STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

Meadowsweet Dairy, LLC	:	**Index No. 40558**
	:	
and	:	
	:	
Steven and Barbara Smith	:	
	:	
Plaintiffs	:	
	:	
against	:	
	:	
Patrick Hooker, Commissioner	:	**PLAINTIFFS' REPLY TO**
	:	**DEFENDANTS' MEMORANDUM**
Department of Agriculture and	:	**OF LAW IN OPPOSITION TO**
Markets of the State of New York	:	**PLAINTIFFS' MOTION FOR**
	:	**PRELIMINARY INJUNCTION**
and	:	
	:	
Will Francis, Director	:	**Assigned Judge:**
Division of Milk Control and	:	**Hon. Dennis F. Bender**
Dairy Services	:	
	:	
Defendants	:	

Plaintiffs seek a preliminary injunction in order to maintain the *status quo* between the parties until this Court has had an opportunity to rule on the declarations sought by Plaintiffs in their complaint. Because Plaintiffs seek only to maintain the *status quo* they do not necessarily need to meet the traditional four elements of a preliminary injunction.

Moreover, the parties have already presented their evidence at the administrative show cause hearing conducted on January 17th and 18th and the evidence received at that hearing conclusively demonstrates that Defendants do not have jurisdiction over the conduct engaged in by Plaintiffs. Consequently, Plaintiffs will prevail at trial on this matter.

In addition, the evidence presented at the administrative hearing completely contradicts the affidavits submitted by Defendants in support of their memo in opposition. To rebut these faulty affidavits, Plaintiffs present two affidavits of Plaintiff Barbara Smith, one affidavit to rebut the affidavit of Will Francis and another affidavit to rebut the affidavit of Dennis Brandow.

For these reasons, and as more fully described below, Plaintiffs are entitled to a preliminary injunction.

I. Plaintiffs are trying to maintain the *status quo* and are making an "as applied" unconstitutional argument, not a "facially" unconstitutional argument.

Generally, in ordering the maintenance of the *status quo* pending a determination of issues raised in court, a court "is exercising an inherent power, not dependent upon statutory provisions" governing the issuance of a stay. *Id*. at 273. See also: *Ocorr v. Lynn*, 105 Misc. 489, 491 (N.Y. Misc. 1918). "The issues joined herein over the construction and meaning of those statutes in the area of plaintiffs' business requires determination and is properly brought in this form of declaratory action (citations omitted). In the court's view and discretion, and in the interests of preventing irreparable further injury to plaintiff, the *status quo* should be maintained pending the trial (citations omitted) and same may be invoked in an action for declaratory judgment." *Public Service Mut. Ins. Co. v. Murtagh*, 15 Misc. 2d 973, 977 (N.Y. Misc. 1958).

Maintaining the *status quo* is generally accomplished through preliminary injunctive relief and is available to a party pending the determination of the merits of a case. For example, a preliminary injunction was issued in the case of *Valdez v. Northeast Brooklyn Hous. Dev. Corp*., 2005 NY Slip Op 50986U, 4 (N.Y. Misc. 2005) in order to "serve the salutary purpose of preserving the *status quo* pending the outcome

of plaintiff's action." In *Valdez*, the court stated "It is well settled that the purpose of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the *status quo* until there can be a full hearing on the merits." *Id*. at *5.

In *Gambar Enterprises, Inc. v. Kelly Servs., Inc*., 69 A.D.2d 297, 306, 418 N.Y.S.2d 818 (1979), the court stated "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the *status quo* until a decision is reached on the merits." Therefore, a stay may also be granted where necessary to maintain the *status quo*, even if the movant's success on the merits cannot be determined at the time that the application for a preliminary injunction is brought. See: *Mr. Natural, Inc. v Unadulterated Food Products, Inc*., 152 A.D.2d 729, 730, 544 N.Y.S.2d 182 (1989) ("the existence of a factual dispute will not bar the granting of a preliminary injunction if one is necessary to preserve the *status quo* and the party to be enjoined will suffer no great hardship as a result of its issuance."). Accord: *U.S. Ice Cream Corp. v Carvel Corp*., 136 A.D.2d 626, 628, 523 N.Y.S.2d 869 (1988); *Burmax Co. v B & S Indus., Inc*., 135 A.D.2d 599, 600, 522 N.Y.S.2d 177 (1987).

In this case, Plaintiffs seek the *status quo* with Defendants until this Court determines the issues raised in Plaintiffs' complaint, i.e., do the State's Agriculture and Markets Laws ("A&ML") apply to them? Consequently, they are entitled to a preliminary injunction pending a resolution of this case.

