

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:) **DOCKET NO. AO-368-A32;**
MILK IN THE PACIFIC NORTHWEST) **AO-271-A37; DA-03-04**
AND ARIZONA - LAS VEGAS)
MARKETING AREAS)

**SEPARATE EXCEPTIONS AND COMMENTS OF SARAH FARMS TO
RECOMMENDED DECISION RE: PROPOSED AMENDMENTS TO TENTATIVE
MARKETING AGREEMENTS AND ORDERS¹**

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¹ Sarah Farms has contemporaneously filed, along with Edaleen Dairy, Mallorie's Dairy and Smith Brothers Farms, Joint Exceptions and Comments to the Recommended Decision. Those joint Exceptions and Comments are incorporated by reference.

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I. INTRODUCTION

Sarah Farms is an independent business with both dairy and milk processing operations. Sarah Farms was founded as a producer-handler operation and has existed as producer-handler in the Arizona-Las Vegas Marketing Area since its inception. From almost day one of its operations, the largest cooperative in the Arizona-Las Vegas market, United Dairymen of Arizona (“UDA”) and the largest processor located in Order 131, Shamrock Foods Co. (“Shamrock”) have attempted to limit the growth and/or to force Sarah Farms through litigation, legislation and now ultimately regulation, out of business. Indeed, the real purpose of this hearing is to eliminate Sarah Farms from the marketplace. If the Recommended Decision is allowed to become a final decision, the operation of Sarah Farms will be significantly curtailed or may cease altogether.

The imposition of a 3 million pound per month hard cap would restrict the future growth of Sarah Farms; whenever that may be. Meanwhile, UDA, Shamrock, and other handlers who control Order 131 would retain the ability to expand without any such restrictions. Furthermore, the imposition of the 3 million pound hard cap based on what marketing conditions might be in the future is unjustified and speculative. See Fairmont Foods Co. v. Hardin, 442 F. 2d. 762, 772 (D.C. Cir. 1971). There is no substantial evidence in the hearing record that Sarah Farms holds any advantage, let alone an unfair advantage as a producer or as a processor. In fact, the actual evidence at the hearing established that in exchange for regulations as a producer-handler, that Sarah Farms bears costs that are usually not borne by other market participants.

The proposed Amendments to the Marketing Orders are based on claims that disorderly marketing conditions allegedly existed in the Pacific Northwest (Order 124) and the Arizona/Las

Vegas (Order 131) marketing areas, due to the “growth” of producer-handlers in those areas. The proponents, the largest players in the dairy industry, offered no evidence at the hearing that producers were not receiving parity prices for their milk, nor that the prices to consumers were unreasonable, nor that there had been any interruption in the regular and steady supply throughout the year of good, wholesome milk to the consuming public. Further, the undisputed evidence established that producer-handlers had over time become less and less of a factor in the overall milk marketplace, with both the absolute number of producer-handlers and their percentage share of the total milk volume showing substantial decline including continued decline in the last five (5) years. By the conclusion of the hearing, there were only seven (7) producer-handlers in the Pacific Northwest and only one (1) producer-handler of any size (two (2) in total), in the Arizona/Las Vegas marketing area. The percentage share of milk volume of producer-handlers in Order 124 was below nine percent (9%) and in Order 131, was approximately ten percent (10%). The actual hearing evidence further showed that the surviving producer-handlers in Order 124 had not increased their business in the last several years; and that while one producer-handler, Sarah Farms, had grown in Order 131, that it grew only from a small amount and that it still accounted for only a limited portion of the overall milk volume in that Order. There was no contention that there had been, or were any now, price wars, or that any price war likely to occur any time soon. There was no evidence presented of any disruptions in supply of milk. Rather, the testimony presented by all parties established that there was consistent, but healthy, competition among all handlers, including producer-handlers and pool handlers. Faced with this total absence of objective evidence of any disorderly marketing conditions in either Order 124 or Order 131, the proponents alleged, and the Recommended Decision unaccountably adopted, a definition of disorderly marketing conditions, which not only

is without support in the Agricultural Marketing Agreement Act (“AMAA”) or the Department’s regulations, but also requires the conclusion that there have been disorderly marketing conditions for the full seventy (70) years since the AMAA was first enacted; a definition, moreover, which has its corollary, not admitted in the Recommended Decision, that the very existence of any producer-handlers exempted from the pool, whether above or below the proposed arbitrary 3,000,000 pound monthly cap, creates disorderly marketing conditions.

To justify that strained and unwarranted definition, the proponents claimed that the producer-handlers were “unfairly competing” and taking business away from pool handlers, and if they were not “stopped now”, that so many producer-handlers would arise that the entire Federal Milk Marketing Order (“FMMO”) system would be destroyed. The substantive and substantial evidence at the hearings demonstrated that these allegations, too, were nonsense. Though long on rhetoric, the proponents ancillary allegations about the inability of the sharks in the industry to compete with the minnows were false, and their allegations of imminent doom were likewise noticeably short of any confirming evidence. Mere speculation is never converted, even by alchemy, into actual data and evidence.

Moreover, the actual events since the close of the hearing show that Shamrock, one of the proponents, has taken away substantial business from Sarah Farms based solely on price. (Declaration of Hein Hettinga dated June 9, 2005 [hereinafter Hettinga Declaration] attached herein as Exhibit “A”). Moreover, a smaller distributor in the Phoenix Arizona marketplace, Schade Distributing, has been forced to purchase milk from Sarah Farms because of the uncompetitive conduct of UDA and Shamrock. (Statement of Tom and John Schade of Schade Distributing dated May 20, 2005, attached as Exhibit “B”). Schade Distributing has purchased milk from Sarah Farms at a price “slightly higher” than the price charged by UDA (Id.)

Similarly, the allegations of the nation's largest cooperative, Dairy Farmers of America ("DFA"), and the nation's largest milk processor, Dean Foods, that there was a huge reservoir of producer-handlers waiting to flood into the market and to destroy the system as it now exists, was not substantiated by any hard facts; in addition to being totally contrary to both the historical record over the last seventy (70) years; and the current downward trend in the absolute numbers and market share of producer-handlers nationwide, as well as in Orders 124 and 131.

Finally, the Recommended Decision ignores the basic fact that the Secretary lacks the statutory authority to, in effect, penalize the producer-handlers growing their business where producer-handlers are not subject to required equalizing pool contributions and where the effect of the Order is to limit the dairy farm production of producer-handlers, an act the statute prohibits.² These central infirmities in the Recommended Decision are more fully developed below.

II. THERE ARE NO DISORDERLY MARKETING CONDITIONS IN THE MILK MARKETS IN ORDERS 124 AND 131

The Department's Recommended Decision uncritically asserts that there is a current disorderly marketing situation because there is an alleged price advantage enjoyed by larger producer-handlers over pool handlers; in that the producer-handlers are not required to pay into the pool the difference between their Class I use price and the Blend price. (Federal Register,

² Not only does the hearing record not support the alleged grounds for the amendments, it positively refutes them. Further, Sarah Farms has, by separate motion, filed with the Department on April 7, 2005, (but not placed on the Department's website until June 3, 2005) objected to the *ex parte* communications between Gary Hanman, the President and CEO of DFA, and Dana Coale, the USDA Deputy Administrator for Dairy Programs at the Annual Meeting of the Dairylea Cooperative on October 12, 2004. At that meeting after spending time on "problems in the industry", Mr. Hanman turned to alleged "critical" issue of producer-handlers and addressed his comments "directly" to Ms. Coale in the audience and argued the substantive evidence at the hearing and also made an argument for amending the Order (see pages 11-13, 25-26, of the transcript provided with the motion). This communication took place outside the hearings; without the knowledge of the opponents of the proposed amendments, and without opportunity for the opponents of the proposed amendments to rebut those remarks. This

April 13, 2005, Vol. 70, Nr. 70, at p. 19654). Neither the proponents nor the Recommended Decision could point to any statutory or regulatory language supporting this definition. Indeed, this strained definition of a disorderly market, which has no relation to actual market conditions, has no support, and is contrary to the language of the AMAA. What constitutes a lack of orderly marketing conditions is indicated in the statute, and in the history behind the statute. As statutorily and historically defined, the hearing record shows that the market not only exhibits no objective disorderly marketing conditions, but that none are likely to occur by reason of the activities of Sarah Farms.

A. The Statutory Reference to Orderly Markets is Defined in Terms of a Reliable, Steady Supply of Milk Delivered to Consumers

The AMAA, at 7 U.S.C. §608(c)(4), authorizes the Secretary to issue orders “to effectuate the declared policy of this chapter.” In 7 U.S.C. §602(4), the Secretary is directed to exercise his powers to “establish and maintain such orderly marketing conditions for [milk] as will provide, in the interests of producers and consumers an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.” Additionally, 7 U.S.C. §608c(18) refers directly to the purpose behind the establishment of minimum prices paid to producers:

The Secretary of Agriculture ... shall fix prices as he finds will ... insure a sufficient supply of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs and be in the public interest.

The AMAA reference to orderly marketing conditions is not an empty vessel into which any definition might be poured that appealed to special interests, like the proponents, but is

was a clear violation of 5 U.S.C. §557(d)(1) and C.F.R. §900.16(b) which has never been remedied by the Department.

specific in both its objectives and its characteristics. An “orderly market” is one that protects the interests of consumers and producers alike in a steady flow of milk to market without unreasonable fluctuations in either supplies or prices. A “disorderly market” (itself not language used in the statute) can only be one that does not have these objective characteristics. Nowhere in 7 U.S.C. §602 is there any reference to the Secretary controlling or regulating competition among handlers, or promoting any vague notion of “equity among handlers,” or fixing prices at which handlers must sell to consumers, much less creating a “level playing field” or equalizing costs among handlers to negate advantages, real or imagined, which one or more of them may or may not have over others. The central precept of the AMAA was to require that handlers pay minimum prices to producers (adequate to maintain productive capacity) and to organize the market so that a steady supply of milk is provided to consumers at reasonable prices; but at the same time avoiding restrictions on competition, even price competition, among handlers in serving the public. No statutory basis exists for asserting that orderly marketing conditions do not exist, within the meaning and authorization of the statute, simply on the basis that there is a potential disparity between the cost of raw milk to a producer-handler and a pool handler.

