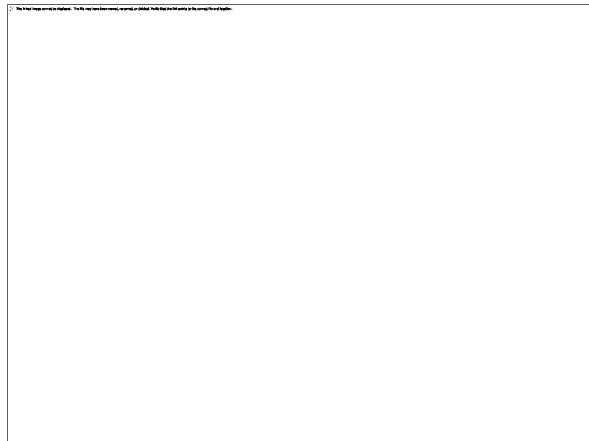
To: Katherine Alexander <katherine.alexander@milkmovement.com>

IDFA and Ever.Ag to host DairyTech 2023 in Minneapolis, MN.

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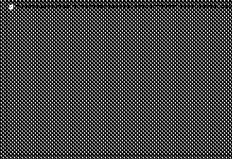
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If you have insights on how to use technology to transform your dairy operations, anywhere from farm to fork, we'd love to hear from you! We are now accepting submissions from potential speakers.

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www.milkmoovement.com



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This email was sent to: katherine.alexander@milkmoovement.com

This email was sent by: **International Dairy Foods Association**
1250 H Street, NW
Suite 900
Washington, DC 20005

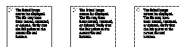
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Katherine Alexander

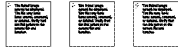
Marketing Lead
Milk Moovement

katherine.alexander@milkmoovement.com



We're hiring! Join our herd

--



Katherine Alexander

Marketing Lead

Milk Moovement

katherine.alexander@milkmovement.com

We're hiring! Join our herd