

1 ROBERT M. CHILVERS, Calif. Bar No. 65442
AVIVA CUYLER, Calif. Bar No. 185284
2 CHILVERS & TAYLOR PC
83 Vista Marin Drive
3 San Rafael, California 94903
4 Telephone: (415) 444-0875
Facsimile: (415) 444-0578

5 Attorneys for Plaintiffs
6 Straus Family Creamery, Inc. and
Horizon Organic Holding Corporation
7

8
9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 STRAUS FAMILY CREAMERY, INC. and)
HORIZON ORGANIC HOLDING)
CORPORATION.)
14 Plaintiffs,)

15 vs.)

16 WILLIAM B. LYONS, JR., Secretary,)
California Department of Food and)
Agriculture,)
17 Defendant.)

Case No.: C 02 1996 BZ

18 **PLAINTIFFS' MEMORANDUM OF**
19 **POINTS AND AUTHORITIES IN**
20 **SUPPORT OF MOTION FOR SUMMARY**
21 **JUDGMENT**

Hearing Date: July 30, 2003

Time: 10:00 a.m.

Department: G

Judge: Magistrate Judge Bernard
Zimmerman

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 1
- II. STATEMENT OF ISSUES 2
- III. STATEMENT OF FACTS 2
 - A. LEGAL BACKGROUND 2
 - 1. The Milk Stabilization Laws 2
 - 2. The Milk Pooling Laws 4
 - 3. The Organic Food Laws 5
 - B. FACTUAL BACKGROUND 7
- IV. ARGUMENT 12
 - A. STANDARD FOR GRANTING MOTION FOR SUMMARY JUDGMENT 12
 - B. THE STABILIZATION AND POOLING LAWS, AS APPLIED BY DEFENDANT, VIOLATE PLAINTIFFS’ CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS 12
 - 1. The Court’s Review is Based on the Rational Basis Test 12
 - 2. Defendant’s Application of the Stabilization and Pooling Laws to Plaintiffs is Arbitrary and Irrational 14
 - a. It is Irrational to Require Plaintiffs to Subsidize Conventional Producers 14
 - 1. Plaintiffs Do Not and Cannot Purchase Milk from Conventional Producers 15
 - 2. The Defendant Does Not Even Attempt to Rationally Relate the Pool to Organic Production and Processing .. 17
 - b. Calculating Plaintiffs’ Pool Obligation Based on Conventional Milk Values is Arbitrary and Irrational 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

C. THE REFERENDUM REQUIREMENT, AS APPLIED BY DEFENDANT, VIOLATES PLAINTIFFS’ CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS 21

1. The Referendum Requirement, As Applied, Improperly Delegates Decision Making Authority Affecting Plaintiffs to Members of a Distinct Industry Who Have a Direct Pecuniary Interest in Their Decision 22

2. Defendant’s Application of Section 62717 Is An Unlawful Delegation of Authority 23

V. CONCLUSION 25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<u>CASES</u>	<u>PAGE</u>
<u>Bayside Timber Co., Inc. v. Board of Supervisors</u> , 20 Cal.App.3d 1 (1971)	22, 23
<u>Carter v. Carter Coal Co.</u> , 298 U.S. 233, 56 S.Ct. 855 (1936)	23, 25
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 106 S. Ct. 2548 (1986)	12
<u>Cornwell v. Hamilton</u> , 80 F.Supp.2d 1101 (S.D.Cal. 1999)	13, 14, 17
<u>Exxon Corp. v. Governor of Maryland</u> , 437 U.S. 117, 98 S.Ct. 2207 (1978)	13
<u>Faulkner v. Jones</u> , 10 F.3d 226 (4 th Cir. 1993)	13
<u>Fry v. City of Hayward</u> , 701 F.Supp. 179 (N.D.Cal. 1988)	24
<u>Gibson v. Berryhill</u> , 411 U.S. 564, 93 S.Ct. 1689 (1973)	22
<u>Greene v. McElroy</u> , 360 U.S. 474, 79 S.Ct. 1400 (1959)	13
<u>H.P. Hood & Sons, Inc. v. United States</u> , 307 U.S. 588, 59 S.Ct. 1019 (1939)	23
<u>Hillside Dairy, Inc. v. Lyons</u> , 529 U.S. __ (2003)	2
<u>International Assoc. of Plumbing & Mechanical Officials v. California Building Standards Commission</u> , 55 Cal.App.4th 245 (1997)	23-24
<u>Jenness v. Fortson</u> , 403 U.S. 431, 91 S.Ct 1970 (1971)	13
<u>Johnson v. Michigan Milk Marketing Board</u> , 295 Mich. 644, 659-660, 295 N.W. 346 (1940)	23
<u>Jones v. Bergland</u> , 440 F.Supp. 485 (E.D.Pa. 1977)	13, 24
<u>Kass v. Brannan</u> , 196 F.2d 791 (2 nd Cir. 1952)	15-16, 19-20
<u>Lebbos v. Judges of the Superior Court</u> , 883 F.2d 810 (9 th Cir. 1989)	13
<u>Lehigh Valley Cooperative Farmers, Inc. v. United States</u> , 370 U.S. 76, 82 S.Ct. 1168 (1962)	4, 22
<u>Mountain Timber Co. v. Washington</u> , 243 U.S. 219, 37 S.Ct. 260 (1917)	19
<u>Noble State Bank v. Haskell</u> , 219 U.S. 104, 31 S.Ct. 186 (1911)	19

1 Pringle v. U.S. of America,
2 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. December 8, 1998) 20

3 Railroad Retirement Board v. Alton Railroad Co.,
4 295 U.S. 330, 55 S.Ct. 758 (1935) 19, 20

5 United States v. Rock Royal Cooperative, Inc.,
6 307 U.S. 533, 59 S.Ct. 993 (1939) 19

7 Thompson v. Consolidated Gas Utilities Corp.,
8 300 U.S. 55, 57 S.Ct. 364 (1937) 15, 16

9 Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927) 22

10 Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972) 22

11 Washington ex rel. Seattle Title Trust Co. v. Roberge,
12 278 U.S. 116, 49 S.Ct. 50 (1928) 24, 25

13 Young v. City of Simi Valley, 216 F.3d 807 (9th Cir. 2000) 24, 25

14 Zuber v. Freeman, 402 F.2d 660 (D.C.App. 1968) 25

15 **CONSTITUTIONAL PROVISIONS**

16 U.S. Const. Amend. 5 1, 12-13

17 U.S. Const. Amend. 14 1, 12-13

18 Cal. Const. Art. 1, Sec. 7(a) 1, 12-13

19

20 **STATUTORY PROVISIONS**

21 7 U.S.C. § 7401(E) (2002) 19

22 California Code of Food & Agriculture §§ 61801-62403 2

23 California Code of Food & Agriculture § 61802 2, 14, 24

24 California Code of Food & Agriculture § 61805 2, 3, 24

25 California Code of Food & Agriculture § 61807 3, 19, 24

26 California Code of Food & Agriculture §§ 61931-61937 3

27 California Code of Food & Agriculture § 61962 24

28

1
2 California Code of Food & Agriculture § 62062 3, 17, 19, 24
3 California Code of Food & Agriculture § 62701 4, 14
4 California Code of Food & Agriculture § 62702 4, 14-15
5 California Code of Food & Agriculture § 62717 21-24
6
7 California Health and Safety Code § 110810, *et seq.* 5

