

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SELECT MILK PRODUCERS, INC.,	:	Civil Action 01-60
ELITE MILK PRODUCERS, INC., and	:	
CONTINENTAL DAIRY PRODUCTS, INC.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Washington, D.C.
	:	Wed., January 31, 2001
DAN GLICKMAN, SECRETARY	:	10:08 a.m.
U.S. DEPARTMENT OF AGRICULTURE,	:	
	:	
Defendant.	:	
	:	
-----	:	x

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: BENJAMIN F. YALE, ESQUIRE
 BENJAMIN F. YALE & ASSOC. CO., LPA
 102 W. Wapakoneta Street
 P.O. Box 100
 Waynesfield, Ohio 45896
 (419) 568-5751
 Fax: (419) 568-6413

DONALD M. BARNES, ESQUIRE
 LOWELL H. PATTERSON, III, ESQUIRE
 SEYFARTH, SHAW
 815 Connecticut Avenue, N.W.
 Suite 500
 Washington, D.C. 20006-4004
 (202) 828-3577
 Fax: (202) 828-5393

Pages 1 through 00

Theresa M. Sorensen, CVR-CM, Official Court Reporter

APPEARANCES CONTINUED:

For the National STEVEN J. ROSENBAUM, ESQUIRE
Cheese Institute: COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000
Fax: 662-6291

For the Association MARVIN BESHORE, ESQUIRE
of Dairy Cooperatives 130 State Street
P.O. Box 946
Harrisburg, Pennsylvania 17108
(717) 236-0781
Fas: (717) 236-0791

For the Defendants: THOMAS MILLET, ESQUIRE
Assistant Director
Federal Programs Branch
SUSAN K. ULLMAN, ESQUIRE
Trial Atty., Federal Programs Branch
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883,
Washington, D.C. 20044

GREGORY COOPER, ESQUIRE
Office of General Counsel
U.S. DEPARTMENT OF AGRICULTURE
14th St. & Independence Avenue, N.W.
Room 2343 South Building
Washington, D.C. 20250

Court Reporter: THERESA M. SORENSEN, CVR-CM
Official Court Reporter
Room 4808-B, U.S. Courthouse
Washington, D.C. 20001
(202) 273-0745

Theresa M. Sorensen, CVR-CM, Official Court Reporter

1 appearing for the National Cheese Institute.
2 THE COURT: Okay.
3 MR. BESHORE: Marvin Beshore, Your Honor, for the
4 Association of Dairy Cooperatives in the Northeast.
5 THE COURT: Glad to have you both. We don't get
6 too many amici at the District Court level, so I'm always
7 glad to see you.
8 Do you want to go ahead and introduce your table,
9 and then I'll take the plaintiff's arguments.
10 MR. YALE: I'm Susan Ullman from the Department of
11 Justice, representing the Secretary of USDA.
12 MR. MILLET: Good morning, Your Honor. Thomas
13 Millet, Civil Division, Department of Justice, for the
14 Secretary.
15 THE COURT: Okay.
16 MR. COOPER: Gregory Cooper for the Office of
17 General Counsel, U.S. Department of Agriculture.
18 THE COURT: All right.
19 Mr. Yale, you may proceed.
20 MR. YALE: First off, Your Honor, thank you for
21 allowing me to participate before this Court. It truly is a
22 great honor. Thank you.
23 Your Honor, Your Honor, Ms. Ullman --
24 THE COURT: I'm glad you said that first. You may
25 not think so at the end.

PROCEEDINGS

1 THE DEPUTY CLERK: Civil action 01-60, Milk
2 Producers, et al, versus Dan Glickman. Benjamin Yale, Donald
3 Barnes, and Lowell Patterson, III, Steven Rosenbaum and
4 Marvin Beshore for the plaintiffs. Thomas Millet and Susan
5 Ullman for the defendant.

6 THE COURT: All right, we're here on the motion for
7 preliminary injunction. Plaintiffs may proceed.

8 MR. BARNES: Good morning, Your Honor. Before we
9 begin, I would like to introduce Mr. Ben Yale to the Court.
10 Ben is our lead counsel in this matter. We had previously
11 filed a motion under Local Rule 83.2 for admission pro hac
12 vice. I don't know if Your Honor has had an opportunity to
13 look at that --

14 THE COURT: If I haven't, it will be granted. I
15 don't remember seeing it, but I will certainly take care of
16 it. We're happy to have him here.

17 MR. BARNES: Thank you, Your Honor. With me at
18 counsel table is my colleague, Mr. Patterson. The other two
19 gentlemen will introduce themselves. They are not
20 representing the plaintiff. They are amici in this matter.

21 THE COURT: Right. Those motions will be granted
22 as well since they're unopposed. Go ahead and introduce
23 yourselves, if you would.

24 MR. ROSENBAUM: Your Honor, Steven Rosenbaum
25

1 MR. YALE: Pardon?
2 THE COURT: I'm glad you said that first. You may
3 not think so at the end.
4 (Laughter.)
5 MR. YALE: Well, I think I will. I mean, whether
6 we -- regardless of what you do, I always believe that when
7 justice is done, it's a pleasure to be a part of that
8 process.
9 THE COURT: All right.
10 MR. YALE: Ms. Ullman, Mr. Millet, Mr. Cooper, may
11 it please the Court.
12 I'm here on behalf of three milk cooperatives:
13 Select Milk Producers, Inc., Elite Milk Producers, Inc., and
14 Continental Dairy Products. They have members located in
15 the States of New Mexico, Texas, Ohio, Indiana and Michigan.
16 Our case has also been joined with support from several
17 amici, as you had noticed, National Cheese Institute.
18 Mr. Rosenbaum is here. They filed, on their behalf,
19 affidavits from one of their economists, Mr. Yonkers. Also
20 members of Mr. Raskas, who is Raskas Dairy, filed an
21 affidavit. Mike Reinke of Kraft, a member of theirs, filed
22 an affidavit. We also have, that supported our position,
23 the amici Association of Dairy Cooperatives in the
24 Northeast, and that includes the two largest dairy
25 cooperatives in the nation, Dairy Farmers of America, and

