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July 14, 2009

Hearing Clerk  
U.S. Department of Agriculture  
South Building, Room 1031  
1400 Independence Ave. SW  
Washington, D.C. 20250-9203

VIA OVERNIGHT MAIL

Re: Enclosed Brief of New England Producer-Handlers Association Inc., Willard J. Stearns & Sons d/b/a Mountain Dairy, Monument Farms Inc., and Homestead Creamery  
Docket Nos: AO-14-A78, AO-388-A23, AO-356-A44, AO-356-A52, AO-361-A44,  
AO-313-A53, AO-166-A73, AO-368-A40, AO-231-A72 and AO-271-A44, DA-09-02,  
AMS-DA-09-0007

Dear Clerk:

Enclosed for immediate filing and stamping, please find the Brief of New England Producer-Handlers Association Inc., Willard J. Stearns & Sons d/b/a Mountain Dairy, Monument Farms Inc., Homestead Creamery and David Bower in the above hearing matter.

Also enclosed, please find an Affidavit of Mailing Service on all appearing parties.

Please call 315-474-5356 or e-mail [monica@carrolloffice.com](mailto:monica@carrolloffice.com) to confirm filing.

Very Truly Yours,



John Benjamin Carroll, P.C.  
JBC/mds  
Enc.

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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In re: ) Docket Nos.  
Milk in the Northeast, ) AO-14-A78, AO-388-A23,  
Appalachian, Florida, ) AO-356-A44, AO-366-A52,  
Southeast, Upper Midwest, ) AO-361-A44, AO-313-A53,  
Central, Mideast, Pacific ) AO-166-A73, AO-368-A40,  
Northwest, Southwest, and ) AO-231-A72 and AO-271-A44,  
Arizona Marketing Areas ) DA-09-02, AMS-DA-09-0007  
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**Affidavit of Service**

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) ss:

I, Monica D Seeber, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age, and resides at 107 Circle Road, North Syracuse, New York 13212.

That on the 14th day of July, 2009 deponent served copies of the attached legal brief of New England Producer-Handlers Association Inc., Willard J. Stearns & Sons d/b/a Mountain Dairy, Monument Farms, Inc., Homestead Creamery in the above matter on all appearing counsel and/or parties as follows:

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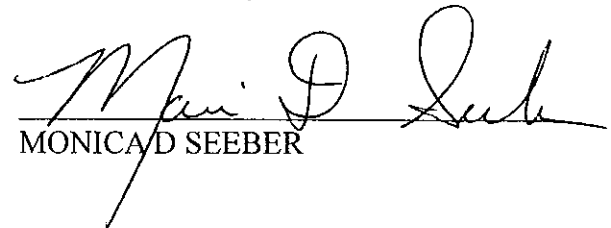
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by depositing same enclosed in a postpaid properly addressed wrapper, with first class postage, in a post office-official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

  
MONICA D SEEBER

Sworn to and subscribed before me on  
this 14<sup>th</sup> day of July, 2009.

  
NOTARY PUBLIC  
JOHN BENJAMIN CARROLL  
Notary Public, State of New York  
Qualified in Madison County No. 02CA4984904  
My Commission Expires August 5, 2013

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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**INTRODUCTION**

This brief is submitted on behalf of the hearing parties, New England Producer Handlers Association Inc., Monument Dairy, Mountain Dairy and Homestead Dairy.

New England Producer handlers Association Inc. is an association of approximately 25 Producers and Sellers of their own milk production either as Producer-Handlers or as Exempt Milk Dealers. They do business in Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York. They do not market milk originating from other milk marketing areas and sell in the vicinity of their farms.

Monument Dairy is located at Storrs, Connecticut. It is one of two Producer-Handlers presently exempt under Order No. One who, will be driven out of business by an elimination of that exemption. The other business is Mountain Dairy of Weybridge, Vermont.

These business are of similar size i.e., approximately 450 cows. Each has been in business for a great number of years. There is no claim, allegation or proof they have done or failed to do any personal action or created any disorder of any kind let alone sufficient to cause the loss of the exemption that they have built their lives and the lives of their 35 + - employees around.