8 **REGULATORY PROVISIONS**

9 7 CFR Part 205, § 205.236 6, 7, 9, 15
10 7 CFR Part 205, § 205.237 6, 7, 8, 9
11 7 CFR Part 205, § 205.238 6, 9
12 7 CFR Part 205, § 205.239 6, 9
13 7 CFR Part 205, § 205.603 6
14 7 CFR Part 205, § 205.604 6
15
16 Pooling Plan for Market Milk as Amended, Passim
17
18 Stabilization and Marketing Plan for Market Milk, as Amended, Passim

19 **TREATISES**

20 Lawrence H. Tribe, American Constitutional Law 1438 (2d ed. 1988) 21
21
22
23
24
25
26
27
28

1 I. INTRODUCTION

2 In this action, Plaintiffs Straus Family Creamery, Inc. (“Straus”) and Horizon Organic
3 Holding Corporation (“Horizon”), challenge the constitutionality of California’s milk
4 stabilization and pooling laws as applied. Defendant requires plaintiffs, who process organic
5 dairy products, to pay money into a pool that is designed to provide a sustainable pay price to
6 conventional (but not organic) dairy farmers, from whom plaintiffs cannot, by law, purchase
7 milk. Defendant has further held that he could not alter this requirement without the assent of all
8 dairy farmers, the vast majority of whom produce conventional milk.
9
10

11 As applied to plaintiffs’ organic dairy businesses the pooling requirement violates
12 plaintiffs’ constitutional right to equal protection and substantive due process because it is
13 arbitrary and irrational to: (1) require plaintiffs to pool their revenues with conventional dairy
14 farmers from whom they cannot purchase milk; (2) require plaintiffs to participate in a pool that
15 is not designed to, and that does not, provide a sustainable pay price to the organic dairy farmers
16 from whom plaintiffs purchase milk; and (3) calculate the amount of money that plaintiffs must
17 pay into the pool without any regard for the costs incurred by organic dairy farmers and
18 processors. Accordingly, summary judgment on plaintiffs’ first and second claims is warranted.
19
20

21 Further, allowing conventional dairy farmers, from whom plaintiffs’ cannot purchase
22 milk, and who have a financial interest that is adverse to plaintiffs, to perpetuate the
23 unconstitutional application of the pooling requirement violates plaintiffs’ constitutional right to
24 procedural due process. Summary judgment on plaintiffs’ third claim is warranted.
25
26
27
28

1 II. STATEMENT OF ISSUES

2 A) Whether requiring plaintiffs to pool their revenues with the conventional dairy
3 industry, even though plaintiffs cannot and do not purchase conventional milk, and the pool does
4 not create a sustainable price for organic dairy farmers from whom plaintiffs do purchase milk, is
5 rationally related to a legitimate state interest; and
6

7 B) If so, whether calculating plaintiffs' Pool Obligation based on the costs of producing
8 conventional milk and the value of conventional manufactured dairy products, and without
9 regard to the unique factors and costs imposed on organic dairy operations by the organic food
10 laws, is rationally related to a legitimate state interest; and
11

12 C) Whether determination that he cannot amend the Pooling Plan to account for the
13 additional costs that organic producers are required to incur, without first submitting the
14 proposed change to a referendum of all market milk producers in California violates plaintiffs'
15 right to procedural due process.
16

17 III. STATEMENT OF FACTS

18 A. LEGAL BACKGROUND

19 1. The Milk Stabilization Laws

20
21 In 1935, the California legislature enacted the Milk Stabilization Act, Food & Agr. Code
22 §§ 61801-62403, to ensure that milk producers receive a fair and reasonable price for their milk
23 and are thereby able to comply with applicable health and safety regulations. Id., §§ 61802,
24 61805. The purpose of the Milk Stabilization Act is to “establish minimum producer prices at
25 fair and reasonable levels so as to generate reasonable producer incomes.” Id. § 61802(h);
26 Hillside Dairy, Inc. v. Lyons, 529 U.S. ___ (2003). Toward this end, the Milk Stabilization Act
27 authorizes the defendant to “determine minimum prices to be paid to producers by handlers
28

1 [processors] for market milk which are necessary due to varying factors of costs of production,
2 health regulations, transportation and other factors.” Id., § 61805(a), (d). The Milk Stabilization
3 Act divides processed milk products, such as fluid milk, yogurt and cheese, into different
4 “Classes”; fluid milk is designated as “Class 1,” and has the highest value. Food & Agr. Code §§
5 61931-61937; Joint Statement of Undisputed Facts (“Jt. Stmt.”), ¶ 19. Prior to 1967, the Milk
6 Stabilization Act and implementing regulations required processors to pay producers different
7 prices for their milk depending upon the “Class”, or use, to which the processor put the milk, in
8 accordance with the Minimum Class Prices established by defendant’s predecessors. Id.; Jt.
9 Stmt., ¶ 4.

12 The legislature authorized the defendant to promulgate market stabilization plans and
13 establish Minimum Class Prices by adopting methods or formulas whereby the prices can be
14 determined. Food & Agr. Code § 62062. The legislature directed that, in establishing the prices,
15 the defendant “shall take into consideration any relevant economic factors, including, but not
16 limited to . . . the reasonable and economic soundness of market milk prices for all classes,
17 giving consideration to the combined income from those class prices, in relation to the cost of
18 producing and marketing market milk for all purposes” and “the cost of management and a
19 reasonable return on necessary capital investment.” Food & Agr. Code § 62062. The legislature
20 mandated that the defendant take into consideration the “varying costs of production, health
21 regulations, and other factors of costs of production” resulting from “varying conditions of
22 production.” Id. § 61807. Defendant has established formulas from which the Minimum Class
23 Prices are derived regulations called Stabilization and Marketing Plans for Market Milk. Jt.
24 Stmt., ¶ 3. The variable inputs into these formulas are all based on the prices of conventional
25 dairy products. Id.

