

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Select Milk Producers, Inc., Elite Milk Producers, Inc., Continental Dairy Products, Inc.)	
)	
Plaintiffs,)	
v.)	Civ. No. 1:01-CV-00060 (RCL)
)	
Dan Glickman, Secretary)	
United States Department of Agriculture,)	
)	
Defendant.)	

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION AND FOR EXPEDITED HEARING**

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I. Introduction

Plaintiffs note at the outset that eight (8) additional dairy cooperatives (through their “Association of Dairy Cooperatives in the Northeast” (“ADCNE”)) have this date filed their unopposed Brief Amicus Curiae in support of the injunctive relief sought here. Those dairy farmers (representing a substantial portion of the milk in the Federal Order system) together with amicus National Cheese Institute, (representing manufacturers of over 80% of the cheese consumed in the United States) join Plaintiffs in challenging the administrative vigilantism and regulation by “ambush” present here.

The ADCNE declarants (as do the other declarants supporting Plaintiffs’ motion for injunctive relief) describe the defects in the hearing notice, their justifiable reliance on the ruling excluding the only proposal for a new Class III butterfat price and the impending irreparable injury.

ADCNE Declarant Herbert F. Shepard, was employed for 36 years in the Boston office of the Federal Milk Market Administrator from 1953 to 1990. During his last five years of service he was the Market Administrator. He graphically relates how the Secretary’s tentative final decision departs from over 40 years of established USDA precedent and policy of using the value of butterfat in butter to determine the value of butterfat in milk used in all classes of product. (Declaration of Herbert R. Shepard at ¶ 6).

As demonstrated in the eight (8) declarations submitted by representatives of all industry segments, the defective hearing notice, compounded by the exclusionary ruling at the hearing itself provided assurance to the industry that over 40 years of precedent would remain intact. To be sure, the requirements of the Administrative Procedure Act together with relevant judicial precedent

require injunctive relief to stop a post hoc decision from radically changing the status quo and causing market disruption and irreparable loss.

The Secretary “blind sided” the Milk Producers and the entire dairy industry. The Secretary’s brief does not refute that. The challenged Class III Butterfat Price surfaced only after *three* representatives of the Secretary by words, action, or silence agreed that Class III Butterfat Price was not within the scope of the hearing, after all of the witnesses had testified, after all the exhibits had been admitted, and after all of the written comments had been filed. This *post hoc* rule violates not only fundamental due process but deprives the Secretary of the needed expertise of the industry in this complex rulemaking scheme. Even now, in her brief, the Secretary fails to identify one single sentence in the Notice of Hearing or the transcript in which the proposal she now wants to implement was even mentioned, let alone discussed or supported.

She compounds this failure to give notice by hiding behind yet another *post hoc* document, “Economic Analysis” (Exhibit L), which contradicts the earlier USDA Preliminary Analysis on the issue of Class I movers (Exhibit D). The Secretary in her brief extrapolates the “analytical” years, not months, to claim that Class III will “never” be the Class I mover in any month. As a result she was excused from evaluating the Class III Butterfat Price in terms of a Class I mover. Thus, she avoids explaining why the producer settlement fund (the trust she is required to maintain for the producers) should be exposed to substantial reductions and volatility in price.

This *post hoc* prediction (akin to a statement the Dow Jones will always be a “bull market”) directly conflicts with the Secretary’s own Chief Economist’s testimony in Congressional hearings in 1999 (he said that Class III and IV moved about the same number of times) and the same Dr. McDowell’s own preliminary analysis discussed at the rulemaking hearing just months prior to the

Tentative Final Decision. That analysis showed his projected Class III averaged 12 cents more than Class IV for the next six years and that Class III and Class IV would alternate as the Class I mover.

As it stands today (before February 2, 2001), Milk Producers are not (1) subject to a contingent liability in the producer settlement fund to cheese and cream users that pay the inflated price for butterfat, (2) subject to reduced Class III prices due to the imposition of the separate Class III Butterfat Price, (3) subject to disorderly marketing conditions as cream purchasers skirt the Federal Milk Marketing Orders and find cheaper cream outside of the market, (4) exposed each month to the real prospect that the producer settlement fund will be substantially reduced as the Class III Butterfat Price wreaks its havoc on the Class I price returns.

