

## Daily Dicta: Egg on Their Faces: Plaintiffs Giants Come up Empty in \$3B Antitrust Trial

Ten co-defendants settled for a combined \$150 million, but the trio of egg producers left standing were willing to risk everything by going to trial. Their gamble paid off.

By Jenna Greene

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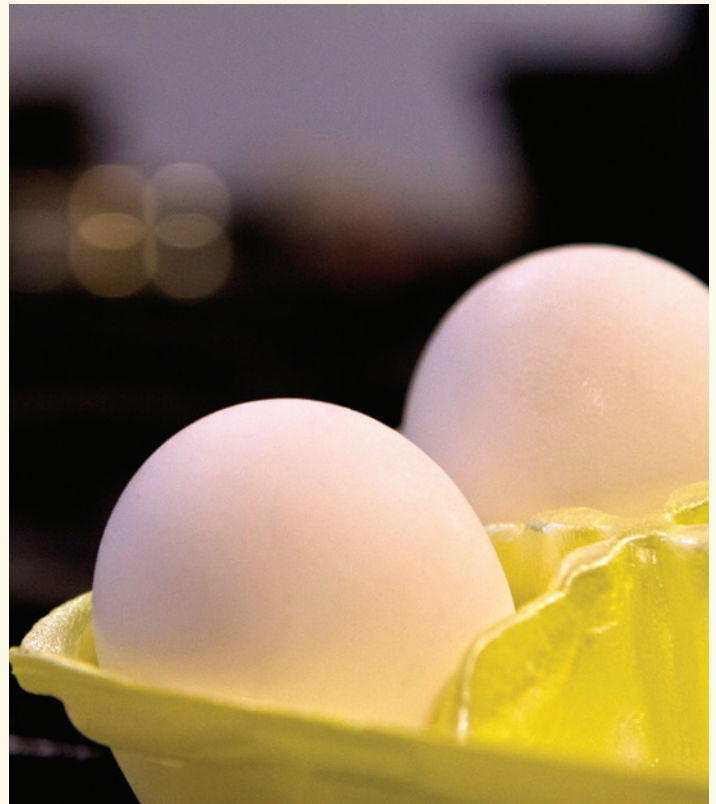
With \$3 billion on the line, three national egg producers scored a complete defense verdict last week in an antitrust class action.

It was a resounding win for lawyers from Dechert; Porter Wright Morris & Arthur; and Keating Muething & Klekamp, whose clients braved going to trial after 10 co-defendants settled for a combined \$150 million.

The trio of egg producers left standing— R.W. Sauder Inc., Rose Acre Farms and Ohio Fresh Eggs—could have been on the hook for the entire alleged conspiracy to manipulate the supply and raise the price of eggs since 2000: \$1 billion, plus treble damages.

Instead, after a 27-day trial before U.S. District Judge Gene E.K. Pratter in the Eastern District of Pennsylvania, the jury on June 14 found for the defense, concluding that Sauder and Ohio Fresh were not part of any conspiracy. As for Rose Acre, the jurors found that the alleged market restraints were reasonable, and therefore lawful.

On the losing side: Direct purchasers of eggs represented by superstar lawyers including Stephen Neuwirth of Quinn Emanuel Urquhart & Sullivan; Michael Hausfeld of Hausfeld; Stephen Susman of Susman Godfrey and Stanley Bernstein of Bernstein Liebhard.



The plaintiffs alleged that the egg producers violated Section 1 of the Sherman Act by developing and implementing an “unlawful” egg certification program, exporting eggs at a loss, and colluding to reduce egg production. That included an animal welfare program designed to give caged egg-laying hens more space.

(I just have to stop here and say that if giving hens a little more cage space is wrong, then I don't want to be right. An animal welfare program is supposed to make them the bad guys?)

In September 2015, the court approved a litigation class of direct purchasers such as grocery stores, restaurants and food manufacturers, but declined to certify a class of indirect purchasers.

The settlements came thick and fast. Among them: \$75 million from Michael Foods, which was represented by Carrie Mahan Anderson of Weil, Gotshal & Manges and William Greene of Stinson Leonard Street.

Cal-Maine Foods Inc., represented by a team from Gibson, Dunn & Crutcher including Brian Robison and Veronica Lewis, paid \$28 million. Moark LLC, Norco Ranch Inc. and Land O'Lakes Inc. agreed to pay \$25 million, with representation by Eimer Stahl.

Other settlements included Midwest Poultry Services for \$2.5 million; National Food Corp. for \$1 million; and Hillandale Farms for \$3 million.

But Sauder and Ohio Fresh Eggs pushed back hard at the suggestion that they were part of any conspiracy.

