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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STRAUS FAMILY CREAMERY, INC. and HORIZON ORGANIC HOLDING CORPORATION. Plaintiffs, vs. WILLIAM B. LYONS, JR., Secretary, California Department of Food and Agriculture, Defendant.	Case No.: C 02 1996 BZ **PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Hearing Date: July 30, 2003 Time: 10:00 a.m. Department: G Judge: Magistrate Judge Bernard Zimmerman

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I. INTRODUCTION

It is undisputed that defendant requires plaintiffs to (1) pool their revenues with conventional dairy farmers from whom they cannot purchase milk; (2) participate in a pool that is not designed to, and that does not, provide a sustainable pay price to the organic dairy farmers from whom plaintiffs do purchase milk; and (3) contribute to the conventional pool based on the difference between the established minimum price to purchase conventional milk and the value of processed conventional dairy products, and without any regard for the costs incurred by organic dairy farmers and processors. Defendant's Response to Plaintiffs' Separate Statement of Undisputed Facts, ¶¶ 1-4, 14[1]; Joint Statement of Undisputed Facts, ¶¶ 5-6, 13-15, 17, 25. Plaintiffs are entitled to summary judgment on their equal protection and substantive due process claims because there is no rational relationship between these requirements and a legitimate state interest.

Plaintiffs are also entitled to summary judgment on their procedural due process claim. It is undisputed that defendant has interpreted Section 62717 of the California Code of Food & Agriculture to require the assent of conventional dairy farmers to amend these unconstitutional requirements. Id., ¶¶ 23-24. Section 62717 is constitutionally impermissible as applied to plaintiffs.

[1] Because defendant has failed to dispute these facts, defendant's objection to, or dispute of, some of the underlying supporting facts and evidence, is utterly irrelevant.

II. ARGUMENT

A. THERE IS NO RATIONAL BASIS FOR THE MANNER IN WHICH DEFENDANT APPLIES THE POOLING AND PRICING LAWS TO PLAINTIFFS

1. Plaintiffs Have Not Mischaracterized the Purpose of the Pooling and Pricing Laws

The legislature itself, and the courts, have stated that the purpose of the milk pricing laws is to "establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes," and the purpose of the milk pooling laws is to "eliminate unfair, unjust, destructive and demoralizing trade practices in the production, marketing, sale, processing or distribution of milk" that resulted from competition among producers to obtain higher valued Class 1 contracts with processors. Hillside Dairy, Inc. v. Lyons, 529 U.S. __, 123 S.Ct. 2142, 2002 U.S.LEXIS 4423 at *6 (2003), quoting, California Code of Food & Agriculture § 61802(h); See also Knudsen Creamery Co. of California v. Brock, 37 Cal.2d 485, 489 (1951); Challenge Cream & Butter Assoc. v. Parker, 23 Cal.2d 137, 140-141 (1943); Food & Agr. Code §§ 62701, 62702 Id. § 61802(h).

As set forth in plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Pl. Br."), there is no rational relationship between these purposes and requiring plaintiffs to (a) pool their revenues with an industry in which they do not participate; (b) contribute to a pool that does not support the industry in which they do participate; and (c) pay an amount into the pool that is calculated by using prices associated with an industry in which plaintiffs do not participate. Summary judgment would be warranted even if defendant's position regarding the legislative purpose were correct, because there is also no rational relationship between these requirements and ensuring that California's citizen have an adequate

supply of fluid milk at reasonable prices. Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Br."), pp.3:25-4:1.

2. It is Irrational to Require Plaintiffs to Pool their Revenues with Conventional Producers from Whom They Do Not, and Cannot, Purchase Milk

Defendant's conclusory argument, that it is rational to require plaintiffs to pool their revenues with the conventional dairy industry because this will "most likely ensure that the pool maintains its stability" cannot justify denying plaintiffs' Motion for Summary Judgment. Def. Br., p.4:17-18. While protecting the "integrity" of the pool system, or ensuring an adequate supply of milk to the public at reasonable prices, may be "a legitimate interest, the interest is not self-supporting." Cornwell v. Hamilton 80 F.Supp.2d 1101, 1106, fn.15 (S.D.Cal. 1999). Requiring plaintiffs to pool their revenues with the conventional dairy industry must be rationally related to this interest, and it is not. Id.

