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September 6, 2005

Mike Johanns, Secretary
U.S. Department of Agriculture
C/o Hearing Clerk
United States Department of Agriculture
STOP-9200- Room 1031
1400 Independence Ave, SW
Washington, DC 20250-9200

Re: Docket No. AO-14-A73 et al., DA 03-10; Post-hearing brief in opposition to amendment of the Federal Milk Marketing Order "Fluid milk Product" definition.

Dear Secretary Johanns:

New York State Dairy Foods, Inc., is a full service member funded trade association representing dairy product processors, manufacturers, distributors, retailers, and producers doing business in New York and surrounding Northeast states since 1928. Further information about NYSDFI is available on our website, <http://nysdfi.org/>.

NYSDFI submits this letter-brief on "Fluid Milk Product" definition issues, which were subject to hearing in Pittsburgh, Pennsylvania, in late June 2005.

We strongly concur with hearing testimony by many parties, including our sister organization representing national milk handlers, the Milk Industry Foundation, that no change should be made to the Fluid Milk Product definition. We refer to hearing testimony by Bob Yonkers (MIF). New technology dairy beverages using milk protein and protein fraction ingredients enter the beverage market with milk higher ingredient costs than fluid milk, represent a very small share of the milk beverage market, cannot be sold as "milk," and are too new to the market to make sound conclusions about their impact, positive or negative, on Class I sales and producer revenue.

Some of our members produce milk beverages in addition to traditional fluid milk; others do not. We are aware of no complaint by our member-processors that new milk beverages (such as Swerve, Carb Countdown, and others introduced within the past three years) are taking away market share from conventional fluid milk products, that milk beverage makers have an unfair competitive advantage in milk ingredient costs, or that a higher regulated cost for milk ingredients in dairy beverages is necessary to create more uniform handler prices. The opposite, we believe, is true. Proposals to up-charge use of milk protein ingredients will create unfair higher costs for milk beverages, and discourage development of new products and chill sales of dairy ingredients, causing harm to manufacturers, processors, producers and the consuming public.

The Northeast has greater use of Class II milk than any other market – 4.4 billion pounds in 2004, representing 20% of all milk uses, according to FMOS data, Tables 17-18, on the Dairy Programs website. Such use contributes value to producer prices and the health of the Northeast dairy industry. We believe that if any Class II beverages are moved to Class I, any additional Class I revenue to producers will be negligible and more than offset by milk forced into Class IV use, which also represents a large share of Northeast milk use (2.3 billion pounds in 2004). Miscellaneous dairy beverages currently classified as Class I, however, represent a very small share of Class I disposition – 198.4 million pounds in 2004, up slightly from 180.4 million pounds in 2002. New technology dairy beverages such as carbohydrate-reduced products introduced in 2003, as well as yogurt beverages and other products, would constitute part of this miscellaneous use. This 2004 volume of “miscellaneous” Class I disposition represented only 1.9% of all Class I use, and 0.8% of producer milk. The 18 million pound growth in “miscellaneous” Class I milk beverages from 2002 to 2004, which includes some beverages the NMPF proposal is intended to preserve in Class I, represented less than 1/10th of 1% of producer milk. Its classification as Class I is inconsequential for blend price purposes, but of great importance for product development purposes.

The cry of alarm by DFA in 2003 about new technology dairy beverages and their competitive impact is now revealed to be a tempest in a teapot. Several new products such as Swerve and LeCarb, that stimulated DFA’s proposals, are no longer even on the market. It seems clear that many new products and dairy ingredient uses will not see the light of day if USDA adds a regulatory disincentive to all of the risks of new product development.

NYSDFA urges the Secretary to avoid regulations that have a chilling effect on new dairy beverages and new uses for dairy ingredient, and to allow new products that are developed to reach market potential before classification changes are considered. Then, perhaps, the agency and the industry can measure competitive impact and classification policy with objective measurements rather than speculative and alarmist predictions. This proceeding should be terminated.

Sincerely yours,



Bruce W. Krupke
Executive Vice President