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**UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE**

RECEIVED

**IN RE:**

**MILK IN THE CENTRAL MARKETING  
AREA; HEARING ON PROPOSED  
AMENDMENTS TO TENTATIVE  
MARKETING AGREEMENT  
AND ORDER**

**DOCKET NO. A0-313-A48; DA-04-06**

**POST-HEARING BRIEF**

**SUBMITTED BY**

**DEAN FOODS COMPANY**

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## I. INTRODUCTION

The United States Department of Agriculture formal rulemaking proceeding for the Central Milk Marketing Order addresses central issues of equity and fairness regarding the regulatory treatment of all market participants. It is increasingly obvious that the legal mandate to the Secretary of Agriculture of creating and maintaining orderly marketing conditions (7 U.S.C. 602) is frustrated by groups of individuals exploiting unintended regulatory loopholes at the expense of fluid milk processors and the dairy farmers committed to serving those fluid milk processors on a consistent, year-round basis. As in Shakespeare's *Othello*, these modern day Iagos merely feign loyalty to the system in order to feather their own nests, but ultimately their greed undermines the very system that feeds them. Only direct and immediate intervention by the Secretary, in adopting the proposed federal milk order amendments discussed here, can prevent greater, potentially fatal, injury to a system designed to treat all players uniformly.

The Central Marketing Area hearing record contains numerous statements from producers, their cooperatives and processors providing clear guidance to the Secretary that change is needed for the well being of the producers of the Order and assurance of a supply of milk to the fluid market. The core concern embedded in all the arguments at the hearing is equity between all producers and handlers, with different types of businesses. The Secretary should exercise his authority and responsibility in eliminating, or at least increasing the economic consequences of, depooling and tightening the pooling provisions of this Order.

Order reform of 2000 created a marketplace that is different than anything experienced in the past. The larger geography and more diverse market conditions, the result of congressional direction, have changed the landscape of milk pricing and milk movement. The Central

Marketing Order is likely the most extreme example. The action taken in 2003 to correct some of the problems was incomplete. It did not account for conditions recently experienced. Clear illustration of the chaos can be seen in the Utilization of Producer Milk by Class graph in Exhibit 9 pages 14, 17, 19, 21, and 22 (See Appendix I updated through Dec 2004).

The situation is akin to dairy farmers playing stacked Texas-Hold'Em against one another with a slight rule twist. The stacking is that one player knows all the cards on the table, what he has in his hand, and the opponent's hand before placing his bet. The hand begins with both players making a small ante (qualifying shipment). If the player, who views all the cards, knows his hand is a loser, he places no bet. However, if the player knows it's a winner he can bet big. The other player is stuck, having little opportunity to be on the benefiting end, and must provide payment when his hand loses.

This game is very similar to what is occurring within the Central Marketing Order in times of depooling. There have been handlers who have limited their pooling to the bare minimum to maintain association with the pool (placing small ante). These small antes force other handlers to work harder and carry more of the burden of servicing the market when it is the hardest (paying out on losing hands). In times when it is easy, when there is money to be made, all are participating in the process. The Secretary in permitting this to continue neglects his mandate under the Agriculture Marketing Agreement Act of 1937, as amended, to create and maintain equity among handlers and producers in the marketplace and to mitigate these dire circumstances.

## **II. Hearing Background**

This proceeding is the second in a potential series of similar federal milk order hearings primarily focusing on the issue of "depooling" and its effects together with the magnifying

economic impact of “paper-pooling” milk on federal milk orders. The problem of inequity and unfairness is obvious, especially in the geographically large and diverse Central Order. In fact, this Order is simply broken.

Federal milk orders are designed to ensure a sufficient supply of milk for the fluid market and to protect dairy farmers against destructive competition by establishing minimum uniform class prices paid by processors, resulting in minimum uniform prices paid to dairy farmers. However, the system is being exploited by those who merely pretend to serve the market and disappear at times of economic inconvenience.

Thus, representatives of dairy farmer cooperatives who are committed to the fluid milk market testified extensively about the nature of the problems, the harm to their dairy farmer patrons, and potential solutions. Moreover, individual dairy farmers testified about the non-uniform prices that they receive in competition with their dairy farmer friends and neighbors who happen to ship to cheese plants. Class I processors further testified that they have difficulty receiving the milk for which they generally pay the highest class price, especially in St. Louis (this problem of non-delivery to St. Louis being the ultimate example of a broken Central Order). Opponents love the system just the way it is. They perform little and are permitted to disappear altogether when economics dictate that result. Of course, Class I processors have no such voluntary pooling opportunity. And the dairy farmers committed to the Class I market are the ultimate losers, unless they re-shift some or all of the burden back to Class I handlers through additional charges for their milk to make up the shortfalls.