Defendant's attempt to distinguish plaintiffs' supporting authorities is unavailing. Def. Br., pp.4:22-5:12, citing, Kass v. Brannan, 196 F.2d 791, 796-797 (2nd Cir. 1952), and Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57 S.Ct. 364 (1937). First, the court's conclusion in Kass, that the pool obligation was a discriminatory penalty, is directly on point in this case. Contrary to defendant's claim, in both Kass, and this case, the law required the defendant to establish uniform pricing schemes "wherein he finds the conditions affecting the production, distribution, and sale of fluid milk, fluid cream, or both, are reasonably uniform," and to establish different minimum pricing schemes when "necessary due to varying factors of costs of production, health regulations, transportation and other factors." Food & Agr. Code §§ 61803, 61805, 61807, 61961; Jersey Maid Milk Prods. Co. Inc. v. Brock, 13 Cal.App.2d 620, 641-642 (1939); Kass, at 796, fn. 7, quoting, Section 8c(5), 7 U.S.C.A. § 608c(5). The statutes

not only authorize, they mandate, that defendant distinguish among producers and processors where conditions are not reasonably uniform, and anticipate the creation of "one or more pools." Food & Agr. Code §§ 61803, 61807, 62704-62707(a) ("the secretary shall include in the pooling plan . . . one or more pools throughout the state.")

In Kass, the court concluded that calculating the pool obligation of processors who could not purchase milk from New York producers based on the New York pool prices, when the evidence supported the conclusion that the prices paid by those processors were higher than the New York pool prices, unlawfully discriminated between processors who purchased New York milk and processors who did not. Id., at 796. Similarly in this case, calculating the pool obligation of organic processors who cannot purchase milk from conventional producers based on the conventional pool price, when the evidence supports the conclusion that the prices paid by organic processors are necessarily higher than the conventional pool price, unlawfully discriminates between organic and conventional processors.

Defendant's attempt to distinguish Thompson on the ground that the regulation there was for a "narrow legislative purpose," while the pooling and pricing laws are for a "broad public purpose," is similarly misplaced. Def. Br., p.5:1-12. Just as defendant asserts that the "overriding" purpose of the pooling and pricing laws is to ensure an adequate supply of milk to the public, the overriding purpose of the law in Thompson was to ensure an adequate supply of gas to the public. Thompson, at 67 ("the State has power to conserve its natural resources for the public."); Def. Br., p.3:15-18. As in this case, the regulations in Thompson purported to achieve this purpose by requiring some businesses to subsidize other businesses. Thompson, at 78. As in Thompson, the regulations in this case are unconstitutional.

Defendant's arguments about the possible reasons the legislature could "reasonably believe" that "organic milk" should not be "exempt" from the pooling and pricing laws have nothing whatsoever to do with this case. See Def. Br., pp.5:13-6:23. Plaintiffs do not challenge any legislative decision and do not seek to exempt organic milk from the pooling and pricing laws. Further, whether organic producers could, in the future, compete with conventional producers for contracts with processors of conventional dairy products, is irrelevant. The relevant and undisputed fact is that plaintiffs could not, under any circumstance, subject conventional producers to "unfair, unjust, destructive and demoralizing trade practices" resulting from competition for Class 1 contracts, or any other contracts, because plaintiffs cannot purchase milk from conventional producers.

