UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	**)**	**DOCKET NOS. AO-388-A15;**
MILK IN THE APPALACHIAN AND	**)**	**AO-366-A44 AND DA-03-11**
SOUTHEAST MARKETING AREAS	**)**	

MOTION TO STRIKE TESTIMONY

OF CARL HERBEIN, CPA

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I. INTRODUCTION

Michael P. Sumners and Sarah Farms (collectively, "opponents"), pursuant to 7 C.F.R. §900.7, move to strike those portions of the hearing transcript containing the testimony of Carl Herbein (hereinafter "Herbein") whether from his direct testimony, cross-examination, or re-direct testimony, testimony from prior hearings, and any accompanying exhibits.[1]

The Herbein "study" consists of "testimony" compiled for the specific purpose of a separate Department hearing to restrict producer-handlers. There is no data at all in that "study," not one scintilla, concerning Orders Five and Seven. At the time Mr. Herbein's prior testimony was introduced, the Department, Michael Sumners, and Sarah Farms vigorously objected to the use of immaterial and irrelevant testimony from an unrelated hearing. *See e.g.* Fed R. Evid. 702 (expert testimony may be admitted if, ". . . (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.") ; 7 C.F.R. § 900.8(d)(2) ("The judge shall, insofar as practicable, exclude evidence which is immaterial, irrelevant . . . or which is not of the sort upon which responsible persons are accustomed to rely."); Deskins, 999 ("[The] Government has the same objection to it, which is it's from another hearing, and it's not relevant.").

Producer-handlers from the Pacific Northwest and Arizona opposed Herbein's theses, methodology, and results the first time he presented its "study," and every

[1] Mr. Herbein's testimony from a prior proceeding concerning producer–handler regulations in Orders 124 and 131 is contained in Exhibits 57 and 69. Additional testimony based on the "study" and cross-examination can be found in Exhibit 57 and pages 441-546 of the transcript from this proceeding.

complaint raised then is equally valid, if not more so, in this hearing. The Herbein "study" is based on unverifiable data that was hand-selected by Herbein from an allegedly "confidential database" maintained by Herbein and Company. This data, unavailable to either the Department or the other hearing participants, was then grouped, averaged, and adjusted by Herbein to produce what has become an integral component of the proponents' argument for the adoption of the proposed producer-handler limitations.

The method by which Herbein selected his underlying "data" is faulty and unreliable. *See* Rule 702, Federal Rules of Evidence. (Expert testimony must be, "… the product of reliable principles and methods"). Most importantly, however, Herbein has again denied the Department and the hearing participants any opportunity to assess the validity of his hand-selected data, to cross-examine him in a meaningful manner, and/or to assess the underlying facts or data upon which he based his analyses. See e.g. 7 C.F.R. § 900.8(d)(1) ("Cross-examination shall be permitted to the extent required for a **full and true disclosure of the facts**"); Fed. R. Evid. 705 ("…expert may…be required to disclose the underlying facts or data on cross-examination"). Indeed, the Herbein testimony is so devoid of objective reliability that its use in a federal court proceeding would be precluded under the standards announced in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) and its progeny.

Herbein's "study" is inadmissible for a number of reasons: (1) Herbein is not qualified to express an opinion regarding plant costs since he has never operated a processing plant and is not an expert in that area; (2) Herbein's "proprietary" database and conclusions have never been published or peer reviewed; (3) Herbein's database is unreliable and meaningless for the purposes for which he purports to use it; (4) Herbein's

statistical analyses are irrelevant because they are not based on actual plant costs from and do not address the real marketing conditions that exist in either Order 5 or Order 7 (in fact, Herbein admitted that he possessed absolutely no knowledge about actual marketing conditions in either of the affected Orders); and (5) Fundamental fairness in the rule making process requires that Herbein produce the underlying information and data so that the opponents and the Department will have an opportunity to test the reliability of his statistics and the underlying data. Since Herbein refused to produce the underlying database that he relied upon, no determination can be made as to whether the data was manipulated in order to achieve the conclusions mandated by DFA and the other proponents of the so-called "three million pound cap."

