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IN THE SUPERIOR COURT OF SAN BENITO COUNTY
STATE OF CALIFORNIA

ORGANIC PASTURES DAIRY COMPANY, LLC, and CLARAVALE FARM, INC.,

Plaintiffs,

v.

STATE OF CALIFORNIA and A.G. KAWAMURA, Secretary of California Department of Food and Agriculture,

Defendants.

Case No.: CU-07-00204

PLAINTIFFS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

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Plaintiffs Organic Pastures Dairy Company, LLC ("OPDC") and Claravale Farm, Inc. ("Claravale") hereby submit their Points and Authorities in Support of their Motion for Preliminary Injunction.

I. Standard of Review

Code of Civil Procedure §526(a)(2) provides, in part, that an injunction may be issued "when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to a party to the action." *Valley Casework Inc. v. Comfort Construction Inc*. (1999), 76 Cal. App. 4th 1013, 1019. What this means is that preliminary injunctions are issued to preserve the *status quo*. *Continental Banking Co. v. Katz* (1968), 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889. Since there was no coliform standard for raw milk prior to the imposition of AB 1735, returning to the *status quo* would not be wasteful and would not harm the Defendants.

To determine if a preliminary injunction is warranted, the trial court in the exercise of its discretion considers two inquiries: (1) What are the injuries to be suffered by the defendant if the injunction is issued, as against the injuries to be suffered by the plaintiff if the injunction is refused? and (2) Does the plaintiff have a reasonable probability of success on the merits? *Robins v. Superior Court* (1985), 38 Cal. 3d 199, 205-206, 211 Cal. Rptr. 398, 695 P.2d 695. By balancing the respective equities, the trial court should conclude whether, pending trial on the merits, the Defendant should or should not be restrained from exercising its claimed right. *California Correctional Peace Officers Assoc. v. State of California* (2000), 82 Cal. App. 4th 294, 302. Consequently, a balancing of the equities in this case is warranted to determine whether a preliminary injunction should issue.

As demonstrated below, Plaintiffs and their customers will be harmed if a preliminary injunction is not issued, the State and people who do not consume raw dairy products will not be harmed if an injunction is issued, and Plaintiffs will likely prevail on the merits of their claims at trial in this matter. Accordingly, a preliminary injunction should issue.

II. Balancing the equities in this case favors the issuance of the preliminary injunction.

Both Plaintiffs will suffer irreparable injuries by enforcement of AB1735 if a preliminary injunction is not issued pending the trial of this case. Specifically, and as stated in the previously filed Declarations in support of Plaintiffs' Motion for Temporary Restraining Order of Mark McAfee, owner of OPDC, and of Ron Garthwaite, owner of Claravale, both Claravale and OPDC will suffer the following:

- Damage to their businesses as they will be unable to sell their commercially produced dairy products resulting in the loss of $500,000 a month for OPDC and $70,000 a month for Claravale.
- Loss of employment and income to maintain their farms. Both dairies have herds of livestock that need to be fed and cared for during the pendency of this action. They have a combined total of 550 head of livestock and without a continued source of income they will not be able to sustain their farms.
- Loss of employment to employees of both dairies that rely on the sale of dairy products for their employment. Plaintiffs combined employ 44 workers.
- Damage to their reputations and loss of market once they have been accused of failing to meet state standards for dairy products.

In addition, putting both OPDC and Claravale out of business will cause harm to the raw milk drinkers in the State. As testified to by the several testimonials of OPDC customers, many people have come to rely on the health benefits derived from drinking raw milk. See Declaration of Mark McAfee in Support of Motion for Preliminary Injunction. Consequently, Plaintiffs' customers will also be injured if the injunction is not issued.

