STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | DANE COUNTY

FARM-TO-CONSUMER LEGAL DEFENSE FUND, GRASSWAY ORGANICS FARM STORE LLC, GRASSWAY ORGANICS ASSOCIATION, and KAY and WAYNE CRAIG d/b/a GRASSWAY FARM,

Plaintiffs,

DECISION AND ORDER

vs.

WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Case No. 09-CV-6313

Defendant.

FARM-TO-CONSUMER LEGAL DEFENSE FUND, MARK and PETRA ZINNIKER, NOURISHED BY NATURE LLC, PHILLIP BURNS, GAYLE LOISELLE, and ROBERT KARP,

Plaintiffs,

DECISION AND ORDER

vs.

WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Case No. 10-CV-3884

Defendant.

DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs bring this motion for summary judgment under Wis. Stat. § 802.08, seeking a declaratory judgment under Wis. Stat § 806.04 as to whether their actions violate the terms of Wis. Stat. § 97.24(2), which prohibits the sale and/or distribution of unpasteurized milk in Wisconsin. Also at issue in this case is whether Plaintiffs Grassway Organics Farm Store LLC Grassway Association, and Nourished by Nature LLC are "retail food establishment(s)" as

defined by Wis. Stat. § 97.30(1)(c), and as such, are required to be licensed under Wis. Stat. § 97.30(2)(a). For the reasons discussed below, Plaintiffs' motion is **DENIED**.

BACKGROUND

This case is a consolidation of two cases, 09CV6313 and 10CV00302. Both cases present the same issues for review, but have slightly different factual backgrounds.

I. The Grassway Plaintiffs

Husband and Wife Kay and Wayne Craig ("the Craigs") are members of the Farm-to-Consumer Legal Defense fund ("FTCLDF"), and own and operate a farm in New Holstein, Wisconsin. The Craigs are the principal owners of Grassway Organics Farm Store LLC ("the Store"), a Wisconsin limited liability corporation that holds a milk producer license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"). The Craigs have sold a herd of dairy cows to the Store, and have a Custom Hire Agreement with the Store to board, manage, milk, and take care of the Store's herd of cows which are kept at the Craigs' farm. In addition to the herd of dairy cows, the Store also owns inventory and a store building located at the Craig farm in New Holstein. Only members of the Grassway Association ("the Association") may purchase products from the store.

The Association is a group with restricted membership. Wayne Craig is the President of the Association, and Kay is the Treasurer. An individual must pay a fee to become a member of the Association. In return, the individual receives an ownership interest in the Store, and is also able to purchase products from the store at the Craigs' farm. The Association has a website, www.grasswayorganics.com, which contains information about the farm and its practices, and the Association, its member meetings, and store hours. The Association also has a Facebook page describing the farm, and containing information on the store address and times of operation.

One product available to members of the Association at the store is unpasteurized milk that is obtained from the Store's cows at the farm. The Store has distributed unpasteurized milk to Association members in this manner since it obtained its milk producer's license in December of 2005. The Store receives revenue from the Association by virtue of making unpasteurized milk available to members of the Association. The Craigs receive revenue from the Store by virtue of their Custom Hire Agreement with the Store.

II. The Zinniker Plaintiffs

Husband and Wife Mark and Petra Zinniker ("the Zinnikers") are members of the FTCLDF and own and operate a farm ("the Farm") in Elkhorn, Walworth County, Wisconsin. Phillip Burns ("Burns") resides in Eagle, Walworth County, Wisconsin, and is the manger and a member of Nourished by Nature, LLC ("the LLC"), a Wisconsin limited liability corporation. The LLC's principle place of business is Dousman, Waukesha County, Wisconsin.

Through a private contract, the LLC purchased a herd of dairy cows from the Zinnikers. The herd of cows is the primary asset owned by the LLC. The LLC also entered into a boarding contract with the Farm to have the Farm board, tend to, manage, milk, and take care of the herd of dairy cows at the Farm. Under the boarding contract, the LLC boards the herd at the farm, and in exchange pays the Farm an annual fee in monthly installments. The fee is commensurate with the cost of taking care of, managing, and boarding the herd.

Burns and all other members of the LLC pay a fee to become members of the LLC, and agree to be bound by the terms of the LLC's operating agreement. Under the terms of the LLC's operating agreement, Burns and other members agreed to pay, and have been paying, assessments which are used to defray the cost of caring for, and milking the LLC's herd.

As a member of the LLC, Burns and other members can visit the Farm to obtain and collect unpasteurized milk produced by the LLC's herd. Under the LLC's operating agreement, this milk can only be consumed by LLC members and their families. All of the milk produced by the LLC's herd goes only to LLC members, except some milk which goes to the Zinnikers and their farm employees. The LLC does not sell milk from its herd to any of its members or members of the public.

Plaintiff Robert Karp ("Karp") resides in Troy, Walworth County, Wisconsin. Plaintiff Gayle Loiselle ("Loiselle") resides in Dousman, Waukesha County, Wisconsin. Together, Karp and Loiselle entered into a contract with the Zinnikers to purchase a 50% interest in a dairy cow named Target. Under the contract, Karp and Loiselle were entitled to all offspring of Target, except dairy bull calves. After the Zinnikers culled Target, Karp and Loiselle acquired ownership interest in a heifer named Soldier Girl.

Karp and Loiselle also entered into a boarding contract with the Zinnikers to have them tend to, manage, and milk Soldier Girl. Under the boarding contract, the Zinnikers board Soldier Girl at their farm, and tend to, manage, and take care of the cow. In exchange, Karp and Loiselle pay an annual boarding fee, paid in monthly installments, that is commensurate with the cost of taking care of, managing, and milking Soldier Girl.