In sum, Mr. Herbein is essentially a "statistical shaman" using statistics and methodologies that are unreliable and inadmissible; rendering opinions that are irrelevant and without any probative value in reaching conclusions; and drawing inferences that the data does not (or may not) support. Herbein's opinions represent the type of misuse of statistics which prompted British Prime Minister Benjamin Disraeli to observe: "There are three kinds of lies: lies, damned lies, and statistics."[2]

As noted herein, the Herbein "study" is actually prior testimony from another proceeding, including cross-examination. In fact, the Herbein "study" was compiled for the exclusive purpose of presentation in a proceeding concerning two completely different marketing areas. The "methodology" employed by Herbein to relate his prior analysis to this proceeding was to simply select some cities located in Orders Five and Seven, at random, and to then arithmetically divide by the number of cities selected in

[2] Benjamin Disraeli (1804-1881), British Statesman and Author. Quoted by Mark Twain in his Autobiography, ch. 29, Mark Twain (1924), Rev. Charles Neider (1959).

order to make his prior "study" applicable to these Orders. Such rudimentary "grade-school mathematics" is no substitute for "reliable principles and methods."

Accordingly, Herbein's opaque study and its unverifiable conclusions must be excluded from the hearing record and not used as the basis for any decision by the Department. The sheer irrelevance of the Herbein testimony to any event in the Southeast or Appalachian marketing areas alone necessitates that it be stricken. Moreover, any testimony tied to his conclusions from other sources, including testimony provided by both Roger Cryan and Elvin Hollon, must likewise be stricken.

II. DISCUSSION

A. A Summary of the Herbein Hearing Testimony

A careful review of the testimony and exhibits establishes the appropriateness of an order to strike the testimony of Herbein and any testimony linked to Herbein's unreliable "study." The proponents have relied upon Herbein's testimony and portray his "study" as critical evidence of alleged disorderly marketing conditions in Order 131 and to justify the otherwise arbitrary selection of a three million pound cap on producer-handlers. In Arizona, Herbein used this faulty analysis to imply that disorderly marketing could occur in the Pacific Northwest. Now, he has "localized" the data again and now claims it is relevant to the marketing conditions in The Southeast and Appalachian Orders. In addition, Herbein's selective and flawed analysis is the lynchpin for the testimony of Roger Cryan of the National Milk Producers Federation ("NMPF"). Cryan, 596-97, 608 (describing Herbein's analysis as the "best available" of the cost data compiled by NMPF).

Herbein was retained by Dairy Farmers of America and testified in support of the

producer-handler limitations at issue in this hearing. According to his earlier testimony, Herbein was asked "to analyze the value of unpriced raw milk to a large producer-handler and to compare that value with the cost of milk to regulated processors [and] to compare the economic impact of a regulated handler competing with an unregulated producer-handler." Ex. 57, p. 764. Later in the hearing, Herbein added that his "study" defines three million pounds of Class I production as a rational break point. Ex. 69, p. 3046. In fact, Herbein's study is not and cannot be the basis for selecting the break point. As Herbein admits, he was retained sometime during the summer of 2003, shortly before the hearing in Arizona began. Ex. 69, p. 3045. In fact, the three million pound cap was pre-determined, selected arbitrarily by United Dairymen of Arizona in a letter to USDA authored over a year before the Arizona hearing was noticed and before Mr. Herbein was retained.

In compiling his "study," Herbein personally selected twenty of the approximately fifty plants from his firms "proprietary database." Herbein, 477; Ex. 57, p. 765, 807. Herbein then adjusted the "costs" from these hand-selected plants to "show the costs for both the Order 131 and order 124 areas." Ex. 57, p. 765. Herbein made these "adjustments," even though he had no data from a plant located in Order 131 and supposedly had some data from some undisclosed plant in Order 124. Months later, he adjusted those earlier adjusted figures to "localize" them to the areas affected by the instant hearing (although he still used CPI data and localized to cities that often did not have dairy plants and failed to include information from plants in Orders Five or Seven despite possessing that data). Herbein, 509-521. Herbein then grouped the twenty hand-selected plants into six groupings differentiated by plant size. Exhibit 57,p. 765. The

different plant sizes selected were 90,000 pounds, 2 million pounds, 5 million pounds, 12 million pounds, 18 million pounds, and 30 million pounds of Class I utilization per month. Id. There are all of two plants in the 90,000 pound classification and the 2 million pound classification and four plants in each of the remaining classifications. Herbein, 495.

Once Herbein hand-selected the plants for his "study," grouped them, made regional price adjustments, made a second round of regional price adjustments, and averaged the figures, he derived a per-gallon cost for processing, packaging, and shrinkage. Herbein, Ex. 57, 771-72 and Tables (a), (b). This per-gallon figure was then converted to a per-hundredweight figure. *Id.* Again, however, this figure is premised on assumptions, adjustments, averages, and Herbein's hand selection as opposed to real data or facts.

