

**STATE OF MINNESOTA**

**DISTRICT COURT**

**COUNTY OF SIBLEY**

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**FIRST JUDICIAL DISTRICT**

File No. **72-CV-10-167**

Gene Hugoson, Commissioner of  
Minnesota Department of Agriculture,  
Petitioner,

**ORDER AND  
MEMORANDUM**

v.

Embargoed Food at Hartmann Farm,  
61896 326th Street, Gibbon Minnesota  
55335, Michael Hartmann

Respondent,

v.

Greg and Rae Lynn Sandvig, husband and  
wife; Debra Anderson; Deanna Miller;  
Barbara Bredesen; Hank Titus; and The  
Foundation for Consumer Free Choice, a  
Minnesota non-profit corporation

Intervenors.

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The above-entitled matter came before Rex D. Stacey, Judge of District Court, on  
June 8, July 20, August 19, 20, 25, 31, September 1, 7, 8 and 9, 2010, at the Sibley  
County Courthouse, Gaylord, Minnesota.

Kimberly Middendorf and Thomas Overton appeared for Petitioner.

Zenas Baer appeared for Respondent.

Lance Heisler appeared for Intervenors.

Based upon the proceedings, this Court makes the following:

ORDER

1. The Petition to condemn embargoed food is granted. Petitioner shall destroy all embargoed product within 30 days of the date of this Order. Petitioner is authorized to enter the premises to carry out this Order. Respondent shall cooperate with that process.
2. Respondent shall be liable for all costs of condemnation as set forth in Minn. Stat. § 31.05, subd. 3. Petitioner shall submit an Affidavit of Condemnation Costs within 30 days of the date on which the product is destroyed.
3. Respondent's Motion to Quash Administrative Orders and Secure Computer Data is denied.
4. Petitioner's Motion to Sever Counterclaims is granted.
5. The attached memorandum is incorporated herein and shall constitute the findings of the Court.

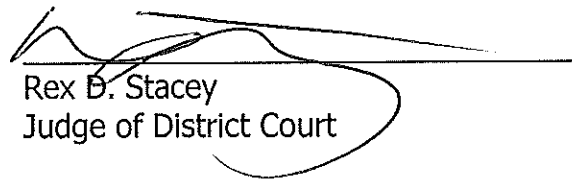
Dated: December 20, 2010

**BY THE COURT:**

**FILED**

DEC 22 2010

KAREN V. MESSNER  
COURT ADMINISTRATOR  
SIBLEY COUNTY, MINN.

  
Rex D. Stacey  
Judge of District Court

## MEMORANDUM

Michael Otto Hartmann, Diane Hartmann and Roger Hartmann own and operate a dairy farm located at 61896 326<sup>th</sup> Street, Gibbon, Minnesota, where they sell the milk from their cows. The Hartmanns also operate a dairy plant at this location where dairy products are stored, made and sold for profit. The products include bottled, unpasteurized whole and skim milk, and Monterey Jack cheese, gouda cheese, cheddar cheese curds, yogurt and ice cream.

At issue is product owned by the Hartmanns that are embargoed by the Minnesota Department of Agriculture (hereinafter referred to as MDA) as adulterated and/or misbranded or otherwise held in violation of law. Many of these products contain ingredients that are not produced on the farm. Roger Hartmann testified that some of the eggs used in the products were from Wisconsin and that the cream used in some of the products is from another farm. Michael Hartmann testified that the ice cream has, at most, two of the six ingredients from the Hartmann farm.

Michael and Roger Hartmann testified that they deliver the majority of their food products to customers at various drop off locations around Minnesota. They also testified that only a small amount of product is purchased by customers at their farm. Roger Hartmann testified that the Hartmanns gross approximately \$250,000.00 annually.

The Intervenors are customers of the Hartmanns and claim an ownership interest in the embargoed goods. Intervenors are also one of the drop sites for the sale and distribution of Hartmann products in Bloomington, Minnesota. The Hartmanns have

about eight to ten various drop sites around the metro area. (MDA Ex. 238 at p. 16.)

