Davis Wright Tremaine LLP

Charles M. English, Jr.
Suite 800
1919 Pennsylvania Ave. N.W.
Washington, D.C. 20006-3401

202.973.4272 tel
202.973.4499 fax
chipenglish@dwt.com

Rochelle Wilcox
Suite 800
505 Montgomery Street
San Francisco, CA 94111-6533

(415) 276-6500 tel
(415) 276-6584 fax
rochellewilcox@dwt.com

October 29, 2019

Via Federal Express and Email (secretary.ross@cdfa.gov)

The Honorable Karen Ross
Secretary
California Department of Food & Agriculture
1120 N Street
Sacramento, CA 95814

Re: Quota Implementation Plan/Quota Administration Program

Dear Secretary Ross:

This firm represents A.J. Bos and STOP QIP, a California dairy farmer unincorporated association. Even as they seek eventual termination of quota in California, Mr. Bos and STOP QIP are genuinely looking for a negotiated resolution that provides, if possible, a win-win scenario for all California dairy farmers, quota and non-quota holders alike. To this end, while STOP QIP has submitted and intends to submit petitions seeking termination of the QIP/QAP, it supports United Dairy Families in its efforts to develop and discuss alternative proposals for resolving differences between quota and non-quota holders. However, if petitions, referendums, and a lawsuit are to be avoided, industry needs to move with greater speed and not simply delay these critical discussions or a resolution.

We write to address a separate issue, though, in the hope of preventing litigation. STOP QIP has determined that the CDFA's current enforcement of QIP/QAP is without legal basis. Specifically, while the QIP was "adopted" after Producer Review Board meetings and a producer referendum, it lacks the force of law because it is neither 1) part of an existing Pooling Plan, nor 2) validly adopted independent of a Pooling Plan because the QIP was never subjected to a public hearing as that term is defined and used by CDFA under its statutes and regulations or under California's Administrative Procedure Act. Thus, the operation of the QIP, the collection

of fees to administer the QIP, and the redistribution of producer revenue under the QIP is merely voluntary and without force of law.

First, the stand-alone quota program is not part of the pre-existing Pooling Plan for Market Milk (the "Pooling Plan"). The Pooling Plan was adopted via the hearing process, as required in California. However, the Pooling Plan was suspended as being in conflict with the new FMMO under California Food & Agriculture Code § 62726, and the QIP was never integrated into that Pooling Plan prior to suspension. This appears to be because there was concern that CDFA needed the Pooling Plan and QIP to be effective on different timelines. Specifically, it needed the Pooling Plan to be effective up until (but not a day after) October 31, 2018 when the FMMO became effective, but it also needed to fill the gap with the QIP passed before the FMMO became effective and continuing in effect thereafter.

Rather than creating a stand-alone QIP, another approach would have been to amend the Pooling Plan to incorporate the QIP, but make it effective on and after the date of the FMMO. However, such an amendment would have required a public hearing (California Food & Agriculture Code § 62717) in the same manner as for a Stabilization and Marketing Plan under California Food & Agriculture Code §§ 61801 et. seq. The public hearing regulations are set forth in California Code of Regulations §§ 2080.2 – 2080.4. The public hearing requires a hearing officer and panel, exhibits, testimony of witnesses, questioning by the panel, written statements, briefs and a hearing transcript. Not a single one of these requirements were followed in the so-called adoption of the QIP.

Second, the QIP also was not lawfully adopted as a stand-alone program under Section 62716. The 2017 trailer bill language in California Food & Agriculture Code § 62757(c) states that the statewide referendum shall be "conducted pursuant to Sections 62716 and 62717." It was not, and arguments that such a hearing is not required fail for two reasons. In the first instance, the trailer bill language does not negate the requirement for a public hearing. Nowhere does the legislature clearly and specifically release the CDFA from that obligation. In the second instance, § 62716 opens with "*[F]ollowing the required hearing*, the director shall submit the pooling plan to producers. . . . " (emphasis added). The referendum could not be conducted pursuant to § 62716 without first holding the required hearing under the Code and Regulations.

Since the QIP was neither a lawful amendment to the pooling plan nor adopted under § 62716 following the required hearing, the QIP is not a regulation and has no legal existence. It cannot and should not be enforced by CDFA.

Before STOP QIP files a lawsuit and seeks declaratory and injunctive relief, we respectfully request that CDFA immediately cease and desist from operating the QIP, collecting administrative fees and acting to redistribute the funds of non-quota holders. We are concerned that once fees are collected and QIP monies distributed that it may be extremely difficult or

impossible to recover those funds. We know of no requirement that STOP QIP exhaust administrative remedies; indeed we know of no administrative remedies applicable in this instance. But we make this request because we consider it prudent and in furtherance of the goal of seeking an immediate negotiated resolution.

Notwithstanding and without waiving the foregoing, STOP QIP genuinely desires that the California dairy farmers find a way to resolve this issue amicably and without resort to petitions and/or a lawsuit. Our involvement should not signal anything else. But we also are not strangers to the rights that dairy farmers have under the regulatory system, nor the necessity to seek legal protection of those rights. In addition to actively participating in the California Federal Milk Marketing Order proceeding and the Producer Review Board meetings that discussed quota under a FMMO, lawyers at this firm have been engaged in representing dairy industry interests going back to the 1980's, including involvement in the Knudsen-Foremost bankruptcy and the *Hillside Dairy* litigation.

We are prepared to discuss this letter and request with you at your earliest convenience. Please respond prior to November 15.

Respectfully,

Chip English A/V

Chip English

Rochelle Wilcox

cc: Michele Dias, Esq. (michele.dias@cdfa.ca.gov)
Don Shippelhoute, QIP Administrator (donald.shippelhoute@cdfa.ca.gov)
California Producer Review Board, c/o CDFA (dairy@cdfa.ca.gov)
Megan Oliver-Thompson, Esq. (moliverthompson@hansonbridgett.com)
Robert Vandenheuvel (rvandenheuvel@californiadairies.com)
Dino Giacomazzi (dino@giacomazzi.us)
Francis Pacheco (fpacheco@dfamilk.com)
Pete Garbani (prgarbani@landolakes.com)