

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

MEADOWSWEET DAIRY, LLC,
STEVEN SMITH and BARBARA SMITH,

Plaintiffs,

-against-

PATRICK HOOKER, COMMISSIONER,
DEPARTMENT OF AGRICULTURE and MARKETS
of the STATE OF NEW YORK and WILL
FRANCIS, DIRECTOR OF DIVISION OF MILK
CONTROL AND DAIRY SERVICES,

Defendants.

DECISION & ORDER

Index No. 2277-08

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APPEARANCES:

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**PATRICK HOOKER, COMMISSIONER OF
THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND
MARKETS**

Attorneys for Defendants Patrick Hooker, Commissioner, Department of Agriculture and
Markets of the State of New York and Will Francis, Director of Division of Milk Control
and Dairy Services
(Michael McCormick, Esq.)
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JOHN C. EGAN, JR., J.:

The plaintiffs Meadowsweet Dairy, LLC, Steven Smith and Barbara Smith (hereinafter

“plaintiffs” or “Meadowsweet”) bring the instant action seeking a declaration that plaintiffs’ activity in producing raw milk and raw milk products is not subject to regulation by the defendants (hereinafter collectively “defendants”, the “Department of Agriculture and Markets” or the “State”). Plaintiffs seek an order enjoining the Department of Agriculture and Markets from conducting any further inspections, issuing any further search warrants and taking any further administrative, civil or criminal actions against the plaintiffs¹. Plaintiffs also make a motion seeking a preliminary injunction prohibiting the Department of Agriculture and Markets from conducting any further inspections, issuing any further search warrants and taking any further administrative, civil or criminal actions against the plaintiffs during the pendency of this litigation.² The Department of Agriculture and Markets opposes both the motion seeking a preliminary injunction and the Article 78 proceeding and cross-moves, pursuant to CPLR §3211 and §3212³, seeking dismissal of the

¹This proceeding was originally commenced in Seneca County Supreme Court as a declaratory action, but, by Order executed by the Honorable Dennis F. Bender on March 7, 2008, the proceeding was converted into one pursuant to CPLR Article 78, and was transferred to Albany County Supreme Court.

²Plaintiffs also sought a temporary restraining order which was denied by the Honorable Dennis F. Bender on December 12, 2007.

³The Department of Agriculture and Markets’ cross-motion seeking summary judgment pursuant to CPLR §3212 is an improper procedural device in this proceeding. *Gold v. Department of Motor Vehicles* 95 Misc.2d 252, 253 (S. Ct. Sullivan County 1978). Section 7804(a) of the CPLR provides that a proceeding under that article ‘is a special proceeding’, and is governed by and subject to the provisions of Article 4 of the CPLR. Section 409(b) of the CPLR provides that “[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment.” Thus, every hearing of a special proceeding is equivalent to the hearing of a motion for summary judgment and makes a formal motion for same unnecessary. *In re Javarone*, 76 Misc.2d 20, 20-21 (N.Y.Co.Ct. 1973).

complaint. The plaintiffs oppose the Department of Agriculture and Markets' cross-motion.⁴

Initially, the Court notes that the milk industry within New York State is a proper subject for regulation under the State's police power. *Tuscan Dairy Farms, Inc. v. Barber*, 45 N.Y.2d 215 (1978). According to the Agriculture & Markets Law §46 "....the dairy industry is a paramount industry of the state and the production, processing, packaging, distribution and sale of milk products has become an enterprise of vast economic importance to the state and of vital importance to the consuming public of the state, and which should be encouraged and promoted in the public interest. It is further declared that milk and milk products have long been accepted by the consuming public as wholesome and nutritious articles of food...." A&ML §46. The Department of Agriculture and Markets, through the Commissioner, shall have power to:

1. Execute and carry into effect the laws of the state and the rules of the department, relative to agriculture, horticulture, farm, fruit, and dairy products, agriculture, and the production, processing, transportation, storage, marketing and distributing of food;.....

35. Investigate, inspect, and supervise all sanitary aspects relative to the production, processing, sale and distribution of milk and milk products.

