STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE

IN RE: Hearings by Department of Agriculture, Concerning Milk Pricing	: : :Hearing Dates: November 19, 2009, :December 17, 2009, January 28 & 29, 2010 :and February 22, 2010 : : :

POST HEARING REPLY BRIEF OF GREATER NORTHEAST MILK MARKETING AGENCY ("GNEMMA")

I. INTRODUCTION

This reply brief is submitted on behalf of the Greater Northeast Milk Marketing Agency ("GNEMMA"), the marketing agency for the majority of New Jersey dairy farmers. GNEMMA, as its hearing participation demonstrates, strongly supports the efforts of the New Jersey Department of Agriculture to find ways within its authority to better the interests of New Jersey dairy farmers. GNEMMA put forth its proposal for an assessment on fluid milk products, made and collected at the wholesale in-to-store point of the farm-to-consumer chain. The GNEMMA proposal provides a mechanism for raising funds for a premium distribution to New Jersey, and other, dairy producers serving the state and it is a mechanism which does not disadvantage plants purchasing New Jersey farm milk, which a direct producer premium could. The proceeds of the assessment would be collected and disbursed through a pool administered by the Department in the manner of the administration and distribution of the current fuel adjuster, which has been a successful program. We urge the Department to adopt the GNEMMA proposal.

This reply brief will address issues raised by the Pennsylvania Association of Milk Dealers (PAMD) in their post-hearing brief. Specifically, it will address: (1) the PAMD

objections to the GNEMMA premium proposal; and (2) the PAMD assertion that the *Beyer Farms v. Brown* 1990 federal court settlement agreement ties the Department's hands regarding consideration of the proposals of various New Jersey interests with respect to minimum wholesale and retail pricing.

It is noteworthy that the PAMD does not challenge the fundamental fact established by the evidence presented by New Jersey dairy farmers that milk price levels have been disastrously low, well under the cost of milk production in New Jersey, and fundamentally insufficient to sustain a viable dairy farm sector in New Jersey. That should be the premise upon which the consideration of remedies from this hearing is based.

II. THE COOPERATIVES' PROPOSED PLAN FOR PREMIUM ASSESSMENT AND DISTRIBUTION IS LAWFUL AND WOULD BE GOOD POLICY.

The Pennsylvania Association of Milk Dealers (PAMD) levels multiple challenges to the GNEMMA cooperatives' proposal that a fee be assessed on sale of wholesale fluid milk products in New Jersey for the purpose of generating funds for distribution to New Jersey and other dairy farmers supplying the New Jersey fluid milk market. None of these arguments has merit. We will address the following arguments in turn: (1) the proposal is unconstitutional because it would discriminate between in-state and out-of-state farmers; (2) the proposal is unconstitutional because it would discriminate among fluid milk plants; and (3) the proposal is not wise policy.

With respect to uniformity among producers, the GNEMMA proposal would provide a uniform distribution from the fund to all producers – in-state and out-of-state -- delivering to New Jersey plants processing Class I fluid milk products. In the event that a New Jersey producer did not deliver to a New Jersey fluid milk plant, which is unusual and unlikely, the

producer would not share in the fund.[1] Out-of-state producers could also share to the extent they delivered to plants distributing milk into New Jersey. Those producers' distribution from the New Jersey pool would be based on the on the plant's volume of wholesale sales/deliveries into New Jersey.

The discrimination argument advanced by the PAMD is, first of all, inapposite because none of the cases relied upon by PAMD involved any distribution to out-of-state suppliers. In particular, in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), the Massachusetts fund was generated through assessments on all fluid milk products sold in Massachusetts but distributions were solely to Massachusetts farms. Similarly, in the *Hillside Dairy* litigation, post-remand from the U.S. Supreme Court, the out-of-state producers received no distributions from the California pool, as the District Court reported: "The face of the Pooling Plan reveals that out-of-state raw milk producers selling milk to California processors received no benefits from the pool." *Hillside Dairy v. Kawamura*, 317 F.Supp. 2nd 1194, 1198 (E.D.Ca. 2004).

