

BEFORE THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Farm to Consumer Legal Defense Fund, <i>et al</i> , Plaintiffs, v U.S. Department of Agriculture, Tom Vilsack, Secretary and Michigan Department of Agriculture Director Don Koivisto, Defendants.	Case No. 1:08-cv-01546-RMC
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**DEFENDANT MICHIGAN DEPARTMENT OF
AGRICULTURE DIRECTOR KOIVISTO'S RESPONSE
TO MOTION TO VOLUNTARILY DISMISS PLAINTIFF GREG NIEWENDORP**

Defendant Michigan Department of Agriculture Director Don Koivisto requests that the Court dismiss Plaintiff Greg Niewendorp for the following reasons:

1. Plaintiff Niewendorp was alleged to be in the cattle production business at a farm at 4185 Beishlag Road, East Jordan, Michigan. The farm is located in the Modified Accredited Zone (MAZ) (the tuberculosis-infected zone) of Michigan. First Amended Complaint, ¶ 9; Declaratory Statement on NAIS by Gregory L. Niewendorp (Docket No. 34-9).
2. Cattle in the Modified Accredited Zone must be tested frequently by the Michigan Department of Agriculture for bovine tuberculosis and are required by the MDA to have radio-frequency identification (RFID) eartags at all times, including while they are on the farm premises. Mr. Niewendorp's claims in this case are unique in that he is the only Plaintiff in the MAZ. Declaration of Kevin Kirk, April 20, 2009, ¶ 6. All other Michigan-based Plaintiffs are

located outside of the MAZ and are not required by the MDA to have the RFID eartags placed on their cattle while on their premises. All Plaintiffs other than Niewendorp may have the eartags applied by others upon transfer of possession at the market. *Id.*

3. Attached is the Affidavit of Diane Talicska who is employed by the MDA and involved in that agency's bovine tuberculosis program. As set forth in Ms. Talicska's affidavit, on February 19, 2009, she visited Mr. Niewendorp's farm after being informed that Mr. Niewendorp was no longer in the cattle production business. On that date, she observed that there were no cattle on Mr. Niewendorp's premises.

4. On May 14, 2009, Ms. Talicska revisited the same premises as described above and observed that there were no cattle. Based on Ms. Talicska's observations and the information provided to her, she does not believe that Mr. Niewendorp is raising cattle in Michigan. Affidavit of Diane Talicska.

5. Upon discovery of these facts, counsel for MDA contacted counsel for Plaintiff Niewendorp to provide counsel with the attached affidavit of Ms. Talicska and to suggest, if her observations were accurate, that Plaintiff Niewendorp's claims be dismissed. Counsel for Plaintiff Niewendorp agreed that Niewendorp be dismissed because he "moved out of Michigan and no longer owns any cattle in the State of Michigan" (Plaintiff memo, May 20, 2009), but would not agree to the Director's motion to dismiss and then preempted that motion by filing a motion for leave to voluntarily dismiss Niewendorp.

6. The Director's draft motion laid out the pertinent facts above, and explained the uniqueness of Niewendorp's claims as contrasted to those of the other Plaintiffs.

7. Plaintiff Niewendorp's claims are moot due to a change in circumstances by which he is no longer subject to the alleged offenses and he should be dismissed. *See, DuVall v. Postmaster General*, 585 F. Supp. 1374, 1377 (D.D.C. 1984).

WHEREFORE, because Plaintiff Niewendorp's claims are moot due to a change in circumstances occurring after the filing of the complaint, Defendant MDA requests that he be dismissed.

Respectfully submitted,

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S: NR/cases/Farm to Consumer/2008-3021908-B/motion to dismiss Niewendorp's claims