STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), *People v. Alfinito*, 16 NY2d 181 (1965), and CPLR 2211 and 2212, Respondents move the Court to quash the search warrant issued in this matter on December 14, 2007 or, alternatively, for a *Franks/Alfinito* hearing to determine whether administrative probable cause existed in the first place. A memorandum in support is attached hereto and incorporated as if rewritten herein.

Respectfully submitted,

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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:

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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**
	:	**RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION TO QUASH WARRANT OR, ALTERNATIVELY, FOR *FRANKS/ALFINITO* HEARING**
Steven and Barbara Smith d/b/a Meadowsweet Yogurt Meadowsweet Dairy, LLC 2054 Smith Road Lodi, New York 14860 Meadowsweet Dairy, LLC	**:**	**Assigned Judge: Hon. John C. Egan, Jr.**

I. Introduction.

The search warrant obtained by the Department of Agriculture and Markets ("the Department") is facially defective for two reasons and must be quashed. First, the warrant is "continuing" in nature and delegates the determination of "probable cause" from this Court to the Department, in violation of the Fourth Amendment to the United States Constitution; NY Const. Art. 1, Sec. 12; NY CLS CPL § 690.30(1); and of the concept of separation of powers. Second, the warrant does not limit its execution to between the hours of 6:00 a.m. and 9:00 p.m. and thus is in violation of NY CLS CPL § 690.30(2). For these reasons the warrant should be quashed.

In the alternative, if the Court does not deem it necessary to quash the warrant then Respondents request that this Court convene and schedule a *Franks/Alfinito* hearing to determine whether administrative probable cause even existed to issue the warrant in the first place.

II. The warrant illegally allows entrance upon a "continuing basis" and also delegates the determination of probable cause to an administrative agency.

NY CLS Agr & M § 20-a provides, in part, that the Commissioner of the Department, or any person so authorized by him, may apply to a Court for the issuance of an administrative search warrant. The warrant "shall be issued by any court to which application is made" whenever the Commissioner or a person authorized by him "has reasonable grounds for believing" that a person is violating "any of the provisions of the agriculture and markets law." However, if a warrant is issued, the warrant provisions of Article 690 of the Criminal Procedure Law "shall apply to such warrant as far as applicable thereto." See also: *In re City of Rochester*, 4 Misc. 3d 310, 318 (2003) ("Like its criminal counterpart, an administrative search warrant necessarily incorporates the warrant execution requirements of Criminal Procedure Law * * *.").

NY CLS CPL § 690.30(1) 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." The failure to execute the warrant within the 10 day statutory period "may not be excused as a mere ministerial or clerical aspect of search warrant proceedings." *People v. Ampro De Jesus*, 125 Misc. 2d 963, 964 (1984). Thus, once a warrant is issued it must be executed within 10 days. A warrant cannot be issued one day and then be executed over and over again *ad infinitum* into the future.

The policy reason that search warrants must be executed within 10 days of their issuance is that the probable cause necessary for execution of the warrant must be "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v United States*, 287 U.S. 206, 210 (1932). See also: *United States v. Grubbs*, 547 U.S. 90, 96 (2006) (Search warrants "require the magistrate to

determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed.") (Emphasis in original); *People v. Edwards*, 69 N.Y.2d 814, 816 (1987). Thus, the probable cause that exists at the time the warrant is issued must also be present at the time the warrant is executed.

In this case, the warrant issued by this Court states that the Department is "authorized to enter the premises on a continuing basis."[1] In essence, there is no end to when the Department may stop searching the Respondents, no matter how long ago it has been since the warrant was issued. Conceivably, the warrant that was issued in December 2007 could still be executed in December 2017, ten years later. A blanket warrant with no expiration date is not only in violation of the express provisions of NY CLS CPL § 690.30(1), it also violates the Fourth Amendment's requirement that the probable cause which existed at the time the warrant was issued must be "closely related to" the probable cause that exists at the time of its execution. The warrant in this case, however, violates this fundamental tenet and should be quashed.