<p style="text-align: right;">Page 6</p> <p>1 Land of Lakes, both coast-to-coast, border-to-border 2 cooperatives: St. Albans Creamery, Oadka, Dairy Lee, 3 Agrimart, Maryland/Virginia, and also there was an affidavit 4 filed on behalf of us by the National Jersey Association, 5 Mr. Brown. 6 Milk producers are here today because this Friday, 7 February 2nd, 2001, the Secretary will announce for the 8 first time in at least 40 years, a butterfat price based 9 upon the value of cheddar cheese. This announcement this 10 Friday will set in motion a series of events in dairy 11 marketing nationwide. Events, once started, cannot be 12 reversed or remedied. Collectively and individually, these 13 events will reduce all producers's income irreparably, 14 create disorderly marketing conditions, add unnecessary 15 volatility and uncertainty to the dairy markets. This 16 announcement on Friday is the result of bad rule-making, a 17 bad rule, and will have bad, irreparable results. 18 Milk producers are asking the Court to enjoin the 19 Secretary from making that announcement and enforcing that 20 separate Class Three butterfat scheme in the federal order. 21 This rule is the -- is part -- or this creation of 22 this separate Class Three butterfat price is part of a 23 broader, comprehensive scheme of federal milk marketing 24 orders. The purpose of the federal milk marketing orders is 25 set out in the Agricultural Marketing Agreement Act of 1937,</p>	<p style="text-align: right;">Page 8</p> <p>1 began to price, although we still has a class price and four 2 classes -- class, one, two, and three -- started a different 3 price discovery. It's a market driven price. It's not 4 something like the old ICC that would dictate a price, or 5 the Federal Power Commission. These are prices that they 6 tried to discover from the market and make sure that the 7 plants pay those prices. And they start with four common 8 dairy commodities. They look at it from the standpoint of 9 the processor, and those products out there. That's cheese, 10 butter, non-fat dry milk. They go through a formula that 11 changes those into component prices, and that's what the 12 producers deliver to the plants, are components: Butter 13 fat, protein, those types of things. 14 These four components, then, are also combined to 15 form the four classes of milk. Class One is bottled milk or 16 beverage milk. It's milk that we drink. Class Two is 17 primarily cream, such as ice cream and yoghurts. Class 18 Three is what we call the cheese price, and it's cheeses - 19 mozzarella, cheddar, those types of things. Class Four 20 includes butter and non-fat dry milk. 21 Until Friday, unless we get an injunction, it will 22 change. But up until now, all four of these classes have 23 used fundamentally the same butterfat price, and this is a 24 price that is derived from the price of butter, market price 25 of butter.</p>
<p style="text-align: right;">Page 7</p> <p>1 and as amended over the years, and that purpose has never 2 been departed from by Congress, is to promote market 3 stability and, thereby, enhance producer income. These 4 FMMOs cover virtually all of the United States, all the 5 populated United States, with the notable exception of 6 California. It represents over one hundred billion pounds 7 of milk marketed annually, or through those organizations. 8 The fundamental part of the federal marketing 9 scheme is the use of a producer settlement fund, a 10 two-tiered prices. Under the two-tier pricing established 11 by the AMA, plants, handlers, buyers of milk pay into the 12 producer's settlement fund a trust that's administered by 13 the USDA, monies based upon the use of the milk that they 14 have acquired. Higher value from milk goes in the bottle, 15 lower milk goes into butter and cheese. Then in this 16 pricing -- all of those various prices are all blended into 17 one, and it's paid then to the producers on a uniform price. 18 This producer settlement fund has no funding from 19 the federal government. In fact, it is even administered -- 20 it's administration, with the exception of the staff here in 21 Washington, by and large is funded by the industry in 22 administering this fund. 23 Now, these prices that the plants pay into the 24 federal milk marketing producer settlement fund are minimum 25 prices, and the department, beginning in the year 2000,</p>	<p style="text-align: right;">Page 9</p> <p>1 Now, the Class Three and four prices are the 2 driving prices in this scheme. They set both the Class One 3 and Class Two. Class Four is a function of Class Two. 4 Class One is a function of either three or four, depending 5 on the which is the higher for that particular month. 6 Now, these minimum prices are announced by the 7 Secretary in two announcements. The first announcement is 8 on approximately the 23rd of the month, and it announces 9 what the Class One and Class Two price will be for the next 10 month, and I think attached to Ms. Ullman's brief for the 11 government there were two price announcements for January 12 and February's Class One milk. 13 After the last -- well, in this case, it will be 14 February 2nd, the Secretary, early the following month -- in 15 this case February 2nd -- the Secretary announces what the 16 Class Three and four price is for the previous month. So 17 the January price is going to be announced Friday, and it's 18 been tradition that way for decades in the industry. That 19 price on Friday will include what the butterfat price is 20 going to be for three and four, and that's why that is such 21 an important date. 22 THE COURT: Now, until February 2nd, give me an 23 example of what that announcement would be in the past before 24 this change. 25 MR. YALE: In the past, on February the 2nd, the</p>

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1 Secretary would announce that the minimum Class Three price,
2 skim price, is this. The minimum Class Four price is this,
3 and the butterfat for both of those is, and it would give a
4 number.
5 THE COURT: Is some other number.
6 MR. YALE: And then there's a formula that you can
7 take the skim price and the butterfat and come up with a
8 three-five price. It's in the rule. I mean, I can give it
9 to you. I don't know if you --
10 THE COURT: No.
11 MR. YALE: On Friday it will be different. It'll
12 say the skim price for butterfat -- I'm sorry, the skim price
13 for Class Three is this. The butterfat price for Class Three
14 is this. The skim price for Class Four is this, and a
15 different butterfat for Class Four.
16 THE COURT: For Class Four. So that's the change.
17 The butterfat is separated out between three and four?
18 MR. YALE: That's right, and it can have an
19 implication if Class One is moved by Class Three. They can
20 also be setting it for Class One.
21 THE COURT: Right.
22 MR. YALE: It seems like, in a sense, kind of a
23 simple thing because it's just an extra line, but it has
24 ramifications that ripple through a very complex marketing
25 scheme, and this marketing scheme has been successful over

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1 the last 60 years because it's, in a sense, been owned by the
2 industry. The industry takes pride in this program.
3 Processors and producers alike, and the department and
4 academia. They talk about problems, both in a formal
5 rule-making hearing and outside, and these formal rules
6 historically, until this one, have been the product of that
7 collaborative effort. We were blindsided, to put it in very
8 simple terms, and that collaborative effort from the
9 industry, and that ripple effect that occurs when this second
10 butterfat price will be instituted, the industry never had a
11 chance to explore its ramifications and express those to the
12 department, and that's really where the flaw comes out.
13 You know, by and large again, it's been a -- it
14 continues to be an excellent program, people in good fate in
15 all aspects. Academia and government work together and have
16 made it work, and plants have grown, and we've developed a
17 one wonderful dairy industry in this country as a result of
18 that.
19 Now, this rule-making --
20 THE COURT: I'll try to resist, but I can't
21 totally. Mr. Barns told me after the last case I had like
22 this that I shouldn't say these things, but it's by bizarre
23 to me as a judge to see such a heavily regulated thing like
24 milk marketing. I never had any idea until my first milk
25 markets case. I mean, this sounds like the 1930s, and yet

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1 here we are in 2001 in terms of the detailed regulations that
2 we have at Agriculture. It's sort of a strange field for me,
3 but --
4 MR. YALE: Yes. Well, you're repeating some of the
5 arguments that have been going on in the industry and from
6 Congress.
7 THE COURT: Sure.
8 MR. YALE: You know, when we talk to them, like,
9 you know. And it is. It's a new deal program. Of course,
10 it's been modified and amended. The reason that it worked
11 then and it continues to work, dairy is unique in the fact
12 that the raw milk that comes off the farm has the
13 characteristic of imminent perishment. It has to get moved,
14 and it's done on a daily basis, seven days a week, and
15 there's no ability for the dairy farmer to hold product until
16 prices recover. They have to market it today. There is
17 also, along with that imminent perishment, what we call
18 counter-cyclical movements. The supply of milk tends to
19 grow. It's starting to climb now. And by the flush, or what
20 we call the high period, will peak out in May or June in the
21 upper part of the country, and then it drops off as the heat
22 comes, and it get tight in September. Well, the demand for
23 milk traditionally has done the other way, particularly in
24 the fall. When schools begin, the demand is very high. The
25 demand for cheese -- we prepare for the holidays and the