It is their case, the elimination of these two Producer-Handlers along with all other Order One Producer-Handlers and Exempt Milk Handlers would net no increase in Producer returns because the Class I sales of those entities is one percent +- of Class I sales. There is no contrary claim or contrary proof to this mathematical fact. No opposing economist or documents were offered perhaps for the reason it is simple mathematics.

It is their case further that the record shows there are substantial economic barriers to entry to becoming a Producer-Handler shown as admitted facts in the record; that findings must be made on a order by order basis; that the Eastern marketing order conditions have no Producer Handler or other disorder; that the loss of exemption would force Producer-Handlers out of business. There is no burden or affect upon the regulatory scheme from their exemption; the Secretary lacks the power on this record to take away the Producer-Handler exemption. Any regulation would be unauthorized, and a violation of public policy, the AAA, SBRA and due process under the United States Constitution.

A further claim is that Producer-Handlers do not purchase their own farm milk the only act the Secretary is authorized to regulate. Thus those sales can not be regulated and priced.

Homestead Creamery is located at Wirtz, Virginia. It markets milk of its own production directly to the public at retail. It is recognized as a Producer-Handler under the laws and regulations of the State of Virginia but not under Federal Milk Marketing Order No. Five because Order No. Five requires unity of title ownership of the assets not present since some assets used in the business are owned by legal descent to separate family members. They are in and out of the exempt category in the order on a monthly basis.

The claim of the New England Producer Handlers is that the exemption for exempt milk should be increased to avoid administrative expense and handler loss by in and out of regulation monthly because the level is unrealistic; that their volumes are de minimus to the order and particularly Orders One and Five; that they have been traditionally exempted; that no one proposes to eliminate that exemption; that all hearing participants agree to an upward revision in the poundage figure; that level is increase these petitioners seek is 1,000,000 pounds monthly based upon the need to obtain competitive size. However, if the Producer-Handler exemption is eliminated and then the request is for 3,000,000 lbs. monthly to save the disaster that would follow.

The above parties particularly request the definition of Producer-Handler be altered to allow family and relatives holding of individual title to assets used in the operation to be accepted by the Market Administrator. This request was not objected to. It supplies needed equity. It will allow tax and other planing so common today in business without affecting the program.

Each of the operating parties and New England Producer Dealer Exempt Milk Members employ less than 500 plant employees. They claim the benefits of the findings required by the Small Business Regulatory Flexibility Act and other small business rules and regulations laws and regulations which can not be made on this record.

## POINT I

### **THERE IS CONTROLLING EVIDENCE IN THE RECORD THAT EVEN FULL REGULATION OF ALL CLASS I SALES OF PRODUCER-HANDLERS WOULD NOT AFFECT PRODUCER RETURNS. FINDINGS BY THE SECRETARY RECOGNIZING THAT STATE OF THE RECORD ARE REQUESTED.**

Professor Wayne A. Knoblock of Cornell University Dairy economics faculty testified at page two of his statement that pooling Producer-Handler Class I sales would not affect Producer returns from Order No. One at all (Exhibit 90; pg. 3, R. 3026, 33401):

“What would producers gain by having Producer Handlers pooled? In 2008, about 39 percent of producer receipts in federal orders were used in Class I sales. The Producer Handler volume in 2008 was about 1.5 percent of Class I sales. If we assume that the average Class I differential that would have been paid by Producer Handlers was between \$2-3 per cwt. then the average statistical uniform price would have increased from \$18.24 per cwt. to \$18.25-18.26-a mere 1-2 cents per cwt. These increases in the uniform prices due to the full regulation of producer-handlers would neither offset the differences already existing amount producer mailbox prices nor would it change the existing spread among producers. Producers are not losing significant revenues because Producer Handlers are not contributing to the pool. Just to put this in perspective, this is well below than the 4-5 cents of administrative costs required in most federal orders that producer-handlers would have to pay.

Let's talk about the pay price to the producer. The cooperatives set the prices to the extent that they are above the minimum price, and also have add on charges and deductions which they charge back to the producers. Thus, the 1-2 cents might never even go into the producers' pockets in any event.”

His full testimony on this subject is attached at the Appendix hereto.

That testimony is based upon simple mathematics. It was not and can not be refuted and there was no attempt to counter his testimony. Accordingly, these parties are entitled to a finding

by the Secretary of the uncontroverted testimony based upon Department statistics that Producer-Handlers and Exempt Handlers exemption has no effect upon Producer order returns in Order No. One and Five or the other orders which have even less exempt milk. We specifically do now request that finding.

