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May 5, 2005

VIA FEDERAL EXPRESS

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

Re: **Milk in the Mideast Marketing Area; Docket No. AO-166-A72; DA-05-01**

Dear Ms. Dawson:

Please find enclosed four copies of Dean Foods Company's Order 33 Post-Hearing Brief in the above-referenced matter.

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 Peter M. Davenport (via e-mail)
Garrett B. Stevens, Esq. (via e-mail)
Brian Hill, Esq. (via e-mail)
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DC #192536 v1

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:

MILK IN THE MIDEAST MARKETING AREA	)	**DOCKET NO. AO-166-A72; DA-05-01**

POST-HEARING BRIEF

SUBMITTED BY

DEAN FOODS COMPANY

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Attorneys for Dean Foods Company

May 5, 2005

I. INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law is submitted on behalf of Dean Foods Company. Since the completion of Federal Milk Order Reform in 2000, this is the ninth rulemaking proceeding tackling as primary issues the questions of which milk should be permitted to share in regulated regional milk pool proceeds and under what conditions. Indeed this odyssey of hearings, landing for now in Ohio for the second time, includes multiple hearings for three orders because industry and the United States Department of Agriculture ("the Department" or "USDA") have been unable to find safe harbor from continuing disorderly marketing conditions.

Federal Order Reform created new consolidated milk orders with, for lack of a better term, the lowest common denominator for standards for raw milk association with the markets. This unintended impact of federal order reform has permitted both excessive pooling of raw milk on many orders, while at the same time permitting those with a lack of dedication to serve the fluid market with the double opportunity of removing their milk from the pool when economic circumstances warrant. This so-called "depooling" is the ultimate form of "paper pooling", whereby, with the simple stroke of a pen (Tr. 101-102 [Uther]), a handler can pool or not pool milk in any given month even though the physical receipt of the milk is left unchanged.

Fortunately, in this proceeding, no one actually chose to defend the disorderly practice of depooling, rather some, who benefit from depooling, hemmed and hawed that the matter should be resolved more globally or bickered over the solution. But with the completion of this hearing, no present complaints concerning depooling in other federal orders (other than those for which a hearing has already been held) have been voiced. It is now past time for USDA to conclude this portion of the odyssey and afford Odysseus some much needed rest. As to the

solution, Dean Foods continues to extol the virtue of the Northeast Order, which has largely limited the impacts of depooling through a time-tested and industry tested "dairy farmer for other markets" provision, which has as its only hole in the net, a correctible one at that, that it has shifted pool riding milk off the Northeast pool onto the Mideast pool.

With respect to the issue of pooling, Dean Foods notes that notwithstanding the Department's earlier decision for the Mideast order, pooling features remain that still result "in pooling of milk that is not serving the fluid needs of the market" contrary to the express determination of the Secretary to limit or eliminate such activity. 69 Fed. Reg. 19292, 19299 c. 1 (April 12, 2004). Therefore, in this ongoing odyssey, the Department must seek another solution. Industry proposals to limit abusive diversions of milk should be adopted.

Finally, Dean Foods, with some trepidation and proposed modifications, supports encouraging delivery of raw milk to fluid milk processors through the proper construction of transportation credits. Protections must be adopted along side any such proposals to ensure that such credits do not undercut the efforts to improve pooling standards by instead providing too much of an economic benefit for distant milk that does not otherwise serve the fluid market.

This Hearing thus requires the Secretary to steer between the Scylla of "the transient onslaughts of dumping by outsiders" and the Charybdis of "persistent volumes of surplus milk" not serving the fluid market. *Norse, Edwin G., Report to the Secretary of Agriculture by the Federal Milk Order Study Committee*, April 1962. Adoption of the modified proposals on an emergency basis as supported by Dean Foods can thus successfully bring Odysseus at long last safe home to his Penelope.[1]

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[1] The Secretary has obviously participated in this odyssey. Without undercutting the proposed Findings below, Dean Foods attaches (as Attachments 1 and 2) and incorporates by reference its Briefs filed October 15, 2004 in the Upper Midwest and Central Order proceedings in order to provide the complete legal framework for these issues.

II. OVERVIEW OF DISORDERLY MARKETING CONDITIONS

Milk Marketing Orders are by design governmental regulation of the raw milk market. When regulation is properly working, this design prevents destructive competition for raw milk supplies, ensures adequate supplies of milk for the fluid milk market, provides minimum uniform prices paid to dairy farmers by dairy processors, and effectively ensures the proper market reserve. When Orders fail, disorderly marketing conditions – the very thing the Secretary is required to avoid – result. In this proceeding, there is ample evidence that paper pooling and paper depooling of milk are quite simply undermining the entire system methodology.

By paper pooling, we mean the ability to attach milk, without much or any delivery to the Mideast market simply, for the economic benefit that comes from being able to draw money out of the federal order pool without truly serving the needs of the fluid market when needed. By paper depooling, we mean the ability to detach (and later reattach through paper pooling without any or sufficient economic cost) milk for the economic benefit that comes from being able to avoid paying money into the federal order pool, when the economic incentive to depool arises – when the Class III price approaches or certainly when it exceeds the blend price at the plant's location. These transactions do not benefit the entire pool, rather they by their very nature preserve and provide unequal economic opportunities for individual handlers – defeating the underlying purposes of the Orders. Moreover, these actions necessarily result in non-uniform prices paid by handlers and to producers in contravention of the Secretary's basic goals.

The case law dealing with the 70 years of Federal milk regulation establishes that the "sufficient supply of milk" standard articulated in 7 U.S.C. 608c(5)(18) is a fluid milk measurement that requires steps to ensure that fluid milk processors can obtain milk

competitively based upon uniform pricing. *See generally Schepps Dairy v. Bergland*, 628 F.2d 11, 13-16 (D.C. Cir. 1979). S*ee also* Tr. 951 [Evan Kinser]; "The Federal Milk Marking Order Program," Marketing Bulletin Number 27 at 7-8, 25) (Revised June 1981).

Indeed, there can be no debate that under the present day statutory framework FMMOs are supposed to ensure a sufficient supply of milk for fluid purposes at the location needed. As the Federal Court for the District of Columbia Circuit explained in *Schepps*, present day FMMOs, which are authorized by the Agricultural Agreement Act of 1937, shored up the efforts by the dairy industry and the Federal government in the first third of the 20th century to address the problems associated with serving the **fluid** market. In recounting these early efforts, the Seventh Circuit affirmatively recognized that the impetus for these early efforts was the need to protect dairy farmers from the vagaries of milk marketing while ensuring that processors handling milk for fluid purposes would be able to get the milk they needed year round:

> (in) order to meet **fluid** demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, 'handlers,' to take advantage of this surplus to obtain bargains during glut periods.

Schepps, 628 F.2d at 14 (emphasis added), *citing*, *Zuber v. Allen*, 396 U.S. 168, 173 (1969).

