UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:
MILK IN THE NORTHEAST AND
OTHER MARKETING AREAS;
Class III/IV FORMULAS
Dockets: AO-14-A77
DA-07-02

Reconvened Hearing
Indianapolis, Indiana
April 9 – 13, 2007

MOTION OF THE INTERNATIONAL DAIRY FOODS ASSOCIATION TO (1) EXCLUDE THE PROPOSED WITNESS TESTIMONY BY COUNSEL OF RECORD BEN YALE, AND (2) REQUIRE THAT WITNESSES MARY LEDMAN, AND ANY WITNESSES TESTIFYING IN SUPPORT OF THE MAINE DAIRY INDUSTRY ASSOCIATION, PROVIDE WRITTEN COPIES OF THEIR TESTIMONY AT LEAST 48 HOURS BEFORE THEY TESTIFY

Pursuant to 7 C.F.R. §§ 900.6 and 900.8, the International Dairy Foods Association ("IDFA") respectfully requests that Administrative Law Judge Palmer issue a ruling: (1) excluding the proposed witness testimony by Ben Yale, who is counsel of record for Dairy Producers of New Mexico and other parties to this proceeding; and (2) requiring that witness Mary Ledman, and any witness testifying in support of the Proposal 18 (submitted by the Maine Dairy Industry Association), provide written copies of their testimony at least 48 hours before they testify.

At the end of the first phase of the hearings in the above captioned proceedings in Strongsville, Ohio, Administrative Law Judge Palmer stated: "All of the people who intend to submit statements of the sort that we are receiving as exhibits shall provide them to the Department of Agriculture on or before March 29th," so that the "statements will then be made available on the [USDA] Web site, as soon as possible after March 29th." ALJ Palmer specified that "in respect to opposition testimony,

statements of that sort, it is understood that many of these statements will not have been prepared in advance of the hearing. And they will still be received at the hearing, even though they were not sent in by March 29th." (March 2, 2007 Hearing Transcript, pp. 1163-64; Attachment A hereto).

This protocol for the submittal of witness statements, and the specific date selected for their submittal to USDA, had been specifically advocated by attorney Ben Yale, who entered his appearance at the hearing on behalf of the Dairy Producers of New Mexico and several other dairy farmer cooperatives. For example, Mr. Yale requested an early date for the submittal of written witness statements, lest he be required to work over the Easter weekend in order to review those statements and prepare for the hearing.

IDFA complied with ALJ Palmer's directive, and three written statements from its witnesses were duly posted on the USDA Website on Monday, April 2. Witness statements were also submitted and posted from Agrimark, All-Jersey, and Dairylea.

No statements were posted by any witnesses appearing on behalf of Mr. Yale's clients, even though his clients are the sole proponents of Proposals 3, 6, 7, 8 and 15 (*see* Notice of Hearing, Hearing Exh. 1), and as noted, he was the major proponent of the protocol Judge Palmer adopted regarding the advance circulation of witness statements.

Furthermore, no statements were posted by any witnesses appearing on behalf of the Maine Dairy Industry Association, even though that organization is the sole proponent of Proposal 18.

Undersigned counsel sent separate emails to Mr. Yale and counsel for the Maine Association on Monday April 2, 2007, inquiring whether the absence of such witness statements meant that they did not intend to call witnesses in support of their

proposals. (Attachments B and C hereto). Mr. Yale responded by email, indicating his clients were still working on their testimony, without explaining why his clients had violated the deadlines that he had advocated. *See id.* Counsel for Maine responded that he did intend to call witnesses in support of Proposal 18, but was not intending to provide an advance copy of their written statements. *See id.*

Mr. Yale's law partner called undersigned counsel for IDFA on Tuesday, April 3, 2007, indicating that Mr. Yale's clients intended to call a single witness at the hearing -- Mr. Yale himself -- and that his written testimony would be provided to IDFA counsel later that day. Although she indicated that the possibility of Mr. Yale testifying had been raised informally by Mr. Yale with other counsel at the Strongsville hearing, undersigned counsel had not been party to any such discussions.

