

1 David G. Cox (OH Sup. Ct. No. 0042724)  
2 Donald M. Collins (OH Sup. Ct. No. 0037701)  
3 Two Miranova Place, Suite 500  
4 Columbus, OH 43215-7052  
5 Tel: 614-228-6885  
6 Fax: 614-228-0146  
7 [dcox@lanealton.com](mailto:dcox@lanealton.com)  
8 [dcollins@lanealton.com](mailto:dcollins@lanealton.com)

9 Bradley W. Sullivan, #112111  
10 Paul A. Rovella, Esq. #245745  
11 Lombardo & Gilles, LLP  
12 318 Cayuga Street  
13 Salinas, CA 93901  
14 Tel: (831) 754-2444  
15 Fax: (831) 754-2011  
16 [brad@lomgil.com](mailto:brad@lomgil.com)

17 Attorneys for Plaintiffs

18 IN THE SUPERIOR COURT OF SAN BENITO COUNTY  
19 STATE OF CALIFORNIA

20 ORGANIC PASTURES DAIRY )  
21 COMPANY, LLC, and )  
22 CLARA VALE FARM, INC., )

23 Plaintiffs, )

24 v. )

25 STATE OF CALIFORNIA and )  
26 A.G. KAWAMURA, Secretary of California )  
27 Department of Food and Agriculture, )

28 Defendants. )

Case No.: CU-07-00204

**DECLARATION OF MARK  
MCAFFEE IN REPLY TO THE  
DECLARATIONS OF ANITA E.  
RUUD AND STEPHEN W. BEAM**

I, Mark McAfee, declare as follows:

1. I am the owner/operator of Organic Pastures Dairy Company, LLC, one of the Plaintiffs in this case.

2. I have read the declarations of Anita E. Ruud and Stephen W. Beam that were filed in opposition to Plaintiffs' motion for temporary restraining order.

3. The papers attached to the Declaration of Anita E. Ruud all refer to unpasteurized, raw milk that is meant to be pasteurized before it is consumed by humans. Those papers do not refer

1 to raw milk that is tested, labeled, regulated and intended to be consumed by humans without  
2 pasteurization.

3 4. I agree that the type of milk referred to by the papers attached to the Declaration of Ms.  
4 Ruud should be pasteurized before consumed because that type of milk is contaminated with  
5 filth, feces, contaminants and pathogens that cause illness to humans.

6 5. Neither of the Plaintiffs in this case, Organic Pastures Dairy Company, LLC and  
7 Claravale Farms, Inc., produce milk that is intended to be pasteurized prior to consumption by  
8 humans. The milk and other dairy products that are produced by Plaintiffs in this case do not and  
9 have not ever contained pathogens causing illness in humans.

10 6. Consequently, none of the papers attached to the Declaration of Ms. Ruud pertain to the  
11 raw, unpasteurized dairy products produced by Plaintiffs in this case.

12 7. The milk and dairy products that are produced by my dairy operation and the operation of  
13 Claravale Farms, Inc. are different from the milk and dairy products that are meant to be  
14 pasteurized before consumed.

15 8. The milk and dairy products that are produced by my dairy and Claravale Farms, Inc. has  
16 never had a pathogen detected in them that could cause illness to humans.

17 9. With respect to the Declaration of Stephen W. Beam, it is so incredible for the many  
18 inaccuracies, misstatements, errors and omissions it makes that it lacks any credibility  
19 whatsoever.

20 10. For example, on page 2, line 1, Mr. Beam refers to a 10 coliform limit for whole milk yet  
21 fails to mention that there is also a 10 coliform limit for raw cream and skim milk. My operation  
22 will be put out of business because it cannot comply with any of these 10 coliform limits on a  
23 regular or consistent basis, let alone the whole milk limit referred to by Mr. Beam.

24 11. On page 2, line 6, Mr. Beam states that the California Department of Food and  
25 Agriculture (“CDFA”) is responsible for “testing raw milk that processors sell to consumers” yet  
26 fails to state that although CDFA tests raw milk intended for human consumption for pathogens,  
27 CDFA does not test pasteurized milk for pathogens. The only milk that CDFA tests for  
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1 pathogens is raw milk intended to be consumed. Mr. Beam fails to inform the Court that CDFA  
2 does not conduct pathogen testing for raw milk that will be pasteurized prior to consumption.

3 12. On page 3, line 19, Mr. Beam states that when my dairy products are degraded because  
4 they are in violation of AB 1735 they can “still be utilized in manufactured (i.e., “non-Grade A”)  
5 milk products such as butter and cheese.” That is not true. I cannot manufacture “non-Grade A”  
6 butter and cheese because I do not have a license to do so. All raw butter produced by OPDC is  
7 Grade A raw butter.