Not only does the warrant violate the "closely related to" constitutional and statutory requirements, it also improperly delegates to the Department the determination of whether administrative probable cause exists in the first place. It is fundamental that probable cause is to be determined by a neutral Court, not by the individual seeking the warrant. See, e.g.: *Johnson v. United States*, 333 U.S. 10, 14 (1948) (The point at which "the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.");

[1] The warrant was issued on December 14, 2007 and it was executed on at least two separate occasions, December 19, 2007 and December 28, 2007.

Mitchell v. United States, 258 F2d 435, 437 (D.C. Cir. 1958) (A search warrant must be "based upon a judicial determination of the *present existence* of justifying grounds, i.e., at the time of issuance of the warrant." (Emphasis in original); *People v. Bilsky*, 95 N.Y.2d 172, 176 (2000) ("Notably, warrant requirements of the State and Federal Constitutions [NY Const, art I, § 12; US Const 4th Amend] are designed to place such matters before the detached and independent judgment of a neutral Magistrate."). Thus, probable cause must be determined by the judiciary, not the executive.

In this case, 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. 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.

In addition, because the warrant improperly delegates the determination of probable cause to an administrative agency or office, it also constitutes a violation of the separation of powers doctrine because it transfers a judicial function to an executive agency.

Consequently, the warrant should be quashed.

III. The warrant does not limit its execution to the hours of between 6:00 a.m. and 9:00 p.m.

NY CLS CPL § 690.30(2) 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." A warrant that

does not specify the times during which it may be executed is unconstitutionally overbroad and any evidence gathered or obtained under it will be suppressed. See: *People v. Brown*, 96 N.Y.2d 80, 85 (2001) ("It is now settled law that when a search warrant is partially but not wholly invalid, only the fruits of the invalid portion need be suppressed."). See also: *In re City of Rochester*, 4 Misc. 3d 310, 318 (2003) ("The warrant submitted for the court's signature omits this required provision [of CPL Section 690.30].").

In this case, the warrant does not specify any time during which it may be executed, day or night. In addition, it does not contain any language that authorizes its execution beyond the hours of 6:00 a.m. to 9:00 p.m. Indeed, the warrant is silent on the times during which it can be executed. Thus, the warrant is invalid because it omits the required language of when it can be executed.

Consequently, the warrant should be quashed.

IV. If the Court declines to quash the warrant it should conduct a *Franks/Alfinito* hearing to determine whether probable cause existed at the time the warrant was issued.

The cases of *Franks v. Delaware*, 438 U.S. 154 (1978) and *People v. Alfinito*, 16 N.Y.2d 181 (1965) essentially hold that when a party challenges the propriety of the issuance of a search warrant, they are entitled to an evidentiary hearing. In *Franks*, the United States Supreme Court stated as follows: "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Franks v. Delaware*, 438 U.S. at 171. In *Alfinito*, the Court of Appeals of

New York stated as follows: "We hold as follows: first, that [former Article 690] of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (citations omitted), and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant * * *." *Alfinito*, 16 N.Y.2d at 186. In this case, Respondents allege that based on the facts of the case, they are not even subject to New York's Agriculture and Market Laws (A&ML) and thus probable cause cannot, as a matter of law, form the basis of an administrative search warrant.

The parties to this action are involved in at least two other proceedings that involve the same legal issues, witnesses and evidence that is presented in this case.[2] The first proceeding is a declaratory judgment action that was commenced in Seneca County Supreme Court but which may be converted to an Article 78 proceeding and transferred to Albany County Supreme Court. In that declaratory judgment action, Respondents are seeking various legal declarations that they are not subject to the A&ML. If those declarations are issued, then the Department would not have probable cause for an administrative warrant to issue. Consequently, it is necessary for this Court to conduct a hearing on the issue of whether Respondents are even subject to New York's A&ML before it can lawfully issue any search warrant in this case. The only way this determination can be made is through an evidentiary hearing.