## **POINT II**

### **THERE IS NO RECORD EVIDENCE OF ANY INTENT OF NUMBERS OF LARGE COW HERD OWNERS TO BECOME PRODUCER-HANDLERS. FEARS ARE NOT EVIDENCE.**

The case of the Milk Producers and large handlers was solely directed to the claim that owners of large cow herds would become Producer-Handlers.

There was absolutely no evidence large cow owners of thousands of cows had in fact newly applied to the Market Administrator of Orders One or Five or other orders or that such persons were even contemplating applying to be Producer-Handlers at all, let alone in numbers sufficient to affect the pool and no proof of any pending applications in the orders to become new Producer-Handlers.

We request a finding of that fact.

Not only is no evidence of such applications but there are high barriers to entry into processing and distribution. Among those barriers are many millions of dollars of plant investment, expensive rebreeding of cattle, and other expense. The record shows the processing plant for 450 cows cost ten years ago \$200,000,000. For thousand cows that figure would be at least \$500,000,000 today. The record shows the herd would have to be rebred for even production, a matter that would take at least a year or more with production loss in the process. Then customers would have to be obtained. It is a new business and costly management problems can arise; it is entirely different and more costly than producing milk alone (see Rooney testimony in Appendix agreed to by Stearns).

We request a finding on this uncontroverted testimony showing high barriers to entry.

Further the long history of the exemption shows a decline in numbers of producer handlers.

### POINT III

#### **THE SECRETARY HAS NO AUTHORITY TO ELIMINATE OR BURDEN THE PRODUCER-HANDLER EXEMPTION.**

The Secretary has no authority to pool milk not purchased by the Handler. It is only purchased milk that can be regulated. Purchase by definition is a change in ownership for consideration. That does not occur with own farm milk ( 7 USCA Sec 608c (5)).

Congress has recognized that fact after the AAA first enactment. It has repeatedly, explicitly, directly directed the Secretary on amendment of the act to abstain from regulation of producer-handlers. Exemplar directions of that nature are in the Appendix.

The Food and Agriculture Act Amendment of 1965 at page 13 of the house report stated Section 104 of the Act was specific for directing the Secretary to preserve the exemption without burdensome restrictions. That report was incorporated in the Conference Report. It provided as to Producer-Handlers:

#### PRODUCER HANDLERS

SECTION 1004 - This section would make it clear that it is not intended to alter the legal status of producer handlers of milk under the existing act.

“Traditionally all Federal orders have exempted producer-handlers from such requirements and have limited regulation to those requirements designed to guarantee that, as sellers of fluid class I milk,producer-handlers use their own production as a source of supply without substantial use of the production of other dairymen.

The committee wishes to make it clear that it approves of the practice of keeping the producer-handlers' avenue of marketing open to dairy farmers without unduly burdensome restrictions and that this legislation shall not be deemed to be a justification for producer handler inclusion in the pooling requirements of any Federal order. This is the purpose of section 104 of the bill.



This section means that this legislation is not to be regarded as a reason for, nor as any new legal authority to include producer handlers in the pooling arrangements of Federal market orders and that if justification and legal authority for such inclusion did not exist prior to the enactment of this legislation it will not exist thereafter by virtue of any provisions of this bill.

The committee wishes to express its disapproval of certain administrative restrictions on producer-handlers that have grown up under the act such as levying of assessments on milk produced over a period of 1 year, because of a violation which occurred on a single day and restrictions on the buying;and selling of cattle, barns, and milking parlors, or on the manner in which business is conducted. Other than those restrictions which are necessary to define and maintain the status of producer-handlers.”

The recent Milk Regulatory Equity Act at paragraph 5(O) explicitly ruled out altering any Producer-Handler exemption in other orders by reason of any events in Order 131:

“Rule of Construction Regarding Producer-Handlers Subparagraphs(M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such sub paragraphs.”

Accordingly, the Secretary lacks the authority to abolish the Producer-Handler exemption or burden its use and we request such a finding.

