

1990

Meadow Fresh Farms, Inc. v. Utah State University
Department of Agriculture and Applied
Science Von T. Mendenhall. Archie Hurst, Claudia
Clark, Nancy G. Robinette, Barbara Prater and
John/Jane Does 1 through 20 : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

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DOCKET NO. _____

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MEADOW FRESH FARMS, INC.,

Plaintiff/Appellant

vs.

UTAH STATE UNIVERSITY
DEPARTMENT OF AGRICULTURE AND
APPLIED SCIENCE, STATE OF UTAH
STATE DEPARTMENT OF
AGRICULTURE, VON T. MENDENHALL
ARCHIE HURST, CLAUDIA CLARK,
NANCY G. ROBINETTE, BARBARA
PRATER and JOHN/JANE DOES 1
THROUGH 20,

Defendants/Respondents.

District Case No. C-88-00171

Appeals Court No. 900410-CA

Category Number 16

BRIEF OF APPELLANT

Appeal from Order Denying Plaintiff's Motion To Set Aside
Order of Dismissal of the Third Judicial District Court,
Salt Lake County, Salt Lake Department, State of Utah
The Honorable J. Dennis Frederick, Presiding

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FILED

DEC 30

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MEADOW FRESH FARMS, INC.,

Plaintiff/Appellant

VS.

UTAH STATE UNIVERSITY
DEPARTMENT OF AGRICULTURE AND
APPLIED SCIENCE, STATE OF UTAH
STATE DEPARTMENT OF
AGRICULTURE, VON T. MENDENHALL
ARCHIE HURST, CLAUDIA CLARK,
NANCY G. ROBINETTE, BARBARA
PRATER and JOHN/JANE DOES 1
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**Appeal from Order Denying Plaintiff's Motion To Set Aside
Order of Dismissal of the Third Judicial District Court,
Salt Lake County, Salt Lake Department, State of Utah
The Honorable J. Dennis Frederick, Presiding**

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PARTIES

The following is a statement of the parties to this action:

PLAINTIFF/APPELLANT: MEADOW FRESH FARMS, INC.,

DEFENDANTS/RESPONDENTS: UTAH STATE UNIVERSITY
DEPARTMENT OF AGRICULTURE AND APPLIED
SCIENCE, STATE OF UTAH STATE DEPARTMENT OF
AGRICULTURE, VON T. MENDENHALL, ARCHIE
HURST, CLAUDIA CLARK, NANCY G. ROBINETTE,
BARBARA PRATER

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JURISDICTION AND NATURE OF PROCEEDINGS

Jurisdiction

Jurisdiction was conferred on the Utah Court of Appeals pursuant to a transfer of the case by the Utah Supreme Court on July 31, 1990, pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

Nature of Proceedings

Meadow Fresh Farms initiated this action against the defendants for breach of contract, for defamation, and for interference with business relations. The trial court on its own motion under Rule 4-103 of the Utah Rules of Judicial Administration gave notice of an order to the show cause to Meadow Fresh's former counsel, who had resigned from private practice to take a seat on the bench and his former firm failed to give notice to Meadow Fresh Farms of the order to show cause hearing date. Meadow Fresh Farms failed to appear at the hearing, and the trial court dismissed its complaint without prejudice. Upon learning of the dismissal order, within a few weeks Meadow Fresh appeared through new counsel and filed a motion to set aside the order of dismissal. Upon denial of Meadow Fresh's motion to set aside, this appeal was filed.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. The issue on appeal is whether the trial court abused its discretion in failing to set aside a dismissal entered sua sponte under Rule 4-103 of the Utah Rules of Judicial Administration under the facts of this case where the dismissal was entered after sending notice of the hearing to Meadow Fresh's former counsel who had previously withdrawn to take the bench.

2. Is the Lower Court's Rule 4-103 dismissal without prejudice effectively a dismissal with prejudice precluding plaintiff from pursuing its causes of action under Utah Code Annotated Section 78-12-40 where a prior similar dismissal without prejudice for failure to prosecute has occurred.

DISPOSITIVE STATUTES AND CONSTITUTIONAL PROVISIONS

1. Utah Rules of Judicial Administration, Rule 4-103.

Rule 4-103. Civil Calendar Management.

(1) If a default judgement has not been entered by the plaintiff within 60 days of the availability of default and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

(Amended effective January 15, 1990).

2. Section 78-12-40 Utah Code Annotated

78-12-40. Effect of failure of action not on merits.

If any action is commenced within due time and a judgement thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

3. Amendment XIV, Section I of the Constitution of the United States.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Article I, Section 7 of the Constitution of Utah

Sec. 7 [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

5. Rule 5 of the Utah Rules of Civil Procedure

Rule 5. Service and filing of pleadings and other papers.