The real point of Herbein's testimony is to convey the unverifiable conclusion, based upon his cost "study" and analysis, that "when looking at the exhibits that when you have a loss on the bottom line, when you've accounted for all of your costs in accordance with Generally Accepted Accounting Principles and you have a loss, it doesn't make sense, from a business standpoint, to pursue [the warehouse store] business because you are losing money, and that's -- you can't pay your bills if you lose money." Ex. 57, p. 786. Despite having this testimony admitted as part of Exhibit 57, there is some notion that Herbein does not wish for his testimony to stand for the proposition at this proceeding. That, of course, raises the question of what exactly his testimony is intended to convey. See Herbein 474-75, 522, 545

However, Herbein's own clients, who are regulated handlers, service Costco

stores [warehouse stores] in Order 124. Accordingly, the Herbein "study" cannot support the conclusion it attempts to reach. When faced with this issue, Herbein (at least momentarily) recognized the implications of this fact and recanted his answer. "Q. So we can't -- given at least that information, we can't take a broad conclusion, as Exhibit 25(a) attempts to, that in fact a regulated handler can't compete with a producer-handler for business such as Costco, can we? A. No. Q. Okay. And -- A. Excuse me. Q. Yes. A. I think we can -- I had your question in reverse. I'd like to change my answer to: You can, because my analysis is a detailed cost analysis, a specific cost center analysis, of what the likely outcome would be of a regulated handler doing business with Costco." Ex. 69, p. 3027-28.

It is difficult to reconcile this opinion with the fact that two of Herbein's clients, one in the Pacific Northwest and the other in Colorado, either have had or currently have ongoing contractual agreements with warehouse stores to provide those stores with milk and other dairy products. As Herbein conceded during his testimony, he did not review the actual cost data for these customers (who are regulated handlers) for purposes of his "study." He also conceded, however, that these regulated handlers in the Pacific Northwest and Colorado would not be doing business with the warehouse stores if they were not making money. Ex. 69, p. 3026-27. This real fact obviously flies in the face of Herbein's "conclusions."

Of course, if the data or methods used to reach these conclusions were materially flawed, then the conclusions are also flawed. In computer shorthand: "garbage in; garbage out." Herbein anticipated this critique of his conclusions and made the following assertions regarding his "study" during his initial direct testimony in Tempe, Arizona.

- "[Because] we've adjusted our database [using the CPI], that we have costs that are applicable to the two areas so that we are making an apples-and-apples comparison for the Secretary." Ex. 57, p. 770.
- "The plant processing costs that are reflected here are actual costs. They are not theoretical engineering studies but the costs that have been extracted from the annual financial statements for the plants that are in the various cost sizes." Ex. 57, p. 773.
- "These are actual, hard numbers that are **not at all judgmental**. They are real." Ex. 57, p. 782 (emphasis added).

These pre-emptive efforts indicate the importance of this study to the proponents and demonstrate the weight that DFA hopes the Department will ascribe to its findings.

In reality, however, the plant processing costs used to arrive at Herbein's conclusions are not actual costs. Allegedly, the process started with actual processing costs from Herbein's "double-secret" database for some unspecified plant, in some unspecified area of the country, for some unspecified period of time. The difficulty for the Department and the other hearing participants is that no one except Herbein and DFA know what that starting point is. A review of Herbein's testimony reveals just how badly flawed and misleading both the "study" and Herbein's "conclusions" really are.

B. Carl Herbein's has no knowledge of the marketing conditions in Orders Five and Seven and his testimony is fundamentally unreliable and inadmissible.

In a litigation setting, in order for an expert witness to be permitted to testify to an opinion, it must be shown that, " . . .the testimony is based upon sufficient facts or data."

Fed R. Evid. 702. Not only does Carl Herbein lack sufficient facts and data upon which to base on opinion, he lacks any facts and knowledge about the Appalachian and Southeast marketing areas. Indeed, there is a yawning analytical gap between his lack of data and the opinions proffered by Herbein. *See General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Foe example, in an attempt to place the veneer of reliability on his data from his "study" in Order 131, Herbein allegedly "localized" prices to Orders Five and Seven by selecting metropolitan areas located in those areas without assessing the characteristics of the chosen cities—for example the population of the cities and the proximity of milk processing plants. The absurdity of his "methodology" is shown by the following testimony in which Herbein opines that he applied his data from certain cities in Order 131 to cities within Orders Five and Seven without knowing the population of the cities in any of the orders.

Q. What region of 131 did you use in your original study?

A. In 131?

Q. That would be the Phoenix/Las Vegas market, in case you wanted to know.

A. We used Las Vegas, and Phoenix.

Q. What's the current population of Phoenix metropolitan area?

A. I don't know that.

Q. What's the current population of Las Vegas metropolitan area?

A. I don't know that without checking my study.

Q. Well, I'd like to see it, if you've got it.

A. I don't.

Q. What's the population of Charlotte?

A. I don't know the population.

Q. What's the population of Knoxville?

A. Don't know the population. It was obviously considered when I went to the major cities, but I don't have that data here.