#### POINT IV

### **THE SECRETARY HAS NO AUTHORITY TO BAN NEW PRODUCER-HANDLERS AND LIMIT THE RIGHTS OF THE EXISTING ONES BY "GRANDFATHERING".**

The Secretary exercises delegated powers from Congress. He is bound to exercise those powers as directed. He has been directed to provide a producer handler exemption. He has been given no authority to close off new producer handlers from entry by regulation at the behest of competitors.

There is no section of Law that gives the Secretary authority to erect barriers to entry into milk marketing which is the effect of elimination of the Producer-Handler exemption. He certainly can not do so to confer competitive advantage upon billion dollar dairy interests. (Sherman and Clayton Anti-trust Acts), and cannot do so on this record without violating the AAA and the RFA acts. Grandfathering assumes the right to eliminate the exemption and as such can not stand.

In addition, grandfathering by its nature is a slippery complex regulatory problem as is shown by the Producer Associations chief witness testimony under the cross examination of this counsel. it will absorb regulatory time, future hearings and 15 A petitions and Congress will be involved as well. Preservation of the exemption prevents all these evils.

We request findings on the above.

#### POINT V

### **UNCONTROVERTED TESTIMONY IN THE RECORD SHOWS THAT PRODUCER HANDLERS CAN NOT SURVIVE LOSS OF EXEMPTION. THEREFOR THE EXEMPTION CAN NOT BE WITHDRAWN UNDER THE AAA , THE SBRFA OR THE SHERMAN CLAYTON ANTITRUST ACT PROVISIONS AND PUBLIC POLICY. THE SECRETARY IS REQUESTED TO MAKE SUCH FINDINGS.**

John Rooney, President of Mountain Dairy at Weybridge, Vermont testified extensively that the effect of the loss of the Producer-Handler exemption would put him out of business. He said(R. 1539-1540):

“A. Yes. They’re all what I would consider local.

Q. How many employees do you have besides the family?

A. I would put it at 28 or 29.

Q. Thank you. Now, would you tell me what would happen to those employees and to yourself if you were to be -- have the exemption taken away from your farm?

A. Well, it would-- as it would extremely-- well, not just difficult, there’s no way we can--we can finance, you know, 2 million in debt, a debt load of 2 million and still pump out what we’ve estimated would be \$360,000 for market pool payments. The two won’t fit together.

Q. Would you be out of business?

A. Yes, absolutely.”

He testified regarding the number of his employees (28, 29) to the lack of benefit to the pool; to the high cost of being a Producer-Handler; to his objection to cutting off entry to the exemption, and the risks of grandfathering.

His testimony was concurred in by James Stearns President of the New England Producer Dealers, and President of Mountain Dairy of Storrs, Connecticut, Mr. Stearns agreed with the testimony of Mr. Rooney. He testified at Record pg. 1559:

“Q. What effect, if any, would it have on your business if you were to lose that exemption?

A. It would substantially alter. What effect? It would be where --we’re about the same size of Mr Rooney, and the cost of being in the pool would amount to \$360,00 a year. We’ve managed to avoid being in the pool. But at one point when I thought it might be imminent, I had the Market Administrator just run up a mock what it would cost. And it was \$33,000 for the month of July of ’08.”

Q. So you think it’s approximately 360,000?

A. I would say approximately, yeah.

Q. Is there \$360,000 of money in your business to make payment?

A. Unfortunately, no.”

Accordingly, we request the facts stated in their testimony be found by the Secretary. Their full testimony is set forth in the attached appendix.

On such a record the findings required by the Small Business Regulatory Act and the Administrative Procedure Act the Agricultural Adjustment Act can not be made.

#### IV.

**MAINTAINING THE PRODUCER-HANDLER EXEMPTION  
WITHOUT BURDENSOME RESTRICTIONS IS IN THE  
CONSUMER AND PUBLIC INTEREST. THE SECRETARY IS  
REQUIRED TO SO FIND BY THE RECORD.**

The word consumer is apparently an anathema to the Producer Associations and the Dairy Dealers. It virtually never passed their lips or surfaced in any of their documents. They are primarily interested in their own interests despite the fact they are seeking Secretarial action from the Secretary that has the duty to consider and protect consumer interests. The Secretary does not have the luxury to ignore consumer interests.