Defendant's speculation that exempting organic milk from the pooling and pricing laws would result in "an artificial competitive advantage for organic processors," has no bearing on this case. Plaintiffs do not seek to "exempt organic milk" from the pooling and pricing laws. Plaintiffs seek to enjoin defendant from requiring plaintiffs to pool the revenues of their organic processing operations with revenues of conventional processors and based on conventional costs and prices. Complaint, ¶¶ 26, 33. There is no evidence that there would be any incentive for conventional processors to purchase organic milk if the defendant established minimum prices for organic producers that reflected the costs of organic production (which are higher than the costs of conventional production), and established a pooling obligation for organic processors that reflected the cost of purchasing raw organic milk and the value of processed organic dairy products. Even if plaintiffs were excluded from the pooling and pricing laws, that would have no bearing on the defendant's calculation of the pooling obligation associated with processing conventional dairy products, regardless of whether those products are processed with milk

purchased from an organic producer. If a processor purchased organic milk and used that milk to process conventional dairy products, that milk should, of course, be included in the conventional pool. Plaintiffs do not contend otherwise.

The purported "dilemma of where to draw the line" cannot justify violating plaintiffs' constitutional rights. Def. Br., pp.5:25-6:1. There is only one group of dairy producers and processors who are distinguished by their required compliance with an entirely separate set of regulations to which no other dairy producer or processor is subject - certified organic dairy producers and processors. There is only one group of processors who cannot, as a matter of law, purchase milk from conventional producers - certified organic dairy processors. Jt. Stmt., ¶ 16; Sep. Stmt., ¶ 1; NOP, Section 205.236; California Health and Safety Code § 110810, *et seq*. There is only one group of dairy producers whose increased cost of producing milk is the result of legally mandated limitations and requirements - certified organic dairy producers. Sep. Stmt., ¶¶ 2-14. Defendant overlooks these facts in his brief. See e.g. Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3rd Cir. 1997) (rejecting claim that imposing different requirement on alternative party candidates than major party candidates would involve the state in treating some candidates more favorably than others because the candidates are not similarly situated and the reason for imposing the requirements on major party candidates did not apply to independent candidates.)[2]

[2] See also Jordan v. Gardner, 986 F.2d 1521, 1536 (9th Cir. 1992) ("Almost any accommodation of constitutional rights will result in some 'administrative burden'; most accommodations are not 'cost free,'" but this is not a grounds to deny constitutional rights.); Doran v. Clark, 681 F.2d 605, 608 (9th Cir. 1982) (classification for administrative convenience is constitutionally impermissible where it denies rights of one group).

3. It is Irrational to Require Plaintiffs to Participate in a Pool that Does Not Create Sustainable Prices for the Organic Producers from Whom Plaintiffs Purchase Milk

Defendant's attempt to justify his failure to establish minimum producer prices at a sustainable level for organic producers, and his argument that the Equal Protection and Due Process clauses do not "require the Secretary to set minimum pries sufficient high to ensure that all producers make a profit," is similarly misplaced. Def. Br., pp.6:24-8:15, p.9:6-10. Plaintiffs make no such contention. In particular, plaintiffs do not contend that organic producers are constitutionally entitled to make a profit. The issue is whether it is constitutionally permissible to require plaintiffs, who are organic processors, to contribute money to a pool the admitted purpose and effect of which is only to stabilize the conventional dairy industry, in which plaintiffs do not and cannot participate. See e.g. Thompson, supra.[3]

The fact that Cornwell v. Hamilton, 80 F.Supp.2d 1101 (S.D. Cal. 1999) involved a challenge to licensing requirements does not distinguish that case on any relevant ground. As in this case, the plaintiffs in Cornwell challenged the failure to differentiate between classes of persons. In Cornwell, as in this case, there was no rational connection between applying the regulations to the particular plaintiffs and the state's asserted interest. Id., at 1106-1108.

