

# Dairy Producers Sue California Dairies, Inc. & DairyAmerica: Claim NFDM Price Misreporting Resulted in Milk Income Losses

by Pete Hardin and John Bunting

Bombs away! On Friday, March 6, 2009, a legal complaint was filed on behalf of four dairy producers, seeking certification for a class action lawsuit against California Dairies, Inc. (CDI) and DairyAmerica.

Long-running failure to properly report weekly sales prices for nonfat dry milk by CDI is cited as cause for untold “millions of dollars” of financial losses suffered by dairy farmers whose milk was priced by USDA’s federal milk order system. On January 1, 2000, USDA revised federal milk order pricing system to use weekly dairy commodity prices as the bases for pricing farm milk. Plaintiff’s attorneys contend that DairyAmerica intentionally misreported weekly milk powder prices from January 2002 through April 30, 2007.

At issue: failure to comply with USDA’s “30 day rule” – a stipulation that no sales based upon contracts older than 30 days may be included in the mandatory, weekly price reporting surveys submitted to USDA.

The legal complaint states:

“From January 1, 2002 through April 30, 2007, DairyAmerica negligently and incorrectly reported dairy product prices to NASS. As a result, the raw milk prices set by the FMMOS were lower than they should have been, and Plaintiffs and other members of the proposed class of dairy farms were deprived of millions of dollars of income.”

Further, the complaint alleges:

“At all times relevant to this Complaint, DairyAmerica was aware that the dairy product price it reported to NASS would be, and were intended to be, incorporated into the raw milk prices set by FMMO’s and paid to dairy farmers. Yet, by its own admission, DairyAmerica failed to properly report its dairy product prices to NASS.”

The complaint asserts that dairy farmers whose monthly prices are determined by USDA lost unspecified, large amounts of milk revenue. Further, the complaint asserts that CDI and DairyAmerica unduly profited by these misrepresentations in weekly reports to USDA. Had CDI and DairyAmerica honestly reported the figures, their raw product costs would have been higher at times, the complaint details.

In June 2007, USDA calculated the financial loss to dairy farmers as \$50 million.

However, USDA calculated those losses as only affecting Class II (cultured products) and Class IV (butter-powder) prices. Since the nonfat dry milk price began to rise sharply in April 2007 (after this misreporting ruse was unveiled), logically, milk used for nonfat dry milk production was competing with milk going into the cheese vat. Plotting out the correlating rise in both nonfat dry milk and Cheddar commodity prices, as demonstrated by NASS’ weekly price surveys (starting in April 2007), indicates all classes of milk utilization would be affected and the amount of price short-changing suffered by dairy farmers was far larger than USDA’s lowball estimates of price impact for the misreporting.

As many as 50,000 U.S. dairy farmers’ milk prices may have been understated, due to failure by CDI/DairyAmerica to properly report nonfat dry milk prices.

## Calif. Milk Pricing Not Covered By Milk Powder Lawsuit

The class action complaint filed against DairyAmerica and California Dairies, Inc. has no bearing on dairy producers whose prices are set by the California Department of Food and Agriculture’s milk-pricing system.

This lawsuit targets DairyAmerica and CDI only producers whose milk prices were established by USDA’s federal milk order program, during the period January 1, 2002 through April 30, 2007.

Some possible implications might arise for legal matters specifically concerning similar claims by California dairy producers in matters of milk powder price misreporting. But at this time, such considerations are strictly theoretical.

## The rogue’s gallery:

CDI is the largest dairy producers cooperative, based in Fresno, California. CDI owns dairy processing plants. CDI is the nation’s largest producer of nonfat dry milk powder.

DairyAmerica is a “marketing agency in common” for nine dairy cooperatives based in the U.S. Those individual dairy co-ops are not named as defendants in the complaint. DairyAmerica operates as the exclusive marketing agent for milk powder (and other dairy protein powders) produced by the nine cooperatives.

