BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

In re: MILK IN THE NEW ENGLAND AND OTHER MARKETING AREAS, HEARING TO CONSIDER POSSIBLE CHANGES IN THE FEDERAL MILK MARKETING PROGRAM	)	Docket No. A0-14-A64, etc.; DA-90-017

REPLY BRIEF OF THE DEPARTMENT OF JUSTICE

James F. Rill
Assistant Attorney General
Antitrust Division

Mark C. Schechter
Chief
Transportation, Energy and Agriculture Section

Charles James
Deputy Assistant Attorney General
Antitrust Division

Roger W. Fones
Assistant Chief
Transportation, Energy and Agriculture Section

Susan L. Edelheit
Janet R. Urban
Attorneys
Transportation, Energy and Agriculture Section
Antitrust Division
Department of Justice
555 4th St. N.W.
Washington, D.C. 20001
(202) 307-6349

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REPLY BRIEF OF THE DEPARTMENT OF JUSTICE

The United States Department of Justice ("Department") respectfully submits this brief in reply to arguments raised in the various parties' post-hearing submissions. No party, however, has presented any facts or proffered any argument to undermine the conclusion that the Secretary of the Department of Agriculture ("USDA") can and should adopt proposals to (1) terminate the down allocation and compensatory payment provisions that effectively ban use of reconstituted milk; (2) eliminate or significantly reduce the distance differentials; and (3) eliminate or significantly reduce the Grade A differential.

Moving decisively toward a free market, rather than perpetually re-engineering the current regulatory scheme to compensate for its shortcomings and misincentives, is the most effective way to make milk marketing more efficient and to improve the welfare of American consumers.

I. The Secretary Has The Authority To Make Broad National Changes In Marketing Orders

The AMAA vests in the Secretary broad powers to make changes in marketing orders when such changes are necessary to effectuate the policy of the statute. Indeed, the Act expressly provides that the Secretary shall terminate or suspend operation of an order or a provision of an order if the Secretary finds that the order or provision "obstructs or does not tend to effectuate the declared policy of this chapter." 7 U.S.C. § 608c16(A). Nonetheless, an argument appears to have been proffered that adoption of some of the more substantive reform proposals -- where differentials are flattened or eliminated -- are beyond the scope of the powers of the Secretary of Agriculture and solely within the jurisdiction of Congress.1/ No legal authority is offered in support of this argument, and none exists. There are no legal barriers to the necessary reforms that have been proposed by the Department of Justice once the Secretary determines that the subject provisions do not tend to effectuate the AMAA.

The record in these hearings demonstrates that down allocation and compensatory payment provisions, and the distance

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1/ Post Hearing Brief, Proposed Findings and Conclusions on Behalf of CONE at 8-9.

and Grade A differentials, should be terminated since they are provisions that no longer effectuate the policies of the AMAA. Rather than help to assure an adequate supply of Grade A milk for the fluid market -- identified by virtually all participants in the hearing as the AMAA's primary purpose2/ -- these provisions keep milk prices unnecessarily high and prevent reconstituted milk, a lower-cost fluid milk option, from reaching consumers in regions suffering from fluid milk deficits. These provisions obstruct the goals of the AMMA and should be removed.

II. Use of Reconstituted Milk Effectively Would Address the Very Concerns Raised By Other Parties

The use of reconstituted milk would allow deficit markets to secure supply at reasonable prices and would provide the most efficient way to smooth out seasonal variations. Nevertheless, some parties who oppose changes in the down allocation and compensatory payment provisions, which would allow consumers to choose reconstituted milk, raise the very concerns that would be addressed by removing these government-imposed penalties on its use. They argue that current regulation, as pervasive as it is,

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2/ See e.g., Brief of Southern Coalition of Dairy Farmers ("Southern Coalition Brief") at 26; CONE Brief at 11; Brief and Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Anderson-Erickson Dairy Company ("Anderson-Erickson Brief") at 11; Brief and Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Marigold Foods, Inc. ("Marigold Brief") at 10.

nonetheless fails because Southern markets in particular are not getting enough fluid milk -- either from their own production or from northern sources -- at reasonable prices. Claims also have been made that the seasonal variations in milk production that exist under current regulation are disruptive. Compounding the current regulatory intervention is a poor answer -- the concerns of deficit markets cry out for market solutions.

