

FARM-TO-CONSUMER LEGAL DEFENSE FUND,  
8116 Arlington Blvd. Suite 263  
Falls Church, VA 22042, and

HON. JOHN R. RACE

Mark and Petra Zinniker  
N 7399 Bowers Rd.  
Elkhorn, WI 53121

Case No. 10 CV 00302

Nourished by Nature, LLC  
W 339 S 4358  
Deer Park Drive  
Dousman, WI 53118

Declaratory Judgment  
Classification: 30701

Gayle Loiselle  
W 339 S 4358  
Deer Park Dr.  
Dousman, WI 53118

Robert Karp  
W 2811  
Friemoth Road  
E. Troy, WI 53120

FILED  
CIRCUIT COURT

FEB 25 2010

CLERK OF COURTS-WALWORTH CO.  
BY DOROTHY MORGAN

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION,  
Rod Nilsestuen, Secretary  
2811 Agriculture Drive  
Madison, WI 53708-8911,

Defendant.

---

**SUMMONS**

---

**THE STATE OF WISCONSIN**, to each Person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached and is served upon you, states the nature and basis of the legal action.


Within 45 days of receiving this Summons, you must respond with a written Answer or otherwise respond and take action as defined and described in Chapter 802 of the Wisconsin Statutes and applicable law, to the Complaint. The Court may reject or disregard an Answer or other response that does not follow the requirements of the statutes. The answer or other response must be sent or delivered to the Court, whose address is, Walworth County Circuit Court, Judicial Center, 1800 County Road NN, Elkhorn, WI 53121, and to Elizabeth Gamsky Rich, Plaintiffs' attorney, whose address is 637 Walton Drive, Suite 1, Plymouth, WI 53073. You may have an attorney help or represent you.

If you do not provide a proper answer or other required response within 45 days, the Court may grant judgment against you for the award of money or other legal remedy requested in the Complaint as allowed by law, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 25<sup>th</sup> day of February 2010.

**P.O. Address:**  
637 Walton Drive, Suite 1  
Plymouth, WI 53073  
T: 920.892.2449  
F: 866.432.7226  
erich@rich-law.com

Elizabeth Gamsky Rich  
Attorneys for Petitioners

  
\_\_\_\_\_  
Elizabeth Gamsky Rich  
State Bar No. 1019123

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

---

FARM-TO-CONSUMER LEGAL DEFENSE FUND,  
8116 Arlington Blvd. Suite 263  
Falls Church, VA 22042, and

Mark and Petra Zinniker  
N 7399 Bowers Rd.  
Elkhorn, WI 53121

Case No. \_\_\_\_\_

Nourished by Nature, LLC  
W 339 S 4358  
Deer Park Drive  
Dousman, WI 53118

Declaratory Judgment  
Code: 30701

Gayle Loiselle  
W 339 S 4358  
Deer Park Dr.  
Dousman, WI 53118

Robert Karp  
W 2811  
Friemoth Road  
E. Troy, WI 53120

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION,  
Rod Nilsestuen, Secretary  
2811 Agriculture Drive  
Madison, WI 53708-8911,

Defendant.

---

COMPLAINT

---

Now come Plaintiffs Farm-to-Consumer Legal Defense Fund, Mark and Petra Zinniker, Nourished by Nature, LLC, Gayle Loiselle and Robert Karp, by their attorneys, David G. Cox and Elizabeth Gamsky Rich, and as and for their complaint against Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection allege as follows:

Parties

1. Plaintiff Farm-to-Consumer Legal Defense Fund (hereinafter "the Fund") is an Ohio nonprofit organization with tax exempt status under Section 501(c)(4) of the Internal Revenue Code, with its principal place of business at 8116 Arlington Blvd., Suite 263, Falls Church, VA 22042.
2. As of February 1, 2010, the Fund has approximately 1,900 members nationwide, with 111 members residing in the State of Wisconsin.
3. Plaintiffs Mark and Petra Zinniker (hereinafter "the Zinnikers") are members of the Fund and are also the owners of Zinniker Farm, Inc. and reside at N 7399 Bowers Rd., Elkhorn, Walworth County, WI 53121.
4. Plaintiff Nourished by Nature, LLC (hereinafter "the LLC") is a Limited Liability Company organized in January 2010 under the laws of the State of Wisconsin, with its principal place of business at W 339 S 4358 Deer Park Drive, Dousman, Waukesha County, WI 53118.
5. Plaintiff Gayle Loiselle is a member of the LLC and resides at W 339 S 4358 Deer Park Drive, Dousman, Waukesha County, WI 53118.
6. Plaintiff Robert Karp is a member of the LLC and resides at W 2811 Friemoth Road, E. Troy, WI 53120.

7. Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) is an agency of the State of Wisconsin with its principal place of business located at 2811 Agriculture Drive, Madison, WI, 53708-8911. Rod Nilsestuen is the Secretary of the Defendant DATCP.

#### Nature of the Action

8. This is an action brought under the Uniform Declaratory Judgments Act , Wis. Stat. §806.04 seeking a declaration on the proper interpretation and application of Wis. Stat. §97.24(2)(b). *See also City of Kenosha v. State*, 35 Wis.2d 317, 323, 151 N.W.2d 36 (1967) (“...courts may entertain suits to enjoin state officers and state agencies from acting beyond their constitutional or jurisdictional authority.”). Plaintiffs are not seeking damages in this action, but rather, only a proper interpretation of applicable law that would provide prospective relief, i.e., such relief that would allow Plaintiffs to engage in the conduct described below.
9. Wis. Stat. §97.24(2)(b) provides, in part, as follows: “No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to *consumers*, or to any restaurant, institution or retailer for consumption or resale to *consumers*.” (Emphasis added).
10. The term “consumers” is not defined in Chapter 97 of the Wisconsin Statutes.
11. However, the term “consumer” is defined in the Wisconsin Administrative Code at Chapter ATCP 75.
12. The Appendix to ATCP Chapter 75 is known as the “Wisconsin Food Code” and defines “consumer” at 1-201.10(B)(16) as “a person who is a *member of the public*, takes

possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.”

(Emphasis added).

13. Although Wis. Stat. §97.24(2)(b) prohibits raw milk sales to consumers, Wis. Stat. §97.24(2)(d)(2) provides for an exemption that allows “[i]ncidental sales of milk directly to consumers at the dairy farm where the milk is produced.”
14. In an Administrative Order dated October 30, 2002, DATCP interpreted the “incidental sales” exemption of Wis. Stat. §97.24(2)(d)(2) to mean that “any sales to employees or persons shipping milk” to a dairy plant would be legal and lawful.
15. The Zinnikers seek declarations that their conduct as described herein (1) does not constitute a violation of Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60 and (2) does not constitute “selling or distributing” any milk as those terms are used in Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60.
16. The LLC seeks a declaration that its conduct as described herein does not constitute a violation of Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60.
17. Plaintiffs Loiselle and Karp seek a declaration that their conduct as described herein does not constitute a violation of Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60, and that they are not “consumers” as that term is defined by ATCP Chapter 75, 1-201.10(B)(16).
18. The LLC has entered into a private contract with the Zinnikers and has purchased from the Zinnikers a herd of dairy cows (the “herd”).
19. The LLC is the owner of the herd.