Herbein, 482-83. In addition, Herbein made no effort to select cities that were geographically close to those regulated bottling plants whose costs he was purporting to estimate. In fact, his testimony indicated that there were no bottling plants in the cities selected.

Q. Can you point out to me, please, the number of pool distributing plants that are listed there that are located either in Charlotte or Knoxville?

A. On page 147 and 148 there are no plants listed with Charlotte or Knoxville addresses. However, as I said in earlier testimony today, these plants do business in those cities, in the metropolitan areas of those cities.

Q. But let's talk about that for a second if we can. I have a plant that's located in Charlotte or Knoxville, and by the way there isn't one. But let's assume hypothetically there is. If in fact I have to take a look at the cost of living, actually we should look at the cost of production. But let's look at the cost of living. I still have to look at issues like local labor costs, don't I?

A. You would incur in your plant wherever it's located the localized costs for all of the items that you purchase.

Q. And so we have to look at an area that's closest to the plant to be able to do a more specific study as to what the plant costs would be to make adjustments, wouldn't we?

A. No, not necessarily. Depends on what the purpose of your study is.

Q. If I want to get the most accurate information, then I want to get the information that's localized to where the plants are located, correct?

A. Not necessarily.

Q. If I want to find the specific information regarding costs for that area, that plant, I want to get the cost that are associated with that local area, don't I?

A. If you're studying one plant, and your, the purposes that determine the costs for that one plant, it 's obvious that you would gather information for that plant in that region only.

Q. Let's go and get to the point that you're just talking about. For order number five, you took two cities only, correct?

A. I took two cities: Charlotte, and Knoxville.

Q. And those are located in what states?

A. Charlotte, North Carolina, and Knoxville, Tennessee.

Q. So in looking at the Appalachian marketing area, get back to the map, page 120 as part of exhibit ten, you have no information regarding Indiana, correct?

A. That's correct.

Q. You have no information regarding Kentucky.

A. I did not select a city out of Kentucky.

Q. You have no information regarding Virginia.

A. That's right.

Q. You have no information regarding South Carolina.

A. That's right.

Q. You have no information regarding Georgia.

A. That's right.

Q. You have no information regarding West Virginia.

A. Yes.

Herbein, 510-12.

Once Mr. Herbein selected "appropriate" cites for comparison with Order 131, he began a rigorous analysis in order to "localize" the cost data to this region of the country, which consisted of taking the number of cities and dividing by that number.

> Q. Well, I'm not any type of - - I became a lawyer, so therefore, I don't know anything about numbers. But I can do that. Sir, is that analysis? Is that what you represent to the secretary to be analysis? Take the CPI numbers from three selected cities, divide them by the number of cities and come up with an average? That 's what you did.
>
> A. Yes. That's precisely what I did.
>
> Q. And that's what you did for [Order] five, too.
>
> A. Absolutely.
>
> Q. You took two cities, you divided them and you came up with a number.
>
> A. Absolutely.

Herbein, 520-21. It is difficult to dignify what Mr. Herbein did by calling it a "principle," "method," or "methodology." One thing is certain, however, it is not reliable.

The paucity of Herbein's knowledge regarding marketing conditions (or anything else) about the affected orders is breathtaking. The following examples are representative only:

> Q. That was the only question I asked. Now, you didn't have audited information from any producer/handler in five or seven, to make this extrapolation, correct?
>
> A. I had no producer/handler information from five or seven.
>
> * * *
>
> Q. Is it your testimony that currently, as the evidence exists in this market, based upon the information provided by the market administrators, is it your testimony that right now, that there is any problem with a regulated handler competing with a producer/handler as it exists?
>
> A. I haven't studied that.
>
> Q. So you don't know one way or the other.
>
> A. I do not.
>
> * * *
>
> Q. . . . Here's what we know. With regard to the information in the base document, exhibit 57, there is nothing in the data that you looked at that has anything to do with Federal order number seven or five. Correct? There's no information in there that had anything to do with a handler, a

plant, or anything in five or seven, correct?

A. The exhibits, Herbein (a, b, c, and d), as I've said before, the base data was derived without using plants located in five or seven.

Herbein, 487, 98, 542.

A trial court can exclude the testimony of an expert where that expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Electric*, 522 U.S. at 146. Here, Herbein has taken an unfounded premise and, without any facts whatsoever, extrapolated an unfounded conclusion. The remedy is to strike that testimony because it is immaterial and irrelevant to any issues at the hearing and, more importantly, is not the sort of testimony upon which responsible persons would rely.

