

1 David G. Cox (OH Sup. Ct. No. 0042724)
2 Donald M. Collins (OH Sup. Ct. No. 0037701)
3 Two Miranova Place, Suite 500
4 Columbus, OH 43215-7052
5 Tel: 614-228-6885
6 Fax: 614-228-0146
7 dcox@lanealton.com
8 dcollins@lanealton.com

9 Bradley W. Sullivan, #112111
10 Paul A. Rovella, Esq. #245745
11 Lombardo & Gilles, LLP
12 318 Cayuga Street
13 Salinas, CA 93901
14 Tel: (831) 754-2444
15 Fax: (831) 754-2011
16 brad@lomgil.com

17 IN THE SUPERIOR COURT OF SAN BENITO COUNTY

18 STATE OF CALIFORNIA

19	ORGANIC PASTURES DAIRY)	Case No.: CU-07-00204
	COMPANY, LLC, and)	
	CLARAVALE FARM, INC.,)	
)	MOTION FOR PRELIMINARY
	Plaintiffs,)	INJUNCTION AND
)	MEMORANDUM IN SUPPORT
	v.)	
)	
	STATE OF CALIFORNIA and)	
	A.G. KAWAMURA, Secretary of California)	
	Department of Food and Agriculture,)	
)	
	Defendants.)	
)	
)	

20 Now come Plaintiffs, Organic Pastures Dairy Company, LLC (OPDC) and Claravale
21 Farms, Inc. (Claravale), by and through counsel, who move the Court pursuant to California
22 Rule of Civil Procedure 526 for a preliminary injunction to:

- 23 a. Enjoin the State of California and A.G. Kawamura, Secretary of the California
- 24 Department of Food and Agriculture (CDFA) from enforcing the provisions of AB1735; and
- 25 b. Enjoin the State of California and A.G. Kawamura, Secretary of CDFA from testing,
- 26 inspecting, sampling or otherwise taking any action with respect to the enforcement of newly
- 27 enacted AB1735.

1 Plaintiffs respectfully request the Court to return to the status quo prior to the recent
2 amendment of AB1735 until such time as the Court has the opportunity to hear the merits of
3 their complaint.

4 Plaintiffs respectfully submit that the enforcement of AB 1735 will cause dramatic and
5 irreparable harm to the only two raw milk producers in the State of California, and there exists a
6 reasonable probability that Plaintiffs will succeed on the merits of the case. The legislation is not
7 rationally related to a legitimate governmental interest. A Memorandum in Support of this
8 Motion is attached below and incorporated as if rewritten herein.

9 Date: March 5, 2008

Respectfully submitted,

10
11 _____
12 David G. Cox (OH Sup. Ct. No. 0042724)
13 Donald M. Collins (OH Sup. Ct. No. 0037701)
14 LANE, ALTON & HORST, LLC
Two Miranova Place, Suite 500
Columbus, OH 43215-7052

15 and

16 Bradley W. Sullivan, #112111
17 Paul A. Rovella, #245745
18 Lombardo and Gilles
318 Cayuga Street
19 Salinas, CA 93901

20 Attorneys for Plaintiffs
21 Organic Pastures Dairy Company, LLC and
22 Claravale Farm, Inc.
23
24
25
26
27
28

1 **MEMORANDUM IN SUPPORT**

2 Plaintiffs, Organic Pastures Dairy Company, LLC (“OPDC”) and Claravale Farms, Inc.,
3 (“Claravale”) respectfully request this Court to enjoin the enforcement of the recently enacted
4 AB1735, which adds a new standard for, in part, permissible coliform bacteria in raw whole
5 milk, skim milk and cream sold to purchasing consumers in California. The new standard is ten
6 coliform bacteria per milliliter. Plaintiffs, the only two raw milk producers in the State of
7 California, state they will have difficulty meeting this new additional standard when it is tested at
8 the bottle and believe the standards for pathogen testing of commercial grade raw milk are
9 adequate.
10

