

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

FARM-TO-CONSUMER LEGAL)	
DEFENSE FUND, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 5:10-cv-4018-MWB
)	
KATHLEEN SEBELIUS, Secretary,)	
United States Department of Health)	
and Human Services, et al.,)	
)	
Defendants.)	

PLAINTIFFS' MARCH 2011 STATUS REPORT

Pursuant to the Court's Order of September 17, 2010 (doc. #29) and the text entry of October 19, 2010, the Plaintiffs hereby submit their status report.

The Court has already denied without prejudice that portion of Defendants' motion to dismiss for lack of subject matter jurisdiction that was based on a lack of standing and lack of ripeness. In addition, the Court has already denied that portion of Defendants' motion to dismiss for failure to state a claim that was based on Plaintiffs' failure to exhaust administrative remedies. However, the Court concluded that in order to reach a final decision on the other issues raised by Defendants in their motion to dismiss (including Plaintiffs' failure to state a claim) it was prudent for Defendants to answer three questions *ante*. Accordingly, the Court referred three questions *ante* to Defendants with instructions to provide an answer.

Defendants have now answered the three questions *ante* posed by the Court. In essence, Defendants have admitted that 21 C.F.R. 1240.61 applies to and proscribes the conduct of the Plaintiffs as alleged in the First Amended Complaint.

Consequently, Defendants have now admitted that Plaintiffs have standing, their claims are ripe, and they do not have any administrative remedy to exhaust or, if they do have one, resort to such an administrative remedy would be futile.

Defendants' admissions also provide the Court with enough facts to rule on the Constitutional claims brought by Plaintiffs in their First Amended Complaint.

Consequently, the terrain is now set for the Court to rule on the remainder of Defendants' motion to dismiss.

However, Defendants in their March 2011 Status Report suggest that the parties take additional time to brief the matter. Specifically, Defendants recommend that they have until May to file their supplemental brief and Plaintiffs have until June to file their supplemental brief. Significantly, Defendants do not indicate in their status report that they have any intention to present any facts to the Court beyond the "administrative record" that existed prior to the adoption of 21 C.F.R. 1240.61 and 131.110 in 1987 and 1973, respectively. Consequently, Defendants have no intention of making a "factual" challenge to Plaintiffs' claims because the "facts" as they existed in 1987 and 1973 have nothing to do with Plaintiffs' claims. Accordingly, Defendants appear to be resting on their facial challenge to Plaintiffs' claims.

In any event, Plaintiffs respectfully state that the matter has already been fully briefed and that there is nothing more for the parties to brief. Consequently, Plaintiffs respectfully request that the Court proceed with rendering a final decision on all issues in Defendants' motion to dismiss.

In addition, Plaintiffs have stated on page 3 in their opposition to Defendants'

motion to dismiss that Plaintiffs represent the “tipping point” of a food right’s movement. Plaintiffs also stated on page 3 of their opposition that this Court will be issuing a decision that will have “profound impacts across the country.” As support for these allegations, Plaintiffs hereby submit with this status report a study conducted by the Defendants’ own Centers for Disease Control and Prevention in 2007. *See* Exhibit A attached hereto. The link to the study is contained at http://www.cdc.gov/foodnet/surveys/FoodNetExposureAtlas0607_508.pdf.

This report, “Population Survey, Atlas of Exposures, 2006-2007,” was a telephonic interview designed to use the information that was gathered “to determine the prevalence and severity of gastrointestinal illness among persons” and to “summarize information on select exposures.” *See* Pg. 3. The survey was conducted from May 2006 through 2007 of English and Hispanic speaking households and asked select questions of “all age groups” over the age of 13 in order to summarize “food consumption and animal exposure information....” *Id.* The survey asked questions of persons located in ten states and estimated it conducted 17,372 interviews. *Id.*

One of the questions asked during the interview was whether the respondent had consumed “unpasteurized milk” within the past 7 days prior to the interview. According to the survey results, 3% of the population surveyed said yes. This suggests that 3% of the total U.S. population, or roughly 9 million individuals, consume raw milk. This number does not include the number of individuals who consume raw milk products, such as cheese, kefir, yogurt or butter.

Consequently, this Court’s decision could potentially impact 9 million

citizens. Therefore, there is no reason for this Court to delay this matter for an additional length of time merely to enable Defendants to re-formulate their arguments.

Accordingly, Plaintiffs respectfully request that the Court proceed with rendering a final decision on all issues in Defendants' motion to dismiss.

Dated: March 17, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2011, 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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