Although Plaintiffs will be forced out of business because of the new coliform standard imposed by AB 1735, the State of California will not suffer any injuries by restoring the *status quo*. Presumably, the State of California is acting on behalf of the 40,000 raw milk consumers in California by keeping raw milk off the market, but as has been pointed out previously:

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

Consequently, Claravale and OPDC submit that maintaining the *status quo* will not damage or hurt any interest of the State. It certainly will not harm people who do not consume raw dairy products. There has never been any great outcry in California against raw milk or any incidents of illness caused by raw milk or the spread of disease caused by raw milk. Quite frankly, it has never been a problem in California. Issuing an injunction will not cause any damage to either the State or to the public welfare of its citizens.

Moreover, if an injunction is issued, the citizens of California will still be able to make a choice about their milk, they can either consume pasteurized or raw milk. However, not granting an injunction will effectively force both Claravale and OPDC out of business. Specifically, OPDC has annual sales of $5,000,000, and Claravale has annual sales of $800,000. Already, OPDC was told its raw cream sales must stop and thus lost raw cream sales in the amount of $10,000 monthly.

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

III. Plaintiffs will prevail on the merits of their claims.

A threshold issue in this case is whether AB 1735 should be analyzed under the "rational basis" test or under the "strict scrutiny" test. Plaintiffs believe the case law demonstrates that the strict scrutiny test applies.

A. AB 1735 fails to pass a strict scrutiny test.

Cal Const., Art. I § 1 refers to inalienable rights, and provides as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." As stated by the Supreme Court of California, a "legion of cases establishes and enforces the entrepreneur's property right of access to, and expectancy of customers." *Crittenden v. Superior Court of Mendocino County* (Cal. 1964), 61 Cal. 2d 565, 568. See also *McKay Jewelers, Inc.* v. *Bowron* (Cal. 1942) 19 Cal.2d 595; *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc*. (Cal. 1953), 40 Cal. 2d 436, 441; *Guillory* v. *Godfrey* (Cal. 1955) 134 Cal.App.2d 628; *Uptown Enterprises* v. *Strand* (Cal. 1961) 195 Cal.App.2d 45, 50-51 ("Everyone has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded."). Thus, engaging in a business is a fundamental property right recognized by the California Constitution.

Because this case involves a fundamental property interest recognized by California's Constitution and its Courts, the proper test to apply is "strict scrutiny." As stated by the Supreme Court of California, "First it must be emphasized that the ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened." *Spiritual Psychic Sci. Church v. City of Azusa* (Cal. 1985), 39 Cal. 3d 501, 514. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U.S. 516, 530 (U.S. 1945). (Attached hereto as Attachment A). Thus, AB 1735 is not entitled to great deference.

In order for a reviewing court to uphold a statute under strict scrutiny, "the State must establish its compelling interest which justifies the law and that the distinctions drawn by the law are necessary to further its purpose. *Lucas v. Superior Court* (Cal. Ct. App. 1988) 203 Cal. App. 3d 733, 738. See: *Curtis v. Board of Supervisors* (Cal. 1972), 7 Cal. 3d 942, 952. See also:

Fullerton Joint Union High School Dist. v. State Bd. of Education (Cal. 1982), 32 Cal. 3d 779, 805 ("We conclude that the decision of the State Board is subject to strict judicial scrutiny, and cannot be sustained unless justified by a compelling state interest."). In this case, AB 1735 must fail because the imposition of a coliform standard does not protect the public's health or safety. In fact, the 10 coliform limit is arbitrary and is not based on reason or science, and does not further the public's interest.

To begin, Plaintiffs' expert pathologist, Dr. Theodore Beals, has testified that coliforms do not cause illness; pathogens cause illness. This testimony has been unrebutted. Moreover, Dr. Beals testified that there is no relationship between the presence of a coliform and the presence of a pathogen. This testimony is also unrebutted. Thus, AB 1735's imposition of a 10 coliform limit does nothing to protect the public's health and safety. Instead, the coliform limitation is nothing more than an unnecessary and unreasonable burden on Plaintiffs' ability to conduct their business.