B. There is No Objective Evidence of a Market Experiencing a Lack of Orderly Marketing Conditions

In a hearing premised on the claim of a disorderly market, it is remarkable how unanimous the witnesses were, and how overwhelming the hearing record is, that there are no disorderly marketing conditions in the statutory sense.

There was no evidence presented of any supply disruptions or failure to provide adequate and regular supplies of milk to the consuming public. There is not a single incident in the record of this hearing, nor in recent memory of any market in either Order 124 or Order 131, where the

consuming public was unable to obtain as much wholesome milk as it wanted at a reasonable price. Moreover, the surplus supply is more than ample for both Order 124 and Order 131. Indeed, the testimony was that there were adequate and regular supplies. Tr. Albright, 2497-2505; Tr. Hollon, 1180, 2581-86; Tr. Van Dam, 2905-11; Tr. Tillison, 375, 378.³

There was also no evidence presented that either the supply or price of milk in the two orders at issue in this hearing is fluctuating unreasonably at all; let alone as a result of producer-handler activity. To the contrary, there is so much milk in these markets that with or without producer-handlers, the quantity of milk previously or currently available to the consuming public is more than adequate. Tr. Albright, 2500. In fact, producer groups recognize the problem caused by this surplus of milk. Led by National Milk Producers Federation (“NMPF”) and Dairy Farmers of America (“DFA”), producers nationwide, including United Dairymen of Arizona (“UDA”) and Northwest Dairy Association (“NDA”), are engaged in a program entitled “Cooperatives Working Together” (“CWT”), in order to reduce the current milk supply and to boost producer prices. Tr. Cryan, 924-25.

There was no evidence presented of inefficient movements of milk in the markets. There have been no recent price wars, either at the producer or the handler level; and there was no evidence presented that any price war was imminent.

While there has been consolidation among handlers and producers over the years, there was no testimony that such historical consolidation has been a function of the growth of producer-handlers (instead the testimony was that producer-handlers have actually declined in both number and share in the market); nor that such consolidation has threatened the supply of

³ The reference are to the pages of the hearing transcript where the testimony can be found.

milk to consumers at a reasonable price, nor that the consolidation threatened the payment of parity prices to producers.

C. Producer-Handlers are Not a Threat to Take Over the Milk Market

Despite allegations made by proponents that the producer-handlers, by reason of an alleged price advantage, were in the process of taking over the milk market; the overwhelming evidence in the record is that producer-handlers are a minor, and declining, share of the overall market; and that pool handlers were as likely to take business away from them as not. In short, the record reveals that competition has not been threatened, but is working very well.

Seventy (70) years ago producer-handlers were far more numerous. In some cases, they reached at least fifty percent (50%) of the total handlers. This was the case, for example, in Kansas City as evidenced by testimony presented by the proponents themselves. Tr. Van Dam, 2860-2861. In contrast, at the present time, there are less than sixty (60) total producer-handlers in the entire United States. In Order 124 (or its predecessors), the number of producer-handlers has fallen from 73 in 1975 to 11 in 2000, to 7 in 2004 and the average daily pounds of milk handled by them has increased only 4.7% from 1985 to 2000. Ex. 7, Table 4. In Order 131, the number of producer-handlers has fallen from 7 in 1982 to only 2 today. Exh. 10. Only one (1) is of any size. The volume of milk handled by producer-handlers is likewise minimal and declining, and this trend has not been reversed in the last five (5) years, but shows continued decline. Nationwide, from 1980 to 1998, the share of total milk production of producer-handlers fell both in absolute numbers (from 1.47 billion gallons to 1.16 billion gallons) and as a percentage of total production (from 1.14% to .73%). Tr. Knutson, 2141-2144. In 1999-2000, for Order 124, the figures showed producer-handlers controlling 10.43% of the Class I milk volume. In 2003, producer-handlers in Order 124 were controlling only 9.8% of the milk

volume. In 2004, it was 8.6%. This reduction was true of both the percentage, and the absolute volume, of milk. See Exh. 5 at pp. 36-37; Exh. 7; Exhibits 49-51.

Nor is there any evidence that there is a vast reservoir of pool producers waiting to become producer-handlers. The proponents presented witnesses who said they knew of unnamed persons who were “interested” in becoming producer-handlers; but even the number of those undisclosed potential producer-handlers were few; as well as being totally incapable of verification. See, for example, Tr. Cryan, 931-932 (never interviewed everyone who said they wanted to be a producer-handler, nor seen any due diligence by any such person) and 958-959 (admits that if there was advantage, the numbers of producer-handlers would be increasing, not decreasing; believes a proliferation could occur, but is not aware of it occurring in any market). Needless to say assertions that a few people might be interested in becoming producer-handlers in the future, where there is no ability to verify either interest or ability, deserves no weight. On the other hand, the hard historical facts are, as noted above, that producer-handlers are a vanishing species with a negligible share of the overall milk market.

When pressed to explain why, if there is such a great price advantage as the proponents claimed, there were not more, and increasing numbers, of producer-handlers, as contrasted to the fact of fewer and decreasing numbers, the proponents were reduced to asserting (i) that being a producer-handler was difficult, calling for skills relatively few possessed, and (ii) that those interested were “hiding in the weeds” awaiting the outcome of the hearings. See Tr. Van Dam, 2896-2901. The first “explanation” is, in truth, an admission that there is no significant amount of producer-handlers in waiting; the latter argument is fundamentally nonsense because, if there was any such price advantage, it has existed for the last seventy (70) years without generating a flood of producer-handlers in the industry. Indeed, quite the contrary has taken place.

In an effort to portray Sarah Farms and a few producer-handlers in the Northwest as threats, the proponents who control more than ninety percent (90%) of the milk market in Order 124 and are believed to control approximately eighty five percent (85%) in Order 131, have alleged that business has been lost to the producer-handlers; and pointed to a few anecdotal instances of allegedly lost business, and to Sarah Farms growth, as evidence of that assertion. The actual hearing record shows, however, that (i) there is no loss of business by pool handlers in the Northwest other than as a result of normal competition and pool handlers have taken substantial business from the producer-handlers; (ii) the pool producers took roughly as much business from Sarah Farms in Order 131 as Sarah Farms is alleged to have taken from pool producers; (iii) Sarah Farms growth was due to a combination of hard work and efficiency combined with good timing and good luck, but not to the use of pricing below Class I; and (iv) no evidence was presented of any unusual growth by the producer-handlers in Order 124. Indeed, the testimony was that they remained roughly constant in their volume of milk handled. Tr. Flanagan 2361.

With respect to Order 124, the proponents came up with only one specific instance in which a producer-handler allegedly caused the failure of a pool handler, that of Vitamilk; which, upon closer investigation, proved to be nothing of the sort. Contrary to the Recommended Decision's statement, at Fed. Reg. P. 19655, the record reveals that Vitamilk went out of business because Kroger and Safeway (pool handlers vertically integrated into their retail operations) merged with Vitamilk customers who accounted for approximately fifty percent (50%) of Vitamilk's business, and Vitamilk was not able to come up with a sufficient number of new distributors. Tr. Vanderpol, 468, 484, 514-515; Tr. Van Dam, 1450-1451. Mr. Vanderpol of Vitamilk testified that Vitamilk lost a customer to Edaleen, a producer-handler, but there was

no testimony from that customer as to the reason why the business was lost, and the uncontradicted testimony was that such business represented no more than a truckload of milk a week, amounting to a negligible impact (a little over one percent (1%)) on Vitamilk's then 14.2 million pounds a month of business. Tr. Brandsma 2542-44; Tr. Van Dam 1454-1455. There was also testimony that Vitamilk lost customers to pool handlers, and that it was unable to find sufficient replacement markets because its past business practice alienated potential customers and it was unwilling to be flexible in its marketing policies to school systems. Tr. Vanderpol, 472-73, 481-82. Its costs were higher, as well, because it was unionized. Tr. Vanderpol, 477, 496-497. In short, it may have been unfortunate that Vitamilk failed, but the factual record shows that the failure was not caused by producer-handlers. Moreover, even had Vitamilk been damaged by competition of producer-handlers, one swallow does not make a spring, and there is no evidence of specific instances in the record evidencing that any other pool handlers were significantly damaged in their business by activities of the producer-handlers. The biggest competitors of pool handlers, after all, are the other pool handlers.

There were also many instances of pool handlers taking business from producer-handlers. Mallories Dairies lost a dozen or more Thriftway stores and Albertson's stores to pool handlers. Tr. Flanagan 2352-2355. Smith's Farms lost business to Vitamilk and another regulated handler. Tr. Koester 1815-1816; Tr. Vanderpol, 489. Edaleen lost Starbucks account to Safeway (25% of business), Tr. Heerspink 1984-1985.

With respect to Sarah Farms, it is a remarkable American success story due to Hein Hettinga's strong management and marketing skills, developed through a lifetime in the industry. It is true that Sarah Farms has shown growth since 1995, taken as a percentage against the low base from which it began. However, that growth was not due to insuperable price advantage, nor

by putting any regulated handler out of business, but rather to efficient and modern methods of dairy farming and processing, together with strong marketing skills, long hours and hard work, as well as good timing and good luck.

Sarah Farms is an integrated business with both dairy and milk processing operations. In other words, the quintessential definition of a producer-handler. The privately owned, family company is named after the daughter of Hein Hettinga, who serves as controller. Mr. Hettinga, the founder and owner of Sarah Farms, has been in the dairy industry for more than 30 years. Born in Holland, he has two sons and a daughter who are all part of the business. Sarah Farms is a family owned and run company, and there are few “suits and ties” at Sarah Farms. Instead, it is simply a company that relies upon hard work, technology, and efficiency in order to better serve its customers.

Sarah Farms dairy farm and processing plant are modern, and of sufficient size to make its production run, limited to a few sizes of containers, extremely cost efficient. Sarah Farms also pays attention to its customers needs and concerns, providing product in modern packaging, with full jugs, foil-sealed containers packed in cardboard boxes that eliminates leakage, keeps milk cooler longer and enhances milk shelf life. Transport is immediate and efficient and prompt delivery is made to the retailers – from cow to shelf in twenty-four (24) hours. Tr. Hettinga 2620-2621; Tr. Van Dam, 1469-1470. This combination of low prices due to production efficiency, timely delivery of a high quality product, and willingness to meet customer concerns, makes it an effective competitor. As an example of such attention to customer needs, when Basha’s was looking for a supplier of cottage cheese, although Sarah Farms did not itself produce cottage cheese, Sarah Farms went out and obtained a supplier of cottage cheese (Foster Farms) in order to keep its customer happy. (Hettinga Declaration, ¶7). Subsequently,

Shamrock came in and offered the same price or a better price to Basha's, causing Sarah Farms to lose that business. (Id.) Sarah Farms is also unable to compete with large companies like Shamrock because Shamrock has the financial wherewithal to offer "business perks" such as corporate tickets to events to buyers for customers like Bashes. Thus, based upon the "logic" of the proponents, Shamrock has an "unfair advantage" over Sarah Farms.