Once Soldier Girl begins producing milk, all of the milk and dairy products that will be produced will go only to Karp, Loiselle, and their families, except that some of the milk will go to the Zinnikers and their farm employees. Karp and Loiselle will periodically visit the farm to obtain unpasteurized milk produced by Soldier Girl.

The Zinnikers, Burns, the LLC, Karp, and Loiselle do not sell unpasteurized milk or dairy products to anyone. The Zinnikers, Burns, the LLC, Karp, and Loiselle do not own or operate any sort of store on the farm. The Zinnikers do not own any lactating dairy cows.

Neither the Zinnikers, Burns, the LLC, Karp, nor Loiselle possess a milk producer's license from DATCP. The Farm was licensed as a milk producer by DATCP, but the license was automatically voided on October 18, 2009 for not having a dairy plant where it had a contract to ship milk.

On December 14, 2009, in Case No. 09-CX-11, a Consent Judgment and Permanent Injunction were issued by Walworth County Circuit Court, Branch 3. The Consent Judgment provides in part:

> 3. This Consent Judgment and Permanent Injunction shall apply to, and bind, Defendant Zinniker Farm, Inc., a Wisconsin corporation; any agent, employee, servant, successor, assign or representative of Zinniker Farm, Inc.; any corporation or other business entity or entities whose acts, practices of polices are directed or controlled by the Defendant Zinniker Farm, Inc., now or at any time in the future, including, without limitation, Markus and Petra Zinniker, any agent, officer, employee, servant, successor, assign or representative of any corporation or other business entity or entitles whose acts, practices or policies are directed, formulated, or controlled by Defendant Zinniker Farm, Inc., now or at any time in the future; and time in the future [sic]; and all other persons or entities in active concert or participation with Defendant Zinniker Farm, Inc., whose conduct or activities are subject to regulation under Wis. Stat. ch. 27 and/or Wis. Admin Code ch. ATCP 60.
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> ****
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> 6. Pursuant to Wis. Stat. § 97.73, Defendant Zinniker Farm Inc., and all other persons or entities to which this Consent Judgment and Permanent Injunction applies pursuant to paragraph 3 above, are hereby permanently enjoined and restrained from failing to comply with the provisions of Wis. Stat. ch. 97 and Wis. Admin. Code ch. ATCP 60, as they are currently written or as they are amended in the future, and from directly or indectly [sic] engaging in any of the follow [sic] acts or practices in the State of Wisconsin:

A. Selling and/or distributing any milk, unpasteurized or pasteurized to any person without a milk producer license, in violation of Wis. Stat. § 97.22(2)(a);

B. Selling and/or distributing any milk which is not produced, processed and distributed in compliance with standards established by DATCP by rule under WIS. Stat. ch. 97 in violation of Wis. Stat. § 97.24(2)(a);

C. Selling and/or distributing raw milk, that is, unpasteurized milk, and raw fluid milk products to consumers, or to any restaurant, institution, or retailer for consumption or resale to consumers in violation of Wis. Stat. § 97.24(2)(b);

D. Selling and/or distributing milk or fluid milk products which are not grade A milk or grade A milk products to consumers, or to any restaurant, institution or retailer for consumption or resale to consumers in violation of Wis. Stat. § 97.24(2)(b);...

III. The DATCP's interpretation of Wis. Stat. § 97.24(2)

DATCP has issued several orders and written responses to Plaintiffs involving the interpretation of Wis. Stat. § 97.24(2). On October 30, 2002, DATCP issued an order providing in pertinent part, "Under the long-standing interpretation of § 97.24 Wis. Stats., [the Craigs] are free to devise valid agreements sharing ownership in their milk producer license under applicable law that may include allowing actual owners to take a share of their ungraded raw milk produced under the license."

In 2004, DATCP again addressed the 2002 Order, issuing another order that specifically authorized the use of agreements sharing ownership in a milk producer license. The 2004 Order acknowledged that investment in such entities could be for the purpose of purchasing non-pasteurized milk and milk products, but investments in such entities can not be for the sole purpose of purchasing such products. Instead, investments must be for the main purpose of holding a milk producer license and using milking animals to produce milk for sale or distribution to the public.

On March 22, 2005, the Store obtained a Conditional Use Permit from Calumet County for the operation of its farm store. The permit required that the business be a "members only" type of store, and that it not be open to the general public. DATCP also worked in conjunction with the Wisconsin Department of Financial Institutions ("DFI") to assist DFI in issuing an Order of Exception to the Store to allow it to offer and sell membership interests in the Store.

On January 5, 2006, DFI issued the Store an Order of Exemption under § 551.23(18) of the Wisconsin Uniform Securities Law that allowed the Store to offer and sell membership interests in the Store's milk producers license to "persons in Wisconsin to enable them-as membership interest holders, and therefore, owners of the LLC- to purchase unpasteurized dairy products under the Wisconsin Milk Producers license # 191666-D2 currently owned by the LLC." This order was valid for a two-year period.

On March 20, 2007, DATCP issued a warning letter to the Store stating that owners in a valid agreement who shared ownership in a milk producer license may receive distributions of raw milk, but that raw milk distributions to owners cannot occur in a retail food establishment licensed by DATCP.

On September 14, 2007, DATCP issued a Final Order regarding its proposal to revise regulations relating to the sale and distribution of fresh milk. The revised regulation included a statement to the purpose of the revisions, stating that the revision "clarifies current statutory prohibitions against the sale of raw milk to consumers, consistent with administrative law judge decisions." The ALJ decisions referenced were the 2002 and 2004 orders discussed above.