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1 Superbowl -- begins to climb, and yet the milk tends to be
2 lower. And this idea of the imminent perishment used to be a
3 club that the handlers could use to beat up the producers,
4 putting it in kind of a blunt thing, to get lower prices
5 throughout the year, and sometimes so low that there wasn't
6 enough milk to meet the nation's supply or market
7 conditions. So the purpose of this two-tiered pricing and
8 the minimum pricing has been used to ensure that producers
9 get a fair price all year round. The plants though, it's
10 tied to the market, so they're not overburdened, and then the
11 result is that we have a sufficient supply of milk to the
12 consuming public at a reasonable price. The purpose and its
13 need still exist today because of that unique characteristic
14 you don't find in other agricultural products.
15 THE COURT: Right.
16 MR. YALE: Did that answer your question?
17 THE COURT: Well, it doesn't answer it, but it --
18 MR. YALE: It explains. Well, it is a --
19 THE COURT: I don't think anybody could answer that
20 today.
21 MR. YALE: But, you know, the other part of it is
22 though, Your Honor, you say it's highly regulated, but it
23 has, as I indicated too, it has worked because it's been a
24 collaborative effort.
25 THE COURT: Well, it's a partnership --

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1 MR. YALE: Bingo.
2 THE COURT: -- that we don't always see between
3 industry and government, I agree.
4 MR. YALE: Right. Right. I mean, sometimes
5 there's divisions, but they tend to come together, and we
6 realize that the undermining -- the overall policy is of
7 value to us, and we work together. And as long as that
8 happens, it will work, but when it starts to become kind of
9 central planning dictating things, then it will be a
10 different problem, somewhat akin to what we have today.
11 Now, the rules that form part of these federal
12 marketing orders is part of that collaborative are done a
13 little different than we see in things like the
14 Environmental Protection -- well, some of those are formal,
15 but a lot of these are done on informal rule-making, notice
16 and comment. These are done in a formal rule-making
17 process. The Secretary has laid out the rules, how he does
18 it, and there's been a long industry practice -- in fact, I
19 believe one of the amici's affidavits -- I think
20 Mr. Sheppard, I think it is -- indicated how it has been
21 done over the years. And it's more than just the Secretary
22 gets proposals or solicits proposals, which he does, or she
23 does now, and they review those, and they issue a notice of
24 hearing. Well, in the meantime, once that request for
25 proposals, the industry starts talking, and they start, you

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1 know, discussing what they want to put in. Coalitions are
2 formed, compromises are made, committees are created to do
3 all of this, and a proposal is submitted to the department.
4 If it's one of the noticed ones, they then prepare their
5 testimony and their positions. And I think it's indicated
6 in several of the affidavits of what they went through. I
7 mean, the committee meetings and like. And they show up for
8 the hearing. It's ruled by an Administrative Law Judge, who
9 is basically -- I'm not minimizing his importance, but a
10 referee to make sure it's an orderly event. Witnesses are
11 sworn. You have to be cross-examined -- you're subject to
12 cross-examination, so although you may be tempered and
13 swayed by your own position on the issue, you've got pretty
14 educated, experienced people from the industry on the other
15 side who now have that opportunity to ask some pretty
16 pointed questions and develop a very good record on those
17 issues. And it -- the result comes out that there is a
18 proposed rule, comments again, and the Secretary issues his
19 final rule. We have, again, we've survived under that.
20 This instant rule-making has a little more complex
21 history than that, and it's really began with the '95 farm
22 bill. It used to be every five years they'd revisit
23 agricultural programs, including -- well, this was brought
24 up as part of it, would be the milk issues. And through
25 those debates, and in 1996 was passed the FAIR Act, the

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1 Federal Agricultural and Improvement Reform Act, and that
2 changed the rule-making for that time only into informal
3 rule-making, and the Secretary was ordered to consolidate
4 the orders and do some other things. It was a massive
5 rewrite of the federal orders, and parties, including my
6 own, made proposals. We had industry meetings. They came
7 out with a proposed rule. There were comments, and then
8 there was a final rule.
9 And one of the issues that came out -- there were
10 several hot button topics, and producers, by and large, were
11 very disappointed with that result and sought legislative
12 relief. Got a bill passed through the House, but this was
13 going to take effect by law on October 1st of 1999, and it
14 was, therefore, necessary to seek injunctive relief. An
15 injunction was granted -- not by this Court but another one,
16 but there was a case pending in this Court at that time.
17 And in response to all of that, Congress then said, "Okay,
18 here's who we're going to do. Mr. Secretary, you're going
19 to adopt this Class One pricing scheme" -- because that was
20 one of the complaints that was there -- "and you're also --
21 we're not real pleased with the way the rule-making happened
22 on the manufacturing prices. You're going to go back to a
23 formal rule-making on this, and we're going to give you a
24 deadline. You have to have it done in a year. So the
25 Secretary asked for those proposals. We submitted them.

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1 Others submitted them. There was, again, all that
2 collaborative effort. And the result was, the Secretary
3 issued a notice of hearing wherein he identified 32 numbered
4 proposals, specific proposals, specific CFR sections to be
5 modified, with the exception of three. Two of them simply
6 said, if you're going to change three and four, we don't
7 want whatever that impact is to automatically roll into two
8 and one. And then the Secretary is kind of conforming.
9 People need to know that if there are going to be some
10 technical things we've got to change if we adopt any of
11 these, we're going to do that.
12 Well, those were the proposals that were noticed,
13 and as indicated in the affidavits, the parties thought
14 about them, prepared testimony, and went to the hearing.
15 Now, in the meantime, a scholar from Cornell University, one
16 of the -- part of that academia that assists so much in
17 this -- thought this thing through, and he thought that
18 there ought to be a separate price for butterfat for cheese.
19 So he makes a specific proposal, appears on his own behalf,
20 testifies, and parties get up and object. And in the end,
21 the Administrative Law Judge says that that proposal is not
22 within the scope of the hearing, and that sent out a
23 tremendous signal to everybody in that room, that this isn't
24 part of the issue.
25 THE COURT: So, presumably, when the ALJ did that,