(b) Service: How made.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is

ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

6. Rule 41(a)(1) of the Utah Rules of Civil Procedure

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: effect thereof

(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

STATEMENT OF THE CASE

Nature of the Case and Facts

The events which precipitated the complaints of the Meadow Fresh Farms first occurred in May, June, and September of 1981 (TR 002). Specifically, Utah State University and the Utah State Department of Agriculture improperly and negligently conducted tests to evaluate the nutritional value of the Meadow Fresh imitation lowfat dry milk. The test samples were improperly reconstituted with an insufficient amount of liquid, which caused the test samples to be overly concentrated. As a result of this over-concentration, the test analysis improperly showed the Meadow Fresh product to contain more calories, sugar, and sodium than it actually

contained. Utah State University and the Utah State Department of Agriculture and the Utah State Department of Health then published various written false and inaccurate statements and news releases that Meadow Fresh's imitation lowfat dry milk lacked nutritional value and posed a "health risk". These publications by a State University were immediately picked up by the dairy lobby trade journals and have been used to discredit Meadow Fresh's lowfat dry milk product, causing Meadow Fresh to continually re-test their product before each out-of-state food regulatory agency wherein it wants to sell. As a consequence over twenty four major tests have been made all approving the product, and not one agency has been able to duplicate Utah State University and the Utah State Department of Agriculture's tests. Notwithstanding this test data, Utah State University and the Utah State Department of Agriculture refuse to withdraw their test conclusions or re-test the product, and continually re-publish and affirm their earlier studies concerning the Meadow Fresh product whenever inquiries from outside agencies and the public are received.

Course of the Proceedings

On or about July 19, 1982, the plaintiff filed an Administrative Claim for Damages with the Utah State Department of Health, the Utah State University and the Utah Attorney General pursuant to requirements of Utah Code Annotated Section 63-30-12.

This action was initially filed in the Third Judicial District Court of Salt Lake County, Utah on April 25, 1983, as Civil No. 833163 (TR 330).

On September 27, 1985, Judge Daniels dismissed the plaintiff's Complaint for failure to prosecute pursuant to an Order to Show Cause. This Order was affirmed by the Utah Supreme Court on May 29, 1987, and leave was given to re-file the action within one year under Sec.

78-12-40, U.C.A., 1953, as amended (TR 261).

On January 12, 1988, plaintiff filed a second action alleging the same causes of action against the same defendants in Civil No.8800171 filed in the Third Judicial District of Salt Lake County, State of Utah (TR 002).

Meadow Fresh Farm's counsel B.H. Harris was appointed to sit on the First Circuit Court and withdrew as counsel on December 14, 1988 (TR 163). Plaintiff believed Mr. Harris' law office was still continuing to represent him (TR 184). The law office believed the withdrawal of counsel applied to the entire office (TR 169).

On December 5, 1989, Judge Frederick issued an Order to Show Cause pursuant to Rules 4-103 of the Rules of Judicial Administration and mailed a copy to appellant's former counsel Harris and Preston (TR 165), who failed to appear at the hearing. An Order of Dismissal without prejudice was entered on January 18, 1990 (TR 180).

Disposition at Trial Court

Upon learning of the Dismissal, Meadow Fresh Farms retained new counsel and a Motion to Set Aside the Dismissal was filed (TR 189). This motion was denied by Judge Frederick on May 22, 1990 (TR 481). A Notice of Appeal of this denial was filed with the Third District Court on June 6, 1990 (TR 483).

Plaintiff's third Complaint again alleging the same causes of action against the same parties was then filed with the Third District Court on May 22, 1990, Civil No. 900902988CV (Addendum). Government defendants/Respondents filed a Motion to Dismiss based on the Statute of Limitations; arguing that the savings statute, Sec. 72-12-40, U.C.A., 1953, as amended, allows only one re-filing. On November 26, 1990, an Order of Dismissal of the re-filed case

without prejudice by reason of this appeal was entered by Judge Rigrup (Addendum).

SUMMARY OF THE ARGUMENT

- I. This dismissal is governed by Rule 4-103 of the Rules of Judicial Administration.
- II. The case law interpreting Rule 41 of the Federal Rules of Civil Procedure for failure to prosecute is of some guidance in understanding the limits of rule 4-103.
- III. The language of Rule 4-103 provides for dismissal "absent a showing of good cause" if the case has been inactive for 180 days.

ARGUMENT

I.

MEADOW FRESH FARMS WAS DENIED DUE PROCESS OF LAW WHEN THE
LOWER COURT FAILED TO SET ASIDE THE DISMISSAL UNDER RULE 4-103 OF THE
RULES OF JUDICIAL ADMINISTRATION

The policy of Rule 4-103 as stated in the rule is:

To establish a procedure which allows the trial courts to manage civil case processing.

To reduce the time between case filing and disposition.

The rule itself provides:

(1) If a default judgement has not been entered by the plaintiff within 60 days of the availability of default and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.
(Amended effective January 15, 1990).

