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STATE OF WISCONSIN

CIRCUIT COURT

LAFAYETTE COUNTY

LISA KIVIRIST, KRISS MARION,
and DELA ENDS

Plaintiffs,

Case No.: 16-CV-06

Hearing Requested

v.

WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION, and
RANDY ROMANSKI, in his official
capacity as Secretary-designee of the
Wisconsin Department of Agriculture,
Trade and Consumer Protection

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO SHOW CAUSE

Nearly four years ago, this Court ordered Defendants to allow the sale of shelf-stable (or “nonhazardous”),¹ home-baked goods directly to consumers. Specifically, the Court “enjoin[ed] any enforcement of a licensing requirement . . . for the direct sale of [Plaintiffs’] home-baked goods directly to any consumer wishing to purchase them, provided that those baked goods are . . . nonhazardous and . . . shelf stable.” Transcript of May 31, 2017 Oral Ruling at 30 (attached).

¹ As this Court has noted, “nearly every filing made in this action made reference to non-hazardous, not potentially hazardous food and shelf stable as being synonymous terms.” Order Denying Defs.’ Mot. for Clarification at 1–2 (Feb. 26, 2018).

This Court then extended that order to apply to all those “who seek[] to sell commercially non-hazardous baked goods . . . that are shelf stable.” Supp. Decision at 2 (Oct. 2, 2017) (attached).

Defendants are acting contrary to those orders. They are prohibiting Plaintiffs and others from selling certain shelf-stable, home-baked goods—such as granola and flourless cakes—solely because they are not “flour-based” baked goods. This Court’s injunction, however, clearly contemplates *all* homemade, shelf-stable baked goods, “flour-based” or otherwise.

The court said nothing to limit its holding to “flour-based” baked goods. Instead, it applied its ruling to “home-baked goods,” “provided that those baked goods are, as has been termed in this action, ‘nonhazardous.’” Transcript of May 31, 2017 Oral Ruling at 30. *See also* Supp. Decision at 2 (Oct. 2, 2017) (extending relief to those “seek[ing] to sell commercially non-hazardous baked goods . . . that are shelf stable”).

Many Wisconsin home bakers, including Plaintiffs, would like to sell nonhazardous baked goods that do not contain flour. Although the terms of this Court’s order plainly include such goods, DATCP has been prohibiting their sale. Thus, Plaintiffs respectfully request that this Court conduct a hearing, under Wis. Stat. § 785.03(1)(a), for Defendants to show cause regarding their actions and for this Court to consider issuing remedial sanctions as authorized by Wis. Stat. § 785.04(1).

I. Facts

In January 2016, Plaintiffs filed a complaint seeking relief for “Plaintiffs and other persons producing and selling not potentially hazardous home-baked goods directly to consumers.” Complaint, Request for Relief ¶ B. This Court ruled for Plaintiffs and issued an injunction:

[T]his Court enjoins any enforcement of a licensing requirement or the requirement of a licensed commercial kitchen for the processing by these Plaintiffs of baked

goods for the sale to consumers directly. Neither shall be subjected to any penalties under the statutory scheme as it now exists for the direct sale of their home-baked goods directly to any consumer wishing to purchase them, provided that those baked goods are, as has been termed in this action, nonhazardous and as that term has been used in this action; that they are shelf stable; and they are not in need of refrigeration from the time of baking to the time of sale.

Transcript of May 31, 2017 Oral Ruling at 30–31.

When Defendants insisted on continuing to enforce the enjoined provisions against home bakers other than Plaintiffs, Plaintiffs asked this Court to clarify the relief. Specifically, Plaintiffs “respectfully request[ed] that this Court clarify once and for all that its holding in this case . . . applied to *all* home bakers selling not potentially hazardous baked goods directly to customers.” Pls.’ Mot. for Clarification at 10 (June 21, 2017).

This Court agreed and extended its earlier ruling “to those other individuals that are similarly situated to the Plaintiffs.” Supp. Decision at 2 (Oct. 2, 2017). The injunction thus applies to “home baker[s] . . . who seek[] to sell commercially non-hazardous baked goods . . . that are shelf stable.” *Ibid.* See also Order Denying Defs.’ Mot. for Clarification at 3 (Feb. 26, 2018) (“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.”).

Defendants, however, are still preventing the sale of some non-hazardous baked goods. As stated on their website, Defendants take this Court’s order as “appl[y]ing only to flour-based ‘baked goods.’”² Accordingly, Defendants are prohibiting people across Wisconsin from selling any home-baked, shelf-stable food that is made without flour.

² Department of Agriculture, Trade and Consumer Protection, *Licensing Exemption for Home Bakers*, https://datcp.wi.gov/Pages/Licenses_Permits/HomeBakers.aspx

Consider, for example, Steph Zink. Steph read about this Court's injunction in her local newspaper, and it inspired her to start selling her granola at her local farmers' market. When she called DATCP to confirm that she could start selling, however, DATCP told Steph that she would need a license because her granola—though shelf stable and baked in her home oven—did not contain flour and was therefore not a “baked good.” Steph was devastated and almost quit on the spot, but instead she obtained a license and tried to make it work. After two years, the costs of renting a commercial kitchen became too high and Steph had to close her business.

Steph's story is not unique. Plaintiff Lisa Kivirist, too, cannot legally sell her homemade cereals that, though baked and shelf stable, are made with whole oats and not flour. Plaintiff Dela Ends is also afraid to sell any shelf-stable food that, to cater to gluten-free customers, is baked with flour substitutes. Members of the Wisconsin Cottage Food Association are concerned that their shelf-stable, homemade macarons—which are baked using egg white and almond meal but not wheat flour—are also illegal to sell. On information and belief, Defendants are enforcing their “flour-based” requirement across the state.

Because of Defendants' continued actions, Plaintiffs and others throughout Wisconsin are currently being prevented from supporting themselves and their families in contravention of this Court's clear orders.

II. Argument

This Court issued an injunction. “The language of [that] injunction is clear,” *Mohr v. City of Milwaukee*, 106 Wis. 2d 80, 92 (1982), in that it enjoins Defendants from enforcing licensing and regulatory requirements against persons producing and selling homemade, shelf-stable baked goods. Both this Court's orders and the record are utterly bereft of the term “flour-based,” or of any other language suggesting that Plaintiffs' requested relief was or should be

limited based on the presence of flour. Defendants appear to have invented their “flour-based” distinction out of whole cloth and are using it to continue prohibiting safe, baked, cottage foods—despite this Court’s orders.

Defendants are “not beyond the [ken] of the law” and they may not abridge it. *Ibid.* By inserting their own “flour-based” requirement, Defendants have done just that, at the expense not only of this Court’s authority but also of many Wisconsinites who are illegally being burdened from exercising what this Court has explicitly recognized as their constitutional rights. Such actions call for this Court to consider remedial sanctions. *See Frisch v. Henrichs*, 2007 WI 102, ¶¶ 81–82, 304 Wis. 2d 1, 39–40 (“[T]he intent behind the contempt statute . . . is to provide the court with a mechanism, or toolbox, to effect compliance with court orders.”).

III. Conclusion

Plaintiffs respectfully request a hearing, pursuant to Wis. Stat. § 785.03(1)(a), for Defendants to have the opportunity to show cause regarding their continuing violation of this Court’s injunction. After such hearing, this Court may consider issuing “[a]n order designed to ensure compliance with [its] prior order,” as well as any other sanction that this Court should find appropriate. Wis. Stat. § 785.04(1).

Respectfully submitted,

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