The proposed solutions, while not identical, all would increase the cost of making the economic decision not to associate milk with this market – that is depooling. There is no good excuse for depooling, just a naked assertion of the continued right to do so. However, the

Secretary's statutory mandate to create and maintain orderly marketing conditions and to have dairy farmers paid uniform prices is frustrated by the existing loopholes and magnified by paper-pooling (the ability to pool milk on paper although it rarely, if ever, serves the fluid milk market). Dean Foods' proposals would impose the greater cost on depooling and the greater limits on paper-pooling and thus provide the better cure for the illness. Opponents of the Dean proposals are proposing Band-aids at best. Their proposals simply will not stabilize the market in the Central Order.

### **III. ARGUMENT**

#### **A. Same or similar fact pattern as the Upper Midwest Order with the same type of solutions**

Most of the concerns that were presented in the Central Order testimony were also concerns in the Upper Midwest hearing. All the conclusions that were reached and defined in our Upper Midwest Order brief are applicable. To save the Secretary the trouble of sorting through the differences between the hearings, Appendix II is the Dean Foods Brief from the Upper Midwest Order, which we request be incorporated herein by reference. The transcript references in that brief are, of course, not a part of this record. The application of the facts (as defined also in this record), the statement of the law, and the proposed solutions are what are relevant to this proceeding.

Thus, the intent of including the Upper Midwest brief is not to downplay the significance of the arguments presented here. The concern is merely to avoid confusion and reader fatigue. New information in this record, particularly testimony of producers provides strong support for the Secretary to adopt the proposals presented and supported by Dean Foods.

This brief builds on the arguments that were provided in the Upper Midwest brief to recognize the testimony presented at this hearing. It also addresses alleged concerns that were raised by other parties in their Upper Midwest brief and their application to this Order. This brief thus provides the Secretary a clear case for why the Central Order should be amended with the proposed solutions offered by Dean Foods.

**B. Lamers Dairy, Inc. v. United States Department of Agriculture,**

Opponents may suggest, as they did in their filing regarding the Upper Midwest Order proceeding, that the 7<sup>th</sup> Circuit's decision in *Lamers Dairy, Inc. v. United States Department of Agriculture*, 379 F.3d 466 (7<sup>th</sup> Cir. 2004) somehow provides them cover. To the contrary, that case strongly supports the case presented by proponents of fixing the problems in this proceeding for at least three reasons. That Court, in denying Lamers' claims, actually took "note that the history of the milk-marketing regime evidences primary concern with producer competition to make sales to the fluid milk market, not the manufacturing market." *Id.* at 474. Opponents appear at various times to make the contrary assertion. (Tr. 787-790 [Neil Gulden]). Next, opponents in this and other proceedings have complained that the Secretary should instead address other issues and consider these necessary reforms at one national proceeding. However, the Lamers' case strongly supports proponents' and the Secretary's current "one-hearing-at-a-time approach" stating:

However, it is well-established that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' without creating an equal protection violation. *Williamson v. Lee Optical, Inc.*, 348 U.S. 489 (1955). As such, 'scope of coverage provisions' are 'virtually unreviewable' because the government 'must be allowed leeway to approach a perceived problem incrementally.' *Beach Communications*, 508 U.S. at 316.

Similarly, equal protection does not require a governmental entity to 'choose between attacking every aspect of the problem or not attacking the problem at all.' [citations omitted].

*Id.* at 475.