<p style="text-align: right;">Page 18</p> <p>1 he was aware of this logical outgrowth law that's developed, 2 and, presumably, he looked at notice of proposed rule-making 3 and thought this was not a logical outgrowth. Presumably, 4 that's what he was deciding when he said that, right? 5 MR. YALE: That would be exactly right, Your Honor. 6 I mean, he realized that -- 7 THE COURT: He has to know logical outgrowth law, 8 too. 9 MR. YALE: Right, and then sometimes someone might 10 propose maybe a different make allowance. Well, that's a 11 logical outgrowth, and so that's fine. But there were some 12 other proposals at the hearing that he said we can't talk 13 about because they weren't logically an outgrowth of these 14 that were noticed, and he said no. And what's important also 15 is that there were representatives of department there, and 16 if they thought -- their position -- and they have expertise. 17 I mean, these are smart people. They've been in this 18 industry many years, and they know what's going on. They 19 have that things that they want. They could have spoken up, 20 and they didn't. So the industry said, okay, we know where 21 this is at, and we went on. We prepared, and people 22 testified on the other issues, cross-examined, exhibits, had 23 the final issues. 24 Well, we get through that process, and it was a 25 very -- I mean, that was a very lengthy hearing. We started</p>	<p style="text-align: right;">Page 20</p> <p>1 wept down. There was a change in the yield, change in 2 the -- an adjustment for the cheese price, and a separate 3 Class Three butterfat price. 4 THE COURT: Now, where is the Secretary's 5 explanation for the separate butterfat class? 6 MR. YALE: It is in the record, and I believe it's 7 Exhibit D of our attachment that we had, and it occurs at -- 8 no, that was the other issue. Well, I thought I had that 9 marked right away. We quoted those provisions in our record. 10 April 14th, 2000. I was just trying to find the -- there was 11 actual language used in the proceeding. Here it is, at page 12 2000 and 103. Oh, I'm sorry. I'm looking at notice of the 13 hearing. I apologize. No, it's Exhibit A, issued December 14 7th, 2000, and it is over here at page 76846 on Exhibit A. 15 And over on the left-hand column -- right-hand column -- 16 there's three columns -- the top says Class Three butterfat, 17 76846, and there is approximately three or four paragraphs 18 that they discuss. 19 THE COURT: But I take it in that discussion the 20 Secretary does not set forth -- and there is no discussion of 21 why the ALJ was wrong on this logical outgrowth determination 22 the ALJ made? 23 MR. YALE: There is no discussion of that 24 whatsoever, Your Honor, none. And there is no explanation -- 25 there's no identification of any proposal that it's a logical</p>
<p style="text-align: right;">Page 19</p> <p>1 at 8 o'clock in the morning, and ended at 7, and I think 2 even 7:30, I think, Friday night. It went five days, solid 3 days of work. A lot of people put a lot of time and effort 4 in it. A record was made. The record was closed. 5 Arguments made, and the Secretary came out with a decision, 6 and as -- 7 THE COURT: And in the arguments, I take it, this 8 notion of having the separate price for butter fat was not 9 even discussed because of the ALJ's comments that it wasn't 10 on the table? 11 MR. YALE: Right. It was not discussed. That's 12 absolutely right. Nobody had thought about it. And, you 13 know, these -- and the other part is, a lot of times there 14 are what we call -- I shouldn't use this because it belittles 15 it, but a tinkering of the orders. We need to twist some 16 things, maybe change a price here or something like that, and 17 every time we have a federal order hearing, we don't relook 18 at the whole order. We just look at the specific CFRs. I 19 mean, everybody trained on that and said, "This is the 20 issue." And trust me, Your Honor, there was enough to talk 21 about that we didn't need to get into these other issues. 22 So the Secretary came out with basically three 23 things that are relevant to a degree here, and one of those 24 was that there was some changes in the make allowances when 25 they go to the commodity to components. Some went up, some</p>	<p style="text-align: right;">Page 21</p> <p>1 outgrowth of, and there is no identification of where the 2 proposal was submitted into the record. If you read the rest 3 of the decision, they repeatedly talk about this witness said 4 this and this witness said that. You don't see any of that 5 here. They simply dealt with an issue that because the use 6 of the Class Four butterfat price had an impact on the 7 protein price and they didn't like it, they wanted to fix it. 8 But I might add, in the final rule that was issued, part of 9 that challenge that we had with Congress and Congress said 10 implement and then look at this, they explained that the 11 Class Three was going to have the same butterfat as Class 12 Four in large part because of accounting problems. Trying to 13 trace where this butterfat ended up and deciding whether it 14 was two or four could create some real havoc, and, again, 15 some months it would apply to Class One and some months it 16 wouldn't. They don't even discuss that issue in here, of why 17 that's no longer a point. And the most significant one, that 18 yields about eight pages, the actual CFR changes takes about 19 three paragraphs, one column out of about 60 columns in their 20 entire discussion. 21 Now, to say the least, the industry was in 22 somewhat of a shock. At first somewhat ameliorate because 23 the initial analysis done by the department, or at least the 24 economic analysis would suggest that it had minimal economic 25 impact. But as the industry began to consider the true</p>

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1 ramifications of this with this multiple component pricing
2 system that existed, and how it rippled through the
3 industry, began to discover that it had far more serious
4 impact than what was obvious from the beginning.
5 Had this been an issue at the hearing, a lot of
6 these things would have been thought out before, and so they
7 would have known that immediately, and it took time. It's
8 still taking time to figure this all out. But it has a
9 multifaceted ripple effect through the industry. In the
10 first case, the introduction of the separate Class Three
11 butterfat does reduce producer prices on Class Three. A
12 small amount, but it does reduce them. And if plants pay
13 that lesser price, we'll never get it back again. It's
14 irrecoverable, irreparable. It's creating disorderly
15 marketing conditions. We've got a number of affidavits:
16 Mr. Brown, Mr. Raskas, Mr. Reinke, Mr. Holland have all
17 submitted affidavits indicating what even now people are
18 starting to think about and do as a result of this, and
19 basically what they're trying to do is get the cheaper
20 butterfat that's outside of the federal order program into
21 their plants, or get butter instead of butterfat because the
22 butterfat will be cheaper than the fresh milk butterfat that
23 comes in off the farm.
24 THE COURT: Now, explain that to me because I think
25 it does go to this irreparable injury argument. You have

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1 milk that is subject to this?
2 MR. YALE: Yes.
3 THE COURT: And then where does the other milk come
4 from that's not subject to this that they can go to?
5 MR. YALE: That's a good question. It's an
6 excellent question. There's milk -- Class One bottlers are
7 the only ones that really have to be pooled and subject to
8 the minimum prices. The handlers and the processing plants
9 that produce the butter, powder and ice cream, if they have
10 no bottling, can choose to be part of the pool or not. Most
11 of the them choose to be part of the pool because then they
12 get the benefit of that higher Class One milk to pay to their
13 producers. But there are a number of plants that for various
14 reasons aren't pooled.
15 THE COURT: Because they, in effect, don't bottle?
16 MR. YALE: Because they don't bottle, and there's
17 not an advantage to them to be -- because there's some costs
18 associated with being a part of that pool. So there is a
19 source of milk out there that is unpooled. We have
20 California, which is the largest dairy state in the nation,
21 that from the federal order standpoint is unregulated because
22 it's not regulated by the federal program. And the cream and
23 that market can move into the federal market at a premium of
24 what they get, but less than what the regulated handlers
25 would have to pay here. And the other thing that happens --

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1 THE COURT: So that's what would affect the market
2 share, in effect?
3 MR. YALE: Right. That's right. It reduces --
4 THE COURT: By this new procedure that you say --
5 now, how can that be irreparable injury?
6 MR. YALE: Well, it's irreparable injury because it
7 reduces the value that goes into the producer's settlement
8 fund. It reduces the value that are paid to producers for
9 fresh milk. This extra value is going into the handling, and
10 the brokering, and these other handlers that have this cream,
11 butter or butter substitutes.
12 THE COURT: So you lose, in effect, some profits?
13 MR. YALE: We lose profits and we lose market
14 share.
15 THE COURT: That are unrecoverable?
16 MR. YALE: That's right.
17 THE COURT: And I guess the question is whether
18 that constitutes legally irreparable injury.
19 MR. YALE: There is in this circuit, I believe --
20 I'm trying to think. I want to say it's the Jobbers case,
21 but I may be wrong on that. I can confirm that later. But
22 it does indicate that if you have a situation where there is
23 a loss of profits and a loss of market because those cannot
24 be recovered, that becomes irreparable harm. It's because
25 there's not a -- there's no recourse for this loss. I mean,

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1 there's no U.S. Treasury funds to do it. The plants -- this
2 is legal. They paid a lawful price. Producers don't really
3 have a recourse.
4 There's two other aspects of that that --
5 THE COURT: The --
6 MR. YALE: Oh, I'm sorry. Go ahead.
7 THE COURT: I think the lost profits are
8 unrecoverable. I don't know if that's legally irreparable,
9 but lost market now, why wouldn't you -- wouldn't the shares
10 switch back if you ultimately won the case? You wouldn't
11 necessarily lose the marketing forever.
12 MR. YALE: But the settlement -- you're absolutely
13 right, and if this Court subsequently were to order that, and
14 if we go back to the other. It's in the interim that --
15 those producer settlement funds. So if the money is not paid
16 in and it's not accounted for, and if it's not --
17 THE COURT: I agree, you'd lose those profits.
18 MR. YALE: And that money.
19 THE COURT: Bus in terms of market share, would
20 there be a permanent damage to the market share?
21 MR. YALE: Well, there is -- Mr. Raskas and his --
22 I believe this is correct -- in his affidavit indicated that
23 if this continues, they would look at some major procurement
24 and processing changes. And you can have a long-term
25 change -- because that brings up another point. You can

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1 also, because of the substantial difference, start to look at
2 butter substitutes rather than just butter - anhydrous
3 butter, butter oil, maybe even some vegetable fats. One of
4 the concerns that the dairy industry has always had is that
5 when you get prices and commodities too high -- we don't
6 compete just amongst the dairy, we compete with the whole
7 food industry in all those ingredients. And if a plant or a
8 processor decides to make a fundamental ingredient change,
9 that can be a long term market loss.