[3] Defendant's assertion that "there is a rational basis for the Legislature to have the Secretary create one set of minimum prices for all market milk" is misleading. The legislature has specifically provided that "it is necessary to establish marketing areas wherein different prices and regulations are necessary." California Code of Food & Agriculture, § 61803; See also Id., §§ 61805, 61807. Defendant has, in fact, established more than one Stabilization Plan. Joint Statement, ¶ 3, citing, Stabilization and Marketing Plan for Market Milk, as amended, for the Northern California Marketing Area § 300.0; Stabilization and Marketing Plan for Market Milk, as amended, for the Southern California Marketing Area § 300.0.

4. It is Irrational to Calculate Plaintiffs' Pool Obligation Based on Conventional Prices

Defendant does not even attempt to establish any rational basis for calculating plaintiffs' pool obligation based on conventional prices, or to provide any legal authority to support this irrational assessment on plaintiffs' operations. Rather, defendant merely attempts to challenge and distinguish plaintiffs' supporting authorities. Contrary to defendant's argument, Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330, 356-360, 55 S.Ct. 758 (1935), and Pringle v. U.S. of America, 1998 U.S.Dist.LEXIS 19378 (E.D.Mich. December 8, 1998) are applicable to this case.

First, Alton is still controlling authority; it is neither discredited nor distinguishable. Defendant's attempt to denigrate Alton simply because it was decided during the "Lochner era" is misguided. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 455, 113 S.Ct. 2711 (1993) (rejecting the respondent's "unabashed" denigration of certain cases as "Lochner-era precedents," when the Justices who had dissented in the Lochner case itself joined those opinions.)[4] The Alton Court was not the Court that decided Lochner; it was, in substantial part, the Court that ended the Lochner era. See West Coast Hotel v. Parish, 300 U.S. 379, 57 S.Ct. 578 (1937). Indeed, Justice Roberts, who wrote the opinion in Alton, also wrote the opinion upholding the constitutionality of the minimum milk price laws in the case of Nebbia v.New York, 291 U.S. 502, 54 S.Ct. 505 (1934), cited by defendant in his Motion for Summary Judgment. In Nebbia, the Court clearly articulated the standard of rational basis review that the courts currently apply. See Nebbia, at 525, 537; Pennell v. City of San Jose,485 U.S. 1, 11, 108

[4] The case of National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043 (9th Cir. 2000), that defendant cites, did not even refer to Alton. Def. Br., p.9:17-22.

S.Ct. 849 (1988) (quoting Nebbia as the controlling standard); United States v. Alexander, 48 F.3d 1477, 1491 (9th Cir. 1995) (same). Further, the decision in Alton was based on the criteria set forth in Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186 (1911) and Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260 (1917), both of which upheld the challenged economic legislation and were thus not examples of the "judicial activism" attributed to the "Lochner era." Def. Br., p.9, fn.3; Alton, at 359-360..

Contrary to the defendant's claim, the United States Supreme Court continued to apply the "reasoning behind Alton," even after the conclusion of the so-called Lochner era in 1937. The Court's decision in Alton was based on the principle that the government may require private parties to contribute to a common pool, but only where the laws account for "the varying conditions found in their respective enterprises." Alton, at 359-360. The Court reaffirmed the validity of this principle in United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 59 S.Ct. 993 (1939), cited by defendant (Def. Br., p.15:10), when it upheld the milk pooling plan specifically on the ground that, unlike the plan in Railroad Retirement Board, the milk pooling plan differentiated among producers and processors who operated under different conditions. Id., at 573; See also United States v. Carolene Prods. Co., 304 U.S. 144, 153-154, 58 S.Ct. 778 (1938) (citing Alton as authority for the proposition that: "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.")

The Court should also not be misled by defendant's out of context citation to cases that purportedly questioned the continuing validity of Alton. These cases addressed an entirely

different portion of the Alton decision from the one relied upon in this case.[5] To plaintiffs' knowledge, neither the United States Supreme Court nor this Circuit has questioned the validity of Alton's holding regarding the constitutional limitations on pooling requirements.