11 AB 1735’s new standard is without foundation and will cause irreparable harm and
12 damage to Plaintiffs’ businesses. Both plaintiffs state that when tested in the bulk tank they may
13 be able to meet this new standard, however, when tested in the milk bottle they certainly cannot
14 meet this standard on a regular basis, if they can meet it at all.
15

16 Plaintiffs are two California dairy farms who are the sole producers of raw milk and raw
17 dairy products for human consumption in California. Claravale is operated by Ron Garthwaite
18 and Collette Cassidy and has its principle place of business in Paicines, San Benito County,
19 California. Organic Pastures Dairy Company LLC (OPDC) is operated by Mark McAfee and
20 has its principle place of business in Fresno, Fresno County, California. They both produce
21 specialized raw dairy products, i.e., whole milk, cream and skim milk.
22

23 Their customer base is 40,000 consumers located throughout California and they have
24 combined annual sales of over \$6,000,000. Raw milk is different from pasteurized milk in that
25 the bacteria and nutrients in raw milk are not destroyed by pasteurization. To date, there have
26 been no reported illnesses caused by the consumption of any raw milk sold by Claravale or
27
28

1 OPDC under the present owners. (See Affidavits of Mark McAfee and Ron Garthwaite, attached
2 hereto.)

3 On January 1, 2008, AB1735 took effect and requires, in part, that raw milk or cream
4 may not contain more than 10 coliform bacteria per milliliter at the point of sale. Prior to the
5 enactment of AB 1735, there was no coliform standard for either raw whole milk or cream.
6

7 Under applicable law, the State of California Department of Food and Agriculture
8 (CDFA) will order the dairies to stop selling raw milk if they fail three tests out of five attempts.

9 To date, Claravale has met once and failed once the standard for whole milk. However, it
10 has twice failed the standard for its cream and skim milk products. Claravale and Ron
11 Garthwaite know from prior testing that Claravale will not regularly meet this new standard for
12 cream and skim milk, or for whole milk for that matter, and that they will soon fail three out of
13 five tests for coliforms for these products. (Garthwaite Affidavit pars. 9, 10 and 13).
14

15 To date, OPDC has failed two of its monthly tests for coliform levels in its whole milk
16 yet has already failed three of its monthly tests for coliform in its raw cream product. On
17 February 28, 2008, OPDC was informed by CDFA that its raw cream product could no longer be
18 sold. (McAfee Affidavit para. 13).
19

20 Both Plaintiffs submit that AB 1735's standard of no more than 10 coliform bacteria per
21 milliliter, as a standard to protect the public health, is without scientific foundation and is
22 without the support of research. (See Affidavit of Dr. Theodore Beals, pars. 32, 33 and 34,
23 attached hereto). Prior to this newly enacted standard these two dairies routinely submitted their
24 products to state testing for standard plate count and pathogen testing.
25
26
27
28

1 Respectfully, Plaintiffs request the Court to enjoin the State of California from enforcing
2 this new statute until the Constitutionality of AB1735 can be determined by the Court.

3 Both dairies submit that they maintain commercial Grade A levels of sanitation and
4 cleanliness in the raw milk production and there has never been any illness or sickness
5 associated with the sale and consumption of their raw milk. (McAfee Affidavit, par. 10,
6 Garthwaite Affidavit, par. 10). The dairies also submit they are not sure why AB1735 was
7 passed in the first place. Enforcement of this new standard will put them out of business and
8 taint their good names and reputations in the farming and agricultural industry.

9
10 **STANDARD OF REVIEW FOR PRELIMINARY INJUNCTIONS**

11 Code of Civil Procedure §526, Subdivision (a)(2) allows for the issuance of an injunction
12 “when it appears by the complaint or affidavit that the commission or continuance of some act
13 during the litigation would produce waste, or great or irreparable injury to a party to the action.”
14 Valley Casework Inc. v. Comfort Construction Inc. (1999), 76 Cal. App. 4th 1013, 1019. Trial
15 courts evaluate two interrelated factors when deciding whether to issue a preliminary injunction.
16 The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the
17 interim harm that the plaintiff will likely sustain if the injunction was denied as compared to the
18 harm that the defendant will likely suffer if the injunction were issued.

