

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

Farm-to-Consumer	:	Case No. 5:10-cv-4018
Legal Defense Fund, et al.	:	
	:	
Plaintiffs	:	Judge Mark W. Bennett
	:	
v.	:	
	:	
Sebelius, et al.	:	
	:	
Defendants	:	

**PLAINTIFFS’ MOTION TO AMEND AND SUPPLEMENT THEIR BRIEF IN
RESISTANCE TO FDA’S RENEWED MOTION TO DISMISS**

Pursuant to LR 7a., Plaintiffs move the Court for permission to amend and supplement their Brief in Resistance to Defendant Food and Drug Administration’s (“FDA”) renewed motion to dismiss, Doc. #61. Pursuant to LR 7d.8., a Brief in Support is not required to be submitted in support of this motion. Pursuant to LR 7l, Plaintiffs have contacted counsel for Defendants to obtain the Defendants consent to this motion. Defendants did not consent to this motion. Consequently, Plaintiffs move the Court to amend their brief in resistance to FDA’s renewed motion to dismiss as follows.

Previously, the Defendant Food and Drug Administration (“FDA”) informed the Court in response to the Court’s questions *ante* that an individual who purchases raw milk in final package form and then takes that milk across state lines would be in violation of 21 C.F.R. 1240.61 (“1240.61”) but that FDA would reserve to itself the right to bring an enforcement action if warranted by the facts of the specific case. *See* Doc. #43-1, pg. 8 of 9. FDA did admit, however, that the travelling consumer could distribute their raw milk to “friends or family members.” *Id.*

Now, however, FDA has announced that it has no intention of bringing any such enforcement action against any such travelling consumer. Specifically, FDA announced on November 1, 2011 its intent *not* to enforce 21 C.F.R. 1240.61 against an individual who purchases raw milk and transports it across state lines for their own personal consumption. *See* FDA press release, attached hereto as Exhibit A.¹ FDA states in its press release that “the FDA has never taken, *nor does it intend to take*, enforcement action against an individual who purchased and transported raw milk across state lines solely for his or her own personal consumption.” Emphasis added. FDA may argue that this press release does not change anything or that it does not break any new ground, yet there is nothing in the press release that conditions FDA’s intent not to take any enforcement action against a travelling consumer. It is a *carte blanche* exercise of discretion not to enforce 1240.61 against a travelling consumer. This constitutes a reversal of FDA on this issue.

This reversal of FDA’s position has significance to Plaintiffs’ resistance to FDA’s renewed motion to dismiss for several reasons. To begin, FDA’s position constitutes a tacit recognition that application of 1240.61 against a private consumer who transports raw milk across state lines for their own benefit would be an unconstitutional deprivation of the consumer’s constitutional rights to privacy and travel. Moreover, FDA’s position is a tacit admission that there is no public health risk posed by an individual consumer who takes raw milk across state lines for their own personal consumption. Consequently, 1240.61 does not promote a substantial governmental interest and must fall under a strict

¹ Plaintiffs are also filing a concomitant Motion to Amend Appendix in Support of their Motion for Summary Judgment to include a copy of FDA’s press release.

scrutiny analysis. Thus, FDA's motion to dismiss should be denied and in the alternative its motion for summary judgment should also be denied.

Also, FDA's position means that there is no reason to bring any enforcement action against a farmer who makes raw milk available to or who distributes raw milk to a travelling consumer in possession of raw milk. For FDA to suggest that it will unconditionally not bring an enforcement action against a private consumer who brings raw milk across state lines yet reserve to itself the right to bring an enforcement action against a farmer who provided that milk to the consumer is irrational. Consequently, allowing the interstate transportation of raw milk across state lines by an individual consumer yet bringing an enforcement action against the distributor of that raw milk who enables the protected interstate transportation to take place would be arbitrary and capricious and irrational. If there is no public health threat posed by a consumer who takes raw milk across state lines for personal consumption, there cannot be any public health risk when a farmer makes that raw milk available to the travelling consumer. Thus, FDA's motion to dismiss should be denied and in the alternative its motion for summary judgment should also be denied.

In addition, if a consumer who takes raw milk across state lines is unconditionally free from an enforcement action, that consumer's agent who takes the consumer's raw milk across state lines should also enjoy such complete freedom.² For example, the consumer may have a medical or physical condition that prevents the consumer from travelling and thus would require the services of an agent to obtain the raw milk from an out-of-state source. Therefore, there would be no public health threat posed by the agent

² Plaintiff Wagoner resides in Georgia, and Georgia law recognizes an agency/principal relationship. *See, e.g.,* Title 10, Chapter 6, Section 10-6-1 *et seq.*

of a consumer who transports the raw milk across state lines on behalf of the agent's principal, i.e., the consumer. Consequently, as in the farmer situation, bringing an enforcement action against an agent but not bringing one against the principal would be arbitrary and capricious and irrational. Thus, FDA's motion to dismiss should be denied and in the alternative its motion for summary judgment should also be denied.

For these reasons, FDA's renewed motion is not well taken and it should be denied. In the alternative, FDA's motion for summary judgment is not well taken and it too should be denied.

Dated: November 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send notification of such filings(s) to the following:

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