The Government defendants/respondents argued before the trial court that Meadow Fresh

Farm's Motion to Set Aside was governed by the law interpreting Rule 60(b) of the Utah Rules of Civil Procedure for setting aside default judgements. Meadow Fresh Farms' Motion to Set Aside is distinguished from those cases in that the order of dismissal complained of was not made pursuant to a motion of any of the defendants, but was brought by the court on its own motion pursuant to the streamlining authority and the policy of the District Courts under Rule 4-103 of the Rules of Judicial Administration of the Courts.

This difference is significant for at least 3 reasons, (1) the dismissal under Rule 4-103 is understood to be without prejudice, (2) is for the purpose of managing the court calendar and reducing the time between filing and disposition and (3) is brought by the court on its own motion. In this case none of the government defendants/respondents made a motion to dismiss for failure to prosecute, but rather only appeared in response to the order to show cause issued by the court. It is not correct to apply the legal standard and burden of proof for setting aside a default judgement to this case.

Examining the application of Rule 4-103 to this case, the Order of Dismissal did not have the effect of managing the case and expediting its resolution in accordance with the requirements of due process. Meadow Fresh Farms was not provided adequate notice of the order to show cause hearing, where its counsel had withdrawn and the notices of the order to show cause hearing were sent to Judge Harris' former office after his withdrawal. Under Rule 5(b) of the Utah Rules of Civil Procedure, the court's service on former counsel was therefore improper, and was required to be sent directly to Meadow Fresh Farms. As a consequence, Meadow Fresh Farms was not provided adequate notice of the order to show cause proceedings and therefore was denied due process of law under the Fourteenth Amendment, Section 1 of the Constitution of the

United States, and Article I, Section 7 of the Constitution of Utah; see the long standing rulings of the Utah Supreme Court with respect to notice requirements in Naisbitt v. Herrick, 76 U. 575, 290 P. 950 (1930), and Christiansen v. Harris, 109 U. 1, 163 P. 2d 314 (1945). These cases require that notice be sent to the party at the inauguration and purpose of the inquiry and contain the time at which such party should appear. Therefore, the entry of the judgment of dismissal against Meadow Fresh Farms, where it was not properly served with notice of the hearing and therefore failed to appear to oppose the default was a denial of due process of law. Also see Blyth & Fargo Co. vs. Swenson, 15 U. 345, 49 P. 1027(1897); and Parry vs. Bonneville Irr. Dist., 71 U. 575, 290 P. 950 (1930), where the court stated that it is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment.

Meadow Fresh Farms quickly sought and retained new counsel and sought to set aside the default. However, the Lower Court refused to set aside the dismissal and did not follow the intent of the rule, or the "due process" requirements. Rather, the Lower Court abused its discretion and applied said rule in an overly harsh manner, delaying and prejudicing the result.

II.

THE CASE LAW INTERPRETING RULE 41 OF THE UTAH RULES OF CIVIL PROCEDURE FOR FAILURE TO PROSECUTE IS OF SOME GUIDANCE IN UNDERSTANDING THE LIMITS OF RULE 4-103 OF THE RULES OF JUDICIAL ADMINISTRATION.

The factors considered under Rule 41 of the Utah Rules of Civil Procedure are most clearly set out in Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975). The court in reversing an order of dismissal indicated that the

following factors should be considered in determining whether there is a justifiable excuse to explain delays in a prosecution of an action.

1. The conduct of both parties.
2. The opportunity each has had to move the case forward.
3. What difficulty or prejudice may have been caused to the other side by any delay.
4. "And for most importantly whether injustice may result from the dismissal."
Ibid at 879.

Assuming this were a motion to dismiss brought by party and applying these factors to this case, it is clear that both parties have been active in this matter during the last nine months and that neither party has been prejudiced during this period. If this court were to allow the order of dismissal to stand significant injustice would occur. The prior rulings of this court concerning the statute of limitations and other issues would need to be re-decided at considerable expense and delay to all parties.

In addition, the government defendants/respondents have opposed the re-filing of this action under their interpretation of Sec. 78-12-40, U.C.A., 1953, as amended. by arguing that the protection of this statute allows only one re-filing of a case dismissed other than on the merits. If they are successful, then the Lower Court's dismissal will have been with prejudice and Meadow Fresh Farms will have been denied the right to have its case heard upon the merits. Even if Meadow Fresh Farms is allowed to re-file, the effect of the Lower Court's ruling is not an efficient management and reduction of the time between filing and disposition as required by the rule policy.

The Utah Court has often determined that there was an abuse of discretion when a case was dismissed for lack of diligence in prosecuting claims when the dismissal was with prejudice. See for example Utah Oil Company v. Harris, 565 P.2d 1135 (Utah 1977), Johnson v. Firebrand Inc., 571 P.2d 1368 (Utah 1977). In Utah Oil, supra there was a 16 month lapse of action and in Johnson v. Firebrand, supra there was a four year lapse of activity and in both cases the lack of diligence was held not to be a basis for dismissal with prejudice.

III.

