IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI

STATE OF MISSOURI ex rel. CHRIS KOSTER, the MISSOURI DEPARTMENT OF AGRICULTURE, and the MISSOURI STATE MILK BOARD	)	
Plaintiff,	)	
v.	)	Case No. 10 AL-CC00135
MORNINGLAND OF THE OZARKS, LLC, d/b/a MORNINGLAND DAIRY	)	
Defendant.	)	

PLAINTIFF'S MOTION TO STRIKE TRUSTEES' MOTION TO RECONSIDER

The *Trustees' Motion to Reconsider and Memorandum in Support*, which was filed by defense counsel on behalf of Joseph and Denise Dixon as individuals, is a frivolous, improper motion. The motion is a blatant attempt to relitigate issues that have already been raised and ruled on, and defense counsel's misuse and misapplication of Missouri Rules should not be tolerated. Plaintiff therefore moves this Court, pursuant to Missouri Court Rule 55.27(e), to strike the *Trustees' Motion to Reconsider*, the Memorandum in Support, and Defendant's Exhibit A. In support thereof, Plaintiff states as follows:

I. Procedural History of Contempt Action

On April 18, 2011, Plaintiff filed its first *Application to Show Cause*. As Plaintiff received additional evidence supporting a finding of contempt, Plaintiff filed an *Amended Application to Show Cause* and a *Second Amended Application to Show Cause*. On June 13, 2011, a contempt hearing was held. On June 23, 2011, Defendant filed a *Motion to Admit Newly Discovered Evidence*. On June 29, 2011, the Court overruled Defendant's motion and entered its *Judgment in Contempt*. As part of the *Judgment in Contempt*, the Court ordered Defendant to produce to Plaintiff "all sales records from February 23, 2011, through the present." *Judgment*, p.7, ¶ 2.

On July 29, 2011, defense counsel filed a *Motion to Reconsider Order of Contempt* ("*Motion to Reconsider I*") and a *Motion to Clarify Judgment in Contempt* ("*Motion to Clarify*"), in which Defendant asked the Court to "issue a new [j]udgment finding no willful and contumacious contempt by Defendant," and to issue a judgment "specifically stating that Defendants (*sic*) need not provide the names and addresses and other identifying and contact information of the individual members of the Private Association." *Motion to Reconsider I*, p. 1, introductory ¶; *Motion to Clarify*, p. 2, last ¶. Plaintiff filed memoranda in opposition to both of Defendant's motions, and, on August 8, 2011, the Court issued its *Order on Motions to Reconsider and for Clarification* ("*Order*"). The Court ordered Defendant to "produce *all*

records of sales to persons and entities" made prior to June 13, 2011, "*including the names and addresses* of such persons." *Order*, p. 3 (emphasis added).

In keeping with the Court's *Order*, Plaintiff's counsel demanded complete, non-redacted sales records from Defendant on August 15, 2011, and defense counsel refused to produce them. *See* Letter from David G. Cox to Jessica Blome (Exhibit A). Instead of complying with the *Order*, defense counsel filed *Trustee's Motion to Reconsider and Memorandum in Support* ("*Motion to Reconsider II*"). In the *Motion to Reconsider II*, defense counsel asks the Court, for the second time, to find that Defendant is not required to produce complete sales records. *Reconsider II*, p. 1.

II. Argument

Under Missouri Court Rule 55.27(e), the Court may strike from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Each of the points discussed below supports a finding that the *Motion to Reconsider II* is insufficient, redundant, immaterial, impertinent, and scandalous. Plaintiff's *Motion to Strike* should therefore be granted.

A. Defense counsel's motion should be struck as untimely.

Defense counsel asks the Court to treat the motion for reconsideration as a motion for a new trial. *Motion to Reconsider II*, p. 5, ¶ 1-3. Under

Missouri Court Rule 78.04, a motion for a new trial must be filed within thirty days of the entry of a "judgment." The Court issued its *Judgment in Contempt* on June 29, 2011, nearly sixty days ago. Defendant filed its *Motion to Reconsider I* on July 29, within the thirty day time limit provided under the Rules. The Court subsequently issued its ruling on Defendant's July 29 motion in the *Order on the Motion to Reconsider and for Clarification*, which the Court entered on August 8. Defense counsel now argues that his second motion to reconsider, filed on August 18, is timely because it was filed within thirty days of the entry of the August 8 *Order*. *Motion to Reconsider II*, p. 6, ¶ 2. However, defense counsel has misinterpreted the Missouri Rules, and the motion is untimely.

