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UNITED STATES DEPARTMENT OF AGRICULTURE
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BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
)	
Kreider Dairy Farms, Inc.,)	98 AMA Dkt. No. M 4-1
)	
Petitioner)	

POST HEARING BRIEF OF PETITIONER, KREIDER DAIRY FARMS, INC.

I. Introduction and Procedural History

Since 1993, Kreider Dairy Farms, Inc. ("Kreider") has sought refund, as an exempted producer-handler, of principal and interest for fluid milk fees paid the USDA's Order 2 Market Administrator monthly beginning in 1991 under 7 C.F.R. §1002, the federal milk marketing order for the New York - New Jersey area. The charges have been levied on the grounds that Kreider, by distributing its milk to sub-dealers rather than supermarkets, grocery stores or consumers, violated an unpublished prohibition against "riding the pool" of regulated milk suppliers. After becoming ensnared in a procedural "trap for unwary litigants,"¹ Kreider was not able to vindicate the claim for relief which originated in a Petition filed December 23, 1993 ("Kreider I").

The present petition ("Kreider II"), filed February 17, 1998, seeks review of four years of Market Administrator billings to Kreider for transactions occurring since December 1995, within

¹ Darby v. Cisneros, 509 U.S. 137, 147, 113 S.Ct. 2539 (1993).

two years² of the filing of the second Petition, and through December 31, 1999, when the regulations changed and clarified the producer-handler status of Kreider. A hearing was held on June 15, 2001, before Administrative Law Judge Jill S. Clifton in Washington D.C. This post-hearing brief is now filed on behalf of Petitioner.

II. Proposed Findings of Fact

A. Notice to Kreider by Market Administrator

1. Kreider Dairy Farms, Inc., ("Kreider"), 1461 Lancaster Road, Manheim, Lancaster County, Pennsylvania is a Pennsylvania family farm corporation formed in 1975. Its shareholders include Noah W. Kreider, Jr., and Ronald Kreider. (Tr. 166; Exhibit C hereto)³

2. Kreider owns dairy cattle, milking equipment, a milk processing plant, and dairy stores and restaurants. (Exhibit C; Tr. 166-68)

3. Kreider processes milk produced by its dairy cattle in its plant at Manheim. Kreider does not receive or process milk from any other sources. (Tr. 166-68; Exhibit C)

4. After its formation in 1975, Kreider applied for recognition as a producer-handler under Federal Milk Order 4 (7 C.F.R. § 1004), which regulates the marketing of milk in the Middle Atlantic Marketing Area, including Lancaster County Pennsylvania. Kreider was duly recognized by Order 4 as a producer-handler and has been so recognized ever since. (Tr. 166-170)

5. In December 1990 Kreider received a letter from the Acting Market

² See 7 C.F.R. § 1000.6.

³ Tr references are to the hearing of June 15, 2001; The 2001 hearing exhibits will be identified by the party offering the exhibit and the number. Exhibits from prior hearings are attached to this brief and identified by their prior hearing number.

Administrator, Federal Order 2, stating that he had become aware of Kreider's distribution of milk products to Ahava in the New York-New Jersey milk marketing area. The Acting Market Administrator stated that Kreider would be required to file reports to Order 2 and "may qualify as a producer-handler." (Exhibit B)

6. Kreider immediately contacted the Order 2 office and requested the appropriate forms for producer-handler reporting and application. (Exhibit C)

7. Kreider filed an application for recognition as a producer-handler in January 1991. The application was received by the Market Administrator January 11, 1991. (Exhibit C)

8. Beginning in January 1991 and continuing through December 1999 Kreider timely filed with Order 2 complete and accurate reports of its sales as required by Order 2. Kreider during the same time period also filed with the New York State Department of Agriculture and Markets regular reports of sales to subdealers. These reports were available to the federal Market Administrator. (Exhibits D, E, F)

9. The Order 2 Market Administrator raised no questions about Kreider's producer-handler status until approximately April 1992 when Kreider was informed that a detailed audit of its operation would be conducted to determine its status under Order 2. Thereafter, until mid-summer 1992 an audit of Kreider's activities was performed by Order 2 audit staff.⁴ (Exhibits D, E, F)

10. In August 1992 the Market Administrator of Order 2 determined that Kreider did not qualify as a producer-handler under Order 2 and billings in excess of \$100,000 were sent to Kreider reflecting assessments upon Kreider's sales to Ahava and sales to FPPTLC which were

⁴The auditors reported that "Kreider Dairy Farms, Inc. appears to be what we would define in Order 2 as a producer-handler." (Exhibit F)

distributed in the Order 2 area in New Jersey. (Exhibit E)

11. The August 1992 correspondence from the Market Administrator of Order 2 to Kreider said nothing about whether Kreider's customers purchased fluid milk products from any other source. (Exhibit E)

12. The August 1992 letter from the Market Administrator of Order 2 to Kreider said nothing about the extent or volume of Kreider's sales of milk from it's farm for Class III or (IV) purposes. (Exhibit E)

B. Sales to the FPPTLC

13. Since December 1996 and for years before that, Kreider has had sales each month to the FPPTLC. (Kreider Exhibit 1) The FPPTLC purchases all its fluid milk products exclusively from Kreider. (Tr. 88-100)

14. The FPPTLC distributes the fluid milk products and purchases from Kreider to Jewish seminaries including a large institution in Lakewood, New Jersey. (Tr. 88-100)

15. Neither the FPPTLC nor its customers have ever acquired fluid milk products from sources other than Kreider. (Tr. 88-100)

16. There is no evidence in the record that the FPPTLC has relied in any way on Order 2 sources of fluid milk products or that Kreider has directly or indirectly relied upon Order 2 in any way for its milk production and sales to the FPPTLC.

17. From December 1995 through December 1999, Kreider distributed 6,225,163 pounds of fluid milk products to the FPPTLC. (Kreider Exhibit 2)

C. Sales to other Order 2 Accounts

18. Readdington Farms and Farmland Dairy are pool plants or pool handlers under Order 2. (Kreider Exhibit 1; Respondent's Exhibit 1)

19. Sales by producer handlers to pool plants in Order 2 do not disqualify the producer handler from that status under Order 2. (Tr. 55, 58)

20. Kreider sales to Readdington Farms from December 1995 through July 1997 totaled 4,294,918 pounds of fluid milk products. (Kreider Exhibit 1)

21. Kreider's sales to Farmland from November 1997 through December 1999 totaled 290,513 pounds of fluid milk products. (Kreider Exhibit 1)

22. During the period from December 1995 through January 1998 Kreider had small volumes of fluid milk sales to Jersey Lynn and D.B. Brown, two (2) small Order 2 distributors. The volumes of those sales were respectively, Jersey Lynn 98,519 pounds and D.B. Brown 324,814 pounds. (Kreider Exhibit 1)

23. There is no evidence of record that D.B. Brown or Jersey Lynn were supplied by processors other than Kreider when they purchased from Kreider.

24. Kreider operates a single dairy farm and production facility in Manheim, Pennsylvania from which it distributes milk in Order 2, Order 4, non federally regulated areas of Pennsylvania, and the federal order regulating Western Pennsylvania- Eastern Ohio, and the federal order regulating Michigan (Kreider Exhibit 8; Tr. 166-70; 173-75)

25. All milk produced by cattle on Kreider's dairy farm which is not sold as Class I fluid milk products is marketed as "surplus", that is, it is sold for Class III or IV uses at whatever price Kreider can obtain. (Kreider Exhibit 5)

26. There is no way to determine whether the surplus milk Kreider has is a by product of its Order 4 sales, Order 2 sales, or sales in other areas. (Tr. 173-75)

27. During the period from May 1997 through December 1999, Kreider had surplus milk sales in every month in excess of its total volume of Class I sales in Order 2. In some

months, Kreider surplus was ten times as large as its sales in Order 2. (Kreider Exhibit 5)

28. The Order 2 Market Administrator has always billed Kreider on a per unit basis for each hundred-weight of fluid milk products distributed in Order 2. Consequently, the billings to Kreider for any particular account or sales can be determined by prorating the total billings to the volumes per account during any monthly period.