Implementation of the Class III Butterfat Price provision is a time bomb. On February 2, the bomb triggering device will be started. Exactly when, not if, it blows up, we cannot exactly predict. That it will explode in producers' faces, we can so predict. Now, not later, is the time to defuse the bomb. Now is the time to enjoin the implementation of the separate Class III Butterfat Price.

II. The Secretary does not refute the Milk Producers' assertions in several key areas.

The Secretary does not deny that the Notice of Hearing did not contain a specific proposal to set a separate Class III Butterfat Price. Instead she argues that she did not need to do so. (Deft's Mem. At 9, 10). In point of fact she identifies the only statement in the Notice of Hearing that remotely could address that issue as a statement "*Following the final proposal* (proposed by USDA)..." (Deft's Mem. at 9). That is, she acknowledges that the statement she relies on was not even part of her own proposal 32!

The Secretary further does not dispute that under the separate Class III Butterfat Price when Class III is the mover, the Class I skim price will be significantly lower than the Class IV skim price and that there is not enough butterfat in Class I at the higher prices to offset this loss. We know she

does not refute it because she never thought about it. She blithely responds that Class III will *never* be the Class I mover. This sweeping declaration has no foundation in any testimony or exhibit at the hearing, it contradicts the same Secretary's economist who testified that they alternated, and it only exists as a *post hoc* argument made by counsel explaining something not at the hearing.

III. The Secretary's Brief misstates or misrepresents Milk Producers arguments and the Administrative Record.

The Secretary's brief is replete with misstatements and misrepresentations of Milk Producers and their arguments. From the first paragraph she asserts "by their own prior admission, they are not likely to succeed" (Deft's Mem. at 1). Milk Producers never admitted such a thing. At the hearing they simply raised the question whether the Barbano proposal was properly within the scope of the notice. But, the Secretary's representatives rejected the suggestion that the Notice of Hearing included a separate Class III Butterfat Price.

She also misrepresents Milk Producers' argument when she says 'relies on the narrow claim that USDA's statement of subjects to be addressed was not a specific proposal, so it did not give adequate notice.' (Deft's Mem. at 9). Milk Producers relied upon the Secretary's position (and ruling) at the hearing that the issue of a separate Class III Butterfat Price was outside the scope of the hearing. The issue turns not on the meaning of some ambiguous words in the Notice of Hearing, but the Secretary's own words limiting testimony at the hearing. When she says, "Plaintiffs now argue that Barbano's proposal for a separate Class III Butterfat Price was outside the scope of the hearing" (Deft's Mem. at 10), that is precisely the position the Secretary took at the hearing.

The affidavits accompanying the amici briefs state that participants did not see Class III Butterfat Price as an issue at the hearing. Declaration of Herbert E. Shepard attached to Amicus Brief of Association of Dairy Cooperatives. Declaration of Michael Reinke at ¶ 12 attached to Amicus Brief of National Cheese Institute, Declaration of Michael L. Brown at ¶ 5 attached to

Ptf's Mem., Declaration of Dr. Robert D. Yonkers at ¶ 10 attached to Amicus Brief of National Cheese Institute, Declaration of Dennis Shadd at ¶ 6 attached to Amicus Brief of Association of Dairy Cooperatives, Declaration of Herschel Raskas attached to Amicus Brief of National Cheese Institute at ¶ 97 . Even the USDA when it testified on behalf of proposal 32 said nary a word about a separate Class III Butterfat Price. In that way the Secretary's assertion that "The ALJ did not rule that no testimony on a separate Class III butterfat price was relevant" (Deft's Mem. at 11) is ludicrous.

She misstates the plain meaning of regulations, the practice of the Secretary, and the practical necessity of specific proposals. She states that "procedural regulations do not require that only specific proposals be considered." (Deft's Mem. at 9). Milk Producers' point is there must be *a* proposal, specific or otherwise, to be considered at the hearing. How can the Secretary on one hand declare that the only proposal presented is not in the scope of the hearing while, on the other hand, argue that a proposal that was never expressed or noticed is in the scope of the hearing?

