

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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SELECT MILK PRODUCERS	)	
INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	Case Number: 1:01-00060 (RCL)
	)	
ANN VENEMAN <sup>1</sup> , Secretary,	)	
United States Department of	)	
Agriculture, 14th Street and	)	
Independence Ave., S.W.,	)	
Washington, D.C. 20250	)	
	)	
Defendant.	)	

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DEFENDANT’S STATEMENT OF POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFFS’ MOTION FOR  
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs, milk marketing cooperatives and associations of dairy producers, seek to enjoin the end product of a Congressionally-mandated reformation of the federal milk marketing order system.

Plaintiffs are not entitled to a temporary restraining order or a preliminary injunction because, by their own previous admission, they are not likely to succeed on the merits. Plaintiffs’ primary claim is that the Notice of Proposed Rulemaking, which initiated this process, failed to

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<sup>1</sup> Pursuant to Fed.R.Civ.P. 25(d)(1) Secretary Veneman is substituted for Dan Glickman.

give adequate notice of the final rule. Contrary to their claim, the proposed rule did give sufficient notice. Indeed, plaintiffs' own comments during the hearing demonstrate that they were aware that the issue addressed in the final rule, a separate price for Class III butterfat, was part of the proceeding. See Transcript of Hearing, 5/9/00, pp.507-8 (Attachment 1).<sup>2</sup> Thus, plaintiffs were well aware that this issue was part of the proceeding.

Plaintiffs are also not entitled to a TRO or preliminary injunction because they cannot show that they are injured. Plaintiffs' claim of injury, that they will receive less money for the milk they produce, relies on a number of contingent assumptions that (1) USDA's economic analysis that milk producers would receive increased prices for milk was wrong; (2) USDA's predictions for the next 5 years are wrong; (3) milk prices in the year 2000 cannot be relied upon for economic analysis; (4) milk prices in 1999 were "typical"; and (5) the cheese manufacturing industry was wrong when it objected to the proposed rule as increasing the prices it would pay to the producers for milk. See Ledman Decl., Plaintiffs' Ex. C.<sup>3</sup> These predicates are unsupported and therefore plaintiffs do not have a claim of certain harm.

#### STATUTORY AND FACTUAL BACKGROUND

Responding to unstable marketing conditions prevalent in the early 1900s, Congress, in the Agricultural Marketing Agreement Act ("AMAA"), empowered the Secretary of the United States Department of Agriculture to adopt regulations governing the handling and pricing of milk. See 7 U.S.C. § 601, et seq. The AMAA authorizes USDA to issue milk marketing orders

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<sup>2</sup> The transcript of the entire hearing, and indeed all of the record documents defendants rely upon, are available on-line at: [www.ams.usda.gov/dairy/hearing-III\\_iv.htm](http://www.ams.usda.gov/dairy/hearing-III_iv.htm).

<sup>3</sup> Rather than duplicate submissions to the Court, defendant will cite to plaintiffs' exhibits where appropriate.

and amend the orders as necessary where the Secretary finds that an order or amendment would tend to effectuate the declared policy of the AMAA, which is set forth in 7 U.S.C. § 602. See 7 U.S.C. § 608c(1), (3), (4) and (17). The Secretary’s decision to issue or amend milk marketing orders is based on formal rulemaking, including notice and hearings. Id. Following issuance of a final decision to amend marketing orders, USDA conducts referenda or polls of industry participants subject to the amended marketing orders. See 7 U.S.C. § 608c(9), (17) and (19). If approved by a two-thirds majority of producers in an affected region, the final decision is issued as a final order. See id.

Following a national rulemaking which reformed and consolidated existing milk marketing orders, Congress legislated changes to the resulting rules in the Consolidated Appropriations Act of 2000. That Act required that the Secretary conduct formal rulemaking to reconsider the Class III and Class IV<sup>4</sup> milk pricing formulas included in the final rule for the consolidation and reform of Federal milk orders. See Pub. L. 106-113, 115 Stat. 1501; see also Plaintiffs’ Ex. M. In response, on January 31, 2000, USDA posted and sent to interested parties an “Invitation to Submit Proposals - Class III and IV Prices” and noted that a hearing would be held in late April or early May 2000. See Plaintiffs’ Ex. H. The “Invitation” provided in part:

In addition to the Class III and Class IV prices adopted in the final rule, the hearing will consider proposals that address changes to any of the factors such as the specification of the products whose prices are identified, the yield factors, and the make allowances included in the computation of the component prices.