To correct the discrepancy created by the need to serve the Class I market, the Court explained that Congress first enacted legislation to allow for pooling by cooperatives. *Id.* This solution was unsuccessful due in part to its voluntary nature. *Id.* As a result, Congress intervened with the passage of the Agricultural Adjustment Act of 1933 and amendments in 1935, which according to the Court were adopted to shore up these earlier efforts by the power of the Federal government. *Id.* at 14-15 (the 1935 amendments "can be seen as a shoring, with the

power of the Federal Government, of the classified pricing scheme initiated by the cooperatives.").

The 1935 amendments were carried forward into Section 8c of the present day statutory framework, the Agricultural Marketing Agreement Act of 1937 (the AMAA). *Id.* at 15. It follows, therefore, that the present day statutory framework, like early cooperative efforts at pooling and the 1933 Act framework referenced in *Schepps*, provide for the pricing and pooling of milk ***in order to ensure that fluid milk plants are able to procure adequate supplies of milk to serve the fluid market.***

Somewhere along the way, it seems the industry has lost sight of this core principle. Revenue sharing through pooling gives producers an incentive to supply handlers that are not paying the highest classified price by ensuring that all producers receive uniform prices. It also discourages producers from engaging in cutthroat competition and handler hopping to the handler that is paying the highest classified price. Preventing such cutthroat competition and handler hopping, as the Court indicated in *Schepps*, is important to maintaining an adequate supply of fluid milk year round.

Historically and traditionally, therefore, pooling gave producers serving handlers of manufactured milk an incentive to continue to supply their handler, even when Class I handlers were paying significantly higher classified prices. This is because those producers were assured that they would still receive in their milk check their fair share of the Class I value. It is this historical perspective that seems to cause some of the industry to conclude that Class I must subsidize Class III, and never the reverse.

However, if the Secretary is intent on maintaining marketwide pooling, the Secretary must remember that, at its core, pooling is intended to minimize handler hopping by producers

seeking the highest classified price. Thus, the Secretary must reject the view that Class I must subsidize Class III, but not the reverse.

Today, Class I is not always above the other Class prices. As a result, the record is replete with examples of random[2] pooling and depooling by producers and handlers of manufacturing milk, who are pooling when Class I milk subsidizes their operations and depooling when unregulated prices are more advantageous for producers and their handlers.

This random pooling and depooling is now placing producers who supply Class I handlers in a position that is similar (but the reverse) to producers of manufacturing milk in the 1930s – they have an incentive to leave their Class I handler (which in the 1930s would have been the handler of manufactured milk) for the greener pastures of supplying a Class II, III, or IV handler (which in the 1930s would have been a Class I handler) where they can get higher prices by pooling and depooling.

This is the epitome of disorderly marketing. The Secretary must act swiftly to restore orderly marketing.

III. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dean Foods Company hereby submits the following proposed Findings of Fact and Conclusions of Law and requests a specific holding on each proposed Finding and Conclusion:

A. The Parties

1. Dean Foods Company operates twelve fluid milk processing plants on the Mideast Order, purchasing raw milk supplies from multiple suppliers. Tr. 948-949 [Kinser].

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[2] By random pooling and depooling, we mean it is difficult to forecast when negative PPDs will occur and thus when producers and handlers will have an incentive to depool. This unpredictability makes it difficult for fluid milk processors to ensure that they will have an adequate milk supply over time.

2. For December 2004, there were 42 fluid milk processing plants operated by 23 handlers on the Mideast Order, all of which purchased raw milk supplies from multiple suppliers. Ex. 6, Table 1 and Ex. 11, Table 2.

3. In addition to Dean Foods' operating as a handler, there were six other handlers processing 25 million or more pounds of milk in December, 2004. There was one handler processing between 15 and 25 million pounds; three handlers processing between 5 and 15 million pounds (simple average 6.4 million pounds) and twelve handlers processing less than 5 million pounds (simple average 3.6 million pounds). Ex. 11, Table 2.

4. The Secretary should conclude that with 23 handlers and 42 plants all operated in a wide range of processing, there are numerous outlets for raw milk. Indeed these 42 plants are supplied by eleven Section 1033.9(c) Cooperatives, four Supply plants (one of which is located in Wisconsin, a state neither in nor adjacent to the Marketing Area) and approximately 3,000 independent dairy farmers. Ex. 6, Table 1; Tr. 614 [Uther].

B. Depooling Constitutes Disorderly Marketing

5. In a rare industry display of dairy industry unity and agreement, 19 of 22 non-governmental witnesses testifying at the Hearing agreed that depooling was an economic ill – and many of these witness who had the expertise to understand the meaning of disorderly marketing went one step further and testified that depooling "constituted disorderly marketing". Tr. 173-174 [Wolfe for Ohio Farm Bureau]; Tr. 186 *et seq.* [Gallagher for Dairy Farmers of America, Dairylea, Michigan Milk Producers (thus implicitly for Rasch a supporter of Proposal 7), National Farmers Organization and Dairy Marketing Services]; Tr. 369-371 [Blum]; Tr. 376-378 [Lausin for Ohio Farm Bureau]; Tr. 392-400 [Rohrer]; Tr. 438 [Speck for Continental Milk

Producers]; Tr. 447 [Finton]; Tr. 452-455 [Ramsey]; Tr. 458-464 [Hathaway]; Tr. 467 [Stoll]; Tr. 472-476 [Stizlein for Independent Milk Producers Organization]; Tr. 478 [Croner]; Tr. 491-496 [Lee for Prairie Farms]; Tr. 508 [Fleming for Ohio Dairy Producers Association]; Tr. 725 [Leeman for White Eagle Cooperative Federation and its constituent members: Superior Dairy, United Dairy, Family Dairies USA, Dairy Support, Guggisberg Cheese, Brewster Cheese, and certain Undisclosed Principals] (Mr. Leeman's acknowledgment that depooling came on cross-examination, but was definitive); Tr. 873 [Steiner for Smith Dairy Products]; and Tr. 944 *et seq.* [Evan Kinser for Dean Foods and thus implicitly for Paul Christ who testified regarding technicalities of solutions].

6. The three remaining non-governmental witnesses were either neutral (Tr. 666 [Weis for Foremost Farms and not speaking for Alto Dairy] or made no substantive comments regarding depooling. [Metzger and Cotterill].

7. As to the timing of solutions, only one witness asserted that the Secretary should wait to deal with depooling on a national basis, although he acknowledged that he had no knowledge of any effort to resolve the issue nationally. Tr. 723-726 [Leeman]. He provided no other reason for permitting what he acknowledged was disorderly marketing to continue. Not surprisingly then, this was the only witness, who testified about depooling substantively, who did not conclude that the issue of depooling was and is an emergency situation requiring the Secretary's urgent and immediate attention.

8. For these various and numerous participants, the conclusion that depooling was disorderly marketing was based on their various perspectives. Some, like Edward Gallagher and numerous dairy farmer witnesses, were naturally concerned that depooling did not result in uniform prices to producers. Exhibit 7, Request Number 5 reflects losses to Mideast regular

market shippers of 42 cents and $1.66 per cwt in the months of August 2003 and April 2004 resulting from depooling. These very real losses had very real impacts as described by the numerous small business dairy farmers who appeared at the hearing. Others, like Dean Foods were concerned that depooling did not result in uniform prices paid by handlers to producers. Still others, like Smith Dairy Products, were concerned about their ability to maintain a quality local supply of milk while maintaining the profitability of their Class I operation.