C. The Herbein "study" is inherently unreliable because of Herbein's unverifiable data and faulty methodology.

Both on cross-examination and through the testimony of other expert witnesses, it was apparent that Herbein failed to use a methodology that could have resulted in a study with a predictive value. Most importantly, the entire "study" was based on Herbein's exclusion of certain data and his hand-selection of the twenty plants used in the "study." Herbein alleges that this "judgmental selection" was preferable in this situation, despite his earlier conflicting statement that he was presenting "actual, hard numbers that are not at all judgmental." Compare Ex 69, p. 2998 with Ex. 57, p. 782. Rather than engage in a statistically sound random selection, there was adverse selection.

The hand-selection of the plants used in the "study" is not the only methodological flaw. Herbein also utilized a sample size that was too small; even if it

were randomly selected. The already small sample of twenty was further diminished when Herbein broke it down into six smaller categories, further compromising the predictive value of the results. Most importantly, not one of the twenty plants used in the Herbein "study" was located in Order 5 or Order 7. The remaining methodological faults in the Herbein "study" are summarized below:

- Only two of the plants in the "study" are producer-handlers, both being substantially smaller than those potentially impacted by this proposal. Yet, Mr. Herbein generalized as if all of the plants were producer-handlers.
- Mr. Herbein's sample plants were located entirely outside of Orders 5 and 7 with no demonstrated comparability of product mix, processing, or distribution conditions.
- There was adverse selection in that the selected plants were not representative of the producer-handler niche.
- An error was made in making regional cost adjusted by using the CPI rather than the PPI (Producer Price Index).

In other words, Mr. Herbein's data represents an unrepresentative worse case scenario that is completely useless in this hearing. Mr. Herbein's testimony is of no value in either drawing the conclusions he reached or as a basis for decision regarding the proposal to fully regulate producer-handlers.

D. Herbein's repeated stonewalling denied the hearing participants a meaningful opportunity to cross-examine his "study" and also deprives the Department of the ability to test his findings.

Herbein provided no opportunity for either the Department or the opponents to

cross-examine the data in the study. When questioned, he refused to disclose any of the specific data used to arrive at his hand-selected, location adjusted, neatly grouped, "hard number" processing cost averages. On at least a half-dozen occasions in Tempe, Arizona and Alexandria, Virginia, Mr. Herbein refused to disclose additional relevant information about his database and study that would have allowed other hearing participants to assess the validity of his methods and conclusions. He again refused at this hearing. Herbein 478, 505.

Assuming for the sake of argument that a "judgmental selection" is a proper methodology (which it is not) or that Herbein employed some other reasonable method (which he did not), the only way those conclusions could be reached is if there were some way to verify the data selection process and to evaluate whether the facts and data relied upon were related to the issues at the hearing. Herbein has denied the Department and the hearing participants any ability to question him on any of these issues because he has repeatedly refused to disclose any of his data.

Instead, Herbein is hiding behind the cloak of client confidentiality. As he stated at the outset of his testimony in Tempe, "I utilized our firm's proprietary database of dairy manufacturers' operating costs to conduct my comparison. This database is maintained on a confidential basis utilizing financial information extracted from the financial statements and other accounting data of our clients. We are authorized to utilize this information on a confidential basis for this engagement." Ex 57, p. 764-65.

Maintaining the confidentiality of his clients does not mean he could not have permitted hearing participants to assess his data. He could have provided the underlying numbers he used to arrive at his estimates without disclosing the specific plants from

which the costs came, but he did not. He could have provided the costs data for the thirty plants he decided were not "relevant" to his study, but he did not. This information could have been provided without naming the plants or otherwise identifying the sources.

More importantly, maintaining the confidentiality of Herbein's clients is not nearly as critical as protecting the integrity of the formal rulemaking process. DFA retained an accountant to provide a "study" to the Department in order to advocate the imposition of regulations that would substantially limit the growth of any producer-handler in Order 5 or Order 7. The selection of the accountant, Herbein, was made by DFA with the advance knowledge that the data on which we would base his conclusions would not be provided to the Department. Herbein and DFA chose to hide behind the rubric of client confidentiality in order to prevent the Department and the other hearing participants from examining the underlying data in Herbein's "database."

In fact, Carl Herbein indicated that he wouldn't advise a client to base a business decision on information like that utilized in his "study."