The Secretary on more than one occasion calls the Economic Analysis of Dr. McDowell "official." (Deft's Mem. at 17). These are not "official" predictions of monthly prices. They are the result of an analysis on an annual basis. Besides, they are *post hoc* and cannot be used to rationalize the decision of the Secretary.

Finally she refers to the Class III Butterfat Price as the result of an amendment "tentatively adopted." (Deft's Mem. at 17). Such implies that it has no force at this time. It is a Tentative *Final* Decision which has real impact now i.e. on February 2

IV. The Separate Class III Butterfat Price provision is insupportable both as a matter of procedure as well as not being in compliance with applicable law.

A. Fatal Defects in the USDA Notice of Hearing Were Compounded by

the Secretary's Support of the Exclusionary Ruling at the Hearing

The government's assertion that the Secretary provided proper notice of a separate Class III Butterfat price rests upon a narrow reading of plaintiffs' arguments, a blind eye towards a half century of USDA practice with respect to specificity in the notice of proposed rule-making, and a flawed interpretation of the "logical outgrowth" doctrine. Reduced to its barest elements, the government's position depends upon an extreme extension of the "logical growth" test to interpret and justify the Notice of Hearing. The government contends in error that "[p]laintiffs do not dispute that the Notice in dispute in this instance met this regulatory standard; their argument relies on a claim that more notice was due, *i.e* that a specific proposal that looked like the final rule had to have been proposed." (Def't's Mem. at 9). As more particularly set forth in the Plaintiff's Memorandum of Points and Authorities, (Plfs' Mem. at 1, 2, 3, 7, 8, 11, 12, 13, 14, 15, 16, 17) the Plaintiffs repeatedly contested the sufficiency of notice. In addition to the clear language of the Notice itself, the Secretary's representatives agreed with the ruling of the ALJ excluding the only Class III Butterfat price proposal from the hearing (Plfs' Mem., Ex. E at 790). In this action, Plaintiffs simply seek to require the government to meet its minimal obligations to provide fair notice and opportunity to be heard before a new rule is imposed on the industry¹ --- nothing more, nothing less, nothing else.

The AMAA requires that any amendment to federal milk marketing orders must be preceded by formal, on the record, rule making. 7 U.S.C. §608c(3). Hearings concerning milk marketing orders follow a notice of hearing which, "shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed

¹In its Memorandum, the government quotes the Secretary's Tentative Final Decision which correctly characterizes the provision challenged here as "[t]he most substantive change" in The Tentative Final Decision. Def't's Mem. at 14.

marketing agreement or marketing order or a description of the subjects and issues involved...” 7
C.F.R. § 900.4(a). The notice options for the USDA are set forth in the alternative. Where the
USDA has elected as here to notice specific proposals, the other option is limited to matters
which represent a “logical outgrowth” of the noticed proposals.

The Notice of Proposed Rulemaking says, in pertinent part:

Proposals to change the Class IV butterfat price that would not also result in changes to the Class III butterfat price raise the issue of whether the butterfat price for milk used in Class III should be based directly on the value of butterfat in cheese instead of the value of butterfat in butter Changing the protein price calculation to reflect only the value of protein in cheese, with a separate Class III butterfat price calculation is an issue that should be considered at the same time as the proposals to reduce the Class IV butterfat price. Data and testimony concerning yield factors specific to butterfat in cheese would be appropriate additions to the hearing record.

65 Fed. Reg. 200094, 20103. [Emphasis added].

The government asserts that the italicized portion of the notice provided sufficient notice that a separate class III Butterfat Price calculation was under consideration, and that a final rule may differ from a proposed rule so long as the final rule is the “logical outgrowth” of the rule as proposed. (Dft’s Mem. at 11). The government’s interpretation ignores the plain language of the Notice clearly linking any consideration of a separate Class III butterfat price with a reduction in the existing Class IV Butterfat price.² Nevertheless, from this tenuous perch, the government seeks to impermissibly uncouple the new Class III Butterfat price from the predicate Class IV Butterfat price reduction. To accomplish this administrative “sleight-of-hand,” the government resorts to the “logical outgrowth” theory.

