

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 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

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

21 Defendants do not rebut the testimony of Mark McAfee or Ron Garthwaite, owners of
22 Plaintiff Organic Pastures Dairy Company LLC (“OPDC”) and Plaintiff Claravale Farms, Inc.
23 (“Claravale”), respectively, that AB 1735 is forcing them out of business. For example, OPDC
24 has already had its cream degraded at least once (i.e., taken off store shelves), and Claravale has
25 submitted testing data from 2001 to 2007 demonstrating that it cannot meet the requirements of
26 AB 1735. Thus, Defendants do not rebut the fact that enforcement of AB 1735 is causing
27 Plaintiffs immediate and irreparable harm.

1 In addition, Defendants do not rebut the testimony of Dr. Theodore Beals, who declared
2 that there is no connection between the presence of coliforms and the presence of pathogens that
3 causes illness in humans. Moreover, Dr. Beals has declared that coliforms, by themselves, do
4 not cause illness, only pathogens cause illness. Thus, Defendants do not rebut the fact that AB
5 1735's requirement to test for the presence of coliforms does not protect the public's health and
6 safety.

7 Because Defendants in their opposition papers focus on whether or not raw,
8 unpasteurized milk is or is not a good thing, rather than focusing on whether AB 1735 protects
9 the public's health and safety, Defendants fail to address the merits of Plaintiffs' motion for
10 temporary restraining order, i.e. are Plaintiffs' being irreparably harmed and does the
11 requirement to test for coliforms protect the public's health and safety?

12 Because a balance of the hardships and burdens weighs in favor of Plaintiffs, Plaintiffs'
13 motion for a temporary restraining order is well taken and it should be granted.

14 **I. AB 1735 should be stayed because its enforcement is causing Plaintiffs immediate**
15 **and irreparable harm.**

16 It has long been held in California that "where the enforcement of an ordinance may
17 cause irreparable injury, the injured party may attack its constitutionality by an action to enjoin
18 its enforcement." *McKay Jewelers, Inc. v. Bowron* (Cal. 1942), 19 Cal. 2d 595, 599. See also:
19 *Jones v. City of Los Angeles* (Cal. 1930), 211 Cal. 304; *San Diego Tuberculosis Assn. v. City of*
20 *East San Diego* (Cal. 1921), 186 Cal. 252; *Novar Corp. v. Bureau of Collection & Investigative*
21 *Servs.* (Cal. Ct. App. 1984), 160 Cal. App. 3d 1, 5. In this case, Plaintiffs have alleged through
22 un rebutted testimony that they are being harmed by the enforcement of AB 1735. Specifically,
23 Plaintiffs have declared they cannot comply with the requirements of AB 1735 and they will go
24 out of business. Thus, they have standing to bring this action in declaratory judgment and to
25 bring this motion for a temporary restraining order.

26 Even though OPDC and Claravale are both regulated by the State, they have the right to
27 challenge AB 1735. As the Supreme Court of California has stated "A business may be
28

1 inherently lawful and still subject to police regulation, but when such lawful business is
2 regulated, it is a judicial question whether the law or ordinance is a lawful exercise of the police
3 power.” *McKay Jewelers, Inc. v. Bowron* (Cal. 1942), 19 Cal. 2d 595, 600. Moreover, even
4 though the legislature has the right to regulate both OPDC and Claravale under its police powers,
5 it cannot, “under the guise of providing for this component of the police power, impose
6 unnecessary and unreasonable restrictions upon the pursuit of these useful activities. If a statute
7 has no real or substantial relation to any legitimate police power objective, it is the duty of the
8 court to so declare.” *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (Cal. 1953), 40
9 Cal. 2d 436, 441. In this case, AB 1735 does not protect the public’s interest or safety because a
10 test for coliforms is not an indicator of the presence of pathogens.

