

Eberly, Douglas

From: Marvin Beshore <mbeshore@beshorelaw.com>
Sent: Friday, August 10, 2018 11:55 AM
To: Eberly, Douglas
Cc: Saylor, Andrew; Yoviene, Wendy; John J. Bell (jjbell@pfb.com); Allen Warshaw; Howard, John; chipenglish@dwt.com
Subject: Motion for Protective Order - Cooperative Procurement Costs Hearing
Attachments: Proposed Protective Order for Cooperative Procurement Costs Hearing.docx

Doug:

PADC hereby requests that the Board enter the attached protective order for the Cooperative Milk Procurement Costs hearing. Messrs. English, Warshaw, Howard and Bell, and Ms. Yoviene have indicated their concurrence or non-opposition. I have not heard from Mr. Saylor.

Thank you for your consideration.

Marvin

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PROPOSED PROTECTIVE ORDER RE:

October 3, 2018, cooperative procurement costs hearing

1. This Order shall apply to all information disclosed during the course of this proceeding, including, without limitation, documents produced, transcripts, responses to requests for information, affidavits, exhibits, testimony, and other such material and information as may be disclosed, produced, or filed during the course of this proceeding whether disclosed, produced, or filed by an interested party or by any other parties that may be added to this proceeding or by third parties. This Order shall cover all information that is contained in hard copy, electronic, or other format.
2. Parties may designate as “Confidential – Attorney Eyes Only” material which contains trade secrets, or other confidential financial or business information, or that relates to the costs incurred or claimed to be incurred by an identified cooperative or milk dealer buying, processing, selling, or delivering milk, or material relating to the prices charged by or to specific suppliers or customers of the producing party or non-party. Such information shall include but not be limited to financial statements, reports filed with government agencies, sales information, including customer identities, customer volume, invoices from suppliers, producer payroll information including identity and characteristics of producers, or checks or wires or other evidence of payments, plant volume, geography of milk procurement or packaged milk sales, and proprietary corporate price forecasts. The information so designated shall only include that information which: (i) is not in the public domain; and (ii) has been held in confidence by the producing party. Information that has been made available to a governmental entity such as Board Staff for regulatory compliance or that has been made available to third parties subject to confidentiality arrangements for previous hearings shall be deemed to have been held in confidence by the producing party.
3. Material that is designated as “Confidential – Attorney Eyes Only” shall be used solely for purposes of the captioned proceeding among the parties and not for any other purposes.

4. Financial information that is designated as “Confidential – Attorney Eyes Only” may be provided in a form which does not include or state the identity of the entity to which that information pertains. If a party believes that it is necessary to know the identity of the entity to which that information pertains, it may ask for that information, stating the reason why it believes that the disclosure of that information is appropriate. If the parties are unable to agree on the need for disclosure, the issue shall be submitted to the Board for resolution. In such case, the burden of persuasion shall be on the producing party.

5. If a page or part of a document including an exhibit, brief, or transcript contains information designated pursuant to this Protective Order, those pages or parts shall be so designated by clearly and prominently marking them with the words “Confidential – Attorney Eyes Only” on the first page thereof. Transcript testimony may be designated as containing “Confidential – Attorney Eyes Only” information under this Protective Order by: (i) designating the transcript as containing “Confidential – Attorney Eyes Only” information on the record during the testimony; or (ii) sending a written notice to that effect to the parties to this action within ten (10) days from the date the transcript becomes available to the designating party. During this ten (10) day period, the transcript shall not be disclosed by any non-producing party to persons other than the attorneys representing the non-producing party.

6. Pages or parts of papers or documents, exhibits, briefs, or transcripts filed with the Board that contain “Confidential – Attorney Eyes Only” information shall be filed with the Board under seal or *in camera*, provided however that only those portions of such documents filed with the Board that contain such “Confidential – Attorney Eyes Only” information shall be subject to seal. The party making the filing shall provide the Board and all interested parties with a redacted copy for the public record and the unredacted pages or parts of papers or documents or briefs shall be clearly and prominently marked “Confidential – Attorney Eyes Only Subject to Protective Order.”