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<sup>4</sup> Milk is classified as Class I if it is used as fluid milk, such as beverage milk; as Class II if it is used for “soft” dairy products, such as yogurt, ice cream and cottage cheese; Class III if it is used “hard” cheeses; and Class IV is if it is used to produce powdered milk and butter. Plaintiffs’ Ex. L, Appendix B, p. 2. Historically, Class III and IV minimum prices are lower than those for Class I and II and have been used as components of the formulae for Class I and Class II prices.

Id.

A Notice of Public Hearing on Proposed Rulemaking was published by USDA in the Federal Register, Vol. 65, on April 14, 2000. See Plaintiffs' Ex. D. That Hearing Notice indicated when and where the hearing would be held, described the purpose and subject matter of the hearing, and discussed the proposals received. See id. It stated, in part, that the rulemaking was to:

reconsider the Class III and Class IV milk pricing formulas included in the final rule for the consolidation and reform of Federal milk orders and to implement any changes on January 1, 2001.

65 Fed. Reg. at 20,095, Plaintiffs' Ex. D. The Preliminary Analysis in the Hearing Notice made clear that USDA understood that “[w]hile the proposals seek to amend the product pricing formulas used to price milk regulated under Federal milk marketing orders and classified as either Class III or Class IV milk, these product price formulas also would affect the prices of regulated milk classified as Class I and Class II.” Id. at 20,095-96. The Hearing Notice goes on to set forth the 32 proposals, including those proposed by plaintiffs. Following the final proposal (proposed by USDA), is a heading, “Class III and Producer Butterfat Prices,” and that section provides, in 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.

In addition, the possibility of having four different butterfat prices . . . .

Id. at 20,103.

The hearing was held, as noticed, beginning on May 8, 2000, and did not conclude until May 12, 2000. Forty-eight witnesses presented testimony, 54 exhibits were accepted into evidence, official notice was taken of 36 publications and 20 briefs were filed after the hearing to accompany the record.<sup>5</sup>

A tentative final decision was issued on November 29, 2000, and published in the Federal Register on December 7, 2000. 65 Fed. Reg. 76,832 (to be codified at 7 C.F.R. pt.1000, et al.), Plaintiffs' Ex. A. Parties have the opportunity to submit comments by February 5, 2001, and after review of the comments, USDA will determine which of the amendments tentatively adopted should be made final, which should be modified or rejected, and which proposed amendments that were not adopted should be implemented. See 65 Fed. Reg. at 76,832, 76,836 and 76,850. The "Findings and Conclusions" section in the Tentative Final Decision describes the changes to Class III butterfat price, in part, as follows:

Further analysis also revealed that there is very little relationship between the current butterfat price and the cheese price or between the current protein price and the cheese price.

Under the current system, market distortions occur due to using the Class IV butterfat price, calculated from the value of butterfat in butter, to also represent the value of butterfat in cheese, (Class III), and trying to incorporate the difference in value in the protein price. As a result instances have occurred when the protein price declines while, at the same time, the cheese price is increasing. This outcome is completely contrary to the concept of pricing components on the basis of the value of the products in which they are used.

\* \* \*

The reasons for using the same butterfat price in Class III and Class IV under Federal order reform have been outweighed by the outcome of that

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<sup>5</sup>All of the referenced materials can be accessed at: [www.ams.usda.gov/dairy/hearing-III\\_IV.htm](http://www.ams.usda.gov/dairy/hearing-III_IV.htm).

decision. The pricing concept of reflecting the value of a manufactured product in the prices for the milk components that are instrumental in the yield of that product require that Class III protein and butterfat prices be tied more directly to their value in the cheese that is produced using those components. Therefore, it is necessary to separate the value of butterfat used in the manufacture of cheese from the value of that component in butter. The pricing system contained in this decision will eliminate the distorted relationships between the Class III butterfat and protein prices and the cheese price.

65 Fed. Reg. at 76,846-47, Plaintiffs' Ex. A.

The Secretary noted the significance of the changes to the Class III price formula:

The changes to the formulas used to compute the Class III component prices would result in fairly significant changes to the component prices, as might be expected. For instance, since the current Class III butterfat price is based on the butter market and the proposed butterfat price is based on the cheese market, the proposed Class III butterfat price would average \$0.4651 per pound above the current Class III butterfat price over the 22-month period if cheese and butter prices had been the same. However, the component prices are expected to track the underlying commodity prices to a much greater extent than they did previously.

\* \* \*

The calculation of the Class III price at 3.5 percent butterfat, based on the formulas contained in this decision, would have averaged \$0.02 per hundredweight above the 3.5 percent Class III price based on the current Class formulas.

Id. at 76,848.