"Judgment" and "order" are not terms that are used interchangeably under the Missouri Rules. The Rules expressly distinguish a "judgment" from an "order." Under Rule 74.01, a "judgment" is defined as "a writing signed by the judge and denominated 'judgment' or 'decree'. . . ." Under Rule 74.02, an "order" is defined as "every direction of a court made or entered in writing and *not included in a judgment* . . . ." (emphasis added).

While the Court's August 8 *Order* may have been an appealable order had defense counsel filed notice of appeal within the requisite timeframe, it is not a "judgment" on which defense counsel may move for a new trial. The only judgment on which defense counsel could have properly moved for a new

trial is the underlying *Judgment in Contempt*. Defense counsel did so move, and its motion was denied by the Court. Since the *Motion to Reconsider II* was not filed within thirty days of the entry of the *Judgment in Contempt*, it is untimely under Rule 78.04 and should be struck.

B. Defense counsel's motion should be struck as the issues raised in the motion have already been litigated and ruled on.

The *Motion to Reconsider II* seeks the same relief that defense counsel sought in the *Motion to Reconsider I* and the *Motion to Clarify*: a finding that Defendant is not required to produce non-redacted sales records. This issue has already been ruled on once by the Court, and the *Motion to Reconsider II* is therefore redundant, immaterial, impertinent, and scandalous. Further, the motion is barred by the law of the case doctrine.

Under the law of the case doctrine, a previous holding in a case "constitutes the law of the case and precludes relitigation of the issue. . . ." *Walton v. City of Berkley*, 223 S.W.3d 126, 128-29 (Mo. 2007) (en banc). The purpose of the doctrine is to bar relitigation of issues within the same pending case. *Id.* According to the Supreme Court of Missouri, the law of the case doctrine is "important because it protects the parties' expectations and promotes uniformity of decisions and judicial economy." *Id.* at 131. "It can advance these goals only if it applies nearly all the time, and discretion to disregard it is exercised only in rare and compelling situations. . . ." *Id.*

The law of the case doctrine supports the striking of the *Motion to Reconsider II*. In the *Judgment in Contempt*, the Court ordered Defendant to disclose all sales records. *Judgment in Contempt*, p. 7, ¶2. Defendant then filed the *Motion to Reconsider I* and the *Motion to Clarify*, and asked the Court to set aside its finding of contempt and issue an order providing that Defendant did not have to produce complete sales records. *Motion to Reconsider I*, p. 1, introductory ¶; *Motion to Clarify*, p. 2, last ¶. The Court considered these arguments and denied Defendant's requests, ordering the disclosure of "all records of sales . . . without redaction . . . ." *Order on Motions to Reconsider and for Clarification*, p. 4. Unhappy with this *Order*, defense counsel filed a second motion to reconsider, once again seeking a ruling that Defendant is not required to disclose complete records.

The *Motion to Reconsider II*, however, raises no new issues and addresses no new arguments. In the *Motion to Reconsider II*, defense counsel makes the exact same arguments that were made in the *Motion to Clarify*: Morningland of the Ozarks, LLC formed a "private member association," and this private association should not be required to disclose the names of the members of its organization because it is somehow protected by the First and

Fourteenth Amendments.[1] *Motion to Reconsider II*, p. 6-9; *Motion to Clarify*, p.1-2. The relief sought in the *Motion to Clarify* and the *Motion to Reconsider II* is also identical. The *Motion to Clarify* prays the court "specifically stat[e] that Defendants (*sic*) need not provide the names and addresses and other identifying and contact information of the individual members of the Private Association." p. 2, last ¶. The *Motion to Reconsider II* prays the court "not require the disclosure of the [Private Member Association] members' names and addresses on its sale orders." p. 9, last ¶.

Defense counsel cannot now, making the same argument made in the *Motion to Reconsider I* and *Motion to Clarify*, ask the Court again to change its mind without cause. The filing of such a motion is frivolous, frustrates the principle of judicial economy, and is a waste of the Court's and Plaintiff's time and resources. Not only does failure to raise new issues in the *Motion to Reconsider II* render the motion redundant, immaterial, impertinent, and scandalous, but the motion should also be struck in keeping with the law of the case doctrine.