Finally, and most tellingly, this Court concluded as a matter of law precisely the point argued by proponents for reform here – that the Class III pooling exemption harms Class I handlers and the dairy farmers whom the handler relies on for a supply of milk: “Thus, the Class III pooling exemption is economically harmful to Lamers and other Class I handlers **(as well as to producers committed to dealing with them) who must suffer the effects of Class III depooling.**” *Id.* at 475-476 (emphasis supplied).<sup>1</sup>

**C. Milk Supply defined by opponents does not serve fluid market.**

Testimony of opponents strongly supports proponents' contention both that milk allegedly available as a reserve supply is withdrawn when prices are inverted and that the so-called reserve supply of milk is actually far greater than that needed or ever made available to fluid milk plants. Thus, there is ample record evidence, supplied by opponents themselves, that a significant volume of milk that is associated with the Central Order pool provides minimal, at best, assurance of its availability to this market. Examination of the area defined by Mr. Joe Weis, Vice President of Fluid Products Division, Foremost Farms USA Cooperative, as the supplemental supply area (Tr. 594-95 [Joe Weis]) reveals an area covering at most (being

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<sup>1</sup> So why, one might ask, would opponents cite this case? Perhaps, with all due respect to Lamers and its Counsel, because Lamers appears to have made the almost “impossible-to-win” equal protection argument without bothering to link it to the statutory command that the Secretary create and maintain orderly marketing conditions by, *inter alia*, insuring that all handlers pay uniform prices, subject to proscribed adjustments not applicable here, to all producers. The Class III depooling debacle actually defeats both sides of that uniform pricing equation and promotes disorderly marketing conditions that the Secretary is required to avoid. We do not yet know, because the claim has not yet been decided, nor yet brought in precisely this way, the outcome of a similar case made when handlers in competition with other handlers are not paying any, or the same, required uniform price to the detriment of both other handlers and the market's producers. That analysis, if and when it comes, will proceed not under equal protection analysis which is highly deferential to the Secretary, but under *Chevron II. Chevron U.S.A., Inc. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837, 842-844 (1984).

generous) twelve counties in Northeast Iowa, Southeast Minnesota, and Southwest Wisconsin. (See Appendix III). From this data, we learn: (1) that much of this milk “vanishes” from the pool during the months of depooling; and (2) that it, in any event, provides little of the milk actually delivered to distributing plants. In opponents’ words, this is the area of supplemental supply (ignoring the vast quantities of milk pooled from the north of this region), and yet even it does not supply this market.

From the data provided these counties would have provided 3.26%, 4.56%, and 6.68% of the shipments to distributing plants in the states of Iowa, Nebraska, Missouri, and Illinois (defined as Area 2 & 3) for the months of May 2004, November 2003 and May 2003, respectively. (See Appendix IV). These numbers can only be achieved by the most generous connection of the points defined by Mr. Weis. If only the areas that he provided for in his testimony are used those percentages would drop to 2.18%, 2.94%, and 3.91%. If the most generous area defined by the opposition to tightening the pool as the supplemental supply is only providing 6.68% of the milk (realistically 3.91%), how could this be viewed as “reasonable assurance that milk will be available in satisfying the fluid needs of a market”? 6.68% would be insufficient shipments for pooling milk under the most generous Central Order requirement.

Moreover, the same conclusions can be reached when studying Table 30 provided by the market administrator in Exhibit 9 (Compilation of Selected Statistical Data 2000-2001-2002-2003-2004 YTD). (See Appendix V). This table provides a graphical illustration of September 2004 under two scenarios. On the left are the pounds of milk by county actually pooled. This is a pool of 759,355,181 pounds with 585,769,657 in area and 173,585,524 out of area. On the right is the same month including depooled milk. In this “potential” pool there are 1,184,698,369 pounds (a 56% increase) with 777,423,838 (a 33% increase) in-area and



407,274,531 (a 135% increase) out-of-area. Clearly more of the milk riding the pool is out-of-area. When you begin to compare the colors of the out-of-area counties in the two maps to find where this “vanishing” milk is located, it becomes clear the counties showing the most change are Minnesota and Wisconsin. Note, that in the illustration including depooled pounds there is one county in Wisconsin that would have had a range of 12 to 32 million pounds that changed to a range of 1 to 4 million pounds. Using the most conservative estimate this is a loss of eight million pounds (12 minus 4) or a 67% reduction. Furthermore, there were 13 counties within a range of 4 and 12 million pounds in the pooled category that actually pooled less than 1 million pounds. Conservatively speaking, this was a loss of 36 million pounds. Finally, there were 19 counties with a range of 1 and 4 million “potential” pounds that actually pooled less than 1 million pounds. If one supposed this was only a drop of 500,000 pounds per county (likely very conservative) that would total to 9.5 million pounds. These conservative estimates total to 53.5 million pounds, explaining 23% of the “vanishing” pounds.