Moreover, Defendants assert on page 5 of their memo in opposition that Plaintiffs' request for a preliminary injunction "should be denied" because Plaintiffs have not established that "any of the provisions of law * * * are invalid as being

unconstitutional, or that any of the provisions of regulations so referred to are invalid as being unconstitutional." (Emphasis in original.). That is true, Plaintiffs are *not* alleging that these laws and regulations, on their face, are unconstitutional. Instead, Plaintiffs are alleging that they do not apply to them, or that they are unconstitutional "as applied" to them. Consequently, Defendants' argument lacks merit because Plaintiffs are making an as applied argument, not a facial argument.

Therefore, Plaintiffs are entitled to a preliminary injunction.

II. The facts introduced at the administrative hearing demonstrate that Defendants' affidavits of Francis and Brandow are wrong.

A. Plaintiffs are not a milk plant.

On page 7 of their motion, Defendants assert they "clearly" have jurisdiction over Plaintiffs because Plaintiffs "operate a dairy farm and milk plant." That is not true. As demonstrated at the administrative hearing conducted on January 17th and 18th, Plaintiffs do not meet the definitions of "dairy farm" or "milk plant" and this was admitted by Defendant Francis.

For instance, 1 NYCRR 2.2(bb) refers to "milk plant" as "any place, premises or establishment engaged solely or predominately in the receipt of prepasteurized milk." There was no evidence presented at the administrative hearing that Plaintiffs receive "prepasteurized milk" and Defendant Francis admitted that if a facility does not receive prepasteurized milk it cannot be a milk plant. As stated by Barbara Smith in her affidavit, Plaintiffs do not receive "prepasteurized milk." Therefore, they are not a milk plant. Consequently, the affidavit of Defendant Francis is wrong.

Moreover, 1 NYCRR 2.2(mm) defines "prepasteurized milk" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or

more healthy cows, goats or sheep which is to be pasteurized prior to being processed into milk." Again, there was no evidence that Plaintiffs pasteurize their milk prior to processing it into dairy products. Again, Defendant Francis admitted that Plaintiffs do not pasteurize their milk and admitted that an entity that does not pasteurize its milk prior to processing it into dairy products does not fall within the definition of "prepasturized milk." Moreover, Barbara Smith affirmatively states that they do not pasteurize their milk. Consequently, the affidavit of Defendant Francis that Plaintiffs are a "milk plant" is simply wrong and is contradicted by his own hearing testimony.

With respect to "dairy farm," 1 NYCRR 2.2(h) defines "dairy farm" as "a place or premises where prepasteurized milk or raw milk is produced from cows, goats or sheep." It has already been established that Plaintiffs do not produce prepasteurized milk because none of their milk is pasteurized. However, in order to properly determine whether Plaintiffs are operating a "dairy farm," this requires an interpretation of the words "raw milk." As explained below, Plaintiffs are not operating a "dairy farm."

B. Plaintiffs do not "sell or offer for sale" to consumers any raw milk or dairy products.

1 NYCRR 2.2(pp) defines "raw milk" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which will not be pasteurized prior to being sold or offered for sale to consumers." Consequently, this whole case turns on the phrase "sold or offered for sale to consumers." If raw milk is not "sold or offered for sale" to consumers then it is not regulated. If it is "sold or offered for sale", then it is regulated.

"Consumer" is not defined anywhere in the 1 NYCRR Part 2 regulations. However, there is a definition in A&ML section 253(9), which defines "consumer" as "any person other than a milk dealer who purchases milk for fluid consumption." Therefore, in order for the raw milk provisions to apply there must be a "sale" of raw milk because consumers must purchase.

The whole issue at the administrative hearing turned on whether Plaintiffs "sold or offered for sale" any raw milk. The evidence demonstrated that no, there was not any sale. The closest the Defendants could come was the testimony of a snitch, a Department employee, who "joined" the LLC merely to collect evidence against Plaintiffs.

That Department snitch, Dennis Brandow, testified on direct examination that he "obtained" some milk from Plaintiffs on two occasions. On cross examination, however, the Department employee admitted that he did not "purchase" the milk and dairy products but in fact had obtained them as a member. That Department employee also admitted that he did not know how the LLC operated, how capital contributions and equity distributions were made, how income and expenses were accounted for, nor who had authority to make decisions for the LLC or how the LLC's assets, i.e., the herd of dairy cows, was managed or maintained. Consequently, the Defendants could not put on any evidence of a "sale" of raw milk.