²None of the proposals involving the reduction of Class IV Butterfat price were in fact accepted. See 65 Fed. Reg. At 76833 (Dec. 7, 2000).

“Where a final rule differs from a proposed rule and the agency does not provide separate notice and comment for the final rule, ‘the question for the court is whether the final rule is a ‘logical outgrowth’ of the rulemaking proceeding.’” Association of American Railroads v. Department of Transportation, 38 F.3d 582, 588 (D.C. Cir. 1994). *quoting* AFL-Cio v. Donovan, 7575 F.2d 330, 338 (D.C. Cir. 1985). But the “logical outgrowth” test is not a bootstrapping device that affords the government *post hoc* license to enact rules based simply on general and obscure notice language.

Indeed, this Circuit used the “logical outgrowth” test to invalidate an EPA rule regulating the burning of hazardous waste because the EPA did not sufficiently foreshadow the components of its final rule. Horsehead Recourse Development Company v. Browner 16 F.3d 1246, 1267-68 (D.C. Cir. 1994). In that case, while the EPA provided notice with respect to individual components of a final rule that might limit the carbon monoxide (“CO”) or total hydrocarbon (“HC”) emissions from waste burning kilns, the agency did not provide notice of a rule that limited the combined emissions of CO and HC from such kilns. Id. The Horsehead Court said, “this omission is critical because notice of individual parts of a proposed rule is not necessarily notice of the whole.” Id. This reasoning is applicable to the case at hand. The Notice here did not identify any free-standing Class III Butterfat price proposal and there was no formula advanced for the separate Class III Butterfat price calculation. The Secretary’s Notice did not in any meaningful way amplify the possibility of a new separate Class III Butterfat price calculation that was not coupled to a Class IV price reduction. This omission deprived the Plaintiffs and all other interested parties of notice that a new free-standing Class III Butterfat price calculation provision would be considered.

Furthermore, general industry knowledge that a rule might be under consideration does not satisfy the “logical outgrowth” test. In National Mining Assn. v. Mine Safety & Health Administration, 116 F3d. 520 (D.C. Cir. 1997), the government argued unsuccessfully that whatever the defects in the notice, the National Mining Association “(NMA)” had actual notice that the agency was considering timing changes for mining inspections from the written comments and testimony at hearings. 116 F.3d at 187. The Court was willing to assume that the NMA knew of the comments concerning a possible change in the rule. Id. The Court said, “[e]ven if a party knows that a commentator made some novel proposal to an agency during rule making, the party cannot be expected to respond unless it has some reason to believe the agency will take the proposal seriously.” Id. Here, at the hearing Dr. Barbano advanced the “novel” (and only) proposal that dealt with a separate Class III butterfat price. Plaintiffs had no reason to believe the agency would take any part of the proposal seriously. To the contrary, they had every reason to believe otherwise once the ALJ, with the concurrence of the Secretary’s representatives eliminated the entire proposal from consideration.

For several decades the USDA has promulgated rules and conducted rulemaking hearings, “by notice of the terms of substance of specific rules rather than by a general description of issues involved.” (Reinke Dec. ¶ 12). As Mr. Reinke states, the industry relies on this practice and tailors testimony in accordance with the same. (Reinke Dec. at 12). In the past, where the standard for notice has not been met the USDA has voided the particular rule. In re Blenheim Creamery Corp., 5 Agric. Dec. 663 (1946) (where notice and hearing record were insufficient order assessments voided); In re Kraft Cheese Co., 1 Agric. Dec. 216 (1942) (voiding location adjustment not foreseen in notice and hearing record). Likewise the USDA has

abandoned recommended rules on grounds that parties complained of insufficient notice. 53 Fed. Reg. 24298, 24311 (June 28, 1988).