III. Questions Presented

1. Does Kreider qualify for exemption as a producer handler during the period of May 1997 through December 1999, when all sales were (1) to customers who dealt exclusively with Ahava or (2) to pool handlers?

2. Does Kreider qualify as an exempt producer handler with respect to all sales from December 1996 through May 1997 to FPPTLC and Order 2 pool plants because Kreider had no unearned economic benefit with respect to those sales?

3. Is Kreider entitled to exemption for all purposes under Order 2 since December 1996 because Kreider complied with the Order 2 producer handler regulations?

IV. Argument

A. Kreider is entitled to producer handler status under Order 2 from May 1997 through December 1999.

For the May 1997 through December 1999 period, which Respondent agrees is at issue in this appeal, there is no basis for disqualifying Kreider for producer handler status on any theory. Therefore, Kreider is entitled to a full refund with interest of all of the payments made to the Order 2 Market Administrator during this period of time.

While Kreider continues to adhere to the position, reargued in part C below, that Order 2

does not and has not ever prohibited producer handlers from selling to sub dealers and, therefore, since that has been the only basis for ever disqualifying Kreider, it is not a legitimate basis and Kreider has qualified at all times as a producer handler and should be so recognized.

Nevertheless, for the period of May 1997 through December 1999 which is agreed to be at issue, the record clearly demonstrates that Kreider meets all of the standards which have been articulated by the decision⁵ of Judge Cahn, of the United States District Court, for the Eastern District of Pennsylvania, and the subsequent ruling of Administrative Law Judge Bernstein. Judge Cahn held that Kreider's sales to sub dealers (such as Ahava) were not *per se* disqualifying under Order 2 since such sales in fact did qualify as "distribution" despite the Market Administrator's contentions to the contrary. Judge Cahn held that Kreider was, therefore, entitled to producer handler status unless it was demonstrated that the transaction resulted in some unearned economic benefit because Kreider was able to "ride the pool." On remand the government contended, and convinced Administrative Law Judge Bernstein, that in fact, Kreider was riding the pool with respect to the Ahava transactions for two (2) reasons: (1) Ahava obtained supplies of fluid milk products from pool sources on a regular basis and, arguably or inferentially, could use pool sources (or rely on the pool) to cover for Kreider when Kreider didn't have sufficient volumes to meet Ahava's needs; and (2) the government argued, and convinced Administrative Law Judge Bernstein, that Kreider's low proportion of surplus (non Class I) milk sales indicated that it was taking an unfair advantage of Order 2.

Neither of these conditions are present in the May 1997 through December 1999 period. First, it is undisputed and undisputable, that the FPPTLC has never been supplied by any source

⁵Judge Cahn's decision is attached as Exhibit A. It is published by Westlaw at : 1996 WL 472414.

of fluid milk products other than Kreider. Rabbi Tendler so testified unambiguously and there is nothing more in the record about it. In contrast to the record before Judge Bernstein in 1997, where the Market Administrator had audited Ahava's records and documented the volume of milk which it acquired from other sources, the government has produced no records to dispute Rabbi Tendler's testimony. Consequently, the sales to FPPTLC were solely Kreider's, solely from its own production facilities, and cattle, without reliance in any way upon the Order 2 pool and these sales meet any criteria for producer handler sales which have ever been argued. Furthermore, Kreider's sales to Order 2 pool plants - the sales to Readdington Farms and Farmland - are not disqualifying. While the Assistant Market Administrator was a bit reluctant to acknowledge this, he did so and there is now no question or dispute about that. (Tr.55, 58) Consequently, these sales, to pool plants, are no basis whatsoever for disqualifying Kreider as a producer handler.

Finally, the small volume of sales to D.B. Brown from July through January 1998 are also non-disqualifying. There is no evidence of record that Brown acquired fluid milk products from other sources during this time. Kreider certainly had no knowledge of Brown's acquisition from any other sources and Kreider was not relying upon any Order 2 sources to balance in any way these short term sales to D.B. Brown. In any event, Kreider had plenty of milk to supply any order from Brown (Kreider Exhibit 5)

In summary, for the period from May 1997 through December 1999 it is undisputed that Kreider made no distributions in Order 2 which were disqualifying.

Furthermore, during this period of time Kreider had surplus - Class III/IV milk - which it was required to dispose of at lower prices far in amounts far in excess of any volume which could ever be argued to be indicative of an unearned economic benefit. It is simply indisputable

on this record that from May 1997 through December 1999. Kreider received no unearned economic benefit of any nature from its status as a producer handler in Order 2. Therefore, it is entitled to full refund of the payments made, with interest.

B. Kreider's non-Ahava sales from December 1996 through May 1997 are exempt producer handler sales in Order 2.

Judge Bernstein's 1997 decision determined that Kreider did not meet the Order 2 producer handler definition because it received an unearned benefit with respect to the Ahava transactions. However, that decision did not consider the non-Ahava sales that Kreider had during that period of time and on this record it is clear that those sales are perfectly in conformity with any standard established for qualification under Order 2.

First, as demonstrated above, the sales to FPPTLC did not rely on Order 2 sources in anyway for balancing or covering of Kreider shortages. The FPPTLC was supplied solely by Kreider at all times since prior to 1990. Consequently, there is no way in which Kreider was receiving an unearned economic benefit through its sales to the FPPTLC. Similarly, the sales to Order 2 pool plants, namely Readdington Farms during this period of time, are non-disqualifying sales under Order 2. That fact is now undisputed. Consequently, there is no basis for charging Kreider with respect to such sales. Kreider is entitled to a refund of its payments made to Order 2 on account of the sales to FPPTLC and Readdington Farms during the December 1996 through May 1997 time period.

The argument may be made that one is either a producer-handler or not a producer-handler and that the sales cannot be viewed on an account by account basis. That could arguably be true if the Order 2 Market Administrator had ever treated Kreider in that manner, but he has not. Kreider is one farm and one plant. It has always been recognized as a producer handler in

Order 4 because the farm production, plant production, and distribution are solely under control of Kreider Dairy Farms, Inc. The Order 2 Market Administrator, faced with the fact that Kreider is a recognized producer handler under Order 4, but nevertheless determined to bill Kreider as a non-producer handler under Order 2 came up with the system of billing Kreider only on a transactional basis for its Order 2 sales.⁶ All Kreider asks is that if it is going to be recognized as a producer handler on the basis of sales to particular customers (such as Ahava) then it should be recognized, or not recognized, on that basis with respect to all customers. Clearly, the sales to the FPPTLC and to Readdington Farms are qualifying producer handler sales under every standard which has been enunciated by any judicial authority in this proceeding to date. Consequently, they should be recognized as such and Kreider refunded pro rata the billing which the Order 2 Market Administrator made to it upon such sales.

It is worth noting that Kreider was never placed on any notice by the Market Administrator at anytime that the criteria with respect to (unearned) economic benefits, which were eventually applied by Judge Bernstein in 1997, were in existence or applicable to Kreider. (See Exhibits B-E attached) Consequently, in fairness and equity Kreider's otherwise-qualifying sales to FPPTLC and to pool plants should not be disqualifying and it should be refunded billings related to those accounts with interest.

C. Kreider is entitled to a refund with interest of all billings made with respect to the Ahava account from December 1996 through May 1997.

Without rearguing in full its position here with respect to the Ahava transactions, Kreider continues to assert that Order 2 never has prohibited sales by producer handlers to sub dealers and, therefore, Kreider is entitled to a refund of all payments made on account of sales to Ahava

⁶There is no precedent ever cited for being able to do this and there are no cases in which it has been done.

within two (2) years prior to the filing of this petition. See 7 C.F.R. § 1000.6; 7 U.S.C. § 608c(15)(A). As Kreider previously demonstrated, the promulgation history of Order 2 makes it abundantly clear that there was never a prohibition in the regulation of sales by producer handlers to subdealers. The regulation should be interpreted and applied just as it was written. Kreider is entitled to refund of all payments made with interest because of sales to Ahava from December 1996 through May 1997.