On May 21, 2010, the Minnesota Department of Health (hereinafter referred to as MDH) notified the Minnesota Department of Agriculture of an E. Coli O157:H7 outbreak. MDH was notified of the outbreak through clinical laboratories where doctors send human samples for testing and report illnesses, including the E. Coli O157:H7, as required by law. This particular strain of E. Coli had never previously been found in testing in Minnesota. MDH Public Health Laboratory confirmed that the bacteria involved was E. Coli O157:H7 and DNA "fingerprinted" the bacterial isolates by a laboratory technique called pulsed-field gel electrophoresis ("PFGE").

David Boxrud is considered an expert in the field of PFGE and works for the Minnesota Department of Health. (MDA Ex. 249) Dr. Joni Scheftel is the State of Minnesota's Public Health Veterinarian and is considered an expert in the field of epidemiology generally and epidemiological investigations. (MDA Ex. 253.) Dr. Scheftel specializes in zoonotics. Dr. Scheftel testified that Zoonosis is any infectious disease that can be transmitted from non-human animals, both wild and domestic, to humans. E. Coli O157:H7 is a type of zoonotic illness. Dr. Boxrud and Dr. Scheftel testified that when the PFGE patterns of two isolates are indistinguishable, especially when it is a rare pattern, then the two isolates likely came from the same source. They further testified that until this outbreak, there had never been a recorded E. Coli O157:H7 outbreak with this particular PFGE pattern in Minnesota. Dr. Scheftel testified that the national epidemiological registry for the preceding ninety days showed no cases of E. Coli O157:H7 with a similar PFGE pattern other than the outbreak in Minnesota, which

indicates that the illnesses stemmed from a local source. The Court finds the testimony of Dr. Scheftel and Dr. Boxrud credible.

There were eight people who all became ill with *E. Coli* O157:H7. The bacterial isolates of all eight patients had PFGE patterns that were indistinguishable, leading MDH to conclude that they were made ill by the same bacteria from a common source. (MDA Ex. 248.) The Court finds that the PEGE test results are accurate and reliable.

According to Dr. Scheftel, when the MDH Public Health Laboratory reports two or more case-isolates of *E. Coli* O157:H7 with the same PFGE subtype, MDH epidemiologists begin an epidemiologic investigation to try to identify a common source for the infections.

Dr. Scheftel also testified regarding the epidemiologic investigation performed by MDH and MDH's determination that the Hartmann operation was the source of the May and June *E. coli* outbreak. MDH conducted a thorough epidemiological investigation. MDH gathered information on where each of the first four reported *E. coli* O157:H7 victims lived, where each had traveled, who each had been with, what each had eaten, and similar information for the relevant time period. (MDA Ex. 246.)

While investigating the *E. coli* O157:H7 outbreak in May and June of 2010, the Department of Health ultimately confirmed eight human infections by retesting each of the samples submitted by the clinical laboratories. (MDA Ex. 246.)

Four of the *E. coli* O157:H7 victims were so ill they required hospitalization. One two-year-old child developed hemolytic uremic syndrome (HUS), a condition that may cause kidney failure and, even if successfully treated, permanently damages kidneys.

Children and the elderly are particularly vulnerable to this illness. Some of those who fell ill were not aware they were consuming raw milk products from the Hartmann farm.

All eight ill individuals were infected by the same strain of Shiga toxin-producing *E. coli* ("STEC"), identified as a strain of *E. coli* 0157:H7, indicating that the infections were from a common source. (MDA Ex. 248.) This figure does not represent the total of individuals actually rendered ill by Hartmann product. This figure does not include individuals who were made ill but either did not seek medical treatment or sought treatment but were not tested for *E. coli* 0157:H7. Dr. Scheftel testified that for every one confirmed case of food poisoning, it is estimated that there are another 28 unconfirmed victims.

Epidemiological investigation of the first four illnesses reported to MDH showed the only common exposure among three of the first four victims was that each had consumed unpasteurized milk products from the Hartmann farm within days prior to the onset of symptoms. The fourth victim was a child whose family denied use of Hartmann dairy products but who ate at the homes of schoolmates or friends whose families did use Hartmann unpasteurized dairy products. (MDA Ex. 246.)

Dr. Scheftel testified that based upon their research, consumption of unpasteurized dairy products is low among the Minnesota population as only 2% of Minnesotans consume unpasteurized milk. Most are farmers consuming their own product. Dr. Scheftel also testified that the probability of randomly selecting four Minnesotans and finding that three drank unpasteurized milk from *any* source in the past week was known to be very remote and was later calculated to be about one in

thirty-three thousand. The probability of randomly selecting four Minnesotans and finding that three drank unpasteurized milk from *a particular farm* is approximately *one in 250 million*. (MDA Ex. 254.) The fact that the victims all shared this uncommon event or exposure indicates that the Hartmann operation was the source of the infection. (MDA Ex. 246.)

