

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’ BRIEF IN SUPPORT OF MOTION TO AMEND JUDGMENT

Fed.R.Civ.Proc. 59(e) provides, in part, that a motion to amend a judgment “must be filed no later than 28 days after the entry of the judgment.” Judgment was entered in this case on April 2, 2012 and all of the claims of all the Plaintiffs were dismissed. Thus, this motion of Plaintiffs Michael Buck and Eric Wagoner is timely.

This Court has stated that under Rule 59(e), “a judgment may be amended to correct ‘clearly’ or ‘manifestly’ erroneous findings of fact or conclusions of law.” *Doctor John’s, Inc. v. City of Sioux City, Iowa* (467 F.Supp. 2d 925, 931 (N.D. Iowa, 2006) (J. Bennett). *See also Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988). When a trial court makes “an error of law or an erroneous factual finding,” it engages in an abuse of discretion in denying a Rule 59(e) motion. *See, e.g., Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 919 (N.D. Iowa, 2003) (J. Bennett). As described below, Plaintiffs respectfully submit that it was error to dismiss all of Plaintiff Buck’s and all of Plaintiff Wagoner’s claims.

In its Opinion and Order of March 30, 2012 (Doc. #79), the Court relied on

FDA's answers to the Court's certified questions in concluding that none of the claims of any of the Plaintiffs presented any "threat of injury in fact." Specifically, on page 3 of its Opinion, the Court believed that FDA had "made abundantly clear that it has not and does not intend to enforce the regulations against any of the plaintiffs." With all due respect to the Court, FDA made it clear that it has no intention of enforcing the law against *an individual* who travels across state lines with raw milk in their possession. With respect to farmers and agents, however, FDA made it clear that it *would*, under appropriate circumstances, take an enforcement action against either of these entities.

For example, FDA states in its answers to the Court's questions (Doc. #43-1) that an agent who makes a "single delivery" of raw milk to an out of state consumer would "not likely" be the subject of an enforcement action. In the first amended complaint filed in this matter (Doc. #8, ¶¶28, 32), however, Mr. Wagoner admitted that on more than one occasion in 2009 he made cross border deliveries of raw milk. Mr. Wagoner has also admitted in his affidavit (Doc. #15-2) that he collected 110 gallons of raw milk in South Carolina on behalf of Georgia purchasers and drove back into Georgia with 110 gallons of milk, 108 of which belonged to third parties. Mr. Wagoner also admitted in his affidavit that the person who ordered him to destroy all 110 gallons of the raw milk was FDA employee Marybeth Willis. Thus, Mr. Wagoner, acting as an agent, *has already been* the subject of an enforcement action taken by FDA and has already made more than "one delivery" of raw milk across state lines as an agent. Consequently, and with all due respect to the Court, this Court erred when it dismissed Mr. Wagoner's claims, as agent for third parties,

when it concluded that his claims were conjectural.

With respect to farmers, FDA states in its answers to the Court's questions (Doc. #43-1) that it would take "possible regulatory action" if the farmer "solicits interstate sales and/or regularly sells raw milk that is ultimately transported across state lines." (Internal pg. 9 of 9). For his part, Michael Buck admitted in the first amended complaint that he sells raw milk to customers that he knows come from out of state, i.e., both Georgia and North Carolina. *See* Doc. #8, ¶42. Mr. Buck also admitted in his affidavit (Plaintiffs' Appendix in Support of Motion for Summary Judgment, pgs. 0005-0007) that he sells 200 gallons of raw milk *per week* at retail stores and 20 gallons at their farm store, and that some of these customers are from either North Carolina or Georgia. Plaintiffs' Appendix pg. 0006, ¶¶8 and 15. Thus, Mr. Buck engages in the exact kind of behavior that FDA believes calls for "regulatory action," i.e., Mr. Buck "regularly sells raw milk that is ultimately transported across state lines." Consequently, and with all due respect to the Court, this Court erred when it dismissed Mr. Buck's claims, as a farmer who distributes raw milk to out of state customers, when it concluded that his claims did not rise to the level of an injury.

FDA's "plan" on how it will enforce the law is not binding and can change at any moment. Also, a change in administration may well lead to a different FDA enforcement strategy. Moreover, it is significant to note that FDA has admitted that it will "continue to direct its limited resources to enforcement actions against those who produce and/or distribute" raw milk in interstate commerce. (Doc. #43-1, internal pg. 9 of 9). The conduct of both Mr. Buck and Mr. Wagoner fit FDA's "plan"

exactly; Mr. Buck produces the raw milk that is taken across state lines, and Mr. Wagoner delivers the raw milk across state lines acting as an agent. Consequently, and with all due respect, the Court erred when it concluded that their claims should be dismissed.

Again, FDA has already taken action against a farmer such as Michael Buck. As noted in the affidavit of Pete Kennedy (Doc. #15-3), FDA has already taken an enforcement action against a farmer from the State of Washington for distributing raw milk in interstate commerce. Indeed, the facts of the Washington farmer case are nearly identical to the facts of Mr. Buck's situation; the Washington farmer was legally selling raw milk in Washington to persons that he knew were from the State of Oregon and the Washington farmer was charged *criminally*. This is exactly what Mr. Buck is doing; he is legally selling raw milk in South Carolina to individuals who he knows are from out of state. Thus, Mr. Buck's claims should not have been dismissed.

For these reasons, Plaintiffs Buck and Wagoner believe good cause exists for the Court to amend its Judgment and to reinstate their claims.

Dated: April 5, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2012, 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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