The complaint was filed in United States District Court/Eastern District of California, Fresno Division. Representing the four plaintiffs is the Washington, D.C.-based law firm Cohen, Milstein, Sellers & Toll, PLLC.

The four plaintiffs are all dairy farmers: Gerald Carlin (Meshoppen, Pennsylvania); John Rahm (Versailles, Ohio); Paul Rozwadowski (Stanley, Wisconsin); and Bryan Wolfe (Rome, Ohio).

## Where CDI/DairyAmerica went wrong

In spring 2006, DairyAmerica officials worried about a potential build-up of surplus milk powder in the U.S. They’d failed to recognize key global signals that long-time surplus supplies of nonfat dry milk no longer existed.

DairyAmerica, in the spring of 2006, entered a long-term milk powder export price contract with Fonterra, the New Zealand-based dairy export behemoth. By late summer and early fall 2006, the U.S. was shipping out as much as half of all the milk powder it produced to serve the export markets. Domestic and global prices rose sharply. DairyAmerica even “shorted” contracted domestic buyers of nonfat dry milk to meet export contracts. “Spot” prices in the U.S. rose to as high as \$2.00 per pound. But CDI/DairyAmerica consistently reported weekly milk powder prices below \$1 per pound until late November/early December 2006.

Whether by error or by design (more likely), CDI/DairyAmerica repeatedly cited contract prices for product sold (at lowball prices) to Fonterra throughout a tremendous global run-up of nonfat dry milk prices. As the lawsuit notes, had CDI/DairyAmerica reported milk powder prices honestly, the sellers would have lost large amounts of money as their raw product costs would have risen sharply. On that issue, the complaint specifically alleges:

“Defendants have been unjustly enriched at the expense of Plaintiffs and members of the class. Specifically, DairyAmerica’s negligent actions as described above enabled the Defendants to pay below market prices to Plaintiffs and other Class members for the purchase of raw milk, thus unjustly providing considerable economic benefits to the Defendants.”

## CDI & DairyAmerica: Siamese twins

CDI and DairyAmerica are dramatically intertwined, the complaint details. Richard Cotta, CDI’s President and CEO, served as Chairman of DairyAmerica’s board of directors. Gerben Leyendekker, CDI’s Treasure (and executive committee member), serves on DairyAmerica’s board of directors. Steve Maddox, CDI’s Secretary, served on DairyAmerica’s board of directors.

Further, former CDI Senior Vice President and Chief Operating Officer Keith Gomes served simultaneously as DairyAmerica’s President, before departing CDI in 2008.

## CDI has already admitted mistakes

The beauty of this lawsuit is that CDI officials have already acknowledged that their cooperative committed the milk powder price reporting errors that are referred to in the lawsuit. Once revealed by *The Milkweed* in this publication’s March 2007 issue, the milk powder pricing fiasco quickly developed a life of its own. DairyAmerica CEO Rich Lewis admitted price reporting mistakes to USDA in early April 2007. USDA commenced a hasty review of the issue and ordered all firms reporting nonfat dry milk powder prices to resubmit price data for all weeks in question. In late June 2007, USDA issued

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10 EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION	
11	
12 GERALD CARLIN, JOHN RAHM, PAUL ROZWADOWSKI and BRYAN WOLFE, individually and on behalf of themselves and all others similarly situated,	Case No.
13 Plaintiffs,	CLASS ACTION COMPLAINT
14 v.	DEMAND FOR JURY TRIAL
15 DAIRYAMERICA, INC. and CALIFORNIA DAIRIES, INC.,	
16 Defendants.	
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19 Individual and Representative Plaintiffs Gerald Carlin, John Rahm, Paul Rozwadowski and Bryan Wolfe, on behalf of themselves and all others similarly situated, allege:	
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21 1. This class action is brought on behalf of dairy farmers located in Wisconsin, Pennsylvania, New Mexico, Minnesota, Texas, Michigan, Washington, Ohio, Iowa, Arizona, Vermont, Colorado, Kansas, Florida, Illinois, Missouri, Georgia, Kentucky, South Dakota, Tennessee, Nebraska, North Carolina, Oklahoma, Maine and California who sold raw milk that was priced according to a Federal Milk Marketing Order (“FMMO”) during the period January 1, 2002 through April 30, 2007.	
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27 2. Plaintiffs and tens of thousands of other dairy farmers sold raw milk that was	
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	- 1 - CLASS ACTION COMPLAINT

## Legal Complaint on Our Web Site

The entire, 20-page legal complaint is available on *The Milkweed’s* Web site: [www.themilkweed.com](http://www.themilkweed.com).