SUFFICIENT CAUSE WAS SHOWN UNDER RULE 4-103 TO SET ASIDE THE DISMISSAL OF MEADOW FRESH FARMS' CAUSES OF ACTION.

Rule 4-103 provides for dismissal "absent a showing of good cause" if the case has been inactive 180 days. Since 180 days is significantly less than four years, the "good cause" required under Rule 4-103 of the Rules of Judicial Administration should not be as strict as required under Rule 41 of the Utah Rules of Civil Procedure. In fact, "good cause" should be liberally construed so as to effect the policy of managing case load by urging and pushing clients or counsel to continue with the case. Only in extreme cases should a willing litigant taking reasonable steps be stopped from going forward by Rule 4-103 of the Rules of Judicial Administration.

In this particular case the Meadow Fresh Farms had contacted a law firm and believed that it was represented by by said firm and, in fact, believed that the case was proceeding towards trial. No actual notice of the Order to Show Cause Hearing was provided to Meadow Fresh Farms. There was no reason for Meadow Fresh Farms to be apprised in fact or by implication that it could somehow lose its rights to a trial on the merits due to the inaction of his counsel. Thus,

Meadow Fresh Farms was not provided the requisite notice that would justify the entry of a final Order of Dismissal.

Further, Meadow Fresh Farms timely obtained new counsel, given the complexities of the case which was substantially developed for a trial. The additional time now required to prosecute the case on appeal, because of the Lower Court's harsh application of a calendaring administrative rule is inexcusable. It was improper for the Lower Court to treat Meadow Fresh Farms Motion to set aside the calendaring dismissal pursuant to Rule 4-103 of the Rules of Judicial Administration in the same manner as setting aside under Rule 41 of the Utah Rules of Civil Procedure a default entered for failure to answer a Complaint. The Lower Court therefore abused its discretion in failing to set aside the Rule 4-103 dismissal, and the case should be remanded for trial on the merits.

IV.

**IF THE LOWER COURT'S DISMISSAL WITHOUT PREJUDICE IS NOT
SET ASIDE, LEAVE TO RE-FILE UNDER SEC. 78-12-40, U.C.A., 1953, AS AMENDED,
SHOULD BE GRANTED**

Alternatively, if the Appellate Court does not reverse the Lower Court's Rule 4-103 dismissal, the Appellate Court is requested to allow Meadow Fresh Farms the right to re-file the case under Sec. 78-12-40, U.C.A., 1953, as amended. Even though the Lower Court specifically dismissed Meadow Fresh Farms' action without prejudice, government defendants/respondents have taken the position that only one re-filing is allowed under Sec. 78-012-40, U.C.A., 1953, as amended, citing case law from other jurisdictions. Pending resolution of this issue on appeal, the Honorable Kenneth R. Rigtrup has dismissed Meadow Fresh Farm's re-filing in Meadow

Fresh Farms, Inc. vs. Utah State University, et al., in Civil No. 900902988CV without prejudice by reason of this appeal. Section 78-12-40 U.C.A., 1953, as amended, reads:

78-12-40. Effect of failure of action not on merits.

If any action is commenced within due time and a judgement thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

There is nothing in the language of Sec. 78-12-40, U.C.A., 1953, as amended, which precludes a second re-filing where a case has not been decided on the merits. The cases cited by government defendants/respondents and discussed in American Law Reports, 65 2d 642, all address different statutes, and do not deal with calendar streamlining dismissals under rules similar to Rule 4-103 of the Utah Rules of Judicial Administration. Nor does it make any sense to limit the number of re-filings; particularly where trials are frequently bifurcated and acted upon separately on multiple appeals. It is therefore Meadow Fresh Farms position that under the due process requirements of the U.S. and Utah Constitutions, a re-filing should be allowed where there has been a calendaring dismissal under Rule 4-103 of the Rules of Judicial Administration. Otherwise, Meadow Fresh Farms has been denied due process of law as outlined above.

If the Appellate Court does not reverse and remand the case for trial now that the summary judgment dismissal motions have been argued and successfully resisted by Meadow Fresh Farms, the Appellate Court is respectfully requested to allow the case to be re-filed for a trial on the merits.

CONCLUSION

For the foregoing reasons, the Appellate Court is petitioned to reverse the Lower Court's Order of Dismissal under Rule 4-103 of the Rules of Judicial Administration, and remand the case for trial, or alternatively grant leave for Meadow Fresh Farms to re-file the

case under Sec. 78-12-40, U.C.A., 1953, as amended.

Respectfully submitted this 8th day of December, 1990.