A&ML §16

As background with respect to the issues presented in this case, "pasteurization" is the partial sterilization of liquids such as milk, orange juice, wine, and beer, as well as cheese, to destroy disease-causing and other undesirable organisms. The process is named for the French scientist Louis

⁴By Notice of Motion dated July 23, 2008, plaintiffs sought an Order seeking to supplement the record with the transcript of an administrative hearing conducted on January 17, 2008 and January 18, 2008 before a hearing officer of the New York State Department of Agriculture and Markets. As set forth in its reply memorandum dated September 26, 2008, the Department of Agriculture and Markets does not oppose the relief sought. Accordingly, the plaintiffs' motion seeking to supplement the record is granted.

Pasteur, who discovered in the 1860s that undesired fermentation could be prevented in wine and beer by heating it to 135°F; (57°C;) for a few minutes. Milk is pasteurized by heating it to about 145°F; (63°C;) for 30 min or by the "flash" method of heating to 160°F; (71°C;) for 15 sec, followed by rapid cooling to below 50°F; (10°C;), at which temperature it is stored.⁵ The purpose of pasteurization is to kill the harmful bacteria which milk contains. *People ex rel. Ogden v. McGowan* 118 Misc. 828, 830 (S. Ct. Dutchess County 1921). "Raw milk" is milk that has not been pasteurized before consumption.⁶

The relevant facts are as follows: From 1995 until 2007 the plaintiffs Steven Smith and Barbara Smith (Smiths) operated a dairy farm located at 2054 Smith Road, Lodi, New York. During that time period, in conjunction with the operation of their dairy farm, the Smiths held all necessary permits as required by the State, including a "milk dealer's licence", a "grade A permit", a "raw milk" and "milk processing" permit. In March 2007, the Smiths relinquished all dairy permits and formed Meadowsweet Dairy, LLC ("Meadowsweet" or "the LLC"), which is a limited liability company. The LLC now owns the dairy cows which produce raw milk products. The Smiths are operating managers of the LLC, which includes 121 members. Plaintiffs have "decided to opt out of the government sanctioned dairy food system and have decided to produce their own dairy products at their own expense for their own benefit."⁷ All of the milk products produced at

⁵ The Columbia Electronic Encyclopedia® Copyright © 2007, Columbia University Press. Licensed from Columbia University Press available at <http://encyclopedia2.thefreedictionary.com/pasteurization> [accessed November 7, 2008].

⁶ WordNet® 3.0. Princeton University. Copyright © 2008 Dictionary.com, <http://dictionary.reference.com/search?q=raw+milk> [accessed November 7, 2008].

⁷ "Affirmation" of David G. Cox, Esq., sworn to on December 20, 2007, ¶¶7,8.

Meadowsweet are “raw” or unpasteurized and alleged by plaintiffs to be only made available to members of the LLC. Meadowsweet has been the subject of investigation by the Department of Agriculture and Markets, which has included the issuance of search warrants, inspections, seizures and destruction of milk products, and the assessment of administrative civil penalties, based on the allegation that the raw milk products produced are adulterated or misbranded, and based on the production of raw milk products without “raw milk” and “milk plant” permits required pursuant to 1 NYCRR 2.3⁸.

Specifically, based on inspections conducted by the Department of Agriculture and Markets from March 2007 through October 2007, plaintiffs were served with a Notice of Hearing dated October 12, 2007. Plaintiffs were notified that a hearing would be conducted on October 23, 2007 (hereinafter referred to as the “October 2007 hearing”), at which time the plaintiffs would be afforded the opportunity to establish why the 260 pounds of raw milk products seized “....should not be destroyed or otherwise disposed of in accordance with the provisions of section 202-b⁹ of the Agriculture and Markets Law (Law), on the grounds that...the food is adulterated within the meaning

⁸Prior to March 2007, the Smiths, in the operation of their “dairy farm”, produced raw milk products with the proper permits. Plaintiffs claim that the State’s regulations were too burdensome and made it impossible for the dairy farm to be financially viable, so they relinquished their permits and formed the LLC. “Affirmation” of David G. Cox, Esq., sworn to on December 20, 2007, ¶¶3-4.