Grant and Crawford counties, the two Wisconsin counties in Mr. Weis’s defined area, would have a minimum of 44 million “potential” pounds pooled, but they actually pooled 5 million pounds; a reduction of 89%. It is difficult to make the case that milk, which can disappear in such large percentages, is a reliable supply for the fluid market needs. Thus, action must be taken to ensure the stability of milk supply through adoption of the proposals offered by Dean Foods.

**D. There is no Market Access Issue for the Central Order**

The sprawling Central Order is easily accessible by dairy farmers and handlers wishing to pool on this Order. The discussion in the prior section reveals that abundant volumes of milk pool, but do not serve or even stand ready to serve this market. Opponents strained to cast this as

another alleged example of a market locking out handlers other than Dairy Farmers of America (DFA), Dean Foods and Prairie Farms. This argument appears to be both incorrect and a bizarre justification for letting the free-riders continue to eat their cake and have it too. Leaving aside the inapplicability of the argument in the prior Upper Midwest Order proceeding, here the charge is even more absurd. Dean Foods, for instance, does not even operate either of the two largest fluid milk plants on the Order. (TR 673 [Evan Kinser] and Ex. 14, p. 3). Thus, dairy farmers have ample access to substantial fluid milk operations not operated by Dean Foods.

Next, despite opponents strained reading of Dean Foods' required public filings with the Securities and Exchange Commission (SEC) (the incorrect allegation being that Dean Foods must for contractually accepted economic reasons purchase milk only from DFA), Mr. Evan Kinser amply demonstrated that in the Central Order Dean Foods can and has purchased milk from at least three suppliers other than DFA. (TR 689-690, 710 [Kinser]).<sup>2</sup> Thus, the Secretary should conclude that the SEC filing does not state all of the terms and conditions of that agreement and that the agreement does not, in any event, prevent Dean Foods from purchasing milk at competitive prices from multiple sellers.<sup>3</sup> Dean Foods makes it abundantly clear that especially at St. Louis, it will gladly take high quality milk, delivered on a consistent basis at a competitive price from non-DFA sources. How can there be any purported "lock-out"?

Moreover, Prairie Farms testified that it also receives milk from multiple sources in addition to its own member milk. In fact, several opponents constitute the major source of Prairie Farms' supplemental supply with DFA picking up only the smallest share. (TR 541-541

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<sup>2</sup> While the following occurred after the hearing, in fairness to the parties and the Secretary, Dean Foods chooses to disclose that as of mid-January it no longer receives milk from Central Equity Milk Producers. The point remains that Dean can and does receive high quality milk delivered on a consistent basis at a competitive price. DFA is simply not Dean's sole supplier of milk. Furthermore, Dean Foods is not the only market available to handlers in the Central Order.

<sup>3</sup> In addition, Dean Foods made a multi-million dollar payment, amounting to 60% of the purported liquidated damages that opponents' counsel said would never be paid, in order to modify that agreement.

[Gary Lee]). Thus Prairie Farms, too, has multiple suppliers, making any so-called “entry-ticket” cheap and readily available.

The Secretary should thus conclude that the alleged concern about being locked-out of this market bears no reasonable relationship to reality.

**E. Dairy Farmers support Dean’s Position**

A significant difference between the Upper Midwest Order hearing and this proceeding was the presence and testimony of seven dairy farmers. The common thread among these producers was their concern for their industry and ultimately their livelihood if the Order is permitted to remain as is (TR 355 & 359 [Jim Huffman], TR 378 [James Reed], TR 396 [Bob Seiler]). These were not producers conveniently located to Kansas City who could be paraded through to support the position of their cooperative (See Table 1).

Table 1	Miles*	Drive time**
McCook, NE	434	7.23
Esbon, KS	276	4.61
Valley Center, KS	204	3.41
Stromsburg, NE	260	4.33
Purdin, MO	122	2.03
Trenton, MO	95	1.58
Skidmore, MO	101	1.68

\* to Kansas City, MO

\*\* Assume avg of 60 MPH

It is clear in the testimony these are producers concerned about their industry. They were willing to make the drive to have a real voice before the Secretary. These are voices that should not be ignored, as they are the ones for whom the Order is intended to benefit. They are predominately small businesses as noted by the Secretary’s own standards. (TR 381 [Reed], TR 398-399 [Seiler], TR 407 [Richard Groves], TR 416 & 421 [Doug Nuttelman], TR 430 [Bill Siebenborn], TR 612 [Barbara Rinehart]).

