

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

HUGH HENLEY, PRESTIGE PROTEINS,
PRESTIGE MILK PROTEINS, LLC, and
AGRI-DAIRY PRODUCTS, INC.,

Defendants.

USDC SDNY
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**STIPULATION AND ORDER OF
SETTLEMENT AND DISMISSAL AS TO
AGRI-DAIRY PRODUCTS, INC.**

14 Civ. 2030 (WHP)

WHEREAS, this Stipulation and Order of Settlement and Dismissal is entered into by and among plaintiff the United States of America (the "United States"), by its attorney Preet Bharara, United States Attorney for the Southern District of New York, and defendant Agri-Dairy Products, Inc. ("Agri-Dairy") (collectively, the "Parties"); and

WHEREAS, Agri-Dairy is, and has been at all times relevant to this action, a New York company in the business of importing and supplying dairy products, including casein and nonfat dry milk;

WHEREAS, the United States, through the United States Department of Agriculture ("USDA"), is responsible for administering the Dairy Product Price Support Program ("DPPSP"), and as a result of the DPPSP, at times, maintains surplus stocks of dairy products, including nonfat dry milk;

WHEREAS, the USDA has authority to offer for sale such surplus stocks of nonfat dry milk to individuals or entities on a bid basis and may accept bids at discounted prices in

SO ORDERED:

3/28/14


WILLIAM H. PAULEY III U.S.D.J.

order to promote the strengthening of the domestic casein industry: nonfat dry milk sold under that authority must be used only for the manufacture of casein or caseinate, which are ubiquitous proteins that are commonly made from nonfat dry milk but are rarely manufactured domestically;

WHEREAS, in accordance with its authority, on certain occasions, the USDA has acquired surplus nonfat dry milk and has issued invitations for competitive bids to purchase that nonfat dry milk, which is restricted for sale to those who certify that the purchaser itself would use the product solely for the purpose of domestic conversion of the nonfat dry milk into casein or caseinate within 90 days, among other requirements;

WHEREAS, on or about March 24, 2014, the United States on behalf of the USDA filed a Complaint (the "Complaint") in the United States District Court for the Southern District of New York (the "Court") pursuant to the False Claims Act, 31 U.S.C. §§ 3729-33 (the "FCA" or "False Claims Act");

WHEREAS, the Complaint alleges, among other things, that Agri-Dairy, and co-defendants Hugh Henley ("Henley"), and two entities that Henley owns or owned, Prestige Proteins and Prestige Milk Proteins, LLC (together, the "Prestige entities"), defrauded the United States by making, and causing to be made, misrepresentations to the USDA in connection with two 2009 bids to, and purchases from, the USDA, such that defendants fraudulently acquired more than two million pounds of subsidized, discounted NDM, and unlawfully resold it at market prices for substantial profits, instead of using it for domestic conversion of NDM into casein or caseinate; as certified and required (including all the allegations in the Complaint, the "Covered Conduct");

WHEREAS, the Complaint seeks treble damages and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-3733, as well as damages under the common law;

WHEREAS, the Parties desire to reach a full and final settlement and compromise of the claims that the United States asserts against Agri-Dairy by entering into this Stipulation (the "Stipulation");

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The Parties consent to this Court's exercise of personal jurisdiction over each of them.

2. In settlement of this action, Agri-Dairy shall pay to the United States, no later than fifteen (15) days after the Effective Date, as defined in Paragraph 22 below, \$632,527.56 (the "Settlement Amount"). The Settlement Amount shall be made by check or electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Southern District of New York.

3. Agri-Dairy Products, Inc. admits, acknowledges, and accepts responsibility for the following facts:

a. On or about June 1, 2009, and November 25, 2009, Henley presented two bids to the USDA to purchase discounted nonfat dry milk ("NDM");

b. In those bids to purchase NDM, Henley falsely certified that the NDM would be used solely for domestic conversion into casein or caseinate, one of USDA's requirements for purchasing the NDM;

c. The two false bids were made pursuant to an agreement between Agri-Dairy and Henley, by which the NDM would not be used for the purpose of domestic

conversion into casein or caseinate, but instead would be sold by Agri-Dairy to third parties, with the net profits from the sale split between Henley and the Prestige entities, on the one hand, and Agri-Dairy, on the other;

d. Pursuant to that agreement, the NDM that Henley acquired from the USDA in connection with the June and November 2009 bids was not converted to casein, but was resold by Agri-Dairy; the net profits from those sales were split between Henley and the Prestige entities, on the one hand, and Agri-Dairy, on the other; and

e. On or about October 5, 2009, and March 9, 2010, Henley falsely certified that the NDM purchased from the USDA in connection with the June and November 2009 bids had been converted to casein or caseinate, when in fact that had not occurred.