20. The LLC has entered into a boarding contract with the Zinnikers to have the Zinnikers tend to, manage and take care of the LLC's herd of dairy cows.
21. Pursuant to the boarding agreement between the LLC and the Zinnikers, the LLC boards its herd at the Zinnikers' farm and in exchange pays the Zinnikers an annual boarding fee, payable in monthly installments, that is commensurate with the costs of taking care of, managing and tending to the herd.
22. This type of arrangement has been known since Medieval times as an Agistment Agreement whereby the Zinnikers are known as the Agister.
23. Plaintiffs Loiselle and Karp are members of the LLC.
24. Plaintiffs Loiselle and Karp pay a fee to become a member of the LLC.
25. As members of the LLC, Plaintiffs Loiselle and Karp agree to be bound by the terms of the LLC's operating agreement.
26. Pursuant to Article 8 of the LLC's operating agreement, Plaintiffs Loiselle and Karp have agreed to pay, and will be paying, assessments established by the Managers of the LLC.
27. The assessments established by the Managers of the LLC will be used to defray the cost of the care and milking of the LLC's herd.
28. Plaintiffs Loiselle and Karp will periodically visit the Zinnikers' farm in order to obtain and collect the milk produced by the LLC's herd and they will bring their own sanitized bottles and caps for this purpose.
29. Plaintiffs Loiselle and Karp will then take the milk produced by the LLC's herd back to their own homes where it will be consumed by them and their respective families.



30. All of the milk that will be consumed by Plaintiffs Loiselle and Karp from the LLC's herd will be unpasteurized, unprocessed and fresh.
31. The LLC does not advertise.
32. The LLC is selective in who it allows to become a member.
33. The LLC discloses to its potential members the alleged risks of consuming raw milk and raw dairy products.
34. All of the milk and dairy products that will be produced by the LLC's herd will go only to LLC members and to no other persons, except that some of the LLC's milk will go to the Zinnikers and to their employees pursuant to DATCP's interpretation of the "incidental sales" exemption of Wis. Stat. §97.24(2)(d)(2).
35. The members of the LLC believe that the quality, taste and nutritional value of raw milk and raw dairy products is superior to that of pasteurized milk and pasteurized milk products.
36. The members of the LLC associate together in the LLC with the belief that they have the fundamental right to produce, obtain and consume the foods of their own free choice.
37. The members of the LLC share a common belief that they have the right to raise their children and their families free from governmental interference.
38. The members of the LLC shun large-scale agribusiness in favor of small producers and a local economy.
39. The members of the LLC have a genuine concern for the preservation of the earth's resources and therefore support sustainable agricultural practices.

40. On September 30, 2009 a letter was sent to DATCP presenting the following hypothetical situation: if an entity owns a herd of cows and boards the cows at a Wisconsin farmer's farm, and in exchange for paying a fee to the Wisconsin farmer for tending to, managing and taking care of the cows, could the raw milk and other raw dairy products produced by the herd of cows be consumed without being in violation of Wis. Stat. §97.24(2)(b)?
41. On October 1, 2009, DATCP sent a response to the September 30, 2009 letter and stated that such an arrangement would be a "sham" and would be illegal under Wis. Stat. §97.24(2)(b).
42. DATCP's letter of October 1, 2009 does not constitute a contested case or proceeding, licensing, proposed rule or rule as those terms are defined by Wis. Stat. §227.01.
43. As stated below, Plaintiffs are being damaged and are suffering an injury in fact by the position taken by DATCP. Specifically, Plaintiffs, alone or in conjunction with each other, are being deprived their fundamental and inalienable right of (a) possessing and using their own property; (b) providing for the care and well being of themselves and their families by consuming the food of their own choice; (c) enjoying the benefits of their contracts; and (d) associating together with like-minded individuals.
44. A favorable ruling on the claims presented in this Complaint would redress Plaintiffs' injury in fact. Specifically, a ruling that DATCP's interpretation of the law is illegal would allow the individual Plaintiffs to use their own property, provide for the care and well being of themselves and their families by consuming the food of their own choice, allow

them to enjoy the benefits of their contracts, and allow them the freedom to associate with others who share similar beliefs and values.