The fact that coliforms have nothing to do with pathogens is borne out by the test data submitted by both OPDC and Claravale. For example, OPDC's test data from 2006 and 2007 show that coliforms in its raw whole milk product ranged from 1 to 530 and averaged 89.67, and that coliforms in its raw cream product ranged from 7 to 1,500 and averaged 525.3. However, at no time were any pathogens ever found in any of OPDC's whole milk or cream. With respect to Claravale[1], its test data from 2001 to 2007 for raw whole milk showed that coliforms ranged from less than 1 to over 1500 and averaged 100, and that coliforms for its cream product ranged from less than 1 to 1600 and averaged 140.8. Like OPDC, no pathogens have ever been found in either Claravale's whole milk or its cream.

Thus, it is apparent that the presence or absence of coliforms has nothing to do with the public's safety or health because no matter the level coliforms, pathogens are absent. Consequently, limiting coliforms to no more than 10 does not ensure the safety of dairy products.

[1] Plaintiffs in their Reply to Defendants' Opposition to Plaintiffs' Request for a Temporary Restraining Order erroneously referred to the wrong data set for Claravale. In their Reply, Plaintiffs' erroneously referred to testing data from Claravale's bulk tank, not from its finished product. That error is corrected in this paper.

To the contrary, the purpose of AB 1735's coliform limit is to drive these Plaintiffs out of business because the limit is unattainable on a regular and consistent basis.

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

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

B. AB 1735 does not pass a rational basis test either.

Defendants argue that rational basis is the appropriate test to use in this case. Assuming *arguendo* that is the case, AB 1735 fails even a rational basis test.

As the Supreme Court of California has stated "A business may be inherently lawful and still subject to police regulation, but when such lawful business is regulated, it is a judicial question whether the law or ordinance is a lawful exercise of the police power." *McKay Jewelers, Inc. v. Bowron* (Cal. 1942), 19 Cal. 2d 595, 600. Moreover, even though the legislature has the right to regulate both OPDC and Claravale under its police powers, it cannot, "under the guise of providing for this component of the police power, impose unnecessary and unreasonable restrictions upon the pursuit of these useful activities. If a statute has no real or substantial relation to any legitimate police power objective, it is the duty of the court to so declare." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc*. (Cal. 1953), 40 Cal. 2d 436, 441. In this case, AB 1735 imposes unreasonable and unnecessary requirements on OPDC and Claravale because testing for coliforms is not an indicator of the presence of pathogens that cause human illness. Therefore, there is no rational basis for AB 1735's existence.

In *McKay Jewelers*, the issue was whether a city ordinance that prohibited store owners from accosting and soliciting its "window shoppers" was constitutional. The City argued the

ordinance was necessary to prevent "crowds of such proportion" as to "impede or obstruct traffic on the sidewalk." A store owner challenged the ordinance, arguing that it solicited shoppers "in a quiet, dignified and peaceful manner" and that it did so from locations on its own property. In striking down the ordinance, the Supreme Court of California stated "we find the prohibition has no reasonable relation to the general public welfare." *McKay Jewelers, Inc. v. Bowron*, 19 Cal. 2d at 602. Specifically, the Court stated as follows:

> "Such solicitation, confined as it is to private property, differs little from window displays which passers-by may pause and inspect or disregard entirely if they so desire. It is conceivable that some hypersensitive individuals may find this type of solicitation offensive. However, that is not sufficient to justify the prohibition of an otherwise lawful method of conducting a business. * * * *The burden placed upon appellants by such prohibition far outweighs the benefit, if any, to the public generally*. Therefore, we are of the opinion that the restriction as applied to appellants under the facts disclosed in the complaint is an unwarranted and unreasonable interference with a lawful business." (Emphasis added).

Id. Thus, the ordinance was found to be unconstitutional.

In *Thrift-D-Lux Cleaners, Inc*., the issue was whether it was legal for a "price fixing" statute to impose a minimum price on how much it would cost a consumer to dry clean a suit. The government argued that a minimum price was necessary to protect the public's health and safety yet the dry cleaner owner argued it was an "unnecessary and unreasonable restriction on the pursuit of private and useful business activities." The Supreme Court of California struck down the statute, stating that "the price fixing provision of the statute here involved is invalid because it is not, by any recognized or recognizable standard, an enactment providing for the public health, safety, morals, or general welfare." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc* , 40 Cal. 2d at 448.

