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	)	

MOTION TO STRIKE TESTIMONY AND EXHIBITS CONCERNING PLANT COSTS AS TESTIFIED TO BY CARL HERBEIN, CPA

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I. INTRODUCTION

Edaleen Dairy, Mallorie's Dairy, Sarah Farms, and Smith Brothers Farms (collectively, "opponent producer-handlers"), pursuant to 7 C.F.R. §900.7, move to strike those portions of the hearing transcript containing the testimony of Carl Herbein (hereinafter "Herbein") whether from his direct testimony, cross-examination, or re-direct testimony, and any accompanying exhibits that address the processing costs of various hypothetical plants located in Orders 124 and 131. This "study" is generally discussed at pages 759-887 of the hearing transcript and in Exhibit 25. Additional testimony based on the "study" and cross-examination can be found at pages 2983-3057.

Exhibit 25 and Herbein's testimony is based on unverifiable data that was hand-selected by Herbein from an allegedly "confidential database" maintained by Mr. Herbein's accounting firm, Herbein and Company. This data, unavailable to either the Department or the other hearing participants, was then grouped, averaged, and adjusted by Herbein to produce what has become an integral component of the proponents' argument for the adoption of the proposed producer-handler limitations.

The method by which Herbein selected his underlying "data" has been criticized by at least one hearing participant as faulty and unreliable. Dr. Ronald D. Knutson, 2140; See also Rule 702, Federal Rules of Evidence. (Expert testimony must be, "... the product of reliable principles and methods"). Most importantly, however, Herbein has denied both the Department and the opponent producer-handlers any opportunity to assess the validity of his hand-selection of data, to cross-examine him in a meaningful manner, and/or to assess the underlying facts or data upon which he based his analyses. See e.g. Rule 705, Federal Rules of Evidence ("...expert

may...be required to disclose the underlying facts or data on cross-examination"). Indeed, the Herbein testimony is so devoid of objective reliability that its use in a federal court proceeding would be precluded under the standards announced in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993) and its progeny.

Herbein's testimony regarding "plant costs" is inadmissible for a number of reasons: (1) Herbein is not qualified to express an opinion regarding plant costs since he has never operated a processing plant and is not an expert in that area; (2) Herbein's "proprietary" database and conclusions have never been published or peer reviewed; (3) Herbein's database is unreliable and meaningless for the purposes for which he purports to use it; (4) Herbein's statistical analyses are irrelevant because they are not based on actual plant costs and do not address the real marketing conditions that exist in either Order 131 or Order 124; and (5) Fundamental fairness in the rule making process requires that Herbein produce the underlying information and data so that the opponent producer-handlers and the Department will have an opportunity to test the reliability of his statistics and the underlying data. Since Herbein refused to produce the underlying database that he relied upon, no determination can be made as to whether the data was manipulated in order to achieve the conclusions mandated by DFA and the other proponents of the so-called "three million pound cap."

In sum, Mr. Herbein is essentially a "statistical shaman" using statistics and methodologies that are unreliable and inadmissible; rendering opinions that are irrelevant and without any probative value in reaching conclusions; and drawing inferences that the data does not (or may not) support. Herbein's opinions represent the type of misuse of statistics which prompted British Prime Minister Benjamin Disraeli to observe: "There are three kinds of lies:

lies, damned lies, and statistics."[1]

Accordingly, Herbein's opaque study and its unverifiable conclusions must be excluded from the hearing record and not used as the basis for any decision by the Department. Moreover, any testimony tied to his conclusions, from other sources, including testimony provided by both Roger Cryan and Elvin Hollon, must likewise be stricken.

II. DISCUSSION

A. A Summary of the Herbein Hearing Testimony

A careful review of the hearing transcript establishes the appropriateness of an order to strike the testimony of Herbein and any testimony linked to Herbein's unreliable study. The proponents have relied upon Herbein's testimony and portray his "study" as critical evidence of alleged disorderly marketing conditions in Order 131 and in order to justify the otherwise arbitrary selection of a three million pound cap on producer-handlers. In addition, Herbein's selective and flawed analysis is the lynchpin for the testimony of Roger Cryan of the National Milk Producers Federation ("NMPF"). Cryan, 894-95, 900 (describing Herbein's analysis as the "most relevant" of the cost data compiled by NMPF).