The PAMD's example, which attempts to show discrimination among milk producers (and plants), raises multiple issues which we will address. First, the alleged discrimination with respect to milk delivered by New Jersey milk producers to non-Class I plants does not need to be considered. As indicated above and at f.n. 1, GNEMMA does not propose to distribute to any producers on the basis of deliveries to New Jersey non-Class I plants. Mr. Schad's testimony to

[1] There would also be no entitlement to distribution for any producer, in-state or out-of-state, for deliveries to a New Jersey non-Class I plant. GNEMMA makes this clarification to make clear that the issue of commerce clause discrimination for deliveries to non-Class I plants does not need to be considered. GNEMMA does not in any way concede that a state could not, consistent with the commerce clause, pool revenues among producers delivering to both Class I and non-Class I plants. However, in the New Jersey marketplace, such pooling is not important or necessary.

that effect is withdrawn.[2] Consequently, there needs to be no evaluation of this basis of alleged discrimination.

Second, the apparent assertion that it is discriminatory not to pool all of the production of an out-of-state milk plant delivering some fluid milk products into New Jersey is without basis. Since, as pointed out above, the commerce clause cases relied upon by PAMD did not involve **any** distribution to out-of-state producers, it is quite a stretch to suggest that they stand for the proposition that a pro-rata distribution on volumes sold in New Jersey (either as plant milk or fluid milk products) is unconstitutionally discriminatory.

Finally, by comparing costs between plants, the PAMD makes a fundamental mis-comparison or misapplication of the proposal.[3] As Mr. Schad testified, the assessment is at the wholesale, in-to-store level. It is not a price premium at the farm-to-plant level. It does not change the plants' cost of milk. For every hundredweight of milk distributed in New Jersey, the producers supplying a non-New Jersey plant receive the same distribution from the pool as do the New Jersey producers. Every plant or wholesale distributor is subject to the same assessment; and supplying producers share on a pro-rata basis. This is not discriminatory treatment in violation of the dormant commerce clause of the United States Constitution.

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[2] Mr. Schad testified that "all New Jersey dairy farmers be included in the pool" (TR. (1/29/2010) p. 57). To the extent that that would literally include farmers delivering to non-Class I plants, that portion of the proposal is revised and the testimony, as literally stated, is withdrawn.

[3] A good example of court analysis of a commerce clause challenge to state milk pricing and pooling regulations is in *Grant's Dairy v. Maine*, 232 F.3d 8(1st Cir. 2000), where the court discussed, and rejected, a broad-based commerce clause challenge to Maine's pricing program by a dealer with both in-state and out-of-state distribution. The decision includes a comprehensive review of state milk regulatory commerce clause jurisprudence concerning farm milk pricing. 232 F.3d at 18-24.

Finally, the contention that it is not wise public policy for New Jersey to adopt a program for the benefit of its dairy industry is a predictable contention, coming from the Pennsylvania dealers, but one which lacks merit. The State of New Jersey's statutes document New Jersey's commitment to its dairy industry. The state legislature has stated, in passing the current law:

> [I]t is the policy and intent of this act to prevent these unfair, unjust destructive and demoralizing practices by providing a reasonable return for the milk producer, so as to prevent possible curtailment of a sufficient supply of fresh, wholesome, sanitary milk for our citizens; and that it is necessary in order to assure an adequate supply of fresh, wholesome, sanitary milk and to protect the public health and welfare, to treat the production, sale and distribution of milk as a business affecting the public health and affected with a public interest.

Ch 274, 1941 N.J. Laws 713, *quoted in* Historical Note following N.J.S.A § 4:12A-21.

The State's commitment, to be valid and important to the state, does not require that it be an exporter of milk or dairy products as the PAMD would imply. What is important to New Jersey is that the state maintain a viable dairy industry within its limits and capabilities. That is the purpose of the statutes; it is the purpose and effect of the GNEMMA proposal; and should be its purpose if adopted by the Department. Of course, the Pennsylvania dealers might prefer that New Jersey cede its fluid milk production and sales to Pennsylvania sources of production and processing. But New Jersey is not obligated to be so subservient to Pennsylvania proprietary interests and it should not be.

