UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
Milk in the Mideast Marketing Area;	)	Docket Nos. AO-11-0333
Proposed Amendments to	)	AMS-DA-0067; DA-11-04
Tentative Marketing Agreement and	)	
Order	)	

Objection to Portion of Superior Dairy Brief As Outside The Scope of the Hearing

Guers Dairy, Galliker Dairy Company, Schneider's Dairy, and Dean Foods object to footnote 5 of the Superior Dairy brief because it proposes a course of action that is outside the scope of the hearing. In footnote 5, Superior states:

> Should AMS Dairy Programs perceive any conflict between the proposal and other provisions, or lack of clarity in the regulatory text, Superior Dairy would not object to other modifications created by agency experts that would achieve the same result without potential conflict and/or with greater clarity. The objective for Superior might also be achieved by reducing the in-area distribution requirement from 25% to 15%, as it was prior to 2000.

See Post-Hearing Brief Submitted on Behalf of Superior Dairy, Inc. at 4 (November 30, 2011). However, the only substantive amendment that was affirmatively contemplated at the hearing involved a mechanism for "locking-in" Superior Dairy to Order 33. Oct. 5, 2011 Tr. 139-140 (Soehnlen). The hearing record is devoid of any suggestion that the threshold for transition from partial to full regulation should be reduced from 25 percent to 15 percent route disposition; an action that would undoubtedly shift some plants from partial to full regulation.

There are only two places in the hearing record where the parties explained that the current 25 percent threshold was previously 15 percent. Oct. 4, 2011 Tr. 140 (Hollon); Oct. 5, 2011 Tr. 118 (Soehnlen). However, those references were historical in nature and neither party relied on them as a basis for requesting the modification that is now suggested in footnote 5.[1] Therefore, nothing at

[1] The DFA witness simply made a historical point explaining that USDA shifted from 15 percent to 25 percent with federal order reform and did so with a mind toward keeping then fully regulated plants fully regulated after reform. There was no suggestion that USDA should go back to 15 percent and certainly no evidence to support such a decision.

the hearing could have alerted those in attendance, let alone those that did not attend because of the limited scope of the hearing, to the possibility that such a modification would be requested.

Indeed, the limited scope of the hearing notice is an additional reason why footnote 5 is objectionable. The hearing was limited to a proposal that would cause full regulation of an Order 33 located plant with route disposition in multiple orders of less than 25 percent, but which had aggregate route disposition of 50 percent across those orders. Milk in the Mideast Marketing Area; Notice of Hearing on Proposed Amendments, 76 Fed. Reg. 55608-09 (Sep. 8 2011). The proposal was specific and by all accounts aimed at the regulatory status of Superior Dairy in particular. Oct. 5, 2011 Tr. 110 (Soehnlen). When Superior Dairy submitted proposals that would strictly circumscribe if not terminate the partially regulated status of plants not having aggregate route disposition in multiple orders of 50 percent and not located in Order 33, USDA rejected those proposals for this hearing. Superior Dairy brought action to force the Secretary to reverse its decision, but the Court sustained the limited scope of the hearing. *Superior Dairy, Inc., v. Vilsack, et al.*, Order and Decision (Resolving Doc. 2), Case No:5:11CV1979 (Sep. 29, 2011). Accordingly, a modification that would affect plants located outside of Order 33 and those without aggregate route disposition of 50 percent in multiple orders would not be contemplated by the hearing notice.

Thus, Superior Dairy's suggestion in footnote 5 simply cannot survive under the precedent of *Alto Dairy v. Veneman*, 336 F.3d 560, 570 (7th Cir. 2003). On the basis of the hearing notice, the court ruling confirming the limited scope of the hearing, and most significantly the dearth of notice or evidence at the hearing proceeding itself, insiders could not be expected to realize that such a modification could conceivably come out of the hearing. Accordingly, the suggested course of

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Superior Dairy's response, because it was seeking to avoid a shift back to full regulation, simply explained that the decision to elect 25 percent was in its view less about keeping fully regulated plants regulated and more about not altering the status of partially regulated facilities. Neither party asserted that 25 percent should be reduced to 15 percent and certainly neither offered evidence to support such a change. Nor was there evidence of why or how such a change would help Superior Dairy, let alone how it would affect facilities that were not parties at the hearing because of the limited scope of the hearing.

action in footnote 5 is outside the scope of the hearing, is doomed by the lack of testimony to support it, and must not be considered by the Secretary.

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Respectfully submitted,

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