In contrast, Plaintiff Barbara Smith testified to how the LLC operates. She testified that members who join the LLC contribute working capital to the LLC, that working capital is used to offset the costs of maintaining the herd, the herd is owned by the LLC itself and not the members, and that the LLC has two managing members, she

and her husband Plaintiff Steve Smith. Barbara Smith also testified that the LLC has authorized she and her husband to maintain and manage the herd and that members receive their equity share in the LLC in the form of raw milk and other dairy products. Barbara also testified that the LLC does not make its raw milk and dairy products available to anybody but LLC members. She also testified that the LLC has never sold or offered for sale to any consumer any of the milk or dairy products produced by the herd.

Because Plaintiffs do not "sell" their raw milk or dairy products to anybody, Plaintiffs do not need a raw milk license for their activity. Therefore, the affidavits of Francis and Brandow in support of their memo in opposition are wrong and incorrect. Consequently, Plaintiffs are entitled to an injunction.

C. Plaintiffs are not subject to the adulteration or misbranding provisions of Article 17 of the A&ML.

Defendants argue on page 7 of their memo in opposition that Plaintiffs are required to "adhere to the provisions of A&ML section 199-a(1)" which pertains to adulteration and misbranding. However, Defendant Francis admitted that this provision is subject to the provisions of A&ML section 199, which clearly states that it pertains to "the manufacture, production, processing, packing, transportation, exposure, offer, possession, and holding of any such article for sale." The only way to read section 199 is for the words "for sale" to modify each of the activities described in that section, e.g., "manufacture for sale, production for sale, processing for sale, packing for sale" etc. Otherwise, a person who milks their own dairy cow and drinks that milk is violating the "adulteration" provision because they are drinking milk that is not pasteurized.

Again, there is no evidence that Plaintiffs are engaged in a "sale" of raw milk or other dairy products. Because there is no "sale" there cannot be any "adulteration" or "misbranding." Therefore, Plaintiffs are entitled to a preliminary injunction.

III. There is nothing in New York's Limited Liability Company laws that prohibit an LLC from making raw milk and raw dairy products available to its members.

This case requires the Court to think "outside the box." Usually, LLC's are created for "business" purposes in order to "make a profit" or to "sell" products to consumers. However, that is not why Plaintiff Meadowsweet Dairy LLC was formed. As testified to by Barbara Smith, she and her husband Steve approached a local attorney for assistance in forming an LLC and with that attorney's help they formed Meadowsweet Dairy LLC ("the LLC").

As testified to by Barbara Smith, the LLC was formed in order to make raw milk and raw dairy products available to its members. The LLC is not engaged in the "business" of "selling" a product. Instead, the LLC owns a herd of dairy cows and as managing members Steve and Barbara Smith manage and maintain the herd. The LLC members contribute working capital to the LLC that is used for paying the expenses associated with maintaining the herd. These expenses include supplies, equipment, fencing, pasture, seed and various other sundry expenses associated with managing a herd of dairy cows. All of these parameters are spelled out in the LLC's operating agreement and there is nothing in New York that prohibits this type of conduct.

All of the only raw milk and raw dairy products produced by the LLC's cows are distributed in the form of equity to the LLC members. Nobody else has access to these dairy products. Since there is nothing in NY's Limited Liability Company laws that prohibit this type of arrangement, it is not illegal.

Defendants, however, suggest that the LLC is a "sham" and on pages 9 and 10 refer to cases that are not on point in order to suggest that "courts have consistently found" that arrangements such as the LLC "constituted sales of raw milk." For example, in the *Johnson County* case, the organization involved there was a non-profit organization, not a Limited Liability Company. Also, the *Johnson County* court found that there was a definition of "sale" in the state's dairy code and that the operating agreement at issue provided that the dairy products remained the property of the non-profit organization itself, not the members of the non-profit. In this case before this Court, there is no definition of "sale" in A&ML or in its enabling regulations. Moreover, the operating agreement for the LLC expressly specifies that equity in the LLC is distributed in the form of raw milk and dairy products. Consequently, *Johnson County* is not on point.

In the *Kenley v. Solem* case, that case involved individuals who were not organized into any type of organization, but instead, had entered into ad hoc arrangements with the owner of goats to receive goat milk. There was no LLC that was formed, there was no non-profit or for profit organization that was formed, nor was there any written type of contract involved. Consequently, *Solem* does not apply because it is limited to the peculiar facts of that case.