Herbein testified on behalf of the Dairy Farmers of America ("DFA"), a proponent of the producer-handler limitations at issue in this hearing. According to his testimony, Herbein was asked "to analyze the value of unpriced raw milk to a large producer-handler and to compare that value with the cost of milk to regulated processors [and] to compare the economic impact of a regulated handler competing with an unregulated producer-handler." Carl Herbein, Tr. 764. Later in the hearing, Herbein added that his "study" defines three million pounds of Class I production as a rational break point. Herbein, 3046. In fact, Herbein's study is not and cannot be

[1] Benjamin Disraeli (1804-1881), British Statesman and Author. Quoted by Mark Twain in his Autobiography, ch. 29, Mark Twain (1924), Rev. Charles Neider (1959).

the basis for selecting the break point. As Herbein admits, he was retained sometime during the summer of 2003, shortly before this hearing began. Herbein, 3045. In fact, the three million pound cap was pre-determined, selected arbitrarily by United Dairymen of Arizona in a letter to USDA authored over a year before this hearing was noticed and before Mr. Herbein was retained.

In compiling Exhibit 25, Herbein personally selected twenty of the approximately fifty plants from his firms "proprietary database." Herbein, 765, 807. Herbein then adjusted the "costs" from these hand-selected plants to "show the costs for both the Order 131 and order 124 areas." Herbein, 765. Herbein made these "adjustments," even though he had no data from a plant located in Order 131 and supposedly had some data from some undisclosed plant in Order 124. Herbein then grouped the twenty hand-selected plants into six groupings differentiated by plant size. Exhibit 25, Pages A, B; Herbein, 765. The different plant sizes selected were 90,000 pounds, 2 million pounds, 5 million pounds, 12 million pounds, 18 million pounds, and 30 million pounds of Class I utilization per month. Id. There are all of two plants in the 90,000 pound classification and the 2 million pound classification and four plants in each of the remaining classifications. Herbein, 811.

Once Herbein hand-selected the plants for his "study," grouped them, made regional price adjustments, and averaged the figures, he derived a per-gallon cost for processing, packaging, and shrinkage. Herbein, 771-72; Exhibit 25, Page A, B. This per-gallon figure was then converted to a per-hundredweight figure. Id. Again, however, this figure is premised on assumptions, adjustments, averages, and Herbein's hand selection as opposed to real data or facts.

Additionally, Herbein used these cost figures to analyze sales to warehouse stores during the months of January 2003 through June 2003. Herbein, 776; Exhibit 25, E-K. Herbein supposedly took the average "actual out-of-store prices" and compared them to the costs of raw

milk and processing, for the hand-selected, regionally adjusted, grouped, and averaged costs from his proprietary database. Herbein, 785.

The real point of Herbein's testimony is to convey the unverifiable conclusion, based upon his cost "study" and analysis, that "when looking at the exhibits that when you have a loss on the bottom line, when you've accounted for all of your costs in accordance with Generally Accepted Accounting Principles and you have a loss, it doesn't make sense, from a business standpoint, to pursue [the warehouse store] business because you are losing money, and that's -- you can't pay your bills if you lose money." Herbein, 786.

Faced with the fact that his own clients, regulated handlers, were servicing Costco stores [warehouse stores] in Order 124, Herbein conceded that his survey cannot support the conclusion it attempts to reach. Upon realizing the implications of his statement, Herbein recanted his answer. "Q. So we can't -- given at least that information, we can't take a broad conclusion, as Exhibit 25(a) attempts to, that in fact a regulated handler can't compete with a producer-handler for business such as Costco, can we? A. No. Q. Okay. And -- A. Excuse me. Q. Yes. A. I think we can -- I had your question in reverse. I'd like to change my answer to: You can, because my analysis is a detailed cost analysis, a specific cost center analysis, of what the likely outcome would be of a regulated handler doing business with Costco." Herbein, 3027-28.

