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BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE

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In the Matter of: ) DOCKET NO. AO-368-A32;  
MILK IN THE PACIFIC NORTHWEST ) AO-271-A37; DA-03-04  
AND ARIZONA - LAS VEGAS )  
MARKETING AREAS )

**RESPONSE OF OPPONENT PRODUCER HANDLERS IN OPPOSITION TO MOTION  
TO STRIKE FILED BY DAIRY FARMERS OF AMERICA**

**INTRODUCTION**

In an overreaching attempt to distract the Department from the arguments and evidence that undercut the claimed bases for the Department's Recommended Decision, Dairy Farmers of America ("DFA") has moved to strike the entirety of the joint comments and exceptions as well as the individual comments and exceptions filed by the four producer-handler operations who vocally and unequivocally oppose the removal the long-standing producer-handler exemption from pricing and pooling. These four dairies, Edaleen Dairy, LLC, Mallories Dairy, Inc., Sarah Farms, and Smith Brothers Farms, Inc. through their respective counsel, submit this response in opposition to DFA's Motion. For the reasons set forth below, the Department should summarily deny DFA's motion.

A. **THE DEPARTMENT'S DECISION SHOULD BE BASED ON THE ENTIRE RECORD, NOT SOLELY ON THE PUBLIC HEARING.**

DFA premises its motion on the erroneous proposition that the Department must base any decision "only on the basis of evidence taken at the public hearing." DFA Motion ¶ 1 (emphasis

in original). DFA offers no specific authority to support this contention, only a general citation to the rules of procedure for order formulation. There is a critical distinction between the formal hearing record and the record of the proceeding. The record includes far more than the hearing transcript and documentary exhibits submitted at the hearing. 7 C.F.R. § 900.13. While the regulations state that proposed findings and conclusions should not contain factual material beyond the record, no such restriction exists concerning exceptions to a proposed rule. *Cf.* 7 C.F.R. § 900.9(b) *with* 7 C.F.R. § 900.12(c).

In addition, the rules affirmatively contemplate that additional filings, argument, and evidence will be submitted to the Department for consideration. *See* 7 C.F.R. § 900.7 (“All motions and requests shall be filed with the hearing clerk . . .”); 7 C.F.R. 900.17 (“In addition to the documents or papers required or authorized by the foregoing provisions of this subpart to be filed with the hearing clerk, the hearing clerk shall receive for filing and shall have custody of all papers, reports, records, orders, and other documents which relate to the administration of any marketing agreement or marketing order and which the Secretary is required to issue or approve.”). All of these submissions become part of the hearing record. 7 C.F.R. § 900.13. It is this **entire record**, including all such submissions, that the Secretary must give due consideration to in rendering a decision. 7 C.F.R. § 900.13a.

The entirety of the comments and exceptions filed by the opponent producer handlers have been submitted to the hearing clerk pursuant to rule and must be made part of the hearing record for consideration by the Secretary. Of course, the Secretary remains free to accord whatever weight he may attribute to the evidence and arguments in the hearing record.

**B. NEWLY DISCOVERED MATERIAL EVIDENCE AROSE AFTER THE CLOSE OF THE HEARING AND MUST BE CONSIDERED BY THE DEPARTMENT**

The Declarations of Eric Flintoff, Jerry Handlos, Hein Hettinga, and Alexis Koester, each contain sworn statements regarding facts and events occurring after the hearing in this proceeding concluded. The inclusion of this information during the hearing was impossible.

The Department issued a Recommended Decision that, if made a final ruling, would impose severe financial obligations that place the viability of these four producer-handler operations at risk. Never before has the Department recommended termination of private businesses as the Recommended Decision proposes. When proposed changes promise such a devastating impact, the Department owes those who stand to be adversely affected every opportunity to inform the Department so that a wrong result can be avoided. Any information on the issue of whether the current order tends to effectuate the terms of the AMAA cannot be ignored. This is especially the case when evidence is newly discovered and/or otherwise unavailable during the hearing.