10 THE COURT: Okay.

11 MR. YALE: And there is one other disorderly thing
12 that happens, and it's just -- you know, they game it, but
13 you've got Class Four as butter. The butter that we market
14 is Class Four. Cream cheese makers could then go to this
15 Class Four market and buy the butter to meet their cream
16 needs, and there's enough of a difference they can justify
17 doing that. So the producers only get the Class Four price
18 for the butter, even though in a sense it ended up in a Class
19 Three product.

20 There's another -- and we pointed it out in our
21 reply brief -- I think a more insidious irreparable harm
22 just the way these orders work -- and that is this
23 contingent liability. If a injunction is not granted, and I
24 believe we've established the merits on the this case, the
25 cheese processors, if they have to pay the higher fat price,

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1 can come back through in an administrative proceeding and
2 get recovery plus interest, that comes out of the producer's
3 settlement fund, a subsequent producer's settlement fund.
4 The processors, because they lose a lower fat and a higher
5 skim value in their cheese, who kind of maybe got a benefit
6 out of this, are not obligated to pay any higher price if
7 the order is declared illegal because they've already paid
8 their lawful price. It's kind of that *expo facto* doctrine
9 that permeates, fortunately, society. Not enough maybe, but
10 enough here.

11 So now the producers are looking at it in a kind
12 of worst of both worlds. We go through this disorderly
13 marketing. We get the lower blend price because we didn't
14 get the full credit. To the degree there was Class Three
15 butterfat paid for, then we've got to refund that back,
16 though we aren't able to recover it from the processors who
17 got the other benefit. That's irreparable, and that will
18 happen immediately. Once it's decided that this is an
19 illegal rule, that will be applicable, and I'm sure -- I'm
20 not going to point to Mr. Rosenbaum, but I'm sure his
21 client's members are going to be seeking that because it is
22 a substantial amount of money. In a sense, the producers
23 are guarantors of that product.

24 We've also indicated, and we don't know when this
25 will happened but we know that it will, and that is this

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1 Class One impact. This has the most serious and most
2 devastating economic impact to producers, and the reason for
3 that is that the ratio of the value of fat and skim in the
4 Class Three price is higher than it is in the Class Four.
5 So although combined at three/five, it looks like the three
6 is the higher price, as we know, most of the milk today is
7 sold as skim, or one or two percent. In fact, I think the
8 national average is about 1.98 or 2 percent of butterfat
9 sold in Class One. There isn't enough butterfat actually
10 sold in Class One to make up that loss. And as Ms. Ledman
11 indicated, she estimates a loss of hundreds of millions of
12 dollars a year on a normal situation where the three and
13 four trip back and forth.

14 You know, they are commodity markets, Your Honor.
15 You know, if we could actually plot out exactly where
16 they're going to go, I probably wouldn't be here. I'd be
17 selling commodities, you know. And they're volatile, and
18 for someone to sit back and say that something is absolutely
19 going to happen for a period of time -- we heard that with
20 some of the stockmarket things a couple of years ago, and we
21 found out that markets do work.

22 So we believe we have established those four
23 prongs for injunctive relief. We've established the
24 irreparable -- or the success on the merits. I mean, this
25 was a bad rule-making and a bad rule. We've established

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1 that the results are irreparable.

2 And there's one other irreparable thing I think
3 that I want to mention to the Court, and that is that if the
4 Secretary is able to impose this rule, even for a month of
5 two, we will have irretrievably lost that right of
6 participation that has been so fundamental in this program
7 for so long, and that -- we could never put a price to that.
8 We can't put a price to the wounds and the lack of
9 confidence that people have in this program that hurt us.
10 So we've established the irreparable and -- the lack of
11 harm, and that leaves that other issue of the -- the other
12 two issues of that prong, and one of those is the balance of
13 the equities.

14 I think it's noteworthy, Your Honor, that at my
15 table I have amici from both producers and processors. I've
16 been in this 20 years. I've had cases where Mr. Beshore has
17 been on that side with Mr. Cooper, on this side. I've had
18 him over here with me. Mr. Rosenbaum back and forth,
19 Mr. English and others, and we've together. So the
20 industry, the equities are there, and I think that's very
21 significant.

22 The department has no pecuniary interest in this.
23 They have an interest to process according to the law, and
24 this order will make them follow the law, which brings up
25 the final issue, and that is the public interest. And I can

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1 simply say that the public interest is always served by
2 following the law, and there is no other interest we need to
3 look at.
4 THE COURT: All right. Thank you very much,
5 Mr. Yale.
6 Give me just a moment.
7 (Brief pause in proceedings.)
8 MS. ULLMAN: (Due to technical difficulties, the
9 first 30 to 45 seconds of Ms. Ullman's argument is not
10 capable of being transcribed.)
11 Ledman points out that, therefore, Class Three
12 could be the mover in some months if USDA's model is only
13 showing the annual amount. There is still no irreparable
14 harm if at the end of the year the producers come out ahead
15 under the new rule. There's no reason to enjoin a rule that
16 at the end of the year will help them. Ledman appears to
17 use the Class Three and Class One prices as they're
18 announced in her model. She doesn't acknowledge that these
19 prices are minimum, and that this is a market situation, and
20 many producers get what is called over order premiums. They
21 get more for their milk than the minimum announced.
22 In Ledman's affidavit in plaintiff's brief,
23 they're still using the 1999 numbers, even though there were
24 big changes in the milk market orders in 2000 and 2001.
25 Similarly, when the plaintiffs are trying to use former

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1 testimony of USDA officials to attack what is in the final
2 decision, they are always quoting older testimony that
3 refers to the market either prior to 2000 or prior to 2001.
4 Ledman says that plaintiffs are hurt by the change
5 in the Class Three formula itself, that the Class Three
6 price will go down. Ledman does not explain how this works,
7 and nobody else has come out that way - not USDA, not one of
8 the declarants who filed with the amici. They all predict
9 that Class Three will go up and, therefore, there will be
10 harm to the producers because the processors, the cheese
11 plants will seek their milk elsewhere.
12 The amicus cooperatives and processors say the
13 rule will harm producers because they will go to California
14 where they can get this class three milk cheaper. First of
15 all, that's not any specific harm. Plaintiffs have never
16 said that that is how they're hurt and given us a number and
17 shown us how. No plaintiff, in fact, has said that it sold
18 milk to any of the processors that filed these declarations.
19 Moreover, this is a market, and if milk -- if these
20 processors go get their milk, say, from California, that
21 means the cheese plants in California will need more milk,
22 so they will then bid up the price in California, and we'll
23 just get a new equilibrium, the same as before this rule
24 went into effect, where the prices were different but can be
25 accounted for.