⁹When the Commissioner of Agriculture and Markets has probable cause to believe that food is adulterated or misbranded, he is authorized, pursuant to A&ML §202-b to quarantine such food, and to hold a hearing to permit the owner to show cause why such food should not be destroyed.

of sections 200(3)¹⁰ and 200(4)¹¹ of the Law, in violation of section 199-a¹² of the Law....”¹³ The Notice of Hearing states that inspections revealed that the milk plant was operated under severe insanitary conditions, whereby the products “may have become contaminated.... rendered diseased, unwholesome or injurious to health”.

Although they received notice of the October 2007 hearing, plaintiffs did not attend the same, present evidence, or object to the Department of Agriculture and Markets’ jurisdiction to regulate Meadowsweet’s activities. On November 20, 2007, the Hearing Officer issued a report, finding that there was “....ample evidence in the record upon which to recommend that the Commissioner of Agriculture and Markets confirm the seizure and order the destruction or other disposal of the 260

¹⁰Food is deemed adulterated under A&ML §200(3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food.

¹¹Food is deemed adulterated under A&ML §200(4) if it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health.

¹²A&ML §199-a(1) provides that “[n]o person or persons, firm, association or corporation shall within this state manufacture, compound, brew, distill, produce, process, pack, transport, possess, sell, offer or expose for sale, or serve in any hotel, restaurant, eating house or other place of public entertainment any article of food which is adulterated or misbranded within the meaning of this article.”

¹³The hearing notice invites the plaintiffs to show cause why such action should not be taken in accordance with A&ML §202-b, and alleges violations of A&ML §199-a, as evidenced by violations of 1 NYCRR §2.3, §2.9-2.28, §2.29-2.65, and violations of A&ML §201(7).

pounds of raw milk, raw milk yogurt, and raw buttermilk held....".¹⁴ In her report, the Hearing Officer states that "[t]he issues before the Department are whether the seizure was justified and whether the seized product should be destroyed. The respondent did not appear or otherwise object to the seizure, and is in default." By Final Determination dated December 12, 2007, the Commissioner of Agriculture and Markets adopted the findings of fact, the conclusions and recommendations of the Hearing Officer based on the October 2007 hearing.

Thereafter, on December 13, 2007, the Department of Agriculture and Markets commenced an enforcement action "...citing Meadowsweet for violations of sanitary regulations applicable to milk producers generally, for failing to hold a permit for operating a milk plant, for making raw milk available to consumers off the premises where they were manufactured, for possessing and offering to consumers raw milk and raw milk products that were unfit for food, for acting as a milk dealer without possessing a milk dealer's licence, and for offering to consumers misbranded or adulterated food, e.g., food for which standards of identity exist but which are not meet by such foods being offered."¹⁵ A hearing with respect to the December 2007 complaint took place on January 17, 2008 and January 18, 2008 (hereinafter referred to as the "January 2008 hearing"), at which time the

¹⁴At the October 2007 hearing, among other evidence presented, the Department of Agriculture and Markets presented that, in the milking plant, fly strips, heavily laden with dead flies, hung from the ceiling; there were dead flies, cobwebs and dust on windowsills in the processing area; equipment was rusty, tables were dirty and littered with cheese bits; cheese molds were greasy; hoses used to transport milk were uncapped; mold and manure stains were evident in the milking barn; freely ranging chickens were located in the barn; supplies and equipment cluttered the barn; raw milk and cheese was not dated or labeled; rodent droppings were found in the cheese aging room; and raw milk was being stored at ambient room temperature. The Hearing Officer found that the Department demonstrated beyond doubt that all the product seized is adulterated within the meaning of A&ML §200(3) and (4) and unfit for human consumption. The Hearing Officer recommended the destruction or "other suitable disposition" of the seized products.

¹⁵Affirmation of Michael McCormick, dated September 26, 2006, Exhibit "B", page 3.

plaintiffs argued that Meadowsweet's operations were outside the scope of State regulation for the manufacture and distribution of milk and milk products. As a result of the January 2008 hearing, the Hearing Officer concluded that Meadowsweet's raw milk "must be considered within the scope of State regulation....the legislative intent is clear: to provide jurisdiction to the Department of Agriculture and markets to regulate milk production and distribution to protect public health."¹⁶ The Hearing Officer further concluded that, although the arrangement for the distribution of raw milk products is not a purchase and sale transaction, but a distribution of profit based on the value of the LLC members' contributions, Meadowsweet must be in compliance with applicable laws regarding manufacture, processing, handling and distribution of dairy products.¹⁷ The Hearing Officer found that Meadowsweet is in violation of 1 NYCRR §2.3(a)¹⁸ and §2.3(b)¹⁹, §2.3(b)(ii), A&ML §199-a(1)

