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17 Attorneys for Plaintiffs

18 IN THE SUPERIOR COURT OF SAN BENITO COUNTY

19 STATE OF CALIFORNIA

20 ORGANIC PASTURES DAIRY)
21 COMPANY, LLC, and)
22 CLARAVALE FARM, INC.,)

23 Plaintiffs,)

24 v.)

25 STATE OF CALIFORNIA and)
26 A.G. KAWAMURA, Secretary of California)
27 Department of Food and Agriculture,)

28 Defendants.)

Case No.: CU-07-00204

**DECLARATION OF MARK
MCAFEE IN REPLY TO THE
DECLARATIONS OF ANITA E.
RUUD AND STEPHEN W. BEAM**

I, Mark McAfee, declare as follows:

1. I am the owner/operator of Organic Pastures Dairy Company, LLC, one of the Plaintiffs in this case.

2. I have read the declarations of Anita E. Ruud and Stephen W. Beam that were filed in opposition to Plaintiffs' motion for temporary restraining order.

3. The papers attached to the Declaration of Anita E. Ruud all refer to unpasteurized, raw milk that is meant to be pasteurized before it is consumed by humans. Those papers do not refer

1 to raw milk that is tested, labeled, regulated and intended to be consumed by humans without
2 pasteurization.

3 4. I agree that the type of milk referred to by the papers attached to the Declaration of Ms.
4 Ruud should be pasteurized before consumed because that type of milk is contaminated with
5 filth, feces, contaminants and pathogens that cause illness to humans.

6 5. Neither of the Plaintiffs in this case, Organic Pastures Dairy Company, LLC and
7 Claravale Farms, Inc., produce milk that is intended to be pasteurized prior to consumption by
8 humans. The milk and other dairy products that are produced by Plaintiffs in this case do not
9 and have not ever contained pathogens causing illness in humans.

10 6. Consequently, none of the papers attached to the Declaration of Ms. Ruud pertain to the
11 raw, unpasteurized dairy products produced by Plaintiffs in this case.

12 7. The milk and dairy products that are produced by my dairy operation and the operation of
13 Claravale Farms, Inc. are different from the milk and dairy products that are meant to be
14 pasteurized before consumed.

15 8. The milk and dairy products that are produced by my dairy and Claravale Farms, Inc. has
16 never had a pathogen detected in them that could cause illness to humans.

17 9. With respect to the Declaration of Stephen W. Beam, it is so incredible for the many
18 inaccuracies, misstatements, errors and omissions it makes that it lacks any credibility
19 whatsoever.

20 10. For example, on page 2, line 1, Mr. Beam refers to a 10 coliform limit for whole milk yet
21 fails to mention that there is also a 10 coliform limit for raw cream and skim milk. My operation
22 will be put out of business because it cannot comply with any of these 10 coliform limits on a
23 regular or consistent basis, let alone the whole milk limit referred to by Mr. Beam.

24 11. On page 2, line 6, Mr. Beam states that the California Department of Food and
25 Agriculture (“CDFA”) is responsible for “testing raw milk that processors sell to consumers” yet
26 fails to state that although CDFA tests raw milk intended for human consumption for pathogens,
27 CDFA does not test pasteurized milk for pathogens. The only milk that CDFA tests for
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1 pathogens is raw milk intended to be consumed. Mr. Beam fails to inform the Court that CDFA
2 does not conduct pathogen testing for raw milk that will be pasteurized prior to consumption.

3 12. On page 3, line 19, Mr. Beam states that when my dairy products are degraded because
4 they are in violation of AB 1735 they can “still be utilized in manufactured (i.e., “non-Grade A”)
5 milk products such as butter and cheese.” That is not true. I cannot manufacture “non-Grade A”
6 butter and cheese because I do not have a license to do so. All raw butter produced by OPDC is
7 Grade A raw butter.

8 13. On page 4, line 5, Mr. Beam states that my samples for cream that were collected on
9 March 7, 2008 were “found to be in compliance” with the coliform limits of AB 1735 yet fails to
10 inform the Court that our cream had to be thinned out to comply with the coliform limit of AB
11 1735. When our cream is thinned out it does not have enough fat in it to comply with our
12 labeling requirements, which requires at least 6 grams per serving size of 14.8 ml.

