STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS

In the Matter of Considering the Issuance of an Order to:

Meadowsweet Dairy, LLC
Barbara and Stephen Smith
Respondents

RESPONDENTS' MOTION TO STAY HEARING AND MEMORANDUM IN SUPPORT

Respondents move the Hearing Officer for a stay of this matter until the Seneca County Supreme Court hears the matters raised in the case of *Meadowsweet Dairy, LLC, et al. v. Hooker, et al*., Index No. 40558. A memorandum in support is attached hereto and incorporated as if rewritten herein.

Respectfully submitted,

LANE, ALTON & HORST, LLC

David G. Cox (OH Sup. Ct. No. 0042724)
Two Miranova Place, Suite 500
Columbus, OH 43215-7052
Phone: 614-228-6885
Fax: 614-228-0146
dcox@lanealton.com
Counsel for Respondents

MEMORANDUM IN SUPPORT

Background

The Department issued an administrative complaint in this matter on December 13, 2007 and, without even consulting Respondents, scheduled the matter for a hearing on January 17 and 18, 2008. However, Respondents also filed on December 13, 2007, a complaint in declaratory judgment in the Seneca County Supreme Court, captioned *Meadowsweet Dairy, LLC, et al. v. Hooker, et al*., Index No. 40558. See Attachment A. In addition, Respondents filed for a preliminary injunction in that case and the matter is set for a preliminary injunction hearing on January 22, 2008. See Attachment B. Because the matters raised in Seneca County are pending, this matter needs to be stayed.

A stay in this case is all the more important because both the administrative complaint and Respondents' complaint in declaratory judgment address the same issues. For example, Respondents in their declaratory judgment action request the Court to issue a declaration that they are not subject to regulation under 1 NYCRR Section 2.3(b), which requires a permit to sell raw milk to the consuming public. The Department, however, alleges at paragraph (i) of their administrative complaint that Respondents are illegally making products because Respondents do not have a permit issued under Section 2.3(b).

In addition, Respondents in their declaratory judgment action request the Court to issue a declaration that they do not sell, offer for sale or otherwise make available raw milk and raw milk products to the consuming public. The Department, however,

alleges at paragraph (ii) of its administrative complaint that Respondents have "sold, offered for sale and made available raw milk."

Moreover, Respondents in their declaratory judgment action request the Court to issue a declaration that the raw milk and raw milk products produced, handled and managed by them can not be adulterated or misbranded as prohibited by NY CLS Agr & M Section 199-a.1. The Department, however, cites to and alleges at paragraphs (iii), (iv) and (v) of its administrative complaint that Respondents have violated Section 199-a(1).

Finally, Respondents in their declaratory judgment action request the Court to issue a declaration that they do not sell, offer for sale or otherwise make available raw dairy products to the consuming public. The Department, however, alleges at paragraphs (ii) through and including (v) of its administrative complaint that Respondents have engaged in exactly this type of behavior.

It is clear that the parties to these two actions are the same, the issues are the same, the legal arguments are the same, and the evidence to be used to prove each party's claims will be the same. Therefore, the *status quo* should be maintained until these issues are resolved by the Seneca County Supreme Court.

Argument

Courts have long recognized that it has inherent authority to maintain the *status quo* until matters raised in its court have been determined, whether those matters are raised by declaratory judgment or otherwise. "A court has incidental powers to effectuate its jurisdiction. In any event, a court has power to protect its jurisdiction and to prevent devices which will have the purpose alone of frustrating a final

determination." *Ohrbach v. Kirkeby*, 3 A.D.2d 269, 272 (N.Y. App. Div. 1957). 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 matter, a stay is needed to maintain the *status quo* until the Seneca County Court rules on the claims raised in Respondents' complaint for declaratory judgment. For instance, the Court in Seneca County may find in favor of Respondents and rule that Respondents are not regulated by the State. If that is the case then this entire administrative matter will be rendered moot. Conversely, if this matter proceeds before the Seneca County Court has a chance to hear the matter, the Hearing Officer may find that Respondents should be Ordered to cease all conduct and pay administrative fines, only to have that conclusion contradicted by the Seneca County Court. Consequently, if the administrative hearing goes forward as scheduled it runs the risk of reaching conclusions of law and making findings that are inconsistent with the conclusions and findings issued by the Seneca County Court, thereby rendering ineffective any possible outcome in Seneca County. See *Tucker v. Toia*, 54 A.D.2d 322, 326 (N.Y. App. Div. 1976) ("This is precisely the situation in which a preliminary

injunction should be granted to hold the parties in *status quo* while the legal issues are determined in a deliberate and judicious manner.")

To promote economy and efficiency, therefore, and to avoid inconsistent rulings and hardship to the parties, especially to the Respondents, this administrative matter should be stayed pending the outcome of the matter in Seneca County.

Respectfully submitted,

LANE, ALTON & HORST LLC

David G. Cox (OH Sup. Ct. No. 0042724)
Two Miranova Place, Suite 500
Columbus, OH 43215-7052
Phone: 614-228-6885
Fax: 614-228-0146
dcox@lanealton.com
Trial Attorneys of Record for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic and regular U.S. mail, postage prepaid, on January 2, 2008 to the following:

Larry Swartz
Associate Attorney
Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235
Counsel for the Department

David G. Cox (OH Sup. Ct. No. 0042724)