¹⁶ The Hearing Officer concluded this notwithstanding the "inconsistency in the section 2.2 definition" of raw milk, which includes the concept of "sale" only, while the raw milk permit section is broader, encompassing one who "sells, offers for sale, or makes available" raw milk. 1 NYCRR §2.2(pp), §2.3(b).

¹⁷ Among the findings of fact, the Hearing Officer determined that "[p]ersons become Meadowsweet members by paying a one-time membership fee of \$50. Thereafter, they may obtain raw milk and raw milk products in exchange for money paid per gallon of product." "Milk may be obtained for an "investment" of \$4.50/gallon, yogurt and buttermilk for \$3.00/quart, and butter for \$10/pound." The Hearing Officer also determined that Meadowsweet members are consumers of the raw milk products; that Meadowsweet operated a raw milk plant and sold raw milk products without the required licence or permit.

¹⁸ The Hearing Officer found that, based on the evidence presented, that Meadowsweet consists of a barn for milking cows together with an adjoining "plant" to which the raw milk is conveyed and where it is bottled or processed, Meadowsweet operates a "milk plant" as defined by the regulations. 1 NYCRR §2.2(bb); §2.2(cc). Prior to the relinquishing their permits, Meadowsweet held a licence as a "milk plant". No evidence was offered that the facility changed. The only difference is that the plant no longer receives pre-pasteurized milk from the milking barn.

¹⁹ The Hearing Officer rejected Meadowsweet's argument that the Department of Agriculture and Markets' jurisdiction over Meadowsweet's raw milk operation fails because Meadowsweet's members are not "consumers" as defined in Article 21, §253 of the A&ML. That section defines "consumer" as "any person other than a milk dealer who purchases milk for fluid consumption." The Hearing Officer determined that Article 21 does not apply to the regulations in 1 NYCRR Part 2, which were

(within the meaning of §200(4)), A&ML §257 and §258-c(e) and (k). By Order dated July 23, 2008, the Commissioner of Agriculture and Markets adopted the findings of fact, the conclusions and recommendations of the Hearing Officer, but also found that Meadowsweet violated A&ML §199-a(1)(within the meaning of §A&ML §200(3) and 201(7)).

Pursuant to A&ML §20, the Commissioner, "...shall have full access to all places of business, factories, farms, buildings, carriages, cars and vessels used in the production, manufacture, storage, sale or transportation within the state of any dairy products or any imitation thereof.... They may examine and open any package or container of any kind containing or believed to contain any article or product, which may be manufactured, sold or exposed for sale in violation of the provisions of this chapter, or of the rules of the department, and may inspect the contents therein, and take therefrom samples for analysis."

Pursuant to A&ML §199-a(1), "[n]o person or persons, firm, association or corporation shall within this state manufacture.... produce, process, pack, transport, possess, sell, offer or expose for sale....any article of food which is adulterated or misbranded within the meaning of this article."²⁰

"promulgated under the authority of Sections 16, 18, 46, 46-a, 50-k, 71-a, 71-n and 214-b. There is no definition of "consumer" in those sections of law." The Hearing Officer cites to the New World and Webster's dictionary for the definition of "consumer" - one who eats, drinks or devours. The Hearing Officer notes that the dictionary definition of "consumer" is without the requirement of a purchase.

²⁰Food shall be deemed to be adulterated: 1. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this subdivision if the quantity of such substance in such food does not ordinarily render it injurious to health....3. If it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food. 4. If it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health. A&M §200.

1 NYCRR §2.3(a) requires that every person who operates a milk plant²¹ to hold a permit. 1 NYCRR §2.3(b) requires “[e]very person who sells, offers for sale or *otherwise makes available* raw milk for consumption by consumers shall hold a permit to sell raw milk issued by the commissioner.” *Id.*(emphasis added). 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.*” *Id.*(emphasis added). 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. *Id.*(emphasis added). “Dairy farmer” means a person who operates a dairy farm and produces prepasteurized milk. 1 NYCRR §2.2[i]. A “raw milk producer” means a person²² who operates a dairy farm and produces raw milk. 1 NYCRR §2.2(qq).