### Standing

45. The FTCLDF is a nation-wide non-profit organization dedicated to protecting and promoting sustainable, environmentally sound farming practices and direct farm-to-consumer transactions which the FTCLDF believes furthers the common good and general welfare of all Americans. The FTCLDF defends and protects the right of farmers to directly provide, and for consumers to directly obtain, unprocessed and processed farm foods. Toward this end, the FTCLDF provides advocacy, education and legal services for farmers and consumers against any local, State, and federal government interference with the legal transfer of products produced and processed on the farm.
46. In addition, agrarian-based communities are an integral part of the fabric of American custom and culture and all Plaintiffs help to preserve and protect that culture.
47. All Plaintiffs have chosen to support: the preservation and protection of America's agricultural heritage and traditional farming techniques; the maintenance and protection of heirloom varieties of plants and animals constituting a valuable genetic resource which may help to protect America's food supply in the event of a disease outbreak; and the contribution to the national security benefit founded in a diverse and sustainable agricultural system in the event of a terrorist attack or natural disaster that interrupts the distant transportation of centrally-produced food across the country.
48. All of the Plaintiffs will be damaged and will suffer an injury in fact by DATCP's illegal interpretation of Wis. Stats. §97.24(2)(b). Specifically, all individual Plaintiffs are now

subject to civil, criminal and/or administrative penalties and/or sanctions for allegedly being in violation of Wis. Stats. §97.24(2)(b).

49. The threat of an enforcement action by DATCP guarantees standing to the individual Plaintiffs. *See Houston v. Hill*, 482 U.S. 451, 459, n. 7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785, n. 21 (1978); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).
50. A declaratory judgment action is the appropriate action to bring when faced with a Hobson's choice, i.e., either comply with an unlawful interpretation of a statute or ignore the unlawful interpretation and face the possible consequences of noncompliance. *See Abbott Laboratories v. Gardner*, 386 U.S. 136, 152-153, (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). *See also Lister v. Board of Regents of University Wisconsin System*, 72 Wis.2d 282, 307, 240 N.W.2d 610 (1976).
51. A favorable ruling on the claims presented in this Complaint would redress Plaintiffs' injury in fact. Specifically, a ruling that DATCP's interpretation of Wis. Stats. §97.24(2)(b) is illegal would allow Plaintiffs to exercise their fundamental and inalienable right of (a) possessing and using their own property; (b) providing for the care and well being of themselves and their families by consuming the food of their own choice; (c) enjoying the benefits of their contracts with the farmer; and (d) associating together with like minded individuals.
52. The Fund Plaintiff has standing because the Zinnikers have standing to sue in their own right. The interest at stake in this suit, namely the halting of an arbitrary and capricious

agency interpretation of Wis. Stats. §97.24(2)(b) that interferes with farmers' ability to raise food and consumers' ability to obtain such foods, is germane to the Fund's purpose and mission. None of the claims asserted nor the relief requested require the participation of individual members.

#### Legal Principles

53. Article 1, Section 1 of the Constitution of the State of Wisconsin provides that “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”
54. Article 1, Section 3 of the Constitution of the State of Wisconsin provides, in part, that “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.”
55. Article 1, Section 4 of the Constitution of the State of Wisconsin provides that “The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.”
56. Article 1, Section 9 of the Constitution of the State of Wisconsin provides that “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.”

57. Article 1, Section 12 of the Constitution of the State of Wisconsin provides, in part, “No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed.”
58. Article 1, Section 13 of the Constitution of the State of Wisconsin provides that “The property of no person shall be taken for public use without just compensation therefore.”
59. Article 14, Section 13 of the Constitution of the State of Wisconsin provides that “Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.”
60. The inherent rights preserved by Article 1, Section 1 of the Wisconsin Constitution are substantially the equivalent of the due process and equal protection rights guaranteed by the Fourteenth amendment to the United States Constitution. *See Buse v. Smith*, 74 Wis.2d 550, 579, 247 N.W.2d 141 (1976). *See also Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis.2d 631, 643, 169 N.W.2d 441 (1969); *Dowhower ex rel. Rosenberg v. West Bend Mut. Ins. Co.*, 236 Wis.2d 113, 119-120, 613 N.W.2d 557 (2000).
61. The Courts of Wisconsin are free to construe the liberties and freedoms under the Wisconsin Constitution as affording greater protection than the liberties and freedoms that are afforded under the United States Constitution. *See State v. Doe*, 78 Wis.2d 161, 171, 254 N.W.2d 210 (1977). *See also State v. Knapp*, 285 Wis.2d 86, 115, 700 N.W.2d 899 (2005).