These producers understand very clearly the adverse effects depooling has on their businesses and the economic differences it creates between their operations and that of their neighbors. Mr. Doug Nuttelman may have best stated the problem of disorderly marketing.

When class prices for milk change rapidly (especially Class III), producers that are supplying the manufacturing should not be able to withdraw from the order. This leaves the producers that are servicing the rest of the market at a price disadvantage. When this happens, producers begin to switch markets. (TR 414 [Nuttelman]).

Mr. Nuttelman was not the only producer to make this observation and assessment. Mr. Bill Siebenborn, Vice Chairman of the DFA corporate board and Chairman for United Dairy Industry Association (UDIA) supported Mr. Nuttelman's statements in his responses to questions by Mr. Marvin Beshore.

**Beshore:** "Q. Does depooling create differences in pay price among dairy farmer in the 15 county area with which you're most familiar?"

**Siebenborn:** "A. Absolutely."

**Beshore:** "Q. Are they substantial difference such as the magnitude that Mr. Nuttelman just described? (TR 417, 418-420 [Nuttelman])"

**Siebenborn:** "A. Yes, they are."

**Beshore:** "Is that a disorderly marketing condition, in your view?"

**Siebenborn:** "A. It certainly is, because the Class I market that Deans, I'm sure, is here to protect and encourage depends on all of us wanting to participate in that market, but participation means more than sharing in the proceeds, it means supplying the milk." (TR 429)

Each of these producers acknowledged that change is necessary. Two of these producers either in direct statement or additional examination supported the Dean Foods proposals. Mr. James Reed in responding to Mr. Beshore agreed that the DFA proposal was an improvement but didn't believe it to be far enough. "I think it should be tighter than what you've proposed." (TR 383 [Reed]). In cross-examination, Mr. Reed acknowledged that he and likely the board of directors for the Kansas Dairy Association would lean toward the Dean Foods proposal (TR 384 [Reed]). Mr. Bob Seiler in his direct statement indicated support for the Dean proposal (TR 397 [Seiler]).

These statements are made by producers with some understanding of the how the marketplace functions. Many admit to not being experts, which is understandable. Yet, in their

own way they have urged the Secretary to action and provided support for the Dean Foods proposals in the process.

Opponents openly and disdainfully contest the logic underlying the federal order system's uniform pricing requirements. We understand the fury in the words, but not the words. *Othello*, Act iv, Sc. 2. Their position is an open rejection of the unfairness and inequity that results from depooling. This position was rejected by the Court in *Lamers Dairy*, at 475-476. The 7<sup>th</sup> Circuit's finding of economic harm to both Class I handlers and their dairy farmer suppliers is not so easily dismissed. The real point is that the loophole "puts money in thy purse" (that is the depooling handlers' purse). *Othello*, Act i, Sc. 3. The Secretary should not so blithely conclude that such economic unfairness "is neither here nor there" (*Id.* Act iv, Sc. 3). Instead the Secretary should conclude that the twin statutory mandates to create and maintain orderly marketing conditions and to provide for uniform prices paid by handlers and to producers require immediate and substantial revisions of the rules.

**F. The Various Proposals: Dean's Position**

Dean Foods provided various solutions for the two problems identified to be plaguing this marketplace; depooling and paper pooling. It is our hope that the clear testimony provided and the structure of this brief that depooling is merely an exaggeration of the problem of paper pooling. Therefore, any attempt to adjust pooling provisions will come up short without action to curtail depooling itself.

Mr. Kinser, on behalf of Dean Foods, established the priority for the depooling solutions (TR 674-677, 724-726 [Kinser]). The order of preference is proposals 6, then 7 then 8 and finally 2. After the Secretary has taken action on depooling, Dean Foods has offered other proposals to address the inequities of paper pooling.