V. Conclusion

On the basis of the foregoing proposed findings and argument, Kreider respectfully requests that the Market Administrator be ordered to refund to it with interest according to law, (1) all payments made from May 1997 through December 1999; (2) all payments from December 1996 through May 1997 to non-Ahava customers; (3) all payments made December 1996 through May 1997 on account of sales to Ahava. The amounts of the payments and interest on the refunds ha been calculated in Kreider Exhibit 6.

RESPECTFULLY SUBMITTED,
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By 

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Dated: August 14, 2001

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KREIDER DAIRY FARMS, INC.

POST HEARING BRIEF

INDEX OF EXHIBITS

Exhibit A

Decision of August 15, 1996; Kreider Dairy Farms, Inc. v. Dan Glickman

Exhibit B

Respondent's Exhibit No. 1; Hearing of December 14, 1994

Exhibit C

Respondent's Exhibit No. 2; Hearing of December 14, 1994

Exhibit D

Respondent's Exhibit No. 5; Hearing of December 14, 1994

Exhibit E

Respondent's Exhibit No. 4; Hearing of December 14, 1994

Exhibit F

Respondent's Exhibit No. 37 (page 1); Hearing of December 14, 1994

1996 WL 472414

(Cite as: 1996 WL 472414 (E.D.Pa.))

<KeyCite History>

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

KREIDER DAIRY FARMS, INC., a Pennsylvania
Family Farm Corporation

v.

Dan GLICKMAN, Secretary of the United States
Department of Agriculture

No. CIV.A. 95-6648.

Aug. 15, 1996.

MEMORANDUM

CAHN, District Judge.

*1 Plaintiff, Kreider Dairy Farms, Inc. ("Kreider"), seeks review of a Decision and Order issued by the Judicial Officer of the United States Department of Agriculture ("USDA"). [FN1] Kreider initiated this case by filing a complaint pursuant to section 608c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* (the "AMAA"). The case arises from the administration of a federal milk marketing order, enacted under the authority of the AMAA, which regulates the sale of milk and fluid milk products in the New York-New Jersey milk marketing area. See 7 C.F.R. § 1002 *et seq.* (1995).

FN1. The Judicial Officer acts on behalf of the Secretary of Agriculture in all adjudicative matters which are appealed to the USDA. See 7 C.F.R. § 2.35 (1995).

Kreider challenges the ruling of the Judicial Officer ("JO") who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2") [FN2] to regulate Kreider as a handler under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk. Pursuant to 7 U.S.C. § 608c(15)(B) of the AMAA, Kreider sought review of the JO's decision by filing a complaint in this court against Defendant Dan Glickman, the Secretary of the USDA ("Defendant" or "the Secretary"). Currently before

this court are Kreider's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. After consideration of the memoranda and the on-record hearing on this matter, this court finds that Defendant's action is not warranted by the record before this court. Therefore, this case is remanded to the Secretary for further factual findings.

FN2. The following provides a helpful background on the purpose of a milk marketing order:

Milk marketing orders issued under the [AMAA] provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and for the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. The procedure is generally as follows:

The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions.... The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

In re Yagur Farms, Inc., 33 Agric. Dec. 389, 391-92 (1974) (quoting *Grant v.*

Benson, 229 F.2d 765, 767 (D.C.Cir.1955), *cert. denied*, 350 U.S. 1015 (1956)).

PROCEDURAL HISTORY

Kreider initiated these proceedings on December 23, 1993, by filing a Petition with the USDA pursuant to section 608c(15)(A) of the AMAA. An Answer to the Petition was filed by the Administrator of the Agricultural Marketing Service, USDA, on February 25, 1994. On December 14, 1994, a hearing was held before an administrative law judge ("ALJ").

In a Decision and Order dated March 20, 1995, the ALJ held that Kreider qualified as a producer-handler under Order 2 and stated that Kreider was therefore entitled to a full refund of all sums which it had been required to pay into producer-settlement and administrative funds established under the Order. As of November, 1994, these sums totalled \$543,864.68. The ALJ denied Kreider's request for interest on the amount paid.

The Agricultural Marketing Service filed its Appeal to the ALJ's Decision on May 5, 1995. Also on May 5, 1995, Kreider filed a Cross-Appeal concerning its right to interest on the refund. On September 28, 1995, the JO issued a Decision and Order reversing the ALJ and upholding the MA's decision to regulate Kreider as a handler under Order 2. *See In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, 1995 WL 598331, at *2 (USDA Sept. 28, 1995).

On October 18, 1995, following the issuance of the JO's Decision and Order, Kreider filed its Complaint with the United States District Court for the Eastern District of Pennsylvania. On December 29, 1995, Defendant filed its Answer to the Complaint.

FACTUAL BACKGROUND

*2 Kreider is a dairy farm corporation with its principal office in Manheim, Pennsylvania. Manheim is located within what the USDA considers to be the Middle Atlantic area, a region in which sales of milk are regulated by Federal Milk Marketing Order 4. *See 7 C.F.R. § 1004 et seq.* (1995). Although Kreider is physically located within the boundaries of Order 4, it sells fluid milk

in the marketing area covered by Order 2.

Since 1990, Kreider has been selling packaged kosher fluid milk to two subdealer/handlers, the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. (the "FPPTLC") and Ahava Dairy Products, Inc. ("Ahava"). The FPPTLC is a distributor of fluid milk and milk products and is located in Baltimore, Maryland. It sells fluid milk to customers in Lakewood, New Jersey. Ahava, which is also a distributor of fluid milk and milk products, is located in Brooklyn, New York. Ahava distributes its dairy products in Brooklyn, Manhattan, and Queens, New York. Its customer base encompasses between 800 and 1,100 customers consisting of grocery stores, restaurants, and schools.

In December, 1990, the MA responsible for administering Order 2 learned that Kreider was selling fluid milk to Ahava for distribution into the milk marketing area covered by the New York-New Jersey Milk Marketing Order. Subsequently, the MA determined that Kreider also sold fluid milk to the FPPTLC, which distributed it into the Order 2 marketing area.

By letter dated December 19, 1990, the MA informed Kreider that it might be subject to regulation under Order 2 and instructed it to file reports with the MA's office. In January 1991, Kreider filed an application for a producer-handler designation with the MA for Order 2. The MA denied the application based on its determination that Kreider did not meet the requirements of a producer-handler as defined in § 1002.12 of Order 2. *See 7 C.F.R. § 1002.12* (1995). Instead, in July 1992, following audits of Kreider, the MA concluded that Kreider should be billed as a regulated handler operating a partial pool plant under Order 2. On August 7, 1992, the MA sent a billing statement to Kreider, billing it as a regulated handler under Order 2 for the period November 1991 to June 1992. Subsequently, the MA continued to bill Kreider on a monthly basis as a handler operating a partial pool plant. As of December 14, 1994, the time of the hearing before the ALJ, the total amount which Kreider had paid to the MA was \$543,864.68.

STANDARD OF REVIEW

A district court's review of an MA's decision is limited to whether the decision was warranted by the

record and has a rational basis in the law. *Marigold Foods, Inc. v. Butz*, 493 F.2d 60, 62 (8th Cir.1974).

The court cannot engage in a de novo fact finding process. *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir.1968), *cert. denied*, 394 U.S. 929 (1969). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Assn v. State Farm Mutual*, 463 U.S. 29, 43 (1983). However, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Because the MA's decision appears arbitrary on the basis of the record before this court, this case is remanded for further factual findings.