The tentative final decision included an economic analysis showing that the price milk producers would receive for the milk would increase over the next five years, and explaining that the "Class I base price is driven by the higher of the Class III or Class IV prices. With the amended formulas, the Class I base price is the Class IV price in all years of the analytical period." Id. at 76,835. A complete economic analysis was also made available by USDA. See Id. and Plaintiffs' Ex. L.

The publication of the tentative final decision included a referendum order for Federal

milk orders ( 65 Fed. Reg. at 76,851) and an additional referendum order was published at 65 Fed. Reg. 77,837 (December 13, 2000), Plaintiffs' Ex. A. USDA conducted the requisite polls and referenda, and two-thirds of the producers supplying milk for each of the 11 Federal milk markets approved the amended Class III and Class IV pricing formulas. See 65 Fed. Reg. at 82,832, Plaintiffs' Ex. B.

On December 22, 2000, plaintiffs filed a motion for an administrative stay of the portion of the Tentative Final Rule that established a separate Class III butterfat price. See Plaintiffs' Ex. F. In that motion, plaintiffs wrote:

This challenge is not made on a claim that the ultimate choice of the Secretary was unwise. After properly noticed, testified, briefed, and considered, it may be the best solution. Instead, that debate is for another day. Instead this extraordinary request arises out of a deep concern that the rulemaking process has been seriously compromised exposing the federal order program to serious risks.

Id. at 1. That motion was denied by letter dated January 5, 2001. See Plaintiffs' Ex. G.

The National Cheese Institute, "a trade association with over 75 member companies, which manufacture more than 80% of the cheese consumed in the United States," also filed a motion for a stay of the implementation of the portion of the tentative final decision that provides for a separate Class III butterfat price. See NCI Motion, Plaintiffs' Ex. J. Interestingly, one of the reasons the National Cheese Institute cited for why a stay is necessary was: "The granting of a stay would not negatively impact dairy farmers. To the contrary, the effect would be an increase in the Class III price." Id. at 6. The National Cheese Institute's motion was denied by letter on December 21, 2000. See Plaintiffs' Ex. K.

On December 28, 2000, following the requisite approval from the milk producers, the "Interim Final Rule" was published in the Federal Register, with the effective date of January 1,

2001. See 65 Fed. Reg. 82,832 (to be codified at 7 C.F.R. pt. 1000 et al.).

On January 11, 2001, plaintiffs filed this action. On Friday, January 19, 2001, after 6 p.m., plaintiffs filed this motion for a temporary restraining order and/or a preliminary injunction and for an expedited hearing.

Using the formulas in the Interim Final Rule, USDA announced on December 22, 2000, the price for Class I milk to be delivered in January 2001, and on January 19, 2001, announced the price for Class I milk to be delivered in February. See Attachment 3. On Friday February 2, 2001, USDA will announce the Class III and Class IV prices for milk delivered in January.

## ARGUMENT

### PLAINTIFFS ARE NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION

It is well-established that “[t]he grant of a preliminary injunction is a drastic and unusual judicial measure.” Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985). Before granting such “extraordinary” relief, Fund for Animals v. Frizzell, 530 F.2d 982, 986 (D.C. Cir. 1976), a court must consider whether “(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will not substantially injure the other party; and (4) the public interest will be furthered by the injunction.” Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998) (citations omitted). There is no mathematical formula to determine the relative weight of these factors. See Washington Metropolitan Area, Etc. v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). Plaintiffs have failed to establish any of the necessary elements.

- I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.
  - A. USDA Gave Adequate Notice That Consideration Of A Separate Class III Butterfat Price Was Within The Scope Of The Hearing.

Plaintiffs' brief is peppered with statements that the separate Class III butterfat price is a "rogue provision" that "was never noticed for consideration" and "no testimony was given on its behalf." Plaintiffs' Br. at 24. This argument 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, because USDA was limited to choosing from among the specific alternatives listed in the Notice. However, the relevant rulemaking procedural regulations do not require that only specific proposals be considered, instead providing that the notice of hearing "shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed marketing agreement or marketing order or a description of the subjects and issues involved . . . ." 7 C.F.R. § 900.4(a). Plaintiffs do not dispute that the Notice 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. The USDA, however, is not required to redo a rulemaking whenever it chooses to vary a final rule from that contained in a Notice of Proposed Rulemaking. Rather, the question is whether the final rule represents a "logical outgrowth" of the matters contained in the notice. See Ass'n of American Railroads v. Dept. of Transp., 38 F.3d 582, 588-9 (D.C. Cir. 1994); American Federation of Labor v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985). Here, the notice clearly indicated that a separate Class III butterfat price would be considered.

The Notice of Proposed Rulemaking specifically says:

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.