It is difficult to reconcile this opinion with the fact that two of Herbein's clients, one in the Pacific Northwest and the other in Colorado, either have had or currently have ongoing contractual agreements with warehouse stores to provide those stores with milk and other dairy products. As Herbein conceded during his testimony, he did not review the actual cost data for these customers (who are regulated handlers) for purposes of his "study." He also conceded, however, that these regulated handlers in the Pacific Northwest and Colorado would not be doing

business with the warehouse stores if they were not making money. Herbein, 3026-27. This real fact obviously flies in the face of Herbein's "conclusions."

Of course, if the data or methods used to reach these conclusions were materially flawed, then the conclusions are also flawed. In computer shorthand: "garbage in; garbage out." Herbein anticipated this critique of his conclusions and made the following assertions regarding his "study" during his initial direct testimony.

- "[Because] we've adjusted our database [using the CPI], that we have costs that are applicable to the two areas so that we are making an apples-and-apples comparison for the Secretary." Herbein, 770.
- "The plant processing costs that are reflected here are actual costs. They are not theoretical engineering studies but the costs that have been extracted from the annual financial statements for the plants that are in the various cost sizes." Herbein, 773.
- "These are actual, hard numbers that are **not at all judgmental**. They are real." Herbein, 782 (emphasis added).

These pre-emptive efforts indicate the importance of this study to the proponents and demonstrate the weight that DFA hopes the Department will ascribe to its findings.

In reality, however, the plant processing costs used to arrive at Herbein's conclusions are not actual costs. Allegedly, the process started with actual processing costs from Herbein's "double-secret" database for some unspecified plant, in some unspecified area of the country, for some unspecified period of time. The difficulty for the Department and the opponent producer-handlers is that no one except Herbein and DFA know what that starting point is. A review of Herbein's testimony reveals just how badly flawed and misleading both the "study" and Herbein's "conclusions" really are.

B. Exhibit 25 is inherently unreliable because of Herbein's unverifiable data and faulty

methodology.

Both on cross-examination and through the testimony of other expert witnesses, it was apparent at the hearing that Herbein failed to use a methodology that could have resulted in a study with a predictive value. Most importantly, the entire "study" was based on Herbein's exclusion of certain data and his hand-selection of the twenty plants used in the "study." Herbein alleges that this "judgmental selection" was preferable in this situation, despite his earlier conflicting statement that he was presenting "actual, hard numbers that are **not at all judgmental**." *Compare* Herbein, 2998 *with* Herbein, 782. As Dr. Knutson observed in his testimony, "there was no indication that [the twenty plants] were randomly selected. In fact, there was adverse selection." Knutson, 2140.

The hand-selection of the plants used in the "study" is not the only methodological flaw. Herbein also utilized a sample size that was too small; even if it were randomly selected. Knutson, 2140. ("Drawing conclusions from a sample size less than thirty leads to tenuous results.") The already small sample of twenty was further diminished when Herbein broke it down into six smaller categories, further compromising the predictive value of the results. Most importantly, only one of the twenty plants used in the study was allegedly located in any affected marketing area. Dr. Knutson's testimony summarizes the remainder of the methodological faults in the Herbein "study":

> Only two of the plants were P-Hs, both being substantially smaller than the P-Hs impacted by this proposal. Yet, Mr. Herbein generalized as if all of the plants were P-Hs. Mr. Herbein's sample plants were located outside of the Arizona-Las Vegas and almost entirely outside of Pacific Northwest Orders with substantially no demonstrated comparability of product mix, processing, or distribution conditions. Even at that, there was no indication that they were randomly selected. In fact, there was adverse selection in that these plants were not only not representative of the P-H niche;

> they were also small firms that have for years had problems surviving. In other words, Mr. Herbein's data represents an unrepresentative worse case scenario that is completely useless in this hearing. Then an error was made in making regional cost adjusted by using the CPI rather than the PPI (Producer Price Index).

Knutson, 2140-41; Exhibit 44, page 9.