13 Consequently, Mr. Beam does not inform the Court that we are faced with a Hobson’s choice,
14 i.e., either produce thick cream and comply with our fat content requirement at the expense of
15 being in violation of our coliform limit, or thin our cream to comply with the coliform limit at
16 the expense of our fat content requirement. Either way, we lose.

17 14. In mother nature and in the cream separator process, coliforms follow the fat. In our
18 situation, when source raw milk that tests at less than 1 coliform is used to make raw cream, the
19 resulting raw cream still comes out higher than 10 coliforms per ml (tests showed 30-60). The
20 skim milk, however, remains very low at less than 1 coliform per ml.

21 15. On page 4, line 14, Mr. Beam implies that the majority of coliforms cause disease by
22 stating “While not all coliforms cause disease, some such as E-coli, 0157:H7, can cause serious
23 illness.” However, Mr. Beam does not inform the Court that CDFA has been collecting samples
24 of our dairy products (whole milk, cream, and skim milk) since at least 1999 and they have
25 NEVER found a disease causing coliform in ANY of our dairy products no matter what levels of
26 coliforms we have had. CDFA has also tested Plaintiff Claravale Farms, Inc. since 1927 and has
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1 also NEVER found ANY pathogens in their raw dairy products. Mr. Beam has access to and has
2 seen these data yet fails to inform the Court of these data.

3 16. On page 4, lines 19-24, Mr. Beam refers to an informal survey he conducted of all 50
4 states in an effort to convince the Court that AB 1735's standards are no different than the
5 standards of other states.

6 17. Specifically, Mr. Beam states that "only 13 states, including California, allow the sale of
7 raw milk at retail stores" and that of those 13 states six others beside California "require that the
8 raw milk sold at retail have no more than 10 coliform bacteria per mL." Mr. Beam then refers to
9 his survey, attaches it as an Exhibit, and refers to it in his Declaration as Exhibit I.

10 18. Mr. Beam's survey and Exhibit are replete with errors and insinuations. Once those
11 errors and insinuations are revealed, it is apparent that California is not in alignment with what
12 other states are doing with respect to regulation of raw milk for human consumption and that Mr.
13 Beam's declaration is disingenuous.

14 19. For example, Mr. Beam claims that at least 13 states can legally sell raw milk at retail
15 stores. However, three of those states, ID, NV and OR, do not have any raw milk and raw milk
16 is illegal to be sold.

17 20. Mr. Beam insinuates that one of the other six states that are "similar" to California is
18 Arizona. However, Arizona does not permit the sale of raw cream or skim milk, both of which
19 are legal in California.

20 21. Mr. Beam insinuates that Nevada is similar to California. However, it is no longer legal
21 to sell raw dairy products in Nevada because its Raw Milk Commission has been disbanded
22 since at least the 1980s. Thus, Mr. Beam is not correct that raw milk sold for human
23 consumption in Nevada must meet a limit of 10 coliform. There is no raw milk legally sold in
24 Nevada.

25 22. Mr. Beam insinuates that Pennsylvania is similar to California. However, the 10
26 coliform limit imposed by Pennsylvania is measured in the bulk tank, not at the bottle for retail,
27 where it is measured in California. Thus, Mr. Beam is not correct that PA allows for a limit of
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1 10 coliform at the retail bottle. In addition, PA does not allow the sale of raw cream and/or
2 butter.

3 23. Mr. Beam insinuates that Utah is similar to California. However, raw milk in Utah
4 cannot be sold in any store where pasteurized milk is also sold, and the store that sells the raw
5 milk must also be the owner of the farm that produces the raw milk, unlike California where it
6 can be sold in any retail store. Sales of raw milk in Utah must be from a farm owned store. In
7 fact, there are only two such stores in Utah that sell raw dairy products.

8 24. Mr. Beam insinuates that Washington is similar to California. However, in Washington,
9 whole milk is hand filled right from the “bulk tank” and is “hand capped” without having to be
10 mechanically filled or capped, a process that agitates the product and increases the number of
11 coliforms in the product. In California, mechanical filling and capping is mandatory and “hand
12 capping” is not allowed. This results in raw milk being further pumped and agitated, flowing
13 through long pipes, and further manipulated prior to entering the final product container,
14 increasing coliform counts.