In addition, the possibility of having four different butterfat prices . . . .

65 Fed. Reg. at 20,103, Plaintiffs' Ex. D (emphasis added). At the hearing itself, plaintiffs' counsel specifically noted that this portion of the Notice of Proposed Rulemaking did indeed put a separate Class III butterfat price within the scope of the proceedings and argued in favor of hearing testimony related to that point:

The Department had a request of its own at the end of the notice of hearing that said, and I am simplifying it, but basically right now let's take a look at the possibility of having a different Class III butterfat price than a Class IV butterfat price.

And I am not saying we endorse Dr. Barbano's testimony or his request, but this is the eminent scholar on cheese manufacturing in the United States. He has an idea. Whether it becomes a proposal that the Department adopts maybe, maybe not. But it clearly is an important addition to this hearing record to deal with these issues of make allowances and yields. And I think that his response to that request is consistent with what the Secretary had asked for.

Transcript of Hearing, 5/9/00, pp.507-8 (Attachment 1).

Plaintiffs now argue that Barbano's proposal for a separate Class III butterfat price was outside the scope of the hearing, and state that the Secretary's tentative final decision is "markedly" different from Barbano's proposal. Plaintiffs' Br. 25. Plaintiffs provide a declaration from Barbano saying that "part" of his proposal was a "separate Class III cheese butterfat price formula" and that the Secretary's "separate Class III Butterfat Price [] differs markedly from the proposal formula that [Barbano] submitted at the Hearing." Barbano Decl. ¶¶ 5, 8, Plaintiffs' Ex. I. Plaintiffs' brief quotes several passages from the hearing transcript where

the admissibility of Barbano's testimony was debated. See Plaintiffs' Br. 14-16. All of this "evidence" does not further plaintiffs' position and argument. No one has claimed that Barbano's specific proposal was properly noticed, and no one has claimed that the Secretary adopted Barbano's proposal. There is no dispute that the ALJ correctly concluded:

I'm going to rule that Dr. Barbano's pricing formula is not one of the proposals being considered at this hearing. Although there's a lot of testimony and comments on it, that is not a proposal being considered.

However, he has provided information in his testimony that's germane to the proposals being considered, and so I will allow Dr. Barbano's testimony to remain in the record and, as Mr. Cooper suggested earlier, leave it to the Secretary's representatives who will make the determination on the final rule to disregard that part of Dr. Barbano's testimony that's not pertinent to the proposals under consideration.

Transcript at 790-91, Plaintiffs' Ex. E. The ALJ did not rule that no testimony on a separate Class III butterfat price was relevant. As noted above, even plaintiffs' counsel thought Barbano could provide relevant testimony on the portion of the Notice of Hearing where the Secretary indicated that testimony concerning a separate Class III butterfat price would be appropriate.

In short, the parties were alerted by the Notice of Proposed Rulemaking that a separate Class III butterfat price was under consideration, and no action was taken at the hearing that contradicted that notice. Plaintiffs had sufficient notice that their interests were at stake. A final rule may differ from a proposed rule, without the need for another round of comments, so long as the final rule is a "logical outgrowth" of the rule as proposed. See Ass'n of American Railroads v. Dept. of Transp., 38 F.3d at 588-9; American Federation of Labor v. Donovan, 757 F.2d at 338. The notice plaintiffs had was more than sufficient under this legal standard. A separate Class III butterfat price is a "logical outgrowth" of a notice provision that indicates both separate Class IV and Class III butterfat prices will be considered. Plaintiffs have not met their burden of

showing that they are likely to succeed on the merits of their claim that the Secretary did not properly notice that a separate Class III butterfat milk formula was under consideration.

B. The Secretary's Decision To Create A Separate Class III Butterfat Price Is Not Arbitrary Or Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With Law.

In reviewing agency action under the APA, a court is bound by a highly deferential standard of review. The court may "is not empowered to substitute its judgment for that of the agency," Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), but must ascertain only whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. If the agency's reasons and policy choices "conform to 'certain minimal standards of rationality' . . . the rule is reasonable and must be upheld," Small Ref. Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 521 (D.C. Cir. 1983), even though the court itself might have made different choices. Under this standard, regulations are presumptively valid and the plaintiff bears a heavy burden of demonstrating their invalidity. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc). Under this narrow standard of review, USDA's action need merely be rationally based on the administrative record.