> Q. Let me ask you a follow-up hypothetical. Let's assume that, again, you're asked to do due diligence on a potential acquisition. Rather than financial statements, all you get is a statement from the president or CEO of the publicly traded, or privately held company in my example would be better, that simply says, "We have a database. The financial statements are all good. We're making this much money." And you have the opportunity in the next 24 hours -- you can't do anything else. You've got to rely upon this by the company. What would you advise your client to do?
>
> A. Well, that wouldn't happen in real life.

Q. I asked in my hypothetical to go ahead and answer it.

A. If that was all we had to do, I would say to my client, "This guy's a nut. Stay away from him." But that wouldn't happen.

Ex. 57, p. 827-28.

DFA has made an intentional choice to hide the information upon which its study is based. That mandates the exclusion of the testimony since, as a result, it could not (and cannot) be verified or examined. DFA could have provided verifiable information and permitted a legitimate cross-examination, but they chose Herbein and his data instead. They now ask the Department to accept that testimony as a basis to regulate a competitor who does not exist, while the those with the courage to call this phobic play for what it is are forced to shadowbox Herbein's phantom figures.

The inability to cross-examine an expert witness on the underlying facts or data is not harmless. Counsel for the opponents repeatedly questioned Herbein about the significance of his methods; specifically his "judgmental selection process" and made similar attempts to flesh out the data in the study but were unsuccessful in garnering any useful information from Herbein.

Participants in an open hearing should be afforded the opportunity to test any study that it put forth as evidence or rationale. Here, Herbein and DFA have voluntarily elected to deny everyone that critical opportunity.

E. Herbein fails to meet the standards utilized by the federal courts in deciding upon the admissibility of expert testimony.

The seriousness of permitting Herbein's testimony to stand in this record cannot be overstated. In fact, were this hearing a formal judicial proceeding, Herbein's data (and

Herbein's testimony) would be excluded.

The first and most fundamental reason for exclusion is the lack of fairness to the Department and the other hearing participants. Disclosure of the data relied upon by a testifying expert and the bases for his analyses goes to the heart of the adversarial process. The Department and the opponents have been kept in the dark regarding the data relied upon by Herbein which he hand selected and skewed to favor his own pre-conceived conclusions. Instead, they have been forced to accept his conclusions without the ability to effectively cross-examine his data. This is the height of unfairness in a system that relies upon cross-examination in order to discover the truth.

Even without the fundamental flaw of failing to produce the underlying data, the Department should look for guidance to the courts in determining whether DFA's hired expert met the threshold standard required in order to introduce his testimony/conclusions at the hearing. The short answer to this question is "no."[3]

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), defined the role of the district court as "gatekeeper" in determining both the reliability of those persons intending to offer scientific expert testimony, and the relevancy of that proposed testimony.

The gatekeeper's role encompasses the proposed testimony of all designated experts; not merely those testifying on scientific matters. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The proponent of an expert witness must prove by a preponderance of the

[3] Even in the administrative context, information used to justify regulatory action is increasingly subject to scrutiny. For example, the Office of Management and Budget recently proposed mandatory peer review of certain technical information used to support federal agency regulatory action. See 68 Fed. Reg. 54023 (September 15, 2003); 69 Fed. Reg. 23230 (April 29, 2004).

evidence that the testimony is reliable, i.e., that the expert's findings and conclusions are based on scientific method. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. *See Daubert v. Merrell Dow Pharmaceuticals*, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995) (on remand). The proponent need not prove to the judge that the expert's testimony is correct, but must prove by a preponderance of the evidence that the testimony is reliable. *See In Re: Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994); *see also* 2 Stephen A. Saltzburg, et al., Federal Rules of Evidence Manual, 1224-1251 (7th ed. 1998).

Courts have essentially promulgated a two-pronged approach for evaluating the admissibility of expert testimony. The first or the "reliability" prong, focuses on evidentiary reliability and requires the district court to perform "a preliminary assessment of reasoning or methodology underlying the testimony as scientifically valid." *Daubert*, 509 U.S. at 592-93. In illustrating this prong, the Court suggested four factors that may be used in determining scientific validity: (1) whether the theory or technique, "can be (and has been) tested", (2) whether the theory or technique has been "subjected to peer review and publication", (3) the method's "known or potential rate of error", and (4) whether the theory or technique finds "general acceptance" in the "relevant scientific community." *Id.* at 593-94.

The second prong of the *Daubert* approach is straightforward. Besides being reliable, evidence must also be relevant to the issues at hand. Basing its logic on the text of Rule 702 (evidence must "assist the trier of fact"), the Court explained that, "[e]xpert testimony which…is not relevant [is] ergo non-helpful." *Id*. at 591 (quoting 3 Weinstein

& Berger, ¶ 702 [02], at 702-18).