A quality product at a competitive price still does not tell the full story of Sarah Farms' growth, although it was a necessary condition to it. Long hours and good luck and good timing also played an important part. When Carnation ceased business in Arizona (as a result of competition by pool handlers), there was a vacuum in the market into which Sarah Farms was able to step in a small way (Tr. Hettinga, 2692) (as opposed to Shamrock, which substantially benefited, Tr. Krueger, 621). Additionally, Sarah Farms obtained Food City as a customer. When Food City expanded, by acquiring Southwest Markets, Sarah Farms was able to pick up that business (to cover the lost accounts of Wal-Mart and Ross Swiss, whose business had been taken away from Sarah Farms by Shamrock, a pool handler).⁴ This gave Sarah Farms the volume base to offer product to Basha's and obtain, for a time, a portion of Basha's business in Tucson, Arizona. Tr. Hettinga, 2619-2620, and Exhibit 22. In 2001, Sarah Farms was also able to obtain business in Arizona from Costco and Sam's Club, which had expanded as alternatives to the traditional retailers, and had been served by Safeway, which was an uncomfortable marriage for both Safeway and Costco because the warehouse stores were becoming significant competitors to Safeway in the grocery business. Sarah Farms also serves customers that UDA and Shamrock will not serve.

⁴ The other producer-handlers testified to the long-term relationship with their base clientele and the stable size of their herds, and/or their lack of growth capacity. Tr. Heerspink, 82. Tr. Brandsma, 2566. Tr. Flanagan, 2352-53, 2361, 2401.

For example, Schade Distributors, an independent distributor, was told that it would be supplied with milk only if it did not compete with existing UDA and Shamrock customers in the Arizona market; effectively controlled by UDA and Shamrock. If Sarah Farms did not supply Schade Distributing, it would be out of the milk business. (See Statement of Tom Schade and John Schade of Schade Distributing dated May 20, 2005 attached hereto as Exhibit “B”). Moreover, and most importantly for this hearing, Schade Distributing has been purchasing milk from Sarah Farms since January of 2005, at a price “slightly higher” than Schade Distributing had been paying to UDA for milk. (Id.) Another example of the real facts trumping unsupported conjecture.

Similarly, Sarah Farms sells milk to Stern Produce Company, an independent distributor in the Order 131 marketing area. Stern has filed a comment, attached as Exhibit “C”, that Sarah Farms sells an “excellent product” to Stern which allows it to purchase dairy products in Arizona at a “competitive price.” (Comment from Gary Hartman, General Manager of Stern Produce, dated June 13, 2005).

As Dr. Knutson pointed out during his testimony, an efficient producer that finds a market niche, in a market area dominated by a very few handlers would be expected to show rapid growth. Tr. Knutson, 2297-2299. While Sarah Farms has shown growth in Order 131, it has not been one-sided. Pool producers have taken as much business away from Sarah Farms as vice versa. For example, as noted above, Sarah Farms has lost Basha’s cottage cheese business to Shamrock based on Shamrock’s ability to offer business “perks” not available to Sarah Farms. Sarah Farms also lost the Basha’s business (7 stores in Tucson, Arizona) to Shamrock earlier this year, based on price. (Hettinga Declaration ¶5). Proponents’ own Exhibit 22, when carefully read, shows that pool handlers in the years 2000-2003 took over approximately 450,000 gallons

per month worth of customer business from Sarah Farms; whereas Sarah Farms obtained about 550,000 gallons per month of business from pool producers; primarily Safeway. Put another way, it is Shamrock, one of the proponents, that has been taking substantial business from Sarah Farms; and not the reverse. This was true in the same time period proponents claim that an allegedly insuperable price advantage existed. See, Tr. Krueger at 595-96, 606-607. Moreover, it continues to be true today. If anyone has a basis to complain about cut-throat competition, it is the minnow, Sarah Farms, and not the sharks, Shamrock and UDA, which otherwise currently have (and have had) a stranglehold on the non-captive milk market in Order 131.

More generally, the Department needs to take into consideration the different growth models of producer-handlers and pool handlers. Pool handlers can sell as much as they can buy and process. A producer-handler's volume is limited to its own dairy farm production. To expand as a handler, it must first build new production facilities, as well as new processing facilities. To create an expanded, or a new, dairy farm, as well as expanded, or new, processing facilities, takes not only money, but also time; perhaps a year to a year and a half or more. Tr. Heerspink, 1979-1981. Moreover, it is one thing to expand growth based on an existing, and concurrently expanding, clientele. It is quite another to incur such expenditures in a market with a relatively fixed number of customers, an essentially static level of milk consumption; and strong competition. When an opportunity arises, a producer-handler can only take advantage if, and to the extent, (i) it has available surplus milk greater than that needed to cover seasonal variations; (ii) of a volume sufficient to meet the needs of the potential new customers; (iii) it has the management expertise to handle the larger operation; and (iv) it has substantial confidence that the customer will remain faithful long-term. It is a rare customer who is willing to wait a year; and customers not infrequently change suppliers. Tr. Van Dam, 1440-1441. The hearing

record is replete with testimony about the danger of expanding, and of customers who would not wait, and of customers who left after a year or two, and of customers whose business the producer-handler could not gain, or was lost, because the producer-handler did not have the production to serve them. Tr. Flanagan, 2384; Tr. Beene, 1683-1687; Tr. Heerspink, 1979-1985; Tr. Hettinga, 2733 (cannot go after the Albertson's or Wal-Mart business because cannot supply their needs). Therefore, a producer-handler is always at a competitive disadvantage to a pool handler in responding to market opportunities, and there are real limits to its ability to grow. Dr. Knutson aptly described the proponent's claims that producer-handlers are a threat to the market as: "ludicrous." Tr. Knutson, 2159-2160.

D. The Producer-Handlers do Not have Any Advantage at all, Let Alone an Insuperable Price Advantage Over Pool Handlers

The proponents claim that producer-handlers have an intrinsic advantage in pricing milk to customers due to the fact that producer-handlers have no obligation to pay into the pool for Class I sales over pool average. The actual hearing record reveals, however, that the proponents' allegations are based on surmise, not on fact; and do not pass the basic "smell test;" i.e. if producer-handlers have such an insuperable price advantage, why are there so few of them, and why has there been a steady decline over the years to the point that producer handlers are almost ready to be placed on the endangered species list?

It is axiomatic that the proponents incessant whine about unfair advantage is the political "spin" of the powerful attempting to eliminate the last vestige of independent producer-handlers. The proponents made no study of the producer-handlers' business to determine what their costs really are, and they offered no evidence of any actual sales by producer-handlers below Class I pricing. In contrast, there was testimony that the producer-handler costs of production of raw

milk in recent years was greater than the blend price, Tr. Flanagan, 2402; Tr. Koester, 1783-1785, 1847-1848; Tr. Heerspink, 1990; Tr. Brandsma, 2538-2540; Tr. Hettinga, 2706. The producer-handlers' representatives all testified that they based their pricing on, and moved their pricing in accordance with, Class I milk prices. Tr. Hettinga, 2632-2635, 2688-2691; Tr. Flanagan, 2381; Tr. Beene, 1696, 1754; Tr. Koester, 1780; Tr. Heerspink, 2009-2010; Tr. Brandsma, 2537. There was also a retail price list from Sarah Farms to a customer that was introduced as an exhibit which showed that Sarah Farms expressly based prices on Class I prices. Exh. 63; Tr. Hollon, 2796-2800. Normally, absence of evidence equates to an absence of proof. When combined with, as is the case here, hard evidence that producer-handler prices did not reflect such a price advantage, the Department was required to reject the proponents' argument, because the proponents in a rule-making proceeding have the burden of proof (both of coming forward with evidence and of ultimate persuasion) by a preponderance of the evidence. Director, Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 276 (1994).⁵

In an attempt to fill the gap between their theories, conjecture and surmise and substantial evidence, the proponents offered at the hearing, a "study" by Carl Herbein, an accountant appearing as a pivotal and paid witness for DFA, and whose firm receives substantial business from Dean's Foods, which "study" concluded that the raw milk component of Sarah Farms milk being sold by Costco "had to have been" sold by Sarah Farms to Costco at a price which an efficient processor paying a Class I price for raw milk could not match. Herbein's "study", however, merely illustrates Mark Twain's old adage that "while figures don't lie, liars can

⁵ William Van Dam, the NDA representative, testified that if the producer-handlers were not, in fact, lowering prices below Class I, but competing on the basis of service and quality, there was no need to bring them into the pool. Tr. Van Dam, 2958-2960. See also, Tr. Hollon, 1262 (if producer-handler selling to retailer at prices consistent with Class I pricing and processing costs it would not be disruptive of the market).

figure.” Mr. Herbein’s analysis was so riddled with methodological errors, absence of factual underpinnings, lack of comparability, lack of specific examples, and so wrapped in secrecy denying verification and examination, that it would never have made it into evidence in a judicial proceeding where courts are charged as gatekeepers with eliminating “junk science posing as expert analysis.” Herbein’s study is “junk science.”⁶

Although purporting to be an analysis of what Sarah Farms sold to Costco, Mr. Herbein did not know, nor did he inquire, what Costco paid for the milk in the period involved, nor what was its margin on the milk. In fact, he did not obtain any information from Costco whatsoever. He did not even know the Costco sales prices for milk; for this he relied upon information provided by unnamed persons at Shamrock; one of the proponents. Tr. Herbein, 775, 837-838, 864-865. Mr. Herbein’s “analysis” likewise was not based, because he did not inquire, or otherwise know, Sarah Farms actual cost of production of the fluid milk sold to Costco. Tr. Herbein, 831-832, 853. Similarly, he did know and therefore did not use the actual costs of the proponents’ plants in Order 131; or any producer-handler in Order 131. Instead, he relied, or so he claimed, on a “proprietary database” of approximately fifty (50) handlers, not selected in a blind random sample, or by characteristics representative of handlers in Order 131, but rather taken from his own client base. Out of this unrepresentative sample he personally, again not randomly, selected a total of twenty (20) handlers (of which only one (1) was a producer-handler) to compile an average cost of production, which he then “adjusted” to “Western