Plaintiffs' burden of demonstrating that USDA's action was arbitrary and capricious is even more onerous where, as here, the agency's actions involve "technical matters within its area of expertise," where a court's "deference to the agency is greatest." Lockhart v. Kenops, 927 F.2d 1028, 1034 (8th Cir. 1991) (citations omitted). These standards apply with special force to judicial review of USDA milk marketing orders. As the court in New York State Guernsey Breeders' Co-Op. v. Wickard, 141 F.2d 805, 808 (2d Cir. 1944), held nearly a half-century ago in

another challenge brought by a special interest group within the milk industry:

In considering the legality of the Secretary's action we need to bear in mind not merely the limited character of review accorded in general to the courts over administrative agencies, including the milk marketing agencies, [citation omitted] but also . . . that [the milk marketing order] involves a difficult and complicated adjustment of the most extensive character and detail which is more likely to achieve fairness in the greater number of cases than any we can think of or suggest.

Describing the technical, complicated nature of milk regulation, one court noted:

the 'milk problem' is exquisitely complicated . . . . The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government.

Queenboro Farms Products v. Wickard, 137 F.2d 969, 974-75 (2d Cir. 1943). See also Zuber v. Allen, 396 U.S. 168, 172-87 (1969) (describing the "labyrinth of the federal milk marketing regulation provisions").

Under this standard, plaintiffs are not likely to prevail on their claim that the Tentative Final Decision is “arbitrary and capricious” because the Secretary “failed to explore or consider” the “real impact of the separate Class III Butterfat Price on the Class I price.” Plaintiffs’ Br. at 26. The Secretary’s decision was made after careful consideration. As discussed above, USDA issued a Notice of Hearing, invited industry participants to present proposals for consideration, and held a hearing for five days where almost 50 witnesses testified and over 100 exhibits, publications and briefs became part of the record. Subsequently, the Secretary issued a Tentative Final Decision, which contained a thorough analysis and discussion of the proposed changes, including discussion about specific testimony at the hearing. See 65 Fed. Reg. 76,832, Plaintiffs’ Ex. A. The written decision takes up 20, single-spaced, 3-column pages in the Federal Register. Id. at 76,832-76851. In addition, USDA made available an even more detailed economic

analysis, including tables and charts. See Plaintiffs' Ex. L.

The Secretary changed the Class III butterfat price formula to more accurately reflect the price of cheese, the product for which it is a component price: "The most substantive change is to calculate a Class III butterfat price on the basis of the value of butterfat in cheese, not on its value in butter." 65 Fed. Reg. at 76,836, Plaintiffs' Ex. A; see also USDA Economic Analysis, at 6-7, Plaintiffs' Ex. L. There is even a section of the final decision devoted just to discussion of this point. See 65 Fed. Reg. at 76,844-48. The decision was made to correct the problem "that there is very little relationship between the current butterfat price and the cheese price or between the current protein price and the cheese price." Id. at 76,846. The change to the Class III butterfat price formula means "the component prices are expected to track the underlying commodity prices to a much greater extent than they did previously." Id. at 76,848. Plaintiffs do not anywhere dispute that this was the intent of the change in the Rule or that this will be the effect.

Plaintiffs' argument that the Secretary did not consider the real impact of the Class III butterfat price on the Class I price, is belied by the record. In the first paragraph of the "Analysis" section of the Tentative Final Decision, the Secretary writes:

While the primary purpose of this decision is to amend the product pricing formulas used to price milk regulated under Federal milk marketing orders and classified as either Class III or Class IV milk, these product price formulas also affect the prices of regulated milk classified as Class I and Class II.

65 Fed. Reg. at 76,834, Plaintiffs' Ex. A. In the next section, "Scope of Analysis," the Secretary writes, "the decision's formula changes have an impact on Class I and Class II prices. . . . Class I prices are based on the higher of the Class III or Class IV prices." Id. In the following section, "Summary of Results," the Secretary writes, "In addition, the advanced Class I base price is

driven by the higher of the Class III or Class IV prices. With the amended formulas, the Class I base price is the Class IV price in all years of the analytical period.” 65 Fed. Reg. at 76,835. As explained in the USDA’s Economic Analysis, the impact of the change in the Class III butterfat price formula on Class I fluid milk prices was certainly considered, but based on all of the data available to USDA,<sup>6</sup> the Class III price will not have the effect on Class I prices plaintiffs claim, because the higher of Class III or Class IV is used as a component to determine the Class I price, and for the next 5 years, USDA’s model shows that Class IV will always be higher. See USDA Economic Analysis, p. 8, Plaintiffs’ Ex. L. This is consistent with what happened in the milk industry in the year 2000. See Ledman Decl. ¶ 17 (“In 2000 when the Class IV was the only mover there was little change in Class I prices because the Class III Butterfat Price is not a factor in Class I prices.”), Plaintiffs’ Ex. C.