The Court's discretion extends to the rejection of proposed expert testimony where "there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Under Rule 702, Federal Rules of Evidence, as amended, a qualified expert witness may testify, "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Under *Daubert*, "any step that renders the analysis unreliable…renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994).

The testimony of Herbein misses the admissibility standards that federal courts apply by a country mile. Under the *Daubert* guidelines, federal trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity. Herbein's testimony and his "data" would not assist the Department in deciding the critical issues involving producer-handlers and therefore this testimony as well any related exhibits should be excluded.

Under Rule 26(a)(2)(B), Federal Rules of Civil Procedure, an expert report, "shall contain…the data…considered by the witness in forming the opinions." The well-known adage that cross-examination is one of the most powerful tools for the discovery of truth requires no citation to authority. In order to conduct a proper cross-examination and in order to meet the testimony presented at the time of the hearing, the hearing participants needed the opportunity to obtain and review the databases utilized by Herbein to develop

his statistics/conclusions. Herbein was not testifying about a principle of accountancy or other established fact. Rather, he was purportedly using a computer database that no one else in the world has access to and generating conclusions that he demanded be taken on trust alone.[4]

This became abundantly clear during the course of the cross-examination of Herbein at the hearing in Tempe, Arizona. When examined about the fundamental unfairness of the type of sleight-of-hand that he was attempting to pull off in reaching conclusions but refusing to provide the underlying data to corroborate those conclusions, Herbein retorted that he was under oath and obviously everything that he was testifying about should be accepted for this reason alone. Ex. 57, p. 817. The mere assurances by an expert witness as to the accuracy of his own methods or results, in the absence of other credible supporting evidence, is insufficient to establish reliability for and therefore the admissibility of that expert's testimony. *See Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999). Herbein may opine that his methods are accurate or his results warranted by his alleged database, but without more, his testimony does not bear the necessary indicia of intellectual rigor that is necessary under *Daubert* to permit its admission.

In short, Herbein had no right to withhold the database's underlying data, and the failure to produce that information constitutes sufficient cause for the Department to preclude that testimony and to preclude other testimony that relies on Herbein's "study."

The importance of production of the underlying information so that the

[4] The fact that Herbein (and DFA) have such conviction in his testimony and the ultimate conclusions of his "research" that Herbein is willing to aver under oath that it is correct without performing the necessary validating tests, is also sufficient for the Department to view his conclusions as lacking the objectivity that is, "the hallmark of the scientific method." *Claar v. Burlington Northern Railway Co*., 29 F.3d 499, 503 (9th Cir. 1994); *see also Mitchell v. Gencorp, Inc*., 165 F.3d 778, 783 (10th Cir. 1999).

conclusions of Herbein could be evaluated for veracity and falsification cannot be overstated. Not all empirical tests of a theory are equally valuable. Some methods, such as gazing into a crystal ball, obviously have little scientific merit. Under *Daubert*, judges are mandated to recognize those scientific methods that, in reality, fail to progress significantly beyond crystal ball gazing or, as in many instances, beyond a researcher/expert's own creativity.

For example, in *Thomas v. FAG Bearings Corp*., 846 F. Supp. 1382 (W.D. Mo. 1994), the Court noted:

> The Eighth Circuit has held that in the case of expert opinion testimony, "[w]hen basic foundational conditions themselves are conjecturally premised, it then behooves a court to remove the answer from one of admissible opinion to one of excludable speculation."

Id., at 1393. (Citations omitted).

Applying that lesson to the case before it, the Court found that, "[the expert's] opinions are concocted of impermissible bootstrapping of speculation upon conjecture." Id. at 1394. *See also Reynard v. NEC Corp.*, 887 F. Supp. 1500, 1504-08 (M.D. Fla. 1995) (expert conclusion that electromagnetic radiation from a cellular phone caused a brain tumor was "worse than speculation" and "not supported by any objective source").

This type of rigorous analysis and testing of an expert is methodology is precluded when the alleged underlying bases for the conclusions is prohibited because the purported expert refuses to provide the data to the opponents for cross-examination. As a result, the hearing participants have been excluded from this testing process. Whether the Herbein data is "good data" or "bad data" is relegated to hypothesis and speculation. In

this regard, "bad data," in and of itself, is clearly a sufficient basis for the exclusion of any expert's testimony.