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[1] Plaintiff addressed the merits and impropriety of defense counsel's constitutional arguments in its *Response to Motion to Clarify*, which is attached hereto as Exhibit B. To avoid repetition, Plaintiff incorporates the arguments made in that response as though fully set forth herein. It should also be noted that the case defense counsel relies on in support of the *Motion to Reconsider II*, *NAACP v. Alabama*, is easily distinguished from the present case. *NAACP v. Alabama* is inapplicable to Defendant's "private association" because Defendant's association was formed with the sole objective of carrying out unlawful activity. A more detailed discussion of this point may be found on pages 3-6 of Plaintiff's *Response to Motion to Clarify*.

C. The *Motion to Reconsider II* should be struck because it was brought by two individuals who are not parties to this action.

"A court has no jurisdiction over someone not a party to the action before it." *State ex rel. Morris v. McDonald*, 817 S.W.2d 923, 926 (Mo. App. S.D. 1991) (citing *Stein v. Mercantile Home Bank & Trust Co.*, 148 S.W.2d 570, 573 (Mo. 1941)). In order for a person to be a party, "a person must either be named as a party in the original pleadings, or be later added as a party by appropriate trial court orders." *Id.* at 926-27.

The *Motion to Reconsider II* was filed by defense counsel as "Lead Counsel for Trustees." The motion was filed on behalf of Joseph and Denise Dixon as trustees of the "Morningland Dairy Private Member Association." Joseph and Denise Dixon are not parties to this action, they never sought to intervene, and they never requested leave to be added as a party to this case. Since the Dixons were not named as parties in the original pleading or later added by the Court, they cannot now, as nonparties, move the Court to "reconsider." As Missouri case law makes clear, the Court does not have jurisdiction over someone who is not a party to the action. The *Motion to Reconsider II* must therefore be struck.

D. In the alternative, Defense counsel's motion is an improper motion and should be struck as having no legal effect.

No Missouri rule allows a motion for reconsideration. *Koerber v. Alendo Bldg. Co.*, 846 S.W.2d 729, 730 (Mo. App. E.D. 1992). To be sure,

Missouri courts have found that "such motions are mentioned in the rules only twice, and in both instances the rules provide they shall *not* be filed." *Koerber v. Alendo Bldg. Co.*, 846 S.W.2d 729, 730 (Mo. App. E.D. 1992). Further, Missouri courts have held that a motion for reconsideration has "no legal effect." *Christman v. Richardson*, 818 S.W.2d 307, 309 (Mo. App. E.D. 1991); *Jacobs v. Howard*, 801 S.W.2d 744, 745 (Mo. App. E.D. 1990).

Defense counsel candidly admits that motions for reconsideration are not recognized in Missouri courts, yet counsel continues to file these motions. *Motion to Reconsider II*, p. 5, ¶¶ 1-4; p. 6, ¶¶ 1-3. Missouri courts have reprimanded attorneys who act with such conscious disregard for the Missouri Rules. *Koerber*, 846 S.W.2d at 730 (Counsel . . . , are encouraged to properly identify their motions and refrain from the use of the term "motion for reconsideration."). The *Motion for Reconsideration II* should therefore be struck as having no legal effect.

Even if the Court entertains this improper motion for reconsideration, the motion should be treated as a motion for a new trial. *Id.* Defense counsel does not dispute this point. *See Motion to Reconsider II*, p. 5, ¶ 1. However, it is unclear on what bases defense counsel believes Defendant is entitled to a new trial. Defense counsel was not granted a new trial on the bases of its first motion for reconsideration. Now it appears that defense counsel is requesting a new trial based on the *Order* that was issued on its first motion,

not on the actual judgment and outcome of the underlying contempt hearing. Defense counsel has alleged only that the relief granted in the *Order* was improper, not that there was any error in the underlying *Judgment in Contempt*. Defense counsel has therefore alleged no error sufficient to warrant a new trial.[2]

WHEREFORE, Plaintiff respectfully requests the Court strike the *Trustees' Motion to Reconsider*, the Memorandum in Support, and Defendant's Exhibit A, and that the Court grant such other relief as it deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