Plaintiffs argue that despite the fact that USDA’s economic model did not find that Class III butterfat prices would ever be higher than Class IV over the next five years, the Secretary should have, nonetheless, analyzed the impact assuming the “separate Class III Butterfat Price [was] the Class I mover.” Plaintiffs’ Br. at 26. While that might have been an interesting theoretical exercise to plaintiffs, it would not be a rational thing for the Secretary to rely upon since it would go against the official assumptions and predictions of his agency. Certainly the Secretary cannot be found to have been “arbitrary and capricious” for failing to analyze data

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<sup>6</sup> The Tentative Final Decision explains, “Impacts were measured as changes from the model baseline as adapted from the USDA dairy baseline published in February 2000. The USDA baseline is a national, annual projection of the supply-demand-price situation for milk and dairy products,” and then goes on to provide details about the assumptions used in the model. See 65 Fed. Reg. at 76,834.

irrelevant to his economic model.<sup>7</sup>

In sum, the record evidence reveals that the Secretary's decision was entirely reasonable and plaintiffs are not likely to succeed on the merits of their claim that the Secretary acted arbitrarily and capriciously.

II. PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY WILL SUFFER ANY IRREPARABLE INJURY IN THE ABSENCE OF PRELIMINARY RELIEF.

“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies’.” Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985), quoting Sampson v. Murray, 415 U.S. 61, 88 (1974). However, the award of a preliminary injunction “is not a matter of right, even though the petitioner claims and may incur irreparable injury.” Marine Transport Lines, Inc., 623 F. Supp. at 334-335.

Mere speculative injury is not enough for an alleged injury to constitute irreparable harm. Rather, “the injury must be both certain and great; it must be actual and not theoretical.” Wisconsin Gas, 758 F.2d at 674. Injunctions are not intended “to prevent injuries neither extant nor presently threatened, but only merely ‘feared.’” Committee in Solidarity v. Sessions, 929 F.2d 742, 745-46 (D.C. Cir. 1991) (citations omitted). In fact, “[w]hen there appears to be no real harm to prevent, a court is justified in refusing to provide such relief.” Id. at 746.

“Bare allegations” of what might occur is of no value to the court, which “must decide whether the harm will *in fact* occur. The movant must provide . . . proof indicating that the harm is certain to occur in the near future.” Wisconsin Gas, 758 F.2d at 674. In order to satisfy the

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<sup>7</sup> It should be noted that so far the Secretary's model is working, for both January and February 2001, the Class I price was already announced and for both months Class IV was “the mover.” (Under 7 C.F.R. § 1000.53(b) the Class I price is announced on or before the 23rd of the month and sets the Class I price for the following month.)

irreparable harm prong of a preliminary injunction, the movant must "substantiate the claim that irreparable injury is 'likely' to occur." *Id.*, citing Wash. Metro. v. Holiday Tours, 559 F.2d at 843 n.3. In addition, "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin." Wisconsin Gas, 758 F.2d at 674.

The Secretary calculated the projected impact of the rule changes, and concluded that milk producers would benefit over the next five years because the average price of milk would increase. See USDA Economic Analysis at 8-10, Plaintiffs' Ex. L.<sup>8</sup> Despite USDA's finding that the price at which plaintiffs sell their milk would increase, plaintiffs claim that the separate Class III butterfat price will cause "plaintiffs' dairy farmer members" irreparable loss of revenue. See Plaintiffs' Br. at 22. The only support plaintiffs provide for their position is the affidavit of Mary Ledman.<sup>9</sup> See id at 22-3. The only way Ledman is able to conclude that plaintiffs will be injured is by making assumptions contrary to those officially predicted by USDA. For example, Ledman's calculations of annual harm for all producers in the Federal milk marketing orders, for all producers pooled on the Southwest milk marketing order, and for plaintiffs, all rely on what Ledman labels "normal marketing years." See Ledman Decl. ¶¶ 2-4. Ledman declares 2000 "not normal," and appears to consider 1999 "normal." *Id.* ¶¶ 17, 20. There is no explanation of the

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<sup>8</sup> While processors pay for milk at Class prices based upon the value of the milk when used for particular products, all producers under a marketing order receive the same uniform price for their milk, which is a blend of all the values of all the processors regulated by that marketing order. This is known as "market-wide pooling" and the collections and payments are done through a producer-settlement fund operated by the Federal Milk Market Administrator.