As a first step towards market-oriented milk marketing, the availability of reconstituted milk would offer the milk industry and consumers significant benefits. Milk produced in low-cost regions could be cheaply shipped to Southern regions, or any regions, where deficits occur. Powder can also be stored, to be reconstituted when needed, thus assuring deficit regions a stable, year-round, source of supply. Finally, in addition to enhancing industry efficiency, the availability of reconstituted milk likely would provide consumers with an important, lower-cost option.

Obtaining enough milk for fluid markets is claimed to be a particular problem in the southeast.3/ It is ironic that some parties who complain that the order system "has failed to

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3/ Anderson-Erickson Brief at 19; Southern Coalition Brief at 47.

attract [a sufficient supply of fluid milk] to the fluid market . . ." overlook the availability of reconstituted milk as an effective solution to concerns raised in their briefs.4/ Instead, they seek additional or redesigned regulation. The Upper Midwest Coalition proposed an overhaul of the Class I pricing system to redress these concerns and "promote efficiency . . . [in] the marketplace."5/ They seek through costly regulation to achieve some of the marketing patterns that in a freer market would occur naturally. The Southern Coalition wants to maintain the current order system at the expense of consumers, although conceding that the high government-imposed Class I prices in the south have not been sufficient to overcome the regulatory disincentives to bringing northern milk to these deficit areas.6/ Even the Southern Coalition admitted that a "geographic shift of production from south to north" would have

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4/ Anderson-Erickson Brief at 11, 18-22; Marigold Brief at 10, 17-21. Anderson-Erickson and Marigold propose increasing some Class I prices and institution of transportation credits to promote fluid use of milk. Anderson-Erickson Brief at 22-24; Marigold Brief at 21-23.

5/ Preliminary Statement and Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of the Upper Midwest Federal Order Coalition ("Upper Midwest Coalition Brief") at 3; 38-47. The Upper Midwest Coalition correctly states that shipping concentrated milk would promote efficiency and lead to substantial savings. Upper Midwest Coalition Brief at 125-130. However, they completely ignore the even greater benefits that use of dry milk powder would achieve.

6/ Southern Coalition Brief at 47.

a "redeeming economic feature" if it allowed the "over supply of milk in the north [to] be more readily available to meet the deficit needs to the south at more reasonable prices."7/ That is precisely what use of reconstituted milk could do: allow bountiful northern milk -- in the form of concentrate or powder -- viably to be shipped when and where it is needed.

Permitting the industry to use reconstituted milk would also effectively solve the problems caused by milk's seasonal production and demand patterns, discussed at length by a number of parties.8/ Instead of instituting yet another layer of regulation in the form of a "seasonal incentive plan", the USDA should allow the industry to take advantage of an efficient, market oriented way to smooth out seasonal supply and demand variations: let milk be made into powder during the spring flush to be reconstituted into much needed fluid milk in the fall.9/

7/ Southern Coalition Brief at 66.

8/ Brief of United States Cheesemakers, et al. ("Cheesemakers Brief") at 7-10; Southern Coalition Brief at 30-36.

9/ The Southern Coalition argues that the "seasonal fluctuations in [milk] supply and demand are not susceptible to solutions available in other industries" because "raw milk is perishable". Southern Coalition Brief at 31. The opposite is true. Post Hearing Brief of the Department of Justice at 13-16. When milk is made into powder, it is no longer perishable and can be stored for extended periods.

There are significant benefits to be gained from removing the regulatory impediments to the use of reconstituted milk. These include less costly transportation of bulk milk, less balancing costs, more efficient use of industry capacity (with less capacity required in deficit regions), less volatility in raw milk prices, and less costs to the government for purchases of surplus dairy products under the dairy price support program.10/ Most importantly, the industry would enjoy lower production costs from shifting production to lower-cost regions, and consumers would gain the option of a lower-cost milk product.

III. The Right of the Department of Justice Fully to Participate in These Proceedings Is Beyond Reasonable Dispute

Absent a theoretical and factual basis to confront the reform proposals advanced by the Department of Justice, opponents once again seek as an alternative to bar the Department's participation in these proceedings. Parties repeatedly have sought to exclude the Department, and have been repeatedly rebuffed.

10/ *See* Cheesemakers Brief at 9, discussing the benefits to be gained from smoothing out milk's seasonal production and demand patterns.