9. All of these concerns are legitimate and provide multiple reasons for the Secretary to bring Order 33 into compliance with the requirements of the AMAA. And certainly, he has an obligation, under the general provisions in favor of uniform pricing for producers and handlers and against disorderly marketing conditions, to take action on an emergency basis.

10. Thus, the loose association requirements in Order 33 are threatening the ability of Class I processors to procure an adequate milk supply at competitive prices. If the Secretary does not take steps to discourage random depooling and repooling, the Secretary will have abdicated his responsibility to prevent destructive competition. Still further, the Secretary will have abdicated his responsibility to maintain uniform prices to producers and handlers (subject to minor adjustments). Under either scenario, the Secretary must, by law, take immediate action to correct this major deficiency in the Order 33 regulations.

11. The attempts by those who, while not openly acknowledging their position since no one defended depooling, attempted to suggest that the Secretary wait to deal with this issue are inappropriate. The suggestion was made by White Eagle and a couple of counsel (not testifying of course) that if the Secretary upholds his legal obligations to maintain orderly marketing conditions, he will somehow move the problem to the two orders to the Southeast. However, the Dean Foods witness easily disposed of this attempted delaying diversion to

Calypso's Island. Those two orders differ substantially from Order 33 in that they have real and substantial association requirements (Tr. 1008 and 1013 [Kinser] and 7 C.F.R. §§ 1005.7 and 1007.7 both require fluid milk plants to meet 50% rather than 30% for Order Class I usage; 7 C.F.R. §§ 1005.13 (with 6 day touch base requirement July through December and 2 day requirement January through June and 25 and 40% diversion limits) and 1007.13 (10 day touch based requirement July through December and 4 day requirement for January through June and 33% and 50% diversion limitations)). Moreover, Orders 5 and 7 lack sufficient manufacturing capacity for anyone to take advantage of depooling. Tr. 1013. There is simply no evidence that random pooling and depooling of milk does or can occur in those orders. It doesn't take Athena to remove this delaying tactic and diversion.

12. Perhaps more importantly, the Secretary has a real obligation to deal with a known problem for which he has called a hearing and not waiting for imagined or, if they are, real problems to develop in other federal orders. The success from attempted large scale national rulemakings is spotty at best given the results of the 1990 National Hearing (a.k.a. the 43-day wandering in the wilderness). In addition, Federal Order Reform failed to deal (or made worse) regional issues unique to each Order precisely because they were undertaken on such a grand scale with so many national issues. While industry is certainly largely to blame, including participants and counsel in this Hearing, Federal Order Reform focused so heavily on the Class prices that we lost sight of the forest for the trees. These now smaller, more manageable hearings necessarily restore the focus (smaller orders would be better, too).

13. Those seeking delay (there were at the Hearing at least no "Opponents" of the depooling proposals *in toto*) may suggest, as they did in their filing regarding the Upper Midwest Order proceeding, that the 7th Circuit's decision in *Lamers Dairy, Inc. v. United States*

Department of Agriculture, 379 F.3d 466 (7th Cir. 2004), *cert denied* 125 S. Ct. 278 (March 7, 2005), *rehearing denied* 125 S. Ct. 1592 (May 2, 2005) somehow provides them cover. To the contrary, that case strongly supports the case presented by proponents of fixing the problems in this proceeding for several 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. Next, "delayants" in this and other proceedings have complained that the Secretary should instead address other issues, such as the Class I price surface, 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" and which "issues to hear" 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].[3]

Id. at 475.

14. Finally, and most tellingly, the *Lamers* 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

[3] Thus disposing once and for all with White Eagle's purported small business objection to the Secretary's decision, for now, not to hear Continental Milk's pricing proposal that would require opening a National Hearing for Part 1000. It is also difficult to fathom how this proposal would create any more or less of a burden on small businesses than the proposals contained herein – White Eagle failed to make an Offer of Proof for this Record.

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).[4]

15. It may be that the Secretary has decided on his own to wait for this Hearing to conclude and the Briefs be filed before releasing his policy determination and conclusions as to the Upper Midwest, Central and Mideast hearings. The Secretary has issued an Interim Final decision regarding distant milk issues only in the Upper Midwest and has, for his undisclosed reason, not yet decided the paramount depooling and random pooling issues from that proceeding. With the conclusion of this Hearing and, to Dean Foods' knowledge, no requests pending for further pooling or depooling hearings, it is entirely appropriate for the Secretary to decide these proceedings now. Even if other proceedings were pending, it would still be appropriate to address depooling promptly. Since the Secretary has undertaken in several recent proceedings to effectively bifurcate the decision making process, since no witness opposed dealing with the acknowledged disorderly marketing condition of depooling, and since this disorderly marketing condition is an obvious emergency, the Secretary could, without further ado, decide the issue of depooling for all three Orders. He should implement an emergency Interim Rule for all three orders simultaneously effective no later than July 1 or August 1 when fluid milk markets and the dairy farmers who regularly, reliably and routinely serve them need

[4] So why, one might ask, would anyone on the other side or seeking delay 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).

the most protection "from the transient onslaughts of dumping by outsiders." *Nourse Report, supra,* at II-3-15. That would produce needed equity among producers.

C. The Solution for Depooling Is to Adopt a Northeast Order Style Dairy Farmer for Other Markets Provision

16. An older proven seaworthy vessel is better than a brand new one with potential leaks. So too when dealing with the underlying problems in this hearing, an old established stand-by provision that everyone agrees has worked well for the Northeast Order should be utilized here in lieu of newer, untested and weaker alternatives. The "dairy farmer for other markets" provision that presently exists in Order 1 has its antecedents in the Boston Regional Order 1 (that order merged with Connecticut in 1976 and later merged with Orders 2 and 4 as a result of Federal Order Reform; Orders 2 and 4 had substantially weaker provisions – *see* 7 C.F.R. Parts 1001, 1002 and 1004 for years prior to 2000). The Boston provision appears to have been developed for different albeit similar reasons. 40 Fed. Reg. 47316, 47321-47322 (October 8, 1975). At the time, there were federally unregulated milk plants near Boston.

> The basic purpose of these provisions is to preclude reserve milk supplies associated with local non-federally regulated markets from being pooled under the Boston order. Before such provisions were adopted, it was not uncommon for dairy farmers who were supplying milk to unregulated distributing plants to be shifted to the Boston market when their milk was not needed in the unregulated area for fluid use. This handling arrangement was used particularly during the months of seasonably high production. The milk that was shifted to the Boston market represented unneeded supplies in the regulated market also, and was thus disposed of in the lower-valued manufacturing uses. **This reduced returns to producers regularly associated with the Boston market.** The dairy farmer for other markets provisions were thus developed to assure that Boston order producers would not have the economic burden of carrying the reserve milk supplies for unregulated markets.