Pursuant to its authority under Wis. Stat. § 97.24(3), and with the approval of the legislature, DATCP issued Wis. Adm. Code § Agriculture, Trade and Consumer Protection ("ATCP") 60.235, effective February 1, 2008, which provides as follows:

No person may sell or distribute unpasteurized milk or fluid milk products to consumers, or to any other person for resale or redistribution in unpasteurized form to consumers. This section does not prohibit any of the following:

(1) The sale or distribution of milk or fluid milk products that are heat sterilized in hermetically sealed containers.

(2) The distribution of unpasteurized milk, produced on a dairy farm, to any of the following:

(a) The milk producer who is licensed under s. ATCP 60.02(1) to operate that diary farm, and who, as a license holder, assumes legal responsibility for dairy farm operations.

(b) An individual who has a bona fide ownership interest in the milk producer under par. (a), if the milk producer is a legal entity other than an individual or married couple.

(c) A family member or nonpaying household guest who consumes the milk at the home of an individual operator or bona fide owner under par. (a) or (b).

(3) The Sale or distribution of unpasteurized milk, produced on a dairy farm, to the employees of that dairy farm.

(4) The incidental sale of unpasteurized milk to a consumer, for delivery to the consumer at the dairy farm where the milk is produced, for consumption by the consumer, the consumer's family, or the consumer's nonpaying guests. A sale is not incidental if it is made in the regular course of business, or is preceded by any advertising, offer or solicitation made to the general public through any communications media.

On April 16, 2009, Jacqueline Owens of DATCP sent a letter to the Store alleging that unpasteurized milk was being sold at the Store in violation of Wis. Stat. § 97.24, and that the store's Retail Food Establishment License application would be rejected because of the violations. The letter stated that the Retail Food Establishment License would not be re-issued unless the Store signed a "Conditional License Agreement." The Agreement stated:

Respondent will not sell or distribute unpasteurized milk and milk products.
a. Sale or distribution includes any distribution to any person through any agreement other than that person being a member of the partnership, cooperative or corporation organized pursuant to chs. 178, 180, 183 or 185

Wis. Stats., to hold the Respondent's milk producers license and operate the facility.

b. Sale or distribution includes any distribution to any person labeled as an "employee" of the Respondent unless there is documentation of an actual employment relationship between the person and the Respondent.

On May 4, 2009, the Store responded through counsel stating that its members were not consumers or members of the public, and therefore the Store was not required to obtain a Retail Food Establishment permit because it was not illegally selling unpasteurized milk.

On May 8, 2009, DATCP responded with a letter that added a new interpretation of Wis. Stat. § 97.24. DATCP stated that for an ownership interest to qualify as a "bona fide ownership interest in the milk producer," the ownership interest must have been acquired with an expectation of financial profit. "It does not include "cow shares," license shares," or other devices that are merely designed to facilitate the illegal sale or distribution of raw milk to consumers who do not have a genuine ownership interest in the licensed business entity that operates the farm."

Counsel for the Store responded on June 1, 2009, protesting that the language of this new interpretation does not appear in either Wis. Stat. § 97.24, Wis. Adm. Code § ATCP 60.235, or any of the 2002, 2004, or 2007 Orders.

Randall Schumann, counsel for DFI, sent a letter to the Craigs on June 16, 2009, stating that the now-expired 2005 Order of Exemption would not be re-issued. Schumann stated that the basis of this refusal was that the Store was not in compliance with DATCP's interpretation of what constituted "a bona fide ownership interest in the milk producer."

On June 22, 2009, DATCP issued another letter to the Store that included another interpretation of "bona fide ownership." This interpretation stressed the "incidental" aspect of raw milk sales. The letter stated,

> The taking of raw milk for personal use by an owner is merely incidental to their business of producing milk for the grade A market. Therefore, all owners must be in that business and must have the evidence of ownership of the business of selling milk for grade A pasteurization. This may include, but is not limited to the following. Do they have actual responsibilities and make decisions of an owner? If they are a passive owner, do they receive any type of annual statements of profit/loss and official forms for filing with their tax returns?

On September 30, 2009, the Zinnikers' attorney sent a letter to DATCP asking whether the boarding arrangements they had in place would be legal under Wisconsin law. DATCP's counsel responded on October 1, 2009, stating that such an arrangement would be a "sham arrangement" and that it could result in civil or criminal penalties. The boarding arrangement would not change the underlying reality that the Zinnikers would be operating a "dairy farm" within the meaning of Wis. Stat. § 97.22(1)(a), and must be licensed to do so under Wis. Stat. § 97.22 and ch. ATCP 60.

IV. Procedure

On December 16, 2009, the Grassway Plaintiffs and Farm-to-Consumer Legal Defense Fund filed a summons and complaint against DATCP seeking a declaratory judgment under Wis. Stat. § 806.04.

On February 25, 2010, the Zinniker Plaintiffs filed a summons and complaint against DATCP for a declaratory judgment in Walworth County, Wisconsin. Following a motion for a change of venue, this case was transferred to Dane County on July 19, 2010.

These two cases were consolidated on October 10, 2010. On April 06, 2011, the combined Plaintiffs filed a motion for summary judgment. Defendant filed their response on May 09, 2011, and Plaintiffs filed their reply on May 24, 2011. The motion is now fully briefed and ripe for the court's decision.