7. Any information designated as “Confidential – Attorney Eyes Only” shall be made available only to those persons outlined below:

a. Those attorneys representing a party at the hearing and those employed in the course of assisting such attorneys, including, without limitation, graphics consultants, outside copy services, paralegals, and office personnel;

b. The Board, Board counsel, Board staff, and court reporters involved in the proceeding;

c. Testifying or consulting experts who are not employees of a party, providing that said expert shall sign a document (in the form of Exhibit A hereto) which shall promptly be provided by the receiving party to the Board and the producing party; and

d. Such other persons as the parties may agree to in writing or as the Board may, upon hearing, so direct.

8. All persons having access to “Confidential – Attorneys Eyes Only” information shall be given a copy of this Protective Order prior to receiving such “Confidential – Attorneys Eyes Only” information, and its provisions shall be explained to such person by an attorney. Each such person,

prior to receiving any "Confidential – Attorneys Eyes Only" information, shall agree not to disclose such "Confidential – Attorneys Eyes Only" information (or any information derived therefrom) to anyone not exempted by this Protective Order and not to make use of any such "Confidential – Attorneys Eyes Only" information other than for purposes of this proceeding.

9. Access to "Confidential – Attorney Eyes Only" information shall be given to those authorized pursuant to this Protective Order in the following manner: Via e-mail to those persons who have agreed to receive service via email and are entitled to receive such data pursuant to this Order. Otherwise, "Confidential – Attorney Eyes Only" information shall be made available in hard copy via Federal Express or other Express Carrier to the offices for counsel to the interested parties by the day following the applicable pre- submission or filing deadline for this hearing. Authorized persons seeking review may receive a hard copy or facsimile if the fax destination is to a machine and not a computer e-mail system where a potential for accidental forwarding exists. Any notes taken by authorized persons must be marked "Confidential – Attorney Eyes Only." Any testimony or exhibits offered by authorized persons commenting on "Confidential- Attorney Eyes Only" information must be marked "Confidential- Attorney Eyes Only."

10. Material offered as "Confidential – Attorney Eyes Only" material shall be made available in redacted form, to the extent practical, to interested parties that are not authorized to have access to the "Confidential – Attorney Eyes Only" material, but with respect to briefs or pre-submissions, there shall be a 24 hour waiting period after filing before redacted versions are distributed.

11. Additionally, notwithstanding any provision of this Order, a party may disclose: (a) its own "Confidential – Attorney Eyes Only" material to non-parties as it sees fit; (b) another party's "Confidential – Attorney Eyes Only" material to any employee of that other party or ex-employee of that other party, provided that the document or thing includes indicia that the ex-employee had previously received it; (c) a non-party's "Confidential – Attorney Eyes Only" material as produced by that non-party to any employee of that non-party, provided that the document or thing includes indicia that the non-party employee had received it.

12. Any person, including attorneys, given access to "Confidential – Attorney Eyes Only" information pursuant to this Protective Order shall be permitted to use such material solely for the purposes of this proceeding. Without losing the status thereof, "Confidential – Attorney Eyes Only" information may also be disclosed to the Board, Board Staff, and any court reporter retained to record testimony at a hearing in this proceeding. If a document designated "Confidential – Attorney Eyes Only" is intended to be used during a hearing, attendance at that part of the hearing shall be limited to those persons otherwise entitled to have access to the information pursuant to this Protective Order.

13. "Confidential – Attorney Eyes Only" information may be used in any other manner only with the consent of the party producing such "Confidential – Attorney Eyes Only" information or by Order of the Board.

14. If at any time a party objects to a designation of material as "Confidential – Attorney Eyes Only," the objecting party shall notify the designating party in writing. The notice shall identify the information in question and set forth in reasonable detail the reasons why the material is not entitled to "Confidential – Attorney Eyes Only" treatment. If the designation of the information as "Confidential – Attorney Eyes Only" has not been withdrawn within ten (10) business days after the

delivery of such notice, the objecting party may apply to the Board for a ruling as to the "Confidential – Attorney Eyes Only" nature of the material, provided that counsel for the moving party has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement any dispute regarding the designation of such material. The material shall be treated as designated "Confidential – Attorney Eyes Only" until the Board rules on the application and pending any appeals to a court of competent jurisdiction. In the event that the exigencies of litigation require Board intervention in less than ten (10) business days, then a party may seek Board intervention, provided that the request for expedited review is accompanied by a declaration of counsel of record establishing good cause for such expedited review. This and any other disputes regarding this Protective Order shall be resolved as expeditiously as possible, preferably by telephone conference call with the Board.