Id.

17. While the original purpose for the provision is different, two things cannot be disputed. First, the provision in actual practice today has been largely successful in limiting the worst abuses of depooling. Ex. 33-G and Tr. 945-948 and 963-965 [Kinser]. The only "hole" in the Northeast Order has been the ability of entities to depool, then use the Mideast Order to repool and then return to the Northeast Order. Thus part of the solution for the Mideast Order will obviate the game being played in the Northeast. Tr. 966 [Kinser]. Second, the rationale for the Northeast provision supports its adoption here to solve the different problem. The *Nourse Report* highlighted the importance of protecting regular market players from periodic dumping and that is precisely what was at issue in Boston. *Nourse Report* pp. II-3-15 and III-15. In the Mideast Order, the same dumping occurs, but because of new economic circumstances, the predators not only dump their market reducing returns surplus to regular market suppliers, but the predators have also found that when they leave for economic reasons that action also reduce returns to those same producers regularly associated with the market.

18. To fix the potential problem exploited by handlers from the Northeast, Dean Foods proposes modifying the Northeast provision for implementation in the Mideast by making the commitment year round with no genuine free month absent real service to the market. And in order to address handlers simply swapping supplies in order to avoid the affects of the provision, Dean Foods has also proposed a modification to its proposal such that any producer who has been depooled by any handler cannot re-associate with the market without cost. Counsel for DFA called this the "scarlet letter" (Tr. 984 [Beshore]) since the dairy farmer may not be responsible for the depooling, but would be unable to easily switch to a new handler. It was further suggested that after a dairy farmer gives notice of its intent to depart a handler, the

handler could deliberately depool that producer just before that producer ships to a new handler. Depriving that dairy farmer of his ability to pool under those circumstances is not Dean Foods' intent. However, Dean remains concerned that handlers could swap volumes and avoid the economic cost intended to be imposed on depoolers. Dean Foods would thus accept a modification of its own proposal: "the Market Administrator shall have the authority to waive the effects of this provision as to any individual producer who becomes associated with a different handler after being depooled if the Market Administrator determines: (1) that the depooling was not affirmatively approved by the producer; and (2) that the change in shipping and reporting was not the result of a subterfuge undertaken by handlers to avoid the proscriptions of this provision." Such a fix would appear to address the only substantive objection to a rule with a proven track record. Proposal 4 as revised at the hearing and here should be adopted. If Proposal 4 as revised is deemed by the Secretary to be too steep an economic cost to impose on those free riders who deplete the federal order pool shared by those regular market participants many of whom were the 19 of 22 witnesses spoke out against depooling, then Dean reluctantly supports its own Proposal number 8 with the same modifications. Proposal 8 as modified would impose similar economic costs on Mideast depoolers as those imposed in the Northeast.

19. If notwithstanding all of the good and sufficient reasons for adopting a tried and true method found in Proposals 4 and 8, the Secretary decides to use a newer and lesser means to fix the problem, Dean Foods at the Hearing expressed its last preference for Proposal 7 as proposed to be modified at the Hearing by Dean Foods. While the timing of a solution (as in immediately) is somewhat less important to Dean Foods than choosing between proposals 4, 8, 7, 6 and 5, both industry and the Secretary should recall that stricter standards supported at earlier hearings by Dean Foods might well have prevented the need for this round of hearings. If

adoption of a lesser proposal does not fix the problem, Dean Foods will be among the first to return to the Secretary for yet another hearing; why not just fix the problem right this second time around?

D. Pooling Milk that Is Not Ready to Serve the Fluid Market is Disorderly Marketing

20. "When a pooling feature's use deviates from its intended purpose, and its use results in pooling milk that is not serving the fluid needs of the market, it is appropriate to re-examine the need for continuing to provide for that feature as a necessary component of the pooling standards of the order. . . . A feature which results in pooling milk on the order that does not provide [fluid milk] service should be considered as unnecessary for that marketing area." 69 Fed. Reg. at 19299.

21. "Pooling standards that are performance based provide the only viable method for determining those eligible to share in the marketwide pool. It is primarily the Class I use of milk that adds additional revenue, and it is reasonable to expect those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds." 69 Fed. Reg. at 19298. Dean Foods concurs with the Secretary's conclusions from the 2004 Proposed Rule for the Mideast Order.

22. Excess pooling of milk not really serving the fluid market is in some measure the flip side of depooling. Milk that is depooled is not available to the fluid milk market regardless of need. Milk that is depooled is not readily, reliably, and routinely serving the fluid market. When enormous volumes of distant milk are depooled, one has to question how much of that milk is serving the fluid milk market versus simply recovering money from the pool when it can

and providing nothing in return. By way of example only, the month of December 2004 is quite instructive:

a. The Market Administrator estimates that for December 2004, 623.7 million pounds of milk were depooled at a cost of $0.29 per cwt to the Mideast producers regularly shipping to the market. Ex. 7, Request 5.

b. As compared to December 2003, 275 million fewer pounds were pooled on the Mideast Order in December 2004. Ex. 7, Request 1(b). It is thus reasonable to conclude that a full 44% of depooled milk was Wisconsin milk. Moreover, with only 38 million pounds pooled in the month of December 2004 from Wisconsin, the 275 million was not and is not regularly available to serve the fluid market. Most likely, a significant amount of that 38 million pounds was still paper pooled, as in it remained in Wisconsin but was pooled on paper in order to permit the pooling of the remainder of the milk once the economics turned around. The Secretary should so find.

c. Most improbably, according to Exhibit 11, Table 8(e) there were five Wisconsin counties supplying physical milk receipts to distributing plants in Western Pennsylvania in October 2004 -- Marathon, Marinette, Ocanto, Shawano, and Waupaca. In December 2003, these five counties pooled (not to be confused by anyone with actually delivering to Order 33 pool distributing plants) 53.4 million pounds, but only pooled 3.6 million pounds in December 2004. This is only 6.7% of the total pooled in December 2003. And again, the Secretary can and should find that a significant percentage of that 3.6 million pounds did not actually move out of Wisconsin in raw form (there is no December touch base requirement in 7 C.F.R. §1033.13(d)(2).

d. In October 2004, Pool Distributing plants in Pennsylvania received 193,115 pounds of milk from distances greater than 620 miles (no milk from 481-620 miles). Ex. 7, Request 7. Dean Foods has prepared a chart of mileage distances from major mileage locations in each of these five counties to three plant locations in Pennsylvania (Erie, Pittsburgh, and Uniontown). Attachment 3. Also included are mileage distances from the most distant counties in Indiana, Michigan and New York with milk supplies delivered to Pennsylvania distributing plants in October 2004 according to Ex. 11, Table 8(e). None of the non-Wisconsin locations can possibly be the source of the 193,115 pounds of milk – the longest distance being 505 miles from Cadillac, Michigan to Uniontown, Pennsylvania. Thus, it is beyond peradventure that 100% of the 193,115 pounds of producer milk delivered to Pennsylvania came from these five counties.