The decision in Alton is also not distinguishable on the asserted ground that the pooling and pricing laws in this case "merely create an equalization pool for dairy producers." Def. Br., fn. 4, p.10:27-28. The law at issue in Alton also "merely" created a pension pool for workers. In Alton, the Court concluded that "the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process." Id., at 360. The same is true in this case.

Despite defendant's argument, Pringle is instructive in this case.[6] Contra Def. Br., p.10:4-17. Although not a constitutional challenge, Pringle reviewed the pricing regulations at issue to determine whether they were arbitrary or irrational, which is similar to the standard

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[5] In addition to holding that the law's pooling requirement improperly treated all carriers as one employer (the only part of the holding that is relevant to this case), Alton also held, in a separate section of the opinion, that the law was impermissible retroactive legislation. Alton, at 349-350. In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976), the court established a new test for evaluating retroactive legislation, and then stated that "[a]ssuming that the portion of Alton invalidating this [retroactive] provision retains vitality, we find it distinguishable from this case." Id., at 16-17, 19 (emphasis added). The cases of S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California, 539 F.Supp. 867 (C.D.Cal. 1982) and Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2001) upon which defendant relies, both involved challenges to retroactive legislation and questioned the continuing validity of Alton's holding on that issue in light of the Court's decision in Turner Elkhorn. Commonwealth Edison, at 1341-1343; S & M, at 871-874. The Ninth Circuit has continued to cite Alton as authority in analyzing retroactive legislation. Licari v. Comm'r of Internal Revenue, 946 F.2d 690 (9th Cir. 1991).

[6] The fact that Pringle is unpublished does not preclude the court from considering it for its persuasive effect. See e.g. Kokal v. Massanari, 163 F.Supp.2d 1122, 1130, fn.5 (N.D.Cal. 2001). This is particularly true where, as here, there is little authority that addresses pricing regulations as applied to organic products. Id.

applicable in this case. Pringle, at * 5. The underlying statutes and regulations at issue in Pringle were substantially similar to the statutes and regulations in this case. The laws at issue in both Pringle and this case require the defendant to establish the payment rate based on market prices and authorize the defendant to provide different rates where the rate is not representative of actual prices received. Id., at *17-18; Food & Agr. Code §§ 61803, 62062(a).

Defendant misstates the law when he represents that the statutes require him to establish "one set of minimum prices for all market milk produced in the state." Def. Br., p.10:11-13; See Footnote 3, supra. Section 62720, upon which defendant relies to support his claim, addresses the pooling regulations, not the pricing regulations. That section states that "no pooling plan shall result in an unequal raw product cost between distributors in the same marketing areas."[7] This language does not purport to require defendant to establish "one set of minimum prices" but, instead, acknowledges that the pool obligation is part of a processor's "raw product cost" and that, without appropriate adjustments among processors, these pooling obligations may result in unequal raw product costs between processors. See Kass, at 793-794, 796 (explaining that the pool obligation was part of the raw product cost to a processor and finding that, by calculating a processor's pool obligation based on New York minimum prices when its actual cost to purchase raw milk was higher, the defendant violated the mandate that he establish uniform prices for processors.); See also Def. Br., p.6:4-8 (explaining that a processor's cost to purchase raw milk includes both the price paid to the producer and the associated pool obligation for that milk.).

[7] By contrast, in the pricing laws, the legislature expressly authorized the defendant to establish more than one minimum pricing scheme when "necessary due to varying factors of costs of production, health regulations, transportation, and other factors." California Code of Food & Agriculture, § 61805(b).

B. SECTION 62717, AS INTERPRETED AND APPLIED, VIOLATES PLAINTIFFS' RIGHT TO PROCEDURAL DUE PROCESS

Contrary to defendant's argument, his interpretation of Section 62717 to require the approval of conventional producers to an amendment of the pooling plan as applied to plaintiffs, is unconstitutional, regardless of whether the defendant also relied upon other reasons to deny plaintiffs' petition. Def. Br., p.12:10-23; Bayside Timber Co., Inc. v. Board of Supervisors, 20 Cal.App.3d 1, 10, 12-14 (1971) (finding it unnecessary to rule on whether permit was properly denied, where there was an unconstitutional delegation to interested parties); Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 657, 295 N.W. 346 (1940) (allowing dairy producers with direct pecuniary interest to determine plaintiff's property rights was a violation of plaintiff's right to due process where there was no allegation of improper conduct.)