8 13. On page 4, line 5, Mr. Beam states that my samples for cream that were collected on  
9 March 7, 2008 were “found to be in compliance” with the coliform limits of AB 1735 yet fails to  
10 inform the Court that our cream had to be thinned out to comply with the coliform limit of AB  
11 1735. When our cream is thinned out it does not have enough fat in it to comply with our  
12 labeling requirements, which requires at least 6 grams per serving size of 14.8 ml. Consequently,  
13 Mr. Beam does not inform the Court that we are faced with a Hobson’s choice, i.e., either  
14 produce thick cream and comply with our fat content requirement at the expense of being in  
15 violation of our coliform limit, or thin our cream to comply with the coliform limit at the expense  
16 of our fat content requirement. Either way, we lose.

17 14. In mother nature and in the cream separator process, coliforms follow the fat. In our  
18 situation, when source raw milk that tests at less than 1 coliform is used to make raw cream, the  
19 resulting raw cream still comes out higher than 10 coliforms per ml (tests showed 30-60). The  
20 skim milk, however, remains very low at less than 1 coliform per ml.

21 15. On page 4, line 14, Mr. Beam implies that the majority of coliforms cause disease by  
22 stating “While not all coliforms cause disease, some such as E-coli, 0157:H7, can cause serious  
23 illness.” However, Mr. Beam does not inform the Court that CDFA has been collecting samples  
24 of our dairy products (whole milk, cream, and skim milk) since at least 1999 and they have  
25 NEVER found a disease causing coliform in ANY of our dairy products no matter what levels of  
26 coliforms we have had. CDFA has also tested Plaintiff Claravale Farms, Inc. since 1927 and has

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1 also NEVER found ANY pathogens in their raw dairy products. Mr. Beam has access to and has  
2 seen these data yet fails to inform the Court of these data.

3 16. On page 4, lines 19-24, Mr. Beam refers to an informal survey he conducted of all 50  
4 states in an effort to convince the Court that AB 1735's standards are no different than the  
5 standards of other states.

6 17. Specifically, Mr. Beam states that "only 13 states, including California, allow the sale of  
7 raw milk at retail stores" and that of those 13 states six others beside California "require that the  
8 raw milk sold at retail have no more than 10 coliform bacteria per mL." Mr. Beam then refers to  
9 his survey, attaches it as an Exhibit, and refers to it in his Declaration as Exhibit I.

10 18. Mr. Beam's survey and Exhibit are replete with errors and insinuations. Once those  
11 errors and insinuations are revealed, it is apparent that California is not in alignment with what  
12 other states are doing with respect to regulation of raw milk for human consumption and that Mr.  
13 Beam's declaration is disingenuous.

14 19. For example, Mr. Beam claims that at least 13 states can legally sell raw milk at retail  
15 stores. However, three of those states, ID, NV and OR, do not have any raw milk and raw milk  
16 is illegal to be sold.

17 20. Mr. Beam insinuates that one of the other six states that are "similar" to California is  
18 Arizona. However, Arizona does not permit the sale of raw cream or skim milk, both of which  
19 are legal in California.

20 21. Mr. Beam insinuates that Nevada is similar to California. However, it is no longer legal  
21 to sell raw dairy products in Nevada because its Raw Milk Commission has been disbanded since  
22 at least the 1980s. Thus, Mr. Beam is not correct that raw milk sold for human consumption in  
23 Nevada must meet a limit of 10 coliform. There is no raw milk legally sold in Nevada.

24 22. Mr. Beam insinuates that Pennsylvania is similar to California. However, the 10 coliform  
25 limit imposed by Pennsylvania is measured in the bulk tank, not at the bottle for retail, where it is  
26 measured in California. Thus, Mr. Beam is not correct that PA allows for a limit of 10 coliform  
27 at the retail bottle. In addition, PA does not allow the sale of raw cream and/or butter.

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1 23. Mr. Beam insinuates that Utah is similar to California. However, raw milk in Utah  
2 cannot be sold in any store where pasteurized milk is also sold, and the store that sells the raw  
3 milk must also be the owner of the farm that produces the raw milk, unlike California where it  
4 can be sold in any retail store. Sales of raw milk in Utah must be from a farm owned store. In  
5 fact, there are only two such stores in Utah that sell raw dairy products.

6 24. Mr. Beam insinuates that Washington is similar to California. However, in Washington,  
7 whole milk is hand filled right from the “bulk tank” and is “hand capped” without having to be  
8 mechanically filled or capped, a process that agitates the product and increases the number of  
9 coliforms in the product. In California, mechanical filling and capping is mandatory and “hand  
10 capping” is not allowed. This results in raw milk being further pumped and agitated, flowing  
11 through long pipes, and further manipulated prior to entering the final product container,  
12 increasing coliform counts.

13 25. Mr. Beam insinuates that Maine is similar to California. However, Maine allows hand  
14 filling and capping much like Washington and test results are entirely different when samples are  
15 collected from containers filled by hand directly from the bulk tank verses samples collected  
16 from containers that are mechanically filled and capped as required in California. Mechanical  
17 capping and filling increases the number of coliforms present in the sample.

18 26. Mr. Beam admits in his Declaration that three states, Idaho, Connecticut and New  
19 Mexico, “have a coliform standard” of no more than 50 coliform, which is a limit that is five  
20 times greater than California’s. In addition, CT tests at the bulk tank and not at the retail bottle.