The conclusion reached by Dr. Knutson as to the predictive value of the Herbein testimony is that, "Mr. Herbein's testimony is of no value in either drawing the conclusions he reached or as a basis for decision regarding the proposal to fully regulate P-Hs." When faced with valueless testimony, the proper course for the Department is to exclude it from the record and from the decision making process, lest it be thought that it was a factor in arriving at the ultimate decision.

C. Herbein's repeated stonewalling denied the hearing participants a meaningful opportunity to cross-examine his "study" and also deprives the Department of the ability to test his findings.

What the hearing transcript demonstrates is that Herbein provided no basis for either the Department or the opponents to cross-examine the data in the study. When questioned, he refused to disclose any of the specific data used to arrive at his hand-selected, location adjusted, neatly grouped, "hard number" processing cost averages. On at least a half-dozen occasions, Mr. Herbein refused to disclose additional relevant information about his database and study that would have allowed other hearing participants to assess the validity of his methods and conclusions.

Assuming for the sake of argument that a "judgmental selection" is a proper methodology (which it is not) or that Herbein employed some other reasonable method (which he did not), the only way those conclusions could be reached is if there were some way to verify the data

selection process and to evaluate whether the facts and data relied upon were related to the issues at the hearing. Herbein has denied the Department and the opponent producer-handlers the ability to question him on any of these issues because he has repeatedly refused to disclose any of his data.

Instead, Herbein is hiding behind the cloak of client confidentiality. As he stated at the outset of his testimony, "I utilized our firm's proprietary database of dairy manufacturers' operating costs to conduct my comparison. This database is maintained on a confidential basis utilizing financial information extracted from the financial statements and other accounting data of our clients. We are authorized to utilize this information on a confidential basis for this engagement." Herbein 764-65.

Maintaining the confidentiality of his clients does not mean he could not have permitted the Department and the opponent producer-handlers to assess his data. He could have provided the underlying numbers he used to arrive at his estimates without disclosing the specific plants from which the costs came, but he did not. He could have provided the costs data for the thirty plants he decided were not "relevant" to his study, but he did not. This information could have been provided without naming the plants or otherwise identifying the sources.

More importantly, maintaining the confidentiality of Herbein's clients is not nearly as critical as protecting the integrity of the formal rulemaking process. DFA retained an accountant to provide a "study" to the Department in order to advocate the imposition of regulations that would have a substantial, if not catastrophic, impact on the four producer-handler operations in Order 124 and Order 131. The selection of the accountant, Herbein, was made by DFA with the advance knowledge that the data on which we would base his conclusions would not be provided to the Department. Herbein and DFA chose to hide behind the rubric of client confidentiality in

order to prevent the Department and the opponent producer-handlers from examining the underlying data in Herbein's "database."

DFA has made an intentional choice to hide the information upon which its study is based. That mandates the exclusion of the testimony since, as a result, it could not (and cannot) be verified or examined. DFA could have provided verifiable information and permitted a legitimate cross-examination, but they chose Herbein and his data instead. They now ask the Department to accept that testimony and use it to regulate DFA's competitors while those competitors who stand to be harmed (as well as the Department) are forced to shadowbox Herbein's phantom figures.

The inability to cross-examine an expert witness on the underlying facts or data is not harmless. Counsel for the opponent producer-handlers repeatedly questioned Herbein about the significance of his methods; specifically his "judgmental selection process" and made similar attempts to flesh out the data in the study but were unsuccessful in garnering any useful information from Herbein.

The opponent producer-handlers should be afforded the opportunity to test the criticism directed against them. That is what an open hearing is about, but the Herbein study does not provide the participants that critical opportunity.

D. Herbein fails to meet the standards utilized by the federal courts in deciding upon the admissibility of expert testimony.

The seriousness of permitting Herbein's testimony to stand in this record cannot be overstated. In fact, were this hearing a formal judicial proceeding, Herbein's data (and Herbein's testimony) would be excluded.

The first and most fundamental reason for exclusion is the lack of fairness to the Department and the opponent producer-handlers. Disclosure of the data relied upon by a testifying expert and the bases for his analyses goes to the heart of the adversarial process. The

Department and the opponent producer-handlers have been kept in the dark regarding the data relied upon by Herbein which he hand selected and skewed to favor his own pre-conceived conclusions. Instead, the opponent producer-handlers have been forced to accept his conclusions without the ability to effectively cross-examine his data. This is the height of unfairness in a system that relies upon cross-examination in order to discover the truth.