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[2] Plaintiff discussed the reasons supporting denial of a motion for new trial in its *Memorandum in Opposition to Motion for Reconsideration*. Should the Court wish to review these arguments, Plaintiff has attached the *Memorandum* hereto as Exhibit C and incorporates the arguments of the *Memorandum* as though fully set forth herein.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered via United States first class mail, postage prepaid, this 24th day of August, 2011, to:

Mr. Gary Cox
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Mr. Jaired B. Hall
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Laura Bailey Brown

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August 18, 2011 via email only

Jessica Blome
Assistant Attorney General
Office of the Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

Re: *Morningland Dairy of the Ozarks, LLC*

Dear Ms. Blome:

I have received your August 15th letter to my co-counsel Jaired Hall, demanding documents from my clients on or before August 22nd. Please be advised that my clients have mailed for filing a motion to reconsider that portion of Judge Dunlap's Order that requires the disclosure of names and addresses of private member information. You have also been served with a copy of that motion. Once Judge Dunlap issues a decision on my client's motion we will respond to your letter.

If you have any questions on this matter please do not hesitate to contact me. Looking forward to hearing from you soon, I remain,

Respectfully,

David G. Cox

cc: Joseph Dixon (via email)
Jaired Hall (via email)

IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI

STATE OF MISSOURI ex rel. CHRIS KOSTER, the MISSOURI DEPARTMENT OF AGRICULTURE, and the MISSOURI STATE MILK BOARD	)	
Plaintiff,	)	
v.	)	Case No. 10 AL-CC00135
MORNINGLAND OF THE OZARKS, LLC, d/b/a MORNINGLAND DAIRY	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO MOTION TO CLARIFY JUDGMENT IN CONTEMPT

In its *Motion to Clarify Judgment in Contempt* ("*Motion to Clarify*"), Defendant asserts that Plaintiff is not entitled to information that this Court ordered be disclosed in its *Judgment in Contempt* ("*Judgment*"). Defendant claims that Plaintiff is not entitled to complete sales records, including the names and addresses of purchasers of Morningland cheese, because the purchasers "have a privacy interest and Constitutional Right to Privacy in their membership" in Morningland's "private association." Defendant further accuses Plaintiff of "demanding that Defendant violate the rights of its members and allow the State to violate the rights of its members." These allegations are simply unfounded. Plaintiff is not the party violating or demanding that any person's rights be violated. However, as its *Motion to*

Clarify makes clear, Defendant continues to violate Plaintiff's rights and this Court's *Judgment* by failing to produce complete records. Plaintiff therefore respectfully requests this Court deny Defendant's *Motion to Clarify* and order Defendant to comply with the terms of the *Judgment* and produce complete, non-redacted sales records. In support thereof, Plaintiff states as follows:

I. Defendant's motion should be denied because the plain language of the Court's *Judgment* is clear and needs no further clarification.

Defendant was ordered to produce "all sales records from February 23, 2011, through the present." *Judgment in Contempt*, p.7. Plaintiff did not request, and the Court did not order, Defendant to produce an "association" membership list. Whether or not Plaintiff is entitled to it, Plaintiff is not seeking a list of the members of this "private association." Plaintiff is only seeking sales invoices that have not been redacted—the complete sales records Defendant was ordered to produce under this Court's *Judgment*. The plain language of the *Judgment* is simple: "*All* sales records" are to be produced. *Judgment*. P.7. "All" means the "total extent of." WEBSTER'S II NEW COLLEGE DICTIONARY 29 (1995). It does not mean a "portion of" or a "redacted version." The plain meaning of the *Judgment* is clear, no further clarification is necessary, and Defendant's motion should be denied.

II. Defendant is not entitled to withhold portions of sales records that this Court ordered to be produced on the basis that the redacted information may identify Defendant's private association members.

Plaintiff does not know what information has been redacted from the invoices and is left to speculate about what information might be missing. Furthermore, Plaintiff has no way of knowing whether all purchasers of Morningland cheese, the purchases that are documented by numerous redacted sales invoices, are members of this "private association." Plaintiff should not be expected to take Defendant's word that all of the individuals and retail establishments that it sold to during the time period covered by this Court's *Judgment* actually belonged to this private association. And even if Defendant's customers were members of this "private association," this information would not be confidential. Defendant should therefore be ordered to provide Plaintiff with complete sales records that have not been redacted.

