

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH #8

DANE COUNTY

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FARM-TO-CONSUMER LEGAL  
DEFENSE FUND, GRASSWAY ORGANICS  
FARM STORE LLC, GRASSWAY  
ASSOCIATION, and KAY and  
WAYNE CRAIG, d/b/a THE GRASSWAY  
FARM,

Case No. 09-CV-6313  
Declaratory Judgment:  
30701

Plaintiffs,

And

FARM-TO-CONSUMER LEGAL  
DEFENSE FUND, MARK and PETRA  
ZINNIKER, NOURISHED BY NATURE,  
LLC, GAYLE LOISELLE, ROBERT KARP,  
and PHILIP BURNS,

Case No. 10-CV-00302

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND CONSUMER  
PROTECTION,

Defendant.

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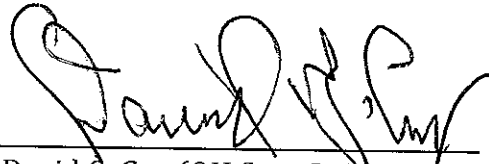
ZINNIKER PLAINTIFFS' MOTION FOR CLARIFICATION  
AND MEMORANDUM IN SUPPORT

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Now come Plaintiffs Farm-to-Consumer Legal Defense Fund, Mark and Petra Zinniker, Philip Burns, Robert Karp, Gayle Loiselle and Nourished by Nature, LLC ("Plaintiffs"), by and through counsel, who hereby seek clarification from the Court on its Decision and Order of August 12, 2011. A Brief in support is attached hereto and incorporated as if rewritten herein.

Dated: August 25, 2011

Respectfully submitted,



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## MEMORANDUM IN SUPPORT

Mark and Petra Zinniker used to own a herd of dairy cows and used to be the holders of a milk producer's license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"). Subsequently, the Zinnikers sold their dairy herd and relinquished their milk producer's license.

After selling their herd and relinquishing their license, Mark and Petra Zinniker were approached by Nourished by Nature, LLC, Gayle Loiselle and Robert Karp who bought the dairy herd from Mark and Petra. Specifically, Loiselle and Karp initially purchased a cow named Target (which was replaced by another cow named Soldier Girl) while the LLC, including Plaintiff Burns purchased the rest of the herd.

After selling their herd, Mark and Petra entered into private contracts to tend to, manage and take care of Target, Soldier Girl purchased by Loiselle and Karp and to tend to, manage and take care of the rest of the herd purchased by the LLC. These private contracts were manifested in the form of private Bills of Sale and private Boarding Agreements. Being private in nature, none of the milk produced by Target, Soldier Girl or the rest of the herd was distributed to anyone other than Loiselle, Karp and the members of the LLC, including Plaintiff Philip Burns.

In essence, Loiselle and Karp purchased private property in the form of a dairy cow and the LLC, including Burns, purchased private property in the form of a herd of dairy cows. Pursuant to private contracts, Target, Soldier Girl and the rest of the herd were kept at the farm of Mark and Petra Zinniker and Loiselle, Karp and members of the LLC, including Burns, would go to the farm to pick up their own

milk. Pursuant to their right to privacy, Loisel, Karp and members of the LLC, including Burns, would consume their own milk that was produced by their own privately owned dairy cows. No raw milk or other raw dairy produced by Target, Soldier Girl or the rest of the LLC's herd was sold or distributed to anybody else.

DATCP, however, called this private arrangement a "sham" and threatened enforcement proceedings against Mark and Petra Zinniker, the LLC, Loisel, Karp and Burns (collectively, "Zinniker Plaintiffs") if this "sham" did not stop. Denying that this private arrangement was a "sham," the Zinniker Plaintiffs filed a complaint for declaratory judgment seeking declarations that:

1. they have the inherent right to own and use property and that this should include the right to own and use property in the form of a cow;
2. they have the constitutional right to privacy and this should include the right to consume the milk from their own cow;
3. they have the right to enter into private contracts and this should include the right to board their cow at the farm of a farmer;
4. they have the constitutional right to associate freely and this should include the right to produce and consume the foods of ones choice;
5. DATCP did not have any jurisdiction over this private conduct.

The Zinniker Plaintiffs made similar arguments in their motion for summary judgment.

On August 12, 2011, the Court issued a Decision and Order ("Order") on the Zinniker Plaintiffs' motion for summary judgment. The Court concluded that the Zinniker Plaintiffs' constitutional arguments were "wholly without merit" because

none of the cases they cited stood “for the propositions that the Plaintiffs have asserted herein” and thus those cases were “not considered” by the Court. See pg. 22 of Order. With all due respect to the Court, the cases cited by the Zinniker Plaintiffs do in fact stand for the propositions of law they argued, but whether those propositions can be extended to the facts of this case remain open questions for which the Zinniker Plaintiffs sought declarations.