15. Counsel shall keep a log setting forth the identity of each document designated "Confidential – Attorney Eyes Only" during the course of this proceeding by another party or a third party, the date said document was received, the identity of each person reviewing that document or a copy thereof, the date of that review, whether that person received a copy and, if so, the date on which that copy was returned to counsel.

16. At the conclusion of this proceeding, including any appeals, the originals of all documents designated as containing "Confidential – Attorney Eyes Only" information, including notes taken that contain "Confidential – Attorney Eyes Only" information, and remaining subject to this Protective Order and all photocopies thereof, shall, within thirty (30) days of a written request, be returned to the producing party or destroyed. Counsel shall certify compliance with this paragraph in a writing filed with the Board within thirty (30) days of written request.

17. This Protective Order shall not be construed: (a) to apply to information which was lawfully in the possession of a third party (or its counsel) not under an ethical obligation as to its confidentiality prior to disclosure by the producing party; (b) to apply to any information which a party (or its counsel) lawfully obtains from a third party having the right to disclose such information; (c) to apply to any information developed independently by a party as reflected in written documents; or (d) to apply to any information that is in the public domain.

18. There is no waiver of the attorney-client privilege or the attorney work-product immunity should a document or thing be produced inadvertently which the producing party claims is protected from disclosure by the attorney-client privilege or the attorney work-product immunity, so long as the producing party provides notice of the inadvertent production and states the privilege or immunity claimed within a reasonable time after actually becoming aware of the inadvertent production. Upon receiving such notice, the receiving party shall, within ten (10) business days, return the originals and all copies of the document or thing inadvertently produced which the producing party claims is protected from disclosure by the attorney-client privilege or the attorney- work product immunity. If the receiving party disputes that the document or thing was inadvertently produced or is protected from disclosure by the attorney-client privilege or the attorney-work product immunity, or that the notice was not provided within a reasonable time, then the receiving party shall so notify the producing party in writing at the time the document or thing is returned to the producing party. The receiving party may file a motion with the Board to compel production of such documents or things. If such a motion is filed, the producing party shall have the burden of showing privilege or immunity, inadvertent production, or that notice was within a reasonable time.

19. The parties shall act in good faith in designating material as "Confidential – Attorney Eyes Only." In that regard: (a) the receipt of any material designated as "Confidential – Attorney Eyes Only" from the producing party shall not be construed as agreement by the receiving party that any such material is in fact confidential and shall not operate as a waiver of the receiving party's right to challenge any such designation as provided herein; (b) none of the parties hereto shall be obligated to challenge the propriety or correctness of the designation of material as "Confidential – Attorney Eyes Only" and a failure to do so shall not preclude a subsequent challenge to such status. The burden of proof with respect to the propriety or correctness in the designation of material as "Confidential – Attorney Eyes Only" shall rest on the producing party.

20. This Protective Order is without prejudice to the right of a party hereto to seek relief from the Board on good cause shown, from any of the provisions or restrictions provided herein.

21. Violations of this Protective Order shall be considered contempt of a Board Order and shall be subject to sanctions as the Board, in its discretion, deems appropriate.

22. Parties to this Protective Order shall have the right to enforce this Protective Order in a court of competent jurisdiction in which relief sought may include but not be limited to injunctive and monetary relief.

EXHIBIT A

BEFORE THE PENNSYLVANIA MILK MARKETING BOARD

In re: October 3, 2018, cooperative procurement

costs hearing

ACKNOWLEDGMENT AND CONSENT

I certify that I have read and am fully familiar with the terms of the Protective Order dated _____, 2017, entered in the above-referenced proceeding. I understand the effect of the Board's Protective Order, and I agree to be bound by its terms. Specifically, I will not disclose or permit the unauthorized viewing or disclosure of "Confidential – Attorney Eyes Only" information as set forth in the Board's Protective Order.

Executed this _____ day of _____, 2017.

Name: _____

Signature: _____