This critical evidence shows that one of the main claims made by the proponents throughout the course of the hearing, that regulated handlers cannot compete with producer-handlers on price for retail customers based upon the price for raw milk, is flatly false. Moreover, and most importantly, such newly discovered evidence must be admitted when it directly undercuts the evidence and claims made by the proponents of the produced 3 million pound per month "hard cap." For example, the Declaration of Hein Hettinga explains that since the date of the close of the formal hearing in this matter, that Sarah Farms has lost the seven Basha's Stores in Tucson to Shamrock **based upon price**. Similarly, the Declaration of Alexis Koester undercuts the testimony from the hearing that regulated handlers could not compete

against Smith Brothers Farms for school milk contracts. Thus, the Department's statement that sales move from producer-handlers to regulated handlers only for reasons other than price is not reflected in market reality.

In a judicial proceeding (which admittedly this is not), the rules of practice, due process, and fundamental notions of fairness provide for the consideration of supplemental arguments and evidence by the court. *See e.g.* Fed. R. Civ. P. 59(a) (permitting additional testimony to be taken following a motion for a new trial), Fed. R. Civ. P. 60(b) (permitting a judgment to be vacated upon a showing that evidence has been newly discovered), Fed. R. App. P. 40 (providing for rehearing of an appellate case where the law has been misapplied).

Despite DFA's litany of reasons why the sky will fall if the Department permitted the introduction of this newly discovered evidence, each of DFA's contentions are without merit. First, there is no risk that interested parties will be unable to discern the exact contents of the record or that this, or any other, proceeding will be of indefinite length, any more so than is now the case. Since, the rules of practice define the contents of the record of proceedings, the contents of will not be in question. 7 C.F.R. § 900.13. If DFA or any other interested person has any doubt, that party can always examine the official record at USDA. Second, the length of the hearing is similarly a non-issue. Under the rules, the Department is under no specific timeframe to issue a decision. All parties desire an expeditious final ruling on this hearing, and the Department is surely working toward that end. What is more important, however, is that any decision in this, or any other proceeding, be full, fair, thorough, well-reasoned, supportable and legal. A decision that completely examines all the relevant facts is mandated. In essence, DFA argues that the Department should reach a decision by disregarding material evidence. The reason for DFA's preference is clear – the introduction of the newly discovered evidence directly

contradicts the central thesis formulated by DFA and the other proponents.

If DFA cannot win by obeying the law and the rules of procedure, then DFA ignores those rules or violates them with impunity. This is particularly true with regard to the blatant *ex parte* violations by DFA's CEO, Mr. Hanman. Indeed, it is ironic that the attorney for DFA claims that the producer-handlers have somehow violated the *ex parte* restriction by submitting their comments and exceptions in plain view for all participants to review in the record.

**C. NO EX-PARTE RESTRICTION HAS BEEN VIOLATED BY THE PRODUCER-HANDLERS.**

Any allegation that the producer-handlers have violated the *ex parte* communication restrictions is wholly frivolous. The producer-handlers' declarations, information, and the supportive statements submitted by the public have been filed with the hearing clerk as part of the comments and exceptions to the Department's Recommended Decision. As stated, the rules mandate that the hearing clerk incorporate such submissions into the record for the Secretary's consideration. The producer-handlers have not hidden these statements from anyone. They have been served upon the primary hearing participants (including DFA) and submitted for inclusion in the public record, open for inspection and review by any interested party. Unlike DFA, the producer-handlers have complied with the rules of practice, not disregarded them.

DFA correctly opines that the actions of Gary Hanman "are of quite a different nature than the matters which are the subject of [the DFA] motion." DFA Motion, n. 2. Hanman privately argued DFA's position to Department officials at a meeting where the opponent producer-handlers were not invited. But for the fortuitous discovery of a recording of Hanman's comments, the producer-handlers would have never learned of his *ex parte* attempt to improperly influence the outcome of this proceeding. In comparison, the producer-handlers here have concealed nothing. Hanman argued factual assertions regarding his opponents' operations,

coupled with bombastic rhetoric and veiled threats to the Department regarding the future of the Federal Milk Marketing Order System. In contrast, the producer-handlers have provided information and comments not previously available for the Department's consideration in open view for all participants to see and review. The declarations were executed under pains and penalties of perjury. There has been no attempt to conceal, to pressure unduly, or to manipulate the process. The same cannot be said about DFA and DFA's "leader".