15 25. Mr. Beam insinuates that Maine is similar to California. However, Maine allows hand
16 filling and capping much like Washington and test results are entirely different when samples are
17 collected from containers filled by hand directly from the bulk tank verses samples collected
18 from containers that are mechanically filled and capped as required in California. Mechanical
19 capping and filling increases the number of coliforms present in the sample.

20 26. Mr. Beam admits in his Declaration that three states, Idaho, Connecticut and New
21 Mexico, “have a coliform standard” of no more than 50 coliform, which is a limit that is five
22 times greater than California’s. In addition, CT tests at the bulk tank and not at the retail bottle.

23 27. Mr. Beam insinuates that Idaho is similar to California. However, Idaho has refused to
24 issue any raw milk permits, thus making it impossible to produce or sell raw milk in Idaho.
25 There is no raw milk for sale legally in Idaho. If raw milk permits were to be issued the
26 regulations would require no more than 50 coliforms. So, California is dramatically different
27 than Idaho.

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1 28. Mr. Beam insinuates that Connecticut is similar to California. However, Connecticut
2 does not allow the sale of either raw cream or raw skim milk, and the 50 coliform limit is in the
3 bulk tank, not the finished product.

4 29. Finally, Mr. Beam states on page 4, lines 25-28 and on page 5, line 1, that “As of the date
5 of this declaration” (March 12, 2008), my dairy operation has been processing dairy products
6 illegally because we do not have a milk products plant license and also states that the
7 “intentional manufacturing or processing” of “milk or milk products” without such a license “is a
8 felony.” That is blatantly misleading and disingenuous.

9 30. On December 14, 2007, my dairy operation sent in a check and a license renewal
10 application to CDFA for renewal of our milk products plant license. As of this date, we have yet
11 to receive any action on that renewal application.

12 31. Because we did not hear back from CDFA on our renewal application for a license, one
13 of my employees contacted CDFA to investigate the matter. We were informed that CDFA has a
14 back log of from 60 to 90 days on the processing of license applications and that ours was part of
15 the backlog. My employee was also told that “CDFA inspectors have been informed of this
16 backlog and not to worry.” Charges that my operation is somehow committing a felony is
17 shocking and deeply concerning to me, especially when the delay and backlog is not of my
18 making but rather stems from CDFA’s backlog.

19 32. On March 7, 2008, we sent in another renewal application and another check to CDFA
20 for our milk products plant license. As of this date, we still have not received any response from
21 CDFA.

22 33. CDFA is supposed to be our state agency that supports our raw milk industry, by testing
23 and verifying safety and quality. A review of the declarations and supportive documents
24 provided to the court reveals a dark truth. CDFA wants raw milk banned completely. These are
25 the exact words used in the supportive documents submitted that include the FDA, AFDO and
26 others. Could a ban of raw milk in California be the true agenda? It would appear to be so.
27 CDFA refuses to acknowledge our concerns or cooperate with us to find methods or processes to
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1 achieve the near impossible standards mandated by AB 1735, standards that have no basis in
2 measuring food safety. If food safety were the concern then pathogen testing would be
3 expanded. There have been no pathogens found in the raw milk at my dairy or Claravale Farms,
4 Inc. in our entire combined 87 years of existence.

5 I declare under penalty of perjury that the foregoing is true and correct. Executed in
6 Fresno, California on March 14, 2008.

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Mark McAfee
Organic Pastures Dairy Company LLC

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PROOF OF SERVICE

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

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

DECLARATION OF MARK MCAFFEE IN REPLY TO THE DECLARATIONS OF ANITA E. RUUD AND STEPHEN W. BEAM

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

	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.
X	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 (614) 228-0146 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

Anita Ruud
Deputy Attorney General
Office of the Regional Attorney General
455 Golden Gate Ave., Rm. 6200
California Department of Justice
San Francisco, CA 94102
Counsel for Defendants

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

Executed on March 14, 2008 at Columbus, Ohio.

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David G. Cox