In keeping with the request of the counsel for the Secretary (TR 900 – 901 [Mr. Garrett Stevens], TR 913 [Judge Marc R. Hillson]), Dean Foods provides Appendix VI, Dean Foods Company FMMO #32 Amended Proposals. This contains all the changes to the proposals offered by Dean Foods at the hearing. Dean Foods' positions on the proposals are as follows:

**Proposal 1 (Sponsored by Dairy Farmers of America, Inc., and Prairie Farms Cooperative.)**

Dean Foods supports only the portions of this proposal that address paper pooling, but only subordinate to its support for proposals 4 and 5. Ideally, the elimination of supply plants, as provided for in proposal 4 is a step in the right direction. In understanding that the Secretary might not yet be ready for that type of change in this Order and recognizing that the historical justification for such plants no longer exists, proposal 5 is a more effective tightening of the pooling provisions than offered in this proposal. However, if the Secretary is not ready to adopt either proposals 4 or 5 we would support the provisions of this proposal addressing paper pooling as an improvement over current standards. The improvement of this proposal is that it will require a greater degree of shipments from handlers than current standards. These shipments will not only demonstrate a handler's desire and ability to perform, it will have the effect of increasing the likelihood that milk pooled on the Order can provide service. The opponents will say that it creates a hardship to provide that degree of service. These are the same opponents that say that serving the market when it costs is unfair. The logic of being able to provide minimal service to gain money and not provide service when it costs seems totally inconsistent with the regulations.

**Proposal 2 (Sponsored by Dairy Farmers of America, Inc., and Prairie Farms Cooperative.)**

Dean Foods sees this proposal as it saw proposal 2 in the Upper Midwest hearing and would encourage the arguments of the Upper Midwest Brief to carry through as our position for this hearing (See Appendix II). Recognizing that Dean Foods strongly prefers proposals 6, 7, and 8 to this proposal, we would support this as an improvement over the current regulation, but it is less effective and less preferred by dairy farmers.

**Proposal 3 (Sponsored by Foremost, et al.)**

Dean Foods supports and prefers the DFA version of this proposal presented by Mr. Elvin Hollon. (TR 296-300 [Elvin Hollon]). In the event that the Secretary does not prefer the DFA version, Dean Foods would support the proposal as amended and supported by Mr. Weis (Exhibit 30). This position is consistent with the testimony of Mr. Kinser. (TR 717-718 [Kinser]). It seems reasonable that a market service payment, which exists to assist in covering the cost of assembling and transporting milk to serve the market should be born by all the milk in the market.

**Proposal 4 – Eliminate Supply Plant Provisions  
(Sponsored by Dean Foods Company.)**

With the understanding Dean Foods feels this proposal addresses the secondary concern of paper pooling, Dean Foods supports and prefers this proposal as an alternative to proposal 5. Implementation of this proposal recognizes that supply plants are not an effective way of providing a “reasonable assurance that milk will be available in satisfying the fluid needs of a market.” Use of supply plants really provides a means for milk to ride the pool. In order not to cut anyone out of the pool, Dean Foods proposed a change in the definition of handler that would allow all handlers to have access to the 9(c) section of the pool report, thereby allowing

proprietary cheese plants to pool the milk at their plant(s). The improvement is this will force milk to move to the market to pool. The producers who draw from the dollars generated by the fluid milk handlers payment of the Class I price in this Order should also be able to be called upon when it comes to servicing the fluid milk demands of the marketplace. Dean Foods believes this is a reasonable and desirable solution.

**Proposal 5 – Improve Performance Standards Provision  
(Sponsored by Dean Foods Company.)**

In the advent the Secretary believes that supply plants are nonetheless still needed for more than merely accommodating paper pooling, the provisions affecting those plants should be modified in such a way as to require them to prove their value to the marketplace. This is not a position that is supported by Dean Foods’ testimony alone. Dairy farmers were advocates for action being taken to tighten the pooling provisions of the Order. Mr. Nuttelman had the most direct statements of the evils of the current provisions:

“Also, the fact that paper milk (milk that is not delivered to a processor) can draw out of the hands of the producers that supply a market is not right. I do not share any of my other income from my farm operations with someone else from a different state, except for the milk I produce.” (TR 413 [Nuttelman]).

Mr. Nuttelman was not alone. Similar statements were made by Mr. Seiler (TR 397) and Ms. Barbara Rinehart (TR 617).

**Proposal 6 – The Dairy Farmer for Other Markets Provision (Full Year Version)  
(Sponsored by Dean Foods)**

Dean Foods maintains the position that was taken in support of this position as Proposal 3 in the Upper Midwest Order Brief (See Appendix II). Again, dairy farmers testified in support of this proposal.