Briefly, the Department of Agriculture and Markets claims that the raw milk products produced by Meadowsweet are adulterated and unfit under the A&ML, and that plaintiffs are in violation of the 1 NYCRR §2.3 by not holding the required “milk plant” and “raw milk” permits. Plaintiffs submit that all of the dairy products produced by Meadowsweet’s cows are consumed by

²¹“Milk plant” means any place, premises or establishment engaged solely or predominately in the receipt of prepasteurized milk, commingled milk or milk products which is or are subsequently processed or manufactured into milk, lowfat milk, skim milk, milk products, goat milk, goat milk products, sheep milk, sheep milk products, melloream and/or frozen desserts and any place, premises or establishment engaged solely or predominantly in the receipt of cheese or butter, as defined in Part 17 of this Title, which is or are grated, shredded, cut, mixed, blended, heated or otherwise treated and which is or are the predominant component of the resulting milk product, goat milk product or sheep milk product. 1 NYCRR 2.2(bb). “Milk product” means a food, other than milk, lowfat milk or skim milk:(1) that meets a standard of identity set forth in sections 17.2 through 17.7 of this Title or provided for in section 17.18 of this Title; or (2) for which a standard of identity has not been prescribed but which is commonly and usually characterized as a milk product. 1 NYCRR §2.2(cc)

²²A “person” means an individual, firm, partnership, corporation, cooperative association, unincorporated association or agency of the State. 1 NYCRR §2.2 (ll)

the members of the LLC only, and are not offered for sale or made available to any members of the consuming public. Plaintiffs assert they are not a “milk plant”, do not produce “raw milk” as defined by the regulations, and are not subject to the jurisdiction of the Department of Agriculture and Markets.

The Court will first address plaintiffs’ motion seeking a preliminary injunction.

As an initial consideration, “[a] preliminary injunction is a provisional remedy. Its function 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.” *Residential Bd. of Mgrs. of Columbia Condominium v. Alden*, 178 A.D.2d 121, 122 (1st Dept. 1991); *Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc.* 10 A.D.3d 223, 226-227 (1st Dept.,2004). To be granted a preliminary injunction, a movant must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors his position . CPLR §6301; *Karabatos v. Hagopian*, 39 A.D.3d 930, 931 (3rd Dept. 2007); *Town of Porter v. Chem-Trol Pollution Services, Inc., et al.*, 60 A.D.2d 987 (4th Dept.1978); *Mariculture Ltd. v. Biggane*, 48 A.D.2d 295 (3rd Dept. 1975). Plaintiff has the burden of proof in seeking a preliminary injunction, and must demonstrate factually and convincingly through affidavits and other proof supplying evidentiary detail that they would be irreparably damaged if an injunction were not granted before trial. *Karabatos*, 39 A.D.3d at 931. Economic loss, which is compensable by money damages, does

not constitute irreparable harm. *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2nd Dept. 2007)²³.

A preliminary injunction is a drastic remedy and should only be used sparingly. *Welcher v. Sobol* 222 A.D.2d 1001, 1002 (3rd Dept.,1995); *Town of Porter*, 60 A.D.2d 987.

In support of their position, plaintiffs argue that since they are engaged in private conduct that does not impact the health safety or welfare of any of the citizens of the State of New York, and since the LLC members are not “consumers”, the State does not have the jurisdiction to regulate the plaintiffs. Plaintiffs submit the reply affidavit of Barbara Smith, who testifies that members who join the LLC contribute working capital to the LLC, which is used to offset the costs of maintaining the herd, and that members receive their equity share in the LLC in the form of dairy products. Barbara Smith claims that there is no sale or purchase of raw milk or dairy products by LLC members. Plaintiffs argue that they do not meet the definitions of a “dairy farm” or “milk plant”, and do not “sell, or offer for sale” to consumers any raw milk or dairy produces so as to be regulated by the State. Finally, plaintiffs claim that there is nothing in the Limited Liability Company Law that prohibits an LLC from making raw dairy products available to its members.