According to Dr. Scheftel, *E. coli* O157:H7 is a human pathogen not naturally present in milk but found in the gut and fecal material of ruminants, including cows. Some strain of *E. coli* O157:H7 is found on about 30-40% of dairy farms, but only in about 4% of animals tested at a given time. Each dairy farm infected by *E. coli* O157:H7 tends to have its own genetically distinctive strain of O157:H7. Despite the statistically low incidence of *E. coli* O157:H7 in animals, MDH found *E. coli* O157:H7 in 28 of 80 animal and environmental samples from the Hartmann farm. Twenty-six of those *E. coli* isolates matched the unique strain of *E. coli* O157:H7 that made eight people so ill they required medical treatment.

Dr. Scheftel's expert opinion that the Hartmann operation is the source of the infections is reinforced by the laboratory confirmation that the specific rare strain of *E. coli* O157:H7 found in the ill patients was also found in multiple animals and at multiple sites on the Hartmann farm. (MDA Ex. 247.) Therefore, the preponderance of the evidence establishes that the source of the *E. coli* O157:H7 outbreak was the Hartmann farm. The Court finds that MDH's epidemiologic study is accurate and reliable. The Court further finds that Respondent did not offer any evidence of any other possible source of the infection.

Upon identification of the Hartmann operation as the source of the outbreak, MDH notified the Minnesota Department of Agriculture, which has enforcement responsibilities for dairy and dairy processing operations. MDA is responsible for the enforcement of the Minnesota Consolidated Food Licensing Law, Minn. Stat. §§ 28A.01-.16 (2008); the Minnesota Food Law, Minn. Stat. §§ 31.001-.96l (2008); the Minnesota Meat and Poultry Inspection Act, Minn. Stat. ch. 31A (2008); Minn. Stat. ch. 32 (2008) (dairy), Minnesota Rules ch. 1520 (poultry and eggs), 1525 (dairy industry), 1540 (meat inspection), 1545 (meat, fish, and poultry industry), and 1550 (food, general rules), and the federal counterparts thereof, including but not limited to the Pasteurized Milk Ordinance and the Milk for Manufacturing Purposes standards. *See e.g.* Minn. Stat. § 31.101 (2008) (Incorporating federal rules related to food).

Pursuant to Minn. Stat. § 31.04, the commissioner is authorized to enter “any factory, warehouse, or establishment in which food is manufactured, processed, packed or held for introduction into commerce[.]” Minn. Stat. § 31.04, subd. 1(a) (2008). In addition, the commissioner is authorized to inspect “such factory, warehouse, establishment or vehicle and all pertinent equipment, finished and unfinished materials, containers and labeling therein[.]” Minn. Stat. § 31.04 (2008).

Upon inspection, the commissioner or the commissioner’s authorized agent is required to issue “a report in writing setting forth any conditions or practices observed which in the agent's judgment indicate that any food in such establishment

- (a) [c]onsists in whole or in part of any filthy, putrid, or decomposed substance; or
- (b) [h]as been prepared, packed or held under insanitary conditions whereby it may



have become contaminated with filth or whereby it may have been rendered injurious to health." Minn. Stat. § 31.04 (2008).

Minn. Stat. § 32.103(a) (2008) provides that "the commissioner shall cause to be inspected all places where dairy products are made, stored, or served as food for pay, and all places where cows are kept by persons engaged in the sale of milk, and shall require the correction of all insanitary conditions and practices found." In addition, the Commissioner has authority to embargo and seek condemnation of food pursuant to Minn. Stat. § 31.05, which authorizes MDA to embargo any food that MDA "has probable cause to believe ... is adulterated" and to petition the district court for an order to condemn such food.

On May 26, 2010, MDA sought and obtained a search warrant issued upon probable cause to believe the Hartmann's were committing violations of Minnesota food laws, many of which are criminal violations. (R. Ex. 412.) The warrant application was supported by ample facts for a person of ordinary prudence to reasonably believe that the Hartmann farm was the source of the *E. coli* outbreak, that the Hartmanns had engaged in the adulteration of food and the sale, dispensing or giving of adulterated food, and that consumption of Hartmann dairy products caused the serious illness of four individuals confirmed at the time of the issuance of the warrant.