1 2. The Milk Pooling Laws

2 Under the system of Class pricing in effect prior to 1967 (pre-pooling), dairy producers
3 who sold milk to processors of Class 1 milk products received a higher price for their milk,
4 leading to heavy competition for those sales. Jt. Stmt., ¶ 4. The legislature determined that this
5 resulted in “unfair, unjust, destructive and demoralizing trade practices.” Food & Agr. Code §
6 62701. In response, the legislature enacted the Gonsalves Milk Pooling Act, (the “Pooling Act”),
7 which authorized the defendant to “equalize gradually the distribution of Class 1 usage among
8 producers of this state.” Id., § 62702. The regulations that defendant has implemented to
9 equalize the distribution of Class 1 usage are known as the Pooling Plan. Jt. Stmt., ¶ 4.
10
11

12 The Pooling Plan establishes prices (“Pool Prices”) to which producers are entitled for
13 their milk, regardless of the use to which the purchasing processor puts the milk. Jt. Stmt., ¶ 5.
14 The Pool Price is a function of the volume of milk used by processors for each Class of
15 manufactured milk product. Pool Prices are the result of pooling the dollars received from all
16 Grade A milk sales to processors according to the Class 1, 2, 3, 4a and 4b prices. Because Class
17 1 milk has the highest value, a reduction in the amount of Class 1 milk participating in the Pool
18 results in a reduction in the Pool Price. Id.
19
20

21 Under the Pooling Plan, if the total value of a processor’s class usage is greater than the
22 amount owed producers for their milk (based on Pool Prices), the processor pays the difference
23 into the pool equalization fund (“Pool”). Id., ¶ 6. Conversely, if the amount owed producers
24 (based on Pool Prices) is more than the value of the processor’s class usage, the processor
25 receives this difference from the Pool. Id. As described in Lehigh Valley Cooperative Farmers,
26 Inc. v. United States, 370 U.S. 76, 79-80, 82 S.Ct. 1168 (1962).¹
27

28 ¹ Lehigh describes the federal pooling act, but the California Pooling Plan works the same way.

1 Adjustments among handlers [*i.e.*, processors] are made by way of a “Producer
2 Settlement Fund,” into which each handler contributes the excess of his “use value”² over
3 the uniform price paid by him to his producer. Handlers whose “use value” of the milk
4 they purchase is less than the uniform price they are required to pay may withdraw the
5 difference from the fund. The net effect is that each handler pays for its milk at the price
6 it would have paid had it been earmarked at the outset for the use to which it was
7 ultimately put. But the farmer who produces the milk is protected from the effects of
8 competition for premium outlets since he is automatically allotted a proportional share of
9 each of the different “use” markets.

7 Thus, the Minimum Prices determine both the Pool Prices and the amount of money that a
8 processor must pay into the pool each month (the Pool Obligation). *Jt. Stmt.*, ¶ 7. The legislature
9 enacted the Pooling Act, and the defendant implemented the Pooling Plan, in the late 1960s, well
10 before the passage of the California Organic Food Act of 1990 and the National Organic
11 Program, effective October 2002. *Id.*, ¶ 8.

13 3. The Organic Food Laws

14 In addition to being subject to the health and safety regulations applicable to all
15 producers and processors of milk, producers and processors of organic dairy products are subject
16 to strict organic regulations. Plaintiffs’ Separate Statement of Undisputed Facts (“*Sep. Stmt.*”), ¶
17 1. Prior to October 2002, the California Organic Foods Act of 1990 specified the standards with
18 which producers and processors of organic dairy products were required to comply. California
19 Health and Safety Code § 110810, *et seq.* Beginning in October 2002, all organic dairy
20 producers and processors became subject to the more stringent requirements of the National
21 Organic Program (“NOP”) 7 CFR Part 205, *et seq.*

22 The NOP requires, among other things, that:

23 a. Organic milk or milk products must be from animals that have been under
24 continuous organic management beginning no later than 1 year prior to the production of

25
26
27
28 ² “‘Use value’ is the price the processor would have had to pay, at the prevailing minimum Class
Price, had it purchased the milk at a price reflecting its ultimate disposition.” *Id.*, fn.5.

1 the milk or milk products that are to be sold, labeled, or represented as organic (with
2 some exceptions) (§ 205.236(a)(2));

3 b. All feed, including pasture and forage, must be organically produced and
4 handled (§ 205.237(a));

5 c. Producers may not: (1) Use animal drugs, including hormones, to promote
6 growth; (2) Provide feed supplements or additives in amounts above those needed for
7 adequate nutrition and health maintenance for the species at its specific stage of life; (3)
8 Feed plastic pellets for roughage; (4) Feed formulas containing urea or manure; (5) Feed
9 mammalian or poultry slaughter by-products to mammals or poultry; or (6) Use feed,
10 feed additives, and feed supplements in violation of the Federal Food, Drug, and
11 Cosmetic Act. (§ 205.237(b));

12 d. The producer must establish and maintain preventive livestock health care
13 practices, including: (1) Selection of species and types of livestock with regard to
14 suitability for site-specific conditions and resistance to prevalent diseases and parasites;
15 (2) Provision of a feed ration sufficient to meet nutritional requirements, including
16 vitamins, minerals, protein and/or amino acids, fatty acids, energy sources, and fiber
17 (ruminants); (3) Establishment of appropriate housing, pasture conditions, and sanitation
18 practices to minimize the occurrence and spread of diseases and parasites; (4) Provision
19 of conditions which allow for exercise, freedom of movement, and reduction of stress
20 appropriate to the species; (5) Performance of physical alterations as needed to promote
21 the animal's welfare and in a manner that minimizes pain and stress; and (6)
22 Administration of vaccines and other veterinary biologics. (§ 205.238(a));

23 e. A producer must use synthetic medications when necessary to treat an ill
24 animal, but must withdraw the treated animal from organic production (§ 205.238(b));

25 f. A producer must not (1) Sell, label, or represent as organic any animal or edible
26 product derived from any animal treated with antibiotics, any substance that contains a
27 synthetic substance not allowed under § 205.603, or any substance that contains a
28 nonsynthetic substance prohibited in § 205.604; (2) Administer any animal drug, other
than vaccinations, in the absence of illness; (3) Administer hormones for growth
promotion; (4) Administer synthetic parasiticides on a routine basis; (5) Administer
synthetic parasiticides to slaughter stock; (6) Administer animal drugs in violation of the
Federal Food, Drug, and Cosmetic Act; or (7) Withhold medical treatment from a sick
animal in an effort to preserve its organic status. All appropriate medications must be
used to restore an animal to health when methods acceptable to organic production fail.
(§ 205.238(c))

g. Producers must maintain optimal living conditions for their animals (§
205.239).

1 Certification that a manufactured dairy product is “organic” is a certification that every
2 participant in the chain of that product has complied with the requirements of the NOP. *Jt. Stmt.*

3 ¶ 32.