III. REVISIONS TO THE PRESENT NEW JERSEY VARIABLE COST REGULATIONS WOULD NOT VIOLATE THE SETTLEMENT AGREEMENT IN *BEYER FARMS v. BROWN.*

PAMD raises a red herring by suggesting that proposals to change the current variable cost regulation for pricing of wholesale and retail fluid milk products would violate a federal

district court consent order entered in 1990. Even a cursory examination of the order, its context, the current regulations governing milk sales within New Jersey, and the current proposals reveal the lack of substance in PAMD's contention.

The Order arose from civil actions by a New York dairy and the State of New York against New Jersey's Secretary of Agriculture and the Director of New Jersey's Division of Dairy Industry. *See State of New York v. Brown*, 721 F.Supp 629, 630 (D.N.J. 1989). New York alleged that New Jersey's Milk Control Act, ch. 274, 1941 N.J. Laws 713, N.J.S.A. § 4:12A-1 *et seq.*, and regulations implementing it, had "both the purpose and effect of discriminating against New York milk dealers and thus violate[d] the Commerce Clause of the United States Constitution both on their face and as applied." *See* 721 F.Supp. at 630. In particular, New York asserted that New Jersey's prohibition on below cost sales, New Jersey Administrative Code §§ 2:52-6.1[4], 6.2 and 6.3, and New Jersey's 14-day prior notice requirement before a retail milk

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[4]Section 2:52-6.1 stated,

> It shall be unlawful and a violation of these regulations for any dealer licensee to directly or indirectly be a party to, or assist in, any transaction to sell or offer to sell milk and milk products within the State of New jersey, or for sale in the State of New jersey at less than the cost thereof as herein-after defined; but nothing in this regulation shall prevent a dealer from meeting the price or offer of a competitor for a product or products of like quality and nature in similar quantities; but nothing in this section shall prohibit bulk, distress or business-closing sale if prior notice of such sale has been filed with the Director of the Division of Dairy Industry; provided however that the burden of proving and properly documenting the meeting of a competitive price shall rest with the licensee asserting the claim.

Section 2:52-6.2 defined "cost" as follows:

> The term "cost" as used herein shall include, but not be limited to, the basic cost of raw or reconstituted milk or derivatives thereof as determined in accordance with the joint State-Federal orders administered by the Division of Dairy Industry

outlet could change its supplier, N.J. Admin. Code § 2:53-4, discriminated against New York dairies in violation of the dormant Commerce Clause. The Court, however, found that New Jersey's milk pricing scheme did not directly regulate interstate commerce nor amount to intentional discrimination against interstate commerce. 721 F.Supp. at 640 - 641. Whether New Jersey, in fact, discriminated against New York dairies raised a question of fact. *See id.* at 640 - 643.

Following several hearings, the defendants "determined, without conceding liability, to propose new regulations, which, if adopted, would substantially modify the existing regulations challenged herein by plaintiffs." *New York v. Brown*, Civil Action No. 88-1512, Order (D.N.J., April 19, 1990). A true and correct copy of that Order is attached hereto as Exhibit 1. The Order "enjoined [New Jersey] . . . from in any manner, directly or indirectly, enforcing New Jersey Administrative Code §§ 2:52-6.1, 6.2 and 6.3 (prohibit sale below cost by a licensed milk dealer) and New Jersey Administrative Code § 2:53-4 (the retail stores '14-day' prior approval notice) pending further order of the Court." *Id.* Entries in the New Jersey Register reveal that the Department of Agriculture, Division of Dairy Industry, repealed the challenged regulations and replaced them. *See* 22 N.J.R. 562-563, 2138-2140 (1990). The Order does not prohibit new Jersey from changing its milk product pricing formula. It merely prohibits the procedures set

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> and the United States Department of Agriculture in the State of New Jersey; the cost of any added ingredients; and all other costs associated with the business of the dealer, for example, but not limited to, the cost of material, labor, salaries or executives and officers, the cost of receiving, cooling, processing, manufacturing, storing and distributing the product sold; rent, depreciation, selling epense, maintenance charges, delivery expense, license fees, taxes, insurance, advertising, advertising allowances, gifts, free service and all other costs as may be incurred, allocated proportionately to each unit of product sold in accordance with generally accepted cost accounting principles.