⁶ Sarah Farms and the other opponents moved to strike Herbein’s testimony, which the administrative law judge provisionally admitted, but the Recommended Decision instead gives it great weight. In court proceedings, an expert opinion when challenged is sometimes admitted for the trier of fact to determine its “weight.” However, the point of the Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its progeny is that some supposedly expert testimony is so lacking in scientific/analytical basis that its admission to the factfinder under the guise of expert analysis is misleading to the point of being a denial of due process. Herbein’s “study” should not even have been allowed for consideration to be “weighed” by the Department; much less given controlling weight.

conditions” using a consumer price index for producer prices, and ascribed the result to Sarah Farms and Shamrock. Tr. Herbein, 807-811. Herbein refused to reveal the identity of the handlers in his sample, nor did he provide their underlying hard data, Tr. Herbein, 896-807, 816-17; thus, preventing any effective inquiry into the true comparability of his asserted costs of production. For packaging and transportation costs, he provided arbitrary figures based on his “experience” (although he had none for the 131 region or as a plant manager at all). The same was true for his assumed Costco margins on milk. He arbitrarily selected margins, although he had no experience in the warehouse business or as a retailer, and had no idea what Costco’s margins actually were.

Herbein’s analysis was replete with methodological errors. The original group of fifty (50) was not randomly selected from the industry nationwide; nor was it chosen from Orders 131 nor 124. The smaller sample of twenty (20) was too small even had it been random, as it was not, but personally selected on the basis of unidentified criteria. Thus not only was the sample too small to serve as a random sample and not randomly selected, but bias was actually built into its selection. It cannot be taken as a representative set of industry costs for plants in the country as a whole. It cannot be used as a representative set of costs for plants in Order 131 or 124; and it absolutely cannot serve as a stand-in for the costs of Shamrock and Sarah Farms in Arizona.

Daniel Morrison, an expert witness for Sarah Farms, Smith Farms, Mallories Dairy and Edaleen, testified that the costs of production used by Herbein were at the high end of costs nationally and did not properly represent the cost of production of either the proponent’s plant in Order 131 or Sarah Farms. Morrison, who had worked for Dean Foods (a proponent of the cap) as a cost accountant and director of their dairy financial operation, called the numbers “extraordinarily high.” Tr. Morrison, 1901, 1917 (suggesting that Herbein’s costs were 15 to 25

cents higher than would be expected for an efficient processor). Among other matters, Morrison pointed out that Mr. Herbein's numbers are substantially inflated when compared with those in the Cornell study. The Cornell Study, an independent study commissioned by neither proponents or opponents, of which official notice has been taken, reported costs, where plant costs cross-over in the study, with plant sizes in the Herbein "study," which are consistently lower than the costs reported by Mr. Herbein. Compare Herbein's range of plant processing costs for plants 12 million pounds and over (33.5 cents to 43.4 cents) to that for the Cornell Study (12.3 cents to 28.0 cents). Ex. 25, Table B; Cornell, p. 15.

Mr. Morrison also pointed out that in Order 124, a pool handler (Wilcox) had the Costco business and was perfectly able to compete with a producer-handler, even though, using Herbein's methodology, there would have been a loss, or at best, such a small profit that the alleged intrinsic producer-handler price advantage would have easily overcome it. Elvin Hollon, an expert witness for DFA, admitted that if Wilcox had the Costco business, it obviously could compete on price. Tr. Hollon, 2805-2807.

Moreover, the basic approach of Herbein's "study", to start with the retail price and seek to derive a plant's cost of raw milk without having those actual costs, also has the built-in deficiency that there is not a necessary correlation between the price at which retailers sell milk and what producers receive for that milk. Several common practices in the retail industry decouple retail milk pricing from class pricing. One such common practice is that the frequently used tactic of a "loss leader," the use of a low price for milk, even one lower than the store's cost, to attract the consumer to the store. Another technique is to maintain current retail price levels when producer prices increase, or to delay the implementation of higher prices for one or

more months to maintain a competitive position in the marketplace. Conversely, when prices fall, stores may hold higher prices longer than is required by the raw milk price.

Similarly imprecise and unknown, absent analysis of the specific plants involved, and their actual costs, which Herbein did not do, is how plants transfer the raw product costs to the sales price for their products. This is complicated because virtually every plant has a multitude of milk products to sell. There are variances in butterfat content and size. There is also the practice of selling brand-name and private label milk at different prices in the store even though it is identical milk from the same plant. Unknown is how the plant allocates its raw milk costs and other costs between two differently priced items that essentially are at the same cost to the processor. The private label milk might be sold at less than cost, but the blended result would be a profitable sale to the plant. There are many more variables involving marketing, timing, cost accounting, and business judgment that go into the retail pricing of milk. In this case, in order to accurately determine the costs for the milk that Sarah Farms sold, and Shamrock hypothetically would sell would be to obtain, over an extended period of time, the actual invoices paid by the stores less the discounts, credits, and any other reduction in price and compare that to the actual prices at which milk was sold. In this regard, Shamrock admitted that it has a different price structure for its customers which depends, among other things, on the size of that customer. Tr. Krueger, 3090-01. None of that information is in this record, nor was it used by Herbein, so his alleged “data” has no usefulness, as substantial evidence in this record since it is not representative of plants in Order 131 or Order 124.

Herbein’s study is comprised of hand selected data, pulled from a database that no one can see, compiled into categories that no one can verify, adjusted for regional prices that were calculated in a way that no one can examine, and applied against prices allegedly taken by

Shamrock, but which Herbein has not himself verified; nor can the Department or the opponents. Reliance on Herbein's study is reliance on the unknown, the unseen and the unverifiable. In a rare moment of candor, Herbein himself indicated that he would not advise a client to base a business decision on information like that utilized in his "study."

Q. Let me ask you a follow-up hypothetical. Let's assume that, again, you're asked to do due diligence on a potential acquisition. Rather than financial statements, all you get is a statement from the president or CEO of the publicly traded, or privately held company in my example would be better, that simply says, "We have a database. The financial statements are all good. We're making this much money." And you have the opportunity in the next 24 hours – you can't do anything else. You've got to rely upon this by the company. What would you advise your client to do?

A. Well, that wouldn't happen in real life.

Q. I asked in my hypothetical to go ahead and answer it.

A. If that was all we had to do, I would say to my client, "This guy's a nut. Stay away from him." But that wouldn't happen.

Tr. Herbein, 827-28.

The experience of Mr. Hettinga contradicts the Herbein testimony and is consistent with Mr. Morrison's conclusions:

At the hearing, the testimony of Carl Herbein, that was used to suggest that our prices were unattainable by a regulated handler, were based on plants whose product mixes were not disclosed but were almost certainly more diverse than that of Sarah Farms'. My experience has shown that the cost of processing, packaging, and labeling is about the same regardless of the size package that is run. A plant running straight white milk gallons will have a lower overall cost per gallon than will have a plant running a product mix of multiple sizes and SKUs. The composite cost information provided to the Secretary is meaningless as a basis for comparison. Sarah Farms' cost per white gallon should be no more than the cost of Shamrock. In fact, it should be less.

Mr. Herbeins' study looks only at 2 percent white gallons. Without knowing what the same store was charging for whole milk or skim milk, it is possible [sic, impossible] to know whether or not the stated price for 2 percent represented a markup over the actual cost from the plant or a markup over some blended milk cost to the plant. Also, the stated period of time is stated to represent January through June 2003, there is nothing stated to indicate the days of the month or the dates of the month these costs were surveyed. This is relevant because the store may be pricing milk based on prior months' costs or anticipation of the following month. As a dairy processor, butterfat costs me money. A gallon of whole milk costs more than a gallon of reduce-fat milk, which costs more than a gallon of skim milk. Sarah Farms prices its products based on the butterfat content. I have noticed that the stores price milk rather uniformly. To the consumer, there isn't much difference between the cost of a gallon of skim milk and a gallon of whole milk, even though the whole milk costs the store more. Also, the figures cited by Mr. Herbein for transportation are highly overstated, based on my experience. Finally, pallet costs do not correlate to those for Sarah Farms because we offer a pallet exchange program. The whole purpose is to keep the cost of my product low – and it works.

Tr. Hettinga, 2633-35.

In short, Herbein's testimony is unfounded conjecture in the service of paid partisanship and is not the sort of substantial testimony upon which the Department must rely. It is certainly not entitled to the controlling weight placed upon it by the Department in the Recommended Decision that it should overcome actual evidence in the hearing record that (i) the producer-handlers were not pricing under the Class I price; (ii) the pool handlers were successfully competing to take away business from producer-handlers, including business at Wal-Mart (and now Bashas) in Order 131 and Costco in Order 124; and (iii) where a comparison of the business gained, and business lost, by producer-handlers does not reveal any trend in loss of business by pool handlers to producer-handlers. Finally, his allegations are directly contradicted by the facts occurring in the real world since the close of the evidence. Shamrock is not only competitive

with Sarah Farms on price, it is selling at a price less than Sarah Farms and taking business away from Sarah Farms. (See Hettinga Declaration, ¶5, 7).

III. THE RECOMMENDED DECISION DID NOT GIVE ANY WEIGHT TO THE TRANSPARENT PURPOSE OF THE PROPONENTS WHICH IS TO ELIMINATE COMPETITION FROM PRODUCER-HANDLERS

The proposed amendment to the marketing orders was prepared and supported by the giants in the milk industry (See discussion in the Joint “Proposed Finding of Fact and Conclusions of Law” submitted by the Opponents at pp. 8-10), ganging up on relatively small producer-handlers. Absent the Recommended Decision’s curious definition which creates a disorderly market based upon the very existence of a producer-handler, there were no objective evidence or indicia of a disorderly market presented to the Department at the hearings. There was no trend of growth in the numbers or market share of producer-handlers in the industry, or in the affected Orders. There was no showing of any significant objectively verifiable loss of business; and there was no showing that any loss of business by pool handlers was due to anything other than normal markets and marketing competition. The proponents’ allegations that producer-handlers are a lethal threat to the AMAA pool resembles nothing so much as elephants complaining about being terrorized by mice.