A second search warrant issued upon probable cause to believe the Hartmanns were committing violations of Minnesota food laws was properly obtained on June 15, 2010. (R. Ex. 412; MDA Ex. 412A.) The warrant was issued upon probable cause to believe that MDA had issued no permits or licenses to the Hartmanns for food

manufacturing or processing on their farm; that Michael Hartmann appeared to be engaged in the unlawful production and/or sale of uninspected meat; that the Hartmanns misbranded products; that the Hartmanns had sold or otherwise distributed unpasteurized milk products including cheese, butter, yogurt and ice cream in violation of law; that the Hartmanns were processing and/or manufacturing food without the required license(s); and that the Hartmanns were engaged in the production of food in insanitary conditions. MDA's application was supported by sufficient facts, including photos documenting misbranded products and photos of insanitary conditions on the Hartmann farm. (R. Ex. 412; MDA Ex. 412A.)

The warrant application was also supported by the fact that MDA had observed milk products, including 100 cases of bottled milk labeled "real" milk, and 20 cases of bottled milk labeled "skim" that violated the Minnesota Food Law's labeling provisions. In addition to being misbranded, MDA asserted that those cases of milk are adulterated because the milk was drawn in a filthy or insanitary place. Minn. Stat. § 31.121 and 32.21. Several samples drawn from the bottled milk tested positive for phosphatase, indicating the milk was not pasteurized or was pasteurized incorrectly. The warrant was further supported by MDA's observations of large quantities of meat bearing no inspection stamp or required labeling for uninspected meat. (R. Ex. 412; MDA Ex. 412A.)

Prior to the execution of the first search warrant on May 26, 2010, MDA inspectors had not been to the Hartmann farm since Michael Hartmann refused to allow an inspection for Grade B certification after Clearview Account's Grade A permit was

revoked in 2001 for insanitary conditions. (MDA Ex. 239, 255.)

Minnesota food law defines a dairy plant as "any place where a dairy product is manufactured, processed, or handled" and includes, among other things, "creameries, cheese factories," and "milk plants." Minn. Stat. § 32.01, subd. 6 (2008). The testimony of Michael Hartmann and Roger Hartmann establish that they operate a dairy barn and a dairy plant as defined by Minn. Stat. § 32.01, subd. 6.

During visits to the Hartmann farm, inspectors observed insanitary conditions that fell far below the sanitary standards of the Pasteurized Milk Ordinance ("PMO"), and the Milk for Manufacturing Purposes regulations (also referred to as "Grade B" standards). The inspectors did not observe any noticeable remediation of insanitary conditions between the May 26, 2010 and June 16, 2010 visits. The Court finds that the testimony of MDA inspectors Jason Gibbs and Greg Pittman was credible.

Dr. Stacy Holzbauer, Dr. Joni Scheftel, and MDA Inspector Jason Gibbs testified to the extreme buildup of manure on virtually every surface in the dairy barn. (MDA Exs. 5, 6, 8, 9, 10, 41, 43, 49, 50, 53.) Thick layers of cobwebs and dust coated the dairy barn ceiling. (MDA Exs. 39, 46). The milk house ceiling was water damaged and crumbling, a milk house wall was damaged, apparently by water, and not easily cleanable, and the floor was pitted and pooling liquids. (MDA Exs. 25, 26, 30.) Dead flies in cobwebs clung to the milk house walls and live flies were abundant. (MDA Exs. 17, 18, 29.). The exterior of the bulk tank and the floor behind it were notably dirty. (MDA Exs. 27, 56.) The milking equipment, pipeline system, receiving jar, bulk tank and cleaning sinks were observed to have buildup inside and out. (MDA Exs. 20, 21, 22, 23,

28, 29, 31, 32, 34, 35, 36, 48). MDA witnesses testified that dark buildup appeared to result from milk leaking out of equipment, allowing contaminants to infiltrate. Buildup results from lack of cleaning and prevents thorough cleaning. The pipeline had a significant dent likely making it impossible to fully drain and dry the line. (MDA Ex. 47.) Flies and their droppings covered surfaces like the pipeline exterior. (MDA Exs. 28, 29, 47, 48.)