forth in the repealed regulation. Indeed, the Court noted, without condemnation, that between 1941 and 1980, New Jersey "imposed absolute minimum prices applicable to all sellers of milk" in New Jersey. Id at 631. That is substantially the same system Mr. Ross advocated in this proceeding.[5]

The Director promulgated the regulations challenged in the Beyer Farms case in 1980. Review of current New Jersey Administrative Code §§ 2:52-61, 6.2 and 6.3, reveals that those sections have been repealed and are "reserved." The transcripts of hearings in 1989 and 1990 reveal that a primary issue before the federal court was "the relative effects of average total cost pricing versus average variable cost pricing." *See New York v. Brown*, Civil Action No. 88-1512, Transcript of Hearing at 82 (D.N.J. April 5, 1990). Accordingly, repealing and replacing the challenged regulations in 1990, the Department and the Division repealed the "average total cost" method and replaced it with the "average variable cost" method. *See* 22 N.J.R. 1629-1631, 21238-2140 (1990). The variable average cost method for calculating a milk dealer's cost remains in effect today, see N.J. Admin. Code §§ 2:52-6, 2:52-7, but the formula is not sacrosanct and New Jersey can modify it without running afoul of the Beyer Farms' court order, as long as the State does not adopt the now-repealed "average total cost pricing" regulation. The current suggestions to establish minimum prices do not specifically embody any particular formula for setting that price and the precise formula would need to be spelled out in the subsequent hearings envisioned by, for instance, Mr. Ross. See TR. (2/22/2010) pp. 65 l. 18 – 66 l. 4.

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[5] See TR. (2/22/2010) p. 55, ll. 5-7, where Carmen Ross testified: "I think you have to establish a farm price. You have to establish a price to the store. And you have to establish a price out of the store."

Similarly, in response to the Beyer Farms case, New Jersey replaced the 14-day notice period with a 2-day notice to the previous supplier to prevent it from shipping milk that would not be accepted. See 22 N.J.R. 1629-1631, 2138-2140 (1990). That provision remains in effect today, see N.J.Admin.Code §§ 2:53-3, 2:53-4 and no witness at the hearing suggested reinstatement of the 14-day notice requirement.

In sum, in 1990, the Federal District Court enjoined, pursuant to New Jersey's agreement and without any determination that New Jersey's statutes or regulations violated the Commerce Clause, New Jersey's enforcement of three sections of the New Jersey Administrative Code. New Jersey repealed those sections and replaced them. The replacements continue in force today, while the provisions subject to the consent order no longer even exist. The proposals of certain dealers for a "Pennsylvania-type" system request the establishment of minimum wholesale and retail prices, set on the basis of hearings to be held. (Ross TR. (2/22/10) p. 65) When held, those hearings would, presumably, determine the precise basis for calculation of the minimum wholesale and retail prices.

Accordingly, PAMD has merely raised a red herring, at this point in these proceedings. The impact, if any, of the *Beyer Farms* consent order would need to be definitively determined when, and if, wholesale and retail minimum prices were established by the Department.

IV. CONCLUSION

GNEMMA wishes to sincerely thank the Director and the Department for the effort at betterment of the New Jersey dairy industry represented in this proceeding. This five (5) day hearing embodies a substantial commitment by the Director to elicit information from those parties interested in the New Jersey dairy industry which can serve as the basis for proposed

regulations for the good of the industry and all those involved. Dairy producers, in particular, are in financial distress and the statutes of New Jersey require that the Director make every effort to address the needs of New Jersey dairy farmers within his statutory authority. GNEMMA has put forth a proposal which, we respectfully suggest, provides a legal and constitutional mechanism for generating funds which will assist New Jersey dairy farmers and those out-of-state farmers supplying the New Jersey fluid milk market. We respectfully request that the Director adopt this proposal.

Respectfully Submitted,

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By: /S/

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