In testimony and in Appendix VI, Dean Foods proposed a conforming change to provide a definition to “temporary.” Mr. Kinser articulated the rationale for this change. (TR 645-646 [Kinser]). Mr. Richard Groves provided support and consistent rationale in testimony.

**Groves:** A. “To me, what would happen, what would be the disruption the milk market if Grade A producer, when you had a negative PPD, would go back and sell manufacturing milk.

**Beshore:** Q. “What do you think would happen?”

**Groves:** A. “I think there would be a lot of disruption to the milk, to the bottle milk – milk going for the bottled milk.”

...  
**Beshore:** Q “So if a Grade A producer went onto a manufacturing market to be depooled, the milk wouldn’t be available to supply the fluid market at a later time?”

**Groves:** A. “That is right.” (TR 405)

Mr. Groves’ testimony perfectly aligns with Mr. Kinser’s testimony and the purpose of the Order to ensure “reasonable assurance that milk will be available in satisfying the fluid needs of a market.” This change will ensure that farmers and handlers alike will not have the latitude to utilize the Pasteurized Milk Ordinance to avoid their obligation and service to the provisions of this Order.

**Proposal 7 – The Dairy Farmer for Other Markets Provision (Seasonal Version)  
(Sponsored by Dean Foods)**

Dean Foods maintains the position that was taken in support of this position as proposal 4 in the Upper Midwest Order Brief (See Appendix II). This is a weaker alternative to proposal 6. The strength of this provision is that it extends the implications of depooling beyond the current month, with the exception of June. It allows handlers more flexibility to make guesses about the market and decisions about depooling by lessening the length of the consequences provided for in proposal 6. Dean Foods fully supports this as an acceptable solution to depooling, but only as a secondary and weaker solution than provided for in proposal 6.

**Proposal 8 – The Gradual Repooling Provision  
(Sponsored by Dean Foods)**

Dean Foods maintains the position that was taken in support of this position as proposal 5 in the Upper Midwest Order Brief (See Appendix II). This solution is akin to proposal 2 advanced by DFA and Prairie Farms in that it takes a percentage approach to limiting the rate at which milk can return to the pool. In the hearing, some attempt was made to show that the history of the pool would suggest this to be too restrictive. If an allowance were made for adjusting the volumes to a daily basis this would not be the case. Such an allowance was suggested and supported in Mr. Kinser's testimony. (TR 672 [Kinser]).

Dean Foods supports this next to the weakest solution for the depooling problem. This proposal is supported behind support for proposal 6 then proposal 7. This proposal is supported in front of proposal 2. The strength of this proposal is that it provides for economic implications for depooling beyond the current month. This provision is weak because it is much more lenient than that provided for in proposal 6 and 7. However, this discipline is more desirable than the loose provisions offered in proposal 2.

**Proposal 9 – Eliminate Split Plant Provision  
(Sponsored by Dean Foods)**

Dean Foods supports this as a weaker alternative to proposal 4 but as a desirable complement to proposal 5 or 1. Dean Foods understands that there are numerous ways for the Secretary to address paper pooling once depooling has been properly resolved. This is the first of several proposals that would complement proposal 5 or 1; in the event the Secretary would choose not to implement proposal 4. Should the Secretary not accept proposal 4, 5 or 1 this proposal is still useful in improving the Order. The statement of complement merely

connections the importance of proposal 5, it does not lessen their value or Dean's support if they would be adopted independently.

This proposal would allow a handler to choose between having a pool plant and a non-pool plant. Current provisions allow a handler to have a plant (single operation), but make it look like two plants from the market administrator perspective. Simply designating a single silo (often the smallest) to serve as a pool silo allows this to be done. The balance of the silos are designated as nonpool. Making this distinction provides the handler the ability to touch-base with a producer in the pool silo as needed, but limits the handler's obligation to the market if that handler would decide it wanted to depool. In a depooling situation their only obligation would be for the pounds shipped directly and those received into the pool silo. All pounds received into the nonpool silos would not exist from the Order standpoint.

Adoption of this provision will not be highly effective in addressing depooling. That is why Dean Foods urges depooling to be addressed by the other proposals. Having addressed depooling, implementation of this provision by the Secretary will force handlers to make a decision to either be in the market or not, before the beginning of the month. Handlers need fewer gates to get in and out of the pool. Such a change is well within the Secretary's authority as demonstrated by the same change in the Mideast Order as part of prior pooling reform in that Order.