This entire process, indeed, has been generated by something quite the reverse. The proponents have been seeking to eliminate the producer-handlers as competition for a number of years. The consolidation in the dairy industry has advanced so far, with the demand for Class I milk relatively static, that further growth to the major players such as DFA and Dean Foods, can only come by subtraction; namely, by eliminating those producer-handlers who serve as independents in a system now dominated by large cartels of cooperatives and handlers. This is

especially true in Order 131 where the market is dominated by UDA and Shamrock. (See statement of Schade Distributing). This is also not the first time that major handlers have attempted to eliminate the producer-handlers by claiming unfair price advantages and, failing that, the imminent end of the AMAA as we know it. See Tr. Van Dam, 2950-51; Tr. Beene, 1677-1678, 1736. They tried about fifteen (15) years ago in Texas, for example. The Department wisely chose not to be stampeded, and the world did not end.

This continuing desire to destroy the purchaser-handler is well evidenced by the proponents' proposal; a proposal designed to ensure that the major producers keep their competitive advantages while eliminating any growth by producer-handlers. The 3,000,000 pound a month "hard cap", set forth by proponents and currently accepted by the Department, contains an "all or nothing" feature. At a 3,000,000 pound monthly route disposition of Class I milk, so the proponents have asserted, a producer-handler can begin to compete with them in terms of production efficiencies.⁷ Below that figure, proponents have candidly admitted that producer-handlers cannot effectively compete on price. It is also quite clear that, below that figure, producer-handlers cannot compete with them in seeking the business of the major retailers and warehouse stores (not only because they cannot compete on price, but also because the volume of production is insufficient), but instead will be confined to serving those small niches that the major handlers do not, now, wish to supply – until such time as those handlers decide to devote their attention to taking that business away as well. Above the 3,000,000 pound a month figure, there was disagreement among the experts about the efficiencies that might be obtained. The proponents' expert claimed that the size efficiencies beyond that point rapidly diminished, the opponents expert argued that the plant size would have to be substantially larger,

perhaps 20,000 pound per month, before a producer-handler could effectively compete on a plant cost per unit efficiency basis with the large plants run by the major handlers; and that the plant costs differentials could be so large that any cost advantage a producer-handler with a 3 million pound plant might have would be over. Tr. Morrison, 1946-1947.

It is precisely to prevent this growth that the proposal was made. If the proposed “amendment” is made final, then in addition to the existing price advantage in favor of the large pool handlers, when a producer-handler reaches the point where production efficiencies would begin to kick in, a major monetary penalty and burden would be imposed on it by way of a mandated contribution to a handler pool from which the purchaser-handler would receive no benefit. This serves as a major disincentive to existing producer-handlers to attempt to increase business, as well as to pool producers thinking of escaping the cartel’s clutches by themselves becoming producer-handlers. It would also potentially eliminate producer-handlers from the milk marketplace. The elimination of these independent, family businesses would reduce choice for the consumers and ultimately result in higher milk prices. Well over 30 thousand consumers representing at least 100,000 milk drinkers have already told the Department not to allow the Recommended Decision to stand. Under the terms of the AMAA, the Department must listen.

A producer-handler is already limited in its ability to grow by the regulatory restriction to its own production. It is not able to increase this production simply by purchasing more milk except for a de minimis amount. To increase production to serve new customers, it must expend substantial capital (hard to obtain on the thin margins in the industry)⁸ in increasing its dairy herd and its processing capacities; all of which takes time. Tr. Flanagan, 2348-2351, 2369-2370; Tr.

⁷ One of the opponents experts, Daniel Morrison, testified that this figure was far too low; at least a 20 million pound plant was needed. Tr. 1891-95.

⁸ Two percent (2%) to four percent (4%) per Smith, Tr. 1269.

Heerspink, 1979-1981; Tr. Beene, 1683-84. When a mandatory contribution of several million dollars is added to this, the effect will be to prevent growth of producer-handlers, to put several of the existing producer-handlers out of business, and to cripple the other producer-handlers. Terry Smith, an expert testifying for proponents, admitted that a result of his analysis (which assumed a full pricing advantage for the producer-handler exemption) a 3,000,000 pound monthly enterprise would have its profit ringed-out by the assessment. Tr. Smith, 1315-1317. For example, using the proponents' own figures on producer-handler volumes and Class I/Blend Price differential in Order 124 and Order 131, the payments required of Sarah Farms would be approximately \$3.5 million, of Smith Brothers approximately \$1.5 million, of Edaleen \$1 million and of Mallories Dairy approximately \$816,000. (See Tr. 5600 and Exh. 35 as to production; Tr. at 1801, 2347, 2548, 2433 and 2637 as to impact generally). This is not only a devastating cost to the producer-handlers, it amounts to a huge subsidy to the competing handlers. The consequence of that, in turn, is that the industry will be wholly dominated by a cartel of large producers and a few giant handlers. That process has already occurred and will only be exacerbated in Order 131 if the Recommended Decision becomes a final decision. Absent the ability to become a producer-handler, the ambitious producer will become increasingly marginalized, resulting in even more consolidation in the hands of the major handlers and large producers within a co-op. See Tr. A. Ritchey, 730-731, 740, 755 (only way to survive as dairy farmer was to become a producer-handler). In Order 131, there is only one major co-op, UDA, one large independent pool handler, Shamrock, and two "captive" handlers, Kroger and Safeway. If Sarah Farms is marginalized or eliminated, as the proposal intends, prices to the consumer may rise as a result. Tr. Knutson, 2286-2290. Neither the consumer, nor the independent dairy farmer, will be served by such a development. In fact, as noted above, over 100,000 milk

drinkers in Orders 124 and 131 have commented to the Department in the last month that the limitation of competition and the elimination of consumer choice which will result if the Recommended Decision is implemented is not what they consumers want to happen. Consumers want competition and choice; not cartels. This is true in Order 131 area and also extends into Mexico where consumers purchase milk from Sarah Farms because of the quality of the milk and the service. (Comment of Jorge Salas, owner of Fruteria Welton, S.A. De C. V., the employer of 350 employees in thirteen store locations in Mexico, attached as Exhibit “D”). The existence of Sarah Farms as an independent producer-handler helps to keep milk prices affordable to “poor people and senior citizens” in both Arizona and Mexico (Id.)

The anti-competitive conduct of UDA and Shamrock is exemplified by their treatment of an independent distributor of milk in the Phoenix market, Schade Distributing. Schade was forced to agree not to compete against Shamrock in order to purchase milk from UDA. (Statement of Schade Distributing, Exhibit “B”). Even this was not enough for UDA and it ultimately refused to sell any milk to Schade. The only alternative for Schade was to purchase milk from Sarah Farms. (Id.). As Schade stated in its comment, if Sarah Farms does not survive as a producer-handler, “...the consumers in Arizona will be paying higher prices for their milk because of the Shamrock and UDA monopoly”. (Id.).

The AMAA was not designed to protect and nourish a cartel of extremely large handlers and co-ops with interlocking agreements. To tax the poor and give to the rich, to the detriment of consumers, is not within the power of the Department given to it under the AMAA and should not be the Department’s mission statement.

IV. PRODUCER-HANDLERS HAVE REAL ADDITIONAL COSTS AND RISKS THAT OTHER PRODUCERS AND OTHER HANDLERS DO NOT HAVE AND WHICH THE RECOMMENDED DECISION IGNORES

The Recommended Decision asserts without substantial evidence, that producer-handlers have been exempt from pooling and pricing under the AMAA for historical reasons of “administrative convenience.” The historical argument that producer-handlers may have been left alone by the Secretary as a matter of “administrative convenience”, is not supported by the record; but even if it were true, nothing in the hearing record shows that the matter has become more significant. When the AMAA was in its infancy, producer-handlers were numerically numerous, perhaps being even as much as fifty percent (50%) of the producers and handlers in a given market. The proponents’ example of Kansas City makes this clear. The Kansas City example also shows how tenuous is the argument that producer-handlers were left out of the pool for administrative convenience only; because fifty percent (50%) of the market is not something the Department would ignore simply for convenience. On the other hand, it is certainly true that producer-handlers are not in the same situation as other producers and other handlers. They have risks and costs, both as producers and as handlers in an integrated enterprise; and if there are problems with either side of the business, the entire producer-handler operation is at risk of failure.

As a producer, a producer-handler has no guaranteed market for the product, nor any guaranteed price. It must generate its own market for the milk it produces, and it must negotiate in the market a price which will cover its costs of production and processing/transportation/packaging costs. As a handler, it is limited by the size of its own dairy farm production and must itself balance its variations in supply, whether seasonal or caused by

production (herd illness, equipment failure, labor, etc.) and supply (feed, transport, etc.) problems. The proponents, despite efforts to minimize the absolute amount, agreed that balancing costs are real and are significant. Tr. Hitchell, 222-233; Tr. Vanderpol, 507. If a producer-handler sells surplus to a pool handler, it receives a Class III or Class IV price, less a substantial discount (\$1.50 per cwt in Order 124), Tr. Koester, 1783, Tr. Heerspink, 1988-1999; Tr. Van Dam, 1395-1396; but there is no requirement or guarantee for a pool handler to accept the milk; and there is no guarantee that an alternative market can be found or at a desired price. If there is a shortage, it can only buy a de minimis amount of milk, and it can lose a valuable customer; the costs of which are substantial, both by reason of lost profit and by reason of the increased cost of finding an alternative customer (perhaps at a lower return) or having a much larger amount to balance (certainly, at a greater cost).

A producer-handler, such as Sarah Farms, also faces inherent difficulties in keeping the processing plant running at a high capacity. A failure to accomplish this increases costs. Thus, keeping processing costs low requires production on the farm and production runs in the processing plant well beyond that which a pool producer, or a pool handler separately require. Moreover, a producer-handler is limited in its growth, as compared to a pool handler, because it cannot, as a producer, grow unless, as a handler, its markets grow in volume; and it is limited as handler because it cannot simply purchase milk to serve such customers as it may be able to obtain, but rather is limited in its ability to gain and keep customers by the volume of its existing production facilities and the need, if it is to acquire new business, to increase the size of its herd and the size of its production facilities. (Tr. Koester, 1880-1881, lost distribution because it gained the Starbucks account and Smiths Farms did not have the volume to supply it; Tr. Heerspink, 1983-1984, lost Starbucks business to Safeway because Safeway offered a lower

price and Edaleen did not have the volume to serve Starbucks expanding needs; Tr. Hettinga, 2733; cannot go offer Wal-Mart and Albertson's – cannot supply their needs).