DISCUSSION

*3 In the instant motion Kreider raises four claims: first, that Defendant's application of the Order 2 producer-handler regulations to Kreider is not in accordance with the law; second, that the MA should be estopped from changing Kreider's status as a producer-handler because the MA initially approved this status for Kreider; third, that Defendant's application of Order 2 to Kreider's distribution of kosher milk products impermissibly interferes with the First Amendment rights of Ahava and its customers; and fourth, that Kreider is entitled to declaratory and injunctive relief and a refund of all payments made pursuant to the unlawful application of the order, with appropriate interest upon the refund. Because Kreider failed to raise the First Amendment and estoppel claims before the Judicial Officer, this court will not consider these claims. *United States v. Daylight Dairy Products, Inc.*, 822 F.2d 1, 2 (1st Cir.1987) (stating that "a district court, when enforcing a marketing order, cannot consider legal challenges to the order until after the handler has pursued his administrative remedy") (citations omitted). [FN3] Therefore, this court confines its discussion to Kreider's first and fourth claims.

FN3. Even if this court were to consider the First Amendment and estoppel claims, it would concur with the ALJ's decision. The ALJ found that Plaintiff had no standing to assert the claim under the First

Amendment. This finding is supported by *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (finding that respondents, who objected to the government's donation of property to a religious organization on First Amendment grounds, had no standing because "[t]hey fail[ed] to identify any personal injury suffered ... as a consequence of the alleged constitutional error"). The ALJ found no undue delay on the part of the MA in reaching his decision with respect to Plaintiff's producer-handler status. This court also finds that the record does not support Kreider's assertion that the Market Administrator misled Kreider as to whether Kreider would qualify for producer-handler status. The record shows nothing more than a misunderstanding between Kreider and the MA, and is therefore insufficient to support an estoppel claim. "When estoppel is alleged against the United States, the [party asserting this] must also prove 'affirmative misconduct' on the part of the government." *United States v. St. John's General Hospital*, 875 F.2d 1064, 1069 (3d Cir.1989). Further, even if the MA had given Kreider erroneous information about its potential for attaining producer-handler status, this does not mean that the Secretary should be bound by that act. *See In re Yasgur Farms, Inc.*, 33 Agric. Dec. at 412 ("[I]t is settled that a handler relies on erroneous advice by the Market Administrator's office at his peril.") (citations omitted).

I. Whether Kreider Qualifies for Producer-Handler Status

Kreider offers two arguments supporting its designation as a producer-handler. Kreider asserts first that the promulgation history of the Order 2 producer-handler regulations establishes that distribution to subdealers is not prohibited. Second, Kreider contends that the plain language of the Order 2 producer-handler regulation establishes that Kreider meets all of the requirements. Because Kreider's second assertion is more logically the starting point for a determination of Kreider's status under Order 2, this court will examine these claims in reverse order. Additionally, the court will examine the JO's findings that departmental

precedent does not support the ALJ's decision that producer-handlers are not prohibited from distributing to subdealers and that Kreider's interpretation of the exemption is antithetical to the federal milk marketing scheme and would defeat the purpose of Order 2.

A. The Plain Language of the Order 2 Producer-Handler Regulation

There are three subpoints to Kreider's plain-language argument. Kreider asserts that "the syntax of the Order 2 producer-handler regulations establishes that there is no requirement that producer-handlers have any specific role in the distribution of their fluid milk products after the products leave their plant." (Pls.' Br. Supp. Mot. Summ. J. at 19.) Kreider also contends that its interpretation is supported by the cancellation provisions of the order. *Id.* at 22-23. Finally, Kreider asserts that the order's treatment of the delivery of producer-handler milk products to regulated pool plants supports its interpretation. *Id.* at 23.

1. The Syntax of Order 2

The relevant language of the Order reads as follows:

*4 (b) Requirements. (1) The handler has and exercises (in his capacity as a handler) complete and exclusive control over the operation and management of a plant at which he handles milk received from production facilities and resources (milking herd, buildings housing such herd, and the land on which such buildings are located) [,] the operation and management of which also are under the complete and exclusive control of the handler (in his capacity as a dairy farmer), all of which facilities and resources for the production, processing, and distribution of milk and milk products constitute an integrated operation over which the handler (in his capacity as a producer-handler) has and exercises complete and exclusive control.

7 C.F.R. § 1002.12(b)(1). Kreider asserts that it is significant that the exempt entity is called a "producer-handler" as opposed to a "producer-handler-distributor" or "producer-distributor." (Pls.' Br. Supp. Mot. Summ. J. at 20.) Kreider contends that when the language of this section of Order 2 is parsed, "it demonstrates a precise concern with the facilities and

resources for the production and processing of milk, but no concern whatsoever with respect to facilities of, or means of, distribution." *Id.* Kreider further asserts that

[i]f the regulation ... was intended to require that producer-handlers have distribution facilities to deliver the milk products directly to the consumer or to the store which sells to the consumer, the regulation, to be logical and consistent, would have specified the types or categories of distribution facilities that were contemplated, just as it did with respect to the farm and plant facilities.

Id. at 22.

In assessing this argument, the JO found that Kreider is "attempting to meet the 'plain language' [of the producer-handler regulation] by putting a meaning on the word 'distribution' which the word cannot bear ...". *In re: Kreider*, 1995 WL 598331, at *21. The JO stated "the Order declares that the 'production, processing, and distribution of milk and milk products' must constitute an 'integrated operation' over which the producer-handler has and exercises 'complete and exclusive control.'" *Id.*

This court finds that the order is ambiguous. The order clearly states that a producer-handler must have complete and exclusive control over distribution facilities and resources, not simply distribution in general. However, while production facilities and resources are defined as "milking herd, buildings housing such herd, and the land on which such buildings are located," there is no definition of distribution facilities. Thus, it does not appear to this court to be clear from the plain language of the order what the distribution facilities are that must be under the complete and exclusive control of the producer-handler.

2. Order 2's Cancellation Provisions

Kreider also contends that the cancellation provisions of the regulation supports its interpretation of "producer-handler." Kreider notes that the cancellation provision, 7 C.F.R. § 1002.12(c), mentions nothing about cancellation for delivery to subdealers but addresses all of the other substantive requirements for producer-handler status. (Pls.' Br. Supp. Mot. Summ. J. at 22.) Kreider points to the three specific instances of cancellation covered in this section of the regulations:

*5 (1) Transfer of cows or production resources to the name of another person who then sells the milk into the pool as producer milk; (2) purchase/transfer into the producer-handler operation of cows or facilities previously used to supply pool milk (except after notice and only during the 'flush' months of the year; and (3) handling fluid milk products from other handlers in amounts exceeding the exempt limits.

Id. at 23 (citing 7 C.F.R. § 1002.12(c)). In response, Defendant cites the JO's finding that "the catch-all provision contained in § 1002.12(c) which states that producer-handler status may be canceled if any of the requirements contained in § 1002.12(b) of the regulation are not met, served to effectively provide that sales to subdealer handlers would be grounds for cancellation." (Def.'s Resp. Pls.' Br. Supp. Mot. Summ. J. & Br. Supp. Cross- Mot. Summ. J. at 23 (citing *In re: Kreider*, 1995 WL 598331, at *22).)

Because this court finds the requirements set forth in section 1002.12(b) ambiguous for the reasons previously stated, Defendant's argument is not a satisfactory explanation of why the cancellation order does not include dealing to subdealers when it does speak to other activity clearly prohibited by the requirements section.

3. Order 2's Treatment of the Delivery of Producer-Handler Milk Products to Regulated Pool Plants

Kreider's final argument concerning the plain language of Order 2 is that the Order "specifically contemplates the delivery of producer-handler milk products to regulated pool plants and establishes the consequences of those transactions (in terms of allocating and pricing the milk)." (Pl.'s Br. Supp. Mot. Summ. J. at 23 (citing 7 C.F.R. § 1002.45(a)(8)(iii).) Kreider asserts that although such sales are discouraged by treating such deliveries as non-pool deliveries and thereby possibly subject to compensatory payments, such sales are allowed and do not affect a producer-handler's status. *Id.* In considering this argument of Kreider, the JO found:

[t]he Order must dictate how all milk and milk products are allocated and priced from every conceivable source. Otherwise, there would be a gap in the regulatory scheme. But it is neither logical nor necessary to include the consequences to a producer-handler of delivering milk to a

subdealer in the "allocation" provisions of the Order. That section is concerned only with the consequences to the pool plant of receiving milk from particular sources.