No new legal contention has been raised in the posthearing briefs. The parties' desire to exclude the Department should be recognized for what it is -- a desperate attempt to silence substantive criticism of the inefficiency and cost to consumers produced by the current system. On four separate occasions -- September 19, 1990, September 28, 1990, November 14, 1990, and March 28, 1991, -- the Administrator ordered that the Department of Justice be allowed to participate fully in this proceeding. Addressing on March 28, 1991, yet another version of the same issue, the Administrator ordered that the Department is a party and that "the testimony of Dr. Kimmel and Exhibit 211 [proffered by the Department] may be addressed in any and all briefs filed in this rulemaking proceeding."

CONCLUSION

The Department urges the USDA to adopt the proposals described more fully in its Post Hearing Brief. The down allocation and compensatory payment provisions should be removed so that reconstituted milk can be made available. Use of reconstituted milk would efficiently solve the very problems that marketing orders were designed to remedy. It would lower industry costs, promote market stability and assure an adequate supply of fluid milk. The USDA should also eliminate or lower significantly the distance differentials and the Grade A differential. Differentials that are now too high encourage

excess and inefficient production of all milk, and in particular of Grade A milk. Moreover, high regulated prices, coupled with the effective ban on reconstituted milk, force consumers to pay more for milk than they would pay in a free market, and deny them an important choice. Adoption of the Department's proposals would substantially improve efficiency in the dairy industry and provide significant benefits to consumers.

Respectfully submitted,

James F. Rill
Assistant Attorney General

Mark C. Schechter
Chief

Charles A. James
Deputy Assistant Attorney General

Roger W. Fones
Assistant Chief

Susan L. Edelheit

Janet R. Urban

Attorneys
Department of Justice
Antitrust Division
555 4th St. N.W.
Washington, D.C. 20001
(202) 307-6349

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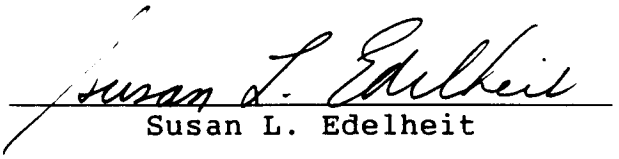
CERTIFICATE OF SERVICE

I hereby certify that this 14th day of May, 1991, a copy of the foregoing Reply Brief of the Department of Justice was served, by first class mail, postage prepaid, upon all parties on the attached service list of this proceeding.



Susan L. Edelheit

Robert J. Williams
901 Moore St. Lot 28
Baraboo, WI 53913

Vincent C. Brockman
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Marvin Beshore, Esq.
P.O. Box 946
126 Locust Street
Harrisburg, PA 17108

David Beren
Morningstar Foods
5956 Sherry Lane #1100
Dallas, Texas 75243

Sheldon Weiss, Esq.
225 Millburn Avenue
Millburn, New Jersey 07041

Bill Coleman, Director
Minnesota Department of
Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Andrew I. Schoenholtz, Esq.
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

William Tinklepaugh
888 16th Street, N.W.
Washington, D.C. 20006

A. J. Ortego, Dairymen, Inc.
10140 Linn Station Rd.
Louisville, Kentucky 40202

Edward T. Loughlin
National Milk Producers
1840 Wilson Blvd.
Arlington, VA 22201

Milk Marketing Inc.
P.O. Box 36050
Strongsville, Ohio 44136

Donald Ommodt
Cass Clay Creamery, Inc.
Box 2947
Fargo, North Dakota 58108

Glen Wagner, Esq.
3858 N. Cliff Road
Port Clinton, Ohio 43452

Steve Halbrook, Esq.
Suite 600
888 16th St., N.W.
Washington, D.C. 20006

James Purdy
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Donald F. Copeland, Esq.
One Meetinghouse Place
Norristown, Pennsylvania 19401

Charles M. English, Jr., Esq.
1200 18th Street, N.W.
Suite 710
Washington, D.C. 20026

George W. O'Brien
Box 55
N. Truro, MA 02652

Steve Rosenbaum
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

James S. Fraher
Atlantic Dairy Cooperative
1225 Industrial Highway
P.O. Box 127
Southamption, PA 18966-0127

D. Paul Alagia, Esq.
P.O. Box 1179
Louisville, Kentucky 40201

Neal R. Bjornson
AMPI
P.O. Box 790287
San Antonio, Texas 78279

Joseph C. Mathis
Eastern Milk Producers
P.O. Box 6966
Syracuse, New York 13217

Robert G. Thomas
Thomas & Thomas
6115 Brookbank
Downers Grove, IL 60515

Robert Isaacson
U.S. GAO
562 Federal Building
Ft. Snelling, Minnesota 55111

Lynn A. Hayls
Farmers' Legal Action
1301 Minnesota Bldg.
46 East Fourth Street
St. Paul, Minnesota 55101

