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

Pursuant to LR 7(g), Plaintiffs hereby submit their Reply Brief in support of their motion to admit newly discovered evidence.

It was only after Plaintiffs filed their Resistance to the Defendants' motion to dismiss that they came into possession of the email chain illustrating FDA's position on raw milk for personal consumption. Consequently, there was no way Plaintiffs could present this new evidence to the Court except via a motion to admit new evidence.

Since the evidence was not obtained prior to the filing of their Resistance, Plaintiffs were correct in describing this evidence as "newly discovered." However, there is no rule of Court or of Civil Procedure that specifies a timeline by which newly discovered evidence must be submitted to the Court. Plaintiffs' submitted this new evidence to opposing counsel the day after Plaintiffs' counsel received it and FDA took the position that it was not worthy of submission to the Court. In fact, FDA objected to Plaintiffs' motion to admit, evincing their intent that this evidence not come to the

attention of the Court. Consequently, Plaintiffs were at liberty to present this evidence to the Court at their discretion.

It was possible that during the Oral Argument on July 22, 2010 the Court could have issued an oral ruling from the bench that denied FDA's motion to dismiss which would have rendered the new evidence moot. However, that oral denial was not forthcoming and thus Plaintiffs took their opportunity to present the new evidence to the Court via motion. As it was, Plaintiffs filed their motion to admit newly discovered evidence two days later on July 24th.

In its Resistance to the motion to admit, FDA argues that Plaintiffs seeks to "file a sur-reply." That is not true. Plaintiffs merely moved for the admission of newly discovered evidence and stated in their motion that such evidence "may be important to the Court when addressing the merits of Defendants' motion to dismiss."

FDA also argues in its Resistance to the motion to admit that "plaintiffs have deprived defendants of a proper opportunity to respond." That is also not true. Defendants had their opportunity to respond by filing their Resistance to the motion to admit, and they took advantage of this opportunity by filing their Resistance.

FDA also argues that Plaintiffs should have availed themselves of the opportunity "to supplement their papers" in Resistance to the motion to dismiss. Query how "supplementing their papers" is any different than filing a motion to admit newly discovered evidence? There is no difference.

FDA also argues that Plaintiffs seek "extraordinary relief" and cite to Fed.R.Civ.Proc. 60(b). However, as Plaintiffs indicated in their motion, a motion to admit newly discovered evidence in this context is not necessarily addressed by Rules 52,

59 and/or 60. Thus, FDA's citation to cases that discuss Rule 60 in the context of a relief from final judgment are not on point.

Finally, FDA argues that the email chain does not establish that "FDA has taken or intends to take enforcement action against" individuals such as Plaintiffs. Again, that is not the point. As demonstrated by the affidavits of Wagoner, Bemis and Kennedy, FDA *has already taken* enforcement action against farmers who have allowed their raw dairy products to be taken across State lines, and they have taken enforcement action against an individual whose own raw milk was taken across State lines. Thus, whether or not these emails reflect FDA's "official policy" is irrelevant; FDA's actions have already spoken for the agency. Moreover, these emails demonstrate that there are elements within FDA who believe that the conduct engaged in by Plaintiffs is illegal. How far up the chain of command that belief runs remains to be seen and will be revealed through discovery.

Consequently, good cause exists for the Court to grant Plaintiffs' motion and to consider the newly discovered evidence when addressing FDA's motion to dismiss.

Dated: July 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 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:

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