IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Farm-to-Consumer Legal Defense Fund, et al.	:	**Case No. 5:10-cv-4018**
Plaintiffs	:	**Judge Mark W. Bennett**
v.	:	
Sebelius, et al.	:	
Defendants	:	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO ADMIT NEWLY DISCOVERED EVIDENCE

Plaintiffs have come into the possession of new evidence that may be important to the Court when addressing the merits of Defendants' motion to dismiss. Motions to admit newly discovered evidence are normally presented to the Court via a motion for relief from judgment (*see* Fed.R.Civ.P. 60); a motion for a new trial or to amend a judgment (Rule 59); or a motion to amend or make additional findings of fact (Rule 52). Although Plaintiffs' instant motion does not address any of these situations, guidance on the admissibility of newly discovered evidence can be gleaned from cases that interpret one or more of these Rules.

In this case, Plaintiffs can prevail on their motion if they show that their newly discovered evidence (1) was discovered after they filed their Resistance to FDA's motion to dismiss, (2) is material and not cumulative, and (3) could produce a different result if it was not introduced. *See, e.g., O.N. Equity Sales Co. v. Pals*, 551 F.Supp.2d 821 (J. Bennett) (N.D. Iowa 2008). As described below, Plaintiffs' motion satisfies all three criteria.

Plaintiffs filed their Brief in Opposition to Defendants' motion to dismiss on June 14, 2010. The next day, June 15th, Plaintiffs' counsel received an unsolicited email from Ms. Sarah McCammon, a reporter who works for the Iowa Public Radio Network. See Exhibit 1 attached hereto. In her email, Ms McCammon explained that she was confused by this case because after questioning FDA by email about this case, FDA had apparently admitted that it would be legal for Ms. McCammon to buy raw milk in Nebraska and bring it back to Iowa. Specifically, Ms. McCammon's email included an email exchange with FDA's press office wherein FDA originally explained that 21 C.F.R. 1240.61 "does not prohibit an individual from purchasing a raw milk product for personal use…."

After receiving Ms. McCammon's email Plaintiffs' counsel sent FDA's counsel an email on June 16th, stated that Plaintiffs had come into possession of new evidence that might impact the case, and recommended that all counsel schedule a conference call to discuss the import of this new evidence. See Exhibit 2 attached hereto. A conference call between all counsel was scheduled for June 24th to discuss whether this new evidence impacted the case in any way.

On June 24th, in anticipation of the conference call, Plaintiffs' counsel forwarded Ms. McCammon's email to counsel for the FDA. See Exhibit 3 attached hereto. Prior to the commencement of the conference call, however, Plaintiffs' counsel received an email from Jennifer Zachary, FDA's Office of General Counsel. See Exhibit 4 attached hereto. Ms. Zachary's email contained a forwarded email from FDA's press office in response to Ms. McCammon, stating that its earlier interpretation of 21 C.F.R. 1240.61 "was totally incorrect."

This new evidence is important for the following reasons:

1. FDA considers the conduct described by Plaintiffs in their amended complaint to be a violation of 21 C.F.R. 1240.61, further proving the Hobson's Choice all Plaintiffs face;
2. forcing Plaintiffs to submit a citizens petition to FDA would be an effort in futility;
3. Plaintiffs would need to conduct discovery on the issue of FDA's change of interpretation of 1240.61, indeed FDA's actual interpretation, should the Court deny FDA's motion to dismiss in whole or in part.

Consequently, good cause exists to admit this newly discovered evidence.

Dated: July 24, 2010

Respectfully submitted,

/s/ David G. Cox

David G. Cox
4240 Kendale Road
Columbus, OH 43220
dcoxlaw@columbus.rr.com
Phone: 614-457-5167
Lead Counsel for Plaintiffs

Wallace L. Taylor
118 3rd Ave., S.E.
Cedar Rapids, IA 52401-1210
wtaylorlaw@aol.com
Phone: 319-366-2428
Local counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send notification of such filings(s) to the following:

MARTHA A. FAGG
Assistant United States Attorney
600 4th Street, Suite 670
Sioux City, IA 51101
712-255-6011
712-252-2034 (fax)
martha.fagg@usdoj.gov
usao.ian-civ-dc-sc@usdoj.gov

ROGER GURAL
Trial Attorney
Office of Consumer Litigation
Department of Justice
Civil Division
P.O. Box 386
Washington, D.C. 20044
202-307-0174
202-514-8742 (fax)
roger.gural@usdoj.gov

Wallace L. Taylor
118 3rd Ave., S.E.
Cedar Rapids, IA 52401-1210
wtaylorlaw@aol.com

/s/ David G. Cox
David G. Cox