Milking equipment, such as the milker claws which come in direct contact with milk, was improperly stored in the sink. (MDA Ex. 20.) Mr. Gibbs observed that the milker claws were stored in an unclean sink and in contact with water pooled in the sink. (MDA Ex. 20) Mr. Gibbs also testified that there is an increased risk of bacterial contamination posed by storing equipment in a manner that prevents it from drying completely. Mr. Gibbs is an expert in the field of dairy sanitation.

Furthermore, dead animals were observed in and around the dairy barn. (MDA Exs. 54, 120. Chickens roamed the milking barn and milk house. (MDA Exs. 4, 8, 42, 51, 52.) Barn and milk house doors were not tight fitting to exclude insects and other pests and stood open. (MDA Exs. 12, 13, 14, and 15.) Junk and weedy areas that provide harborage for insects and rodents were found in the milking barn and around the milk house and dairy plant. (MDA Exs. 2, 7, 12, 13, 16, 45, 118-19.) The milking barn was inadequately lighted. (MDA Exs. 3, 4.) Dairy plant equipment, such as the butter packager, bottle washer and ice cream maker, was observed to be rusty and corroded or in otherwise unacceptable condition. (MDA Exs. 99, 100, 102, 112.) Rodent droppings were found in the dairy plant's utility room, through which people and

product pass through from the bottling room to the rest of the dairy plant, and in the storage area above the processing areas. (MDA Exs. 103-108.)

Dr. Nicole Neeser testified regarding the dangers of cross contamination. Dr. Neeser testified that insanitary conditions like manure buildup pose significant risks of cross contamination, such as manure being tracked into the milk house by farmers and chickens. Dr. Neeser's testimony is corroborated by MDA Ex. 3, which depicts manure tracked into the Hartmann milk house. Cross contamination concerns also exist in the dairy plant. Dr. Neeser is an expert in her field and her testimony is credible.

Hartmann's witness Tim Wightman conceded that there are "concerns" regarding the cleanliness of the Hartmann operation and noted that the chickens in the milking area are a particular problem. Exhibit 402 was authored by Mr. Wightman to guide producers of unpasteurized milk for human consumption. Mr. Wightman emphasized that a "milking area should be clean!" and noted the importance of "keeping the milking and holding areas scrupulously free of manure." (R. Ex. 402, p. 26, 28.) MDA's exhibits evidence substantial manure buildup in the milking areas of the barn. (MDA Exs. 5, 6, 8, 9, 10, 41, 43, 49, 50, 53.)

Michael Hartmann presented little credible evidence to contradict the State's case. The opinions of his expert, Mr. Wightman, regarding the condition of the Hartmann dairy barn and dairy plant is accorded little weight. His opinion that someone possibly "could" produce "quality milk" under those conditions was revealed to be baseless because, among other things, he did not observe the conditions present in the dairy barn and dairy plant on May 26, 2010, or June 16, 2010; he did not apply his own

standards to the operation; and he did not satisfactorily reconcile farm conditions with his published statements that the "milking area should be kept clean" and that milking and holding areas should be "scrupulously free of manure."

Pursuant to the orders to embargo certain Hartmann product, embargoed items were marked and left on the premises. (MDA Exs. 123-138, 241.) Michael Hartmann owns the embargoed product.

Pursuant to the May 26, 2010 embargo order, MDA embargoed approximately 100 cases of "Real Milk," 20 cases of "Skim Milk," 900 packages of "Raw Cheddar," 36 blue tubs of cheddar, 3 blue tubs of Monterey Jack, 4 large cardboard boxes of "Raw Cheddar," packages of cheddar in plastic crates, 125 32oz tubs of yogurt, 60 tubs of ice cream, 1 case butter, 75 cases of butter in freezer, all packaged meat that had not been inspected, and orders which included uninspected meat. (MDA Exs. 123-138, 241.) On June 16, 2010, MDA inspectors embargoed additional cases of milk that had been bottled after the first embargo. (MDA Ex. 241.)

The totality of the circumstances led Dr. Neeser to conclude that the embargoed food had been produced under insanitary conditions whereby it may have become contaminated with filth and, therefore, adulterated within the meaning of Minn. Stat. § 31.121(e) (2008). Food that contains any poisonous or deleterious substance that may render it injurious to health is deemed to be adulterated. Minn. Stat. § 31.121 (a) (2008).