19
20 By balancing the respective equities, the trial court should conclude whether, pending
21 trial on the merits, the Defendants should or should not be restrained from exercising his or her
22 claimed right. California Correctional Peace Officers Assoc. v. State of California (2000), 82
23 Cal. App. 4th 294, 302. Preliminary injunctions are issued to preserve the status quo. Continental
24 Banking Co. v. Katz (1968), 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889. Stated
25 differently, to determine if a preliminary injunction is warranted, the trial court in the exercise of
26
27
28

1 its discretion considers two inquiries: (1) What are the injuries to be suffered by the defendant if
2 the injunction is issued, as against the injuries to be suffered by the plaintiff if the injunction is
3 refused? and (2) Does the plaintiff have a reasonable probability of success on the merits?

4 Robins v. Superior Court (1985), 38 Cal. 3d 199, 205-206, 211 Cal. Rptr. 398, 695 P.2d 695.

5
6 In this case, and as described below, the Court should issue the injunction because no one
7 has ever reported being sick from consuming the raw dairy products of Plaintiffs, and prior to the
8 enactment of AB 1735 it was not even a requirement to test for the presence of coliforms. Thus,
9 Defendants will not be harmed by the issuance of an injunction. However, if an injunction is not
10 issued the standards of AB 1735 will put both Plaintiffs out of business.

11 **The Court should issue a preliminary injunction because the Plaintiffs will suffer**
12 **irreparable damage.**

13 Here, if a preliminary injunction is not issued pending the trial of this case, both Plaintiffs
14 will suffer irreparable injuries by enforcement of AB1735. Specifically, both Claravale and
15 OPDC will suffer:

- 16
- 17 • Damage to their businesses as they will be unable to sell their commercially produced
18 dairy products resulting in the loss of \$500,000 a month for OPDC and \$70,000 a month
19 for Claravale.
 - 20 • Loss of employment and income to maintain their farms. Both dairies have herds of
21 livestock that need to be fed and cared for during the pendency of this action. They have
22 a combined total of 550 head of livestock and without a continued source of income they
23 will not be able to sustain their farms.
 - 24 • Loss of employment to employees of both dairies that rely on the sale of dairy products
25 for their employment. Plaintiffs combined employ 44 workers.
 - 26
 - 27
 - 28

- 1 • Damage to their reputations and loss of market once they have been accused of failing to
2 meet state standards for dairy products.

3 Effectively, because these Plaintiffs have failed the new standards imposed by the State
4 of California, they will be put out of business. Since January 1, 2008, Claravale passed one and
5 failed one monthly whole milk test yet failed two monthly cream tests for coliform. Claravale
6 anticipates it cannot meet the standard of AB 1735 for either its whole milk or its cream and that
7 sometime during March 2008 it will have three failures. For its part, OPDC has failed two whole
8 milk tests for coliform and three cream tests for coliform. Thus, OPDC is already prohibited
9 from selling its cream in California and will soon also be prohibited from selling its whole milk
10 in California. Prior to the enactment of AB 1735, both dairies met the required standard for state
11 inspections for the production of raw milk and cream.
12

13
14 Although Plaintiffs will be forced out of business, the State of California will not suffer
15 any injuries by restoring the status quo. Presumably, the State of California is acting on behalf
16 of the 40,000 raw milk consumers in California by keeping raw milk off the market, but as has
17 been pointed out previously:

- 18 • No one has been harmed by the sale of raw milk from either Claravale or OPDC.
19
20 • Both Claravale and OPDC met the pre-AB1735 requirements for the production of raw
21 whole milk and cream.
22 • Neither dairy has been told by CDFA prior to the enactment of AB 1735 that their raw
23 dairy products were unsafe.
24 • Prior to the enactment of AB 1735, the State of California did not even have a coliform
25 standard for raw milk and cream.
26
27
28