4. Agri-Dairy further admits and acknowledges that the Stipulation, including the Settlement Amount, is fair, reasonable, and adequate under the facts and circumstances.

5. Subject to the exceptions in Paragraph 7 below (concerning excluded claims), conditioned upon Agri-Dairy's timely payment of the full Settlement Amount, the United States releases Agri-Dairy and all of its current or former directors, officers, employees, agents, or shareholders from any civil monetary claim that the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; and the common law theories of fraud, civil conspiracy to defraud, unjust enrichment, and conversion.

6. Agri-Dairy agrees to cooperate fully with the United States in connection with the investigation of the schemes to defraud the United States alleged in the Complaint. Specifically, Agri-Dairy agrees that it shall (a) provide complete and truthful disclosure of all non-privileged information as may be required by the United States with respect to the Covered Conduct, and (b) provide testimony as requested by the United States in connection with any criminal, civil, or administrative proceeding in connection with the Covered Conduct.

7. Notwithstanding the release given in Paragraph 5 of this Stipulation, or any other term of this Stipulation, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct; and
- e. Any liability based on obligations created by this Stipulation.

8. Agri-Dairy shall be in default of this Stipulation if it fails to make the payment required, on the terms required, in paragraph 2. The United States will provide written notice of the default, to be sent by first-class mail to the counsel for Agri-Dairy identified in Paragraph 21 below. In the event of default, the Settlement Amount shall be immediately due and payable, and interest shall accrue at the rate of 5% per annum compounded daily on the remaining unpaid principal balance, beginning seven (7) business days after delivery of the

notice of default. If the Settlement Amount is not paid in full within seven (7) business days after delivery of the notice of default, the United States may, at its option: (a) seek specific performance of the Stipulation; (b) offset the remaining unpaid balance of the Settlement Amount from any amounts due and owing Agri-Dairy by any department, agency or agent of the United States at the time of default; (c) reinstate this lawsuit; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. Agri-Dairy shall not contest any offset imposed or any collection action undertaken by the United States pursuant to this paragraph, either administratively or in any State or Federal court. In addition, Agri-Dairy shall pay to the United States all reasonable costs of collection and enforcement under this paragraph, including attorney's fees and expenses. In the event that the United States opts to rescind this Stipulation pursuant to this paragraph, Agri-Dairy shall not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims which relate to the Covered Conduct, except to the extent those defenses were available on the date of the filing of the Complaint in this action.

9. Agri-Dairy waives and will not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the United States Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action. Nothing in this paragraph or any other provision of the Stipulation constitutes an agreement by the United States concerning the characterization

of the Settlement Amount for purposes of the Internal Revenue Code, Title 26 of the United States Code or New York State Tax Law.

10. Agri-Dairy fully and finally releases the United States, and its agencies, departments, officers, agents, employees, and servants from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Agri-Dairy has asserted, could have asserted, or may assert in the future against the United States, its agencies, departments, officers, agents, employees, and servants related to the Covered Conduct, and the United States' investigation and prosecution thereof, and this Stipulation.

11. This Stipulation is intended to be for the benefit of the parties only. The parties do not release any claims against any other person or entity, except as provided in this Stipulation. Until the cooperation described above in Paragraph 6 is no longer required by the United States and the Settlement Amount has been fully satisfied, Agri-Dairy shall maintain custody of, or make arrangements to maintain, all of its documents and records related to the Covered Conduct.

12. If, within 91 days of the effective date of this Stipulation or within 91 days of any payment under this Stipulation, Agri-Dairy commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization or relief of debtors: (i) seeking to have any order for relief of any Agri-Dairy debts; (ii) seeking to adjudicate any of Agri-Dairy as bankrupt or insolvent; or (iii) seeking appointment of a receiver, trustee, custodian or other similar official for Agri-Dairy or for all or any substantial part of any of their assets, then:

- a. Agri-Dairy's obligations under this Stipulation shall not be avoided pursuant to 11 U.S.C. § 547, and Agri-Dairy shall not argue or otherwise take the position in any such case, proceeding or other action that: (i) Agri-Dairy's obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) Agri-Dairy was insolvent at the time this Stipulation was entered into, or became insolvent as a result of the payments made to the United States hereunder; or (iii) the mutual promises, covenants and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to Agri-Dairy.
- b. In the event that Agri-Dairy's obligations hereunder are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Stipulation, and bring any civil and/or administrative claim, action or proceeding against Agri-Dairy for the claims that would otherwise be covered by the releases provided in paragraph 5, above. Agri-Dairy agrees that (i) any such claims, actions, or proceedings brought by the United States are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this paragraph; (ii) Agri-Dairy shall not contend that any such claims, actions or proceedings brought by the United States are subject to an automatic stay pursuant to 11 U.S.C. § 362(a) as a result of the action, case or proceeding described in the first

clause of this paragraph; (iii) Agri-Dairy shall not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any such civil or administrative claims, actions or proceedings which are brought by the United States within thirty (30) calendar days of written notification to him that the releases herein have been rescinded pursuant to this paragraph, except to the extent such defenses were available on the date the Complaint was filed in this action; and (iv) Agri-Dairy shall not contest the validity of a claim filed by the United States against him for the Settlement Amount and the United States may pursue its claims in the case, action or proceeding referenced in the first clause of this paragraph, as well as any other case, action, or proceeding.

- c. Agri-Dairy's agreements in this paragraph are provided in exchange for valuable consideration provided in this Stipulation.

13. Except as expressly provided to the contrary in this Stipulation, the United States and Agri-Dairy shall each bear their own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

14. This Stipulation is governed by the laws of the United States. The parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the parties under this Stipulation as it relates to this action will be the United States District Court for the Southern District of New York. The parties waive any objection that any of them may now have or hereafter may have to this venue, whether concerning this Stipulation or for any related

suit, action or proceeding, and irrevocably consent to the jurisdiction of this Court and agree to accept and acknowledge service in any such suit, action or proceeding.

15. For purposes of construction, this Stipulation shall be deemed to have been drafted by all parties to this Stipulation and shall not, therefore, be construed against any party for that reason in any subsequent dispute.

16. Any failure by the United States to insist upon the strict performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the United States, notwithstanding that failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Stipulation.

17. If any part of this Stipulation shall for any reason be found or held invalid or unenforceable by any court of competent jurisdiction, such invalidity or unenforceability shall not affect the remainder of this Stipulation, which shall survive and be construed as if such invalid unenforceable part had not been contained herein.

18. This Stipulation constitutes the complete agreement between the parties. This Stipulation may not be amended, changed, modified or waived except in writing signed by all parties or their authorized representatives.

19. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

20. Subject to the exceptions herein, in consideration of the obligations of Agri-Dairy in this Stipulation, conditioned upon the timely full payment of the Settlement Amount, this action shall be dismissed with prejudice as to all claims the United States has

asserted based on the Covered Conduct, and to the extent of, and as governed by, this Stipulation. The Court shall retain jurisdiction over this Stipulation and each party to the extent the obligations herein remain unsatisfied.

21. Any notices pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery or express mail, and shall be addressed as follows:

IF TO THE UNITED STATES:

Sarah J. North, Assistant United States Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007

IF TO DEFENDANT AGRI-DAIRY PRODUCTS, INC.:

Philip A. De Caro, Esq.
DeCaro & DeCaro, P.C.
480 Mamaroneck Avenue
Harrison, New York 10528

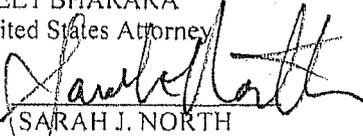
22. The effective date of this Stipulation is the date upon which this Stipulation is entered by the Court (the "Effective Date").

23. The Parties represent that this Stipulation is freely and voluntarily entered into without any degree of duress or compulsion whatsoever and upon due deliberation with the advice of counsel.

For the United States:

Dated: New York, New York
March 21, 2014

PREET BHARARA
United States Attorney

By: 

SARAH J. NORTH
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2639
Facsimile: (212) 637-2717
E-mail: Sarah.North@usdoj.gov

For Agri-Dairy Products, Inc.:

Dated: Harrison, New York
March 22, 2014

DE CARO & DE CARO, P.C.

By: 

PHILIP A. DE CARO, ESQ.
480 Mamaroneck Avenue
Harrison, New York 10528
Telephone: (914) 835-6200
Facsimile: (914) 835-6800
E-Mail: Phil@decaro.com

Dated: New York, New York
_____, 2014

SO ORDERED:

UNITED STATES DISTRICT JUDGE