e. Based upon standard tanker size for tankers leaving Michigan (Tr. 574 [Rasch]), it is reasonable to conclude that these five counties supplied five loads of milk from Wisconsin to Pennsylvania. Now it is reasonable to conclude that the cost of these deliveries were offset by pooling. Indeed the Secretary should conclude that these five loads most likely represented the minimum 2 day equivalent supply of milk, meaning that these loads could have resulted in the pooling of 2,992,282.5 million pounds of milk. In a 31 day month such as October and December, the milk delivered would be 6.5% of the milk pooled.

f. So in a month when deliveries are required, it just happens that one need only deliver 6.5% of the milk pooled and in a month when deliveries are not required and there is depooling, 6.7% of the milk from those same five counties is reported as pooled, but not likely moved out of Wisconsin. The numbers are not a coincidence. They tell a compelling story. 86% of all Wisconsin milk pooled on Order 33 in December 2003 and 93% of the milk pooled from

those five counties and occasionally delivered to Pennsylvania pool plants does not stand ready to serve as a ready reserve for the fluid milk market.

E. The Solution for Excess Pooled Surplus Milk is to Eliminate Abusive Diversions

23. The Secretary should thus conclude that a pooling feature continues to permit excess milk to pool on the Mideast Order notwithstanding the earlier rulemaking. Since no one, other than Dean Foods, which dropped its support in light of USDA's earlier position, supports a 3 or 4 day touch base requirement, it must by process of elimination be a lenient diversion requirement that is the feature that requires modification. Dean Foods supports adoption of Proposal 2. Lower diversion limits and corresponding higher shipping percentages will send the right message to the industry that those who are dedicated to this market will be rewarded. Instead, today the message received is man overboard, save the life-vest for me. Defenders of these practices whereby milk is simply pooled, but not moved, by the stroke of a pen ought to own up to the injury that they cause to the system, to small dairy farmers faithfully serving the market and milk handlers.[5]

24. Dean Foods also supports that portion of Proposal 3 that would define temporary loss of Grade A status for pooling and diversion purposes. At the Hearing, Dean Foods abandoned that portion of Proposal 3 that would have altered the touch base requirements of the Order. However, Dean Foods maintains that in order to prevent both opportunistic pooling and depooling, the loss of producer Grade A permit should be defined so as to prevent a producer (or its reporting handler) from essentially engineering the loss of Grade A status in order to permit depooling and repooling without economic cost. As with our proposed modification to Proposals

[5] It appears that White Eagle with diversions of 50-60% on average might well not be required to alter any of its business practices should the proposals be adopted. Tr. 933 [Leeman]. Therefore, the volume of the opposition is without justification or cause unless one concludes that they merely want to ship less and divert more.

4 and 8, the Market Administrator will need the authority to make exceptions for extraordinary circumstances that are outside the producer's control as defined in the proposed language.

F. Transportation Credits, Carefully Constructed, Can Serve the Federal Order Goal of Serving the Fluid Market

25. Dean Foods supports mechanisms that properly use portions of their Class I dollars paid to the pool to reward the dairy farmers actually supplying the fluid market. One such mechanism can be transportation credits paid to actually deliver milk to the fluid milk market. However, Dean approaches Proposal 9 with some trepidation. First, there is no reason, as a number of witnesses testified (Tr. 493 [Lee]; Tr. 880-883 [Steiner]; Tr. 977-978 and 1023-1025 [Kinser], to provide the credits only for milk that travels more than 75 miles. Such a proposal discriminates against close in – local milk supplies. At most the first 25 miles might plausibly be disallowed, but even this amount effectively discriminates against those farmers who choose to live near the plants they serve.

26. The choice of an outer limit of 350 or 400 miles is not as critical to Dean Foods as making certain that transportation credits do not become an unintended economic opportunity to reduce the economic costs of opportunistic pooling. Tr. 978 [Kinser]. If distant milk from outside the marketing area requests and receives a transportation allowance, why should milk from that same farm be permitted to be diverted to a distant plant? Thus, a limitation could be adopted which treats milk diverted from the same farm for which a transportation credit is requested as dairy farmer for other markets milk if that diversion is to a plant outside the marketing area (see proposed definition of outside the marketing area for this limited purpose below).

27. Alternatively, if that position is viewed as too draconian, then the Secretary could adopt the following new paragraph (f) in the proposed §1033.55:

> If a handler requests transportation credits pursuant to paragraph (b) of this section on bulk milk for which any milk from the same farm or farms is in the same month diverted to a plant located outside the marketing area, the milk for which a transportation credit is requested shall not count as a delivery pursuant to §1033.13(d). For purposes of this paragraph only, a plant located outside the marketing area does not include a plant located in a state that contains any part of the marketing area or a plant in a state immediately adjacent to the marketing area.[6]

G. Dual Pooling of Milk on a Federal and State Order should be Eliminated

28. Dean Foods supports adoption of proposal 1, but prefers the adoption of the language used in the Upper Midwest and Central orders. Dean was an early supporter in the Upper Midwest and Central orders of provisions eliminating the opportunity to effectively pool milk twice on federal orders and thus draw money from two pools for the same milk. No one opposed this proposal and it too should be adopted forthwith, although it would make sense to adopt language identical to that adopted in the Upper Midwest. Tr. 975.

H. The Discovered Hole in the Rules (7 C.F.R. § 1033.7(d))

29. One of the great virtues of these proceedings is the ability through the course of examination of witnesses to refine both the proposals and examine the present rules with a critical, focused eye. In this proceeding, continued discussion revealed that one of the paragraphs open for amendment (Proposal 2 expressly opened § 1033.7(d)) is now revealed to have its own not-yet-abused "hole in the net." A cooperative association plant must deliver a specified percentage of its members' production to distributing plants or to non-pool plants.

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[6] Thus plants located in Illinois, Indiana, Michigan, Kentucky, Ohio, West Virginia, Maryland, Pennsylvania and New York would be exempt from this provision.

30. First, the rule on its face does not require delivery of even one pound of milk to distributing plants. Why should deliveries to non-pool plants count for association purposes? Moreover, the rule on its face does not preclude such a qualified cooperative plant from running through that pool plant (or diverting off of it) milk not from its members (Order 32 has a precise rule on this issue). Finally, other order provisions (again e.g. Order 32) that are similar to this provision, require that the cooperative association plant be located in the marketing area. Tr. 1081-1083 [Christ]. The best time to close a known loop-hole in the rules is before it becomes abused. Tr. 1083-1084 [Christ].