ANALYSIS

I. Summary judgment standard of review

Under Wis. Stat. § 802.08(2), the moving party shall be granted judgment as a matter of law where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court can render summary judgment on liability alone, if there is a genuine issue as to damages. *See id.*

The purpose of summary judgment is to avoid the need for a trial when there are no genuine issues of material fact. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 355, 286 N.W.2d 831 (1980). The moving party has the burden of establishing the absence of a genuine issue as to any material fact. *Kremers-Urban Co. v. American Employers Ins.*, 119 Wis. 2d 722, 734, 351 N.W.2d 156 (1984). In reviewing a motion for summary judgment the court examines the evidence in a light most favorable to the non-moving party. *Kraemer Bros. Inc. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

When deciding a motion for summary judgment, the court must first determine whether the pleadings set forth a claim for relief and present material issues of fact. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Next, the court must look to the moving party's affidavits or other proof to determine whether a *prima facie* showing has been made which would entitle that party to judgment as a matter of law. *Id.*

If the moving party has made a *prima facie* case, the court must then examine the opposing party's affidavits and other proof to determine whether a defense has been raised or material factual issues exist which would entitle that party to a trial. *Ricchio v. Oberst*, 76 Wis. 2d 545, 551, 251 N.W.2d 781 (1977). The opposing party may not rely merely on its pleadings

but rather must cite specific facts, supported by admissible evidence, demonstrating a factual issue and entitlement to trial. *Board of Regents v. Mussallem,* 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980). The facts must be sufficient to "be substantial and raise questions of fact," even if such evidence would be insufficient proof at trial. *Buckett v. Jante*, 2009 WI App 55, ¶ 22, 316 Wis. 2d 804, *citing Gouger v. Hardtke, 167 Wis. 2d 504, 520, 482 N.W.2d 84 (1992).*

II. The Defendant's procedural claims

DATCP puts forth two arguments as to why the Plaintiffs are procedurally barred from bringing the present action. First, DATCP argues that decisions made in prior actions prohibit the Plaintiffs from relitigating the issues in this case. Specifically, DATCP contends that the Grassway Plaintiffs are precluded from brining the action herein because they failed to challenge the Agency's denial of its application for a retail food establishment license. DATCP argues that when it denied the Store's application for a retail food establishment license, it determined that the Store was subject to the requirements and restrictions of Wis. Stat. § 97.30. As a result, DATCP argues that Grassway and its Store are precluded from challenging whether the Store is a retail food establishment in this action because that issue was actually determined by DATCP in the context of the Store's application denial.

As to the Zinniker Plaintiffs, DATCP argues that they are bound by the terms of the Consent Judgment and Order issued in Walworth County Circuit Court Case No. 09-CX-11. DATCP contends that the Zinniker Plaintiffs are precluded from raising any issue that was actually determined by the Agency in the context of the Consent Judgment. As a result, DATCP argues that the Zinniker Plaintiffs must also be dismissed as parties to this action.

Issue preclusion bars re-litigation of issues of law or fact that have been actually litigated in a previous action. *Reuter v. Murphy,* 2000 WI App 276, ¶ 7, 240 Wis. 2d 110, 622 N.W.2d

464. The doctrine derives from the assumption that, in fairness to the defendant, there is a point at which litigation involving the particular controversy must end. *Id.* Thus, the doctrine may apply even if the cause of action in the second lawsuit is different from the first. *Dane County v. Dane County Local 65*, 210 Wis. 2d 267, 278, 565 N.W.2d 540 (Ct. App. 1997). The party seeking to use issue preclusion bears the burden of demonstrating that the doctrine should be applied. *Masko v. City of Madison,* 2003 WI App 124, ¶ 4, 265 Wis. 2d 442, 665 N.W.2d 391.

There is a two-step analysis to determine whether issue preclusion bars a plaintiff's claim. *In re Estate of Rille ex rel. Rille*, 2007 WI 36, ¶ 36, 300 Wis. 2d 1, 728 N.W.2d 693. The first step is to determine whether issue preclusion can, as a matter of law, be applied. *Id.* at ¶ 37. This inquiry examines whether the issue in the current proceeding was actually litigated and determined in the prior proceeding and whether the determination was essential to the judgment. *Id.* If issue preclusion can, as a matter of law, be applied, the second step is to determine whether applying the doctrine would be fundamentally fair. *Id.* at ¶¶ 37-38.

Here, issue preclusion does not bar the Grassway Plaintiffs' or the Zinniker Plaintiffs' claims because the issues in the present case were not actually litigated or determined in the prior proceedings. In the case of the Grassway Plaintiffs, their retail food establishment license was denied because the inspector saw an employee selling raw milk, not because the DATCP determined that the Store was a retail food establishment. Furthermore, after the license was denied, the Store changed its position and argued that it was not required to obtain a retail food establishment license. As a result, whether the Store is a retail food establishment and therefore subject to the requirements and restrictions of Wis. Stat. § 97.30 was not actually litigated in the prior proceeding.

In the case of the Zinniker Plaintiffs, none of the issues in the present action were actually litigated in the context of the Consent Judgment. The Consent Judgment specifically states that the "defendant hereby pleads no contest to each of the 24 counts in the civil complaint alleging the sale of raw milk to consumers." (DATCP's Answer and Answer to First Amended Complaint in Case No. 10-CV-302, Ex. B ¶ 5). Inasmuch as issue preclusion requires actual litigation of an issue necessary to the outcome of a prior action, a judgment based on a plea of no contest, which passes directly to disposition and avoids adjudication of any contested issue, does not prevent future litigation of the same issue in a second lawsuit. *In re Paternity of Amber J.F.*, 205 Wis. 2d 510, 517, 557 N.W.2d 84 (Ct. App. 1996). Therefore, issue preclusion does not bar the Zinniker Plaintiffs from brining the claims in the present action because the Consent Judgment was based on a plea of no contest.