Not one of the 31 proposed amendments in the Notice of Hearing included the creation of a separate Class III Butterfat calculation and nor did the USDA's technical proposal No. 32 (the only proposal offered by the Secretary). Dr. Barbano's proposal was ruled by the ALJ "not one of the proposals being considered at this hearing." (Plf's Mem., Ex. E, at 790). In the face of this ruling, anyone would reasonably conclude that any "outgrowth" of Dr. Barbano's proposal concerning a separate Class III Butterfat price, whether logical or otherwise, was also beyond the scope of the hearing. Remarkably, the government notes, "[t]he ALJ did not rule that no testimony on a separate Class III Butterfat was relevant." (Def't's Mem. at 11). Can the government really be suggesting that, in light of the clear ruling, interested parties should have presented rebuttal testimony or comments on any hypothetical separate Class III Butterfat price calculation? The Secretary's ultimate adoption of a separate Class III Butterfat price, which the government does not dispute is substantially different than the excluded Barbano proposal (Def't's Mem. at 11), is nothing less than arbitrary and capricious.

Based upon the language of the Notice, the long-standing practice of the USDA and the ruling of the Administrative Law Judge, the "logical outgrowth" test lacks the elasticity to remediate the government's error. Indeed, if APA notice is adequate where changes are in character with the original proposal and the resulting rule is a "logical outgrowth" thereof, then a fortiori, a rule which is an "outgrowth" of a proposal judged to be outside the scope of the hearing is clearly unlawful.

B. The Separate Class III Butterfat Price provision otherwise does not comply the with law.

1. The Secretary failed to consider whether the Class III price would be the Class I mover and how the provision would impact the Class I price.

The Secretary, by design or neglect, totally failed to consider an important aspect of the problem— what is the impact of a separate Class III Butterfat Price on the Class I price and producer returns when Class III is the mover? The *post hoc* Economic Analysis cannot excuse that failure.

In *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, (1983), the Supreme Court held that the failure of the agency to consider an important aspect of the issue or to explain why it was departing from a prior position, evidenced arbitrary rulemaking. The failure of the Secretary to consider the impact on a given month when the Class III is the mover of Class I is just such a failure to consider an important aspect of the problem.

The Secretary now hides behind a false front of assuming, without a shred of evidence in the hearing record, that Class III will never be the mover. In point of fact, until the *post hoc* Economic Analysis, the USDA has consistently stated that the Class III and Class IV prices would alternatively move the Class I.

In the “Preliminary Analysis” in the Notice of Hearing, the Secretary made the following finding: “In addition the advanced Class I price mover is driven by the higher of the Class III or Class IV prices; both of which are used over the period, and ***do switch depending on the scenario.***” 65 Fed. Reg. 20094, 20097. [Emphasis added]. In point of fact, the Preliminary Economic Analysis in the Notice of Hearing showed that Class III would average 13 cents higher than Class IV. *Id.*, at 20099. This analysis, too, was done by Dr. McDowell. (Reply Declaration of Mary Ledman at ¶ 4) (Hearing Transcript p. 164 attached as Exhibit “A”).

This monthly interchange of Class III and Class IV as the Class I movers is consistent with testimony given by Dr. Keith Collins, Chief Economist for USDA, in Congressional testimony before the House Committee on Agriculture, Subcommittee on Dairy Livestock and Poultry, May 5, 1999.

http://commdocs.house.gov/committees/ag/hag10620.000/hag10620_of.htm (Relevant portions attached as exhibit “B”).

Finally, the USDA is patently incorrect in asserting that Class III would never be the mover in any given month. Ms. Ledman explains in her Reply Affidavit at ¶ 4 attached hereto, that the Economic Analysis in the Tentative Final Decision expressed *annual* averages. That is, the Class IV price at 3.5 annually averaged in excess of the Class III Price at 3.5 for the year. By rule, such prices are determined each month. An annual average may favor one mover or the other, but that does not mean that Class III would not be a mover in one or more months during that year.