31. And the Secretary should seize the opportunity afforded on this Record and the evidence of the cost abuses impose on dairy farmers and handlers to close that loop-hole before yet another pleasant Ohio hearing is required under emergency conditions. Therefore, Dean Foods urges the Secretary to make the following modifications to paragraph (d) of section 7 of Order 33 as proposed in Proposal 2 (and if proposal 2 is rejected, nonetheless these changes ought to be made promptly) [insertions in bold and deletions with strike-through]:[7]

> (d) A plant **located in the marketing area and** operated by a cooperative association if, during the months of August through November 40 percent and during the months of December through July 30 percent or more of the producer milk of members of the association **(and any producer milk of non-members and members of another cooperative association which may be marketed by the cooperative association)** is delivered to a distributing plant(s) ~~or to a nonpool plant(s),~~ and classification other than Class I is not requested. Deliveries for qualification purposes may be made directly from the farm or by transfer from such association's plant, subject to the following conditions:

I. The Emergency

[7] The Secretary's duty to maintain orderly marketing conditions necessarily includes the right and obligation to fix a potential problem before it actually becomes a problem.

32. Small dairy farmers who have regularly and faithfully served the Order 33 fluid milk market are entitled to immediate and effective relief from acknowledged disorderly marketing conditions regardless of whether the Secretary concludes that this is a reliable supply issue or an equity among producers issue. Tr. 1027-1029 [Mr. Tosi questioning Mr. Kinser]. They have weathered multiple depooling months, but cannot, by their own un-contradicted testimony, continue this way. The hardhearted predators who gleefully paper pool and paper depool should not be permitted to say "not now" or "wait some more" or "national hearing." Moreover, handlers are not now paying uniform prices when depooling permits their competitors to keep the benefits that depooling robs from those dairy farmers. The Secretary can and must act to maintain orderly marketing conditions. Tr. 506 [Lee]. He should do so immediately, certainly acting in time for this summer's short season when those who regularly serve the fluid milk market require the greatest protection from these predations.

J. The Proposed Revised Amended Provisions

For the Secretary's and the interested persons' convenience, we attach as Attachment 5, proposed revised language for proposals for which we changes have been proposed since the inception of the issuance of the Hearing Notice.

III. OTHER LEGAL ISSUES

A. The Allegations Concerning Ex-Parte Communications

In an e-mail letter and Motion dated April 6, 2005, counsel for White Eagle (in this proceeding), asserted that alleged *ex parte* communications had taken place over the past year, which allegedly touched on the merits of numerous rulemaking proceedings before the Dairy

Division including this proceeding. Even though the primary purported *ex parte* communications appear to have been in October 2004 before this hearing was noticed, this is the only proceeding named in that letter in which the record remains open. However, White Eagle's allegations[8] are insufficient to establish an *ex parte* communication since we have yet to see evidence that USDA officials were actually in the room(s) when the alleged public statements regarding the alleged merits of this and other pending proceedings were actually made. Second, there is no indication that these very public statements that were made were anything other than the already publicly acknowledged positions of the respective parties to these proceedings – that is they were not intended as evidence and could not constitute evidence. As such, White Eagle's allegations are insufficient at this time to prove the existence of *ex parte* communications. This is particularly critical information since the undersigned has always understood that USDA officials make it a practice to leave a room if there is going to be any communication regarding the merits of a pending proceeding.

Since there is the potential that White Eagle will avail itself of the briefing opportunity in this proceeding to supplement these inchoate allegations, the undersigned will address and dispute the allegations in its reply brief on May 19, 2005 once White Eagle has, if at all, fully articulated the allegations. If no further information is forthcoming, then there is a chance that little if any response may be needed given the lack of evidence put forth.

Even if no additional allegations are forthcoming, Dean Foods will in the near future (there is no Rule of Practice governing timing) nevertheless place a response on the record for any proceedings actually implicated by filing letter briefs on the subject with the Hearing Clerk in each of the pending proceedings affected.

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[8] After the parties' experience regarding certain attachments to Exhibit 30 (discussed below) submitted by this same White Eagle that later proved to be incorrect recreations, misstatements and distortions of actual documents, our trepidation in dealing with these, to date, unfounded allegations is greatly warranted.

B. Small Business and Paperwork Reduction

Opponents suggest that the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, should affect the Secretary's adoption of proposals herein. As conclusively demonstrated below, the Regulatory Flexibility Act ("RFA") does not require additional analysis or special review in this matter, but even if it does, the regulatory problems that need to be solved, the proposals presented and the alternatives offered all meet the requirements or guidelines of the RFA.

The Small Business Administration, the agency charged with enforcement of RFA, has described the major purpose of the RFA as being:

> [T]o establish as a principle of regulatory issuance that federal agencies endeavor, consistent with the objective of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of entities subject to regulation.

The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, U.S. Small Business Administration, Office of Advocacy, Washington, D.C., 1998, p. 1.

Importantly, the RFA does not exempt small businesses from regulation or require different regulation of any small businesses. There is no basis to conclude that small businesses based upon that fact alone are exempt from federal order pooling (or depooling) rules uniformly applied. At no time in the history of the AMAA has USDA, Congress or the Courts concluded that being a small business exempts one from complying with pooling requirements entirely.

Instead, under the RFA the agency must, when it determines that there will be a substantial economic impact on a significant number of small entities, conduct additional analysis regarding the impact on small businesses. And as stated in the Hearing Notice (Ex. 1), the Secretary will, within the statutory authority of the program, ensure that the regulatory and

informational requirements are tailored to the size and nature of small businesses. But the limitations are clear:

> The RFA does not seek preferential treatment for small entities, ***require agencies to adopt regulations that impose the least burden on small entities***, nor mandate exemptions for small entities. Rather, the RFA ***encourages*** agencies to examine public policy issues using an analytical process that identifies, among other things, barriers to small business competitiveness; and seeks a level playing field for small entities, not an unfair advantage.

The Regulatory Flexibility Act. at 2 (emphasis added).

The first question then is does the RFA require any additional or special analysis. The clear answer here is "no" as to these proposals. First, as to depooling, no one asserting small business status (and in fact no witness at all) defended depooling. No one asserted that their status as a small business would be adversely affected if the depooling provisions were adopted. Of course, there were on the other hand numerous small businesses (most dairy farmers) who are adversely affected by the existence of the present rule – a rule adopted by USDA after an RFA that concluded that there would not be a RFA impact. Reversing the provision should thus also have no RFA impact. Thus, the RFA claims cannot and should not hold up consideration and decisive action on that issue.

Second, as to pooling of milk not needed for service to the fluid milk market, the RFA "encouragement" cannot and must not trump the direct statutory mandates of the AMAA discussed at length above. Third, the Secretary should conclude that numerous small businesses (including most of the 3,000 independent dairy farms) are adversely affected by the present state of affairs; again the RFA cannot be used as an offensive weapon preventing prompt solutions tailored to protect those small business entities. Moreover, the RFA cannot be used to force the Secretary to delay action regarding disorderly marketing conditions in this Order such that he

must consider proposals which naturally have national implications (e.g. the Continental Milk Producers proposal).[9]

Third, based upon the fact that some of the allegedly small businesses are anonymous principals and the inability of the lead witness for opponents/delayants to actually corroborate that the principals for whom he spoke were indeed small businesses, the Secretary cannot conclude that a significant number of small businesses would be adversely affected by any action. Tr. 941-942 [Leeman] (the witness did not even consider one entire business unit in concluding that one of his principals was a small business).