**D. THERE IS NO BASIS TO STRIKE ANY OF THE OPPONENT PRODUCER-HANDLERS' COMMENTS, LET ALONE A BASIS TO STRIKE THEM IN TOTO.**

The Comments and Exceptions filed by the opponent producer handlers took exception with numerous aspects of the Recommended Decision. Specifically, exception was taken to: (1) the findings and conclusions that the Department has statutory authority to regulate producer-handlers based on size, that changes in marketing conditions and the existence of disorder have occurred to justify a change in Department policy, and that the selection of three million pounds as a cap is supported by substantial evidence (including the elimination of the exemption and the imposition of a higher or lower cap); (2) the finding and conclusion that "the legislative history indicates that there is authority to regulate [producer-handler] operations."; (3) the finding and conclusion that "the major consideration in determining whether a producer-handler is a large or small business focuses on its capacity as a dairy farm."; (4) the finding and conclusion that "producer-handlers with more than 3 million pounds of Class I route disposition significantly affect the blend price received by producers" and that "a blend price impact of one cent per cwt is significant."; (5) the finding and conclusion that marketing conditions and the blend price impact of producer-handlers in Orders 124 and 131 have occurred "since implementation of Federal milk order reform in January 2000."; (6) the finding and conclusion that "producer-

handlers with more than three million pounds of route disposition per month in both the Pacific Northwest and Arizona-Las Vegas marketing areas are the primary source of disruption to the orderly marketing of milk.”; (7) the findings and conclusions that “producer-handlers with route disposition of more 3 million pounds per month have and are placing their fully regulated competitors at a comparative sales disadvantage” and that “the large producer-handler is able to compete for commercial customers at prices that a regulated handler is unable to match” and that “the competitive pricing advantage of producer-handlers is clearly attributable to their exemption from paying the difference between the Class I and blend price into the producer-settlement fund.”; (8) the finding and conclusion that “the difference between the Class I price and the blend price is a reasonable estimate of the pricing advantage producer-handlers enjoy. . .”; (9) the finding and conclusion that “producer-handlers with more then 3 million pounds of route dispositions per month have gained the ability to no longer bear the burden of the surplus disposal of their milk production.”; (10) the finding and conclusion that “orderly marketing [is] a key objective of the AMAA” without regard to consumer interests; and (11) the finding and conclusion that it is proper to assess producer-handler operations with more that three million pounds of monthly Class I route disposition a pool obligation equal to the Class I/blend price spread.

This response has established that there is no basis to strike any of the statements objected to in DFA’s motion. Even if it were to be assumed for the sake of argument that DFA’s request was well taken, there would still be no reason to avoid addressing each of the exceptions raised by the producer-handlers.

The validity of all of the exceptions can be determined independently of any information that DFA objects to. The Declarations and information to which DFA objects speaks only to the

exceptions numbered as “7” above. The correspondence that DFA has referenced speaks only to the exception identified as number “10” above. The other nine exceptions are wholly unrelated to the information DFA does not want the Department to consider. Even so, the two exceptions that are allegedly tainted cite to and rely upon evidence and arguments in addition to that which DFA has objected.

Yet, DFA would throw out the baby with the bathwater and have the Department reject all of the exceptions. In DFA’s estimation, the Department is incapable of determining what may or may not be considered in reaching its decision. DFA Motion, 5. This suggestion is insulting. The real reason behind this request is that DFA simply does not want the Department to consider the meritorious arguments and facts that speak against the regulation of producer handlers. DFA would prefer that the truth not stand in the way of furthering its stranglehold on the dairy industry.

### CONCLUSION

The rules of practice expressly permit the inclusion of the exceptions and comments filed by the opponent producer-handlers, and the information therein is material and could not have been introduced during the hearing since it did not then exist. If the Secretary were to find the newly discovered evidence unpersuasive, he is certainly capable of disregarding it. There is, however, no basis to strike the evidence DFA has complained about, let alone the entirety of the comments and objections submitted collectively and individually by the opponent producer-handlers.

DFA’s motion must be summarily denied.



Respectfully submitted this 26<sup>th</sup> day of July 2005.

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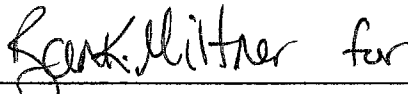
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## CERTIFICATE OF SERVICE

The foregoing Response in Opposition was served upon the following parties on July 26, 2005, by electronic mail and FedEx Overnight Service, as indicated.

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