"The tiny bits of evidence that plaintiffs have introduced about Sauder come nowhere close to establishing that it was part of any anticompetitive conspiracy. If anything, the opposite," wrote Dechert partners Steven Bizar, Christine Levin, Mike McGinley and associate Julia Chapman in a motion for judgment as a matter of law.

Likewise, Ohio Fresh Eggs and its lawyers from Keating Muething argued that "there is absolutely no evidence that OFE joined a conspiracy to reduce the supply of eggs in order to raise the price of eggs."

OFE's "membership in the [egg certification program] and one single document...are insufficient grounds on which any reasonable jury could conclude

that OFE was liable on the Section 1 claim asserted," the Keating Muething team wrote.

Rose Acre, the second largest egg producer in the nation, argued that the United States Egg Marketers Inc.—and by extension, Rose Acre—is entitled to antitrust immunity for below-market exports under the Capper-Volstead Act, of 1922, which pertains to agricultural cooperatives.

"In their opening statement, plaintiffs promised the jury they would prove that each of the defendants agreed they would 'make less of a product available than they would have otherwise,'" wrote Rose Acre lawyers Jim King, Donald Barnes and Jay Levine from Porter Wright in a motion for judgment as a matter of law.

"Over the course of 10 days of testimony," they continued, "this central promise was never fulfilled. Plaintiffs failed to introduce sufficient evidence to prove by a preponderance of the evidence that Rose Acre (or the other two remaining defendants, for that matter) ever agreed to reduce the supply of shell eggs in the United States."

### **Woman Sues NASA over Vial of Moon Dust**

Here's a case that's out of this world: A woman is suing NASA, seeking a declaratory judgment that she's the rightful owner of a vial of moon dust.

Laura Murray Cicco says that her father was friends with astronaut Neil Armstrong, and that Armstrong gave her the moon dust as a gift when she was 10 years old.

Assuming it's actually moon dust (an expert said test results "seem to indicate that this sample may have originated from lunar regolith"), it's potentially valuable. Last year, a bag of dust from the Apollo 11 mission sold for \$1.8 million at an auction.

But NASA is not keen on letting members of the public own lunar material. There's no law against it, but as far as NASA is concerned, moon samples are government property, since the moon missions were government-sponsored.

In bringing her suit in Kansas federal court, Cicco turned to the one lawyer with on-point experience: Christopher McHugh of Kansas City's Seigfreid Bingham.

McHugh also represented the person who owned the moon dust auctioned off last year. As my colleague Jonathan Ringel wrote, Nancy Lee Carlson acquired the bag of dust for \$995 in a sale of items seized by the government from a man convicted of illegally selling other NASA material.

Apparently the U.S. Marshalls didn't give NASA a heads-up about the sale. Once the space agency realized what happened, it asked the court in Kansas to rescind the purchase. But U.S. District Judge J. Thomas Marten found Carlson was a "bona fide purchaser" of the dust, which meant he couldn't set aside the sale.

The current case is before U.S. District Judge Eric Melgren in Kansas (apparently the venue of choice for moon disputes), but McHugh is pursuing the same line of argument.

His client "is the rightful and legal owner of the vial and its contents," he wrote, pointing to a note on that was deemed authentic by a handwriting expert: "To Laura Ann Murray – Best of Luck – Neil Armstrong Apollo 11."

That's not quite the same as Armstrong writing, "Here's some moon dust for you," but McHugh told NBC News it still means his client is the legitimate owner of the vial.

"Unless you call Neil Armstrong a thief," he said, "he had the authority to own it and give it to people. I don't think Neil Armstrong was a thief."

### **What I'm Reading**

**Mueller's Team, in Court, Defends Case Against Russian Company**

The tactics used in the alleged conspiracy were intended to skirt the U.S. regulatory scheme that

targets foreign influence in the electoral process, the special counsel's office said.

**Citibank Agrees to Pay \$100M to Settle AGs' Suit Over Alleged Interest-Rate Manipulation**

Most of the settlement—\$95 million—will go into a fund that will be distributed to government and nonprofit entities that lost money because of the incorrect rate submissions.

**Theranos CEO Elizabeth Holmes Indicted in Alleged Wire Fraud Scheme**

Holmes is represented by Kevin Downey of Williams & Connolly.

**Labaton Sucharow Wants State Street Judge Recused After He Hinted at 'Public Corruption'**

"You're suggesting public corruption," said Labaton's attorney, Joan Lukey. "Honestly, your honor, I am appalled that that was even said."

**Inmate Who Won Lawsuit Against Guard Loses Bid to Collect in Eleventh Circuit**

The inmate won \$200,000 personal injury verdict against a prison guard for physical and sexual assault but will he ever get paid?

**From New York Socialite to Public Defender: Akerman's Whitney Untiedt Talks Career Change**

She used to hang out with people like Gwyneth Paltrow and Madonna at parties. Now she advocates on behalf of underage victims of sex trafficking.

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