4
5 B. FACTUAL BACKGROUND

6 Plaintiffs are processors of certified organic dairy products. *Sep. Stmt.*, ¶ 1. Pursuant to
7 the regulations promulgated by the National Organic Program (“NOP”), plaintiffs may only use
8 certified organic milk in their organic dairy processing operations. Plaintiffs cannot and do not
9 purchase milk from producers of non-organic (“conventional”) milk. NOP, Section 205.236;
10 California Health and Safety Code § 110810, *et seq.*; *Sep. Stmt.*, ¶ 1. As a direct result of
11 complying with the regulations promulgated by the National Organic Program (“NOP”), and the
12 predecessor organic food laws, the cost of producing certified organic milk is higher than the
13 cost of producing conventional milk. *Sep. Stmt.*, ¶¶ 2-14. As a direct result of the mandates of
14 the NOP, producers of certified organic milk engage in different methods of production than
15 conventional producers. *Id.* The costs of producing certified organic milk vary based on
16 different factors than the costs of producing conventional milk. *Id.*

17
18
19
20 The NOP mandates that organic dairy farmers only feed their cows organic feed. NOP, §
21 205.237(a). Feed costs are the highest single expense of a dairy. *Sep. Stmt.*, ¶ 4. Organic feed
22 costs much more than conventional feed. *Id.*, ¶ 5. Organic grain costs nearly twice as much as
23 conventional grain. *Id.* Organic feeds cost at least \$100 more per ton than conventional feeds.
24 *Id.* Currently, the cost of organic cotton feed, which is the best feed to promote milk production,
25 is about \$200 more per ton than conventional cotton feed. *Id.* This feed is prohibitively
26 expensive, when it is available at all. *Id.* The NOP prohibits the use of pesticides or herbicides
27 in the production of organic feed. NOP § 205.237(a). The cost of an organic feed will go up if
28

1 there is an infestation of weeds or insects, which would not significantly affect a conventional
2 feed grower who can use pesticides to control the infestation. Sep. Stmt., ¶ 6.

3
4 Because the cost of organic feeds is so high, and because the NOP requires that organic
5 producers provide their cows with pasture, organic dairies need substantial pasture land to graze
6 cows. NOP § 205.238(a); Sep. Stmt., ¶ 7. The pasture used for organic cows must be chemical
7 free for at least three (3) years before use. Sep. Stmt., ¶ 7; NOP § 205.202(b). Acquiring
8 enough pasture to run an organic dairy can be a major obstacle and expense for a conventional
9 dairy that wants to convert to organic production. Sep. Stmt., ¶ 7. Even the pasture that organic
10 dairies have are only sufficient to feed the cows during the time of year when the pasture is
11 green. Id., ¶ 8. During the dry season, organic dairies must rely entirely on more expensive
12 organic feeds. Id. An especially dry year can impact an organic dairies' feed costs dramatically.
13 Id. The NOP prohibits the use of herbicides or other chemicals to eliminate weeds and thistles
14 that can harm the cows and make the pastures unusable. NOP § 205.237(a); Sep. Stmt., ¶ 9.
15 Organic dairy operators must manually remove weeds and thistles from their pastures, which
16 requires them to incur labor costs that conventional producers do not have. Id.

17
18
19
20 Organic dairies cannot maximize the cows' production to the same extent as conventional
21 producers:

22 a. The NOP prohibits the use of growth hormones, fertility drugs,
23 worming compounds, or any of the many chemical products that are sold to increase a
24 cows' milk production. The NOP also prohibits the use of artificial stimulants.

25 b. While pasture is necessary both to reduce feed costs and because it is
26 required by the NOP, pasture does not provide the most nutritious form of feed. The use
27 of pasture results in lower milk production. Conventional dairy producers are able to
28 maximize milk production in their cows by the consistent use of cheap and available high
nutrition mixes of purchased feed throughout the year.

c. The quality and types of feed that best promote milk production are
often not available to organic producers or they are prohibitively expensive.

1 d. The NOP requires that organic producers withdraw a cow from
2 production if it becomes sick and requires medication, and requires that organic
3 producers take preventive measures to reduce stress for their cows. Organic producers
4 cannot milk the cows as aggressively as conventional producers because this increases
the risk of mastitis and other infections, which require medication.

5 NOP, §§ 205.237, 205.238; Sep. Stmt., ¶¶ 10.

6 The NOP requires that organic producers establish appropriate housing, pasture
7 conditions, and sanitation practices to minimize the occurrence and spread of diseases and
8 parasites, and that organic producers take preventive measures to protect against illness. NOP §§
9 205.238-205.239; Sep. Stmt., ¶ 11. Organic dairies typically hire a veterinarian to regularly test
10 the cows for illness. Id. It is critical for an organic producer to find out if a cow is ill as soon as
11 possible, both to avoid a loss of production for that cow, as well as to avoid the spread of the
12 cow's illness to the rest of the cows. Id. Unlike organic dairies, if a conventional producer's
13 cows become ill they can be treated with medication with little, if any, loss of production. Id. If
14 an organic producer's cows become ill and require medication, there is a substantial loss of
15 income because the cows must be withdrawn from organic production. Id.; NOP §§ 205.236-
16 205.238. An organic dairy must pay approximately \$5,000 annually for organic certification.
17 Sep. Stmt., ¶ 12.

18
19
20
21 The cost and risk of transitioning from a conventional to an organic dairy, or of starting
22 an organic dairy, can be very high. A transitioning producer must incur the high expenses of
23 running an organic operation for at least a full year, during which the producer could only sell
24 the milk at conventional prices. NOP § 205.236. Alternatively, a producer must purchase an
25 entire herd of organic cows, which are substantially more expensive than conventional cows. Id.;
26 Sep. Stmt., ¶ 13. A study conducted by Professor Leslie J. Butler of the U.C. Davis Department
27 of Agriculture Economics concluded that, as a direct result of the requirements of the California
28

1 Organic Food Act of 1990, the cost of producing organic milk was not only higher than the cost
2 of producing conventional milk, it was higher than the Pool Prices. Sep. Stmt., ¶¶ 2, 14-17.

3
4 However, defendant establishes the Minimum Prices, which in turn determine the Pool
5 Prices and Pool Obligations of processors, “without regard to whether the milk is produced or
6 marketed as organic.” Jt. Stmt., ¶ 13. Defendant conducts surveys regarding the costs of
7 producing milk, but does not differentiate between organic producers and conventional
8 producers in these surveys. *Id.*, ¶ 14. In fact, the defendant does not even gather information
9 from which he can determine the cost of producing organic milk or from which he can determine
10 the relationship between the cost of producing organic milk and the Minimum Prices. *Id.*, ¶ 15.

11
12 While defendant establishes Minimum Prices at fair and reasonable levels so as to
13 generate reasonable producer incomes for conventional producers, defendant concedes that he
14 has no knowledge as to whether the Pool Prices or the Minimum Prices are sufficient to generate
15 reasonable incomes for organic producers. Jt. Stmt., ¶ 15. The defendant does not differentiate
16 between processors of conventional and organic dairy products in calculating the Pool
17 Obligation of a processor. Jt. Stmt. ¶ 25. Defendant calculates plaintiffs’ required Pool
18 Obligation each month based on the difference between the Pool Prices, which bear no
19 relationship to the costs of organic production, and the Minimum Prices, which bear no
20 relationship to the value of manufactured organic dairy products. Pooling Plan for Market Milk
21 as Amended, Articles 9 & 10 (and particularly Section 1004). Each month, defendant requires
22 plaintiffs to contribute tens of thousands of dollars to the Pool, which supports a Pool Price
23 designed only to provide a sustainable price for conventional dairy producers from whom
24 plaintiffs do not, and cannot, purchase milk. Sep. Stmt., ¶¶ 15-21.