Notwithstanding the representations made by Mr. Yale's partner in her April 3 telephone call, Mr. Yale's proposed written testimony was not provided to IDFA counsel on April 3, and was not received until the following day, Wednesday, April 4, 2007, at 1:50 p.m. (Attachment D hereto). Mr. Yale's self-describe "draft" written testimony makes reference to no fewer than 78 exhibits, none of which accompanied the email. Indeed, the cover email stated: "Our exhibits are not being provided at this time because of the volume of documents and because our staff is still in the process of scanning them." (Attachment E hereto). As of the filing of this motion, those voluminous exhibits have still not been provided to IDFA counsel.

The April 4 cover email from Mr. Yale's law partner also states:

> I found out this morning that Mary Ledman will be testifying on behalf of our clients on Proposal 15 (CME/NASS) only. She would like to testify first thing Tuesday morning. Because Mary just confirmed her

> willingness to testify this morning, we do not have a prepared statement for her.

In a separate email sent to Mr. Vetne, counsel for Agrimark and others, on Thursday, April 5, 2007, Mr. Yale's partner indicated that Ms. Ledman had not yet prepared her testimony. (Attachment F hereto).

On Thursday, April 5, 2007, at 7:54 p.m., counsel for the Maine Association sent an email to undersigned counsel providing a written statement from one witness, but indicating that the Association intended to call one or two additional witnesses at the hearing, at least one of whom is an expert, for whom no statements were provided. (Attachment G hereto).

I. THE ALJ SHOULD EXCLUDE THE PROPOSED TESTIMONY BY COUNSEL OF RECORD BEN YALE.

Mr. Yale is counsel of record for the Dairy Producers of New Mexico and four other dairy cooperatives participating in these proceedings. He entered his appearance in this proceeding as attorney on behalf of these entities. (February 26, 2007 Hearing Transcript, p. 14; Attachment H hereto).

Although he describes himself in his proposed written testimony as "general counsel and regulatory affairs consultant" to two of his clients, we do not understand Mr. Yale to be an employee of any of his clients, but rather an attorney in private practice. Mr. Yale's Website is consistent with that fact, indicating that he is senior partner at a three person law firm located in Waynesfield, Ohio, which handles, *inter alia*, litigation, lobbying, and estate planning, together with agriculture and dairy law. (Attachment I hereto).

7 C.F.R. 900.6 (b) empowers an ALJ to "[r]ule upon motions and requests" and to "admit or exclude evidence." 7 C.F.R. 900.8(d) provides that an ALJ

shall "insofar as practicable, exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely."

"[A]ppearance of counsel as a witness is improper except in extraordinary circumstances." *United States v. Trapnell,* 638 F.2d 1016, 1025 (7th Cir. 1980). Furthermore, while an ALJ may not be bound to adhere strictly to the Federal Rules of Evidence, those rules provide useful guidance as to the kinds of evidence that "is not of the sort upon which responsible persons are accustomed to rely" and is therefore properly excluded under 7 C.F.R. 900.8(d).

Federal Rule of Evidence 602 provides a common sense requirement that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. As Wright & Miller explain, the requirement of personal knowledge means that, among other things, the witness must demonstrate "sensory perception," meaning that he saw, heard, or otherwise personally perceived the events about which he purports to have knowledge. 27 Charles A. Wright *et al.*, Fed. Prac. & Proc.: Evidence § 6023.

Federal courts regularly bar testimony proffered by attorneys for lack of personal knowledge, often in situations similar to this one. For example, in *In re Bogdanovich*, 301 B.R. 129 (S.D.N.Y. 2003), a party sought to support his own motion for summary judgment with his attorney's affirmation. The court noted that any such affirmation was required to satisfy two requirements: it had to be "made on personal knowledge" and it had to "set forth facts as would be admissible in evidence." *Id.* at 147 n.67. The court then explained that "[a]ttorneys' accounts of the facts, whether stated by affidavit, affirmation or declaration, are rarely in either category." *Id.* As the