In reaching this conclusion, the Court in *Thrift-D-Lux Cleaners, Inc*. stated that the statute "does not purport to be nor can it be justified as a war or emergency measure" (*id*. at

441), that there was "nothing in the dry cleaning business which distinguishes it from the multitude of other business offering services to the general public" (*id*.), and that there was nothing in the statute which "purports to prevent destructive and unfair competition or to suppress violence." *Id*. "[A]ny legislation to be justified and supported by the concept of 'general welfare' must aim to promote the welfare of a properly classified segment of the general public as contrasted with that of a small percentage or a special class of the body politic where no such classification can be justified." *Id*. at 443. Thus, the statute was stuck because it merely served to burden and restrict the business of dry cleaners.

In this case, AB 1735 imposes burdens on only two entities in the State of California, Plaintiffs. No other food producer in the State of California (except for those who produce milk intended to be pasteurized prior to consumption) is required to meet a 10 coliform limit. No restaurant operator, no bed and breakfast owner, no fast food restaurant, dormitory, rooming house, buffet operator, working kitchen, street vendor or other provider of food is required to meet a coliform limit. Only OPDC and Claravale have to meet a 10 coliform standard in their finished product. Therefore, AB 1735 does not promote the public's welfare because hordes of other providers of food are not regulated.

Moreover, coliforms do not make people sick, and because Plaintiffs' own testing data show they cannot comply with the 10 coliform limit on a consistent basis, AB 1735's import is nothing more than an arbitrary, unreasonable and unnecessary burden on their business. Consequently, it is unconstitutional.

C. The factual assumptions under which AB 1735 was passed are not true.

It has long been held in California that "where the enforcement of an ordinance may cause irreparable injury, the injured party may attack its constitutionality by an action to enjoin its enforcement." *McKay Jewelers, Inc. v. Bowron* (Cal. 1942), 19 Cal. 2d 595, 599. See also: *Jones v. City of Los Angeles* (Cal. 1930), 211 Cal. 304; *San Diego Tuberculosis Assn. v. City of East San Diego* (Cal. 1921), 186 Cal. 252; *Novar Corp. v. Bureau of Collection & Investigative Servs*. (Cal. Ct. App. 1984), 160 Cal. App. 3d 1, 5. In challenging the constitutionality of a

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statute, the party "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (U.S. 1979) (attached hereto as Attachment B). See also: *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (U.S. 1988) ("In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one.") (attached hereto as Attachment C); *American Bank & Trust Co. v. Community Hospital*, 33 Cal. 3d 674, 660 P.2d 829, 838 (Cal. 1983) ("[T]he constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing that those facts have ceased to exist."). In this case, the factual predicate for the necessity of AB 1735's 10 coliform standard did not exist. Thus, it should be struck down as unconstitutional.

1. The Pasteurized Milk Ordinance, the National Conference on Interstate Milk Shipments, and other federal guidelines do not apply to raw milk for human consumption.

In the legislative history accompanying AB 1735, several analyses were written by legislative staff people which suggested that AB 1735's 10 coliform limit was "necessary to comply" with the Pasteurized Milk Ordinance ("PMO"), the National Conference on Interstate Milk Shipments ("NCIMS") and other federal guidelines. However, as described below, the PMO (as its name implies), the NCIMS and federal guidelines apply only to raw milk and dairy products which is intended to be *pasteurized* prior to consumption. The PMO, NCIMS and federal guidelines do not apply to raw milk which is intended to be consumed without pasteurization and there is no federal 10 coliform limit on raw milk for human consumption. In other words, the PMO, NCIMS and federal guidelines do not apply to the type of raw milk and dairy products that are produced by Plaintiffs.