**Proposal 10 – 12-month Lock for Nonpool Plant Provision  
(Sponsored by Dean Foods)**

Dean Foods supports this proposal as a weaker alternative to proposal 4 and weaker alternative to proposal 9. Like proposal 9 it is a desirable complement to proposal 5 or 1, but in the absence of proposal 5 or 1, Dean Foods still supports adoption of this proposal. Support of this proposal follows much of the same logic as proposal 9. This proposal is weaker in that it

does not entirely eliminate nonpool plants, instead it allows nonpool plants, but forces handlers to maintain that status for 12 months. If the Secretary believes that somehow nonpool plants provide a service to the market (a position that Dean Foods completely opposes), this would be a reasonable, though less effective, reform for the Secretary to implement.

**Proposal 11 – Eliminate Supply Plant System Provision  
(Sponsored by Dean Foods)**

Dean Foods supports this proposal as a weaker alternative to proposal 4, but as a desirable complement to proposal 5 or 1 and to either proposal 9 or 10. The existing regulation allows handlers to link plants owned by different companies for the purpose of pooling, after giving notice to the market administrator. That regulation allows shipments from plants and farms closer to the distributing plant to make shipments on behalf of more distant plants. This proposal will discourage no cost/no service pooling by plants simply riding the coattails of others actually serving the market.

**Proposal 12 – Eliminate Multi-handler Supply Plant System Provision  
(Sponsored by Dean Foods)**

Dean Foods supports this proposal as a weaker alternative to proposal 4 and 11 but as a desirable complement to proposal 5 or 1 and to either proposal 9 or 10. Dean Foods supports this proposal even if the Secretary does not act on proposals 5, 1, 9 or 10. Current provisions allow any group of handlers to form a system of pool plants. This proposal would allow a single handler to form a system. It would not allow multiple handlers to form a system. The benefit of this provision is that a single handler would be able to perform as if they only had a single plant. Adoption of this provision by the Secretary is a small step, but doesn't take the action offered by proposal 11.

**Proposal 13 – Require shipments from all Plants in a Supply Plant System Provision  
(Sponsored by Dean Foods)**

Dean Foods supports this proposal as a weaker alternative to proposal 4 and 11 or 12, but as a desirable complement to proposal 5 or 1 and to either proposal 9 or 10. Dean Foods supports this proposal even if the Secretary does not act on proposals 5, 1, 9 or 10. This proposal would have all plants in a system provide a degree of service to the marketplace. This provision is beneficial because it requires a plant to demonstrate its attachment to the market by providing some degree of service to the marketplace. If the purpose of a supply plant is to provide service to the marketplace, this record clearly demonstrates that such is not happening (Exhibit 14 (Vetne Exhibit) Page 6). If the Secretary is committed to the notion that supply plants are needed for the purpose of serving the market, these plants should clearly demonstrate service to the market.

**Proposal 14 (Sponsored by the Market Administrator)**

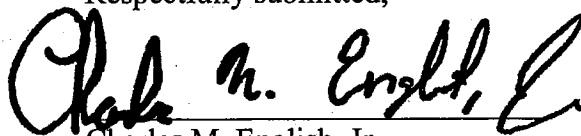
Dean Foods supports this proposal. The present timing situation is awkward for the Market Administrator depending on the alignment of payout dates in a particular calendar month.

**IV. CONCLUSION**

Ample evidence in this record provides strong support for the Secretary to take significant action to address the evils of depooling. Small business dairy farmers in their own words urged the Secretary to make changes quickly to help them survive. Dean Foods has offered proposals that have a track record of success and are supported by dairy farmers as a solution for the problems of the Central Order. We urge the Secretary to use the provisions provided for in emergency proceedings to act expeditiously to implement change addressing depooling in the Central Order.

The Secretary's further review of the record should recognize that paper pooling is also a pressing problem in need of attention in this Order. As with depooling, small business dairy farmers urged the Secretary to take action to put a stop to a policy that shifts dollars to producers who are not serving the market. Dean Foods supports these producers in urging the Secretary to take immediate action implementing paper pooling solutions. The proposed changes are crucial for fairness and equity. "It makes us or it mars us." *Othello*, Act. v. Sc. 1. Let us together make the system better.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles M. English, Jr.", written over a horizontal line.

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