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Straus Family Creamery, Inc. and
Horizon Organic Holding Corporation

**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

**OBJECTION TO DECLARATION OF
KELLY KRUG IN SUPPORT OF
DEFENDANT'S MOTION TO
TRANSFER FOR CONVENIENCE
AND MOTION TO STRIKE
TESTIMONY CONTAINED THEREIN**

Hearing Date: September 4, 2002
Time: 10:00 a.m.
Department: G
Judge: Magistrate Judge Bernard
Zimmerman

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2 Plaintiffs Straus Family Creamery, Inc. and Horizon Organic Holding Corporation
3 hereby object to the testimony contained in the Declaration of Kelly Krug in Support of
4 Motion to Transfer for Convenience (“the Declaration”), which motion is set for hearing
5 on September 4, 2002. Plaintiffs object to the following testimony on the following
6 grounds:

- 7 a. Paragraph 7(a) on the ground that it is hearsay, there is no foundation, and
8 the witness is not competent to give this testimony. Additionally, Mr.
9 Horton’s retirement intentions are irrelevant.
- 10 b. Paragraph 7(b) on the ground that it is hearsay, there is no foundation, and
11 the witness is not competent to give this testimony;
- 12 c. Paragraph 7(c) on the ground that it is hearsay, there is no foundation, and
13 the witness is not competent to give this testimony;
- 14 d. Paragraph 7(d) on the ground that it is hearsay, there is no foundation, and
15 the witness is not competent to give this testimony;
- 16 e. Paragraph 7(e) on the ground that it is hearsay, there is no foundation, and
17 the witness is not competent to give this testimony;
- 18 f. Paragraph 7(f) on the ground that it is hearsay, there is no foundation, and
19 the witness is not competent to give this testimony;
- 20 g. Paragraph 7(g) on the ground that it is hearsay, there is no foundation, and
21 the witness is not competent to give this testimony;
- 22 h. Paragraph 7(h) on the ground that it is hearsay, there is no foundation, and
23 the witness is not competent to give this testimony;
- 24 i. Paragraph 7(i) on the ground that it is hearsay, there is no foundation, and
25 the witness is not competent to give this testimony;

- 1 j. Paragraph 7(j) on the ground that it is hearsay, there is no foundation, and
2 the witness is not competent to give this testimony;
- 3 k. Paragraph 7(k) on the ground that it is hearsay, there is no foundation, and
4 the witness is not competent to give this testimony;
- 5 l. Paragraph 7(l) on the ground that it is hearsay, there is no foundation, and
6 the witness is not competent to give this testimony;
- 7 m. Paragraph 7(m) on the ground that it is hearsay, there is no foundation, and
8 the witness is not competent to give this testimony;
- 9 n. Paragraph 7(n) on the ground that it is hearsay, there is no foundation, and
10 the witness is not competent to give this testimony;
- 11 o. Paragraph 7(o) on the ground that it is hearsay, there is no foundation, and
12 the witness is not competent to give this testimony.
- 13 p. Paragraph 8 on the ground that it is hearsay, there is no foundation, and the
14 witness is not competent to give this testimony.

15 The rules of this Court require that “[f]actual contentions made in support of or in
16 opposition to any motion must be supported by an affidavit or declaration and by
17 appropriate reference to the record.” N.D.Cal. Rule 7(a). The rules further require that:
18 “[a]n affidavit or declaration . . . must conform as much as possible to the requirements
19 of F.R.Civ.P. 56(e). . . . An affidavit or declaration not in compliance with this rule may
20 be stricken in whole or in part.” N.D.Cal. Rule 7(b). Rule 56(e) of the Federal Rules of
21 Civil Procedure requires, *inter alia*, that “[s]upporting and opposing affidavits shall be
22 made on personal knowledge, shall set forth such facts as would be admissible in
23 evidence, and shall show affirmatively that the affiant is competent to testify to the
24 matters stated therein.”
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1 The *California Practice Guide: Federal Civil Procedures Before Trial* explains
2 the application of these rules to motions to transfer venue: “Affidavits or declarations are
3 required to establish whatever facts are involved: e.g. the residence of the parties, the
4 location of witnesses, physical evidence, etc. In any case, the affidavits must be
5 *admissible evidence* of the facts involved – i.e., nonhearsay statements by a competent
6 witness. Conclusory declarations are *not* sufficient.” Schwarzer, Tashima, and
7 Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter
8 Group, 2002) ¶ 4:300 (emphasis in original), citing, *inter alia* N.D. Cal. Rule 7-5.

9 In this case, Mr. Krug has testified in paragraphs 7(a)-(o) as to the existence and
10 location of certain potential witnesses and the testimony that he expects those witnesses
11 to provide, without any foundation that he has personal knowledge of these facts.
12 Accordingly, this testimony is inadmissible and should be stricken. See Local Rule 7-5;
13 Federal Rule of Civil Procedure 56(e); Federal Rule of Evidence 802. Additionally, Mr.
14 Krug has testified in paragraph 8 that “in 1197 [sic], Judge Burrell considered motions
15 for preliminary injunction that required him to familiarize himself with the
16 implementation of the pooling regulations” without showing that he has personal
17 knowledge of this fact. Krug Decl., ¶ 8. Therefore, this testimony is also inadmissible.

18 For the foregoing reasons, plaintiffs respectfully request the Court to sustain these
19 objections and to strike the testimony referred to above.
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1 Dated: August 14, 2002

CHILVERS & TAYLOR PC

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3 By: */s/ Aviva Cuyler*

4 Aviva Cuyler

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