Near the top of the home page, just click on the blue headline “Nonfat Milk Reporting Complaint” and a PDF of the full lawsuit, as filed, can be viewed and downloaded.

The complaint details an excellent history of the milk powder pricing scandal and shows how the defendants repeatedly failed to properly report nonfat dry milk prices to USDA from January 1, 2002 through April 30, 2007.

*The Milkweed* is widely credited in the complaint, and cited by a government investigation, for having uncovered these milk powder misreporting events.

a final report of the matter. But USDA officials soft-peddled the price impact ... estimating that the costs to farmers’ milk prices totaled only about \$50 million – a few pennies per cwt. But USDA’s flawed conclusions failed to account for additional value that higher nonfat dry milk prices would have had on Class I (fluid milk) and Class II (cultured products) in USDA’s complicated milk pricing scheme.

When including economic impact on Class I and Class II prices, *The Milkweed* estimated (in March 2007) that dairy farmers whose prices were set by federal milk orders lost over half a billion dollars in milk income (from August 2006 through January 2007).

## Seeking payments for reporting failure ...

In summary, the legal complaint against CDI and DairyAmerica seeks financial relief for dairy producers on a matter in which private and public players have miserably failed.

CDI/DairyAmerica repeatedly failed to properly report weekly nonfat dry milk prices to USDA’s National Agricultural Statistics Service (NASS). In turn, NASS repeatedly failed to recognize that the largest player in the nation’s milk powder industry was seriously under-reporting weekly sales prices. Another USDA branch, Dairy Market News, had observed at least a couple months before *The Milkweed* article appeared in March 2007 that the spread between NASS weekly nonfat dry milk prices and other measures of that commodity’s value was dramatically divergent.

CDI/DairyAmerica failed to accurately report nonfat dry milk prices to USDA. USDA doubly failed in its task. First, USDA’s NASS failed to be on top of the obviously erroneous prices reported weekly by CDI/DairyAmerica throughout fall 2006 into

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# Dairy Producers Sue CDI/DairyAmerica

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early spring 2007. Secondly, USDA's "investigation" into the milk powder pricing failures was a cover-up. Once again, USDA shilled for its beloved major dairy cooperatives.

### **Analysis: USDA conspired with cover-up**

USDA ought to be an unnamed co-conspirator in this case. In the March 2007 issue of *The Milkweed*, it was reported:

"Finally, USDA bears the lion's share of the guilt. USDA has enough economists to start a small war, and indeed you could say they have waged war on America's dairy farmers. Collectively, those economists have the mental capacity to understand a market system needs price input signals from many sources."

### **List of DairyAmerica's Member Co-ops**

DairyAmerica is a marketing agency in common for nine member cooperatives that produce nonfat dry milk and, in some instances, skim milk

powder. The nine cooperatives use DairyAmerica as a single sales arm for both domestic and export sales of dairy protein powders.

Export sales of dairy protein powders are exclusively contracted with Fonterra, a New Zealand-based global dairy product marketer.

As member/owners of DairyAmerica, the cooperatives have presumed legal liability for the financial and legal obligations of DairyAmerica. Co-ops belonging to DairyAmerica include:

- Dairy Farmers of America
- Land O'Lakes
- California Dairies, Inc.
- Maryland & Virginia Co-op Milk Producers Assn.
- Agri-Mark
- O-AT-KA
- St. Albans Co-op
- Lone Star Milk Producers
- United Dairymen of Arizona