For example, in *Castellow v. Chevron USA*, 97 F. Supp. 2d 780 (S.D. Tex. 2000), plaintiffs' experts developed models of exposure to explain how the decedent's exposure to gasoline vapors could reach a certain Benzene level. The data upon which they relied upon was shown to be erroneous. The level of gasoline vapor exposure that they assumed (twice daily, 250 days a year for a 10 year period) would have been lethal by itself. Thus, the exposure assessment that formed the basis of all plaintiffs' medical causation testimony was found unreliable; the experts were working backwards in order to establish an exposure level. The Court found that the "assessment" by the plaintiffs' expert was, "…not based on adequate data, but instead was devised to support a causation opinion without reliable bases to do so. His methodology, therefore, is not reliable and his testimony is in admissible. In the absence of sufficient, accurate information of exposure levels, his opinion is nothing more than speculation. Such result-driven procedures are an anathema to both science and law and are properly excluded because they are too speculative to assist the triers of fact." 97 F. Supp. 2d at 797.

Similarly, in *In Re: Craig's Stores of Texas, Inc*., 247 B.R. 652 (S.D. Tex. 2000), *aff'd*., 266 F.3d 388 (5th Cir. 2001), the Court was asked to review an expert's methodology for evaluating the bank's handling of an account. The Court found that the proposed expert's methodology was unreliable and not verifiable because his testimony was based solely upon the subjective evaluations of the expert and his screening committee. No standard that could be tested was ever articulated by the expert. This made the reliability of the methodology highly suspect. As the Court noted, "[the

proposed expert] fell victim to the trap of false precision…[the expert] attached a statistic to his own business judgment rather than objectively ascertaining an industry standard." 247 B.R. at 656.

The Department is faced with the same problems here. Herbein failed to produce the data and instead relied upon his own judgment as an accountant in deciding what was important; in deciding what "data" to leave in; what "data" to leave out; and most importantly, in reaching conclusions that could never be accurately tested by the Department. This is not the type of methodology that the Department should base any decision on; let alone the significant change in policy proposed by DFA and the other proponents. As indicated earlier, the testimony established that the Herbein study came into being long after the three million pound cap was decided upon. This raises the serious question of whether, like the *Castellow* plaintiffs, the proponents have "worked backwards" to justify the three million pound cap. Of course, because they have hidden their data, we will never know. Such "results driven" approaches are one of the primary reasons that such unverifiable testimony is routinely excluded from court proceedings.

Whatever objective standard is used for the admission of expert testimony, Herbein does not meet it. The effect of allowing his testimony to stand is to permit the Department to make critical decisions based upon junk statistics, unreliable statistical evidence and other data that must be taken on faith alone. Herbein's study does not have sufficient objective information to permit the Department to take such a non-scientific leap of faith.

F. The integrity of the hearing process is compromised by relying on data such as Herbein's and should be excluded from the

Department's consideration

Any finding by the Department demands that it be based upon evidence that was subjected to cross-examination and complete disclosure. Herbein and DFA, intentionally or otherwise, presented evidence based upon "facts" that could not be explored during cross-examination. Since the Herbein "study" was not properly subjected to the formal hearing process, the Department must refuse to consider it. 7 C.F.R. §900.8(d)(1).

The Department has recognized that regulations should not be based on phantom data. For example, when a witness at the hearing on the establishment of butterfat pricing formulas presented compiled data on cheese manufacturing prices without disclosing the underlying data that went into the compilation, the Department stated in its proposed final rule:

> In contrast to the RBCS and CDFA surveys, the survey of cheese and whey powder manufacturing costs arranged for by NCI was developed solely for the purpose of establishing costs to be used in determining make allowances for this proceeding. The survey was conducted by persons unfamiliar with the dairy industry among cheese processors who would benefit from having overstated costs included in the results. No one who actually conducted the survey was made available to testify, and although the IDFA witness stated that survey participants would testify regarding their responses to the survey later in the hearing, none of the participating firms' witnesses would respond to questions about their firms' results.

The Department concluded that, "less weight must be given the NCI survey than either the RBCS or the CDFA surveys for the reasons stated above." 65 Fed. Reg. 76840

(December 7, 2000).

Obviously, the Department has recognized the risk posed by phantom and result-driven data. The use of the Herbein "data" poses as much of a risk as that disregarded during the butterfat hearing, if not more. Similar treatment of Carl Herbein's testimony is appropriate.

III. CONCLUSION

For the foregoing reasons, Michael P. Sumners and Sarah Farms request that the Department strike the testimony of Carl Herbein and any related exhibits. As a corollary, the same parties request that the Department strike from the record any testimony from other proponent witnesses, including Roger Cryan and Elvin Hollon, that is based in whole or in part upon the inadmissible and otherwise unreliable conclusions reached by Herbein.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The foregoing was Statement was served upon the following parties on August 16, 2004, by electronic mail, FedEx Overnight Service, and /or first-class United States Mail service as indicated.

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