BEFORE THE UNITED STATES DEPARTMENT
OF AGRICULTURE
AGRICULTURE MARKETING SERVICE

In the Matter of Milk in California Notice of Hearing on a Proposal to Establish a Federal Milk Marketing Order	7 CFR Part 1051 Docket No.: AO-15-0071 AMS-DA-14-0095

Clovis, California, October 19, 2015

Memorandum on Negative Inference of Failure to Introduce Relevant Evidence

When a party has relevant evidence in its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Automobile, Aerospace and Agric. Implement Workers of Am. (U.A.W.) v. N.L.R.B.*, 459 F.2d 1329, 1336 (1972) (*citing* 2 J. Wigmore, Evidence § 285 (3d ed.1940)); *c.f. Evis Mfg. Co. v. F.T.C.*, 287 F.2d 831, 847 (9th Cir.1961) ("An unfavorable inference may result from the unexplained failure of a party to produce documentary or other real evidence.").

"Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position." *U.S. v. Roberson*, 233 F.2d 517, 519 (5th Cir. 1956); *see also Paudler v. Paudler*, 185 F.2d 901, 903 (5th Cir. 1950), cert. denied, 341 U.S. 920, 71 S.Ct. 742, 95 L.Ed. 1354 (1951) ("Respondent's unexplained failure to support and substantiate its economic justification for the layoffs by the production of probative and material documentary records within the power of the Respondent to produce, renders the purported reasons dubious and also warrants drawing an inference that if such [records] had been produced, they could not have been favorable to the Respondent. This failure to produce such evidence 'not only strengthens the probative force' of its absence 'but of itself is clothed with a certain probative force."); *and Goldberger Foods, Inc. v. U.S.*, 23 Cl. Ct. 295, 308 (1991), *aff'd* 960 F.2d 155 (Fed. Cir. 1992) (holding in a case against the USDA that plaintiff's failure to furnish any of its primary records on raw beef prices warranted a "*strong* adverse inference" that such records would have a negative impact on its case involving a mistaken bid).

Welcome-American Fertilizer Company, 169 NLRB 862, 870 (1968), quoting from

The failure to produce relevant documents can warrant a negative inference even when there is no subpoena compelling production. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) ("If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.")

"That an adverse inference may arise from the fact of missing evidence is a generally accepted principle of law." *Smith v. U.S.*, 128 F. Supp. 2d 1227, 1232 (E.D. Ark. 2000) (holding that the failure of a party to create standard medical records for a patient's surgery warranted the application of the negative inference).

As stated by Prof. Wigmore, "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." 2 J. Wigmore, Evidence § 285 (3d ed. 1940).

Thus, USDA can and should find that the study proponents refused to disclose would have been adverse to their affirmative claims. *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939); *Stagner v. United States,* 197 F.2d 992, 994 (5th Cir. 1952); *Local 167 v. United States,* 291 U.S. 293 (1934); 29 Am. Jur. 2nd Evidence § 178.

This evidentiary rule is applicable in administrative as well as judicial proceedings. *Singh v Gonzales*, 491 F.3d 1019, 1024-25 (9th Cir. 2007); *In re DeGraff Dairies*, 41 Agric.Dec. 388, 402-403 (1982). In hearings under APA §556, agencies may clearly "draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts. . ." The Attorney General's Manual on the Administrative Procedure Act (1947), at 76.

The USDA has utilized such inferences before. The Tenth Circuit has affirmed a USDA ALJ's use of an adverse inference regarding a party's failure to introduce testimony evidence. *See Reed v. USDA*, 39 F.3d 1192, 2* (10th Cir. Nov. 1, 1994) (affirming a USDA ALJ's use of the inference in a cattle shipping case). In another case appealed from the USDA, the Second Circuit ordered the lower court to conduct further factfinding on the claims involving defective potatoes in the case, an assessment which it noted "may take into account any negative inferences that may be drawn from G&T's failure to keep resale, sorting, and dumping records." *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F.2d 579, 581 (2nd Cir. 1986).

None of the limitations that apply to negative inferences exist here. For example, a party may not seek to employ the inference for evidence it failed to request during the discovery period. *See Faucette v. Nat'l Hockey League*, 2006 WL 213857 (M.D. Fla. Jan. 27, 2006). No such discovery requirements apply to this proceeding. Additionally, this inference cannot be applied against a defendant who asserts his Fifth Amendment rights when the government seeks to prove its criminal charge based on an inference that the defendant did not testify. *Stone v. U.S.*, 390 U.S. 204 (1968). Again, a circumstance that does not apply here.

Exhibit 53, introduced during Erik Erba's testimony is a transcript from a hearing before the CDFA dated May 20, 2013. The subject of the hearing was: "Consolidated Public Hearing to Consider Temporary Market Amendments to the Stabilization and Marketing Plans for Market Milk for the Northern and Southern California Marketing Areas." On page 55, Mr. Erba says the following about the study that Proponent Cooperatives have otherwise failed to introduce:

> "I will make one final point in support of California Dairies' Proposal. Recently, California Dairies received the results of a study that reviewed the potential impacts of a federal milk marketing order in California. We, along with Diary [Dairy] Farmers of America and Land O'Lakes co-funded the study conducted by Drs. Mark Stephenson and Chuck Nicholson. The study identified the large Class 4b – Class III price spread as

being problematic and suggested that a manufacturing differential on the Class III price could resolve the problem of higher milk prices while simultaneously encouraging pool participation by cheese plants. The level of the differential is about $0.70/cwt. In other words, the study suggested that the California price for milk used for cheese ought to be $0.70/cwt. less than the federal price. That $0.70 differential is approximately the same as what was represented in AB 31 and is about the same as the $1.20/cwt. increase in the Class 4b price that we are proposing today."

This one statement by itself reveals that the undisclosed study contains economic analysis of price surface issues that contradict some witnesses' assertions that milk used to produce manufactured products does not have location value. One or more cooperative witnesses denied knowledge of any model regarding price surface issues that is more current than that used in FMMO Reform. If Proponents still refuse to produce the study, the negative inference that should be drawn is that the remainder of the study undermines Proposal 1.