Second, DATCP argues that because issue preclusion bars the Plaintiffs from bringing the present claims the only party remaining is FTCLDF and FTCLDF lacks standing in its own right to maintain the action. However, the court has already concluded that neither the Grassway Plaintiffs nor the Zinniker Plaintiffs are precluded from bringing the present claims. Thus, both the Grassway Plaintiffs and the Zinniker Plaintiffs are to remain as parties to this action which therefore makes DATCP's argument that FTCLDF lacks standing in its own right moot.

III. The Plaintiffs' claims for summary judgment

A. Whether Plaintiffs' actions violate the terms of Wis. Stat. § 97.24(2)

Plaintiffs seeks a declaration stating that they have not violated Wis. Stat. § 97.24(2).[1] Plaintiffs contend that Wis. Stat. § 97.24(2)(d)(2) is ambiguous as to what constitutes an

[1] Plaintiffs documents are not entirely clear as to whether they are challenging DATCP's interpretation of Wis. Stat. § 97.24, or whether they are challenging DATCP's interpretation of Wis. Adm. Code § ATCP 60.235. In their complaint, Plaintiffs state that they are seeking a declaration that they have not violated Wis. Stat. § 97.24 or any regulation promulgated there under. (Compl. 09-CV-6313, ¶ 14; Am. Compl. 10-CV-3884, ¶¶ 18-20). This

"incidental sale." Plaintiffs also contend that DATCP's past interpretations of Wis. Stat. § 97.24(2) should be given no deference because the issue is one of first impression and because they allege that the Agency has inconsistently interpreted and applied the statute.

i. Whether Wis. Stat. § 97.24(2) is ambiguous

"The ultimate goal of statutory interpretation is to ascertain the intent of the legislature." *UFE Inc. v. Labor & Indus. Review Comm'n*, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996). The first step of ascertaining the legislature's intent is to look at the statute itself. *Id.* If the plain meaning is clear, the court does not look to rules of statutory construction or other extrinsic aids, but instead applies the clear meaning of the statute to the facts of the case. *S.C. Johnson & Son, Inc. v. Wisconsin Dept. of Revenue*, 202 Wis. 2d 714, 721, 552 N.W.2d 102 (Ct. App. 1996). However, "a statutory provision is ambiguous if reasonable minds could differ as to its meaning." *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995).

Plaintiffs argue that Wis. Stat. § 97.24(2)(d)(2) is ambiguous as to what constitutes an "incidental sale." In general, Wis. Stat. § 97.24(2) prohibits the sale of unpasteurized milk and states that:

> **(2) Requirements for milk and fluid milk products; grade A requirement.** (a) No person may sell or distribute any milk unless that milk is produced, processed and distributed in compliance with standards established by the department by rule under this chapter.
>
> (b) No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to consumers, or to any restaurant, institution or retailer for consumption or resale to consumers. Grade A milk and grade A milk products shall be effectively pasteurized, and shall be produced,

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statement implies that Plaintiffs are challenging DATCP's interpretation of both Wis. Stat. § 97.24 and Wis. Adm. Code § ATCP 60.235. However, in their reply brief Plaintiffs state that DATCP's interpretation of Wis. Adm. Code § ATCP 60.235 is not an issue in this case. (Pls.' Reply Br. 7). As a result, the court construes Plaintiffs claim as only challenging DATCP's interpretation of Wis. Stat. § 97.24.

> processed and distributed in compliance with standards established by the department by rule under this chapter.
>
> (c) No person may sell or distribute milk or fluid milk products which are labeled or otherwise represented as grade A milk or grade A milk products unless the milk and fluid milk products comply with this chapter and with standards established by the department by rule under this chapter.

The exception to the general rule that is relevant to the present case is that the statute permits "[i]ncidental sales of [unpasteurized] milk directly to consumers at the dairy farm where the milk is produced." Wis. Stat. § 97.24(2)(d)(2).

While the statute does not define what constitutes an "incidental sale," the common and approved usage of the word "incidental" may be established by consulting dictionary definitions. *State v. Sample*, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998). A review of the dictionary definitions for "incidental" shows that the word has a variety of different meanings. For example, "incidental" can be defined as "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." *Black's Law Dictionary,* 905 (Revised 4th Ed. 1968). In contrast, the word can also be defined as "occurring or likely to occur as an unpredictable or minor accompaniment." *The American Heritage College Dictionary,* 687 (3rd Ed. 1997). Because either definition could reasonably work within the context of Wis. Stat. § 97.24(2)(d)(2), the statute's ability to support different constructions creates an ambiguity that cannot be resolved through the language of the statute itself. Therefore, the court must turn to extrinsic sources and rules of statutory construction in order to determine the intent of the legislature in enacting Wis. Stat. § 97.24. *See UFE Inc.*, 201 Wis. 2d 274 at 283.

ii. The DATCP's interpretation of Wis. Stat. § 97.24(2)

One such extrinsic source that can be used to determine the intent of the legislature "is the interpretation of the agency charged with enforcing the statute." *Id.* Agency statutory interpretations are entitled to one of three levels of deference: "great weight," "due weight," or no deference. *See Zignego Co. v. DOR*, 211 Wis. 2d 819, 823-24, 565 N.W.2d 590 (Ct. App. 1997). The court accords an agency's statutory interpretation great weight deference when each of the following requirements are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals,* 2006 WI 86, ¶ 16, 292 Wis. 2d 549, 717 N.W.2d 184. The court gives an agency's statutory interpretation "due weight deference when the agency has some experience in an area but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute." *Id.* at ¶ 18. The court gives an agency's statutory interpretation no deference when any of the following conditions are met: (1) the issue is one of first impression; (2) the agency has no experience or expertise in deciding the legal issue presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance. *Id.* at ¶ 19.