With respect to the issue of irreparable harm, plaintiffs claim, through counsel, that they are subject to “immediate and irreparable harm because, with the State’s continued investigations, they

²³A preliminary injunction may also be granted where injunctive relief is deemed 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. *Mr. Natural, Inc. v. Unadulterated Food Products, Inc.*, 152 A.D.2d 729, 730 (2nd Dept. 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”). As a result, a preliminary injunction to maintain the status quo may be granted even where the court “ha[s] grave doubts regarding the likelihood of plaintiff[s] success on the merits” as long as the court finds that “if [the] preliminary injunction is not granted, any subsequent judgment might be rendered ineffectual”. *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 A.D.2d 615, 615 (2nd Dept. 1977). Generally, such a preliminary injunction is granted where injunctive relief will prevent the potential dissolution of an existing valuable asset or some comparable potential irreparable harm *Id.*; *Mr. Natural Inc.*, 152 A.D.2d at 730.

run the risk of losing product that is manufactured by the LLC's cows, having their house searched at any time, and having their personal belongings seized at any time²⁴. Plaintiffs have been the subject of investigation by the State, which has included the issuance of search warrants, the conduction of inspections, seizures and destruction of milk products, and the assessment of administrative civil fines and penalties. Plaintiffs further argue that they are in immediate harm since the State has already concluded that Meadowsweet should be shut down.

In opposition to the plaintiffs' motion, the Department of Agriculture and Markets claims plaintiffs are not entitled to a preliminary injunction since such relief would interfere with the enforcement actions of public officials.²⁵ The Department of Agriculture and Markets further argues that the plaintiffs have failed to demonstrate a probability of success on the merits. The Department of Agriculture and Markets asserts that the plaintiffs have been "selling, offering for sale, or otherwise making available raw milk for consumption by the consumers"²⁶, and plaintiffs are subject to the jurisdiction of State, which has broad authority over the production, manufacture, distribution and sale of food. As part of its investigation of Meadowsweet, the Department of Agriculture and Markets submits the affidavit of State Investigator Dennis C. Brandow, Jr., who became a member of the LLC. On June 23, 2007, at the Ithaca Farmer's Market, Mr. Brandow approached the

²⁴"Affirmation" of David G. Cox, Esq., sworn to on December 20, 2007, ¶14.

²⁵"As a general rule, the courts will not grant injunctions which interfere with the enforcement actions of public officials taken under the authority of a statute or an ordinance, or under the authority of an administrative order, rule, or regulation, at least in the absence of a showing that the enactment is invalid. A preliminary injunction is a drastic remedy which should be granted only where there is a clear right thereto, and this is especially so in an action involving the enforcement of a law." 12 Carmody-Wait 2d, Injunctions §78.106.

²⁶The Department of Agriculture and Markets argues that the consumers in this case are the LLC consumer-members.

Meadowsweet stall. Mr. Brandow paid \$50.00 to become a member of the LLC. He received a certificate of membership together with a price listing for each container of raw milk product offered for sale. Mr. Brandow states that, as a member of the LLC, on June 23, 2007, he purchased foods represented and/or labeled as raw milk, raw heavy cream, raw milk kefir and raw milk yogurt. On July 11, 2007, Mr. Brandow purchased raw milk, raw butter, raw buttermilk and raw milk yogurt from plaintiffs at the Sick N' Stone Farm located in Ulysses, New York. On January 1, 2008, after plaintiffs determined that Mr. Brandow was an employee of the Department of Agriculture and Markets, his membership in the LLC was terminated. Upon termination from the LLC, Mr. Brandow received a refund, which consisted of the payments made to the LLC and the cost of raw milk products that he had purchased.²⁷

The Department of Agriculture and Markets argues that the LLC status of plaintiff is of no matter²⁸, as §20 of the A&ML provides for inspections of farms used in the production, manufacture, storage, sale or transportation of any dairy products. The Department of Agriculture and Markets further argues that AM&L §199-a(1) prohibits any person firm, association or corporation from

²⁷The State also submits the Affidavit of William Francis, the Director of the Division of Milk Control and Dairy Services of the Department of Agriculture and Markets. Mr. Francis states that, upon information and belief, based on the inspections conducted, Meadowsweet's operations were in violation of the NYCRR and the A&ML, thus resulting in the administrative complaint dated December 13, 2007.