11 Defendants, however, argue in their opposition papers that California Code of Civil
12 Procedure Section 526(b)(4) prohibits the issuance of an injunction in this case because it would
13 prevent public officers from enforcing a public statute for the public’s benefit. Defendants’
14 argument is inconsistent with case law. It is fundamental that Section 526(b)(4)’s prohibitions
15 “do not apply to an unconstitutional or invalid statute or ordinance and that courts have full
16 authority to enjoin the execution of such enactments.” *Conover v. Hall* (Cal. 1974), 11 Cal. 3d
17 842, 850. Therefore, this Court is free to decide whether or not a temporary restraining order
18 should be issued.

19 Because Defendants do not rebut the testimony of either OPDC or Claravale that the
20 enforcement of AB 1735 will force them out of business, Plaintiffs have established immediate
21 and irreparable harm. Moreover, because Defendants have not rebutted the testimony of Dr.
22 Theodore Beals that coliforms do not cause illness and have no correlation with the presence of
23 pathogenic bacteria, they have not rebutted the fact that AB 1735 does not protect the public’s
24 health or safety. Consequently, a TRO should issue to stay the enforcement of AB 1735 until
25 this Court rules on the claims raised in Plaintiffs’ complaint for declaratory judgment.

26 **II. Heightened or strict scrutiny is necessary on Plaintiffs’ due process and equal**
27 **protection claims because they have a fundamental, constitutional property right in**
28 **access to and expectancy of customers.**

1 OPDC and Claravale are both businesses. As explained below, they have a fundamental,
2 constitutional property right in having access to and expecting customers. Because this is a
3 fundamental and constitutional property right, the proper test that is used to determine whether
4 AB 1735 is unconstitutional is “heightened” or “strict” scrutiny. Consequently, AB 1735 should
5 be stayed because it does not promote a compelling state interest and the distinctions drawn by
6 AB 1735 are unnecessary to protect the public’s health and safety.

7 Cal Const, Art. I § 1 refers to inalienable rights, and provides as follows: “All people are
8 by nature free and independent and have inalienable rights. Among these are enjoying and
9 defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
10 obtaining safety, happiness, and privacy.” As stated by the Supreme Court of California, a
11 “legion of cases establishes and enforces the entrepreneur's property right of access to, and
12 expectancy of customers.” *Crittenden v. Superior Court of Mendocino County* (Cal. 1964), 61
13 Cal. 2d 565, 568. See also *McKay Jewelers, Inc. v. Bowron* (Cal. 1942) 19 Cal.2d 595; *Guillory*
14 *v. Godfrey* (Cal. 1955) 134 Cal.App.2d 628; *Uptown Enterprises v. Strand* (Cal. 1961) 195
15 Cal.App.2d 45. Thus, engaging in a business is a fundamental property right recognized by the
16 California Constitution.

17 When a fundamental or constitutional property right is involved, the proper test to apply
18 in a Due Process or Equal Protection context is “heightened” or “strict” scrutiny. As stated by
19 the Supreme Court of California, “First it must be emphasized that the ordinary deference a court
20 owes to any legislative action vanishes when constitutionally protected rights are threatened.”
21 *Spiritual Psychic Sci. Church v. City of Azusa* (Cal. 1985), 39 Cal. 3d 501, 514. “The rational
22 connection between the remedy provided and the evil to be curbed, which in other contexts
23 might support legislation against attack on due process grounds, will not suffice.” *Thomas v.*
24 *Collins* (U.S. 1945), 323 U.S. 516, 530, 531-532.

25 In order for a reviewing court to uphold a statute under strict scrutiny, “the State must
26 establish its compelling interest which justifies the law and that the distinctions drawn by the law
27 are necessary to further its purpose. *Lucas v. Superior Court* (Cal. Ct. App. 1988) 203 Cal. App.
28

1 3d 733, 738. See: *Curtis v. Board of Supervisors* (Cal. 1972), 7 Cal. 3d 942, 952. See also:
2 *Fullerton Joint Union High School Dist. v. State Bd. of Education* (Cal. 1982), 32 Cal. 3d 779,
3 805 (“We conclude that the decision of the State Board is subject to strict judicial scrutiny, and
4 cannot be sustained unless justified by a compelling state interest.”). In this case, AB 1735 must
5 fail because the imposition of a coliform standard does not protect the public’s health or safety.