The other proceeding that involves these same two parties is an administrative proceeding that has already been heard (on January 17 and 18, 2008) and which is now

[2] Because of the similarity between those two other pending and related cases and the instant contempt case, Respondents have filed a motion to stay this contempt proceeding until at least one of those other two related cases are resolved.

awaiting the issuance of a report and recommendation by the Hearing Officer and a final determination by the Commissioner of the Department (which should occur before February 29, 2008). Based on the evidence that was presented at the administrative hearing, and as explained below, it is apparent that there was no probable cause for the warrant to issue in this case.

As evidenced during the administrative hearing, in order for Respondents to be regulated by the Department they have to be operating either as a "milk plant" or a "dairy farm" where they are "selling, offering for sale or otherwise making available" to "consumers" any "raw milk." 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 the A&ML.

For example, 1 NYCRR 2.2(bb) defines "milk plant" as "any place, premises or establishment engaged solely or predominately *in the receipt of prepasteurized milk, commingled milk or milk products* * * *." However, there was no evidence presented at the administrative hearing that Respondents receive either prepasteurized milk, commingled milk or milk products. In fact, Respondent Barbara Smith provided unrebutted testimony that Respondents do not receive any prepasteurized milk, commingled milk or milk products. Thus, Resondents are not a milk plant, contrary to the allegations of affiant William Francis, whose affidavit was relied on in issuance of the search warrant in this case.

Moreover, 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" and 1 NYCRR

2.2(i) defines a "dairy farmer" as "a person who operates a dairy farm *and produces prepasteurized milk*." Prepasteurized milk, in turn, is defined by 1 NYCRR 2.2(mm) 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* * * *." There was no evidence presented by Mr. Francis at the hearing that Respondents pasteurize their milk before processing it into other dairy products, and thus, they do not produce "prepasteurized milk." To the contrary, Respondent Barbara Smith expressly testified that they do not pasteurize any of their milk before processing it into other dairy products.

Also at the hearing, Mr. Francis did not present any evidence that Respondents' production practices fit the definition of "raw milk," which is defined by 1 NYCRR 2.2(pp) 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*." There was no evidence presented at the hearing that Respondents "sold" or "offered for sale" their raw milk to anybody. To the contrary, Respondent Barbara Smith expressly testified that all of the milk produced at the farm is available only to members of Respondent Meadowsweet Dairy LLC and to no other person, and that none of the milk produced by Respondents is sold or offered for sale to anybody.

Finally, 1 NYCRR 2.3(b) provides, in part, that any person "who *sells, offers for sale or otherwise makes available* raw milk for consumption by *consumers*[3] shall hold a permit to sell raw milk issued by the commissioner." Again, Mr. Francis was not able to

[3] The only definition of "consumer" in New York's A&ML is contained in Section 253(9), which defines "consumer" as "any person other than a milk dealer *who purchases* milk for fluid consumption." Since none of Respondents' milk is "purchased" by anybody, it is not "raw milk" as defined by applicable law.

provide any evidence that Respondents have "sold, offered for sale or otherwise made available" any raw milk to anybody other than to Respondents themselves. To the contrary, Respondent Barbara Smith expressly testified that Respondents do not make any raw milk available to anybody except to themselves. Thus, no "raw milk permit" is required because raw milk is not being sold, offered for sale or otherwise being made available to consumers.

If the Court conducts an evidentiary hearing in this matter, the evidence will demonstrate that as a matter of law, Respondents are not subject to the A&ML and thus, as a matter of law, cannot be subjected to a search warrant issued under those laws. Consequently, good cause exists to conduct an evidentiary hearing to determine the underlying validity of the warrant that was issued in this case. In that way, justice will be served.

V. Conclusion.

The warrant issued in this case is "continuing in nature" and violates several fundamental constitutional protections. The warrant also violates other constitutional protections because authorizes the Department, not this Court, to determine when probable cause exists in the future. Moreover, the warrant does not limit the time of day during which it can be executed. For all of these reasons, the warrant is invalid and it should be quashed.

If the Court does not choose to quash the warrant then it should at least conduct an evidentiary hearing so that it can be demonstrated that Respondents are not even subject to regulation under New York's A&ML.

For these reasons, Respondents' motion to quash the warrant or, alternatively, for a *Franks/Alfinito* hearing, is well taken and it should be granted.

Respectfully submitted,

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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:

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