2. The Secretary fails to explain why she changed her policy.

In issuing the existing regulations that were applicable in 2000 and which the Tentative Final Decision sought to amend, the Secretary stated as regards a separate Class III Butterfat Price :

An alternative to incorporating the butterfat value in cheese with the protein price is to compute a separate butterfat price for class III. This would be a relatively simple formula to compute. However, multiple butterfat prices would require full plant accountability of components in all manufacturing plants. ***The resulting increased accounting, reporting, and administrative costs were determined to not be warranted when viewed against the small gain from having an additional butterfat price.***

64 Fed. Reg. [16026, 16099] [Emphasis added]

In adopting the separate Class III Butterfat Price in the Tentative Final Decision the Secretary does not address this issue, let alone explain why that position is no longer viable today. In *Motor Vehicle*, the Supreme Court specifically stated that when there is a change in policy, the agency has to explain why.

3. The Secretary improperly relies on *post hoc* analysis.

The Economic Analysis that the Secretary now relies upon was created and published after the hearing. It was made after the record was closed and it cannot be used to justify the Secretary's decision to either impose the Class III Butterfat Price or excuse her from carefully considering the issue of Class III as a mover.

V. The Milk Producers will be irreparably harmed by the implementation of the Tentative Final Decision and the Class III Butterfat Price.

Unless enjoined, the Secretary will infect the trust fund of Federal Milk Marketing Orders (Producer Settlement Fund)³ with a "virus". This virus, like those found in computers, will erupt and play havoc with producer pricing. The only way to avoid this result is to enjoin it now.

The immediate harm that will necessarily arise out of this rogue rule on the Class III Butterfat Price is (1) an immediate contingent liability to the producer settlement fund will arise and grow, (2) producer prices for Class III milk will be reduced and cannot be recovered, and (3) plants using cream will seek cream from unregulated markets or substitute products. The immediate implementation of the Class III Butterfat Price sets the stage for catastrophic losses in Class I when Class III is the mover.

³The special fiduciary relationship of the Secretary to dairy farmers under the Federal Order program is akin to that of trustee and beneficiary. Stark v. Wickard, 321 U.S. 288, 305-06 (1944).

The Secretary does not have either the resources or the authority to reimburse the Milk Producers for these losses.

A. There is immediate harm that will occur.

1. The producers will be harmed by disorderly marketing conditions.

The affidavits that accompany the *amicus* brief of NCI identify a number of injuries that will occur to producers as the result of “disorderly marketing” of milk. Mark Reinke of Kraft Cheese states that as a result of the separate Class III Butterfat Price Kraft, will look to purchasing cream from unregulated markets which will reduce income to producers. (Dec. of Reinke at ¶ 15). The Class III Butterfat Price adversely affects risk management such as forward contracting because the “future price of fat and nonfat components of milk will be more volatile.” (Dec. of Reinke at ¶ 16). The Congress ordered the Secretary to adopt forward contracting for Classes II, III, and IV. 2000 Act §23. The Class III Butterfat Price renders that process unusable in violation of clear Congressional intent.

Dr. Bob Yonkers stated that the result of the Class III Butterfat Price provision is an increase of 25% in the minimum amount cream cheese plants pay for fat. (Dec. of Yonkers at ¶ 14). This in turn creates a misalignment of prices. (Dec. of Yonkers at ¶ 15). This will create a competitive imbalance between the Federal Milk Marketing Orders and the state regulated California markets.

Herschel Raskas of Raskas Foods states that in response to higher prices, his company has already commenced buying cream from the unregulated markets thereby reducing income to producers in the Federal Order system. (Dec. of Raskas at ¶ 9). If the rule is not stayed, then he will look to other procurement sources to reduce the costs thus imposed.. (Dec. Raskas at ¶ 10).

Mike Brown in his affidavit states that the use of the separate Class III Butterfat Price will “encourage the substitution of cheaper butterfat or other fat substitutes for fresh milk in the making of many cheeses.” (Dec. of Brown at ¶ 11). He also notes that his members’ milk, Jersey producers, will be harder to move into cheese plants. *Id.*

All of these exemplify disorderly marketing of milk. Avoiding such disorderly marketing and its impact on producers was the genesis of the AMAA. *Block v. Community Nutrition Institute*, 467 U.S. 340, 341 (1984).