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1 The rule has been in effect since January 1 of
2 this year. Plaintiffs haven't shown any harm yet, and they
3 haven't shown any disorder in the market. Plaintiffs add as
4 the harm in this reply brief this claim of a contingent
5 liability in the producer's settlement fund. It's based on
6 the fact that the processors prevail in a lawsuit in the
7 future, holding that this rule is illegal. That's certainly
8 no immediate certain harm that can be the basis of a TRO or
9 a preliminary injunction.
10 THE COURT: Well, that's really goes then to the
11 assessment of how strong the likelihood of success on the
12 merits would be; right?
13 MS. ULLMAN: That's true. It interrelates.
14 THE COURT: If you did assess a strong likelihood
15 of success on the merits, then it may well be that that
16 contingent liability is a serious question.
17 MS. ULLMAN: It could be, but it's nothing that's
18 going to change on February 2nd. A TRO or a preliminary
19 injunction is not the only remedy or avenue available to
20 these plaintiffs. The rule went into effect January 1, as
21 required by Congress, but it is an interim final rule. The
22 comment period is open. Plaintiffs can file any response
23 they want to on the proposal, and the Secretary can change
24 it.
25 On the merits issue, the section in the notice of

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1 the hearing, there is a separate request by USDA saying, "We
2 seek testimony on the issue of a separate Class Three
3 butterfat price." Plaintiffs say in their brief it was --
4 THE COURT: Let's look at that exact language.
5 That's at Tab D?
6 MS. ULLMAN: Exactly, Exhibit D, and it is page
7 20103.
8 THE COURT: Okay.
9 MS. ULLMAN: In the right-hand column it says --
10 the second heading says, "Class Three and producer butterfat
11 prices," and then it goes on to discuss a separate Class
12 Three butterfat price in the first paragraph, and then the
13 first line of the second paragraph.
14 THE COURT: Now, if that's what that language
15 meant, then, what was the ALJ looking at when he thought that
16 wasn't within the scope?
17 MS. ULLMAN: No. I disagree with how they
18 represent the ALJ's testimony. In plaintiff's brief, on page
19 16 they quote what the ALJ said, and he says, "I'm going to
20 rule that Dr. Barbano's pricing formula is not one of the
21 proposals being considered at this hearing...however, he has
22 provided information in his testimony that's germane to the
23 proposals being considered, and so I will allow Dr. Barbano's
24 testimony to remain in the record, and as Mr. Cooper
25 suggested earlier, leave it to the Secretary's

<p style="text-align: right;">Page 34</p> <p>1 representatives who will make the determination on the final 2 rule to disregard that part of Dr. Barbano's testimony that's 3 not pertinent to the proposals under consideration." 4 The ALJ never made a ruling on anything like what 5 is considered logical outgrowth. He left that up to the 6 Secretary, and he -- 7 THE COURT: Well, he said this testimony wasn't 8 related to any of the proposals being considered. 9 MS. ULLMAN: No, he says it is not a proposal being 10 considered, that he has given testimony on proposals being 11 considered. 12 THE COURT: And he says that all of this will have 13 to be disregarded if it's not pertinent to the proposals 14 under consideration, doesn't he? 15 MS. ULLMAN: Right. So what is -- 16 THE COURT: Then it wasn't disregarded; it was 17 adopted. 18 MS. ULLMAN: No, no, no. 19 THE COURT: Okay. 20 MS. ULLMAN: Dr. Barbano's proposals was not 21 adopted. Dr. Barbano filed an affidavit saying this was not 22 my proposal, and plaintiffs, on page 13 of their brief, note 23 that Dr. Barbano's proposal was different from what USDA 24 adopted. 25 THE COURT: How was it different?</p>	<p style="text-align: right;">Page 36</p> <p>1 this way. The Secretary, if they hadn't noticed this 2 specific proposal, which they might not have had an 3 obligation to do statutorily, but if they hadn't noticed this 4 specific proposal in the past and then were going to adopt 5 it, the Secretary in the past, under those administrative 6 decisions they cited, always did a new proposal and let the 7 industry comment on it. 8 MS. ULLMAN: But here this was a separate request 9 in that provision we looked at of the notice of the hearing, 10 and plaintiff's counsel, Mr. Yale, was -- 11 THE COURT: Let's go back to what I was asking 12 about. In the past, the Secretary did not adopt a final rule 13 unless the specific proposal had been made in a proposed 14 notice; is that right or not? 15 MS. ULLMAN: I couldn't say that that is always -- 16 THE COURT: Well, they quote several cases where 17 that's been the practice; right? 18 MS. ULLMAN: Right, and it has always been that a 19 proposed rule has been changed. The Secretary never has to 20 adopt a rule as it is set out. 21 THE COURT: I understand, but for the Secretary to 22 adopt a rule that changes something that's been in place 40 23 years, the Secretary has a special burden; right? 24 MS. ULLMAN: The Secretary is under the same burden 25 all the time. The Secretary gave notice. The Secretary gave</p>
<p style="text-align: right;">Page 35</p> <p>1 MS. ULLMAN: Dr. Barbano went beyond a simple 2 question of the Class Three butterfat. He went all the way 3 back into the formula, and he looked at how you calculate all 4 different parts of the cheese and different types of cheeses, 5 and it was much more detailed and, theoretically, changed a 6 lot more than just the Class Three butterfat price. 7 THE COURT: Well, he went further than the 8 Secretary? 9 MS. ULLMAN: Yes, and different. It's not his 10 proposal that was adopted. 11 THE COURT: Well, then, where did it come from? 12 It's not a proposal that was out for comment, so where did it 13 come from? 14 MS. ULLMAN: It wasn't a specific proposal. 15 THE COURT: Okay. 16 MS. ULLMAN: It was an outgrowth -- 17 THE COURT: Okay. Now, in their reply brief, they 18 note how agriculture in the past had a practice, if they 19 hadn't made a specific proposal, to then not do the final 20 rule, to do another proposal; right? 21 MS. ULLMAN: The Secretary, under Congress's 22 directive, had to issue a final rule January 1 of this year. 23 THE COURT: I understand, but the way the Secretary 24 did it, they say in their reply brief, with several citations 25 to prior secretarial decisions, is that it was never done</p>	<p style="text-align: right;">Page 37</p> <p>1 an opportunity to be heard. It presented its rule. In this 2 case it's called an interim final rule, and, as always, the 3 industry gets to comment, and they get to comment through 4 next Monday. 5 THE COURT: And the reason it was interim final was 6 because of the statutory deadline? 7 MS. ULLMAN: Right. Congress required that by 8 January 1 the rule had to be in place. 9 THE COURT: So the Secretary couldn't have done a 10 new notice with the specific proposal and still meet the 11 statutory deadline? That was the problem? 12 MS. ULLMAN: Right. Instead, it's giving people 13 the opportunity to comment with this final order in place as 14 Congress said. 15 Under the case law, the Secretary did not have to 16 renote the hearing when she's changing a proposal, or 17 there couldn't be any end to the rule-making. 18 Both plaintiff's counsel and USDA's counsel at the 19 hearing specifically referenced USDA's request, and 20 distinguish it from Dr. Barbano's proposal. Mr. Yale said 21 that, quote, "The department had a request of its own at the 22 end of the notice hearing that said, 'Let's take a look at 23 the possibility of having a different Class Three butterfat 24 price than Class Four.'" That's quoted full in our brief at 25 page 10.</p>

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1 Mr. Cooper, USDA's counsel, said at the hearing,
2 also just before Dr. Barbano testimony, that the information
3 Barbano is giving here may also be useful with regard to
4 existing proposals or with the request at the end of the
5 hearing notice as to studying the effects of how all this
6 relates to the Class Three price.
7 The Secretary's decision certainly was not
8 arbitrary and capricious. Neither plaintiffs, nor the
9 amici, nor any declarant disputes that the new formula that
10 the Secretary put into place for Class Three butterfat will
11 have the desired effect that the Class Three price will
12 better track the price of its components.
13 Thank you.
14 THE COURT: Okay.
15 MR. YALE: You brought up that question about the
16 legislative mandate to have the rule by a certain time. The
17 Secretary had to address Class Three and Four pricing, had
18 proposals on that, and did, in fact, without the separate
19 butterfat, did meet that deadline. There was no obligation
20 that it had to incorporate at this time that separate Class
21 Three butterfat. The Secretary, under the AMA, has a
22 continuing obligation and right to consider changes that it
23 believes tends to effectuate the act, and could at any time
24 call the hearing on that issue, even today or whatever. So
25 it didn't -- it wasn't compelled to do so.