**V. THE RECOMMENDED ORDER
VIOLATES THE DEPARTMENT'S STATUTORY
AUTHORITY GIVEN TO IT BY CONGRESS UNDER THE AMAA**

Statutory interpretation is not a free form exercise such as that indulged in by the red queen in “Alice in Wonderland.” Neither a court nor the Department is authorized to ignore the statutory wording and replace that wording with different words having a different meaning. The only reliable guide to statutory interpretation, if laws are to be made by the legislature and not wholly relegated to the whim of unelected judges and faceless bureaucrats, is to give the statutory words their plain meaning within their statutory context. It is only when that plain meaning cannot be found that a court or an agency is authorized to look to the expressed policy of the statute to infer that meaning. In this case, both the plain meaning of the wording of the statute and the express policy of the statute do not authorize imposing payment obligations on the producer-handlers.

The Department claims that the basis for imposing the payment obligation upon producer-handlers is to be found in 7 U.S.C. §608(c)(5)(A), (B) and (C). 7 U.S.C. §608(c)(5) limits permitted orders to the conditions set forth in that subsection (except as provided in subsection 7). 7 U.S.C. §608(c)(5)(A) authorizes, in pertinent part, the Secretary to fix or provide a method for fixing “minimum prices ... which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers.” (Emphasis added). Subsection (B) states that an Order can provide “for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them;” or “for the payment to all producers and associations of

producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered” subject to adjustment:

to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time ... and ... a further adjustment, equitably to apportion the total value of milk purchased by any handler, or by all handlers among producers on the basis of the milk components contained in their marketings of milk. (Emphasis supplied).

Subsection (C) further provides that the Order may:

in order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (provide) a method for making adjustments in payments, as among handlers (including producers who are also handlers) to the end that the total sums paid by each handler should equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection. (Emphasis supplied).

Taking all these provisions together, the goal of the statute is plain; i.e., to ensure that producers are paid a uniform and minimum price for milk purchased from the producers by handlers, and that handlers are compensated for payments made by them at the uniform price in excess of the fixed value of the milk they have purchased from producers. Subsections (D) and (E) continue this theme, referring again to milk purchased by handlers from producers, and payments made by handlers to producers. Throughout, the statutory scheme hinges upon purchases made by handlers from producers and payments made for those purchases by handlers to producers. The statute states that an order may contain no other provisions than are specifically provided in subsection (A) and (B); and what is specifically provided by the statute in (A) and (B) are fixed minimum payments on purchases and payments into the pool by

handlers who have themselves made payments to producers in excess of the use value of the milk purchased.

A producer-handler is a person who produces his own milk and handles his own milk. A producer-handler is one integrated operation and does not purchase milk from himself and he does not pay himself for that milk. A producer-handler is not thereby included by Congress within the express scope of the statutory provision requiring equalizing payments by handlers, and which is designed to protect the producer vis a vis the handler by fixing minimum prices and to prevent disadvantage accruing to handlers by reason of their paying those fixed prices in excess of the use value of the milk purchased. A producer-handler who uses his own production, needs no price protection from himself in disposing of his own production; and a producer-handler who uses only his own production needs no adjustments on the use value of the milk because there is no milk sale to a separate person and he is not paying a uniform price to someone else which may vary from the use value to him of that production. The language of subsection 608(c)(5)(C), which provides for making adjustments in payments as among handlers (including producers who are also handlers), refers specifically to adjustments in payments; and, importantly, it goes on to say “to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the [fixed] prices.” In other words, the adjustments expressly refer to payments for milk purchased at fixed prices; payments which are not made by producer-handlers who do not purchase milk from themselves, much less at fixed prices.

Neither the word “purchase,” nor the phrase “paid by” are ambiguous or unclear. The meaning of both within the statutory context is plain and unvarying. The word “purchase,” means acquiring title to something which the person purchasing did not previously own, and an exchange of value to accomplish that change of ownership. Black’s Law Dictionary defines

purchase as the “transmission of property from one person to another by voluntary act and agreement founded on valuable consideration.” Black’s Law Dictionary, 4th ed. 1968. Webster’s New World Dictionary defines purchase as “to obtain for money or by paying a price.” The conjunction of the word “purchase” with the phrase “paid by,” which occurs throughout the statute, leaves no doubt that its applicability requires actual purchases and actual payments. The reference in 608(c)(5)(C) is wholly consistent with that reading. It does not say “including producers who utilize their own milk as handlers.” It says “including producers who are also handlers.” This means that those producers who purchase milk from others, in their capacity as handlers, rather than as producer-handlers within the meaning of the subsequent promulgated regulations, must make those uniform payments and obtain equalized value. Since the statute is clear on its face, there is no need to go any further to determine the meaning. Congress limited the power of the Department to those set forth in the statute and “no other.” The Department cannot, thereafter, include producer-handlers within the ambit of the pricing and pooling portions of the affected orders.

Since there is no solace for the proponents found in the actual statutory language, they have been forced to argue that the statutory word “purchased” does not have its plain meaning but really means “acquired for marketing,” a phrase nowhere to be found in the statute, and nowhere to be found in any definitions of the word “purchase.” The case most often cited by the proponents for this concept is United States v. Rock Royal Co-op, 307 U.S. 533, (1939). Rock Royal, however, made no such holding. No producer-handlers were party to that litigation, nor did the Court determine the applicability of the AMAA to producer-handlers in that case. Instead, in Rock Royal, the Secretary issued an Order pursuant to the AMAA exempting cooperatives from payment of the uniform price and authorizing payments to these cooperatives

and to certain handlers from the producer settlement fund. The defendants asserted there was no statutory basis for these exemptions and payments to cooperatives. The Court held that the defendants lacked standing to challenge the payments made by the Order; and that there was statutory authority to exempt cooperatives under AMAA §8(c)(5)(F). 307 U.S. at 560-562. One defendant cooperative challenged the order on the additional ground that it was not obligated to pay because it was not a handler, but rather an agent of its member producers, and that it distributed the milk of its producers and paid to them the amount received less expenses. Under the order then at issue, milk received from a handler's own farm was exempt, so that the only question before the Court was whether the cooperative was merely an agent for its members or acting as an independent entity. 307 U.S. at p. 551, n. 14. In dictum, because the Court had previously held that the cooperative lacked standing, it said that such an "agency" cooperative was subject to the AMAA; and that, as to such agency cooperative, the word "purchased" meant "acquired for marketing." Crucial to the Court's conclusion, however, was that it believed both "sale" and "agency" cooperatives were separate entities from their producers, and did not themselves produce, but ultimately paid for, the milk they sold "as the cooperative does not have its own farm but is itself a handler under the Act." 307 U.S. at 581. The Court also noted that the cooperative bought and sold milk from non-members.

In reality, Rock Royal actually supports the position asserted by Sarah Farms and the other producer-handlers. Rock Royal involved separate entities in a milk transaction. When there is a separate entities that are involved in a milk transaction, the precise form of that transaction (purchase, consignment sale, lease) may not matter, but the central issue is still that there is a transaction between separate entities. In contrast, there cannot be a transaction between separate entities in the producer-handler context because it is one integrated entity and

does not sell, lease, consign or purchase milk from itself. The other cases mentioned by proponents are similarly inapplicable to producer-handlers.

For example, although sometimes cited as authority by proponents, neither Elm Spring Farm v. United States, 127 F.2d. 920 (1st Cir. 1942), nor Shawangunk Cooperative Dairies v. Jones, 153 F.2d. 700, (2nd Cir. 1946) are on point. Elm Spring Farm involved a cooperative that attempted to avoid the order by entering into sham leases of cows, and claiming thereby to itself to be a producer. In other words, a handler engaged in a sham to avoid regulation. This claim was rejected on the basis of Rock Royal; i.e., elevating substance over form, there was not one entity, but rather several separate and independent producers supplying one handler. Shawangunk involved a processor who was not a producer, and who received milk from producers, and sent the milk out for pasteurization to another handler, receiving a fee for the service. The Court treated it as a handler. Once more, separate entities and separate transactions.

Finally, Acme Breweries v. Brannan, 190 F.Supp. 16 (N.D.Cal. 1952), which has also been occasionally cited as authority, was a lower court case involving hops, and not milk; where a hops quota was imposed on producers with respect to hops that might be sold to make beer “handled.” The Court held that a producer of hops who used his own hops in brewing and selling beer was subject to the quota as a “handler” because it processed the hops, and to rule otherwise would avoid the intended effect of the hops quota. The statutory language did not refer to “purchasers” by a handler, and the AMAA with respect to milk is plainly different in language, operation and intent. The AMAA statutory provisions concerning milk does not seek to raise prices by limiting production, but rather to guarantee minimum prices to producers. There is no limit on what may be produced or sold in the milk portion of the statute.

Ideal Farms v. Benson, 288 F.2d. 608 (3rd Cir. 1961) and Freeman v. Vance, 319 F.2d. 84 (5th Cir. 1963), which relied on Ideal Farms, is just wrongly decided and would not withstand judicial scrutiny today. Ideal Farms concluded that it would be “illogical” to treat a cooperative that acted as an agent for its members differently from a person who processed only his own production. It is inappropriate for a court to change the meaning of a statute by changing the meaning of words so that they are held to mean something quite different (to “purchase” does not mean to “acquire for marketing”), in order to impose its own purported “logic” upon a congressional choice. A statute may or may not be ill-advised. It may or may not be poorly drafted, but where there is no actual contradiction in provisions before the court, that court is not empowered to “improve,” alter or amend the statute. As Judge Hastie stated in his dissent in Ideal Farms:

[I]f Congress has used restrictive language in the relevant operative provision of a statute, resort to the overall purpose of the statute does not...justify relaxing a stated restriction in a way inconsistent with any reasonable construction of the restrictive language itself.

Here, the operative language of the statute authorizes certain impositions upon handlers of milk who purchase from producers, and nothing more than that. It seems to me no reasonable construction can make the ‘purchase’ concept cover the conduct of persons who as handlers simply process and distribute milk they have produced on their own farms.