Bogdanovich court stated, "affidavits of attorneys are not a substitute for affidavits of witnesses who are competent to testify." *Id. See also, e.g., United States v. Patterson*, 173 Fed. Appx. 283, 288 (4th Cir. 2006) (unpublished) ("Although counsel purported to supply the evidentiary basis for this claim, counsel's affidavit was without personal knowledge of the events transpiring ... and bereft of probative evidence other than hearsay statements"); *John Beaudette, Inc. v. Sentry Ins. Mut. Co.*, 94 F. Supp. 2d 77, 88 n.1 (D. Mass. 1999) (striking as improper affidavit from attorney because a "party cannot expect this court to give weight to averments made without personal knowledge or those which are in a form patently inadmissible at trial").

Like the attorneys in these cases, attorney Yale lacks personal knowledge of the subject matter of his testimony. He is offering testimony summarizing facts that he has gathered from his clients or from reviewing various publications, including the following:

"Traditionally, a milk hauler would stop at several farms and use a dipstick to measure the amount of milk picked up at each farm or other measuring method.... In the modern day, the hauler scale weighs his rig before and after a single pick up and delivers that milk directly to the plant, where a similar scale observation is made." (Attachment E, p. 18.)

"*I have conferred with the employees responsible for farm weights and tests, milk marketing reconciliation, and accounting for my clients.* Those employees indicate that the net of all overages and underages between farm weights and tests and plant weights and tests is a wash. In almost all instances, the difference between the farm weights and tests and the plant weights and tests in [sic] significantly less than the 0.25% assumed by the federal milk marketing order presumptions. If there is a consistent error,

steps are taken to identify the source of the difference and to correct it." (Attachment E, p. 19 (emphasis added).)

"Fat losses are not the result of fat sticking to pipes and tanks.... In a plant that receives even a modest ten loads of milk per day, each year 13 tons of butterfat would be sticking to pipes and tanks somewhere, never to be seen again. At a large and modern cheese plant, where 140 loads of milk are delivered each day, this amounts to half ton [sic] of butterfat sticking to pipes each day ...." (pp. 21-22.)

"Manufacturers of cheese making equipment recognize and, in fat, promote butterfat recoveries significantly higher than 90%." (p. 40.)

"The California study, a virtual census of manufacturing costs for plants in California, cannot be used because it only reflects costs in California and those costs are admittedly higher than in the rest of the country. The California data also reflects a different mix of plants than in the FMMO system both in terms of products, but also markets, location of milk to plants, and costs. To the extent that California's industry has an impact on national pricing, that is captured in the NASS survey which properly incorporates by implication the California cost data." (p. 46.)

Attorney Yale is an advocate, and his testimony amounts to nothing more than a lawyer's argument dressed up as testimony. Like the attorneys in the numerous cases cited above, he should not be allowed to testify.

Nor can attorney Yale testify as an expert. "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience or education with the subject matter of the witness's testimony." *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999) (holding that a metallurgist with a Ph.D. from MIT was not qualified to testify about

toxicity of manganese fumes and the lung's ability to absorb manganese from those fumes). Thus, courts limit expert witnesses to testimony in their field of expertise. *See, e.g., Celebrity Cruises, Inc. v. Essef Corp.*, 434 F. Supp. 2d 169, 192 (S.D.N.Y. 2006) (holding that an expert economist was not qualified to opine in areas of brand stigma or restoration); *Levit v. Spatz*, 222 B.R. 157, 171 (N.D. Ill. 1998) (despite a witness's "extensive training, education, and experience" in valuing businesses, witness was not qualified to value parcels of real estate).

Here, similarly, attorney Yale has no qualification to offer any analysis of pricing or economic effects in the market for dairy products. He is not an economist, nor does he otherwise claim to have professional training in evaluating the market for dairy products. He is an attorney, with experience analyzing and advocating about federal milk orders and the factors that affect those orders. While we do not question Yale's ability as an advocate on behalf of his clients, he simply lacks any qualification to offer the type of market analysis or other testimony contained in his draft written statement.

As a practical matter, attorney Yale is in no better position to appear as a witness than is undersigned counsel or counsel for any of the other parties. The integrity of the rulemaking process does not permit any of us to take the stand and, in the guise of a witness, provide what is in essence a post hearing brief advocating our clients' positions.

