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**BEFORE THE UNITED STATES DEPARTMENT  
OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE**

**In the Matter of** :  
: **Docket Nos.:**  
**Milk In the Pacific Northwest and** : **AO-368-832,**  
: **AO-271-837,**  
**Arizona - Las Vegas** : **DA-03-04**  
:  
**Marketing Areas** :

**MOTION TO STRIKE EXCEPTIONS AND COMMENTS  
FILED ON BEHALF OF SARAH FARMS, EDALEEN DAIRY, LLC,  
MALLORIE'S DAIRY, INC. , AND  
SMITH BROTHERS FARMS, INC.**

1. This is an on-the-record rulemaking proceeding conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557, the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 et seq., and the Department's Rules of Practice at 7 C.F.R. §§ 900.1-900.17. The statutes, and the regulations promulgated thereunder, require that the decision be made on the basis of evidence taken at the public hearing and only on the basis of evidence taken at the public hearing. Parties, therefore, are prohibited from attempting to influence the decision-making process by the presentation of evidence outside the course of the proceedings or by the presentation of evidence not part of the public hearing record.

2. The exceptions and comments made both jointly and separately by Sarah Farms, Edaleen Dairy, LLC, Mallorie's Dairy, Inc., and Smith Brothers Farms, Inc., each attempt to add

evidence to the record as support for those exceptions and comments and in contravention of the statutes and rules of procedure applicable to this matter.

3. Among the non-record items presented in these exceptions and comments are: (1) the Declaration of Hein Hettinga dated June 9, 2005 submitted with the separate comments of Sarah Farms; (2) letters from vendors and other interested parties attached as exhibits to the separate comments of Sarah Farms; (3) correspondence in the form of emails addressed to the secretary cited and relied upon in the joint and separate comments and exceptions of all of the parties containing factual assertions not in the record; (4) June 2005 Declarations of Alexis Koester, Eric Flintoff and Jerry Handlos submitted with the Joint Comments and Exceptions; and (5) extra-record assertions with respect to the nature of the various businesses, their numbers of employees, terms of employment, volumes of milk processed, submitted in the separate comments of each of the several parties. All of this information is outside the record, was in many cases specifically withheld from the record by the parties involved,<sup>1</sup> and it may not be considered by the Secretary herein.

4. Because the joint comments and exceptions and the separate comments and exceptions contain material which may not be relied upon by the Secretary and which has been submitted in open and blatant disregard for the Rules of Practice herein<sup>2</sup>, each of those

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<sup>1</sup> For example, Smith Brothers' witness refused to provide daily production data (TR. 1786). Now, in the individual and supplemental comments, p.2, the purported monthly production is specified. Mallorie's pool obligation is now stated to be \$83,000 per month (Individual and Supplemental Comments of Mallorie's Dairy Inc., p.4) when the witness at the hearing said \$60,000 per month (TR. 2347).

<sup>2</sup> We are constrained to note that the violations of the ex parte rules of which Sarah Farms has accused DFA, and which DFA denies, are of a quite different nature than the matters which are the subject of this motion. Sarah Farms complained that DFA's CEO, at a public meeting, restated DFA's position, publicly taken, in this hearing, and urged Department officials to adopt the position which DFA was asking them to adopt. In other words, it was, at worst, a

documents should be stricken *in toto* and the Secretary should make known to the parties that such open violations of the Rules of Practice will not be tolerated.

5. It is especially important in this intensely contested proceeding that there be no question as to what is or is not part of the record which has been considered by the Secretary. It is not feasible to parse the comments and exceptions to eliminate non-record matter. Therefore, the filings should be completely stricken.

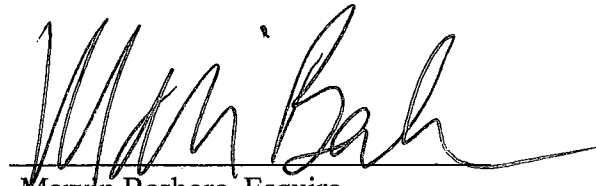
6. If new evidence can be added at any point in a proceeding by one party, an opposing party is either denied due process by not having an opportunity to cross examine and respond to the evidence; or the record of the proceeding will in essence remain open indefinitely without an end point. Neither result is acceptable nor in compliance with the statutes and regulations.

7. This motion is made on behalf of Dairy Farmers of America, Inc.

Respectfully Submitted,

Date: July 8, 2005

By:



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public recitation of DFA's formal position and a public exhortation to appropriate Department action.