In re: Kreider, 1995 WL 598331, at *22 (citation omitted).

This court agrees with the JO that there is no reason to assume that a section on allocation should deal with consequences to a producer-handler for delivering to a pool-handler. However, as noted above, this court finds the order to be ambiguous. If there is ambiguity, it is appropriate to turn to the legislative history. *See, e.g., In re Wileman Bros. & Elliott, Inc.*, 49 Agric. Dec. 705, 798 (1990) (stating that "[i]t is appropriate to consider all of the legislative history in the rulemaking records before the Secretary," and that "where the Secretary's intent is revealed, the regulations should be construed, insofar as possible, in accordance with the Secretary's intent").

B. The Promulgation History of Order 2 Producer-Handler Regulations

*6 Kreider contends that a "[r]eview of [the] record demonstrates that the [USDA] specifically refused to adopt a prohibition of producer-handler sales to subdealers." (Pl.'s Br. Supp. Mot. Summ. J. at 13-14.) The parties agree on the relevant facts of the promulgation history.

The producer-handler exemption currently contained in the New York-New Jersey Milk Marketing Order was first promulgated in 1958 through amendments to what was then Milk Marketing Order No. 27. Prior to 1958, milk from a handler's own dairy farm was exempt from the pooling requirements of the New York-New Jersey Order on the following basis:

(2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.

(3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such point.

7 C.F.R. § 927.65(h).

The 1958 hearings were called (insofar as the producer-handler issue was concerned) to consider

proposed amendments to the producer-handler exemption cited above. The hearings resulted from concern in the milk industry that the terms of the exemption needed to be better defined and more stringently enforced.

Subsequent to the rulemaking hearings, several handler organizations submitted proposals as to how the Secretary should address the producer-handler issue. The largest handler group in the area, the Milk Dealers' Association of Metropolitan New York, Inc., advocated either elimination of the producer-handler status or limitation on the amount of a producer-handler's milk which could be exempt from regulation. If the producer-handler exemption were to remain in effect, this group advocated a complete prohibition on milk sales to subdealers by producer-handlers.

On June 11, 1958, the Secretary issued his Recommended Decision concerning amendments to the New York-New Jersey Milk Marketing Order. The Secretary did not specifically prohibit sales to subdealer handlers. Instead, the Recommended Decision set forth the following requirements for producer-handler status:

(b) Requirements: (1) the handler owns the plant which he operates in his capacity as a handler and also owns, in his capacity as a dairy farmer, the milking herd, the buildings housing the milking herd, and the land on which such buildings are located, all of which constitute the milk production, processing, and distributing facilities and resources of the handler's operation as a producer-handler....

7 C.F.R. § 927.15.

After the publication of the Recommended Decision in the Federal Register, various handler organizations filed exceptions with the Secretary, advocating inclusion of specific language to prohibit producer-handlers from selling milk to subdealers.

When the Final Decision was issued, it did not include specific language barring sales to subdealers.

As can be determined from a comparison of the recommended and current orders, the altered language of what is now the current order adds, among other things, the requirement that the producer-handler have complete and exclusive control over the facilities and resources for the production, processing and distribution of milk and milk products and that such constitute an integrated

operation.

*7 Although both Kreider and Defendant agree on the events of the promulgation history, they of course interpret them in different ways. Kreider asserts that this history shows that the Secretary specifically chose not to include a prohibition on distribution to subdealers in the requirements for producer-handlers. Defendant's argument appears to fall back on its plain language argument: "the Judicial Officer ... turned to the language of the Final Decision itself and noted that 'the new language in the Final Decision, as opposed to the [language of the] Recommended Decision ha[d] the effect of barring sales to subdealers.'" (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 34 (citing *In re: Kreider*, 1995 WI 598331, at * 25).) As previously stated, the plain language of the Order does not clearly have this effect. Further, the promulgation history lends some support to Kreider's interpretation of Order 2's producer-handler requirements.

C. Departmental Precedent

The JO and Defendant rely primarily on *In re Smoot Jersey Farms*, 30 Agric. Dec. 713 (1971) as support for their contention that producer-handlers under Order 2 cannot engage in subdealing. In *Smoot* the relevant milk order, Order No. 136, contained the following requirement for producer-handlers: "The operation of the milk production, processing, and distributing facilities are under the complete and exclusive control of such person and at his sole risk." *Smoot*, 30 Agric. Dec. at 719 (citing 7 C.F.R. § 1136.8(c).) The petitioner in *Smoot* was an individual doing business as Smoot Jersey Farms for many years prior to the formation by his sons and his daughters-in-law of Smoot Dairy Sales, which was formed for the purpose of distributing milk products produced and processed by the petitioner. *Id.* at 715. The operations of Smoot Jersey Farms and Smoot Dairy Sales were conducted on the same premises as follows:

Among other things, the premises housed a milking barn and processing facilities under the control of petitioner, and a cooler or storage area with a loading dock which was leased by and controlled by Smoot Dairy Sales. Milk was produced, packaged, and bottled in the area controlled by petitioner. It was then placed in the cooler which was controlled by Smoot Dairy Sales, and distributed from the dock on retail and

wholesale routes by [Smoot Dairy Sales].

Id. at 715-16. The JO in *Smoot* ruled that the petitioner did not qualify as a "producer-handler" because "the distribution of the milk produced and processed by petitioner is not under the exclusive control or at the risk of petitioner, but is, rather, at the risk and control of Smoot Dairy Sales." *Id.* at 721. In *Smoot*, the JO defined "distribution" as follows:

Petitioners would have us define as a distribution the transfers of processed milk into the cooler and depot. This we cannot do *in the context of a milk order* issued pursuant to the act. Order No. 136 and milk orders issued pursuant to the act generally are constructed on the basis of distribution from regulated plants and not mere intra-plant transfers of milk. The distribution of fluid milk products takes place when such products are taken from the plant and a mere transfer from the processing section therein to storage facilities on the plant premises does not constitute a distribution.

*8 *Id.* at 719-20 (citations omitted).

This case does not appear to squarely support the JO's and Defendant's interpretation of Order 2 as applied to Kreider. In *Smoot*, the Judicial Officer's assertion that "[t]he distribution of fluid milk products takes place when such products are taken from the plant" does not clearly prohibit a producer-handler from distributing to subdealers so long as the producer-handler itself takes the product from its plant. In the instant case, it is undisputed that Kreider uses its own trucks to distribute to Ahava and the FPPTLC. Therefore, under *Smoot*'s definition the distribution of Kreider's fluid milk products is under Kreider's complete and exclusive control.

D. The JO's Finding that Kreider's Interpretation of the Exemption is Antithetical to the Federal Milk Marketing Scheme

The JO and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind Order 2's producer-handler exemption. The JO explains the economic purpose as follows:

"[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the

necessary burdens of surplus milk ... through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated...."

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool-riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

[Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

*9 This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n. 2.) Because of Ahava's special

requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [FN4]

FN4. For example, Ahava has determined that "Farmland Dairies, a major fluid milk processor in the Northern New Jersey-New York area, although entirely owned by a family of the Jewish faith ... was unacceptable as a source of kosher milk" to New York's ultra-orthodox Jewish community, which makes up Ahava's customer base. (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 5.)