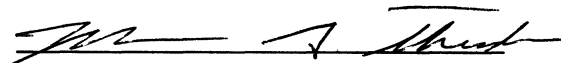
Marcus G. Theodore
Attorney for Plaintiff/ Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant Meadow Fresh Farm's brief was deposited in the United States mail on the 8th day of December, 1990, postage prepaid addressed to the following:

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ADDENDUM

1. Order Denying Plaintiff's Motion for Order to Set Aside Order of Dismissal
2. Order of Dismissal
3. Re-filed Complaint

MAY 10 1990

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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MEADOW FRESH FARMS, INC.,	:	
Plaintiff,	:	ORDER DENYING PLAINTIFF'S
vs.	:	MOTION FOR ORDER TO SET
	:	ASIDE ORDER OF DISMISSAL
UTAH STATE UNIVERSITY, et al.,	:	Civil No. 880900171
Defendants.	:	Judge J. Dennis Frederick

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Plaintiff's motion for an order to set aside this Court's January 18, 1990 Order of Dismissal without prejudice was noticed for decision on April 30, 1990. After having reviewed all of the pleadings in the case and after having reviewed the memoranda of points and authorities submitted in connection with plaintiff's motion to set aside order of dismissal, including the exhibits attached thereto, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's motion for order to set aside this Court's January 18, 1990 Order of Dismissal without prejudice is denied for the reasons more particularly set forth in the defendants' memoranda in opposition to plaintiff's motion.

DATED this 22 day of May, 1990.

BY THE COURT:



J. Dennis Frederick
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the following by depositing a copy of the same in the U. S. Mails, postage prepaid thereon, this 22 day of May, 1990:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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MEADOW FRESH FARMS, INC.,	:	
Plaintiff,	:	ORDER OF DISMISSAL
vs.	:	
UTAH STATE UNIVERSITY, et al.,	:	Civil No. 900902988CV
Defendants.	:	Judge Kenneth Rigtrup

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Defendants' motion to dismiss came before this Court for regularly scheduled hearing at 10:00 a.m. on Monday, November 26, 1990. Plaintiff was represented by Marcus G. Theodore. The State of Utah and its related departments and individuals were represented by Dan R. Larsen. Defendants Utah State University and its related departments and individual defendants were represented by Mark O. Morris. After considering the memoranda on file and hearing arguments of counsel, and for good cause shown,

IT IS HEREBY ORDERED that this case be dismissed without prejudice by reason of the appeal now pending of Civil No. C88-00171, the predecessor case to this instant action.

DATED this ____ day of December, 1990.

BY THE COURT:

Kenneth Rigtrup
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 1990, a true and correct copy of the foregoing Order of Dismissal was served upon the following by depositing a copy of the same in the U.S. Mails, postage prepaid thereon:

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY - STATE OF UTAH

MEADOW FRESH FARMS, INC.,	:	
	:	
Plaintiff,	:	COMPLAINT
	:	
vs.	:	
	:	
UTAH STATE UNIVERSITY	:	
DEPARTMENT OF AGRICULTURE AND	:	
APPLIED SCIENCE, STATE OF	:	
UTAH DEPARTMENT OF HEALTH,	:	
DIVISION OF FAMILY HEALTH	:	
SERVICES, UTAH STATE DEPARTMENT	:	
OF AGRICULTURE, VON T.	:	
MENDENHALL, ARCHIE HURST,	:	
CLAUDIA CLARK, NANCY G.	:	
ROBINETTE, and	:	Case No. _____
JOHN/JANE DOES 1 THROUGH	:	
20,	:	
	:	Judge _____
Defendants.	:	
	:	

The plaintiff, for cause of action against the above-named defendants, alleges as follows:

JURISDICTION AND VENUE

1. This action is filed within one year from the 18th day of January, 1990, the date the Third District Court issued the attached Order of Dismissal pursuant to Rule 4-103 of the Utah Rules of Judicial Administration minute entry case No. 870159. (See copy of Third District Court Order attached hereto as Exhibit "A").

2. This complaint is filed and the jurisdiction of this Court is invoked under the provision of Section 63-30-1 of the Governmental Immunity Act (Utah Code Annotated Section 63-30-1 et.seq., the Agricultural College Act (Utah Code Annotated Section 53-32-1 et.seq., and under the provisions of Utah Code Annotated Section 78-3-4 (1953). The claims asserted in Count I of this complaint arise out of the negligent preparation and dissemination of a Nutrition Policy Statement and Update by the defendants concerning plaintiff's products. In Count II, plaintiff seeks damages suffered by it resulting from the individual defendants' willful and malicious misrepresentations and disparagement of plaintiff's products.

3. The venue in this action is proper in the above-entitled district and court, pursuant to the provisions of Utah Code Annotated Sections 78-13-2, 78-13-7, and 63-30-17 (1953), as the cause complained of or some part of it, arose in Salt Lake County.

4. On or about July 19, 1982, plaintiff filed its administrative claims for damages with the Utah State Department of Health, Utah State University and the Utah Attorney General, pursuant to the requirements of Utah Code Annotated Section 63-30-12 (1953).

5. As the Utah State Department of Health, Utah State University and the Attorney General neither approved nor denied the claims within ninety (90) days, the claims were denied pursuant to Utah Code Annotated Section 63-30-14 (1953).