62. Under Article 1, Section 9, the phrase “conformably to the laws” like the phrase “due process” means “a recognized, long-established system of laws” existing in Wisconsin at the time the Constitution of the State of Wisconsin was adopted. *See McCoy v. Kenosha County*, 195 Wis. 273, 218 N.W. 348, 350 (1928).
63. Among the inherent rights and liberties recognized by the Courts of Wisconsin are the rights of ownership and use of property. *See Penterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 480-481, 565 N.W.2d 521 (1997).
64. The United States Constitution recognizes a fundamental right to privacy that is protected by the substantive Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
65. The fundamental right to privacy includes the fundamental right to raise one’s family. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois* 405 U.S. 645, 649 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *See also Ann M.M. v. Rob S.*, 176 Wis.2d 673, 686, 500 N.W.2d 649 (1993).
66. The fundamental right to privacy also includes the fundamental right to be free from governmental interference with one’s bodily and physical health. *See Rochin v. California*, 342 U.S. 165 (1952); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See also Trogun v. Fruchtman*, 58 Wis.2d 569, 596, 598, 207 N.W.2d 297 (1973); *Hannemann v. Boyson*, 282 Wis.2d 664, 685, 698 N.W.2d 714 (2005).

67. Freedom to contract is a fundamental liberty right protected by the due process clause of the Fifth Amendment to the United States Constitution. *See Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923) (*revd. on other grounds*).
68. Certain rights that are implicit in the concept of ordered liberty include the right of association. *See Palko v. Connecticut*, 302 U.S. 319 (1937); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *See also State ex rel. LaFollette v. Democratic Party*, 93 Wis.2d 473, 481 n. 4, 287 N.W.2d 519 (1980).
69. In Wisconsin, the “constitutional basis for the freedom of association appears to be several constitutional guarantees, including the various rights of free speech, free press, petition, assembly, and voting.” *See Weber v. City of Cedarburg*, 129 Wis.2d 57, 68, 384 N.W.2d 333 (1986).
70. Freedom of association receives protection as a fundamental element of an individual’s personal liberty because such protection safeguards the ability independently to define one’s identity that is central to any concept of liberty. *See Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).
71. Because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by government. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
72. These types of protected relationships presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special



community of thoughts, experiences, and beliefs, but that also share distinctively personal aspects of one's life. *See Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

73. Where a statutory classification adversely affects or interferes with a fundamental constitutional right, the classification is subject to *strict scrutiny* and the normal presumption of constitutionality will not apply. *See In re Reitz*, 53 Wis.2d 87, 93, 191 N.W.2d 913 (1971). *See also Kukor v. Grover*, 148 Wis.2d 469, 513, 436 N.W.2d 568 (1989), concurring opinion; *Roe v. Wade*, 410 U.S. 113, 154-155 (1973).
74. Strict scrutiny means that legislative infringements on liberty interests must be narrowly tailored to serve a compelling state interest. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Reno v. Flores*, 507 U.S. 292 (1993). *See also State v. Baron*, 318 Wis.2d 60, 82-83, 769 N.W.2d 34 (2009).
75. Substantive due process protects individuals from arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them. *See Penterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 480, 565 N.W.2d 521 (1997). *See also Daniels v. Williams*, 474 U.S. 327, 331 (1986).
76. Due process prevents governmental interference with rights that are implicit in the concept of ordered liberty. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). *See also In re Termination of Parental Rights to Diana P.*, 279 Wis.2d 169, 181, 694 N.W.2d 344 (2005).
77. Courts employ a multi-part balancing test to determine whether conduct is private or public in nature. *See U.S. v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No.*

137, 472 F.Supp. 1174, 1175 (E.D. Wis. 1979); *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D. Pa. 1989).