Bryanne Shaw is a microbiologist for the MDA and is an expert in the field of microbiology. Ms. Shaw testified regarding MDA microbiology testing and the test

results of MDA Exhibits 242, 243, and 244. The Court finds the testimony of Ms. Shaw credible and that MDA test results in MDA Exhibits 242, 243, and 244 are valid and reliable.

In addition to the serious illnesses of eight consumers of Hartmann products, MDA laboratory testing confirmed that two of the random product samples collected from the farm contained Shiga toxin-producing *E. coli*. (MDA Ex. 242). Shiga toxin-producing *E. coli* bacteria are pathogenic or illness-causing bacteria. The STEC-positive products were identified as "raw milk cheddar cheese" and "raw milk herb and spice gouda cheese." (MDA Ex. 242.) The presence of STEC in product demonstrates the existence of an ongoing pathway of contamination of the product because Shiga toxin-producing *E. coli* is not an organism naturally present in milk. The presence of STEC in dairy products indicates contamination by fecal matter containing the bacteria. An STEC is a human pathogen, and thus a substance that renders food containing STEC injurious to health. The presence of any amount of a pathogen, including STECs, is impermissible under both state and federal law.

Milk is a highly perishable product that, when drawn or handled in insanitary conditions, poses heightened risks of food-borne illnesses. Minnesota law provides that: "No milk, fluid milk products, ... shall be sold, advertised, offered or exposed for sale or held in possession for sale for the purpose of human consumption in fluid form ... unless the same has been pasteurized and cooled, as defined .... Provided that this section shall not apply to milk, cream, skim milk ... occasionally secured or purchased for personal use by any consumer at the place or farm where the milk is produced."

Minn. Stat. § 32.393 (2008).

The Hartmanns admittedly sell milk and fluid milk products, including whole milk and cream, for the purpose of human consumption in fluid form that have not been pasteurized. The Hartmanns testified that approximately 2/3 of these sales take place at locations other than Hartmann farm. Many of these sales are "standing orders" and do not fit within the pasteurization exception for milk and cream "occasionally secured or purchased." (MDA Ex. 238.) MDA test results establish that the skim milk is not adequately pasteurized. (MDA Ex. 242.)

MDA test results indicate that a number of Hartmann fluid dairy products in final package form are not pasteurized at all or are inadequately pasteurized. (MDA Ex. 242, 243, 244.) Bottled milk and skim milk in final package form are considered to be "processed" and are required to be pasteurized, as is butter. *See e.g.* 21 C.F.R. 131.110 et. seq.; *see also* Minn. Stat. § 32.475 (2008). According to Roger Hartmann, the embargoed Monterey jack cheese was manufactured from unpasteurized milk.

Respondent presented no test results or expert testimony to contradict State test results evidenced by MDA Exhibits 242, 243, and 244 or the testimony of Dr. Scheftel, Dr. Neeser and Bryanne Shaw. Respondent's witness Tim Wightman conceded that MDA test results of Hartmann milk revealed standard plate counts which greatly exceed the PMO standards and Mr. Wightman's recommendations for "raw" milk producers.

The embargoed dairy products were produced, prepared, packed, and held in insanitary conditions. Inspection of the barn and dairy plant determined those facilities to be insanitary conditions that might result in the contamination of the milk with fecal



matter and that might otherwise make the milk and milk products diseased, unwholesome or injurious to health. The inspectors' determination that conditions in the barn and dairy plant are insanitary is amply supported by the inspection reports, testimony and photographs.

While Michael Hartmann denied the State's request for admission that all of the embargoed meat was uninspected, the evidence at trial, including Michael Hartmann's testimony, established that the embargoed meat, none of which bore the required inspection legend, was in fact not inspected. Some of the meat bears the required statement "not for sale," yet the Hartmann's were likely selling it, as shown by the crates ready for delivery to drop-off sites. (MDA Exs. 86, 89.)

Michael Hartmann testified that the embargoed meat was uninspected, custom-processed meat from Lafayette City Meats--an establishment recently closed due to gross insanitary conditions including repeated fecal contamination of carcasses. The embargoed meat thus meets the definition of adulterated food, and should be condemned as adulterated as well as being misbranded and unsalable. The deficiencies of the embargoed product cannot be corrected by labeling or processing. The only way to ensure that the misbranded, uninspected, custom slaughtered meat is not sold to and consumed by the public is to destroy it. The sheer volume of dairy product requires that it be destroyed for protection of the public. The Hartmanns' say they would like to keep the dairy products for personal use. A claim that a family of four will personally consume 900 packages, forty-odd tubs and boxes of cheese, and 76 cases of butter is not credible.