Finally, with respect to the Regulatory Flexibility Act, proponents request that the Secretary make an express finding that the solutions adopted address the regulatory problems presented in this Record. Again, while not definitive given the lack of express requirements by the RFA, such a finding surely is justified given the extensive discussion in the hearing record, the number of proposals in the Hearing Notice intended to deal with the issues, and the conclusions, espoused by almost every proponent witness, that there is no more critical problem than the lack of uniformity in the application of the prices (paid to farmers and paid by handlers) out there in the marketing area. (PFF 5, 8 and 9). The proposed solutions in the proposals are plainly designed to fix the defined regulatory problems presented.

Similarly the Paperwork Reduction Act has no applicability here. Handlers already file reports for pooling (and paper depooling). Those reports need not change in any material way should restrictions on depooling or excessive pooling be adopted. If depooling becomes restricted, handlers will, we trust, depool less milk, but they have to keep track of that milk and

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[9] Note that in their letter to the Secretary urging consideration of this proposal, opponents of fixing disorderly marketing didn't actually endorse the proposal, they merely wanted to add to the Secretary's burdens. Notwithstanding the repeated protestations that they do not seek delay, delay is precisely what these opponents precisely want and desire.

farm's status regardless. If tighter diversion limits are adopted, handlers will have to report accordingly regarding a lower diversion allowance, but today they have to report and keep track of the same information.

The RFA and PRA have been all but thrown into this mix merely to further delay the Secretary's fixing the very problems identified in this Record. Nothing in the history of the RFA or PRA can be read to permit their use as a sword against treating all entities equal – especially small dairy farmers in Western Pennsylvania, Ohio, Michigan, Indiana, Kentucky and West Virginia who suffer losses in their milk check every time a handler, with the lack of support for program and lacking in service to the marketplace, chooses to depool milk for their own financial benefit.

C. Comments on Testimony and Exhibits

Dean Foods, its predecessor entities and its counsel have attended innumerable federal order milk hearings. It is with regret that we see these hearings degenerating into adversarial attacks and counterattacks that appear outside the norm for these essentially legislative proceedings. Whether the Rules of Practice require some updating or those appearing before the Secretary have taken the gravity of these proceedings for granted, a number of issues in this hearing highlight the need to at least maintain some modicum of procedure (notwithstanding the openness of the evidentiary rules). The following are concerns that go to the credibility of certain testimony and exhibits:

1. Credibility when testimony is written by a person that does not testify.

There was quibbling over who wrote how much of any given statement. Obviously counsel participate in final work product. However, it was readily apparent that White Eagle's

witness did not write the significant majority of the testimony he presented. He even quipped at one point in answer to the question of what he actually contributed – "my name". Tr. 731 [Leeman]. The witness admitted to errors made by counsel after he could not for pages of testimony understand what was being asked of him. Tr. 728-730. The witness was testifying in part for undisclosed principals such that it was impossible to cross-examine him on some of his statements. Tr. 694-695. The idea that the testimony was by committee (some of the members unknown), but written by counsel, led to fruitless cross-examination.

2. Official Notice/exhibits from outside sources that have been manipulated

Obviously one cannot always rely on one's own created exhibits (although they are preferred). However, the Secretary cannot tolerate altered documents being foisted upon the Record as official government or public documents only to discover (as we quickly did) that they were re-created with differences and thus necessarily distortions at best. Exhibit 30, Attachment 2 was presented as a true and correct copy of certain materials taken from the internet – one portion allegedly from a dairy publication and the other from the Market Administrator's website. The same witness who did not write his own testimony could not explain this (and other) attachment clearly precisely because he was not the one who had allegedly downloaded it, altered it and then submitted it. Leaving aside the fact that the dairy publication (whose author was not available for cross-examination) noted that much of its information was based upon anonymous sources, the redacted and edited document was redacted so as to make it inaccurate. Tr. 741-744, and 749-750 [Leeman] and 1032-1040 [Kinser]. The person or persons who edited and redacted the document are unknown. The worst part of this now admitted exhibit is that with

no known provenance, what is accurate and inaccurate will never wholly be known to this Record.

The last page of Attachment 2 to Exhibit 30 is an abomination. Comparing it to Exhibit 37, which is the actual unedited version of the document, reveals that someone altered what is Exhibit 37 to insert the critical word "Pool" before the word "Plants." This led counsel for White Eagle to attempt to rehabilitate Attachment 2 concluding that all 52 plants on that list are pool plants. Beyond being a waste of everyone's time, counsel was incorrect thanks solely to White Eagle's own altered exhibit. Tr. 934-938 and 999-1002 [Leeman] and 1032-1040 [Kinser]. Again, the real issue is what is wrong with the remainder of the exhibit?

No one is suggesting that this exhibit problem was the result of an intentional effort to mislead. But the mistake remains. These proceedings must be vigilant in such matters, for absent such vigilance mistakes come at great cost to the participants, the Secretary, and the intended result.

Dean Foods renews is Motion to Strike Attachment 2 to Exhibit 30 together with any and all testimony associated with this manipulated document.

3. Credibility of another drive-by (expert?) Witness

Again, as a business and expense matter, it would be impossible to adopt a rule that requires all major witnesses to attend significant portions of the proceeding. But what are we to make of drive-by witnesses, especially ones who purport to admit evidence as an expert except they are never qualified? Dr. Cotterill graced the hearing with his presence for about a day (Tr. 796) [Cotterill]; acknowledged that he was "not an expert on the intricacies of all these technical pooling regulations" (Tr. 799); then took it back and denied that he had denied he was an expert

(Tr. 808); renounced statements of the Secretary of Agriculture regarding the Secretary's operation of his own program (Tr. 805-808) because he is "a professor" (Tr. 808); incorrectly identified Leprino as presently operating a section 7(e) plant (Tr. 797 and Ex. 6); in effect asserted that a market with over 19 dairy farmer organizations serving it and 3,000 independent dairy farmers was too concentrated such that the Secretary should not take any action designed to strengthen service to the fluid market (Tr. 799-804); and proceeded to rely on the *Nourse Report* for his positions even when confronted with contradictory statements from that report. Tr. 808-810. And this witness was supposed to have added something to this Record to benefit the Secretary? What he added was 110 pages to the transcript.

4. Northeast Order and Dairy Farmer for Other Markets

A questioner attempted to assert that there was no basis to conclude that the Northeast Order's dairy farmer for other markets provision was a critical factor in that market's more solid performance. He based this questioning (not testimony to be sure) on his allegations that Dean Foods had a dominant position in the Northeast market.[10] Leaving aside the inaccuracies in his questioning, his questions were irrelevant. Dean Foods is primarily a fluid milk processor. By definition, fluid milk processors cannot choose to pool and depool – they are forced by regulation to always pool. Thus, the proper inquiry concerning the Northeast Order and depooling is whether and how much Class III milk there is on an order (precisely the inquiry conducted by Mr. Kinser in preparing Ex. 33-G). Fluid milk processors have minimal Class III and IV usage and thus have minimal, if any, opportunities to depool. Thus the question of Mr.