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of Order 2 is ambiguous and the MA's action is not clearly supported by the promulgation history of Order 2 or departmental interpretation. "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." 7 U.S.C. § 608c(15)(B), *see also Minnesota Milk Producers Ass'n v. Yeutter*, 851 F.Supp. 1389, 1398 (D.Minn.1994) (finding that the Secretary's final decision did not provide sufficient explanation so that it could be determined that it meets the requirements of the AMAA and remanding to the Secretary for additional findings of fact and explanation); *Oak Tree Farm Dairy, Inc. v. Butz*, 390 F.Supp. 852, 857 (E.D.N.Y.1975) (remanding the case for "further administrative exploration of the contentions raised here"); *In re: County Line Cheese Co., Inc.*, 44 Agric. Dec. 63, at *1 (1985) ("If the Secretary had failed to engage in reasoned agency decisionmaking, it would have been appropriate to remand the proceeding to the Secretary for the purpose of issuing revised findings."). Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

II. APPROPRIATE RELIEF

Kreider asserts that it is entitled to a judgment declaring that the application of the Order 2 producer-handler regulation to "its sales in Order 2 is not in accordance with law; that further enforcement of the regulations in this manner should be permanently enjoined; ... that the Market Administrator should refund to Kreider the payments made pursuant to the invalid application of the regulations; and that reasonable interest should be added to the refunds." (Pl.'s Br. Supp. Mot. Summ. J. at 28-29.) For the reasons stated below, this court finds that Kreider is entitled to a refund and interest should it be found that Kreider qualifies for the status of a producer-handler.

*10 In his Decision and Order, the JO ruled that Kreider would not be entitled to a return of the principal amount paid into Order 2 even if it were to prevail in this case:

In fact, if I were to conclude that Petitioner meets the criteria in 7 C.F.R. sec 1002.12(b)(1) of a producer-handler, I would hold that there would be no retroactive relief even as to the principal. That is because under the definition of producer-handler, a producer-handler is not a person who meets the requirements of paragraph (b), but, rather, is a person who "has been so designated by the market administrator upon determination that the requirements of paragraph (b) of this section have been met.

In re: Kreider, 1995 WL 598331 at *35 (citations omitted). It is undisputed that Kreider never received producer-handler designation under Order 2. However, at issue in the instant case is whether the MA erroneously denied Kreider's application for such a designation. In *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389 (1974), the JO discussed the propriety of lump sum refund payments for money previously paid into the producer-settlement fund by those later claiming producer-handler status, and stated that "[s]uch a lump sum payment must be made, at times, where it is determined that the Market Administrator erroneously imposed an obligation upon a handler during a prior period." *Id.* at 407 n. 5. Therefore, if it is determined that the MA's failure to designate Kreider as a producer-handler is erroneous, a refund is in order.

This court also finds that interest should accompany this refund. *See Sani-Dairy v. Yeutter*, Civ. A. No. 90-222J, 1995 WL 848950, at *2 (W.D.Pa. Mar. 27, 1995) (finding it appropriate that interest be allowed on a refund from the producer-settlement

fund), *aff'd*, No. 95-3304, 1996 WL 427870 (3d Cir. July 31, 1996); *see also* *Kinnett Dairies, Inc. v. Madigan*, 796 F.Supp. 515, 516 (M.D.Ga.1992) (ordering refunds from producer-settlement funds and interest on the refunds); *Cumberland Farms, Inc.*, CIV. No. 88- 2406(CSF) 1989 WL 85062, at *2 (D.N.J. July 18, 1989) (stating that "[i]t is well settled that a reviewing court may award monetary damages under the AMAA ... and that a reviewing court may award interest on these amounts") (citations omitted). [FN5] Therefore, should it be determined that a refund is due to Kreider, such a refund should be awarded with interest based on the average monthly prime lending rate prevailing from the date Kreider first paid into the producer-settlement fund until the date Kreider is refunded in full. *See Sani-Dairy*, 1995 WL 848950 at *3 (ordering interest based on the average monthly prime lending rate prevailing from the date payment was first made into the producer-settlement fund "until the date that payment of damages to plaintiffs is made in full"). The Secretary of Agriculture is directed to calculate and award the interest due.

FN5. This court finds Defendant's argument against awarding interest unpersuasive. First, Defendant cites *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59-60 (1985), *aff'd*, No. 85-7179 (N.D. Ohio, Dec. 12, 1986), *aff'd* 857 F.2d 1065 (6th Cir.1988), and *In re M.H. Renken Dairy Co.*, 14 Agric. Dec. 794, 807 (1955), for the proposition that "section 8c(15)(A) of the [AMAA] does not contain any language authorizing an award of interest to a handler who prevails in a 8c(15)(A) proceeding." (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 49.) These cases are clearly contradicted by the more recent cases cited in this memorandum. Second, Defendant's citation of *In re Lawson Milk Co.*, 22 Agric. Dec. 126, 22 Agric. Dec. 455 (1963), *aff'd*, 358 F.2d 647 (6th Cir.1966), is inapposite. The *Lawson* court determined not that interest on an overpayment was inappropriate generally, but that by the terms of that particular milk marketing order the refund was not yet overdue and therefore interest had not yet accrued on it. *Lawson*, 358

F.2d at 650. Third, Defendant cites to several Supreme Court cases. However, these cases are distinguishable from the instant case in that they pertain to the awarding of interest in contract or tort actions against the United States as opposed to the award of interest in connection with the refund of an overpayment. Finally, Defendant cites *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed.Cir.1993), which this court finds unpersuasive, particularly in light of the fact that *Sani-Dairy* was recently affirmed by the Third Circuit.

Therefore, if Kreider is eligible for producer-handler status, this court finds that the appropriate remedy is to direct the Secretary to apply the producer-handler status to Kreider and to provide Kreider with a refund plus interest on the sum of \$543,864.68, which Kreider has paid into producer- settlement and/or administrative funds.

CONCLUSION

*11 This court finds that neither the plain language of Order 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is "riding the pool" in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court. Therefore, this action is remanded to the Secretary for further factual findings and a decision in accordance with this memorandum.

ORDER

AND NOW, this day of August, 1996, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, the responses thereto and the on-record hearing, it is hereby ORDERED that these motions are DENIED. The case is remanded to the Secretary of Agriculture for further factual findings and a decision consistent with this memorandum. The clerk is directed to close the within case for statistical purposes.

END OF DOCUMENT

MARKET ADMINISTRATOR
NEW YORK — NEW JERSEY MILK MARKETING AREA

708 THIRD AVENUE, NEW YORK, NEW YORK 10017

212 — 309-1600

Culler
1/20/90
Sp...

John

December 19, 1990

Mr. Noah Kreider, Sr.
Kreider Dairy Farms, Inc.
R. D. 5
Doe Run Road
Nevin Ball, PA 17545

1/20/90

Dear Mr. Kreider:

It has come to the attention of this office that you are supplying packaged fluid milk products to Ahava Dairy Products, Inc., 120 Third Street, Brooklyn, NY 11231 for distribution in the New York-New Jersey Milk Marketing Area. Pursuant to Section 1002.30 of the orders regulating milk in the New York-New Jersey milk marketing area, you are required to submit a report of receipts and utilization to this office. Accordingly, you will find enclosed copies of the required report forms, along with a copy of Order No. 2 Regulating the handling of milk in the New York-New Jersey Marketing Area. The report for the month of November 1990 or any prior period in which you supplied milk to Ahava Dairy should be promptly filed with this office.

You may qualify as a Producer-Handler under this order pursuant to Section 1002.12. If you believe this to be the case, please contact John Poole at this office for the appropriate application forms. Otherwise, you may have a payment obligation to the Producer Settlement Fund of the order.

Yours truly,

Dick High

Ronald C. Pearce
Ronald C. Pearce
Acting Market Administrator

Enclosures

RESPONDENT'S EXHIBIT NO. 1

MARKET ADMINISTRATOR
NEW YORK-NEW JERSEY MILK MARKETING AREA
708 Third Avenue, New York, New York 10017
212 - 309-1600

This report is required by the Order in accordance with 7 U.S.C. 608c and d. Failure to report can, upon conviction, result in a fine of up to \$5,000 per day (7 U.S.C. 608c(1)(4)).

JAN 11 9 41 APPLICATION FOR DESIGNATION AS PRODUCER-HANDLER

Please answer all of the following questions. If they do not apply to your operation, insert N/A (not applicable).