1 On October 23, 2000, plaintiffs requested that defendant conduct a hearing to amend the
2 Pooling Plan to account for the different costs of production that organic producers incur and the
3 resulting higher price that organic processors must pay to organic producers in calculating
4 plaintiffs' Pool Obligation. Jt. Stmt., ¶ 27. Prior to the hearing on plaintiffs' petition, defendant
5 created an illustration entitled "Where Does the Proposed Organic Milk Credit Come From?"
6 Cuyler Decl., ¶ 8, Exhibit G. By this document the CDFA purported to illustrate that a reduction
7 in the pool obligation of organic processors would effectively transfer money from the "gross
8 pool revenues" back to organic processors for payment to organic producers. Id. Defendant also
9 created a spreadsheet that demonstrated that crediting organic processors for their increased cost
10 to purchase organic milk would reduce the Pool Price. Id., ¶ 9, Exhibit H.

13 Following the hearing, the defendant issued a Statement of Determination and Order in
14 which he determined that "[t]he standards governing organic milk production result in higher
15 production costs. Organic milk producers do incur a higher cost of production as indicated in the
16 study 'Organic Milk Production in California' (Hearing Exhibit #63) prepared by Dr. Leslie
17 Butler." Sep. Stmt., ¶ 2; Cuyler Decl., ¶¶ 3, 4, Exhibit C, pp.7-8, 9, Exhibit B, p.7. Defendant
18 concluded, however, that the proposed credit would "reduce the amount of Class 1 usage value
19 that will be available to be distributed among all producers." Cuyler Decl., ¶ 4, Exhibit C, p.10.
20 Defendant denied the relief requested in plaintiffs' petition based, in part, on the conclusion that,
21 because the amendment would "significantly reduce the obligation of organic processors to the
22 pool," he "would not make such a change effective without first issuing the proposed change to
23 referendum vote of market milk producers. Given testimony presented at the hearing, the
24 proposed change would be defeated overwhelmingly by producers in a statewide referendum."
25
26
27
28

1 Id., Exhibit B, p.2; Sep. Stmt., ¶ 23.³ Dairy producers would vote against the proposal because
2 the vast majority of them produce conventional milk,⁴ and they economically benefit by
3 maximizing the plaintiffs’ contributions to the pool. Sep. Stmt., ¶ 24. Furthermore, organic dairy
4 products compete with conventional dairy products in the market place, thus providing an
5 incentive to conventional producers to drive up the cost of organic milk. Jt. Stmt., ¶ 33.

7 IV. ARGUMENT

8 A. STANDARD FOR GRANTING MOTION FOR SUMMARY JUDGMENT

9 Under Rule 56(c), summary judgment is proper “if the pleadings, depositions, answers
10 to interrogatories, and admissions on file, together with the affidavits, if any, show that there is
11 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
12 matter of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986).

13 B. THE STABILIZATION AND POOLING LAWS, AS APPLIED BY
14 DEFENDANT, VIOLATE PLAINTIFFS’ CONSTITUTIONAL RIGHT TO
15 EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

16 1. The Court’s Review is Based on the Rational Basis Test

17 The First Claim of Plaintiffs’ complaint asserts that the Stabilization and Pooling Laws,
18 as applied, violate plaintiffs’ constitutional right to equal protection. The Fourteenth
19 Amendment to the United States Constitution provides that “[n]o State shall . . . deny to any
20 person the equal protection of the laws.” Equal protection of the laws requires not only that the
21 law treat similarly situated people similarly, but that the law differentiate between classes of
22 people: “Fundamental injustice would undoubtedly result if the law were to treat different
23 people: “Fundamental injustice would undoubtedly result if the law were to treat different
24 people: “Fundamental injustice would undoubtedly result if the law were to treat different
25 people: “Fundamental injustice would undoubtedly result if the law were to treat different

26
27 ³ At that hearing, representatives of the largest milk producer and processor organizations testified
against the petition. Jt Stmt. ¶ 32.

28 ⁴ “[T]otal production of organic milk in California in 1999 was about 36 million lbs., which was
approximately 0.12% of the total milk produced in California - a very small amount.” Cuyler Decl.,
Exhibit A, p.3.

1 people as though they were the same.” Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993). Indeed,
2 “[s]ometimes the grossest discrimination can lie in treating things that are different as though
3 they were exactly alike.” Cornwell v. Hamilton, 80 F.Supp.2d 1101, 1103 (S.D.Cal. 1999),
4 quoting, Jeness v. Fortson, 403 U.S. 431, 442, 91 S.Ct 1970 (1971).

6 The Second Claim of Plaintiffs’ complaint asserts that the milk Stabilization and Pooling
7 Laws, as applied, violate plaintiffs’ constitutional right to substantive due process. “Substantive
8 due process refers to certain actions that the government may not engage in, no matter how
9 many procedural safeguards it employs. Substantive due process protects a liberty or property
10 interest in pursuing the common occupations or professions of life.” Lebbos v. Judges of the
11 Superior Court, 883 F.2d 810, 818 (9th Cir. 1989). “[T]he right to hold specific private
12 employment and to follow a chosen profession free from unreasonable governmental
13 interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”
14 Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400 (1959).

17 The Court’s review under both the Substantive Due Process and Equal Protection and
18 the substantive due process clauses is based on the rational basis test, i.e., the means used by the
19 state must be rationally related to a legitimate state interest. See Exxon Corp v. Governor of
20 Maryland, 437 U.S. 117, 124-25, 98 S.Ct. 2207 (1978). “In order to prove a substantive due
21 process claim, [a plaintiff] must plead [and prove] that the government’s action was ‘clearly
22 arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or
23 general welfare.’” Lebbos, 883 F.2d at 818 (quoting Village of Euclid v. Ambler Realty Co.,
24 272 U.S. 365, 395, 47 S.Ct. 114 (1926)). The same standard applies with regard to the Equal
25 Protection claim. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-40,
26 105 S.Ct. 3249 (1985); Cornwell, 80 F.Supp 2d at 1105-1106.

1 While the rational basis test gives deference to the State:

2 [t]here must be some congruity between the means employed and the stated end or the
3 test would be nullity. The question is: given the State’s inherent leeway, has the State
4 regulated in a rational manner? For instance . . . while the State of California has the
5 undoubted latitude to define the practice and necessary skills of law and architecture, to
6 require would-be lawyers and architects to take course work and pass a licensing exam
in cosmetology would be irrational. There are limits to what the State may require before
its dictates are deemed arbitrary and irrational.