1 Consequently, Claravale and OPDC submit that maintaining the status quo will not
2 damage or hurt any interest of the State. There has never been any great outcry in California
3 against raw milk or any incidents of illness caused by raw milk or the spread of disease caused
4 by raw milk. Quite frankly, it has never been a problem in California. Issuing an injunction will
5 not cause any damage to the state or the public welfare of its citizens. Moreover, if an injunction
6 is issued, the citizens of California will still be able to make a choice about their milk.
7

8 However, not granting an injunction will effectively force both Claravale and OPDC out
9 of business. Specifically, OPDC has annual sales of \$5,000,000, and Claravale has annual sales
10 of \$800,000. Already, OPDC has been told its raw cream sales must stop and thus is losing raw
11 cream sales in the amount of \$10,000 monthly.
12

13 Deprivation of the source of income will have dramatic effects on these two dairy farms.
14 Thus, plaintiffs are irreparably harmed by the new standards imposed by AB1735 and an
15 injunction should issue.

16 **Plaintiffs have a reasonable probability of success on the merits.**

17 Claravale and OPDC should be granted a preliminary injunction pursuant to California
18 Code of Civil Procedure §526 because they have a reasonable probability of success on the
19 merits. Here, Plaintiffs rely on the affidavit of expert witness Theodore Beals, M.D. attached
20 hereto. Plaintiffs submit that AB1735 imposes an arbitrary standard, it is not rationally related to
21 the health and safety of Californians, and it is not supported by scientific data. Thus, AB 1735
22 has no rational relationship to a legitimate state purpose.
23

24 That the State of California can adopt regulations for the welfare of its citizens goes
25 without saying. Courts, however, evaluate those regulations under the deferential “rational
26 basis” standard and should uphold the statute unless it is “arbitrary, discriminatory or
27
28

1 demonstrably irrelevant to the policy the legislature is free to adopt”. Pennell v. San Jose
2 (1998), 485 U.S. 1, 1199 Led. 2d 1, 14; 108 Supreme Court 849. Here, Plaintiffs submit there is
3 virtually no rationale for adopting the coliform standard of AB1735 because coliforms have not
4 been shown to be injurious to the health of Californians. Plaintiffs submit less drastic standards
5 may be adopted that achieve the state’s purpose.
6

7 As the Affidavit of Dr. Ted Beals shows, a coliform measurement is no indicia of the
8 presence of harmful pathogens. (Beals Affidavit No. 17.) Pathogens that cause illness are
9 salmonella, *Campylobacter jejuni*, *E. coli* O157:H7, *Listeria monocytogenes*. (Beals Affidavit
10 No. 23.) A more appropriate standard for protecting human health, therefore, would be to test
11 for pathogens at the bulk tank. (Beals Affidavit No. 31.).
12

13 Pathogen testing has been done in California for years. As previously stated, Claravale
14 and OPDC have never had a pathogen found in their milk. (McAfee Affidavit, par. no. 11,
15 Garthwaite Affidavit., par. no. 8). Testing for coliforms as required under AB1735 does not do
16 anything, and has no rational connection to protecting human health. (Beals Affidavit, par. nos.
17 32, 33 and 34).
18

19 Claravale and OPDC also submit that no finding was ever made by the legislature about
20 the need for this legislation and that as the only two raw milk producers in the state they were
21 never contacted or informed about its effects or impact prior to its enactment. Further, raw milk
22 and raw dairy products produced by Claravale and OPDC are healthy and safe for consumption.
23 Those products are produced under modern sanitary conditions. AB1735, however, is too
24 stringent, it imposes a standard that never existed previously, it dramatically impacts both
25 Claravale and OPDC, and it will drive them both out of business for no legitimate reason.
26
27
28