In the state of Ohio, a decision has been handed down on a nearly identical issue that is involved here. In the case of *Schmitmeyer v. Ohio Department of Agriculture*, Case No. 06-CV-63277, Darke County Common Pleas, December 29, 2006 (attached), the issue was whether a "herdshare" operation was illegally selling raw milk. Holding that there was no law that prohibited a "herdshare" operation, the *Schmitmeyer* court

stated that the Department's "inexact practice of allowing owners and their families, etc., to consume raw milk" prevented the court from determining whether a "sale" had occurred. Moreover, there was no definition of "sale" that the *Schmitmeyer* court could rely on. In addition, the *Schmitmeyer* court stated that if it wanted to, the Department could promulgate regulations that would prohibit such activity and conduct.

Schmitmeyer is applicable here. There is nothing in New York's Limited Liability Company laws that prohibits the conduct engaged in by Plaintiffs in this case. Moreover, there is nothing in the A&ML laws that prohibit the conduct in this case. Unless and until the law changes, Plaintiffs are allowed to produce and consume their own raw milk and dairy products.

IV. Plaintiffs do not have any other remedy available to them.

Defendants argue at page 14 of their memo in opposition that an injunction "should not be issued" because Plaintiffs allegedly have "an adequate remedy at law." However, exhaustion of administrative remedies is unnecessary when it would be futile. See *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (N.Y. 1978) (exhaustion not required "when resort to an administrative remedy would be futile."); *Counties of Warren & Washington Industrial Dev. Agency v. Hudson Falls Bd. of Health*, 168 A.D.2d 847, 848 (N.Y. App. Div., 3rd Dept., 1990) ("[E]xhaustion of remedies before the Board would be futile since the Board and its attorney have clearly demonstrated by their prior attempts to halt the project (citations omitted) that petitioners are not likely to receive an unbiased review from the Board."); *Love v. Grand Temple Daughters, I. B. P. O. E. of W*., 37 A.D.2d 363 (N.Y. App. Div., 1st Dept. 1971); *Fahey v. Perales*, 141 A.D.2d 934 (N.Y. App. Div., 3rd Dept., 1988) ("[T]he exhaustion rule is not inflexible

and need not be followed where to do so would be futile."); *Amsterdam Nursing Home Corp. v. Commissioner of N.Y. State Dep't of Health*, 192 A.D.2d 945, 947 (N.Y. App. Div., 3rd Dept., 1993) ("It is axiomatic that administrative remedies need not be exhausted if resort to them would be futile").

In this case, counsel for Plaintiffs inquired whether the Defendants' position at an initial administrative hearing for October 2007 would make any difference if Plaintiffs' conduct was private and did not involve the public. Defendants' counsel responded via email as follows: "I understand your position that the creation of the LLC takes the Smiths out of this realm. I disagree." See Attachment G attached to Plaintiffs' complaint. Therefore, before the October 2007 hearing even commenced, Defendants had already taken the position that New York's Agriculture and Markets laws applied to Plaintiffs' conduct. It would have been futile, therefore, for Plaintiffs to show up and argue otherwise.

In addition, the parties have just concluded another, second administrative hearing on the issue of whether Defendant Commissioner should issue an Order prohibiting Plaintiffs from engaging in their private conduct. The Defendants' position at that hearing was that they have jurisdiction over Plaintiffs, that Plaintiffs are violating the law, and that not only should Plaintiffs' conduct cease, but Plaintiffs should be fined and subject to penalties as well. Clearly, Plaintiffs do not have a remedy available via an Article 78 proceeding before these Defendants.

Consequently, this Court should issue an preliminary injunction.

V. Conclusion

Plaintiffs are entitled to a preliminary injunction because they are merely seeking to maintain the *status quo* until this Court decides the issue in this case.

Defendants' regulatory program deals with the traditional dairy industry in this state, whereby producers milk their cows, they sell the milk to milk haulers who haul the milk around that state in stainless steel containers, picking up hundreds and thousands of gallons of milk from producers all over the state, mixing and commingling that milk from dozens of producers, who then sell that milk to processors who process thousands upon thousands of gallons of milk in huge vats, mixing milk from all over the state and perhaps even the region, pasteurizing the milk so that it can then be sent off to a packaging and labeling facility, where the milk is slapped into containers and then sold to retail grocery stores all over the northeastern portion of the United States and then ultimately sold to consumers in grocery stores. That is the industrial government sponsored and sanctioned dairy system that most people are accustomed with.

However, that regulatory program has no application to a private group of citizens who have opted out of the system, who have decided they wish to produce and consume their own food of their own choice. That regulatory program has no application to Plaintiffs' conduct because Plaintiffs are not injuring the public's health, safety or welfare. If anyone is being harmed in this case, it is Plaintiffs themselves because they are being forced by their government to participate in a system that they truly believe is harmful to their health.

For these reasons, Plaintiffs are entitled to a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic email on January 21, 2008 and by hand delivery on January 22, 2008 to the following:

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