DESCRIPTION OF THE PARTIES

6. Meadow Fresh Farms, Inc., (hereinafter referred to as "Meadow Fresh") is a corporation incorporated in and doing business under the laws of the State of Utah with its principal place of business at 391 South Orange, Salt Lake City, Utah.

7. The defendant State of Utah Department of Health is the sub-division of the State of Utah responsible for all policy making, regulatory and enforcement powers and functions within the State relating to public health, health planning and medical assistance. In the course of these functions it issued a "NUTRITION POLICY STATEMENT CONCERNING MEADOW FRESH/MELLOW FRESH/PRIM FOR UTAH'S CHILD CARE CENTERS AND/OR FAMILY DAY CARE CENTERS" (hereinafter referred to as "Policy Statement") which is the subject matter of this action.

8. Utah State University, by statute, constitutes a body politic of the State of Utah and as such may be sued in the courts of the State of Utah. Acting through its Department of Agriculture and Department of Nutrition and Food Science, Utah State University issued an "Update" which Update is the subject matter of this action.

9. The defendant Utah Department of Agriculture is a sub-division of the State of Utah responsible for all policy making regulatory and enforcement powers and functions within the State relating to agricultural and food products. In the course of these functions, it conducted a nutritional analysis of Meadow

Fresh Imitation Lowfat Dry Milk and disseminated a "news release" which is the subject matter of this action.

10. The defendants Utah Department of Health, Utah State University, and Utah Department of Agriculture are agencies, departments, or divisions of the State of Utah and subject to suit when not acting within the scope of their governmental authority, are subject to suit pursuant to the provisions of the Governmental Immunity Act.

11. Defendant, Von T. Mendenhall, an individual residing in the State of Utah, was employed as an extension Service Food Science Specialist, and in such a capacity, was instrumental in contribution to the false and misleading contents of the analysis of Meadow Fresh products, including Meadow Fresh Imitation Lowfat Dry Milk.

12. Defendants, Archie Hurst and Claudia Clerk, individuals were residents of the State of Utah, and were officials of and employed by Utah Department of Agriculture, at the time the events mentioned herein occurred, and in such a capacity, were instrumental in contributing the false and misleading contents of the analysis of Meadow Fresh Imitation Lowfat Dry Milk.

13. Defendant, Nancy G. Robinette, an individual residing in the State of Utah, was an official of and employed by Utah Department of Health, and in such a capacity, was instrumental in contributing to the false and misleading contents of the analysis of Meadow Fresh Imitation Lowfat Dry Milk.

14. John/Jane Does 1 through 20 are employees and officials of Utah State University, Utah State Department of Agriculture and Utah State Department of Health who were instrumental in contributing to the false and misleading contents of the analysis and reports about Meadow Fresh product whose identities at this time are unknown. Plaintiff will seek leave to amend this complaint to reflect these person's true identifies when they have been ascertained.

FACTS

15. Utah State Department of Agriculture, Utah State Department of Health, are governmental entities which at various time are responsible for implementing policy and regulating both food and dairy products. As governmental agencies, responsible for the health and safety of the public, the consumer looks to these state agencies for guidance when evaluating food products. In this manner, the officials of these state agencies have unfair advantage in capturing public trust and confidence, and therefore are empowered with the ability to destroy the reputation, good name, and public acceptance of new and unique food products. Therefore, as public officials, defendants owe a duty of due care when evaluating new food products and in disseminating information regarding the nutritional value of new food products.

16. Utah State University Department of Food Science and Department of Health, Division of Family Services is involved in product research and as Division of the State of Utah, acts at various times, as an advisor to Utah State Department of

Agriculture and Utah State Department of Health in the evaluation of new food products. In the evaluation of Meadow Fresh Imitation Lowfat Dry Milk, Utah State University was consulted by the Utah State Department of Agriculture and the Utah State Department of Health. Von T. Mendenhall and Barbara Praeder of Utah State University in conjunction with Archie Hurst, Claudia Clark, and Nancy Robinette of Utah State Department of Agriculture and Utah State Department of Health were instrumental in contributing to certain reports evaluating Meadow Fresh Imitation Lowfat Dry Milk.

17. In May, of 1981, Utah State University issued a statement on Meadow Fresh product which it disseminated to various individuals involved in the food and health industry. Said statement was inaccurate and misleading in that it did not fully describe or inform the reader of nutritional attributes of the imitation milk product. Sometime in June of 1981, plaintiffs met with officials of Utah State University to discuss inaccuracies of their statement which was issued in May of 1981 and to present independent studies which showed the actual nutritional values and ingredients of Meadow Fresh products. However, in spite of the information provided by the plaintiffs, the defendants, Utah State University, Utah State Department of Agriculture, and Utah State Department of Health continued to disseminate false and untrue information regarding said product.

