

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

In the Matter of Access to and Inspection of the Premises of: : **Index No. 9865-07**
:
:
Steven and Barbara Smith : **ATTORNEY AFFIRMATION IN**
d/b/a Meadowsweet Yogurt : **SUPPORT OF RESPONDENTS'**
Meadowsweet Dairy, LLC : **MOTION TO QUASH WARRANT**
2054 Smith Road :
Lodi, New York 14860 : **Assigned Judge:**
Meadowsweet Dairy, LLC : **Hon. John C. Egan, Jr.**

STATE OF OHIO :
COUNTY OF FRANKLIN :

I, David G. Cox, being duly sworn, hereby state the following to the best of my personal knowledge, belief and understanding:

1. I am an attorney representing Respondents in this matter, Steven and Barbara Smith and Meadowsweet Dairy, LLC and was admitted *pro hoc vice* by the Supreme Court of Seneca County to provide such representation.
2. I submit this affirmation in support of Respondents' Memorandum of Law in Support of Respondents' Motion to Quash Warrant or, alternatively, for a *Franks/Alfinito* hearing.
3. Respondents are Meadowsweet Dairy LLC (hereinafter "the Dairy LLC"), and Steven and Barbara Smith (hereinafter "the Smiths").
4. On December 14, 2007, this Court issued an administrative search warrant to the Department of Agriculture and Markets (the "Department") authorizing a search and seizure of Respondents and the dairy products they produce.
5. The search warrant issued by this Court states that the Department is "authorized to enter the premises on a continuing basis."

6. Because the warrant can be executed *ad infinitum* into the future, it violates the constitutional protections afforded by the Fourth Amendment to the United States Constitution and by the New York Constitution at Article 1 Section 12.

7. Because the warrant can be executed *ad infinitum* into the future, it also violates NY CLS CPL § 690.30(1), which provides that “A search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court without unnecessary delay.”

8. In addition, the warrant not only authorizes the Department to enter Respondents’ premises “on a continuing basis,” it also states that such authority to enter on a continuing basis can be exercised “only when the Department has probable cause to believe” that a violation of law is occurring.

9. This blanket authorization allowing the Department to determine what constitutes probable cause is a clear violation of the constitutional protections afforded by the Fourth Amendment to the United States Constitution and by the New York Constitution at Article 1 Section 12, which mandate that a neutral Court must determine whether probable cause exists.

10. The warrant also constitutes a violation of the separation of powers doctrine because it transfers a judicial function to an executive agency.

11. Moreover, the warrant issued in this case does not specify the time of day during which it can be executed, in violation of NY CLS CPL § 690.30(2) which provides, in part, that a search warrant “may be executed only between the hours of 6:00 A.M. and 9:00 P.M., unless the warrant expressly authorizes execution thereof at any time of the day or night.”

12. In addition, the parties to this action are also involved in two other related and pending actions. All three of these actions involve the same parties, the same witnesses, the same legal issues and the same evidence in support.

13. In one of those other related proceedings, an administrative hearing conducted before a Hearing Officer on January 17 and 18, 2008, the Department's employee William Francis and Respondent Barbara Smith testified that there is no evidence that Respondents are a "milk plant" or a "dairy farm" where Respondents are "selling, offering for sale or otherwise making available" to "consumers" any "raw milk."

14. Each of these terms is a term of art that is defined in the applicable regulations of the Department. Based on the hearing testimony of Department employee William Francis and Respondent Barbara Smith, Respondents are not subject to New York's Agriculture and Markets Law ("A&ML").

15. Because the testimony presented at the administrative hearing conducted in January 2008 demonstrated that Respondents are not subject to the A&ML, it is necessary for this Court to conduct an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), *People v. Alfinito*, 16 N.Y.2d 181 (1965) to determine whether, as a matter of law, probable cause existed to issue the warrant in the first place.

FURTHER AFFIANT SAYETH NAUGHT

David G. Cox

Sworn and subscribed before me this 19th day of February, 2008.

Notary public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic and regular U.S. mail, postage prepaid, on February 19, 2008 to the following:

Larry Swartz, Esq.
Associate Attorney
Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235

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