1 In Newland v. Board of Governors (1977), 19 Cal. 3d 705, 711 [139 Cal. Rprt. 620, 566
2 P.2d 254], the court held “in the absence of a suspect category or fundamental interest, it must be
3 determined whether the legislature classification relates to a legitimate state interest”. The court
4 further stated it is required to “conduct a serious and genuine judicial inquiry into the
5 correspondence between the classification and the legislative goals. . .” Newland at 711.
6

7 Here, Plaintiffs submit that CDFA has never done any analysis, study or review of the
8 raw milk or dairy products produced by the only two producers in California. Indeed, CDFA has
9 never performed any statistical analysis to determine the proper distribution curve that would
10 yield an appropriate coliform limit. Claravale and OPDC state the coliform level set by AB1735
11 is without foundation. The raw milk process of both dairies is sanitary and does not threaten
12 anyone’s health or safety.
13

14 In the absence of disease or illness, or a rationale for the legislation, Claravale and OPDC
15 state they have a reasonable probability of success on the merits of this case. Here, the State of
16 California broke a milk machine that did not need repair. Unfortunately, this has had a dramatic
17 impact on the business operations of Claravale and OPDC.
18

19 For these reasons, and to avoid further damage to their businesses, Plaintiffs respectfully
20 request the Court to grant a preliminary injunction preventing the State of California from
21 enforcing the requirements of AB 1735 until the claims raised in their Complaint for Declaratory
22 Judgment have been ruled on.
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Date: March 5, 2008

Respectfully submitted,

David G. Cox (OH Sup. Ct. No. 0042724)
Donald M. Collins (OH Sup. Ct. No. 0037701)
LANE, ALTON & HORST, LLC
Two Miranova Place, Suite 500
Columbus, OH 43215-7052

and

Bradley W. Sullivan, #112111
Paul A. Rovella, #245745
Lombardo and Gilles
318 Cayuga Street
Salinas, CA 93901

Attorneys for Plaintiffs
Organic Pastures Dairy Company, LLC and
Claravale Farm, Inc.

1 **PROOF OF SERVICE**

2 I am employed in the County of Franklin, State of Ohio. I am over the age of eighteen
3 years and not a party to the within action. My business address is Two Miranova Place, Suite
4 500, Columbus, Ohio, 43215-7052.

4 On the date set forth below, I caused the following document(s) entitled:

5 **MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT**

6 to be served on the party(ies) or its (their) attorney(s) of record in this action listed below by the
7 following means:

X	BY MAIL. By placing each envelope (with postage affixed thereto) in the U.S. Mail at the law offices of Lane, Alton and Horst, LLC, Two Miranova Place, Suite, Columbus, OH 4322-7052, addressed as shown below. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and in the ordinary course of business, correspondence would be deposited with the U.S. Postal Service the same day it was placed for collection and processing.
	BY HAND-DELIVERY. By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.
	BY OVERNIGHT DELIVERY. By placing with an overnight mail company for delivery a true copy thereof, enclosed in a sealed envelope, with delivery charges to be billed to Lombardo & Gilles, addressed as shown below.
	BY FACSIMILE TRANSMISSION. By transmitting a true copy thereof by facsimile transmission from facsimile number (831) 754-2011 to the interested party(ies) or their attorney(s) of record to said action at the facsimile number(s) shown below.
X	BY ELECTRONIC MAIL. By transmitting a true copy thereof by electronic mail from e-mail address <u>dcox@lanealton.com</u> to the interested party(ies) or their attorney(s) of record to said action at the electronic mail address(es) shown below

19 Anita Ruud
20 Deputy Attorney General
21 Office of the Regional Attorney General
22 455 Golden Gate Ave., Rm. 6200
23 California Department of Justice
24 San Francisco, CA 94102
25 Counsel for Defendants

24 I declare under penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct.

25 Executed on March 5, 2008 at Columbus, Ohio.

26 _____
27
28

David G. Cox

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28