18. In June of 1981, Archie Hurst and Claudia Clark and the Department of Agriculture issued a "news release" entitled

Warning Issued on Imitation Milk Product and in September of 1981, Von T. Mendenhall and Barbara Praeder and Utah State University in conjunction with Utah Department of Agriculture, Nancy Robinette, and Utah Department of Health issued an "Update" and "Policy Statement" concerning Meadow Fresh Imitation Lowfat Dry Milk. Said "news release," "Update," and "Policy Statement" were purportedly based upon testing analysis conducted by Utah State University and Utah Department of Agriculture. Based upon these two tests, the "Update" and "Policy Statement" claimed Meadow Fresh Imitation Lowfat Dry Milk to be dangerously high in sodium, high in calories and sugar, low in calcium, and expensive to purchase. They further claimed that Meadow Fresh Imitation Lowfat Dry Milk increased the incidence of tooth decay, decreased a child's desire to eat "more nutritious foods," and would significantly alter the kinds of fatty acids in a child's diet. Additionally, based upon these two tests, the Utah Department of Agriculture and Utah State University in its news release, entitled, Warning Issued on Imitation Milk Product, represented that Meadow Fresh product posed a "health risk."

COUNT I

NEGLIGENCE AS TO ALL DEFENDANTS

19. Plaintiffs hereby incorporate by reference the allegations contained in above paragraphs 1 through 19 of this complaint.

20. The Utah Department of Agriculture and Utah State University were negligent in their analysis of Meadow Fresh

products. Specifically, the test samples used were improperly reconstituted. The tests reflect, on their face, that an insufficient amount of liquid was used to reconstitute Meadow Fresh product which caused the test samples to be overly concentrated. As a result of this over-concentration, the test analysis improperly showed Meadow Fresh product to contain more calories, sugar, and sodium than it actually contained. Further, the Department of Agriculture and the Utah State University used improper testing procedures, inaccurate and outdated control data, faulty procedures, and performed its testing without independent verification in a negligent and unreliable manner. This caused further significant distortions in the test results.

21. Von T. Mendenhall, Barbara Praeder, Nancy G. Robinette, Utah Department of Health, and Utah State University negligently and recklessly relied on these tests of the Utah State Department of Agriculture and Utah State University in issuing its "news release," "Policy Statement" and "Update" which, if due care had been exercised, they should have known were unreflective of Meadow Fresh's actual nutritional values. Based upon the negligent analysis conducted by Department of Agriculture and Utah State University and without exercising the standard of care requisite of public officials, defendants made the following representations about Meadow Fresh Imitation Lowfat Dry Milk which are false or untrue:

a. They misrepresented that Meadow Fresh posed a "health risk" and "warned" against its use;

b. They misrepresented that Meadow Fresh product was overly expensive;

c. They misrepresented that Meadow Fresh contained more calories than it actually contained;

d. They misrepresented that Meadow Fresh product contained more carbohydrates/sugar than it actually contained;

e. They misrepresented that Meadow Fresh contained more sodium than it actually contained;

f. They misrepresented that Meadow Fresh product would decrease a child's desire to eat "more nutritious foods";

g. They misrepresented that Meadow Fresh contained less calcium than it actually contained.

22. Defendants further made the following misrepresentation about the imitation milk products which are scientifically unsubstantiated or intentionally misleading without further explanation:

a. They misrepresented that Meadow Fresh product does not contain sufficient amounts of Vitamin C and iron, and therefore, if given in lieu of milk, may displace other more nutritious food in the diet, without informing the reader that milk does not contain sufficient amounts of Vitamin C and iron;

b. They misrepresented that Meadow Fresh product may significantly alter the kinds of fatty acids in a child's diet if given in lieu of milk without informing the reader that milk does not contain sufficient amounts of these essential fatty acids.

23. Said "news release," "Update," and "Policy Statement," containing the above false and untrue information were then disseminated to state universities, numerous state departments of agriculture and departments of health, as well as nutrition councils and health institutions, who then in turn, disseminated said information to news agencies, the media, and consumers across the nation. Said false and inaccurate information has been published in newspapers, stated on the radio and television, and even disseminated in public employees' pay envelopes. Said false information, based solely upon the faulty analysis of Utah State Department of Agriculture and Utah State University, has so totally saturated the United States that Meadow Fresh sales have dramatically diminished and its product has been permanently discredited.

24. That defendants were negligent in engaging in consolidating this "news release," "Update" and "Policy Statement" based on these faulty analysis and disseminating said documents without independent verification while they had knowledge, or reason to know, that information existed which was in conflict with these analysis done by various other research laboratories and was in violation of defendant's duty to impart truthful, useful, practical, and unbiased information to the consuming public which constitutes negligence within the meaning of Section 63-30-10 of the Utah Code Annotated and within the meaning of Utah Common Law.

25. As a direct and proximate result of defendant's negligent dissemination of false and misleading information concerning Meadow Fresh product, the plaintiff has been damaged in the form of lost sales, damaged good will, diminished credibility, as well as lost business prospects, distributors, and consumers. Further, plaintiff's product has been permanently discredited.