Minn. Stat. § 31.05 provides that it is the duty of the commissioner or any of the commissioner's authorized agents to condemn or destroy any meat, seafood, poultry, vegetable, fruit, or other perishable articles of food which are unsound, or contain any filthy, decomposed, or putrid substance, or that may be poisonous to health or otherwise unsafe, or in any other manner render the above unsalable as human food, to condemn or destroy the same. *Minn. Stat. § 31.05, subd. 4.* The burden is on the Commissioner to prove that the embargoed food is adulterated, cannot be lawfully sold, or was held with the intent to sell in violation of law. *Minn. Stat. § 31.05 and § 31.09.* Respondent bears the burden of proving any affirmative defense by a preponderance of the evidence.

MDA has the authority under Minn. Stat. § 31.05, subd. 1(a) to detain any "food, animal or consumer commodity if finds or has probable cause to believe that it is adulterated or so misbranded as to be dangerous or fraudulent" and to petition the court for an order to condemn such food. According to Minn. Stat. § 31.121, food is deemed to be adulterated under numerous circumstances. In this case, the Commissioner relies in part on Minn. Stat. § 31.121 (a) and (f) (2009), which state in relevant part that a food shall be deemed adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health" or "if it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health." Furthermore, Minn. Stat. § 31.121 (e) states a food shall be deemed to be adulterated "if it consists in whole or in part of a diseased,

contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." If the court finds that the embargoed goods are adulterated and orders them destroyed, the cost of the disposal shall be assessed to the claimant, or owner, of the condemned goods. *Minn. Stat. § 31.05 subd. 3.* And under *Minn. Stat. § 31.09*, the Commissioner may, in its discretion, render unsalable for use a food the sale or use of which is unlawful.

Hartmann argues that no test results showed the existence of any poisonous or deleterious substance which may render the food product injurious to health, which is required to prove the food is adulterated. Eight people became ill with the same, rare strain of *E.Coli*. The only commonality among these eight people was that they all consumed Hartmann products within days of becoming ill. This same rare, strain of *E. Coli* was present in samples taken from the Hartmann farm. This Court has no doubt that these people became ill from consuming Hartmann products. It is a logical deduction, based on all the expert testimony and exhibits, that the food was adulterated under *Minn. Stat. § 31.121* and should be destroyed.

Hartmann also argues that no food product tested positive for *E. Coli* O157:H7, only environmental samples did. Drs. Scheftel and Neeser testified that *E.Coli* O157:H7 is a human pathogen not naturally found in milk but found in the gut and fecal material of ruminants, including cows. Dr. Scheftel further testified that some strain of *E.Coli* O157:H7 is found on about 30-40% of farms, but only in about 4% of animals tested at any given time. MDH found *E.Coli* O157:H7 in 28 of 80 environmental samples from the Hartmann farm and 26 of those *E.Coli* isolates matched the unique strain of *E. Coli*

O157:H7 that eight people were ill from. The preponderance of the evidence suggests that the consumption of Hartmann products was the source of illness of these people. Based upon this, the epidemiologic investigation and the insanitary conditions observed on May 26, 2010 and June 16, 2010 by inspectors, MDA had probable cause to believe the embargoed goods were adulterated. The embargoed dairy products are adulterated because they have been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth or may have been rendered unwholesome or injurious to health. *Minn. Stat. § 31.121 (f) (2008)*. The conditions in the barn and dairy plant are insanitary, as supported by reports, testimony and photographs, in addition to the illnesses reported and the epidemiologic investigation determining Hartmann product to be the source of those illnesses.

Furthermore, packaged food is misbranded "unless it bears a label containing 1.) the name and place of business of the manufacturer, packer, or distributor, and 2.) an accurate statement of the net quantity of the contents in terms of weight measure, or numerical count" as well as omissions of an "word, statement, or other information required by or under authority of the Minnesota Food Law to appear on the label or labeling is not prominently placed thereon..." *Minn. Stat. § 31.123 (e), (f) (2008)*. None of Hartmann's dairy products are labeled with any of the above information. The yogurt, cheese and ice cream are not labeled with ingredients.