As noted, "appearance of counsel as a witness is improper except in extraordinary circumstances." *United States v. Trapnell,* 638 F.2d at 1025. This is not one of those extraordinary circumstances, and attorney Yale should not be permitted to appear as a witness.

II. WITNESSES APPEARING IN FAVOR OF A PROPOSAL SHOULD NOT BE ALLOWED TO TESTIFY UNLESS THEY HAVE MADE THEIR WRITTEN TESTIMONY AVAILABLE AT LEAST 48 HOURS BEFORE TESTIFYING.

ALJ Palmer issued instructions requiring the submittal of written testimony to USDA by March 29, which would allow it to be posted on the USDA Website and made available to all participants by April 2. This protocol would provide all participants at least one week to prepare their cross examinations, as well as begin their preparation of responsive, opposition testimony.

Mr. Yale and his clients have violated the requirements imposed by ALJ Palmer. Mr. Yale's own testimony, in addition to being inappropriate for the reason set forth in Section I above, was not made available until April 4, and even then, it was incomplete, lacking the more than 70 exhibits to the testimony. These clients' behavior with respect to expert witness Mary Ledman has been even more extreme. She is the only witness scheduled to testify in favor of Proposal 15, but has provided no written testimony whatsoever, and based on the email exchange recounted above, does not intend to do so prior to testifying.

The same problem arises with respect to the Maine Dairy Industry Association. That Association is the sole proponent of Proposal 18, which would radically re-write milk price regulation by basing them minimum prices on "a competitive pay price for equivalent Grade A milk." (See Notice of Hearing, marked as Hearing Exhibit 1). This proposal is so bare bone that USDA economists were unable to prepare an economic analysis of its effect; as USDA stated in its preliminary economic analysis at p. 16 (Hearing Exh. 7):

> Implementation of [the Maine] proposal would require use of a plant survey that does not exist at this time. Also, the

> proposal, does not state exactly how the factor would be computed. For these reasons, Dairy Programs is unable to conduct an economic impact analysis of this proposal.

As noted, the Maine Association has provided (albeit several days late) advance copies of the written testimony of one of its witnesses, but has provided nothing as to one or two other witnesses, including its expert.

This behavior by Mr. Yale's clients and the Maine Association is patently unfair to those parties, including but not limited to IDFA, that complied with ALJ Palmer's instructions and whose testimony has been posted on the USDA Website:

-- It is unfair because, with respect to witness statements that were posted, opponents will have had at least a week to prepare their cross examinations, while those wishing to cross examine Ms. Ledman and the Maine expert (including IDFA counsel) will have to do so on the fly.

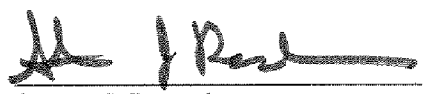
-- It is unfair because those who wish to respond to Ms. Ledman and the Maine expert with their own responsive, opposition testimony will have to prepare such testimony on the fly.

While ALJ Palmer did indicate that "nothing here means that people can't still come to the hearing and give a statement" (*see* Attachment A, p. 1164), this did not detract from the requirement that any witness who intended to provide material, extensive testimony, such as those who are the various proponents themselves, have submitted their witness statements by March 29, *see id.* at 1163 ("All of the people who intend to submit statements of the sort that we are receiving as exhibits shall provide them to the Department of Agriculture on or before March 29th.")

7 C.F.R. 900.6 (b) empowers an ALJ to "[r]ule upon motions and requests," and to "[d]o all acts and take all measures necessary for the maintenance of

order at the hearing and the efficient conduct of the proceeding." IDFA submits that the only partial solution (a complete solution is impossible) is for ALJ Palmer to instruct that no witness can provide testimony in support of a proposal unless the witness has provided his or her written testimony to the other participants in the hearing at least 48 hours before the witness takes the stand. This will at least allow some (albeit inadequate and perhaps frantic) preparation for cross examination and responsive testimony.

Respectfully submitted,



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