Sue M. Taylor
Sorrento Cheese
2375 South Park Avenue
Buffalo, New York 14220

Christie L. Pittman
President, Dunn Co.
Farmers Union Milk Marketing
Cooperative, R5 Box 96
Menomonie, Wisconsin 54751

Dr. Ken Olson
225 Touhy Avenue
Parkridge, Illinois 60068

Bruce F. Wegmueller
Swiss Valley Farms
5910 Central Avenue
Dubuque, Iowa 52001

Dairylea Cooperative Inc.
P.O. Box 4844
Syracuse, New York 13221

Robert Wellington
Agri-Mark, Inc.
P.O. Box 5800
Lawrence, Massachusetts 01842

James Kalkofen
Rt. 1, Box 38
Cecil, Wisconsin 54111

Gary Gunderson
Agri News
801 34th Avenue, N.
St. Cloud, Minnesota 56303

John H. Vetne, Esq.
Blodgett, Makechnie & Vetne
P.O. Box 574
Peterborough, NH 03458

Joe E. Paris
P.O. Box 419
Mountoursville, PA 17754

Dennis Rosen
117 West Spring Street
Chippewa Falls, WI 54729

Rodney K. Carlson
Milk Marketing Inc.
P.O. Box 36050
Strongsville, Ohio 44136

Elvin Hollon
AMPI-MGF
1375 E. Woodfield #350
Sch , Illinois 60173

P. A. Costello
Rose Hill Consultants
1475 Sunrise Camp Road
Minocqua, Wisconsin 54548

Bob Hall
Sorrento Cheese
2375 South Park Avenue
Buffalo, New York 14220

Don Huldeman
Wisconsin Farm Bureau
Federation
P.O. Box 5550
Madison, Wisconsin 53705

Roland Morris, Esq.
One Liberty Place
Philadelphia, PA 19103-7396

Denis Donohue
P.O. Box 1146
Manitowoc, WI 54221-1146

Virgil Roberts
State Representative,
Wisconsin
308 Park Lane
Holmen, Wisconsin 54636

Eric Hillan
W8032 Plant Road
Ladysmith, Wisconsin 54848

Carol DuBard
1301 Longworth Building
Washington, D.C. 20515

David Beren
9435 Hunters Creek
Dallas, Texas 75243

Kenneth Ackerman, Esq.
P.O. Box 4967
Syracuse, New York 13221

Edward J. Johnson, Jr.
New York State Department of
Agriculture & Markets
I Winners Circle
Albany, New York 12110

Gary G. Latta
Crowley Foods, Inc.
P.O. Box 549
Binghamton, New York 13902

John Hitchell
The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202

Jim Dickrell
6205 Earle Brown Drive
Suite 100
Brooklyn Center, MN 55430

Sydney Berde, Esq.
2800 Minnesota World Trade
Center
St. Paul, Minnesota 55101

Gary G. Latta
Crowley Foods, Inc.
P.O. Box 549
Binghamton, New York 13902

William L. Oemichen
310 West Grove Road
Hudson, Wisconsin 54016

Joe Hylton
Farm Fresh
P.O. Box 31
Mountain Grove, MO 65711

Renn Nance
MID-AM Dairymen
3253 E. Chestnut Express
Springfield, MO 65802-2584

Reid Marmillion
Road #2, Box 223
West Cr. Road
Newark Valley, New York 13811

Will Hughes, Esq.
Wisconsin Department of Agriculture
P.O. Box 8911
Madison, Wisconsin 53703

Commissioner Jim Nichols
Minnesota Department of
Agriculture
90 West Plato Boulevard
St. Paul, Minnesota 55107

Robert Cropp
Department of Agricultural
Economy
403 Taylor Hall
University of Wisconsin
Madison, Wisconsin 53706

Paul Christ
Land O' Lakes
P.O. Box 116
Minneapolis, MN 55440-0116

Alan Kraus
State of Wisconsin -
Department of Justice
D 1974 Elm Street
Stratford, Wisconsin 54484

A. W. Samofal, Esq.
U.S. Department of Agriculture
Office of General Counsel
Marketing Division
Room 2014 South Building
Washington, D.C. 20250

Richard A. Glandt
U.S. Department of Agriculture
Agricultural Marketing Service
Dairy Division
P.O. Box 96456
Washington, D.C. 20090-6456