For example, Plaintiffs have a fundamental right to own and use property and cited to *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 480, 565 N.W.2d 521 (1997) and Wisconsin’s Inalienable Rights Clause under Article 1, Section 1 of the Wisconsin Constitution. Whether that right includes the right to own and use a dairy cow or dairy herd was the question raised by the Zinniker Plaintiffs, which they believe was not answered by the Court’s Order.

Plaintiffs also have a fundamental right to privacy, a fundamental right to raise their family, and a fundamental right to be free from governmental interference with their bodily health and integrity and cited to *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 686, 500 N.W.2d 649 (1993), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Stanley v. Illinois* 405 U.S. 645, 649 (1972), and *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Whether these rights include the right to consume the milk from one’s cow and the right to produce and consume the food of one’s choice for oneself and one’s family were the questions raised by the Zinniker Plaintiffs, which they believe were not answered by the Court’s Order.

Plaintiffs also have a fundamental right to enter into private contracts and cited to *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923) (*revd. on other grounds*) and Article 1, Section 12 of the Constitution of the State of Wisconsin. In that connection, they also argued that their private conduct was beyond the scope of the State's police powers unless the State could show that such private conduct impacted the public's welfare or impacted the community at large and cited to *Munn v. People of State of Illinois*, 94 U.S. 113 (1876), *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), *Loving v. Virginia*, 388 U.S. 1 (1967), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Fairmont Creamery Co. v. State of Minn.*, 274 U.S. 1, 11 (1927) and *State ex rel. Carter v. Harper*, 196 N.W. 451, 453 (1923). Whether the right to contract includes the right to board one's animal at the farm of a farmer, and whether the private contracts in this case impact the public's welfare or impact the community at large were the questions raised by the Zinniker Plaintiffs, which they believe were not answered by the Court's Order.

Plaintiffs have the fundamental right to freely associate and cited to *Palko v. Connecticut*, 302 U.S. 319 (1937), *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), *State ex rel. LaFollette v. Democratic Party*, 93 Wis.2d 473, 481 n. 4, 287 N.W.2d 519 (1980), and *Weber v. City of Cedarburg*, 129 Wis.2d 57, 68, 384 N.W.2d 333 (1986). Whether the freedom to associate includes the right to eschew big-agribusiness in favor of sustainable, local farming practices, or includes the right to produce, obtain and consume the food of one's choice for oneself and one's family were the

questions raised by the Zinniker Plaintiffs, which they believe were not answered by the Court's Order.

Finally, Plaintiffs asked the question of whether, if all these rights exist, and if their conduct is private in nature, DATCP was acting in a manner that was *ultra vires* because it lacked jurisdiction over the Zinniker Plaintiffs' conduct in this case, which they believe was not answered by the Court's Order.

Consequently, the Zinniker Plaintiffs seek clarification from the Court on the following issues:

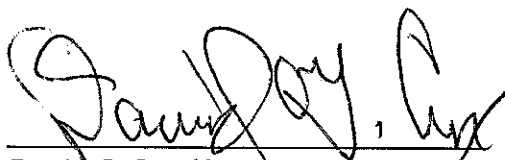
1. Does the fundamental right to own and use property include the right to own and use a dairy cow or dairy herd;
2. Does the fundamental right to privacy, the fundamental right to raise one's family, and the fundamental right to be free from governmental interference with one's bodily health and integrity include the right to consume the milk from one's cow and include the right to produce and consume the food of one's choice for oneself and one's family;
3. Does the fundamental right to enter into a private contract include the right to board one's animal at the farm of a farmer, and do the private contracts in this case fall outside the scope of the State's police power because they do not impact the public's welfare or they do not impact the community at large;
4. Does the fundamental right to freely associate include the right to eschew big-agribusiness in favor of sustainable, local farming practices, or

include the right to produce, obtain and consume the food of one's choice  
for oneself and one's family?

5. If the rights mentioned above can be extended to the rights claimed by the  
Zinniker Plaintiffs in this case, has DATCP acted in an *ultra vires* manner  
because DATCP would not have jurisdiction to regulate the private  
conduct specified herein?

Dated: August 25, 2011

Respectfully submitted,



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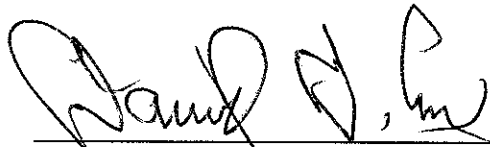
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by regular U.S. mail,  
postage prepaid, on this 25<sup>th</sup> day of August, 2011 to the following:

Robert M. Hunter  
Assistant Attorney General  
Wisconsin Department of Justice  
P. O. Box 7857  
Madison, WI 53707-7857  
Attorneys for Defendant

A handwritten signature in black ink, appearing to read "David G. Cox", written over a horizontal line.

David G. Cox (OH Sup. Ct. No. 0042724)