Plaintiffs contend that DATCP's past interpretations of Wis. Stat. § 97.24(2) should be given no deference because the issue is one of first impression and because they allege that the Agency has inconsistently interpreted and applied the statute. Plaintiffs allege that the following documents show that the DATCP has inconsistently interpreted and applied Wis. Stat. §

97.24(2): DATCP's 2002 Order (Craig Aff. Ex. B); DATCP's 2004 Order (*Id.* Ex. C); DATCP's 2007 warning letter (*Id.* Ex. F); a 2009 Conditional License Agreement (*Id.* Exs. I, J); DATCP's May 2009 reply letter (*Id.* Ex. L); DATCP's June 2009 inspection notice (*Id.* Ex. O); DATCP's June 2009 (*Id.* Ex. P); and DATCP's July 2009 inspection notice (*Id.* Ex. R). (Grassway Supp. Br. 11-13).

Despite the Plaintiffs' contentions, the DATCP's interpretation of the statute is entitled to great weight because it meets the four requirements for the highest level of deference. The interpretation meets the first requirement for great weight deference because the DATCP is the Agency charged by the legislature with the duty of administering the statute and the entire regulatory scheme involving milk production, handling, delivery, processing, and sales. *See* Wis. Stat. § 97.24(3).[2]

Most importantly, however, is that the second requirement for great weigh deference is met because DATCP's interpretation of Wis. Stat. § 97.24(2) is one of long standing. A review of the nine documents Plaintiffs point to as proof that the DATCP has inconsistently interpreted the statute show, in fact, that the Agency's construction of Wis. Stat. § 97.24(2) has remained consistent. First, Plaintiffs point to the DATCP's 2002 Order in which the Agency first interpreted the "incidental sales" exception in Wis. Stat. § 97.24(2)(d)(2). (Craig Aff. Ex. B). According to the Order, incidental sales do not include "sales which are regularly made in the course of business or are preceded by any advertising." (*Id.* at p. 1, ¶ 1). Instead, incidental sales include "any sales to employees [of the entity who owns the milk producers license] or persons shipping milk to the dairy plant." (*Id.*). A "person shipping milk" includes "the

[2] Wis. Stat. § 97.24(3) states that "[t]he department, in consultation with the department of health services, shall issue rules governing the production, transportation, processing, pasteurization, handling, identity, sampling, examination, labeling and sale of milk and fluid milk products; the inspection of dairy herds, dairy farms and dairy plants; the issuing and revocation of permits to milk producers and milk haulers, and of licenses to dairy plants and milk distributors."

underlying owners, if the entity holding the milk producer license is a partnership, association, corporation, firm or any other legal business entity." (*Id.* at p. 13, ¶ 7).

Furthermore, according to the 2002 Order, the statue "clearly allows *owners* of the entity holding the milk producer license to obtain ungraded raw milk for their personal use." (*Id.* at p. 13, ¶ 9; emphasis in original). Milk producer licensees "are free to devise valid agreements sharing ownership in their milk producer license under applicable law that may include allowing actual owners to take a share of the ungraded raw milk produced under the license." (*Id.* at p. 2, ¶ 4). Specifically, if a holder of a milk producer license makes "a legitimate agreement to share [the] responsibilities [of owning a milk producer license]" and if "the potential purchaser understands the benefits and risks through full disclosure... then all are in a position to make the informed choice to obtain their milk in its ungraded raw form." (*Id.* at pp. 13-14, ¶ 9). Therefore, the DATCP's interpretation of Wis. Stat. § 97.24(2) clearly found that a valid agreement sharing ownership in a milk producer license may allow actual owners to take a share of the raw milk because "the [DATCP] recognizes an exception for those persons willing to take on the responsibilities of owning a milk producer license." (*Id.* at p. 13, ¶ 9).

Second, Plaintiffs cite to the DATCP's 2004 Order in which the Agency again interpreted Wis. Stat. § 97.24(2). (Craig Aff. Ex. C). However, the DATCP's interpretation of Wis. Stat. § 97.24(2) in the 2004 Order is consistent with the interpretation of the statute in the 2002 Order. For example, consistent with the 2002 Order's finding that owners can obtain raw milk for their personal use, the 2004 Order also states that owners can receive unpasteurized milk for their personal use because the incidental sales exception "does not apply to the owners of the milk producer license on that dairy farm." (*Id.* at p. 12, ¶ 8). Consistent with the 2002 Order's finding that a milk producer license holder may contract to share the responsibilities of owning a

milk producer license, the 2004 Order states that "the use of the phrase 'valid agreement sharing ownership in their milk producer license' means that the all [sic] owners must share, in some manner, the rights and *responsibilities of having a milk producer license*." (*Id.* at p. 11, ¶ 2; emphasis added). The 2004 Order further elaborates that the rights and responsibilities of having a milk producer license must be consistent with the purpose of having such a license, which is to produce "milk, from cow, sheep or goats, which will be sold or distributed into the pubic, human food chain." (*Id.*). Because the purpose of a milk producer license is to produce milk for the public, human food chain, "the license (and therefore, any ownership interest) may not be used solely for the purpose of allowing purchase of non-pasteurized milk and/or milk products." (*Id.*).