6 As stated by Dr. Theodore Beals, coliforms do not cause illness; pathogens cause illness.
7 Moreover, there is no relationship between the presence of a coliform and the presence of a
8 pathogen. This is borne out by the test data submitted by both OPDC and Claravale.

9 For example, test data from OPDC for 2006 and 2007 show that coliforms in its raw
10 whole milk product ranged from 1 to 530 and averaged 89.67, and that coliforms in its raw
11 cream product ranged from 7 to 1,500 and averaged 525.3. At no time were any pathogens ever
12 found in any of OPDC’s whole milk or cream. With respect to Claravale, its test data from 2001
13 to 2007 for whole milk showed that coliforms ranged from less than 1 to 180 and averaged 64.2.
14 Like OPDC, no pathogens have ever been found in Claravale’s whole milk. Thus, it is apparent
15 that the presence or absence of coliforms has nothing to do with the public’s safety or health and
16 limiting coliforms to no more than 10 does nothing to ensure the safety of dairy products. To the
17 contrary, the purpose of AB 1735’s coliform limit is to drive these Plaintiffs out of business
18 because the limit is unattainable on a regular and consistent basis.

19 If Defendants were serious about protecting the public’s health and safety they would
20 impose a testing standard for pathogens, which currently does not exist. No milk in the State of
21 California is required to be tested for pathogens! Instead, Defendants have imposed a “coliform”
22 limit when it is clearly demonstrated by several years’ worth of testing data that there is no
23 relationship between the presence of a coliform and the presence of a pathogen. Consequently,
24 AB 1735 does nothing to protect the public’s health or safety.

25 Therefore, AB 1735 does not survive a strict scrutiny test and it should be stayed pending
26 this Court’s ruling on the claims presented by Plaintiffs in their complaint.

1 **III. Defendants’ attempt to portray raw, unpasteurized milk as “dangerous” is**
2 **premature for purposes of a Temporary Restraining Order and will be rebutted at**
3 **the appropriate time.**

4 According to the U.S. Department of Health and Human Services, its National Institutes
5 of Health, and its National Center for Complementary and Alternative Medicine, probiotics are
6 “live microorganisms (in most cases, bacteria) that are similar to beneficial microorganisms
7 found in the human gut.” See Exhibit A attached to Affidavit of David G. Cox. Probiotics have
8 been defined by the World Health Organization and the Food and Agriculture Organization of
9 the United Nations as “live microorganism, which, when administered in adequate amounts,
10 confer a health benefit on the host.” See Exhibit A. Raw milk and raw dairy products are filled
11 with probiotics.

12 Recent studies have shown that probiotics may improve the gut health of premature
13 babies (Exhibit B to Affidavit of David G. Cox), may protect against autoimmune disease
14 (Exhibit C), may protect against bacterial infection (Exhibit D) and may lower risks of eczema
15 (Exhibit E). Probiotics have also recently been introduced in infant cereals in order to, in part,
16 “aid early infant brain and eye development while potentially protecting against the development
17 of future allergies, including those leading to asthma, and eczema. See Exhibit F. Raw dairy
18 products like those produced by Plaintiffs in this case contain probiotics.

19 Recent studies have shown that there is an inverse relationship between the consumption
20 of raw milk products and contracting asthma and allergies. See Exhibit G. In other words, the
21 more raw dairy products a person consumes the less likely they are of getting either asthma or
22 allergies. In addition, recent research has shown that conjugated linoleic acid (CLA) may have
23 “anti-carcinogenic, anti-atherosclerotic, anti-diabetic and immune-modulating effects, as well as
24 a favorurable influence on body fat composition.” See Exhibit H. This same study also suggests
25 that the consumption of organic dairy and meat products increases the amount of CLA in breast
26 milk of mothers. Increased amounts of CLA are found in raw whole milk.