21 27. Mr. Beam insinuates that Idaho is similar to California. However, Idaho has refused to  
22 issue any raw milk permits, thus making it impossible to produce or sell raw milk in Idaho. There  
23 is no raw milk for sale legally in Idaho. If raw milk permits were to be issued the regulations  
24 would require no more than 50 coliforms. So, California is dramatically different than Idaho.

25 28. Mr. Beam insinuates that Connecticut is similar to California. However, Connecticut  
26 does not allow the sale of either raw cream or raw skim milk, and the 50 coliform limit is in the  
27 bulk tank, not the finished product.

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1 29. Finally, Mr. Beam states on page 4, lines 25-28 and on page 5, line 1, that “As of the date  
2 of this declaration” (March 12, 2008), my dairy operation has been processing dairy products  
3 illegally because we do not have a milk products plant license and also states that the “intentional  
4 manufacturing or processing” of “milk or milk products” without such a license “is a felony.”  
5 That is blatantly misleading and disingenuous.

6 30. On December 14, 2007, my dairy operation sent in a check and a license renewal  
7 application to CDFA for renewal of our milk products plant license. As of this date, we have yet  
8 to receive any action on that renewal application.

9 31. Because we did not hear back from CDFA on our renewal application for a license, one  
10 of my employees contacted CDFA to investigate the matter. We were informed that CDFA has a  
11 back log of from 60 to 90 days on the processing of license applications and that ours was part of  
12 the backlog. My employee was also told that “CDFA inspectors have been informed of this  
13 backlog and not to worry.” Charges that my operation is somehow committing a felony is  
14 shocking and deeply concerning to me, especially when the delay and backlog is not of my  
15 making but rather stems from CDFA’s backlog.

16 32. On March 7, 2008, we sent in another renewal application and another check to CDFA  
17 for our milk products plant license. As of this date, we still have not received any response from  
18 CDFA.

19 33. CDFA is supposed to be our state agency that supports our raw milk industry, by testing  
20 and verifying safety and quality. A review of the declarations and supportive documents provided  
21 to the court reveals a dark truth. CDFA wants raw milk banned completely. These are the exact  
22 words used in the supportive documents submitted that include the FDA, AFDO and others.  
23 Could a ban of raw milk in California be the true agenda? It would appear to be so. CDFA  
24 refuses to acknowledge our concerns or cooperate with us to find methods or processes to  
25 achieve the near impossible standards mandated by AB 1735, standards that have no basis in  
26 measuring food safety. If food safety were the concern then pathogen testing would be expanded.

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1 There have been no pathogens found in the raw milk at my dairy or Claravale Farms, Inc. in our  
2 entire combined 87 years of existence.

3 I declare under penalty of perjury that the foregoing is true and correct. Executed in  
4 Fresno, California on March 14, 2008.

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Mark McAfee  
Organic Pastures Dairy Company LLC

1 **PROOF OF SERVICE**

2 I am employed in the County of Franklin, State of Ohio. I am over the age of eighteen  
3 years and not a party to the within action. My business address is Two Miranova Place, Suite  
500, Columbus, Ohio, 43215-7052.

4 On the date set forth below, I caused the following document(s) entitled:

5 **DECLARATION OF MARK MCAFEE IN REPLY TO THE DECLARATIONS OF**  
6 **ANITA E. RUUD AND STEPHEN W. BEAM**

7 to be served on the party(ies) or its (their) attorney(s) of record in this action listed below by the  
8 following means:

	<b>BY MAIL.</b> By placing each envelope (with postage affixed thereto) in the U.S. Mail at the law offices of Lane, Alton and Horst, LLC, Two Miranova Place, Suite, Columbus, OH 4322-7052, addressed as shown below. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and in the ordinary course of business, correspondence would be deposited with the U.S. Postal Service the same day it was placed for collection and processing.
	<b>BY HAND-DELIVERY.</b> By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.
X	<b>BY OVERNIGHT DELIVERY.</b> By placing with an overnight mail company for delivery a true copy thereof, enclosed in a sealed envelope, with delivery charges to be billed to Lombardo & Gilles, addressed as shown below.
	<b>BY FACSIMILE TRANSMISSION.</b> By transmitting a true copy thereof by facsimile transmission from facsimile number (614) 228-0146 to the interested party(ies) or their attorney(s) of record to said action at the facsimile number(s) shown below.
X	<b>BY ELECTRONIC MAIL.</b> By transmitting a true copy thereof by electronic mail from e-mail address <u>dcox@lanealton.com</u> to the interested party(ies) or their attorney(s) of record to said action at the electronic mail address(es) shown below

19  
20 Anita Ruud  
21 Deputy Attorney General  
22 Office of the Regional Attorney General  
23 455 Golden Gate Ave., Rm. 6200  
24 California Department of Justice  
25 San Francisco, CA 94102  
26 Counsel for Defendants

27 I declare under penalty of perjury under the laws of the State of Ohio that the foregoing is true  
28 and correct.

Executed on March 14, 2008 at Columbus, Ohio.

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David G. Cox

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