[10] The Rules of Practice provide that any "interested" person may appear – 7 C.F.R. § 900.8(a), but we must note that this person represented that he appeared for an Arizona entity that has no known contact and certainly is not a milk handler or dairy farmer in this market (Query where does *Block v. Community Nutrition Institute*, 104 S. Ct. 2450 (1984) begin and end). His questions appear to be geared more to gathering information and making unsupported (no testimony given) allegations about Dean Foods and Dairy Farmers of America.

Kinser suggesting that he should have considered Dean's alleged concentration of fluid milk sales in the Northeast before reaching his conclusion that the significant difference between the markets is the "dairy farmer for other markets provision" is a non-sequitur. Tr. 1016-1018 [Ricciardi as non-witness and Kinser].

5. The Attacks on Confidential Information (much of it irrelevant anyway)

There is also the increasing tendency to deliberately ask for what most industry witnesses consider to be confidential information and then to be "shocked, shocked" when the information is not provided. Witnesses on all sides indicated that they understood the desire to protect confidential information such as plant capacity and size. Tr. 329 [Gallagher]; Tr. 814 [Cotterill for opponents]; and Tr. 979 [Kinser]. Yet even after a witness clearly articulates what he is going to disclose, repeated efforts are made and loud consternation heard when the witness properly holds his ground.

The attempt to equate the doctrines of "privilege waiver" applicable to litigation or adjudications with a refusal to provide confidential information in a regulatory rulemaking setting fails.[11] The two doctrines are different and relate to different entities, issues and statutory or regulatory bases. These parties may have requested a hearing, but it is the Secretary who decides to hold the Hearing, a non-adjudicatory process. There is nothing in the Rules of Practice that suggest or even hint at the need for a party to waive their confidential information if

[11] Like Exhibit 30, several of the citations provided by Counsel for White Eagle in the transcript (Dean Foods did not receive a copy of any Proposed Transcript Corrections from White Eagle) are mostly confusing, inaccurate or incomplete – as such we await the promised briefing on this issue in order to more completely respond in our May 19 Reply. For instance, one citation in the record "1993 WL 24497" is actaully an IRS News Release naming an IRS Director. Attachment 5. Three attempts by Thelen Reid's librarian to bring up "39 NRC 469" brought up an obviously irrelevant "39 NRC 382." Other citations simply failed to function. The one case we were able to locate from the laundry list of citations, *FDIC v. Wise*, 139 F.R.D. 168 (D. Co. 1991) relates only to the assertion of privilege (a common law right) not the statutory (FOIA) and regulatory (7 C.F.R. § 1.12) protected confidential information.

they want a hearing. Before such a brand new rule should be applied 70 years into the program's operation and *nunc pro tunc* in this proceeding, USDA should instead (without delaying this or any other proceeding) consider whether or not the Rules of Practice require amendment -- they don't. Finally, even if this new rule would or could apply, the sponsor would have to show in this instance that the information was relevant to this proceeding and not just to satisfy their competitive curiosity. Given the lack of opposition to or justification of depooling, what difference does it make? There is ample public information is the volumes of data for everyone to make their needed arguments without resort to destroying the concept of confidential information. After 70 years of rulemaking proceedings that are not adjudications with compulsory process, this proposed rule change cannot be countenanced.

Nothing can be drawn from a witnesses refusal to answer these questions, otherwise all businesses would necessarily have to choose between testifying and giving up valuable confidential (often competitive) business information. Consistent with this position, the Freedom of Information Act maintains an express exemption from disclosure of confidential business information. And both the Senate[12] and House[13] reports specify the types of information intended to be within Exemption 4. These include, *inter alia*, **"business statistics, inventories, customer lists, and manufacturing processes"** (emphasis added).

In the leading case on the issue, the D.C. Circuit upheld the FTC's refusal to reveal sales, costs and profit information submitted by business competitors. *Sterling Drug Co. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971).[14] Volumes of milk received at various plants from various suppliers quite obviously fit within this definition. It would be a bizarre result to

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12 S. Rep. No. 813, 89th Cong., 1st Sess. (1965).
13 H.R. Rep. No. 89-1497, 89th Cong, 2d Sess. (1966); U.S. Code, Cong. & Admin. News (1966).
14 *See, generally, Stein, Mitchell & Mezines, Administrative Law*, § 10.05[3] (2004).

require the government to maintain confidentiality of this information, but then penalize a participant in a hearing for protecting that very same information.[15]

Moreover, in addition to the unnecessary repetitiveness, the testimony requested often has nothing to do with the witness' testimony. Indeed for a person without an interest in the proceeding to continue, after objection, to ask for confidential information, borders on being contumacious. The Rules of Practice do have a solution for that. 7 C.F.R. § 900.8(b)(2).

D. The Bizarre Assertions that Hearsay is Not Hearsay if Your Opponent is in the Room

Finally, but because it is truly bizarre and absurd it requires separate discussion, there is the "rule" of late that rank hearsay and poorly crafted exhibits should be admitted, over objection, because "the other side is in the room and can contradict it if it isn't true" defense. Tr. 691-692 [exchange of T. Vetne and English]. There is no such rule of evidence even in the liberal rules of administrative proceedings. Indeed it was this very colloquy that led to the improvident introduction into evidence of Exhibit 30, Attachments 2 and 3. And lo and behold, as predictable as the spring flush, Attachment 2 turned out to be at best inaccurate. This is an improper attempt to boot strap evidence – the recent corollary being "I had other witnesses in the room who could corroborate, and the other side could have called them, but didn't" offense. This, too, cannot stand as positive evidence. The time has long since passed to reign in these obfuscations and misapplications of the Rules of Practice.

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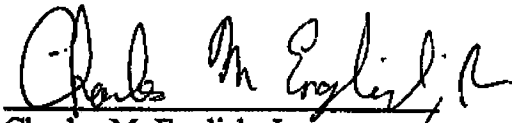
[15] Nothing prevents business competitors from actually testifying, based upon their common business experience and competitive knowledge, about any party's plant operations, products or volumes. But that is wholly different from implying some agreement or substantive evidence from any witness' relying on the accepted rules of confidentiality. Also, refusing to reveal confidential information defensively is different from making a positive statement regarding a purported fact and then claiming confidentiality in refusing to support that very allegation. *See, e.g.*, Tr. 717-718 [Leeman].

IV. CONCLUSION

Federal Orders following Federal Milk Order Reform have been thrown upon the rocks of paper pooling and depooling. This has prevented the Secretary from fulfilling his statutory obligation to maintain orderly marketing conditions. After 5 years, it is long past time that orderly marketing is restored through the elimination of depooling, the limitation on excess pooling of milk not actually standing ready to serve the fluid milk market, and the establishment of proper incentives to serve that fluid milk market, the Secretary can yet salvage this wreck and return us home. Or the Secretary can continue to listen to the delayants and opponents who would rather feather their own nests – and thus by our own follies, can perish, the fools. *The Odyssey*, Bk. 1, l. 7.

Respectfully submitted,



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