288 F. 2d. at 619.

The Ideal Farms majority stretched the text of the statute to fit its purpose. Whether it is “logical” or not for Congress to use “purchase” to actually mean “purchase” and thus effectively exempt integrated operations such as producer-handlers from the reach of the pricing and pooling provisions of the AMAA, the Court and the Department are not at liberty to rewrite the

statute to conform to their own notions of logic or policy. Rather, their obligation is to interpret and apply the statute that was adopted by Congress, whether it is “logical” or “politically correct”, or otherwise.

The word “purchase” means just that, a payment of money to another for a good or service or property, in the context of the means chosen by the AMAA to ensure a steady supply of wholesome milk at a fair price to producers. The statute chose to achieve that, through carefully chosen words with a simple, well understood meaning by having handlers pay a fair price to others for the others’ milk, and to equalize the amounts paid per unit of milk, on a use value basis, among those handlers actually making such payments to others. Producer-handlers do not “purchase” their own product from themselves, nor does title change, nor does money change hands; nor, in the context of statutory policy, is there any risk that they will take advantage of themselves. It would be pointless to have a person pay himself a minimum. If Congress had intended to include within this scheme persons who did not pay anything to others, but processed their own product to sell to customers or retail distributors, it certainly could have said so. Instead the language chosen by Congress repeatedly uses the words “purchased” and “paid by;” words which by definition import a change of title and possession in return for remuneration. By the plain language of the statute, producer-handlers may not be required to pay into the pool based on their use by them of their own milk.

Moreover, it is substantively logical for Congress to exclude integrated operations such as producer-handlers from the statute because of the unique risks these integrated operations face. (Eg., the agents in Rock Royal did not bear any of the costs of inadequate supplies). Likewise, there is no real world market transaction by which to measure the “price” of the

purported “transaction” between a producer-handler and “itself.” Plain meaning and logic must be defied by the Department in order to find that a producer-handler is covered by the statute.

Nor is the imposition of a pool contribution justified by prior decisions of the Secretary asserting that the Department has the power to require producer-handlers to contribute to the pool. It is elementary that the existence of a statutorily derived power is determined by the statute, not by the regulator’s assertion. Nor do amendments to the statute following such assertion bolster the claim to such power. Because the Department has not attempted to use this authority, Congress cannot be said to have approved such claim; and legislative history of later amendments does not contain language confirming or approving the Secretary’s interpretation. Needless to say, the clear wording of a statute is not overturned by congressional silence. More importantly, however, Congress has affirmatively approved the exemption of producer-handlers. The Department itself not so long ago summarized the position of Congress on the status of producer-handlers:

In the legislative actions taken by the Congress to amend the AMAA since 1965, the legislation has consistently and specifically exempted producer-handlers from regulation. The 1996 Farm Bill, unlike previous legislation, did not amend the AMAA and was silent on continuing to preserve the exemption of producer-handlers from regulation. However, past legislative history is replete with the specific intent of Congress to exempt producer-handlers from regulation. If it had been the intent of Congress to remove the exemption, Congress would likely have spoken directly to the issue rather than through omission of language that had, for over 30 years, specifically addressed the regulatory treatment of producer-handlers.

64 Fed.Reg. 16135 (April 2, 1999).

The AMAA also contains specific references to producer-handlers that demonstrates a total exemption for milk produced by the entity that processes the raw milk. For example,

Section 8c(5)(k)(I)(11) requires that certain tax-exempt producers be treated as producer-handlers, language which is necessary based on the belief and assumption that producer-handlers are exempt.

Congress has also expressly said that the ability of the producer to produce milk shall not be regulated. See 7 U.S.C. §608c(13)(B) (“No order issued under this Chapter shall be applicable to any producer in his capacity as a producer.”) The proposed amendments force the producer-handler to choose between paying into the pool for its own farm production or limiting the size of its production. It is an indirect, but effective, restraint on his production and a regulation of him as a producer. A producer-handler is a single operation. Its handling operation is a function of its daily farm production, and vice versa. For this reason, any regulation that limits the ability of the producer-handler to operate by selling additional quantities of milk limits the producer-handler in its capacity as a producer producing milk; which Congress has expressly forbidden.

VI. CONCLUSION

The preamble to subsection 608(c)(5) makes clear that the Secretary may only make orders consisting of certain specified provisions “and no other.” This prohibits the Secretary from including provisions in Orders whose purpose is to restrict or control competition, whether under the ruse of increasing “equity” among handlers, or otherwise. Nowhere in the AMAA is there any reference to regulating the terms of competition among handlers, providing a “level playing field,” or assisting handlers in their competition with each other or producer-handlers. Regulating competition, outside the specific parameters of fixed prices to be paid for milk produced, is not mentioned in the statute; and because it is not mentioned, it is prohibited. Both 7 U.S.C. §602 states that the goal of the statute is to protect the interest of the consumer and

producers in an orderly flow of the supply of milk and avoiding unreasonable fluctuations in supplies and prices. The orderly flow of milk supplies to consumers is the goal set forth in the statute, and all references to an orderly market are followed by the clarifying phrase “so as to” ensure that regular supply of milk. Orderly markets are not goals in and of themselves. The most orderly market imaginable is a pure monopoly. The orderly marketing conditions of John D. Rockefeller’s Standard Oil is not what the writers of the AMAA had in mind when they spoke of orderly marketing conditions. Moreover, and most importantly, the Department cannot subvert the power given to it under the AMAA to preserve and control the market on behalf of handlers based upon a punitive and illegal limitation.

Sarah Farms was born as a producer-handler and has always met the requirements for such an operation. Sarah Farms has invested substantial capital and the “sweat equity” of Hein Hettinga and his family into that business. The largest players in the dairy industry want to curtail the operation of Sarah Farms as an ongoing business, limit consumer choice in Order 131 and ultimately raise the price for milk to consumers in the Arizona-Las Vegas Marketing Area. The Department cannot and should not allow the Recommended Decision to stand to the detriment of Sarah Farms, the independent distributors and businesses that it serves, and to the milk buying public.

Respectfully submitted,

HEBERT SCHENK P.C.

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Phoenix, AZ 85016
(602)248-8203
(602)248-8840 Fax
Counsel for Sarah Farms

CERTIFICATE OF SERVICE

The foregoing Separate Exceptions and Comments of Sarah Farms to Recommended Decision was served upon the following parties on June 13, 2005, by electronic mail, FedEx Overnight Service, and /or first-class United States Mail service as indicated.

VIA U.S. MAIL, E-MAIL, AND FEDEX

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/s/ Alfred W. Ricciardi

EXHIBIT A

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:) **DOCKET NO. AO-368-A32;**
MILK IN THE PACIFIC NORTHWEST) **A0-271-A37; DA-03-04**
AND ARIZONA - LAS VEGAS)
MARKETING AREAS)

DECLARATION OF HEIN HETTINGA

1. My name is Hein Hettinga, and I am the founder and co-owner (with my wife) of Sarah Farms. Sarah Farms is named after my daughter and is a family company which was founded approximately ten years ago. Sarah Farms is an independent business with both dairy and milk processing operations. Sarah Farms was founded as a producer-handler operation and has existed as a producer-handler in the Arizona-Las Vegas Marketing Area since its inception.
2. I have knowledge regarding the information set forth in this Declaration and would be competent to testify to the matters stated herein if required to do so by the United States Department of Agriculture ("USDA").
3. During the course of the lengthy hearing in this matter, Shamrock Foods Co. ("Shamrock"), one of the proponents that is seeking to impose regulatory restrictions on independent producer-handlers, such as Sarah Farms, claimed that it had lost seven Bashas Stores in Tucson, Arizona, to Sarah Farms due to the fact that Shamrock allegedly could not "compete" with Sarah Farms with regards to the price of the milk being sold to those Bashas Stores.

4. As the Department heard during the hearing on the producer-handler issues, there are three essential factors that are important to any buyer/retailer of milk or other dairy products: (1) quality; (2) service; and (3) price. If a seller of milk or other dairy products, whether it is a producer-handler, a regulated handler, or otherwise, cannot provide a quality product and service the accounts, it will not make any difference whether that seller of milk can offer a lower price.
5. With regard to the Tucson Bashas Stores, Sarah Farms lost those stores to Shamrock at the end of January in 2005. When Bashas was asked why it was switching from Sarah Farms to Shamrock, Sarah Farms was told that it was not a quality issue or a service related issue. Indeed, Bashas was extremely happy with the quality of the product being sold by Sarah Farms and the service being provided by Sarah Farms to those stores. Under the circumstances, the only reason that Sarah Farms lost those Bashas Stores to Shamrock was based upon the price of the product. In that case, it was obvious that Shamrock could not only compete with Sarah Farms on price, but that Shamrock could beat Sarah Farms on the price for the milk.
6. As I testified during the hearing, as an independent producer-handler in the Arizona-Las Vegas Marketing Area, Sarah Farms has to compete with the United Dairymen of Arizona (“UDA”), another of the proponents in this matter, Shamrock, as well as two “captive” vertically integrated retailers, Kroger and Safeway. Both Kroger and Safeway are national retailing and service companies. Kroger has 103 supermarkets in Arizona as well as a milk plant which supplies those supermarkets with guaranteed milk sales with no expenditure on a sales force. Similarly, Safeway has 116 supermarkets in Arizona plus a milk plant which supplies those stores with guaranteed milk sales, again with no expenditure on a sales force.

Since there are approximately 420 supermarkets in the entire state of Arizona and Safeway and Kroger control about half of those outlets, it is difficult for Sarah Farms to compete with these giants in the industry. Nevertheless, Sarah Farms will continue its producer-handler operation because, among other things, it is the sole source of independent milk in Order 131.