Third, Plaintiffs point to a Warning Letter issued by DATCP in 2007 to argue that the Agency has inconsistently interpreted Wis. Stat. § 97.24(2). (Craig Aff. Ex. F). However, the Warning Letter is consistent with the findings in the 2002 and 2004 Orders because all three documents state that owners in a valid agreement sharing ownership in a milk producer license may receive distributions of raw milk. (*Id.*) While the Warning Letter also states that "raw milk distributions to owners cannot occur in a retail food store licensed by this Department," this finding is not an inconsistent interpretation of Wis. Stat. § 97.24(2) because the statement construes the licensing requirements for retail food establishments under Wis. Stat. § 97.30(2), Chapter ATCP 75, and ATCP 75 Appendix. (*Id.*).

Plaintiffs cite to six additional documents to argue that the DATCP has inconsistently interpreted Wis. Stat. § 97.24(2). However, each of the six additional documents was written after the DATCP promulgated Wis. Adm. Code § ATCP 60.235 and each indistinguishably interpret both the administrative provision and the statute. Because it is unclear what parts of each document construe the statute and what parts construe the administrative provision, they

cannot be cited to as evidence that the DATCP has inconsistently interpreted Wis. Stat. § 97.24(2). As a result, the DATCP's interpretation of Wis. Stat. § 97.24(2) meets the second requirement for great weight deference because the Agency's interpretation is one of long standing.

The DATCP's interpretation of the statute also meets the third and fourth requirements for great weight deference. The interpretation meets the third requirement because the DATCP utilized the Agency's staff expertise and knowledge of the federal government standards, milk production practices, and public health concerns involving milk safety issues and handling milk on the farm in formulating the interpretation. Finally, the fourth requirement is met because DATCP's interpretation provides for uniformity and consistency in the application of the statute, which "is essential for the protection of consumers and the economic well-being of the dairy industry, and is therefore a matter of statewide concern." Wis. Stat. § 97.24(4).

Because the DATCP's interpretation of Wis. Stat. § 97.24(2) meets the four requirements for great weight deference, the court will uphold the Agency's reasonable interpretation if it is not contrary to the clear meaning of the statute, even if an alternative interpretation is more reasonable. *See UFE Inc.*, 201 Wis. 2d 274 at 287. An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis. *Racine Harley-Davidson, Inc.*, 2006 WI 86 at ¶ 18. If the statute is ambiguous, an agency's interpretation cannot, by definition, be found to directly contravene it. *Harnischfeger Corp.*, 196 Wis. 2d 650 at 662.

Plaintiffs argue that the DATCP's interpretation of Wis. Stat. § 97.24(2) is unreasonable because it fails under a strict scrutiny analysis and is unconstitutional as applied to them.

Plaintiffs argue that they have a fundamental right to possess, use and enjoy their property and therefore have a fundamental right to own a cow, or a heard of cows, and to use their cow(s) in a manner that does not cause harm to third parties. They argue that they have a fundamental right to privacy to consume the food of their choice for themselves and their families and therefore have a fundamental right to consume unpasteurized milk from their cows. Plaintiffs contend that they have a fundamental right to contract to board their cows with a farmer. Finally, Plaintiffs argue that they have a fundamental right to associate in order to promote and support their beliefs, which includes consuming unpasteurized milk. Plaintiffs argue because DATCP's interpretation of Wis. Stat. § 97.24(2) violates the above-mentioned fundamental rights it must be subject to strict scrutiny in order to be reasonable. Plaintiffs contend that the DATCP's interpretation of Wis. Stat. § 97.24(2) is not reasonable because it does not pass the strict scrutiny test.

Where application of a statutory classification adversely affects or interferes with a fundamental or inherent constitutional right, the as-applied classification is subject to strict scrutiny and the normal presumption of constitutionality will not apply. *See In re Reitz*, 53 Wis. 2d 87, 93, 191 N.W.2d 913 (1971). Strict scrutiny means that legislative infringements on liberty interests must be narrowly tailed to serve a compelling state interest. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

Plaintiffs' arguments are wholly without merit. The DATCP's interpretation of Wis. Stat. § 97.24(2) does not affect or interfere with a fundamental right and therefore is not subject to strict scrutiny. While the Plaintiffs have recited a plethora of cases involving a variety of constitutional rights, no case cited stands for the propositions that the Plaintiffs have asserted herein. Arguments unsupported by references to legal authority will not be considered. *Post v.*

Schwall, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). Plaintiffs' arguments are nothing more than an attempt to misconstrue the issues in this case. They do not simply own a cow that they board at a farm. Instead, Plaintiffs operate a dairy farm. If Plaintiffs want to continue to operate their dairy farm then they must do so in a way that complies with the laws of Wisconsin.

Because the DATCP's interpretation of Wis. Stat. § 97.24(2) does not involve a fundamental right, it is not subject to strict scrutiny but instead is analyzed under rational basis review. Specifically, in the absence of a fundamental right, the "appropriate analysis is whether the legislative classification rationally furthers a purpose identified by the legislature. *State v. Annala*, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992). Moreover, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 209 (1993).

It is clear from the circumstances giving rise to the actions brought against Zinniker Farm, Inc. that resulted in the Consent Judgment and Order that there is a rational basis for the legislature's prohibition against the sale and/or distribution of unpasteurized milk and the DATCP's interpretation of Wis. Stat. § 97.24(2). The sale and/or distribution and consumption of unpasteurized milk can result (and in the case of the Consent Judgment and Order did result) in serious illness:

FINDINGS OF FACT

> 1. Since August 13, 2009, 35 individuals from 24 households, from the Walworth, Waukesha and Racine Counties area received treatment and medical care from local health providers such as clinics and hospitals. Individuals were diagnosed with Campylobachter jejuni infection that was confirmed by laboratory tests. All 35 of those patients indicated that they recently consumed unpasteurized raw milk. 30 of these individuals identified Respondent's dairy farm [Zinniker Farm, Inc.] as the source of the unpasteurized raw milk they consumed.