1. Legal Name of Handler Kreider Dairy Farms Inc
Doing Business As Same
Post Office Address 1461 Lane Rd. Manheim Pa 17545
Street Town State Zip Code

2. Type of Organization:
Corporation State of Incorporation Pa Date 6-1-75
Partnership Date of Agreement _____ Oral Written
Proprietorship Number of Years _____

If a corporation or partnership list officers or partners:

Name	Title	Percentage of Ownership
<u>Richard Kreider</u>	<u>Pres.</u>	<u>50%</u>
<u>Noah Kreider Jr.</u>	<u>Sec. Treas.</u>	<u>50%</u>

3. In the event the plant of the applicant was operated by a handler (including applicant) whose designation as a producer-handler had been previously cancelled pursuant to Sec. .12 (c) of the marketing orders, list the quantities and sources of whole milk, fluid skim milk or cream, handled during each of the twelve (12) months preceding this application, derived from sources other than applicant's milk production facilities and resources:

Year	Month	PRODUCT POUNDS			Sources
		Whole Milk	Fluid Skim Milk	Cream	
	January				
	February				
	March				
	April				
	May				
	June				

RESPONDENT'S EXHIBIT NO. 2

(page 1 of 6)

- July
- August
- September
- October
- November
- December

Milk Production Resources and Facilities

Name and location of each farm operated by applicant. If not located on a named street numbered highway give the numbered highway closest to the farm. Indicate by check mark the farm upon which a milk house is situated.

<u>Name</u>	<u>Milk House</u>	<u>Street or Highway</u>	<u>Village Town or City</u>	<u>County</u>	<u>State</u>
Kraider Dairy Farms Inc		Indian Village Rd	Manheim	Lancaster	Pa

i. Cow Inventory

<u>Name of farm upon which located</u>	<u>Fresh</u>	<u>Dry</u>	<u>Heifers</u>	<u>Total</u>
Kraider Dairy Farms Inc	408	47	—	455

ii. State applicant's milk production by weight for the twelve (12) months preceding the month in which this application is filed:

<u>Month</u>	<u>Year</u>	<u>Milk Lbs.</u>	<u>Month</u>	<u>Year</u>	<u>Milk Lbs.</u>
January	90	548,995	May	90	574,386
February	90	521,237	June	90	533,117
March	90	571,046	July	90	547,459
April	90	578,729	August	90	543,362
			September	90	524,700
			October	90	561,900
			November	90	609,000
			December	89	545,422

RX-2
(page 2 of 6)

7. Location of applicant's plant where milk is received from applicant's own production facilities.

Doc King Road Village Manitowish Town or City Lane County Pa St

8. Plant operated by applicant since (give date) 6-1-72

9. If the applicant's plant was formerly operated by another, give name (if not, state):

N/A

10. List by brief description all real and personal properties (equipment) used in production, processing and distribution of milk.

- a. Farms k. 4 SS Laddin tanks 155 cu ft
- b. 2 - Freestall Barns l. Excelsior 1/2 gal R. Paper Carton M.
- c. 2 - double 8 milking parlors m. 500 ⁵⁰⁰ pint - 1/2 pt
- d. 2 - Milking Systems n. Federal 12 1/2 lb. plaster gully
- e. 5 - Bulk Farm Milk tanks o. Tractor ^{45'} in ^{45'} in ^{45'} in
- f. Ford Bulk Milk Truck (for hauling milk to plant) p. Auto parts small items to
- g. Buildings having Processing Plant q. various to mention
- h. 1000 sq ft short time Pasture r. Various Farm things to plant
- i. Pauli Homogenizer s. Corn + dirt and manure
- j. West Failure Separator t. Handing ^{1/2} ^{1/2}

11. Provide the following information for each license (exclusive of a health appr issued by a governmental agency permitting applicant to engage in the handling of milk products.

Name of Agency	License Number	Date Issued	Date of Expiration	Type of Operation	Geographic
a. Pa Dept of Ag ^{Bureau} Food & Chemistry	012	7/28/90	8/31/91	Plant Sell Past. Milk - Pa	Pa.
b. New Jersey State Dept of Health	320323	9/9/90	6/30/91	operate a milk plant	N.J.
c. NY Dept of Milk ^{central}	295	10/15/90	6-30-91	Milk processed is also by one	N.Y.
d. Dept of Health + Mental Hygiene Dir of Milk Central	0915	3/28/90	5-1-91	farm production operate plant to pasteurize + processing milk + other products	M

Provide the following information for each health authority permitting applicant to set milk in the marketing area.

<u>Name of Health Authority</u>	<u>Permit Number</u>	<u>Date Issued</u>	<u>Date of Expiration</u>	<u>Geographic Area</u>
	N/A			

In the event a license or health permit listed under schedules 11 and 12 herein is in name of a person (individual or corporate) other than applicant, after making reference the schedule number and item, provide full details and the name and address of the other person. If each license and permit is in the name of applicant answer NONE.

<u>Schedule No.</u>	<u>Item</u>	<u>Remarks</u>
		None

List the names and addresses of each other person using a part of applicant's plant.

<u>Name</u>	<u>Address</u>	<u>Describe Operations</u>
		used only by applicant

List below the pounds of each product of another dairy farmer, plant or other person handled by applicant for any purpose:

	<u>Whole Milk</u>	<u>Fluid Skim Milk</u>	<u>Cream</u>
<u>Month of Application, to date</u>			
<u>First Preceding Month</u>			
<u>Second Preceding Month</u>			

RX-2
(page 4 of 6)

Milk Pounds

	Bulk to other Plants*	Dairy Stores of Applicant	Routes Operated by Applicant	Routes Operated by Others
--	-----------------------	---------------------------	------------------------------	---------------------------

Month of Application, to date 1-5-91	27, 700 lbs	45, 000	112	142
First Preceding Month Dec	105, 358 lbs	173, 500		616
Second Preceding Month Nov	50, 300 lbs	190, 500		347

*Give name and address of:

Other Plants

Routes Operated by Others

- a. Dairy Plant Dairy
- b. _____
- c. _____
- d. _____
- e. _____

17. In the event one or more of the properties listed in schedules 4, 5, 7 and 10 h. are not exclusively owned by the applicant state fully after reference to the number of schedule and item the bases for applicant's use and control.

<u>Schedule No.</u>	<u>Item</u>	<u>Remarks</u>
		N/A

18. Give the name and address of each other person (including a partnership or corporation) having or exercising any degree of ownership or control or having a contractual arrangement with respect to the applicant's production, processing and marketing of milk products. Provide a brief statement of each other person's interest.

List of Partners

Associated Operations

If there are any other resources and facilities used in the production, handling or processing of milk or milk products in which the applicant in any way has an interest including any contractual arrangement (if none so state), give below a list thereof together with complete information as to their ownership, management and control and the nature and extent of the applicant's interest in or activity associated therewith. If the applicant is a corporation, this description must include the interest and activities of any director, officer, substantial stockholder or executive employee:

JAN 11 11 40 AM '91
NONE

Give any other information not specifically provided for in this application which may be necessary to show that the requirements for designation as a producer-handler as set forth in Section .12(b) are being met:

we own + operate and directly manage all facets of Milk products (from crops, feed, manure, milking) processing (fluid milk from farm to factory, homogenizing, standardizing, packaging, fluid milk in paper cartons 1/2 pt or 1 qt) and distribution (trucks + haul) to New York city market 3 times per week.

The undersigned, hereby affirms that the information given in this application is true and complete to the best of his knowledge, information and belief:

Applicant's Name Kreider Dairy Farms Inc.