7 Cornwell, 80 F.Supp 2d at 1106. The defendant in this case has exceeded those limits.

8
9 2. Defendant’s Application of the Stabilization and Pooling Laws
to Plaintiffs is Arbitrary and Irrational

10 The purpose of the Stabilization and Pooling laws is to “establish minimum producer
11 prices at fair and reasonable levels so as to generate reasonable producer incomes,” and to
12 equalize the distribution of Class 1 usage among producers and thereby eliminate competition
13 and unfair practices resulting from producers competing to obtain the highest valued Class 1
14 contracts. Food & Agr. Code §§ 61802(h), 62701, 62702. While plaintiffs do not dispute that
15 these are legitimate purposes, the application of the Stabilization and Pooling Laws to organic
16 processors such as plaintiffs does not bear a rational relationship to the State’s purposes, in fact
17 contravenes them, and is arbitrary and irrational.
18
19

20 a. It is Irrational to Require Plaintiffs to Subsidize Conventional
21 Producers

22 The vast majority of dairy producers produce only conventional milk, and they
23 economically benefit from maximizing plaintiffs’ contributions to the Pool. Sep. Stmt., ¶ 24.
24 Requiring plaintiffs to contribute to the Pool results in a higher Pool Price to be paid to
25 conventional producers. Sep. Stmt. ¶¶ 23, 24; Jt. Stmt ¶¶ 19, 20. Requiring organic dairy
26 processors to pool their revenues with the conventional dairy industry is arbitrary and irrational
27 because organic dairy processors do not and cannot purchase milk from conventional dairy
28

1 producers. Jt. Stmt., ¶ 16. It is arbitrary and irrational to require plaintiffs to contribute to a
2 Pool that is designed to generate reasonable producer incomes for conventional producers, but
3 not for organic producers. Sep. Stmt., ¶¶ 14-21. It is also arbitrary and irrational to require
4 plaintiffs to contribute to a pool that is designed to eliminate competition for Class 1 sales to
5 conventional processors, but has no relation to or effect on Class 1 sales to organic processors.
6
7 Jt. Stmt., ¶ 16.

8
9 1. Plaintiffs Do Not and Cannot Purchase Milk from
10 Conventional Producers

11 Requiring plaintiffs to participate in the Pool is not rationally related to the State's
12 asserted purpose of preventing unfair competition for Class 1 contracts by equalizing the
13 distribution of Class 1 usage among all producers in the state. Food & Agr. Code § 62702.
14 Plaintiffs do not, and as a matter of law cannot, purchase milk for their organic processing
15 operations from conventional producers. 7 CFR Part 205, Section 205.236(a)(2). Conventional
16 producers could not, under any circumstances, compete for, or obtain, Class 1 contracts with
17 plaintiffs. Id. Because no conventional producer could receive the benefit of plaintiffs' "Class 1
18 usage," plaintiffs' inclusion in the Pool cannot further the purpose of equalizing the distribution
19 of Class 1 usage among all conventional producers. See e.g. Thompson v. Consolidated Gas
20 Utilities Corp., 300 U.S. 55, 57 S.Ct. 364 (1937); Kass v. Brannan, 196 F.2d 791, 796-797 (2nd
21 Cir. 1952).

22
23
24 In Kass, the Secretary of Agriculture attempted to require a New York milk dealer who
25 purchased milk in Ohio for resale in New York to pay a Pool Obligation to the New York pool.
26 Id., at 792-793. The court held that this pooling obligation was equivalent to a "penalty" that
27 was discriminatory, particularly because the Secretary required the dairy processor to pay
28 money into the Pool even when the processor could not have purchased milk from New York

1 dairy producers. Id., at 795. As in Kass, the defendant in this case requires plaintiffs to
2 contribute to the conventional pool even though plaintiffs cannot purchase milk from the
3 conventional dairy producers who benefit from the Pool.
4

5 In Thompson, the United States Supreme Court held that certain gas proration orders
6 were arbitrary and unconstitutional. While acknowledging that the State may validly issue
7 proration orders to “to prevent waste, and to create and protect correlative rights of owners in a
8 common reservoir of gas to their justly proportionate shares thereof,” the Court explained that
9 “obviously, the proration orders would not be valid if shown to bear no reasonable relation
10 either to the prevention of waste or the protection of correlative rights, or if shown to be
11 otherwise arbitrary.” Id., at 69-70. The Court held that, because there was no evidence of waste,
12 or that the conduct of the plaintiff gas companies implicated a common reservoir of gas, the
13 proration orders, served no other purpose than to require some gas companies to support other
14 gas companies who could not otherwise lawfully sell their gas. This was arbitrary and
15 unconstitutional.
16
17

18 Similarly in this case, the evidence establishes that plaintiffs’ organic operations do not
19 implicate any Class 1 milk for which conventional producers could compete, or which could
20 possibly be the subject of unfair competition among them. Therefore, the Pooling Plan as
21 applied to plaintiffs bears no reasonable relation to equalizing the distribution of Class 1 usage
22 among producers. The regulations serve only to require organic processors to support
23 conventional producers, from whom they cannot lawfully purchase milk for their operations.
24
25 This is arbitrary and unconstitutional.
26

27 2. The Defendant Does Not Even Attempt to Rationally
28 Relate the Pool to Organic Production and Processing

1 Requiring plaintiffs to participate in the Pool is also not rationally related to the State's
2 asserted purpose of ensuring reasonable incomes for dairy producers. The Minimum Prices, the
3 Pool Prices and plaintiffs' Pool Obligations are determined without any regard to the cost of
4 producing organic milk and without any regard to the value of organic dairy products. Jt. Stmt.
5 ¶¶ 13, 14 15, 25. Defendant's application of the Stabilization and Pooling Laws is designed to
6 ensure reasonable incomes for conventional producers only. In applying these laws the
7 defendant does not even gather the information that would be needed to apply the laws in a way
8 that would ensure reasonable incomes for organic producers. Jt. Stmt. ¶¶ 14, 15. The Pool
9 Prices, in fact, are not sufficient to sustain organic producers, much less to allow them to make
10 "a reasonable return on necessary capital investment." Food & Agr Code § 62062; Sep. Stmt.,
11 ¶¶ 14-21. Indeed, the cost of producing organic milk is not only higher than the Pool Prices, it is
12 almost always even higher than the highest Class 1 price set by the defendant. Cuyler Decl.,
13 Exhibit D, p.37.

17 In Cornwell, 80 F.Supp.2d at 1106-1108, the court held that it was arbitrary and
18 irrational to require the plaintiffs, who were "natural hair care practitioners" to undergo the
19 same cosmetology training and certification as all other cosmetologists when this training
20 primarily involved the study of areas of cosmetology unrelated to natural hair care. Requiring
21 natural hair care practitioners, who represented a "significant and legitimate branch of
22 cosmetology," to undergo this training did little to further the State's asserted interest in
23 ensuring that these cosmetologists were properly trained. Id. To the contrary, requiring these
24 cosmetologists to expend their resources to obtain training that was unrelated to their practice
25 impeded their ability to successfully pursue their occupation. Id.