7. Since the closure of the hearing in this matter, Bashas made a request to Sarah Farms to assist it in attempting to find a competitive price for cottage cheese at its supermarkets. At the time, cottage cheese was being sold to Bashas by Shamrock. Because Sarah Farms does not process cottage cheese, Sarah Farms attempted to locate a source for cottage cheese to be sold to Bashas. Sarah Farms was able to obtain the cottage cheese from Foster Farms to be sold to Bashas. Even though Sarah Farms essentially acted as the middle man in this transaction, it was able to sell the cottage cheese to Bashas for a price which saved Bashas hundreds of thousands of dollars and also saved the consumers in Arizona a substantial amount of money on the cottage cheese purchased by them from Bashas. Most recently, however, Shamrock came back to Bashas in an attempt to obtain the cottage cheese business and either matched or beat the Sarah Farms' price. Since Shamrock is such a large entity and has substantial amounts of money to spend on things like corporate "perks" such as tickets to professional sporting events and other incentives for the buyers of its customers such as Bashas, it is difficult and in some ways unfair for Sarah Farms to have to compete with these large corporate entities.
8. As I mentioned during my testimony at the hearing, Sarah Farms is a small business under the provisions of the Regulatory Flexibility Act as a dairy products manufacturer that employs less than 500 employees. Sarah Farms also supplies small independent businesses

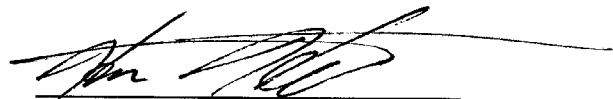
that otherwise would not have a source for the purchase and distribution of milk in the Arizona-Las Vegas Marketing Area. For example, Schade Distributing, which is the largest independent dairy distributor in the Phoenix-Metropolitan Marketing Area, is a family owned and operated business. Schade Distributing has been informed by UDA that UDA would not sell Schade Distributing any Safeway milk or Shamrock. Since Schade Distributing had no local source in Arizona for dairy products, it attempted to obtain milk from outside the State of Arizona in order to provide a source for milk for its customers. Since January of 2005, Schade Distributing has been supplied its milk by Sarah Farms. Schade Distributing is purchasing milk from Sarah Farms at a price which is slightly higher than a price that Schade was paying to UDA for milk. Schade Distributing sells milk to nursing homes, schools, and consumers and is attempting to provide milk at a fair price to consumers in the Arizona-Las Vegas Marketing Area. If the Recommended Decision is allowed to become a final decision and Sarah Farms loses its status as independent producer-handler, companies such as Schade Distributing will lose a source of distribution for consumers in Arizona and Arizona consumers will be paying higher prices for their milk.

9. Sarah Farms also sells milk to Deco Foodservice, which is a small (25 employee) distributor which is located in Needles, California, and serves the tri-state area of California, Arizona, and Nevada. The loss of Sarah Farms as an independent producer-handler would also affect the business of Deco Foodservice as well as such other small distributors and sellers of milk and dairy products in the Order 131 area such as Sterns Produce.
10. In addition to the above, Sarah Farms supplies milk to Sprouts Farmers Markets, which has its corporate offices in Scottsdale, Arizona. Sprouts Farmers Markets is a boutique supermarket which, among other things, supplies organic products to its customers. Sarah

Farms supplies milk to Sprouts because of the quality of the milk and the fact that the Sarah Farms milk comes directly from the farm to Sprouts and the milk is free of rBST. The latter fact is especially important to Arizona consumers that shop at Sprouts.

11. Finally, if the Recommended Decision is allowed to become a final decision and producer-handlers such as Sarah Farms are now forced to be regulated by paying into the pool in Order 131, it would be especially unfair to Sarah Farms because it became a producer-handler under the rules in existence in the early 1990s and has always met each of the requirements for maintaining its status as a producer-handler. Moreover, and most importantly, changing the rules after Sarah Farms has already obtained loans on the existing business models is not only unfair, it is confiscatory. Such a substantial change in the USDA policy that had existed for almost 70 years will have a direct and deleterious affect on the ability of Sarah Farms to repay the loans that it has obtained from banks and other lending institutions as well as have an impact on the ability of Sarah Farms to obtain additional financing. This would force Sarah Farms to change its business operation and/or force Sarah Farms to potentially cease its business. This will also result in economic harm to all of the employees of Sarah Farms and their families.

Executed under penalty of perjury this 9 day of June, 2005.



HEIN HETTINGA

EXHIBIT B

SCHADE DISTRIBUTING
15533 EAST THISTLE DRIVE
FOUNTAIN HILLS, AZ 85268

"THE LARGEST INDEPENDENT DAIRY
DISTRIBUTOR IN THE VALLEY"

May 20, 2005

To Whom it may concern:

Schade Distributing is a family owned and operated business since 1989.

We were a dairy and ice cream distributor for Jackson Dairy in Phoenix from 1989 to 1999. Kroger Corporation which owns Jackson Dairy and the Fry's Supermarkets. In 1999 Jackson Dairy decided to close its dairy plant because of the age of the plant and the competitive situation in the milk business in Arizona.

From 1989 to 1999 my own personnel experience in the milk business was that shamrock wanted 100% of dairy business in Arizona and would do whatever it took to achieve that goal. They put Carnation dairy out of business by offering there account dairy pricing at cost. I spoke to Carnation Dairy distribution and this is the information they gave me. I also spoke to accounts of Carnation they lost and they informed me of the shamrock pricing strategy to eliminate all competition in Arizona.

Jackson Dairy also could not compete against Shamrock when they started low balling on prices to there accounts.

In 1995 we left Jackson Dairy with Lively Distributing to join Shamrock with the promise of new accounts given to us by Shamrock and the verbal promise they would not solicit our account.

We were only at Shamrock for one year, because Shamrock Foods, Lively, and Shamrock Dairy started soliciting our accounts and we lost 20% of our business to them and we were representing and selling Shamrock product. Due to the fact that Shamrock was taking our accounts we were forced to go back to Jackson Dairy.

In 1999 Jackson Dairy closed and we were all forced to find dairy supplier in Phoenix, Arizona. A representative of United Dairy of Arizona Noel Byrne approached myself and partner John Schade to buy Safeway milk thru UDA.

United Dairy of Arizona had two reasons to sell milk thru their organization to Schade Distributing. First reason: was to sell more raw milk to Safeway, by selling us more Safeway milk. Second reason was to put pressure on Shamrock Dairy to buy raw milk from UDA by supplying milk to Schade Distributing so we could compete against shamrock and bid on schools, and business' and their game plan was the Shamrock would come back as a customer for their raw milk.

From 1999 till January of 2005 we bought Safeway milk from UDA and they accomplished both objectives, because our business increased and we were able to compete against Shamrock. They got Shamrock back as a customer in 2004 we were used as a tool by UDA to get them back as a customer.

In November or December 2004 we were informed by Noel Byrne of UDA that were not to go after any Shamrock or Lively accounts in Arizona or he would not sell us any Shamrock products. UDA and Noel took it one step further in January 2005, and refused to sell us any Safeway milk or Shamrock milk.

Since they were selling Shamrock their raw milk now and Shamrock was their 2nd largest customer they wanted to eliminate us as a customer in Arizona against Shamrock. Shamrock Dairy last I heard controlled 93% of the dairy business in Arizona

In January 2005 we had no local source for dairy products in Arizona. We approached Alta Dena in CA, Meadow Gold Dairy in Nevada, Switzer in El Paso Texas, and A dairy in New Mexico to source milk for our customers. Due to the transportation cost of delivery the dairy products from these various states to our warehouse in Phoenix Arizona our cost would be 12% higher then our cost from UDA in Phoenix Arizona.

Locally we approached Sarah Farms and they supplied us with milk in January 2005 at a slightly higher price than UDA.

At the present time even with the good prices from Sarah Farms Shamrock foods is still trying to eliminate us as a competitor for the last two months Lively Distributor (Shamrock Distribution) has been targeting Schade Distributing with price 2% over our cost.

We are the largest independent Dairy distribution in the valley and are the only reason that prices for the nursing homes, schools, and the consumer have been kept at a fair price for the last 6 years.

The reason I am writing this letter is because of my 16 years as dairy distribution and my belief that Sarah Farms does not keep its Status as an independent dairy manufacturer in Arizona. I will not survive as a distribution and the consumers in Arizona will be paying much higher prices for their milk because of the shamrock and UDA monopoly.

Thank you,

Tom and John Schade
602-339-4381

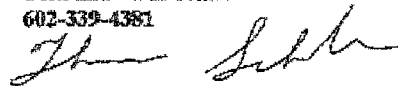


EXHIBIT C



June 13, 2005

Sarah Farms
2751 Palo Verde Street
Yuma, AZ 85365

Re: Competitive Pricing

To Whom It May Concern:

With the every growing number of businesses that consolidate in today's market place, it has left Stern Produce Company, and many other independent businesses, with little options to purchase dairy at competitive prices.

Sarah Farms has provided an excellent product and a price that allows Stern Produce Company to compete against other dairy distributors. If Stern Produce Company did not have the ability to purchase dairy products at a competitive price, there would be little or no competition for the producers of dairy products in Arizona.

If there is any additional information needed please feel free to call or contact myself at anytime.

Sincerely



David Hartman
General Manager

EXHIBIT D

FRUTERIA WELTON, S. A. DE C. V.



R.F.C. FWE-940228-N67
Av. Sonora y Calle 7 Esq. Tel. 534-02-65, 536-31-60 Y 535-76-60
San Luis R. C., Sonora

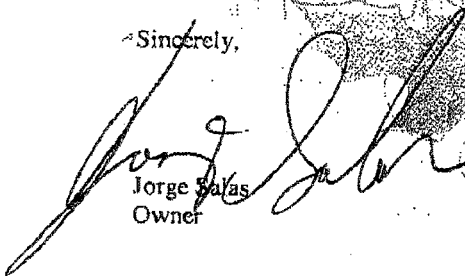
June 7, 2005

To: Secretary of Agriculture
Mike Johanns

Cc: Hearing Clerk of USDA

Mr. Johanns, I am writing to you in opposition of the proposed amendment for producer handlers in Arizona. I am a small business man who operates in Arizona and Mexico. I employ 350 people at thirteen store locations in Mexico. I have been doing business with Sarah Farms for ten years. I based my decision on doing business with Sarah Farms because of their quality and service. The performance through the years has made them a leader in the milk business. Through the competition they present not only in Arizona, but in Mexico has helped keep milk prices affordable to the poor people and the senior citizens of both countries. I fear that through this proposed amendment that milk prices will drastically increase, not only hurting the consumer, but my small business as well. Through competition not only do consumers have a choice of product to buy, but quality is also improved. Here in Mexico we have a lack of competition in the milk business, therefore, the big companies do not feel that they have to improve their quality or offer their prices at a competitive price. I urge you again on behalf of my employees and customers to reject this proposed amendment.

Sincerely,


Jorge Salas
Owner