However, the consumer interests in the proceedings were presented in evidence by Producer-Handlers and by public representatives of the legislature and Commissioners of Agriculture of the States of Vermont, New Hampshire and Wisconsin. That evidence showed that some consumers would not have milk service without Producer-Handlers; that the consumer interest in local milk and strict kosher supplies and state programs for fostering such local supply would be lost; that competition would be restrained by cutting off entry into the market of new Producer-Handlers; that the market in New England was in a oligarchy condition with only two Handlers handling almost all milk sales.

The above facts are not controverted in the record. They are requested to be found.

V.

**THE PRODUCER-HANDLER DEFINITION SHOULD BE  
AMENDED TO ALLOW RELATED PERSONS BY BLOOD OR  
MARRIAGE TO QUALIFY FOR PRODUCER HANDLER STATUS  
BY ASSETS USED IN THE BUSINESS WHICH ARE TITLED TO  
INDIVIDUAL RELATED PERSONS.**

David Bower, President of Homeland Creamery of Wirth, Virginia, testified that title to his plant and the farms sending milk to the plant were not the same but that had occurred by inheritance from common ancestors a fact, that had prevented obtaining a clear right to Federal not state Producer-Handler status. He requested relief from the requirement where there was a blood or marriage relationship. Producer-Handlers should have the rights to organize their business for tax or inheritance reasons as any other business.

There was no objection to that request. This minor adjustment should be made. It has no effect upon the regulatory scheme.

VI.

**EXEMPT MILK LEVEL SHOULD BE RAISED TO  
ONE MILION POUNDS.**

The 150,000 exempt milk limit has not been adjusted for decades. Based on inflation alone it should be increased.. These handlers serve small niche markets. The exemption makes their service possible.

All witnesses agreed some increase in levels to at least 450,000 lbs was needed and that higher amounts were agreeable to the industry.

David Bower, President of Homeland Creamery testified to the need for a one million pound level of exemption for exempt milk in todays marketing world. His testimony is set forth in the appendix to this brief. He set forth the need for that number. It is requested to be found.

Should producer handlers lose their exemption they would need 3,000,000 at least.

Findings on the above are requested.

## VII.

### **REQUIRED REGULATORY FLEXIBILITY ACT FINDINGS CAN NOT BE MADE.**

The Small Business Regulatory Flexibility Act requires the Market Administrator to make specific findings regarding the need for such proposal, and to consider steps to minimize the impact of any proposals on small business, to consider alternative proposals and to consider exempting small businesses.

The Regulatory flexibility Act applies to Producers and Dealers of milk and does so in separate categories of Producers and Dealers. The category of Producer does not apply under the AAA because the AAA forbids the Secretary to regulate Producers. Therefor any regulation put forth by the Secretary is because of the the act of handling milk i.e., plant action which triggers the Act's protection since 500 or more employees are sufficient for the Act's protection.

On this record the Secretary must find that there is no need or necessity, that Producer-Handlers would be driven out of business by a loss of exemption, with no corresponding benefit to the regulatory program. On those findings no regulation can issue.

## VIII.

### **SEPARATE FINDINGS ARE REQUESTED FOR ALL ORDERS INCLUDING ORDERS ONE AND FIVE.**

Orders No. One and Five are separately promulgated on findings of local marketing conditions and local pricing. We request separate Producer-Handler findings for each of those orders separate from any other order generally and particularly as to disorder or history of relationships. We respectfully submit that all orders must have separate findings based upon the existing evidence in that locality. There is no large producer disrupting the market or any Hein

Hettinga in these marketing areas nor is one threatening to. We note however that in Texas he bid for the school as a regulated Handler. The problems identified and dealt with in order 131 by Congress do not exist in Orders No. One and Five. The continue as they always have and there is simply no basis for for any of of these proposals in those orders. If they did congress would have dealt with them.

## **IX.**

### **3,000,000 LBS EXEMPTION AND GRANDFATHERING.**

These parties did propose as an alternative to full loss of exemption a 3,000,000 exemption figure. On this record the Secretary can not and need not reach that issue since it is a restriction on Producer-Handler rights but if reached without waiver of any earlier or other applicable claim of any nature that amount would be needed as a practical matter.