78. Private conduct is beyond the reach of the government's police powers. *See, e.g., 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); *Rochin v. California*, 342 U.S. 165 (1952); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).
79. Plaintiffs' conduct in this case is purely private and is beyond the reach of the State's police powers and the jurisdiction of DATCP.
80. Wis. Stats. §97.24(1)(a) defines "dairy farm" as "any place where one or more cows, sheep or goat are kept for the production of milk."
81. Wis. Stats. §97.24(1)(f) defines "milk producer" as "any person who owns or operates a dairy farm and sells or distributes milk produced on that farm."
82. ATCP 60.01(13) defines a "Grade B farm" as "a dairy farm other than a Grade A farm."
83. ATCP 60.01(14) defines "Grade B milk" as "milk other than Grade A milk."
84. When a regulatory program is overly broad and encompasses private conduct within its reach, citizens have the right to opt out of the protection provided by the public health laws if they make informed decisions. *See Regina v. Schmidt*, Reasons for Judgment, January 21, 2010; [http://foodrightsalliance.ca/regina\\_v\\_schmidt.pdf](http://foodrightsalliance.ca/regina_v_schmidt.pdf). Attached hereto.
85. Plaintiffs have opted out of the alleged protections allegedly afforded by Wis. Stats. Chap. 97 and ATCP Chapter 60 and have instead chosen to engage in the conduct described herein.

86. Agricultural supplier liens (aka Agistment agreements) are authorized by Wis. Stats. §779.43(3), which provides, in part, as follows: “every keeper of a \* \* \* livery or boarding stable, and every person pasturing or keeping any \* \* \* harness or animals \* \* \* shall have a lien thereon and may retain the possession thereof for the amount due for the keep, support, storage \* \* \* and care thereof until paid.”

**COUNT ONE**  
**THE LLC’S INALIENABLE RIGHT TO POSSESS, USE AND ENJOY ITS PROPERTY**

87. Paragraphs 1 through 86 are incorporated into this Count as if rewritten herein.
88. The LLC has the inalienable right to own a cow, or a herd of cows, and to use its cow(s) in a manner that does not cause harm to third parties.
89. The LLC has exercised its inalienable right to purchase a herd of dairy cows for its use, enjoyment and benefit as it sees fit.
90. DATCP’s October 2009 letter deprives the LLC of the use, benefit and enjoyment of the cows it has purchased from the Zinnikers.
91. DATCP’s October 2009 letter operates as an unjust taking of the LLC’s private property, for which no compensation has been paid.
92. Because the right to own, possess and use one’s property as one sees fit is a fundamental right, DATCP’s interpretation of Wis. Stats. §97.24(2)(b) should be analyzed under a strict scrutiny standard.
93. Defendant DATCP’s conduct described in this Count constitutes a violation of Article 1, Sections 1, 9, 12 and 13, and of Article 14, Section 13 of the Wisconsin Constitution pertaining to the fundamental right to possess, use and enjoy property without due

process of law, for which declaratory and other injunctive relief is available and should issue under Wis. Stats. §806.04.

**COUNT TWO**  
**PLAINTIFFS LOISELLE'S AND KARP'S INALIENABLE RIGHT TO PRIVACY**

94. Paragraphs 1 through 93 are incorporated into this Count as if rewritten herein.
95. Plaintiffs Loiselles and Karp have the inalienable right to consume for themselves and for their families the raw milk and raw dairy products produced by the cows in which they have a legal and equitable interest.
96. Plaintiffs Loiselles and Karp have the inalienable right to raise their family in their own way, which includes what foods they do and do not choose to consume for themselves and their families.
97. Plaintiffs Loiselles and Karp have the inalienable right to their own bodily and physical health, which includes what foods they do and do not choose to consume for themselves and their families.
98. Because the right to privacy is a fundamental right, DATCP's interpretation of Wis. Stats. §97.24(2)(b) should be analyzed in this case under a strict scrutiny standard.
99. DATCP's action violates Plaintiffs Loiselles's and Karp's fundamental privacy rights of raising one's family in the way they see fit, in providing them and their families with the foods of their own choice, and in their ability to consume the raw milk and raw milk products produced by cows in which they have a legal and equitable interest.
100. Defendant DATCP's conduct described in this Count constitutes a violation of Article 1, Sections 1 and 9, and Article 14, Section 13 of the Wisconsin Constitution pertaining to the fundamental right to privacy without due process of law, for which

declaratory and other injunctive relief is available and should issue under Wis. Stats. §806.04.