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1 The issue of not knowing when the three or four is
2 mover, I think the Court was absolutely right, the fact that
3 we may have to come in here every month and say, "Your
4 Honor, we're going up. We need a change. We're going down,
5 we don't."
6 I want to point out that Dr. McDowell, in his
7 preliminary economic analysis that was part of the hearing
8 notice in April of 2000, and discussed at the hearing in May
9 of 2000, said that three would average over six years higher
10 than four, and that three and four, different scenarios and
11 stuff, it swapped back and forth being the mover or not.
12 Then six months later now saying that it will never change
13 for five years, well, what a difference six months makes,
14 and what a difference six months or a couple months can make
15 here in the future. So I think to sit back and forecast
16 that is incorrect.
17 This idea that we can take care of it through
18 administrative procedures, what needs to be pointed out is
19 that the evidence is closed on the hearing. All we can do
20 is bring up comments and questions. So we're not able to do
21 any of that.
22 On this whole logical -- I mean, there just wasn't
23 a separate proposal to grow out of. I mean, I guess that's
24 the point. There's nothing --
25 THE COURT: What did that language on page 20103

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1 mean?
2 MR. YALE: It was a puzzle, and we took it -- I
3 mean, I -- it indicated that that might happen, but here's
4 the thing. There's a condition stated twice in there, Your
5 Honor, and it says that there were proposals that would
6 reduce the butter price used for Class Four butterfat. So,
7 in a sense, you'd have a different level of price between the
8 different classes, not a different formula or mover. And it
9 said, if we're going to do that, then we have -- we now have
10 multiple butterfat prices, then why shouldn't we look at how
11 we do the Class Three price; okay? Well, the Secretary did
12 not reduce the Class Four butterfat price. So that condition
13 was never met. I mean, it was a conditional statement, and
14 it had really two meanings, one of which was, if you're going
15 to have testimony concerning a Class Four butterfat price
16 that's lower, you need to address this issue of whether the
17 Class Three has any vitality.
18 We raised the other possibility, and the
19 Administrative Law Judge, with the acquiescence of the
20 department, said that's not what it means. But I think
21 that's where -- that's where it ended, that issue. Again,
22 it was ruled, with the concurrence of the Secretary, beyond
23 the scope of the hearing.
24 I noticed that Ms. Ullman noted that the
25 Secretary's new formula was different than Dr. Barbano's

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1 proposal, so then what was theirs the logical outgrowth of?
2 I think that if they had a valid proposal before, Dr.
3 Barbano's might have been a logical outgrowth of that.
4 Finally, on the success on the merits, because we
5 got such a compelling success on the merits, it does create
6 not so much a contingent liability anymore if it's allowed
7 to continue, it's almost an absolute liability.
8 Mr. Beshore, if the Court would permit, just had
9 one comment he wanted to make on behalf of his amici
10 position.
11 THE COURT: All right.
12 MR. BESHORE: Thank you, Your Honor.
13 I just wanted to respond to the Court's question
14 further, to the Court's question about what did the
15 Secretary's comments at page 20103 in the hearing notice,
16 what did that mean to the participants.
17 My clients were among the advocates of the
18 proposals to change Class Four prices, to which the
19 Secretary's query was addressed. We responded to that query
20 in the context of our proposals to change -- with respect to
21 changing Class Four prices, and understood it to relate
22 solely to that, and only to that, and not to any
23 free-standing, independent proposals to do something
24 different with the Class Three butterfat price, of which
25 there were none in the hearing.

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1 THE COURT: Unless they were going to change the
2 Class Four on --
3 MR. BESHORE: Unless Class Four was going to be
4 changed. Now, they did not -- they refused all the
5 proposals, including those of my clients, to change the Class
6 Four price. It was certainly our understanding that there
7 were no free-standing proposals to change the Class Three
8 butterfat price formulation, to take it off the butter
9 market, which has never been done in at least 40 years, as
10 Mr. Sheppard noted in his declaration.
11 We addressed very carefully my client's, who --
12 you know, producers are the -- this is a producer program.
13 It's only our price that's regulated by these complex
14 regulations, that is, the minimum price producers to plants.
15 The rest of the transactions in the industry are
16 unregulated. We carefully looked at all of these proposals,
17 testified to all of them, took a position on all of them,
18 commented on all that we knew to be part of this process.
19 We had nothing to say whatsoever about Dr. Barbano's, or
20 putting the Class Three butterfat price on the cheese market
21 rather than the butter market because it was clearly
22 understood by all participants that it was not part of the
23 hearing. And as my declarants have stated, the transactions
24 are changing today in the marketplace out there with respect
25 to what sales we can make or cannot make if this rule goes

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1 into effect.
2 Thank you.
3 THE COURT: All right.
4 MR. ROSENBAUM: Your Honor, could I address one or
5 two points?
6 THE COURT: Sure.
7 MR. ROSENBAUM: Your Honor, Steve Rosenbaum.
8 This is unique for me, appearing on behalf of the
9 processing industry, to be on the same side of the table as
10 these gentlemen.
11 THE COURT: I understand that.
12 MR. ROSENBAUM: I've been doing this work for 18
13 years. This is literally the first time I think it's ever
14 happened.
15 I just want to cover a couple of points briefly,
16 Your Honor. To follow up and give more specificity as to
17 the point Mr. Beshore made, there was a proposal -- it's
18 number eight -- in the list of proposals that were published
19 on April 14, which would have lowered by six cents the price
20 of butter that you then use to calculate the butterfat
21 price. That proposal eight would have done tht only with
22 respect to Class Four products. And we, and I think
23 everyone, understood the language on page 20103 from the
24 department to raise the question, well, if you're going to
25 do that for Class Four products only, then maybe you should

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1 do something else on Class Three.
2 We were against that proposal number eight. We
3 had a proposal number three which said you should make that
4 same six-cent adjustment as to all classes. But in the end,
5 the Secretary rejected all proposals to make the six-cent
6 adjustment as to any class. Once that happened, the, if you
7 will, conditional possibility of doing something separate on
8 butterfat in Class Three vanished, and no one understood
9 that to be a free-standing proposal that might be adopted on
10 its own, yet that is precisely what USDA did.
11 A second point, Your Honor. It is true there is
12 some difference between the Dr. Barbano proposal, which the
13 ALJ rejected, and what USDA ultimately did. But those
14 differences are quite meager as compared to the
15 similarities. The critical points are, number one, do you
16 base the butterfat price for Class Three on the price of
17 butter, as it has been historically, or the price of cheese.
18 Dr. Barbano said do it on the price of cheese. The rule
19 that we're challenging does it on the price of cheese. Dr.
20 Barbano said, "Do not make a change, a corresponding change
21 in how you determine the butterfat value for Class Four
22 products." Similarly, that's what the rule under challenge
23 also adopts, that is to say, a different product is used for
24 determining butterfat for Class Three versus Class Four.
25 Those are the key elements of the Dr. Barbano