## **X**

### **ALL RELEVANT CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AND/OR STATUTORY RIGHTS ARE CLAIMED AND SUBMITTED.**

These parties claim their United States Constitutional rights to due process and equal protection, all rights under relevant public policy, and relevant United States statutes AAA including but not limited to the AAA, (for the matters set above and for the total absence of proof sufficient to act and absence of rationality) and under the Small Business Regulatory adjustment Act, the Administrative Procedure Act, the Sherman and Clayton Anti trust acts (for the public policy claims, and liability for combining with competitors to restrain or eliminate competition as that is the motive purpose and intent of the anti handler proposals).

## XI

### APPENDIX IS ATTACHED

Attached hereto is an Appendix. There is an index describing the documents. Additional requested findings of fact are set forth therein together with some full testimony referred to hereinbefore.

### SUMMARY

The Petitioners National Milk Producers Federation and International Dairy Foods Inc., commenced these proceedings. They are attempting to change 74 years of settled administrative construction of the Agricultural Adjustment Act allowing Producer-Handler exemption from milk marketing pooling and pricing provisions. They initiated the petition because of events 3,000 miles from Connecticut and Vermont after being advised by Congress at 7 USCA 608c(1)5(O) the Secretary could not apply those events to regulations in other orders.

In that regard Congress directed the Secretary:

“RULE OF CONSTRUCTION REGARDING PRODUCER-HANDLERS-subparagraphs (m)(n) shall not be construed as effecting, expanding, or contracting the treatment of Producer-Handlers under this subsection except as provided in such subparagraphs.”

The National Milk Producers Federation and International Dairy Foods Inc., regardless brought on these proceedings as the first and foremost dairy problem awaiting the new executive administration.

As a result, the Department has had ten or more of its staff and officers tied up for months of official time; innocent Producer-Handlers resting their entire livelihoods and financial credit and mortgages upon the exemption have been placed at risk and incurred large legal costs in a difficult time of the economy.



One would think that before making these serious moves, which seriously impact the time and resources of the Department and invade the time of key industry figures and wreck havoc on innocent parties, the proponents would possess overwhelming evidence of imminent substantial adverse regulatory impact on the returns to Producers from the exemption that they would not rely upon the prior events in Arizona and the Pacific Southwest areas expressly forbidden by Congress to be considered.

This hearing has made it plain that they did not have and do not have such substantial overwhelming evidence or any evidence at all that producer prices and returns are adversely affected by the producer handler exemption the only grounds for action by the Secretary ; that it was their intent to urge the Department to act in violation of the directions given the Secretary not to effectuate regulation of Producer-Handlers by reason of the events in Arizona and Pacific Northwest Congressional Act.

Amazingly, these essential elements are all ignored by the proponents of the loss of the Producer Handler exemption i.e. the competitors of Producer-Handlers.

Instead, they propose the Secretary sail off into uncharted waters reversing 74 years of settled administrative construction providing for an exemption, violate the command of the Congress in its 2005 Producer-Handler Act; ignore prior directions of Congress over that period of time directing the continuation of the exemption without burdensome restrictions and wreck havoc on innocent Producer-Handlers for the subjective speculative fear that the matters that had occurred in Arizona and the Pacific Northwest might occur 3000 miles away in Connecticut,

Vermont or other states whose marketing conditions are entirely different or because the Class One prices are presently low (having been higher in the immediate past). and that producer dairy herds are larger in size; that together these matters spell the doom of billion dollar dairy processors.

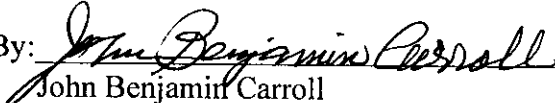
We respectfully submit the Secretary is required by law to follow the directions of Congress both historic and in 2005. Those directions have been to provide a Producer-Handler exemption without burdensome restriction except in Arizona and in Pacific Northwest, to there maintain an exemption of 3,000,000 pounds; to not export that limit to other orders. For those orders it has previously directed there be a Producer-Handler exemption without burdensome restrictions.

We further respectfully submit, that speculative fears of future acts of unknown persons is legally and factually insufficient for regulation. In any event, there was not evidence whatever that any large producers of milk have numerous or any pending applications with the Market Administrators to become Producer-Handlers and thus no evidence except mental fear on which no regulation can be made and none sufficient to change the 74 year old policy of the Department and Congress providing for a Producer-Handler exemption without conditions or burdens of any kind.

Dated: July 14, 2006

Respectfully Submitted,

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