

STATE OF WISCONSIN

CIRCUIT COURT

LAFAYETTE COUNTY

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**ORDER DENYING MOTION FOR  
CLARIFICATION AND DENIAL  
OF MOTION FOR LIMITED  
RECONSIDERATION**

Lisa Kivirist, Kriss Marion, and Dela Ends,

Plaintiffs,

Case No. 16-CV-06

v.

Wisconsin Department of Agriculture, Trade and  
Consumer Protection, and Ben Brancel, in his official  
Capacity as Secretary of the Wisconsin  
Department of Agriculture, Trade and Consumer Protection,

Defendants.

**FILED**

FEB 26 2018

LAFAYETTE COUNTY  
CIRCUIT COURT

This Court on November 7, 2017 received a Motion for Clarification from Defendants in the above entitled action. By way of a footnote in that Defendants' Motion seeks an Amended Order on the limited issues presented in their request, and asks that if the Court concludes that no clarification is needed, that the Motion be construed as a Motion for Reconsideration on the limited question presented. The Court concludes that no clarification of the term non-hazardous food is required, as it is synonymous with the term "not potentially hazardous." Defendants indicate in their motion the term "potentially hazardous food" is defined by statute at 97.27(1)(dm)<sup>1</sup>, 97.29(1)(hm)<sup>2</sup>, and 97.30(1)(bm)<sup>3</sup>. Thus as Defendants allude in their Motion, Non-hazardous food or "not potentially hazardous food" is defined by foods specifically excluded from the definition of "potentially hazardous food."

It is worth noting that that nearly every filing made in this action made reference to non-

<sup>1</sup> 97.27(1)(dm) "potentially hazardous food" means any food that can support rapid and progressive growth of infections or toxicogenic micro organism"

<sup>2</sup> 97.29(1)(hm) refers back to 97.27(1)(dm)

<sup>3</sup> 97.30(1)(bm) Except as provided by the department by "potentially hazardous food" means a food that requires temperature control because it is a form capable of supporting any of the following: 1. Rapid and progressive growth of infections or toxicogenic micro organisms. 2. Growth and toxic production of clostridium botulinum. 3. In raw shell

hazardous, not potentially hazardous food and shelf stable as being synonymous terms.

Respondents purport to ask this Court to define the class of similarly situated individuals by defining low volume or low volume sales. The question itself misconstrues and mischaracterizes this Court's decision. This Court in no way defined the class as being low volume sales food producers. This Court sees Defendants' request as an effort to relitigate issues already decided by the Court, and since no new issue is raised Defendants' motion for reconsideration is denied.<sup>4</sup>

Curiously, Defendants argued against a judicially imposed exemption in briefs to this Court prior to this Court's decision in May and September of last year. Now the Defendants reversed their position, and based on the reversal of position seek reconsideration. Simply now that Defendants seek an order they eschewed prior to the Court's decision on Summary Judgment, such a change in position does not raise a new issue. This Court declined to impose a judicially imposed exemption as Defendants agreed at the time of the Court's decision. Any exemption is the province of the legislature and not appropriate for judicial pronouncement. Neither should this Court prospectively rule on what the legislature may do. Because Defendants themselves raised the issue regarding their case in chief, there is no new issue for reconsideration by this Court.

Because no new issue has been raised by Defendants motion for reconsideration, such motion is denied.

This Court's use of low volume sales in its analysis made an observation that home bakers, as well as other members of the class are generally limited in their production capacity. This Court's use of the term low volume sales or sellers was to observe that the Plaintiffs and others like them have an inherent characteristic typically of those producing home baked goods. The Court observed that the statutory exemptions granted by the legislature were generally "low-

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eggs, growth of salmonella enteritidis.

<sup>4</sup> This Court agrees with Plaintiffs that Defendants time for appeal has long since past. Defendants' motion under Sec. 806.07(1)(h), Wis. Stats. Such motion do not toll the time for an appeal. (See 806.07(2)) A Motion under this section does not affect the finality of a judgment or suspend its operation. See also Eau Claire County v. Employers Ins., 146 Wis 2d 101,111 (Ct. App. 1988). This Court cannot expand this time for appeal after the time has run. Any motion for reconsideration under Sec. 805.17(3) must be filed 20 days after entry of judgment.

volume" high margin food producers or food processors. The observations of the Court in no way define similarly situated individuals. See transcript of May 31 decision at 24-27. It is clear from this Court's decision that home bakers who seek to sell their baked goods directly to consumers and whose kitchens are in a sanitary condition are similarly situated to the three Plaintiffs in this action. (Reference page 2 of the October 2, 2017 decision lines 7-12, see May 31 transcript 25-27.)

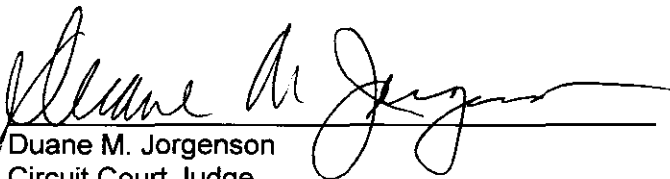
Which in summary they are similarly situated to Plaintiffs in that they are:

- 1.) Business enterprises seeking to make a profit.
- 2.) Food processors as defined by 97.29(1)(g).
- 3.) They are doing food processing outside of a commercially licensed kitchen or seeking to do so.
- 4.) They are processing foods that are shelf-stable, non-hazardous, or not "potentially hazardous." (See 97.27(1)(dm) and 97.30(1)(bm) Wis. Stats.)
- 5.) They seek to sell their foods directly to consumers.
- 6.) Those baked goods like Plaintiffs, are home baked goods, or baked in the producer's home.
- 7.) The kitchens used by these home bakers are clean and sanitary, and are therefore subject to reasonable inspection for cleanliness and sanitation.

Because no clarification of this Court's order is needed and because no new issue is raised, Defendants' requests are denied.

Dated: February 26, 2018

**BY THE COURT:**

  
Duane M. Jorgenson  
Circuit Court Judge