27 It has been demonstrated that the greater the presence of antimicrobial proteins, the less
28 likely it is for pathogenic bacteria to form. See Exhibit I. Raw dairy products are filled with

1 antimicrobial proteins. Also, a recent study suggests that contamination of milk by enterococci,
2 lactobacilli and coliforms of bovine fecal origin is “extremely low” and that when raw milk “is
3 implicated in food infection, other factors in addition to faecal contamination must be involved.”

4 See Exhibit J.

5 The U.S. Department of Health and Human Services, Centers for Disease control and
6 Prevention, compiles statistics on the number of foodborne outbreaks that occur each year in the
7 United States. See Exhibit K. These statistics are kept by food type and bacteria type. For
8 example, from 1973 to 2005, there were 19,968 outbreaks of foodborne illness associated with
9 pasteurized milk and pasteurized dairy products. The largest single outbreak was in 1985 with
10 16,659 outbreaks associated with pasteurized milk. On the other hand, from 1980 to 2005 there
11 were only 1,821 outbreaks associated with unpasteurized milk and dairy products, with the
12 largest outbreak of 202 occurring in 2001 from improperly processed cheese.

13 More outbreaks occur in the industrialized conventional dairy and food industry than in
14 the smaller, raw milk industry because there are more pathogens present in the packaging,
15 processing, and distribution plants. See Exhibit L. The U.S. Food and Drug Administration is a
16 broken administrative agency whose mission and science is “at risk.” See Exhibit M. The FDA
17 cannot fulfill its mission because “its scientific base has eroded,” it “does not have the capacity
18 to ensure the safety of food” for the nation, and its “scientific workforce does not have sufficient
19 capacity and capability.” See Exhibit M. The chaos within the FDA and the industrialized food
20 system it monitors and regulates was manifested in the recent largest recall of hamburger in the
21 nation’s history, 143 million pounds. See Exhibit N.

22 There is a difference between goat’s milk and cow’s milk. See Exhibit O. In the state of
23 Washington, nearly all the goat dairies would be in compliance with AB 1735’s coliform
24 standard. However, a majority of the cow dairies in Washington would be in violation of AB
25 1735’s coliform standard during any five month period, even though they are allowed to use
26 hand capping and bottling, a process which reduces the levels of coliforms. See Exhibit O.

27
28

1 Finally, raw cows' milk and raw dairy products are nutritious and healthy. See Exhibit P.
2 Pasteurized milk can cause and has caused death. See Exhibit Q.

3 The above paragraphs demonstrate that there is as much scientific information, perhaps
4 more, supporting the consumption of raw milk than there is literature that wishes to "ban" or
5 "discourage" the consumption of raw milk. The above paragraphs are meant only to demonstrate
6 that, at the appropriate time, Plaintiffs will introduce expert testimony demonstrating the
7 unconstitutionality of AB 1735. That demonstration need not be made here at this time.

8 For the present, however, Plaintiffs have presented un rebutted testimony that they are
9 being immediately and irreparably harmed, and that AB 1735's imposition of a coliform
10 standard does not protect the public's health or safety.

11 Consequently, AB 1735 should be temporarily stayed until this Court hears Plaintiffs'
12 claims.

13 Date: March 14, 2008

Respectfully submitted,

14
15 _____
16 David G. Cox (OH Sup. Ct. No. 0042724)
17 Donald M. Collins (OH Sup. Ct. No. 0037701)
18 LANE, ALTON & HORST, LLC
19 Two Miranova Place, Suite 500
20 Columbus, OH 43215-7052

and

21 Bradley W. Sullivan, #112111
22 Paul A. Rovella, #245745
23 Lombardo and Gilles
24 318 Cayuga Street
25 Salinas, CA 93901

26 Attorneys for Plaintiffs
27 Organic Pastures Dairy Company, LLC and
28 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
500, Columbus, Ohio, 43215-7052.

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

5 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR**
6 **TEMPORARY RESTRAINING ORDER**

7 to be served on the party(ies) or its (their) attorney(s) of record in this action listed below by the
8 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 (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 (without attachments) by electronic mail from e-mail address dcox@lanealton.com to the interested party(ies) or their attorney(s) of record to said action at the electronic mail address(es) shown below

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

28 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, Columbus, Ohio.

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