1 Similarly, in this case, organic dairy production and processing is a significant (albeit
2 relatively small) and legitimate branch of the dairy industry. Yet, the Stabilization and Pooling
3 Plans do not take into consideration the costs of producing organic milk or the value of
4 processed organic dairy products. Jt. Stmt., ¶¶ 13-15. The Plans do not “establish minimum
5 producer prices at fair and reasonable levels so as to generate reasonable producer incomes” for
6 organic producers. Sep. Stmt., ¶¶ 14-21. It is arbitrary and irrational to require organic dairy
7 processors to contribute to a Pool that supports conventional dairy producers from whom
8 organic processors cannot purchase milk and, that does not even attempt to further the State’s
9 asserted interest with respect to organic producers, from whom plaintiffs do purchase milk.
10 Requiring organic processors to contribute to a Pool that supports only conventional producers
11 transfers money from participants in one industry to members of another. This impedes the
12 ability of organic processors to pay organic producers the amounts that are necessary to sustain
13 them.
14

15
16
17 Organic dairy processors do not operate in the same market as conventional dairy
18 producers any more than orange juice manufacturers operate in the same market with plum
19 growers. Organic processors cannot purchase milk from conventional dairy producers. Sep.
20 Stmt., ¶ 1. Organic producers must use different methods of production that result in different,
21 and higher, costs of production, none of which are accounted for in the Pool Plan. Sep. Stmt., ¶¶
22 2-14. There is no rational basis to require plaintiffs to participate in a Pool that benefits only the
23 conventional milk industry.¹
24
25

26
27 ⁵ Indeed, Congress acknowledged the distinction between organic dairy producers and
28 processors and conventional dairy producers and processors by exempting organic dairy products from
the assessments imposed under the federal dairy marketing laws. 7 U.S.C. 7401(E) (2002).

1 b. Calculating Plaintiffs’ Pool Obligation Based on Conventional Milk
2 Values Is Arbitrary and Irrational

3 The manner in which defendant calculates plaintiffs’ Pool Obligation is arbitrary and
4 irrational. A pooling plan that requires all members of a broadly defined group to pool their
5 money “regardless of their individual obligations and the varying conditions found in their
6 respective enterprises, cannot be justified as consistent with due process.” See Railroad
7 Retirement Board v. Alton Railroad Co., 295 U.S. 330, 356-360, 55 S.Ct. 758 (1935). Pooling
8 plans are only constitutional to the extent that the pooling obligation is rationally related to the
9 participants’ circumstances. Id., citing, Mountain Timber Co. v. Washington, 243 U.S. 219, 37
10 S.Ct. 260 (1917); Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186 (1911); Cf. United
11 States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 573, 59 S.Ct. 993 (1939) (upholding milk
12 pooling plan because, unlike the plan in Railroad Retirement Board, the milk pooling plan
13 contained differentials to account for variations in costs and values); See also e.g. Kass, 196
14 F.2d 796-797.

15 The California legislature apparently recognized this when it mandated that, in
16 establishing the Minimum Prices, defendant take into consideration the “varying costs of
17 production, health regulations, and other factors of costs of production” (§ 61807), including
18 “any relevant economic factors,” (§ 62062(b)), such as “the cost of producing and marketing
19 market milk for all purposes.” § 62062(a), (c).

20 Notwithstanding this legislative direction, defendant sets the Minimum Prices, which in
21 turn determine the Pool Prices and Pool Obligation, without regard to whether the milk is
22 produced or marketed as organic. Jt. Stmt. ¶ 13. Defendant does not even gather information
23 from which he can determine the costs of producing organic milk or how those costs vary, or
24 from which he can determine the relationship between the cost of producing organic milk and
25
26
27
28

1 the Minimum Prices. Jt. Stmt. ¶ 15 Defendant calculates plaintiffs’ Pool Obligation by using
2 Minimum Prices and Pool Prices that are based on the values of conventional dairy products. Jt.
3 Stmt., ¶¶ 3, 7. This method of calculating plaintiffs’ Pool Obligation cannot be justified as
4 consistent with due process or equal protection. Railroad Retirement Board, at 356-360; See
5 also Kass, at 795-796.

7 In Pringle v. U.S. of America, 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. December 8,
8 1998), the court held that it was arbitrary, irrational and capricious for the government to fail to
9 establish a separate disaster payment rate for organic beans. Id., at *16-24. The government
10 agency “took the position that there was only one . . . payment rate that could be made for a
11 specific crop, however it was grown.” Id., at 20. Here, as in Pringle, because the majority of
12 producers are conventional, the payment rate was based on the conventional marketplace. In
13 Pringle, the defendant was “unable to explain why a singular payment was required such that
14 chemical farmers would receive a windfall once they are the minority growers, or why organic
15 farmers should be shortchanged until, if ever, they represent a majority of farmers.” Id.

17 As applied to conventional dairy processors, the Stabilization and Pooling Laws work
18 together rationally to require the processor to pay out-of-pocket an amount that is based on the
19 actual value of the processed dairy product for which the milk is used, *i.e.* the Minimum Price.
20 By contrast, the Stabilization and Pooling Plans arbitrarily require organic processors to pay
21 out-of-pocket an amount that bears no relationship to the actual value of the processed dairy
22 product for which the milk is used. The Minimum Prices, and therefore the Pool Prices and
23 plaintiffs’ Pool Obligations, are based on the fiction that plaintiffs could obtain the milk
24 necessary for their operations at the Pool Prices. A conventional processor can obtain the milk it
25 needs by paying the Pool Price, and then paying into or receiving from the Pool an adjustment,
26
27
28

1 so that, in the end, its out-of-pocket payments are equal to the value of the milk it acquired. But
2 an organic processor must pay organic producers a price sufficient to allow those producers to
3 cover their costs and sustain their operations (which is higher than the Pool Price), and, in
4 addition, pay an amount into the Pool that is determined by assuming that the organic processor
5 only had to pay the Pool Price. Thus the organic processor gets hit twice: once because, as a
6 result of the costs of complying with the organic food laws, the cost of organic milk is higher,
7 and again because the defendant requires the processor to contribute to the Pool based on the
8 fiction that it could have purchased that milk at the lower Pool Price. This is arbitrary and
9 irrational.
10
11

12 “Equality can be denied when government fails to classify, with the result that its rules
13 or programs do not distinguish between persons who, for equal protection purposes, should be
14 regarded as differently situated. So it was with the majestic equality of French law, which
15 Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris.”
16 Lawrence H. Tribe, American Constitutional Law 1438 (2d ed. 1988). In this case, equity has
17 been denied by the State’s failure to distinguish between organic and conventional dairy
18 production and processing.
19
20

21 C. THE REFERENDUM REQUIREMENT, AS APPLIED BY DEFENDANT,
22 VIOLATES PLAINTIFFS’ CONSTITUTIONAL RIGHT TO PROCEDURAL
23 DUE PROCESS

24 Defendants’ interpretation of Food & Agriculture Code § 62717 to require the approval
25 of conventional producers before the Pooling Plan could be amended to alleviate the irrational
26 application of the Plan to plaintiffs, violates plaintiffs’ right to procedural due process because it
27 subjects plaintiffs’ property rights to the decision of others who have an adverse, personal,
28 pecuniary interest in their decision. Defendant’s refusal to amend the Pooling Plan to account

1 for the increased cost of producing organic milk in calculating plaintiffs’ Pooling Obligation on
2 the basis that conventional producers would not assent to such an amendment, amounts to an
3 unlawful delegation of government power that violated plaintiffs’ right to procedural due
4 process.
5