Even without the fundamental flaw of failing to produce the underlying data, the Department should look for guidance to the courts in determining whether DFA's hired expert met the threshold standard required in order to introduce his testimony/conclusions at the hearing. The short answer to this question is "no."[2]

The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), defined the role of the district court as "gatekeeper" in determining both the reliability of those persons intending to offer scientific expert testimony, and the relevancy of that proposed testimony.[3] The gatekeeper's role encompasses the proposed testimony of all designated experts; not merely those testifying on scientific matters. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

The proponent of an expert witness must prove by a proponderance of the evidence that the testimony is reliable, i.e., that the expert's findings and conclusions are based on scientific method. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995) (on remand). The proponent need not prove to the judge that the expert's testimony is correct, but

[2] Even in the administrative context, information used to justify regulatory action is increasingly subject to scrutiny. For example, the Office of Management and Budget recently proposed mandatory peer review of certain technical information used to support federal agency regulatory action. *See* 68 Fed. Reg. 54023 (September 15, 2003); 69 Fed. Reg. 23230 (April 29, 2004).

must prove by a preponderance of the evidence that the testimony is reliable. See In Re: Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994); see also 2 Stephen A. Saltzburg, et al., Federal Rules of Evidence Manual, 1224-1251 (7th ed. 1998).

Courts have essentially promulgated a two-pronged approach for evaluating the admissibility of expert testimony. The first or the "reliability" prong, focuses on evidentiary reliability and requires the district court to perform "a preliminary assessment of reasoning or methodology underlying the testimony as scientifically valid." Daubert, 509 U.S. at 592-93. In illustrating this prong, the Court suggested four factors that may be used in determining scientific validity: (1) whether the theory or technique, "can be (and has been) tested", (2) whether the theory or technique has been "subjected to peer review and publication", (3) the method's "known or potential rate of error", and (4) whether the theory or technique finds "general acceptance" in the "relevant scientific community." Id. at 593-94.

The second prong of the Daubert approach is straightforward. Besides being reliable, evidence must also be relevant to the issues at hand. Basing its logic on the text of Rule 702 (evidence must "assist the trier of fact"), the Court explained that, "[e]xpert testimony which...is not relevant [is] ergo non-helpful." Id. at 591 (quoting 3 Weinstein & Berger, ¶ 702 [02], at 702-18).

The Court's discretion extends to the rejection of proposed expert testimony where "there is simply too great an analytical gap between the data and the opinion proffered." General Electric Co. v. Joiner, 522 U.S. 136 (1997). Under Rule 702, Federal Rules of Evidence, as amended, a qualified expert witness may testify, "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the

[3] The court's gatekeeper role is grounded in the requirements of Rule 702, Federal Rules of Evidence, as amended (effective December 1, 2000).

witness has applied the principles and methods reliably to the facts of the case." Under Daubert, "any step that renders the analysis unreliable...renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 745 (3d Cir. 1994).

The testimony of Herbein on plant cost data and the conclusions reached on this issue misses the admissibility standards that federal courts apply by a country mile. Under the Daubert guidelines, federal trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity. Herbein's testimony and his "data" would not assist the Department in deciding the critical issues involving producer-handlers and therefore this testimony as well as Exhibit 25 should be excluded.

Under Rule 26(a)(2)(B), Federal Rules of Civil Procedure, an expert report, "shall contain...the data...considered by the witness in forming the opinions." The well-known adage that cross-examination is one of the most powerful tools for the discovery of truth requires no citation to authority. In order to conduct a proper cross-examination and in order to meet the testimony presented at the time of the hearing, the opponent producer-handlers needed the opportunity to obtain and review the databases utilized by Herbein to develop his statistics/conclusions. Herbein was not testifying about a principle of accountancy or other established fact. Rather, he was purportedly using a computer database that no one else in the world has access to and generating conclusions that he demanded be taken on trust alone.[4]