Defendant continues to attempt to engage in an argument over the constitutionality of this "private association" that Defendant has formed to unlawfully sell cheese. Although Plaintiff believes this argument to be irrelevant, Defendant has put it in issue. Plaintiff therefore submits that Defendant's alleged "private association" status does not shield it from fully complying with this Court's order and producing complete sales records.

III. Defendant's motion should be denied because associations that are formed to carry out unlawful objectives are not entitled to First Amendment protection.

Without embarking on an extensive discussion on whether Defendant's private association is a legitimate intimate or expressive association or why Defendant's association is not entitled to shield itself under the veil of the First Amendment, Plaintiff simply submits that the State has a compelling interest in both preventing unlawful activity and protecting public health. Defendant's motion should therefore be denied.

There is no doubt that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984, 1105 (E.D. Mo. 2004) (citing *Hanten v. School Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999)). This includes the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[1] *Id.* (quoting

[1] It is questionable whether Morningland's association even falls within one of these categories so as to implicate the First Amendment's freedom of association. Although the right to associate is broad, the professed purpose of Morningland's association is to sell cheese without government regulation. *See* Letter from Morningland Dairy to the Honorable David Dunlap (Jan. 18, 2011). As the evidence at the contempt hearing established, Morningland actively solicited business by sending promotional letters and sold to both public retail establishments and individual customers. Morningland is arguably engaged in commercial speech, rather than an intimate or expressive association, and commercial speech is offered a limited amount of constitutional protection. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978).

Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984)). However, the "right to associate for expressive purposes is *not* . . . , absolute." *Id.* (emphasis added). "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

Plaintiff's demand of complete sales records is not an attempt to suppress Defendant's ideas; it is merely an attempt to ensure compliance with state and federal laws and regulations, to ensure compliance with this Court's *Judgment*, and to ensure that the public health is adequately protected. These are all compelling state interests. Furthermore, Defendant's disclosure of complete sales records in no way burdens or limits Defendant's or its association members' right to associate freely. What Plaintiff is seeking is narrowly tailored specifically to "all sales records."

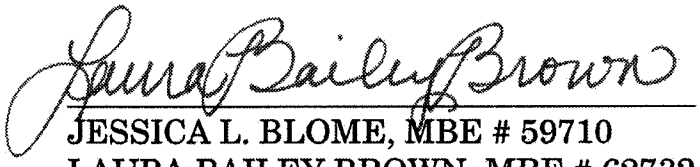
Further, associations that are formed with the specific intent of carrying out unlawful activity are not entitled to First Amendment protection. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also, e.g.*, *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (upholding required disclosure of Ku Klux Klan membership lists). Defendant admittedly formed its private association in an effort to circumvent state and federal laws and this Court's jurisdiction. *See* Letter from Morningland Dairy to the

Honorable David Dunlap (Jan. 18, 2011). Morningland's private association was formed to engage in activity that is unlawful in the state of Missouri—the sale of cheese without a license and without complying with other state laws and regulations. Since the association was formed to accomplish an unlawful objective, it is not entitled to First Amendment protection.

WHEREFORE, Plaintiff respectfully requests the Court deny Defendant's *Motion to Clarify Judgment in Contempt* and order Defendant to comply with the terms of the *Judgment in Contempt* and produce complete, non-redacted sales records.

Respectfully submitted,

CHRIS KOSTER
Attorney General



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered via United States first class mail, postage prepaid, this 8th day of August, 2011, to:

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IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI

STATE OF MISSOURI ex rel. CHRIS KOSTER, the MISSOURI DEPARTMENT OF AGRICULTURE, and the MISSOURI STATE MILK BOARD	)	
Plaintiff,	)	
v.	)	Case No. 10 AL-CC00135
MORNINGLAND OF THE OZARKS, LLC, d/b/a MORNINGLAND DAIRY	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER ORDER OF CONTEMPT

Defendant's *Motion to Reconsider Order of Contempt* ("*Motion to Reconsider*") is an improper and unauthorized post-trial motion that is unsupported by both the evidence adduced at the contempt hearing and case law. Plaintiff therefore respectfully requests this Court deny Defendant's *Motion to Reconsider*, and in support thereof, states as follows:

I. Defendant's motion is an unauthorized post-trial motion and should therefore be denied.

A "motion for reconsideration" is an improper and unrecognized motion that Defendant is attempting to use to have the Court set aside its own *Judgment in Contempt*. No Missouri rule allows a motion for

reconsideration.[1] *Koerber v. Alendo Bldg. Co.*, 846 S.W.2d 729, 730 (Mo. App. E.D. 1992). Further, Missouri courts have held that a motion for reconsideration has "no legal effect." *Christman v. Richardson*, 818 S.W.2d 307, 309 (Mo. App. E.D. 1991); *Jacobs v. Howard*, 801 S.W.2d 744, 745 (Mo. App. E.D. 1990). It appears that the intent of Defendant's motion is to have the judgment set aside, the proper procedure for which would be to file an appeal. Defendant failed to file a notice of such an appeal within the timeframe provided under the rules and should not be allowed to use a "motion to reconsider" as a means of overcoming the time constraints provided in the rules. This Court should therefore treat Defendant's motion as having no legal effect and dismiss the motion as improper.

II. In the alternative, the Court may choose to treat Defendant's improper "Motion to Reconsider" as a motion for a new trial, and this should also be denied.

In an effort to preserve an appellant's right to appeal, some courts may treat a "motion for reconsideration" as a motion for a new trial if the motion is timely filed. *Koerber*, 846 S.W.2d at 730. Since Defendant's *Motion to Reconsider* was timely filed, the Court may choose to treat it as a motion for a new trial. Accordingly, for the remainder of this *Memorandum in Opposition*, Plaintiff will treat Defendant's motion as a motion for a new hearing.

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[1] To be sure, Missouri courts have found that "such motions are mentioned in the rules only twice, and in both instances the rules provide they shall *not* be filed." *Koerber v. Alendo Bldg. Co.*, 846 S.W.2d 729, 730 (Mo. App. E.D. 1992).

III. Defendant's motion should be denied because this Court's *Judgment in Contempt* is supported by substantial evidence.

A prima facie case for civil contempt is established when the party alleging contempt proves: "1) the contemnor's obligation to pay a specific amount or perform an action as required by the decree; and 2) the contemnor's failure to meet the obligation." *Tashma v. Nucrown, Inc.*, 23 S.W.3d 248, 252 (Mo. App. E.D. 2000) (citing *State ex rel. Mo. Dam v. Rocky Ridge*, 950 S.W.2d 925, 928 (Mo. App. E.D. 1997)). "When a prima facie case is established, the contemnor then bears the burden of proving his or her inability to make payments or perform an action and that the non-compliance was not an act of contumacy." *Id.* Since this action involved civil contempt, all that was required for a judgment in contempt to issue was "substantial evidence to establish a prima facie case of civil contempt." *Id.* at 253.

Plaintiff established with substantial evidence, and this Court held, that Defendant had an obligation under the Court's *Final Order of Permanent Injunction* ("*Final Order*") to allow the State Milk Board to inspect the Morningland facility and that Defendant failed to perform such action. *See Judgment in Contempt*, pp. 2-4. At the contempt hearing, Defendant failed to show both that it was unable to perform the requirements under the Court's *Final Order* and that its non-compliance was *not* an act of contumacy. Defendant continues, in its *Motion to Reconsider*, to fail to

establish these two essential elements. To be sure, Defendant's motion only reinforces the Court's finding of contempt. Defendant candidly admits that "the uncontroverted evidence on the record at the contempt hearing—evidence confirmed by witness for both Plaintiff and Defendant . . . was that inspectors for the Missouri Milk Board tried to inspect the former cheese plant of Defendants," and that "the uncontroverted evidence was that the Dixon's *forbade entry* onto the former cheese plant . . ." *Motion to Reconsider*, ¶¶2, 3 (emphasis added).