Signed by Walter Kreider Jr.
(Person authorized to sign on behalf of handler)

Title Sec. Treas. Date 1-8-91

KREIDER FARMS

N. W. KREIDER & SONS
KREIDER POULTRY FARMS

KREIDER DAIRY STORES
KREIDER DAIRY RESTAURANTS

1461 LANCASTER ROAD • MANHEIM, PA 17545
Phone: (717) 665-4415

AUGUST 07, 1992

Mr. Ory Egnoto
New York - New Jersey Market
1 Columbia Circle
Albany, New York 12203

Dear Mr. Egnoto:

Within Order #2 audit of Kreider Dairy Farms, Inc. you have extended courtesies and an open invitation to direct any questions, comments, requests etc. directly to you.

During the audit we had made requests for a post audit meeting in order to discuss your findings. When George Portio visited us on July 20 we were under the assumption his visit would include a presentation of your determination and a request to complete a partially pooled plant report commencing with July, 1992.

Mr. Portio did present the partially pooled plant report concept. We discussed our reworking June, 1992 report and presenting it as a test for your critique. Mr. Portio did not present any determination during his visit and he suggested we call you regarding your time lines on your presentation.

We (I) called you the afternoon of July 20 regarding your determination. Because of the lengthy review process you indicated one would be forthcoming within three or four weeks (or maybe longer), well beyond the filing date for July's report.

Within the spirit of cooperation we have extended to you please know we are reviewing the new report. For the month of July, 1992 however, we are submitting the monthly report under the Producer / Handler format so that you may have a report by the required filing date.

The submitting of the Producer / Handler report does not indicate our refusal to your request to file a partially pooled plant report. Your request is high on our agenda, however based on our previous requests for a meeting to discuss your determination and the attached APPEL & YOST (July 30, 1992) memorandum, we think it most appropriate for the requested meeting to be held.

Will you please contact me as to a time which may be convenient for you to visit us for a meeting?

Sincerely,


Donald L. Caldwell
Controller

pc: NWK, JR/JSK/TRA

RESPONDENT'S EXHIBIT NO. 5

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
Dairy Division

NEW YORK—NEW JERSEY MILK MARKETING AREA

Market Administrator
One Columbia Circle
Albany, New York 12203-51

Phone: 518/452-4410

August 7, 1992

Kreider Dairy Farms, Inc.
1461 Lancaster Road
Manheim, PA 17545

ATTN: Donald L. Caldwell

Dear Sirs:

Enclosed are a statement of your account and audit adjustment sheets for the months of November 1991 through June 1992. Please note that the amounts relating to May and June 1992 are preliminary, based upon reported information, and subject to adjustment after audit.

Your sales of fluid milk products to other handlers for sale or distribution in the New York-New Jersey milk marketing area cause you to be regulated as a handler operating a partial pool plant pursuant to Section 1002.29(b) of the Order. Our examination of records pertaining to your sales of milk to other handlers disclosed that such sales began on or before the month of October 1990. It was decided, however, to limit your prior payment obligation to the Order to the period beginning November 1991 when you began dealing directly with a handler in the New York-New Jersey market.

As the operator of a partially regulated plant, a quantity of your receipts of farm milk equivalent to your Class I-A milk sales each month in the marketing area is pooled, and your payment obligation on such milk is computed pursuant to Section 1002.60 of the Order. The debit balance you owe to the Producer Settlement Fund for each month is determined pursuant to Section 1002.74 of the Order. The amount owed each month for the expense of administration of the Order is computed under Section 1002.85.

The debit balance appearing on the statement of your account is due and payable at this office on or before September 16, 1992. If you have any questions about the statement or audit adjustment sheets, or wish to discuss the schedule of payment of the obligation, you may contact us.

Very truly yours,


RONALD G. PEARCE
Market Administrator

RCP:jh
Enclosure

RESPONDENT'S EXHIBIT NO. 4

TO: O. EGNOTO, CHIEF AUDITOR
FROM: C. CACCIOLI AND D. SKOLNICK
SUBJECT: KREIDER DAIRY FARMS INC. MANHEIM PA.
AUDIT PERIOD: OCT., NOV., DEC., 1990
JAN. THROUGH DEC. 1991
JAN. THROUGH APRIL, 1992
DATE: JUNE 15, 1992
HANDLER
REPRESENTATIVE: MR. DON CALDWELL, CONTROLLER

KREIDER DAIRY FARMS INC. APPEARS TO BE WHAT WE WOULD DEFINE UNDER ORDER 2 AS A PRODUCER HANDLER. APPARENTLY THE CORP. IS REGULATED UNDER ORDER 4. ACCORDING TO MR. CALDWELL, BEFORE BECOMING INVOLVED WITH AHAVA DAIRY PRODUCTS CORP. THROUGH THE F.P.P.T.L.C. KREIDFR DAIRY FARMS INC. AND NOAH W. KREIDER AND SONS(A PARTNERSHIP) WERE SEPARATE COMPANIES. NOAH W. KREIDER AND SONS OPERATED AS AN ORDER 4 PRODUCER SHIPPING MILK THROUGH ATLANTIC DAIRY COOP. KREIDER DAIRY FARMS INC. OPERATED THE DAIRY THAT SUPPLIED MILK TO KREIDER DAIRY STORES AND RESTAURANTS, THE F.P.P.T.L.C. (KOSHER MILK PICKED UP AT THE PLANT AND DELIVERED TO BALT. MD., AND LAKEWOOD N.J.) AND LOCAL CUSTOMERS IN THE MANHEIM AREA. IN DEC. 1990 NOAH W. KREIDER AND SONS SOLD ALL COWS THE PARTNERSHIP OWNED TO KREIDER DAIRY FARMS INC. PRIOR TO DEC. 1990 KREIDER DAIRY FARMS INC. HAD ITS OWN COWS.

THE AUDITORS WORKED AT THE OFFICES OF KREIDER DAIRY FARM INC. LOCATED ON RT. 72 IN MANHEIM PA. THE PLANT WAS LOCATED ON DOE RUN ROAD IN MANHEIM ABOUT 4 MILES FROM THE OFFICE. KREIDERS OPERATIONS INCLUDE STORES AND RESTAURANTS (4 OF EACH) POULTRY OPERATIONS AND DAIRY OPERATIONS, BOTH OF WHICH INCLUDE ACTUAL FARMS. THERE APPEARS TO BE THREE DAIRY FARMS KNOWN BY THE NOMENCLATURE 200, & 400, FOR 200 & 400 COW BARNs AND THE BUCHEN FARM ADDED IN MARCH OF 1992. ONE OF THE FARMS IS LOCATED ON THE SAME PROPERTY AS THE PROCESSING PLANT. WHEN THE AUDITOR VISITED THE PLANT THE BARNs OF SUCH WERE NOT READILY VISIBLE AND FROM THE RECORDS PROVIDED IT IS EVIDENT THAT THE MILK IS DELIVERED TO THE DAIRY VIA A TANK TRUCK NO MATTER WHAT FARM THE MILK WAS FROM. ONE OF THE FARMS HAS TWO BULK TANKS, ALSO EVIDENT FROM THE RECORDS PRESENTED.

I WOULD DESCRIBE THE PLANT AS TWO SHOE BOXES SIDE BY SIDE. ONE CONTAINS ALL THE MILK PROCESSING OPERATIONS INCLUDING MILK RECEIVING, ICE CREAM PRODUCTION. AND MILK PROCESSING, INCLUDING STORAGE (no milk silos, all horizontal) SEPARATION, PROCESSING OF MILK, LOW FAT, CHOC., SKIM, FORTIFIED SKIM AND HEAVY CREAM AND VARIOUS ICE CREAM MIXES. THE HANDLER MIXES ON THE RAW SIDE AND PASTEURIZES THE FINISHED PRODUCTS. THE OTHER SHOE BOX IS FOR STORAGE AND SHIPPING. THE FRONT OF EACH SHOE BOX CONTAINS PART OF THE STORE ATTACHED TO THE PLANT.

THE AUDITORS WERE SENT TO KREIDER DUE TO MILK PROCESSED AT THE PLANT BEING FOUND IN THE ORDER 2 MARKETING AREA. THIS MILK WAS BEING SOLD TO THE F.P.P.T.L.C., (THE FOUNDATION FOR THE PRESERVATION