This became abundantly clear during the course of the cross-examination of Herbein at the hearing in Phoenix, Arizona. When examined about the fundamental unfairness of the type of

[4] The fact that Herbein (and DFA) have such conviction in his testimony and the ultimate conclusions of his "research" that Herbein is willing to aver under oath that it is correct without performing the necessary validating tests, is also sufficient for the Department to view his conclusions as lacking the objectivity that is, "the hallmark of the scientific method." Claar v. Burlington Northern Railway Co., 29 F.3d 499, 503 (9th Cir. 1994); see also Mitchell v. Gencorp, Inc., 165 F.3d 778, 783 (10th Cir. 1999).

sleight-of-hand that he was attempting to pull off in reaching conclusions but refusing to provide the underlying data to corroborate those conclusions, Herbein retorted that he was under oath and obviously everything that he was testifying about should be accepted for this reason alone. Herbein, 817. The mere assurances by an expert witness as to the accuracy of his own methods or results, in the absence of other credible supporting evidence, is insufficient to establish reliability for and therefore the admissibility of that expert's testimony. See Black v. Food Lion, Inc., 171 F.3d 308, 313 (5th Cir. 1999). Herbein may opine that his methods are accurate or his results warranted by his alleged database, but without more, his testimony does not bear the necessary indicia of intellectual rigor that is necessary under Daubert to permit its admission.

In short, Herbein had no right to withhold the database's underlying data, and the failure to produce that information constitutes sufficient cause for the Department to preclude that testimony and to preclude other testimony that relies on Herbein's "study."

The importance of production of the underlying information so that the conclusions of Herbein could be evaluated for falsifiability cannot be overstated. Not all empirical tests of a theory are equally valuable. Some methods, such as gazing into a crystal ball, obviously have little scientific merit. Under Daubert, judges are mandated to recognize those scientific methods that, in reality, fail to progress significantly beyond crystal ball gazing or, as in many instances, beyond a researcher/expert's own creativity.

For example, in Thomas v. FAG Bearings Corp., 846 F.Supp. 1382 (W.D. Mo. 1994), the Court noted:

> The Eighth Circuit has held that in the case of expert opinion testimony, "[w]hen basic foundational conditions themselves are conjecturally premised, it then behooves a court to remove the answer from one of admissible opinion to one of excludable speculation." Id, at 1393. (Citations omitted).

Applying that lesson to the case before it, the Court found that, "[the expert's] opinions are concocted of impermissible bootstrapping of speculation upon conjecture." Id. at 1394. See also Reynard v. NEC Corp., 887 F. Supp. 1500, 1504-08 (M.D. Fla. 1995) (expert conclusion that electromagnetic radiation from a cellular phone caused a brain tumor was "worse than speculation" and "not supported by any objective source").

This type of rigorous analysis and testing of an expert is methodology is precluded when the alleged underlying bases for the conclusions is prohibited because the purported expert refuses to provide the data to the opponents for cross-examination. As a result, the Department and the opponent producer/handlers have been excluded from this testing process. Whether the Herbein data is "good data" or "bad data" is relegated to hypothesis and speculation. In this regard, "bad data," in and of itself, is clearly a sufficient basis for the exclusion of any expert's testimony.

For example, in Castellow v. Chevron USA, 97 F. Supp. 2d 780 (S.D. Tex. 2000), plaintiffs' experts developed models of exposure to explain how the decedent's exposure to gasoline vapors could reach a certain Benzene level. The data upon which they relied upon was shown to be erroneous. The level of gasoline vapor exposure that they assumed (twice daily, 250 days a year for a 10 year period) would have been lethal by itself. Thus, the exposure assessment that formed the basis of all plaintiffs' medical causation testimony was found unreliable; the experts were working backwards in order to establish an exposure level. The Court found that the "assessment" by the plaintiff's experts was, "...not based on adequate data, but instead was devised to support a causation opinion without reliable bases to do so. His methodology, therefore, is not reliable and his testimony is in admissible. In the absence of sufficient, accurate information of exposure levels, his opinion is nothing more than speculation. Such result-driven procedures are an anathema to both science and law and are properly excluded because they are

too speculative to assist the triers of fact." 97 F. Supp. 2d at 797.

