UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

Five motions filed post-hearing (the 12-day hearing ended May 19, 2009), require rulings. I address these motions in the chronological order in which they were received. The motions are available for consideration by the Secretary of Agriculture, maintained in the record file by the Hearing Clerk. I caution the Hearing Clerk to be mindful of sensitive information that will be available to USDA's reviewing officials, and on appeal from the Secretary's rulemaking, but is otherwise not appropriate for dissemination. I have directed Dairy Programs NOT to post the motions on the USDA website.

DENIED: the Motion timely delivered to me on July 6, 2009,¹ by the Cornucopia Institute, over the signature of Mark A. Kastel, Codirector and Senior Farm Policy Analyst of the Cornucopia Institute. Cornucopia Institute requests reconsideration of my rejection of portions of Exhibit 35 from the evidence on May 6, 2009; and refutes assertions that were made on behalf of Aurora Organic Dairy by counsel Livia M. Kiser on May 6, 2009. *See* Tr. 996-1064. The admitted portions of Exhibit 35 are in evidence; the rejected portions of Exhibit 35 are part of the record (rejected exhibits are part of the record) and are contained in a clearly labeled sealed envelope kept with the exhibits. I respectfully decline to change my rulings made May 6, 2009, and I persist in my determination that the evidence relevant to the Secretary's rulemaking IS in evidence, through Mr. Kastel's testimony and the admitted portions of Exhibit 35.

DENIED: the Motion timely filed on July 16, 2009, by New England Producer-Handlers Association, Inc., Willard J. Sterns & Sons d/b/a Mountain Dairy, Monument Farms, Inc., and Homestead Creamery, over the signature of John Benjamin Carroll, Esq. Mr. Carroll's clients request reversal of my decision not to take the testimony of expected witness

¹ The original was addressed to me and delivered to me on July 6, 2009; I delivered it today to the Hearing Clerk for filing.

Jeff Sapp by telephone, video conferencing, or by deposition in Roswell, New Mexico, as suggested by Mr. John H. Vetne, Esq., the attorney who represents Nature's Dairy, of which Jeff Sapp is a co-owner. See Tr. 3266. Mr. Carroll describes Mr. Jeff Sapp as a disabled witness. I do not have evidence that Mr. Jeff Sapp was disabled. Mr. Jeff Sapp's Declaration (which also was notarized) (Exhibit 92) states in pertinent part: "I had intended to appear in person at the hearing, but instructions from my doctor to refrain from travel and avoid stress preclude my personal attendance." Mr. Vetne presented his proposal for taking Mr. Sapp's testimony on May 15, 2009 (Tr. 3263-66). Mr. Vetne stated, "It's two. [exhibits to be marked] The first one is - - as I indicated on the record before, Jeff Sapp has a medical problem that prevents him from being here, so I asked him to sign an affidavit. The second, related to that, is a contract between Dean Foods and a store called - - or an offer to contract Big 8 Food Stores. After Mr. Sapp was incommunicado for awhile and Mr. Carrejo came early, I didn't find out this stuff until after I could talk to my client. So anyway, that's the two things, a declaration and a contract offer." The exhibits offered by Mr. Vetne are Exhibit 92 and Exhibit 93. Exhibit 92 is Jeff Sapp's Declaration, and I rejected Exhibit 92 because Mr. Sapp was not available to testify in-person and was therefore unavailable for crossexamination. I instructed that pages 1 and 2 of that Declaration be displayed on the USDA website, to identify the Declaration that I had rejected. I rejected Exhibit 93 in its entirety for lack of foundation. Rejected Exhibit 92 and rejected Exhibit 93 are part of the record (rejected exhibits are part of the record) and are contained in a clearly labeled sealed envelope kept with the exhibits. I respectfully decline to change my rulings made May 15, 2009 (Tr. 3284-3289), when I emphasized, among other things, that "The best method of proceeding is when we're all in the same room able to confront one another," and "Cross-examination is essential to the testing of evidence." I persist in my determination that the rulemaking hearing was noticed as an in-person hearing, and that it was reasonable and within my discretion to insist that witnesses appear in-person to testify. Tr. 3285-86.

DENIED: the Motion timely filed on July 17, 2009 by the American Independent Dairy Alliance ("AIDA"), members of which include Kreider Dairy of Pennsylvania, Snowville Creamery of Ohio, Heartland Dairy of Missouri, Braums Dairy of Oklahoma, GH Dairy-El Paso, Texas, Longmont Dairy of Colorado, and Aurora Organic Dairy of Colorado, over the signatures of Alfred W. Ricciardi, Esq., Ryan K. Miltner, Esq., and Nancy S. Bryson, Esq. AIDA also requests reversal of my decisions made May 15, 2009 regarding expected witness Jeff Sapp's inability to appear in-person; and AIDA requests reopening the hearing to take testimony and exhibits of Jeff Sapp, and to take additional cross-examination of witnesses from Dean Foods, National Milk Producers Federation and the International Dairy Food Association. I cannot refrain from noting the effective testimony of Mr. Hein Hettinga (Tr. 2690-2764), since AIDA wants the benefits of competition to be fully presented to the Secretary. I respectfully decline to change my rulings made May 15, 2009, for the reasons stated in the foregoing paragraph.

DENIED: the Motion timely filed on July 20, 2009 by Nature's Dairy, Mallorie's Dairy, and Country Morning Farms, over the signature of John H. Vetne, Esq. I respectfully decline to change my rulings made May 15, 2009, for the reasons stated in the two foregoing paragraphs.

GRANTED: the Motion timely filed on July 20, 2009, by Select Milk Producers, Inc. and Continental Dairy Products, Inc., over the signature of Benjamin F. Yale, Esq., to extend the time to file, through July 20, 2009. This Motion is granted because there is good reason for the extension. **All motions and briefs, filed by any party on July 20, 2009, shall be accepted as timely filed.** One "glitch" encountered on July 17, 2009, was that the USDA Security Guards at the building entrance were calling the Hearing Clerk's direct line (he had the day off) to arrange escort, instead of 202.720.4443, the line for the Hearing Clerk's office, which would have been answered. Another "glitch" encountered on July 17, 2009, was that deliverers of boxes were re-directed to the C Street entrance for inspection (and resultant delay). With apologies,

Done at Washington, D.C. this 23rd day of July 2009

Jill S. Clifton Administrative Law Judge