**COUNT THREE**  
**THE ZINNIKERS' AND THE LLC'S INALIENABLE RIGHT TO CONTRACT**

101. Paragraphs 1 through 100 are incorporated into this Count as if rewritten herein.
102. The LLC and the Zinnikers have the inalienable right to enter into a boarding contract, historically known as an Agistment agreement, to board the LLC's herd at the Zinnikers' farm, who is historically known as the Agister.
103. The LLC and the Zinnikers have entered into a boarding contract to board the LLC's herd at the Zinnikers' farm.
104. The LLC and the Zinnikers have the inalienable right to enter into a services contract in order to have some of the raw milk produced by the LLC's cows converted by the Zinnikers into other raw milk products, such as kefir, yogurt and butter.
105. Because the right to contract is a fundamental right, DATCP's interpretation of Wis. Stats. §97.24(2)(b) should be analyzed in this case under a strict scrutiny standard.
106. DATCP's action violates the LLC's and the Zinnikers' fundamental rights of entering into boarding contracts and service contracts.
107. Defendant DATCP's conduct described in this Count constitutes a violation of Article 1, Sections 1, 9 and 12, and Article 14, Section 13 of the Wisconsin Constitution pertaining to the fundamental right to contract without due process of law, for which declaratory and other injunctive relief is available and should issue under Wis. Stats. §806.04.

**COUNT FOUR**  
**LOISELLE'S AND KARP'S FREEDOM OF ASSOCIATION**

108. Paragraphs 1 through 107 are incorporated into this Count as if rewritten herein.
109. Plaintiffs Loisel and Karp are both members of the LLC.
110. In addition to the other members of the LLC, Plaintiffs Loisel and Karp believe that the quality, taste and nutritional value of raw milk and raw dairy products is superior to that of pasteurized milk and pasteurized milk products.
111. In addition to the other members of the LLC, Plaintiffs Loisel and Karp believe that they have the fundamental right to produce, obtain and consume the foods of their own free choice.
112. In addition to the other members of the LLC, Plaintiffs Loisel and Karp share a common belief that they have the right to raise their children and their families free from governmental interference.
113. In addition to the other members of the LLC, Plaintiffs Loisel and Karp shun large-scale agribusiness in favor of small producers and a local economy.
114. In addition to the other members of the LLC, Plaintiffs Loisel and Karp have a genuine concern for the preservation of the earth's resources and therefore support sustainable agricultural practices.
115. Because freedom of association is a fundamental right, DATCP's interpretation of Wis. Stats. §97.24(2)(b) should be analyzed in this case under a strict scrutiny standard.
116. DATCP's action violates Loisel's and Karp's fundamental right of freedom of association.

117. Defendant DATCP's conduct described in this Count constitutes a violation of Article 1, Sections 1, 3, 4 and 9, and Article 14, Section 13 of the Wisconsin Constitution pertaining to the fundamental freedom of association without due process of law, for which declaratory and other injunctive relief is available and should issue under Wis. Stats. §806.04.

**COUNT FIVE**  
**DATCP'S ACTIONS ARE *ULTRA VIRES***

118. Paragraphs 1 through 117 are incorporated into this Count as if rewritten herein.

119. An act is *ultra vires* when it is "beyond the scope of power allowed or granted by a corporate charter or by law." See *PRN Associates LLC v. State, Dept. of Admin.* 317 Wis.2d 656, 668, fn. 5, 766 N.W.2d 559 (2009).

120. DATCP's interpretation of Wis. Stats. §97.24(2)(b) effectively denies Plaintiffs LLC of its fundamental right to possess, use and own private property.