The interstate shipment of milk and dairy products is regulated by the federal Food, Drug and Cosmetic Act and the regulations adopted thereto by the Food and Drug Administration ("FDA"). Specifically, 21 C.F.R. 1240.61(a) provides, in part, as follows: "No person shall

cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale or other distribution after shipment in interstate commerce any milk or milk product in final package form for direct human consumption *unless the product has been pasteurized or is made from dairy ingredients (milk or milk products) that have all been pasteurized* . . . ." (Emphasis added) (attached hereto as Attachment D). Thus, if milk is going to be shipped across state lines, FDA prohibits its consumption unless it and the dairy products that come from it have all been pasteurized prior to consumption. Consequently, raw milk that is intended for human consumption cannot be shipped across state lines.

However, there is nothing in the PMO or federal guidelines that prohibit states from regulating the consumption of raw milk and raw dairy products in the various states. As Defendants have already pointed out at oral argument in this case, 30 states allow the sale of raw milk and raw dairy products in one form or another in their respective states. Consequently, the PMO and federal guidelines do not apply to the milk and dairy products that Plaintiffs produce for their customers.

Nonetheless, several of the analyses performed on AB 1735 by various legislative staff people incorrectly stated that AB 1735 was necessary to comply with federal requirements, the PMO or the NCIMS. Copies of those summaries are attached to the Affidavit of David G. Cox as Exhibits A, B, C, D, and E. For example, in the April 25, 2007 summary provided for the Committee on Agriculture (Exhibit A to Cox Affidavit), the analysis states that "All 50 states, the District of Columbia and U.S. Territories have similar * * * testing programs for Grade-A milk and milk products in accordance with the federal Pasteurized Milk Ordinance." Further, that same analysis states "Each of the provisions in this bill is necessary for the state's milk safety and inspection laws to be consistent with federal interstate milk shipment guidelines." Finally, that analysis also states that "This bill brings dairy farms into compliance with federal inspection guidelines for fluid milk by raising the state's dairy farm inspection score requirement to that of the federal level."

Exhibits B, C, D and E have similar language: "This bill updates provisions and reinstates previously deleted provisions in order to conform the state's dairy sanitation standards to update federal guidelines" (Exhibit B); "The standards establish (sic) in AB 1735 ensure that California will not be in conflict with NCIMS federal standard (sic) that could threaten our interstate milk shipments" (Exhibit C); "this bill is necessary to conform California milk safety and inspection laws with federal guidelines" (Exhibit D); "This bill makes several changes to state sanitation standards applicable to dairies, primarily to conform with federal milk product guidelines." (Exhibit E). Each of these statements is incorrect because there are no federal standards that apply to the consumption of raw milk or raw dairy products.

Had the legislators known that the imposition of a 10 coliform limit was not required under applicable federal law or guidelines, the legislation would not have been introduced, let alone passed and signed into law. Therefore, this alone constitutes evidence sufficient to make a demonstration that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (U.S. 1979) (Attachment B attached hereto). Consequently, AB 1735 should be stricken as unconstitutional.

2. No outbreaks of *E. coli* O157:H7 have ever been caused by OPDC.

In the summer of 2006, there was a spinach scare in the State of California and all across the nation. People were getting sick from an outbreak of *E.coli* and the country was in a frenzy. FDA's Centers for Disease Control and Prevention ("CDC") received over 100 reported illnesses and 19 states reported outbreaks. See Exhibit F attached to Affidavit of David G. Cox. Eventually, the illnesses were traced to contaminated spinach. By September 2006, the FDA had issued two recalls of spinach that implicated 34 brands of spinach, including brands marketed by Natural Selection Foods, LLC of San Juan Bautista, California. See Exhibit F to Cox Affidavit.