6 1. The Referendum Requirement, As Applied, Improperly Delegates
7 Decision Making Authority Affecting Plaintiffs To Members Of A
8 Distinct Industry Who Have A Direct Pecuniary Interest In Their
9 Decision

10 As a matter of well-established law, subjecting a party’s property rights to the decision
11 of others who have an adverse, personal, pecuniary interest violates the right to due process.
12 Gibson v. Berryhill, 411 U.S. 564, 578-579, 93 S.Ct. 1689 (1973); Tumey v. Ohio, 273 U.S.
13 510, 522-524, 47 S.Ct. 437 (1927); Ward v. Village of Monroeville, 409 U.S. 57, 59, 93 S.Ct.
14 80 (1972); Bayside Timber Co., Inc. v. Board of Supervisors, 20 Cal.App.3d 1, 14 (1971).
15 Defendant has interpreted and applied Section 62717 to allow producers of conventional milk to
16 veto an adjustment in the amount of plaintiffs’ monthly Pool Obligation to account for the
17 legally required increased costs of organic production. See Statement of Determination and
18 Order, p.10. As a matter of undisputed fact and law: plaintiffs do not, and cannot, purchase
19 milk from these producers; these producers have a direct pecuniary interest in maximizing
20 plaintiffs’ participation in the Pool because that participation increases the Pool Price. Jt. Stmt.,
21 ¶ 19; Cuyler Decl., Exhibit G, H; See also Lehigh, at 88-89 (describing the impact on the Pool
22 Price when milk is taken out of the pool). These producers’ interests are also adverse to
23 plaintiffs because organic milk competes with conventional milk in the marketplace and
24 displaces sales of conventional milk. Jt. Stmt., ¶ 33.

25 The defendant’s attempt to subject the property rights of processors of one commodity to
26 the approval of producers of a separate, competing, commodity, appears to be unprecedented. It
27

1 is certainly unlawful. See e.g. Carter v. Carter Coal Co., 298 U.S. 233, 311, 56 S.Ct. 855 (1936);
2 and Bayside Timber Co., Inc. v. Board of Supervisors, 20 Cal.App.3d 1, 10, 12-14 (1971)
3 (subjecting regulations necessary to protect the environment to approval of timber industry
4 violated the due process rights of the public, which had an interest adverse to the timber
5 industry), citing, Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 659-660, 295
6 N.W. 346 (1940) (allowing industry members to determine the regulations that affected the
7 plaintiff distributor differently than they affected other distributors, deprived that plaintiff of the
8 right to due process.); See also H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 598, 59
9 S.Ct. 1019 (1939) (holding that Secretary properly limited the producers entitled to vote in the
10 referendum to those farmers who sold milk to processors within the affected market area.)
11
12

13
14 2. Defendant’s Application of Section 62717 Is An Unlawful Delegation of Authority

15 Defendant’s application of the referendum requirement to justify perpetuating the
16 invalid regulations violates plaintiffs’ right to due process. As a matter of law, “one person may
17 not be entrusted with the power to regulate the business of another, and especially that of a
18 competitor. And a statute which attempts to confer such power undertakes an intolerable and
19 unconstitutional interference with personal liberty and private property. The delegation is so
20 clearly a denial of rights safeguarded by the due process clause . . .” Carter, at 311.
21
22

23 Laws that allow private parties to validate improper or unconstitutional regulations, or to
24 effectively veto constitutional regulations, are equivalent to allowing private parties to create
25 the law and are improper. International Assoc. of Plumbing & Mechanical Officials v.
26 California Building Standards Commission, 55 Cal.App.4th 245, 254 (1997) (prohibition
27 against allowing private parties to make the law “applies equally to any legislation that would
28 abrogate the state's police power by giving a private party or parties a veto over the regulatory

1 function.”). Because the private parties “are not bound by any official duty, but are free to
2 withhold consent for selfish reasons or arbitrarily . . . The delegation of power so attempted is
3 repugnant to the due process clause of the Fourteenth Amendment.” Washington ex rel. Seattle
4 Title Trust Co. v. Roberge, 278 U.S. 116, 121-122, 49 S.Ct. 50 (1928); Young v. City of Simi
5 Valley, 216 F.3d 807, 819, 820 (9th Cir. 2000).²

7 In this case, the defendant held that Section 62717 would allow conventional producers
8 to require defendant to continue to implement the Pooling Plan “without regard to whether the
9 milk is produced or marketed as organic” (Jt. Stmt., ¶¶ 13-15; Answer to Complaint for
10 Declaratory and Injunctive Relief, ¶ 11) notwithstanding the legislative mandate that he
11 “establish minimum producer prices at fair and reasonable levels so as to generate reasonable
12 producer incomes,” taking into consideration the “varying costs of production, health
13 regulations, and other factors of costs of production” (Food & Agr. Code §§ 61802, 61805,
14 61807, 62062, 61962) and his finding that “[t]he standards governing organic milk production
15 result in higher production costs. Organic milk producers do incur a higher cost of production”
16 (Sep. Stmt., ¶ 2; Cuyler Decl., Exhibit B, p.7, Exhibit C, p.9.)

17 The defendant has rendered the regulations and plaintiffs’ property rights “subservient to
18 selfish or arbitrary motivations” of conventional dairy producers, conferring upon those
19 producers the power to perpetuate improper regulations. As in Carter and Roberge, the
20 delegation at issue in this case violates plaintiffs’ right to due process. See also Young, 216 F.3d
21 at 820 (administrative decision making may not be rendered “subservient to selfish or arbitrary

22
23
24
25
26 ² See also Fry v. City of Hayward, 701 F.Supp. 179, 182 (N.D.Cal. 1988) (“It is plain
27 that the electorate as a whole, whether by referendum or otherwise, could not order city action
28 violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause
by deferring to the wishes or objections of some fraction of the body politic.”); and Jones, 440
F.Supp. at 489 (recognizing that “the referendum may not validate an otherwise invalid [milk
marketing] order.”)

1 motivations” of private parties). The defendant bears the ultimate responsibility to assure that
2 the regulations conform to the law. He cannot abdicate that responsibility to private parties.
3
4 The amendment of regulations that are unconstitutional and contrary to the enabling statutes is
5 not properly contingent upon producer assent. See, e.g., Zuber v. Freeman, 402 F.2d 660, 674-
6 675 & fn. 41 (D.C.App. 1968) (holding that where provision in milk marketing plan was
7 unauthorized and thus invalid, amendment of plan to conform to statutory requirements did not
8 require remand to Secretary or producer referendum).
9

10 V. CONCLUSION

11 For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted.

12 Dated: June 25, 2003

13
14 CHILVERS & TAYLOR PC

15 By: /s/ Aviva Cuyler
16 Aviva Cuyler

17 Attorneys for Plaintiffs
18 Straus Family Creamery, Inc. and Horizon Organic
19 Holding Corporation
20
21
22
23
24
25
26
27
28