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1 proposal that troubled me as I stood up to object to his
2 proposal at the hearing. It was my objection that was
3 granted by the Administrative Law Judge. The specific
4 question of how you determine what the value of butterfat in
5 cheese is varies somewhat between Dr. Barbano and what USADA
6 did. But that's not the issue that was of concern.
7 Lastly, Your Honor, in terms of irreparable
8 injury, we submitted on behalf of the two largest cream
9 cheese manufacturers in the country -- and cream cheese is
10 important because it's a high fat product -- affidavits
11 saying that today there is cream leaving California and
12 coming to plants located in what are federal order areas
13 solely because a result of this rule. This is cream we
14 historically have bought, and but for the rule would be
15 buying today from farmers subject to federal milk marketing
16 orders. But because this change makes butterfat -- cream is
17 the same thing -- so expensive, it's cheaper for us to go to
18 California and buy the cream there, and ship it to
19 facilities in Pennsylvania, Michigan, Texas, wherever. So
20 these people, these farmers are simply losing sales. They
21 would be selling us their cream. We're buying it from
22 California farmers instead outside the federal order system.
23 That's happening every day. It's happening today. It
24 happened last week. It's been happening since this new
25 order was announced. It seems to me that that's as

<p style="text-align: right;">Page 46</p> <p>1 irreparable as you get, Your Honor. And for those reasons 2 we support the motion for the preliminary injunction. 3 THE COURT: All right. Since you didn't get to 4 respond, you can if you want to to the amici. 5 MS. ULLMAN: Just a few points. In that request in 6 the notice, it does not say that it is a condition that Class 7 Four changes. It said the consideration of a change to the 8 Class Four butterfat price brings it to a head, brings it to 9 the forefront. 10 They criticize Mr. McDowell's economic analysis, 11 saying it changed in the six months since the hearing last 12 spring, but his analysis now is based on new Class Three and 13 Class Four formulas that went into effect in January of this 14 year. So it's apples and oranges. 15 The Secretary, under the rules of practice, can 16 notice proposals and can notice issues. In this case, the 17 Secretary did both. 18 Many times in the past the department had -- the 19 Secretary has adopted a rule that is different from any 20 specific industry proposal. 21 Thank you. 22 THE COURT: All right. The matter comes before me 23 on motion for preliminary injunction by the plaintiffs. 24 Applying the standard four-prong test from 25 Virginia Petroleum Jobbers, and the weighing of the factors</p>	<p style="text-align: right;">Page 48</p> <p>1 omission was critical because notice of individual parts of 2 a proposed rule is not necessarily notice of the whole, and 3 I don't think that the parties were able to anticipate and 4 adequately comment on the ultimate Class 3 butterfat rule 5 that was adopted by the Secretary because of the lack of 6 notice, and because of the ALJ's ruling at the time that the 7 hearing was held. 8 The Court of Appeals has said that general notice 9 that a new standard will be adopted affords the parties 10 scant opportunity for comment, and those parts that the 11 government cited today on page 20103 of the Federal Register 12 are, at best, general notice that a new standard might be 13 adopted, and it certainly gave scant opportunity for the 14 parties to comment. And when the parties tried to comment, 15 the ALJ told them they were out of order, in effect. 16 I do think that the Court of Appeals has it right 17 in Horsehead, where they said the agency's obligation is 18 more demanding. It must explain and describe the range of 19 alternatives being considered with reasonable specificity. 20 Otherwise, interested parties will not know what to comment 21 on, and not -- and notice will not lead to better informed 22 agency decision-making. I think that perfectly applies in 23 this case, where all of the industry representatives and 24 others, really, had not an adequate opportunity to comment, 25 and I don't think the overturning of a 40-year practice like</p>
<p style="text-align: right;">Page 47</p> <p>1 that allows you to adjust the various factors by how strong 2 one factor is versus the others, I grant the motion for 3 preliminary injunction. 4 I think the plaintiffs have established a very 5 substantial likelihood of success on the merits, and the 6 irreparable injury, as the plaintiffs argue, becomes almost 7 certain liability, if I'm right about the likelihood of 8 success on the merits because of their liability, contingent 9 liability, if the rule is ultimately held illegal. 10 I also think this the plaintiffs have shown a 11 sufficient showing of lost profits and effect on the market 12 by California milk and others competing with the federal 13 milk marketing order program; that they have established 14 sufficient irreparable injury to satisfy the Court that the 15 preliminary injunction is warranted because of the strong 16 showing they have of likelihood of success on the merits. 17 I think the Secretary, as the government just 18 said, had the right to make both proposals and issues in her 19 notice, but she clearly did not -- he, I guess, at that 20 time, clearly did not give fair notice to industry. I rely 21 in particular on the Court of Appeal opinion in Horsehead 22 Resource Developments, 16 F.3rd, 1246, where the Court of 23 Appeals noted that an omission, such as happened here, where 24 there wasn't a specific notice that the Secretary was 25 considering overturning this 40-year practice, that the</p>	<p style="text-align: right;">Page 49</p> <p>1 think is something that should be done with a scant notice, 2 but rather with a specific notice. Insightful comments that 3 could have been received from the plaintiffs and others, 4 then, I think might have helped the Secretary on the 5 ultimate rule-making. It may be that ultimately the 6 Secretary, after proper notice and comment, will develop the 7 same rule, but I think the whole point of the Administrative 8 Procedure Act notice and comment provision is to ensure that 9 there is fully informed and the best possible informed 10 decision by the agency at the time it makes a decision like 11 this, so the preliminary injunction will be granted, and 12 I'll sign the plaintiff's proposed order, and indicate that 13 it's for the reasons stated on the record in open Court so 14 that if the government chooses to take an appeal, it will 15 have that record. 16 Any other things that I should do today, then? 17 MR. YALE: Your Honor, on the order, we would like 18 to -- there were some changes. We had caught this morning, 19 some errors. If we could submit a proposed order this 20 afternoon, after we submit it to counsel for the defendant to 21 look at to make sure that it's narrowly on issue and done 22 correctly, if that would be permissible with the Court. 23 THE COURT: All right. If the defendant's object, 24 then, we'll need to reconvene about five o'clock. 25 MR. YALE: Oh, we have one. When you have parties</p>

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1 that help you, you get a lot more done.

2 THE COURT: Okay.

3 MR. ROSENBAUM: Your Honor, could we -- although

4 I'm allied with Mr. Yale on this, generally speaking, the

5 language of the order itself might be quite important to us,

6 and I just would like to have the opportunity to --

7 THE COURT: Sure.

8 MR. ROSENBAUM: I won't be able, frankly, to figure

9 it out just reading it through the first time. It's a little

10 complicated.

11 THE COURT: All right.

12 MR. ROSENBAUM: And I wondered if, perhaps, all of

13 us might have the opportunity to look at it and --

14 THE COURT: If there's any objection to the

15 plaintiff's proposed order, I'll see you back at 5 o'clock

16 because I'm going to do an order today.

17 MR. YALE: Thank you, Your Honor.

18 THE COURT: All right, any other things we should

19 do today, then?

20 (No response.)

21 THE COURT: All right, thank you very much,

22 counsel.

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1 CERTIFICATE OF REPORTER

2 I certify that the foregoing is a correct transcript
3 from the record of proceedings in the above-entitled matter.

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Theresa M. Sorensen, CVR-CM
Official Court Reporter

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