121. DATCP's interpretation of Wis. Stats. §97.24(2)(b) effectively denies Plaintiffs LLC, Loiselle and Karp of their fundamental rights to associate together with other similar like-minded individuals who share similar beliefs.

122. DATCP's interpretation of Wis. Stats. §97.24(2)(b) effectively denies Plaintiffs Loiselle and Karp of their fundamental rights to privacy.

123. DATCP's interpretation of Wis. Stats. §97.24(2)(b) effectively denies Plaintiffs LLC and the Zinnikers of their fundamental rights to enter into contracts with each other.

124. DATCP does not have authority to regulate private conduct that does not impact the public's health, safety or welfare.

125. Defendant DATCP's conduct described in this Count constitutes an *ultra vires* act, for which declaratory and other injunctive relief is available and should issue under Wis. Stats. §806.04.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for the following relief:

- A. A declaration that the LLC has the inalienable right to own, possess and use a herd of cows as it sees fit as long as that use does not injure another or another's property;
- B. A declaration that Plaintiffs Loiselle and Karp and their families have the inalienable right of privacy to consume the raw milk and raw dairy products produced by the cows in which they have a legal and equitable interest;
- C. A declaration that the LLC and the Zinnikers have the inalienable right to enter into a boarding contract or Agistment agreement pertaining to the tending to, managing and taking care of the LLC's cows;
- D. A declaration that the LLC and the Zinnikers have the inalienable right to enter into a services contract with to have the Zinnikers convert some of the raw milk produced by the LLC's cows into other raw dairy products, like yogurt, butter and kefir;
- E. A declaration that Plaintiffs LLC, Loiselle and Karp and their families have the inalienable right of freedom of association by belonging to the LLC and receiving all of its benefits, including but not limited to the receipt of raw milk and raw dairy products produced by the LLC's herd of dairy cows;
- F. A declaration that DATCP's action of October 2009 is unconstitutional as applied to Plaintiffs;

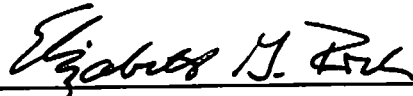


- G. A declaration that DATCP's interpretation of Wis. Stats. §97.24(2)(b) is unconstitutional as applied to Plaintiffs;
- H. A declaration that none of the Plaintiffs are in violation of Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60;
- I. A declaration that the Zinnikers are not "selling or distributing" milk in violation of Wis. Stat. Chapter 97 and/or Wis. Adm. Code ch. ATCP 60;
- J. A declaration that DATCP's action in prohibiting Plaintiffs from engaging in the conduct described herein is *ultra vires*.
- K. A permanent injunction enjoining Defendant from commencing or continuing any enforcement action, civil, criminal, administrative or otherwise, of Wis. Stats. §97.24(2)(b) against Plaintiffs or against anyone else who wishes to engage in the conduct engaged in by Plaintiffs;
- L. A permanent injunction enjoining Defendant from spending or receiving federal, State or local taxpayer funds or monies on any activity related to enforcement of Wis. Stats. §97.24(2)(b) against Plaintiffs or against anyone else who wishes to engage in the conduct engaged in by Plaintiffs;
- M. Pursuant to applicable law, award to Plaintiffs all of their attorneys fees incurred in this matter;
- N. Pursuant to applicable law, award to Plaintiffs all of the costs they have incurred in this matter;
- O. Award to Plaintiffs all other relief as applicable that the Court deems just and reasonable.

Dated: February 25, 2010

Respectfully submitted,

David G. Cox (OH Sup. Ct. No. 0042724)  
4240 Kendale Road  
Columbus, OH 43220  
dcoxlaw@columbus.rr.com  
Phone: 614-457-5167  
Trial Counsel for Plaintiffs



---

Elizabeth Gamsky Rich  
Wisconsin Bar No. 1019123  
Elizabeth Gamsky Rich & Associates SC  
637 Walton Drive, Suite 1  
Plymouth, WI 53073  
T: 920.892.2449  
F: 866.432.7226  
erich@rich-law.com  
Local Counsel for Plaintiffs