26. As a further direct and proximate result of the negligence of the defendants, plaintiff has incurred and continues to incur expenses in its reasonable efforts to mitigate the effects of said false information. These reasonable expenses include, but are not limited to, additional advertising expenses, increased overhead, legal expenses, and personnel expenses, all of which are reasonably foreseeable effects of defendant's negligent actions.

COUNT II

INTERFERENCE AND BUSINESS DISPARAGEMENT AS TO THE INDIVIDUAL DEFENDANTS

27. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 27 of this complaint.

28. As governmental agencies, responsible for health and safety of the public, the officials of the Utah Department of Agriculture and Utah Department of Health have unfair advantage in capturing public trust and confidence, and therefore, are empowered with the ability to destroy the reputation, good name, and public acceptance of new and unique food products. However,

in evaluating Meadow Fresh Imitation Lowfat Dry Milk, a competing product with traditional dairy products, defendants have an inherent conflict of interest due to their direct involvement with the promotion and regulation of traditional dairy products. At all times mentioned herein, defendants have failed to disclose their conflict of interest to the public.

29. Further, defendants acted negligently and recklessly in distributing these reports which they should have known were based upon false, misleading, and unreliable analysis of Meadow Fresh products. Said reports were intended to interfere with plaintiff's contractual relationships with distributors and consumers, and to impair, diminish, or eliminate business relationships which plaintiff had formed or had reasonable assurance of forming with potential distributors and consumers. All this was done in a coordinated campaign to promote traditional dairy products by discrediting the nutritional value of a competing product.

30. Defendants, in furtherance of said campaign to interfere, disparage, and destroy Meadow Fresh, conspired to disseminate said false and misleading information in such a way so as to thoroughly saturate the United States with false information about Meadow Fresh product. Said information was disseminated to over 200 state college extension services, numerous state departments of agriculture and state departments of health, as well as various nutrition councils and health

institutions, who then in turn continued the dissemination by sending these reports to news agencies and the media.

31. In acting in such an excessive, callous, and malicious manner in the dissemination of information which they should have known to be false, misleading, negligently prepared, and scientifically unsubstantiated, and which was done for the purpose of promoting real dairy products by discrediting a competitor, the individual defendants were not performing a governmental function, and defendants are not cloaked with immunity for their acts under the Utah Governmental Immunity Act.

32. As a direct and proximate result of the malicious and intentional acts of the defendants, existing, valid contractual relationships were damaged, and potential business relationships were damaged, lost, or destroyed. As a consequence, plaintiff has been damaged in the form of lost sales, diminished reputation, injured goodwill, diminished credibility, as well as lost business prospects, distributors and consumers.

33. The right to be gainfully employed and to be engaged in business without undue governmental interference is a Constitutional right implicit in the notions of liberty and pursuit of happiness which right defendants did willfully violate by disseminating said false and misleading information about plaintiff's products.

34. As a further and direct and proximate results of the malicious and intentional acts of the defendants, the plaintiff has incurred and continues to incur expenses in a reasonable

effort to mitigate the effects of the false information. These expenses include, but are not limited to, additional advertising expense, increased overhead, legal expenses, and personal expense, all of which are reasonable foreseeable effects of the defendants malicious and intentional actions.

35. The damages directly resulting from the defendants' unlawful conduct as alleged in Count II of this complaint approximate \$12,000,000, which amount is plaintiff's best estimation of its damages it can make at this time.

36. Said false and misleading information is still being disseminated by defendants and defendants' agents even though defendants have knowledge that the test analysis were faulty and do not accurately reflect the nutritional attributes of Meadow Fresh products. Defendants continued dissemination of this false information plaintiff is suffering and will continue to suffer irreparable harm to its business, its reputation, and its contractual relationships and therefore seeks additional relief in the form of a permanent injunction.

WHEREFORE, plaintiff prays judgments against each of the defendants individually and collectively as follows:

1. That this Court adjudge and decree that the acts of the defendants were negligent as alleged in Count I;
2. That this Court adjudge and decree that the defendants improperly and unlawfully interfered with the business of Meadow Fresh in violation of plaintiff's right as alleged in Count II;

3. That plaintiff have judgment against the defendants collectively and severally in the amount of TWELVE MILLION DOLLARS (\$12,000,000), which is the best approximation of plaintiff's damages at this time;

4. That the Court grant plaintiff equitable relief by requiring the Utah Department of Agriculture, the Utah State University, and Utah Health Department to disseminate a retraction of their former reports.

5. That the Court grant an injunction, to be made permanent, enjoining the defendants from further disseminating false and misleading information regarding Meadow Fresh product.

6. That plaintiffs have judgment of the defendants for such other punitive and consequential damages and other relief as this Court may deem appropriate.

DATED this 14th day of May, 1990.


Steven F. Alder
Attorney for Plaintiff

Plaintiff's Address:
Meadow Fresh Farms, Inc.
131 North Main Street
Smithfield, UT 84335

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