Similarly, in In Re: Craig's Stores of Texas, Inc., 247 B.R. 652 (S.D. Tex. 2000), aff'd., 266 F.3d 388 (5th Cir. 2001), the Court was asked to review an expert's methodology for evaluating the bank's handling of an account. The Court found that the proposed expert's methodology was unreliable and not verifiable because his testimony was based solely upon the subjective evaluations of the expert and his screening committee. No standard that could be tested was ever articulated by the expert. This made the reliability of the methodology highly suspect. As the Court noted, "[the proposed expert] fell victim to the trap of false precision...[the expert] attached a statistic to his own business judgment rather than objectively ascertaining an industry standard." 247 B.R. at 656.

The Department is faced with the same problems here. Herbein failed to produce the data and instead relied upon his own judgment as an accountant in deciding what was important; in deciding what "data" to leave in; what "data" to leave out; and most importantly, in reaching conclusions that could never be accurately tested by the Department. This is not the type of methodology that the Department should base any decision on; let alone the significant change in policy proposed by DFA and the other proponents. As indicated earlier, the testimony established that the Herbein study came into being long after the three million pound cap was decided upon. This raises the serious question of whether, like the Castellow plaintiffs, the proponents have "worked backwards" to justify the three million pound cap. Of course, because they have hidden their data, we will never know. Such "results driven" approaches are one of the primary reasons that such unverifiable testimony is routinely excluded from court proceedings.

Whatever objective standard is used for the admission of expert testimony, Herbein does not meet it. The effect of allowing his testimony to stand is to permit the Department to make

critical decisions based upon junk statistics, unreliable statistical evidence and other data that must be taken on faith alone. Herbein's study does not have sufficient objective information to permit the Department to take such a non-scientific leap of faith.

E. The integrity of the hearing process is compromised by relying on data such as Herbein's and should be excluded from the Department's consideration

Any finding by the Department demands that it be based upon evidence that was subjected to cross-examination and complete disclosure. Herbein and DFA, intentionally or otherwise, presented evidence based upon "facts" that could not be explored during cross-examination. Since the Herbein study was not properly subjected to the formal hearing process, the Department must refuse to consider it.

The Department has recognized that regulations should not be based on phantom data. For example, when a witness at the hearing on the establishment of butterfat pricing formulas presented compiled data on cheese manufacturing prices without disclosing the underlying data that went into the compilation, the Department stated in its proposed final rule:

> In contrast to the RBCS and CDFA surveys, the survey of cheese and whey powder manufacturing costs arranged for by NCI was developed solely for the purpose of establishing costs to be used in determining make allowances for this proceeding. The survey was conducted by persons unfamiliar with the dairy industry among cheese processors who would benefit from having overstated costs included in the results. No one who actually conducted the survey was made available to testify, and although the IDFA witness stated that survey participants would testify regarding their responses to the survey later in the hearing, none of the participating firms' witnesses would respond to questions about their firms' results.

The Department concluded that, "**less weight must be given the NCI** survey than either the RBCS or the CDFA surveys for the reasons stated above." 65 Fed. Reg. 76840 (December 7, 2000).

Obviously, the Department has recognized the risk posed by phantom and result-driven

data. The use of the Herbein "data" poses as much of a risk as that disregarded during the butterfat hearing, if not more. Similar treatment is appropriate.

III. CONCLUSION

For the foregoing reasons, Edaleen Dairy, Mallorie's Dairy, Sarah Farms and Smith Brothers Farms request that the Department strike those portions of the testimony of Carl Herbein and any related exhibits regarding his alleged study of the processing costs of hypothetical plants located in Orders 124 and 131. As a corollary, the same parties request that the Department strike from the record any testimony from other proponent witnesses, including Cryan and Hollon, that is based in whole or in part upon the flawed and unreliable conclusions reached by Herbein.

Respectfully submitted,

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The foregoing was Statement was served upon the following parties on August 2, 2004, by electronic mail, FedEx Overnight Service, and /or first-class United States Mail service as indicated.

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