Whether the Morningland Dairy facility was being used as a cheese plant or as something else is irrelevant. And whether the State Milk Board knew that Defendant was engaged in the production and sale of cheese prior to attempting to inspect the facility is also irrelevant. The Milk Board's right to inspect Defendant's facility was not conditioned upon the facility making cheese, nor was it conditioned upon the Milk Board first having a suspicion that the Defendant was producing or selling cheese. Far from that being the case, this Court's *Final Order* gave the Milk Board an unconditional right to inspect the premises to ensure compliance with the Court's *Final Order*. *Final Order*, ¶11. The *Final Order* provides that the "Missouri State Milk Board and its agents shall have authority to enter any facility covered by this Order at all reasonable times and without notice . . . *for the purposes of monitoring the progress of activity required by this Order, for taking inventory*

of Defendant's products, and for obtaining samples." *Final Order*, ¶11 (emphasis added). In the *Judgment in Contempt*, the Court further emphasized that the Milk Board inspectors were at the facility "for the purposes of conducting a compliance inspection," and that "the Board was not obliged to accept Mr. Dixon's word that the corporate defendant had ceased producing cheese." *Judgment in Contempt*, p. 2-3. The evidence adduced at the contempt hearing is clear: Defendant had an obligation to allow the State Milk Board to inspect and admittedly refused Milk Board inspectors access to the facility. Defendant has offered no evidence to the contrary, and the *Judgment in Contempt* is therefore proper.

Interestingly, Defendant asks this Court to "issue a new Judgment finding no *willful* and contumacious contempt by Defendant." *Motion to Reconsider*, Introductory ¶ (emphasis added). While it is arguable that Defendant's have demonstrated, and continue to demonstrate, a willful violation of this Court's orders,[2] proof of a willful violation is not required for purposes of civil contempt. *A.G. v. R.M.D.*, 730 S.W.2d 543, 545 (Mo. 1987) (citing *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 716 (Mo. App. 1977)).

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[2] As addressed in *Plaintiff's Response to Defendant's Motion to Clarify Judgment in Contempt*, Defendant's are now in violation of this Court's *Judgment in Contempt*.

IV. Defendant's motion should be denied because Defendant failed to establish good cause for a new trial.

Rule 78.01 provides that a court may grant a new trial of any issue only upon "good cause shown." Further, the standard in Missouri for granting a new trial is on the basis that the verdict is against the weight of the evidence. *See Braddy v. Union Pacific R.R.*, 116 S.W.3d 645, 650 (Mo. App. E.D. 2003); *see also* MO. SUP. CT. RULE 78.02. Defendant fails to meet both of these standards.

As a matter of law, the Court need only consider whether the evidence adduced at trial supports the Court's finding when weighed in light most favorable to the Court's final judgment. *Dearing v. City of Marceline*, 928 S.W.2d 9, 10 (Mo. App. W.D. 1996). According to Missouri courts, "weight of the evidence" means its weight in probative value, not the quantity or amount of evidence. *Nix v. Nix*, 862 S.W.2d 948, 951 (Mo. App. S.D. 1993). When weighed in light most favorable to the Court's *Judgment in Contempt*, Defendant cannot explain how the Court's findings are "against the weight of the evidence." To be sure, Defendant's motion is devoid of any allegation that the judgment is against the weight of the evidence.

Defendant claims only one error in the Court's findings—a "timeline error." *Motion to Reconsider*, ¶¶5, 6. Defendant fails to assert, argue, or prove that this alleged error makes the judgment against the weight of the

evidence. Further, Defendant's reliance on "a timeline error" is misplaced. The Court specifically stated that "Defendant, through its authorized representatives, wrongfully forbade . . . inspection," and "acting without benefit of qualified legal advice on a subject plainly requiring such advice marks Defendant's actions as contumacious." *Judgment in Contempt*, p. 4. As discussed above, the timeframe within which the Milk Board had proof that Defendant was selling cheese is irrelevant. The evidence at the contempt hearing was overwhelming and uncontroverted: Defendant had an obligation to allow the Milk Board to inspect its facility and refused to do so. This refusal, and the undisputed fact that Defendant did not seek legal advice prior to refusing the Milk Board inspectors access, is what made Defendant's actions contumacious. Since Defendant cannot establish that the *Judgment in Contempt* is against the weight of the evidence, Defendant's motion should be denied.

WHEREFORE, Plaintiff respectfully requests the Court deny Defendant's *Motion to Reconsider Order of Contempt*.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered via United States first class mail, postage prepaid, this 8th day of August, 2011, to:

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