During that time, however, Defendant California Department of Food and Agriculture (CDFA) believed that OPDC was the cause of the *E.coli* outbreak and ordered OPDC to "quarantine" all of its dairy products (except cheese) from grocery store shelves. This

1 "quarantine" was based on a nebulous "abundance of caution" and was not required under the
2 law yet OPDC complied with CDFA's request anyway. See Declaration of Mark McAfee in
3 Support of Plaintiffs' Motion for Preliminary Injunction and Exhibit B attached thereto.

4 After the quarantine, and in a massive display of governmental resources brought to bear
5 to substantiate its quarantine, CDFA employees from across the state collected dozens and
6 dozens of samples of OPDC's products, whether from grocery store shelves (in such far away
7 places as Ventura, Loma Linda, Pasadena, Escondido, Riverside, Fresno and Clovis), from the
8 production premises of OPDC itself, or from manure droppings at OPDC's farm. See Exhibit D
9 attached to the Declaration of Mark McAfee in Support of Plaintiffs' Motion for Preliminary
10 Injunction. In September 2006 alone, 74 samples were collected.

11 All of those samples were analyzed for the presence of not only *E.coli* but also for other
12 pathogens causing human illness. However, no pathogens causing human illness were found,
13 not a single one! Recognizing that it had erred in ordering the quarantine of OPDC's products
14 from store shelves, CDFA and OPDC in July 2007 entered into a "Stipulation and Release"
15 whereby CDFA agreed to pay OPDC for the damages it suffered as a result of the illegal
16 quarantine. See Exhibit C attached to Declaration of Mark McAfee. Consequently, CDFA's
17 own samples proved that OPDS was not the cause of the *E.coli* outbreak. Instead, it was
18 spinach.

19 Notwithstanding these events, the analysis of AB 1735 prepared by legislative staff
20 people in this case referred to the alleged "outbreak" as a reason why AB 1735 was necessary.
21 For example, Exhibit D to the Affidavit of David G. Cox states "The author also notes that two
22 recent outbreaks of E. coli O157:H7 in Washington and California have been linked to raw milk
23 consumption." Exhibit E to the Cox Affidavit states "Within the past year, two outbreaks of
24 Escheria Coli O157:H7 in Washington and one in California have been linked to raw milk
25 consumption." Similar charges were made in Exhibits A through C to the Cox Affidavit.
26 However, all of these charges were erroneous, not to mention misleading.
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Had the legislators known that OPDC was not the cause of an *E.coli* outbreak, and that CDFA's own testing data proved this, the legislation would not have been introduced, let alone passed and signed into law. Therefore, this also constitutes evidence sufficient to make a demonstration that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (U.S. 1979) (Attachment B).

Because the facts on which AB 1735 was based were erroneous, AB 1735's 10 coliform limit is not rationally related to a legitimate public interest and is therefore unconstitutional.

IV. Conclusion

The equities favor the Plaintiffs and their customers in this case. If an injunction is not issued, they will be put out of business because of the 10 coliform limit imposed by AB 1735 and their customers will not have any access to raw milk and raw dairy products. However, if AB 1735 is enjoined consumers will be in the same position they were in before AB 1735 was enacted because there was no 10 coliform limit prior to AB 1735.

There is no correlation between the presence of coliforms and the presence of pathogens that cause human illness. Indeed, test results demonstrate that no matter what the level of coliforms is in their products, OPDC and Claravale have never had a pathogen that caused human illness. Consequently, a coliform standard is not related in any way to human health or safety.

Finally, the factual foundation on which AB 1735 was passed is false. There are no federal standards or guidelines that apply to the consumption of raw milk, and no outbreaks of *E.coli* have ever been linked to raw milk consumption in California.

For these reasons, a preliminary injunction should issue pending a trial on the merits of this case.

Date: April 4, 2008

Respectfully submitted,

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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:

PLAINTIFFS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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 & Horst, LLC, Two Miranova Place, Suite, Columbus, OH 43215-7052, 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 Lane, Alton & Horst, 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

Anita Ruud
Deputy Attorney General
Office of the Regional Attorney General
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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 April 4, 2008 at Columbus, Ohio.

____
David G. Cox