Defendant has not cited a single authority that supports the propriety of allowing conventional producers, from whom plaintiffs cannot and do not purchase milk, and who have an interest adverse to plaintiffs, to prevent the defendant from amending the regulations as they apply to plaintiffs. Rather, defendant has created "supporting" authority out of thin air by reinventing the facts and claims in Sequoia Orange Co. v. Yeutter, 973 F.2d 752 (9th Cir. 1991). Def. Br., p.15:16-16:5. In Sequoia, the plaintiff was not a competitor of Sunkist; the plaintiff did not argue that the referendum provisions unconstitutionally delegated law-making authority to a minority of growers "who were competitors;" and the court did not address, much less reject, this non-existent claim. Def. Br., p.16:1-3. The plaintiff, Sequoia, was an orange processor, and Sunkist Growers, Inc., was a cooperative of growers, entitled to vote in the referendum. Sequoa and Sunkist were not competitors, nor did they claim to be, and they certainly were not involved in the production of different commodities, as in this case. Sequoa, at 754-755. Further, while Sequoa objected to Sunkist's bloc voting in the referendum,

successfully arguing that this part of the procedure violated the Administrative Procedures Act, this claim was separate from Sequioa's unlawful delegation claim. Id., at 758-759. In sum, Sequioa did not address, and does not furnish any basis to reject, plaintiffs' claim in this case.

Defendant has interpreted Section 62717 to allow conventional producers to veto a constitutionally mandated amendment to the regulations. Declaration of Aviva Cuyler in Support of Plaintiffs' Motion for Summary Judgment, Exhibit B, p.2; Sep. Stmt., ¶ 23. This is a violation of plaintiffs' right to procedural due process. See e.g. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-122, 49 S.Ct. 50 (1928); Young v. City of Simi Valley, 216 F.3d 807, 819, 820 (9th Cir. 2000); International Assoc. of Plumbing & Mechanical Officials v. California Building Standards Commission, 55 Cal.App.4th 245, 254 (1997); Bayside Timber Co., Inc. v. Board of Supervisors, 20 Cal.App.3d 1, 10, 12-14 (1971).[8]

Finally, the court in Edwards v. United States, 91 F.2d 767 (9th Cir. 1937) did not hold, as defendant implies, by an out of context quotation, that Roberge was inapt because it did not involve a referendum. Def. Br., p.17:12-17. Rather, Edwards distinguished Roberge because the delegation in Edwards merely allowed private parties to negate an otherwise valid law, while Roberge allowed private parties, by withholding their consent, to prevent the constitutional application of a law. In this case, as in Roberge, plaintiffs have alleged that allowing conventional producers to veto amendments to the pooling plan as it applies to plaintiffs, would allow them to perpetuate unconstitutional regulations.

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[8] Defendant's attempt to discredit Bayside Timber because it was "disagreed with" by Laupheimer v. State of California, 200 Cal.App.3d 440 (1988) is misleading. Laupheimer's alleged "disagreement" with Bayside Timber related to whether the public generally has a due process right with respect to environmental matters. Laupheimer, at 455. Laupheimer did not even address the holding in Bayside Timber upon which plaintiffs rely, that the non-delegation rule "applies equally to any legislation that would abrogate the state's police power by giving a private party or parties a veto over the regulatory function." International Assoc. of Plumbing, at 254, citing, Bayside Timber, supra.

III. CONCLUSION

For the foregoing reasons, in addition to those set forth in plaintiffs' moving papers, plaintiffs' Motion for Summary Judgment should be granted.

Dated: July 16, 2003

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