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CONCLUSIONS OF LAW

1. Campylobacteriosis is an infectious disease caused by bacteria of the genus Campylobachter.

2. Campylobachter infections were confirmed by laboratory tests in 35 persons who sought treatment for diarrheal illness from medical providers in the Walworth, Racine, and Waukesha Counties area. All 35 persons indicated to their health care providers that they recently consumed unpasteurized raw milk. Of those 35, 30 patients specifically named Respondent's dairy farm as the source of their unpasteurized raw milk.

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6. Consumption of unpasteurized raw milk is dangerous to health. No milk or milk fluid products may be sold or distributed under Wis. Stat. § 97.24(2)(b), unless the milk is grade A and is pasteurized.

7. The sale or distribution of unpasteurized raw milk creates and imminent health hazard. The public health value of pasteurization is a significant factor in the prevention of disease which may be transmitted through consumption of raw milk. Pasteurization and processing milk in a licensed dairy plant substantially reduces the risk to public health.

(DATCP's Answer to First Amended Complaint in Walworth County Circuit Court Case No. 10-CV-302 Ex. A). In addition to the finding in the Consent Judgment and Order, the legislature has also clearly articulated that the regulation of milk is a matter of statewide concern:

> Regulation of the production, processing and distribution of milk and fluid milk products under minimum sanitary requirements which are uniform throughout this state and the United States is essential for the protection of consumers and the economic well-being of the dairy industry, and is therefore a matter of statewide concern.

Wis. Stat. § 97.24(4)(a). As a result, the DATCP's interpretation of Wis. Stat. § 97.24(2) passes rational basis review and is therefore reasonable and will not be reversed by this court.

iii. Plaintiffs are in violation of Wis. Stat. § 97.24(2)

Based on the DATCP's interpretation of the statute, Plaintiffs are not entitled to a declaration stating that they have not violated Wis. Stat. § 97.24. As to the Grassway Plaintiffs, the members do not share the rights and responsibilities of owning the milk producer license because the license is not used for its proper purpose of producing milk from cow, sheep or goats, which will be sold or distributed into the pubic, human food chain. In fact, none of the milk that is produced under the license is sold or distributed into the public because all "of the milk produced by the Store's herd goes only to members of the Association and their respective families." (Grassway Supp. Br. 4). Thus, the Grassway Plaintiffs use their milk producer license solely for the purpose of allowing the Association members to purchase non-pasteurized milk. This set-up is a clearly in violation of Wis. Stat. § 97.24(2). Therefore, the Grassway Plaintiffs are not entitled to a declaration stating that they have not violated the statute.

Similarly, the Zinniker Plaintiffs are also not entitled to a declaration stating that they have not violated Wis. Stat. § 97.24. Neither the Zinnikers, Burns, the LLC, Karp, nor Loiselle possess a milk producer license from the DATCP. The Farm was licensed as a milk producer, however, the license was automatically voided on October 18, 2009, for not having a dairy plant where it had a contract to ship milk. Because they do not own a milk producer license, any contract between the Zinniker Plaintiffs does not share the rights and responsibilities of owning a milk producer license. This is a clear violation of the DATCP's interpretation of Wis. Stat. § 97.24(2). Therefore, the Zinniker Plaintiffs are not entitled to a declaration stating that they have not violated the statute.

B. Whether the Grassway Plaintiffs must have a retail food establishment license

The Grassway Plaintiffs seek a declaratory judgment stating that no retail food establishment license is required for the Store. They argue that the Store is not open to the public and that only members of the Association are permitted to purchase items. The Grassway Plaintiffs contend that the members of the Association are not "consumers" within the meaning of Wis. Stat. § 97.24 or the Wisconsin Food Code, App. to ATCP Ch. 75 1-201.10(b)(16) because they are not "member[s] of the public." Instead, the Grassway Plaintiffs contend that they are parties to a private contract and are exercising ownership rights conferred by that contract. Therefore, the Grassway Plaintiffs argue that they are not required to obtain a retail food establishment license.

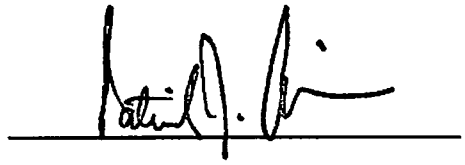
Despite the Grassway Plaintiffs contentions, they are not entitled to a declaratory judgment stating that no retail food establishment license is required for the Store. While they may be parties to a private contract, the court has already concluded that that contract does not meet the requirements of Wis. Stat. § 97.24. Because the contract does not meet the statute's requirements, it is not a valid agreement sharing ownership in the milk producer license. Thus, the Association members are not valid owners of the milk producer license and therefore any sales to such members at the Store would qualify as sales to members of the public. Therefore, the Grassway Plaintiffs are not entitled to a declaratory judgment stating that the Store does not require a retail food establishment license because it is clearly selling unpasteurized milk to consumers as the term is used in Wis. Stat. § 97.24 and defined in the Wisconsin Food Code, App. to ATCP Ch. 75 1-201.10(b)(16).

CONCLUSION AND ORDER

For the reasons stated above, the plaintiff's motion for summary judgment is **DENIED**. This is a final order for purposes of appeal.

Dated: This 12th day of August, 2011.

By the Court:



Judge Patrick J. Fiedler
Circuit Court Judge – Branch 8

cc: Atty. David G. Cox and Atty. Elizabeth Gamsky Rich *(attorneys for Plaintiffs)*

Assistant Attorney General Robert M. Hunter *(attorney for Defendant DATCP)*