<sup>9</sup> Plaintiffs also offered a supplemental filing of a declaration by a Michael L. Brown, the General Manager of National All-Jersey, Inc. Brown's declaration does not offer any specifics as to any immediate harm to plaintiffs, but does offer his "opinion" that "the Class III Butterfat Price will reduce income to dairy producers . . ." Brown. Decl. ¶ 11, Plaintiffs' Ex. N. This opinion is not supported by any data presented to the Court with the declaration.

reason for these assumptions in Ledman's calculations, yet they differ from USDA's assumptions, and underlie all of Ledman's findings of harm. USDA Senior Agricultural Economist Dr. Howard McDowell explains in his declaration that the error of Ledman's using 1999 in her analysis lies in the fact that Federal Order Reform was implemented on January 1, 2000, and therefore Ledman's calculations would not take into account the current status of the industry under new regulations. See McDowell Decl. ¶ 9 (Attachment 2).

Flowing from Ledman's assumption about what is a typical year, is the assumption that in a typical year Class III will be higher than Class IV in about one-half of the months, and therefore Class III will be the "mover" (*i.e.* will be one of the components) in establishing the price for Class I approximately one-half the time. See Ledman Decl. ¶ 20-21. As discussed above, USDA does not agree with this forecast. For the next five years, USDA projects that Class IV will be the mover. Accordingly, plaintiffs "particular concern" about the "anticipated impact on pricing Class I milk" when Class III is the mover (see Plaintiffs Br. at 22-23), which plaintiffs estimate as a loss of \$347.8 million per year *for all producers nationwide* (Ledman Decl ¶ 14), all vanishes unless this Court is willing to disregard the economic model used by the Secretary and USDA. See McDowell Decl. ¶ 7 (Attachment 2). (Plaintiffs never isolate a specific amount of harm they individually will incur if Class III is the mover for Class I. See Ledman Decl.)

More importantly, the immediacy of plaintiffs' claim about the effect on Class I prices if Class III is the mover, is moot at least for the next month, and would not provide the basis for a temporary restraining order or a preliminary injunction by February 2, 2001. On January 19, 2001, the Class I price for February was announced, and it used the Class IV price as the mover, so plaintiffs will not incur any harm due to the Class I price in the month of February. (The

Class I price for January 2001 was based on the new formula, that price was announced on December 22, 2000, and it also used the Class IV price as the mover, so plaintiffs did not incur any injury for milk they delivered in January 2001.) See Attachment 3 and 7 C.F.R. § 1000.53(b).

While Ledman claims that the new Class III butterfat price provision will reduce income to plaintiffs by \$8.8 million dollars a year in “normal marketing years” (Ledman Decl. ¶ 5), she does not isolate the impact *on plaintiffs* if Class III is not the mover, as we know it is not for January and February 2001. See Ledman Decl. ¶¶ 12-14. Nor does Ledman indicate the client-specific data she used, nor what her supply/demand/price assumptions were in calculating the harm she did calculate. See McDowell Decl. ¶ 8.

Plaintiffs’ calculations of harm rely upon assumptions by Ledman that are contrary to USDA forecasts (and indeed are contrary to what the actual market has done for the months of January and February 2001). Plaintiffs do not dispute that USDA correctly determined there would be no harm to producers, in fact producers would benefit, using the numbers/assumptions in USDA’s model.

The amici<sup>10</sup> attempt to bolster plaintiffs’ claims of harm with affidavits making dramatic predictions about how cheese manufacturers will now obtain their milk from California because California milk is cheaper since that state is not part of the Federal milk marketing order system. First of all, amici’s facts support the Secretary’s analysis of the rule, *i.e.* that milk prices will increase as a result of the change in creating a separate Class III butterfat price. See Amicus

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<sup>10</sup> See Brief Amicus Curiae of the National Cheese Institute in Support of Plaintiffs’ Motion for A Preliminary Injunction.

Curiae Br. at 10. Secondly, USDA specifically considered the effects of the California market on the Federal milk order system and did not find the result the amici claim will occur.<sup>11</sup> Third, amici claim the harm to milk producers has already occurred for two months, and do not reference February 2, 2001 as a date that would change anything. Lastly, as discussed in the case law above, to obtain a temporary restraining order or a preliminary injunction the moving party must meet its burden of showing immediate, non-speculative harm. Amici's affidavits do not rise to the requisite level of specificity: The declarant from the International Dairy Foods Association only affirms that the creation of the "substantially higher, federal order price for butterfat in Class III products completely skews the competitive balance between federal order and California handlers." Yonkers Decl. ¶ 15; Kraft Foods' declarant affirms, "[t]he inevitable purchase by Kraft and other cheese makers of butterfat from alternative (unregulated) sources in order to minimize raw product costs . . . will reduce revenue otherwise available to local farms and create unnecessary transportation of milk ingredients to avoid regulatory burdens of the new butterfat pricing rule." Reinke Decl. ¶ 15; and Raskas Foods' declarant claims "[a]lthough Raskas Foods has only ha[d] a few weeks to act, it has already taken steps to try to ameliorate the enormous price increases resulting from the new Class III butterfat formula. For example, the company has increased its purchase of butterfat (cream) from California . . . . These purchases necessarily decrease the amount of money that would otherwise be paid to dairy farmers in the federal milk order system. Furthermore, unless the tentative final decision is changed, Raskas