²⁸The State argues that, pursuant to Limited Liability Corporation Law §601, the plaintiffs' consumer-members have no ownership interest in Meadowsweet property, including the cows and raw milk produced. The State argues that the distribution of raw milk to its members is in the nature of a sale. See, *Johnson County v. Guernsey Ass'n of Johnson County, Iowa, Inc.* 232 N.W.2d 84 (Iowa 1975)(holding that the distribution of milk to nonprofit milk producing corporation's members constituted the transfer of title to property for a fixed price, notwithstanding the corporation's claim that no sales took place since title to the milk was at all times in the members of the corporation); *Kenley v. Solem* 237 Va. 202 (Va.,1989)(sale of undivided interests in a goat and charging a maintenance fee for transfer of unpasteurized milk constituted selling of milk in violation of regulation prohibiting sale of raw milk and milk products and was not a mere delivery of milk).

processing adulterated or misbranded food. The Department of Agriculture and Markets argues that it has jurisdiction over the plaintiffs pursuant to 1 NYCRR §2.3.

Finally, the Department of Agriculture and Markets argues that plaintiffs have failed to establish irreparable harm if the injunction is not granted. The Department of Agriculture and Markets argues that the plaintiffs' claim that they run the "risk" of losing product is speculative. Furthermore, the plaintiffs' house is not subject to search and their personal belongings cannot be seized. The inspection warrants in this case were for the farm and milk processing operations. The Department of Agriculture and Markets argues that financial injury alleged is insufficient to establish irreparable harm. Finally, the Department of Agriculture and Markets argues that plaintiffs have not established that a balance of the equities weighs in their favor, since the legislative mandate and the vital public interest in preventing food borne illness weighs heavily in the defendants' favor.

In reply, the plaintiffs argue that, because they seek to maintain the status quo, plaintiffs "do not necessarily need to meet the traditional elements of a preliminary injunction." Plaintiffs also argue that the evidence received at the January 2008 hearing demonstrates that the State does not have jurisdiction over the conduct engaged in by the plaintiffs. Plaintiffs assert that Meadowsweet does not meet the definition of a "dairy farm" or "milk plant" under the NYCRR.²⁹ Plaintiffs argue that they are not subject to the adulteration or misbranding provisions of the A&ML §199-a, since plaintiffs do not offer raw milk products for "sale". Accordingly, plaintiffs argue that will succeed on the merits. Finally, plaintiffs argue that it would be futile to exhaust administrative remedies

²⁹Plaintiffs assert that since there is no evidence that plaintiffs receives any pre-pasteurized, commingled or other milk products, Meadowsweet does not fall within the definition of a "milk plant" under 1 NYCRR §2.2(bb). Plaintiffs further assert that, since plaintiffs do not pasteurize any of their milk, and because plaintiffs do not "sell or offer for sale" raw milk (as defined by 1 NYCRR 2.2(pp)), Meadowsweet does not fall within the definition of a "dairy farm" under 1 NYCRR §2.2(h).

available to them with respect to the October 2007 hearing. Thus, plaintiffs claim, they have no adequate remedy at law.³⁰

Here, based on the broad language of the Commissioner's powers, the Department of Agriculture and Markets has jurisdiction over the plaintiffs Pursuant A&ML §20. The Commissioner is entitled to full access to Meadowsweet, and may also examine and open any package or container of any kind containing or believed to contain any article or product, which may be manufactured, sold or exposed for sale, and may inspect the contents therein, and take therefrom samples for analysis. Moreover, the Department of Agriculture and Markets has jurisdiction over the plaintiffs pursuant to A&ML §199-a(1), as the clear language of the statute applies to persons, firms, associations or corporations which manufacture, produce or process food.