2. The implementation of the Class III Butterfat Price creates a contingent liability to the producer settlement fund.

Plants such as Raskas and Kraft who pay extra for cream and butterfat as a result of this Class III Butterfat Price have the opportunity as a matter of law to recover this overpayment. 7 U.S.C. § 608c(15) provides an administrative process to recover those funds from the producer settlement fund. *Gore, Inc. v. Glickman*, 137 F.3d 863, 868-869 (5th Cir. 1998) If the plants prevail, then any overpayment comes out of the dairy producers’s pockets. *Id.*

At the same time, those plants who make products that require little or no fat or cream will pay less for their components. A ruling against the new Class III Butterfat Price will not result in additional payments from them. Such a ruling can only expose future producer settlement funds to a charge against dairy farmer revenue. Denial of injunctive relief creates a huge contingent liability to producers. Unless the status quo is maintained, producers face reduced Class III prices, lower Class I prices when Class III is the mover, and possible ruinous assessments for overcharges to plants making cream cheese and other high fat content cheese products.

The producers, not the Secretary bear the risk of his error. In essence, the producers act as guarantors against mistakes by the government. The Secretary has nothing to lose by staying

the rule, while the producers have much to lose by implementing it. Balancing the equities favors issuance of the injunction.

3. Milk Producers still predict losses in Class I income when Class III is the mover.

Nothing in the response of the Secretary or the affidavit of Dr. McDowell suggest that when Class III is the mover, there will not be losses in Class I income. It is noteworthy that the Secretary does not directly recite facts that would counter the statement by Ledman that when the Class III is the mover, Class I prices will suffer. This is because they will. The response, instead, is simply to pretend it will not happen.

To say that it will not happen is ludicrous. The Secretary's analysis in the Notice of Hearing not only notes Class III as the mover some of the time, but the six year average baseline had Class III exceed the Class IV price by over ten cents! Six months later, how can the Secretary say that Class III will never be the mover? (Ledman Reply at ¶ 2-4).

B. This Court will be limited in the kind of relief it can grant if the injunction is not issued now.

The status quo that Milk Producers want to preserve is the situation wherein (1) there is no contingent liability to the producer settlement fund, (2) there is no disorderly marketing of milk, (3) there is no reducing the Class III price and (4) there is no risk of losses from Class I when Class III is the mover. That is the status quo today. On February 2, absent an injunction, that status quo will irretrievably change.

The Secretary suggests (Deft's Mem. at p.21) that Milk Producers can rely upon the administrative process to correct the problem. In the first place, Milk Producers asked the Secretary not to implement the Class III Butterfat Price because it was not procedurally correct.

The Secretary flatly denied that request. Thus, it is hard to believe that the Secretary is now going to reverse himself on this issue.

The other problem is time. When Congress ordered the Secretary to hold a hearing and revise prices, it took the Secretary 11 months to notice and conduct the current rulemaking and he was still late. To expect the Secretary to quickly “address” the problem of Class III Butterfat Price administratively and satisfactory is wishful thinking.

If the government says that the Class III Butterfat Price does not harm producers, then issuance of an injunction will not harm the government. The presence of amici from the major segments of the industry indicates support for the position of the Milk Producers.

VI. Conclusion

For these reasons and those expressed in the initial memorandum, Milk Producers respectfully request that this Court enjoin the implementation of the Class III Butterfat Price on February 2, 2001.

WHEREFORE, the Plaintiffs respectfully request that this Court grant a temporary restraining order and/or preliminary injunction ordering that the Secretary, his agents and attorneys and those persons in active concert or participation with them who receive actual notice of this order be restrained, until further order of this Court from implementing separate Class III Butterfat Price provisions in amendments to the regulations found at 7 C.F.R. Parts 1000 - 1135 as so identified at 65 Fed. Reg. 76832 (December 7, 2000) and 65 Fed. Reg. 82832 (December 28, 2000).

Respectfully submitted,

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