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<sup>11</sup> See e.g., Interim Final Rule, 65 Fed. Reg. at 76,834; USDA's Economic Analysis, p. 4 ("California milk marketings are estimated as a function of the California pool price"), Appendix B, pp. 1-2 ("The state of California is handled as a separate region, under which milk is marketed under its current pricing system."), Plaintiffs' Ex. L.

Foods will have to consider making additional changes in its procurement . . . .” Raskas Decl. ¶¶ 9-10. Amici offer no numbers to support their claims and cannot truly assess any claimed harm to *plaintiffs*. Importantly, no plaintiff here claims to have lost sales due to competition from California.

Plaintiffs’ cry of harm includes the statement that once this Rule is implemented “it cannot be ‘unimplemented’ for future months.” Plaintiffs’ Br. at 2. Defendant is not aware of any reason why this would be true. Nor is defendant aware of any reason the Court could only grant an injunction this month, as opposed to at a later month if plaintiffs were able to demonstrate concrete harm in the future. Currently in effect is an Interim Final Rule. The Secretary is accepting comments through February 5, 2001, and plaintiffs can present their evidence to the Secretary through that channel. This interim rule can be changed if the Secretary determines from the comments that to do so would be appropriate. Contrary to plaintiffs’ assertions, the status quo is that the Interim Final Rule is in effect. As noted above, the Rule has been in effect since January 1, 2001, and was already used to determine the Class I milk prices for January and February.

In sum, plaintiffs cannot meet their burden of showing irreparable harm. Plaintiffs have offered no substantiated proof of certain harm that would provide this Court with a basis for disregarding USDA’s economic model and five year forecast and the Secretary’s conclusions.

### III. THE GRANTING OF INJUNCTIVE RELIEF WOULD BE AGAINST THE PUBLIC’S INTEREST.

Plaintiffs assert that the only purpose of the AMAA is to protect milk producers and, consequently, any action taken by the Secretary in the final rule intended to advance any interest other than protecting producer income is inconsistent with the AMAA. While protecting

producers from the potential for ruinous competition was undoubtedly a primary focus of the AMAA, particularly in milk marketing, it is equally clear that the AMAA does not charge the Secretary with a single-minded focus on producer welfare. Rather, the Secretary is required to balance the interests of consumers, producers, and other market participants in an effort to insure an adequate supply of milk and an orderly market. See 7 U.S.C. § 602.

In this instance, the Secretary weighed the interests of the different market sectors. In the “Summary of Results” in the Tentative Final Decision, the Secretary discusses the effects of the change in the Class III butterfat price formula on producers, processors and consumers. See 65 Fed. Reg. at 76,834-5. The Secretary’s conclusions, simplified, are that under the new rule producers will receive more for their milk over the next five years and consumers will pay more for fluid milk, but less for butter and cheese. Id. at 76,835. The Secretary’s purpose in changing the Class III butterfat price formula was to have it be derived from the cheese price because that is what the milk is used for. The Secretary concluded that to attain that goal, this was the correct balancing of the competing interests at stake.

If plaintiffs are granted an injunction it would mean that cheese manufacturers pay a price for a component of cheese that is not related to the price of their end product and, correspondingly, that consumers pay a price for cheese that is affected by that economic anomaly. Consumers would end up paying more for cheese if plaintiffs’ obtain an injunction.

Even if the Court assumes that plaintiffs are correct, that the price plaintiffs receive for milk will be reduced, then both processors and consumers stand to benefit from this scenario. Plaintiffs assume the processing plants will pay less than they do now for milk and that the plants will price their products to their customers accordingly. See Plaintiffs’ Br. at 2. The public, milk

processors, wholesalers and consumers, would benefit under plaintiffs' analysis.

Balancing the interests of producers, processors, and consumers is obviously a delicate task of assessing hundreds of integrated and interrelated relationships. As noted above, the Secretary has extensive expertise in making this assessment and the Court should defer to that judgment.

#### CONCLUSION

For the reasons stated above, plaintiffs' motion for a temporary restraining order and/or a preliminary injunction should be denied.

Dated: January 26, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2001, a copy of the foregoing Defendant's Statement of Points and Authorities in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction was served upon the following:

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