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February 25, 2005

VIA FEDERAL EXPRESS

Ms. Joyce A. Dawson
Hearing Clerk
United States Department of Agriculture
1400 Independence Ave., S.W.
South Agriculture Bldg. – Room 1081
Washington, D.C. 20250

Re: **Milk in the Central Marketing Area; Docket No. A0-313-A48; DA-04-06**

Dear Ms. Dawson:

Please find enclosed four copies of the Opposition to Motion to Reopen Hearings in the above-referenced matter submitted on behalf of Dean Foods Company.

If you have any questions regarding this submission, please do not hesitate to contact this office.

Respectfully submitted,

Charles M. English, Jr.

CME/sf
Enclosures

cc: Judge Marc R. Hillson (via e-mail)
Marvin Beshore, Esq. (via e-mail)
John H. Vetne, Esq. (via e-mail)
Ryan K. Miltner, Esq. (via e-mail)
Garrett B. Stevens, Esq. (via e-mail)
Jack Rower (via e-mail)
Dana Coale (via e-mail)
Carol S. Warlick (via e-mail)

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

OPPOSITION TO MOTION TO REOPEN HEARINGS

SUBMITTED BY

DEAN FOODS COMPANY

Charles M. English, Jr.
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701 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004

Attorneys for Dean Foods Company

February 25, 2005

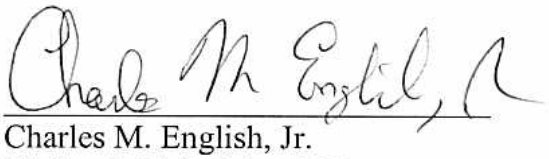
Dean Foods, by counsel, opposes the Motion to Reopen the Upper Midwest and Central Order proceedings. Opponents of reform blithely cite the Secretary's Brief filed in *Lamers Dairy v. United States Department of Agriculture,* 379 F.3d 466 (7th Cir. 2004), ignoring (or conveniently having not read) the Court's holding therein. As discussed in Dean Foods' Brief, the Court holding actually strongly supports reform. It is now a legal finding in this Circuit (e.g. Illinois and Wisconsin) that depooling causes economic harm to Dean Foods and it dairy farmer suppliers. *Id.* at 475-476. Since there is proven economic harm, that this very system is designed ultimately to avoid, opponents simply create, through extra-hearing record "evidence" and other innuendo, smokescreens solely for the purpose of hiding from the truth and its consequences. For instance, in addition to the twin statutory mandates for "uniform pricing" and "orderly marketing conditions" and notwithstanding at least four hearing records with discussion of the difficulty in obtaining a raw milk supply in St. Louis, opponents concoct new factual burdens for proponents to overcome. But proponents do not have to prove that milk is difficult to obtain in all locations or at all times. The evidence, without a reopened proceeding, already amply demonstrates that milk is not available to all Class I handlers at all times – that Class III handlers pull milk from the system when it is needed most. Minimum prices paid to dairy farmers in this Order are simply not uniform.

Moreover, having relied solely on the Secretary's brief rather than the Court decision in *Lamers*, opponents conveniently overlook that Court's holding that the Secretary can (just as legislators or regulators often do) pursue reform "one step at a time." *Id.* at 475. Opponents demand that this proceeding be reopened to permit the hearing of other proposals is simply not apt. They may argue that there is an alternative remedy, but they cannot force USDA to hear or

accept such remedy. *Marketing Assistance Program v. Bergland*, 562 F.2d 1305, 1308 (D.C. Cir. 1977).

Finally, what is the purpose of opponents' attaching a newspaper article that appeared after the conclusion of the evidentiary portion of the hearing, other than a naked attempt to boot-strap their way to alleged new "evidence". With all due respect, the rumors and innuendo repeated in that article are nothing new to the industry, and were at worst heard by all and sundry before and at the time of the hearing. The Chicago Tribune article is nothing new. If such after hearing non-evidence (or the fact that potential hearing witnesses, who do not testify, are in the room becomes "evidence") is countenanced, then the hearing process becomes meaningless. Iago would indeed be proud of this form of evidence-making. The Motion should be denied.

Respectfully submitted,



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