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September 17, 2013

William Schiek, Ph.D.  
Dairy Institute of California  
1127 Eleventh Street, Suite 718  
Sacramento, CA 95814

***Re: September 12, 2013 Hearing to Consider Changes to the Stabilization and Marketing Plan; Post Hearing Brief on Behalf of Dairy Institute of California by Legal Counsel***

Dear Dr. Schiek:

At the Hearing called by the California Department of Food and Agriculture to consider changes to California's Stabilization and Marketing Plan for Market Milk for the Northern California and Southern California Marketing Areas held on September 12, 2013, I was given permission to file a Post Hearing Brief on behalf of Dairy Institute of California. In the interests of simplifying the Hearing Panel's task of processing all of the information presented, it would probably be most efficient to have you include my comments into the post hearing brief that you are filing today. Accordingly, I am forwarding this document to you with the understanding that you will, in turn, include it with your submission to the Department.

The Notice of Consolidated Public Hearing issued by Kevin Masuhara on August 5, 2013 (the "Notice") gave specific directions about the information legally necessary to justify the Secretary in acting on the petitions filed by California Dairies, Inc., Milk Producers Council, California Dairy Campaign and Western United Dairymen. In addition to other matters, the Notice highlighted the critical need for three classes of information by stating as follows:

Proponents of the petition... shall address the sufficiency of the calculation of the whey factor *by reference to quantifiable economic data and methodologies*; such as but not limited to: manufacturing cost data, market and sales data, and the whey stream valuation *directly applicable to California plants*. (Notice, p. 2; emphasis added.)

...

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The Department has highlighted issues and concerns with the serviceability of end product pricing components including whey valuation as outlined in the written results from previous hearings, industry letters from the Director and responses to hearing petitions. Specifically, *these issues and concerns are the lack of transparent data that are readily available, data that cannot be published due to confidentiality, and data that are directly related to the manufacturing and marketing of California whey products.* (Notice, p. 3; emphasis added.)

...

In relation to the whey factor, [proponents and opponents of the petition and alternative proposals] shall address the extent to which the factor can be *transparently calculated* as a component of the Class 4b price and *fairly imposed* upon processors. (Notice, p. 3; emphasis added.)

Despite the clear directive in the Notice, proponents of the Petition failed to provide any testimony at the hearing addressing these issues. No witnesses addressed the sufficiency of the whey factor by referring to quantifiable economic data and methodologies such as manufacturing cost data, market and sales data, and the whey stream valuation directly applicable to California plants. No witnesses presented testimony resolving issues and concerns presented by the lack of readily available transparent data about the manufacturing and marketing of California whey products, as well as concerns that data about these matters cannot be published due to confidentiality. No witnesses presented credible evidence explaining how the whey factor, modified as proposed in the Petition or as presently constituted, can be transparently calculated as a component of the Class 4b price and fairly imposed upon California processors.

The absence of any such evidence in the hearing record is fatal. As a matter of California law, the use or application of any whey factor without evidence in the administrative record showing the prices, costs and yields of California handlers would exceed the Secretary's authority under the Food and Agricultural Code.

Very truly yours,



JOHN M. LEMMON,

Legal Counsel for Dairy Institute of California

JML/bns