The State clearly established by a preponderance of evidence that the goods were properly embargoed, and that these embargoed goods are adulterated under *Minn. Stat. § 31.121 (f) (2008)*. Hartmann is required to comply with food regulations,

whether or not he is subject to licensing.

The State also makes a strong public policy argument in favor of its duty to make sure that food is safe for consumption. In enacting Minnesota food law, the Minnesota Legislature recognized that:

Food in its various forms is essential to the health and well-being of the people of this state and that its production, processing, packaging, labeling, handling, distribution and sale may create health hazards, misinform consumers, perpetrate frauds or otherwise jeopardize the public health and welfare...

Minn. Stat. § 28A.02 (2008).

This policy broadly applies to "*all* producers, processors, packagers, labelers, handlers, distributors and vendors of food, *whether or not subject to licensing.*" Minn. Stat. § 28A.02 (2008) (emphasis added).

All such entities are required to comply with food regulation, whether or not subject to licensing. *Id.* Hartmann concedes that the sale-by-farmer license exemption is limited to product "not otherwise legally prohibited" from sale. (Resp. Mem. at 22.) There is no question that adulterated food cannot legally be sold or that ensuring the safety of food from farmer to table is anything but a valid exercise of the State's police power.

### Constitutional Argument

Hartmann argues that under Minnesota Constitution of 1857, Article I, Sec. 18, Minnesota Restructured Constitution, Article XIII, Sec. 7, he has a constitutional right to sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefore and that the State takes the position that raw milk

cannot be bottled or sold. This is not the case. In *State v. Hartmann*, 700 N.W.2d 449, the Minnesota Supreme Court stated,

"Being relieved of the need to obtain a license therefore allows farmers to sell the products of their farm without obtaining the government's permission. This is not to say that article XIII, section 7, protects farmers from any government regulation of the production of farm products for sale. In other words, we read article XIII, section 7, to exempt farmers from licensure to sell products but not from substantive regulation of the production or sale of their farm products." *Id.* at 455.

The Minnesota Supreme Court went on to state, "Therefore, although article XIII, section 7, exempts a farmer from obtaining a license to sell the products of his or her farm, the farmer is not free to ignore regulations imposed on the production of those products." *Id.* at 456. So, although Hartmann may be constitutionally permitted to make occasional sales of products of his farm, he is not free to ignore regulations. Hartmann also relies on *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) to argue that his right to sell under the Minnesota Constitution is fundamental and that the statutes regulating farmers must meet a higher standard of scrutiny to be applied. That State rightfully points out that the *Gray* case did not address whether the statute in question was subject to a higher standard of scrutiny. *Id.* at 111-114. The State does cite to a case that is on point regarding the constitutional issue. In *State v. Wright*, 588 N.W.2d 166, 168 (Minn. Ct. App. 1998), the Minnesota Court of Appeals stated:

W]here courts have looked at the provision [Minn. Const. article XIII, section 7], they have suggested that it confers upon farmers a privilege to sell their agricultural products. Nothing suggests that this privilege, intended to help farmers bring their crops to market, creates for farmers a fundamental liberty to sell farm products. To the contrary, numerous reasonable restrictions, other exercises of the state's police powers, govern the manner in which a farmer's products may enter the

market. *See, e.g.,* The Minnesota Food Law, Minn. Stat. ch. 31 (prohibiting the sale of unwholesome, misbranded or adulterated food). The right to sell or peddle farm products is not a fundamental liberty.

Hartmann would like for the Court to believe that Minn. Const. Art. XIII, 7 makes him exempt from all regulations.

In sum, eight people became ill with E. Coli O157:H7. Evidence and testimony showed that the MDA and MDH properly determined that the Hartmann farm and product was the source of the illnesses. The goods were properly embargoed and the State has proven that the goods are adulterated and misbranded. The embargoed goods shall be destroyed and the cost of disposal of the condemned items shall be jointly and severally assessed to Michael Otto Hartmann and the Intervenors.

On June 24, 2010, Michael Hartmann filed a Notice of Motion and Motion via Telephone, together with a memorandum entitled "Memorandum in Support of Motion to Quash the Commissioner of Agriculture's Orders and Secure Computer Data."

Claimant Michael Hartmann argued this motion by telephone. This motion is denied.

RDS