Plaintiffs claim that they are exempt from the requirements pertaining to raw milk permits because they do not "sell or offer for sale" to consumers any raw milk or dairy products. Yet, 1 NYCRR §2.3(b) requires "[e]very person who sells, offers for sale or *otherwise makes available* raw milk for consumption by consumers shall hold a permit to sell raw milk issued by the commissioner." (Emphasis added). It cannot be disputed that plaintiffs "otherwise makes available" raw milk to its LLC members. The question remains: Are the LLC members "consumers". Plaintiffs claim that they are exempt from the requirements pertaining to raw milk permits because members of the LLC are not "consumers". Plaintiffs assert that, while the NYCRR does not define the word "consumer", the A&ML §253(9) defines "consumer" as any person other than a milk dealer who purchases milk for fluid consumption. Plaintiffs argue, since none of the LLC members "purchased"

³⁰Plaintiffs assert that exhaustion of administrative remedies would be futile at the October 2007 hearing, since the Department of Agriculture and Markets had already taken the position that the State had jurisdiction over Meadowsweet operations.

raw milk, none of the members are consumers, and plaintiffs are not subject to the requirements pertaining to raw milk permits.

Yet, 1 NYCRR Part 2 has the force and effect of law, and should be interpreted no differently than a statute. As such, the regulation should not be extended by construction beyond its express terms or the reasonable implications of its language, and absent further definition in the regulation or enabling statutes, the words of the section are to be construed according to their ordinary and popular significance *Braschi v. Stahl Associates Co.* 74 N.Y.2d 201, 217-218 (1989).

Since the word "consumer" is not defined in either 1 NYCRR Part 2 or its enabling statutes, the Court looks ordinary meaning of the word. In relation to this action, Webster's Dictionary defines "consumer" as "one that consumes as: a: one that uses economic goods....". Likewise, the word "consume", as applied to this action, is defined as "to utilize economic goods." (See, Webster's Ninth New Collegiate Dictionary 282 (1991)). Dictionary.com defines "consumer" as "a person or thing that consumes".³¹ Likewise, "consume", as applied to this action, is defined as "to eat or drink up; devour" or to "to use or use up consumer goods".³² The American Heritage Dictionary of the English Language defines "consumer" as "[o]ne that consumes, especially one that acquires goods or services for direct use or ownership rather than for resale or use in production and manufacturing...."³³ Nothing in those definitions indicates that to be a consumer, a purchase or sale

³¹"consumer." Dictionary.com Unabridged (v 1.1). Random House, Inc.<Dictionary.com <http://dictionary.reference.com/browse/consumer> > [accessed November 5, 2008].

³²"consume." Dictionary.com Unabridged (v 1.1). Random House, Inc.<Dictionary.com <http://dictionary.reference.com/browse/consume>> [accessed November 5, 2008].

³³"consumer." The American Heritage® Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company
<<http://www.thefreedictionary.com/consumer>>[accessed November 18, 2008].

is required. Accordingly, this Court finds that Meadowsweet's LLC members are "consumers", and plaintiffs have failure to establish a likelihood of success on the merits.

The Court determines that the Department of Agriculture and Markets has jurisdiction over the plaintiffs pursuant to the clear statutory language of A&ML Article 2, §20 and Article 17, §199-a. Furthermore, based on the evidence presented at the January 2008 hearing, Meadowsweet fits within the definition of a "milk plant" under 1 NYCRR §2.2(bb), and thus is required to hold a "milk plant" permit pursuant to 1 NYCRR §2.3(a). The Court further determines that the LLC members are "consumers" of raw milk products based on the plain meaning of the word. Accordingly, the Court finds that the plaintiffs are subject to the requirements of a 1 NYCRR §2.3(b), requiring Meadowsweet to hold a "raw milk" permit since Meadowsweet "...otherwise makes available raw milk for consumption by consumers....". Finally, the Court liberally interprets 1NYCRR §2.2(pp), and finds that Meadowsweet produces "raw milk", notwithstanding that plaintiffs claim that such "raw milk" is not "...being sold or offered for sale to consumers." See, 1NYCRR §2.2(pp). In enacting the Agriculture and Markets Law and the regulations set forth in 1 NYCRR Part 2, the Legislature intended "to protect the public health". A&ML § 3. The Agriculture and Markets Law and all governmental measures adopted pursuant thereto "...should receive a liberal interpretation and application in furtherance of the aforesaid policy and purposes." *Id.* Accordingly, to include Meadowsweet's activities as producing "raw milk" within the meaning of 1NYCRR §2.2(pp) is consistent with the purposes of Agriculture and Markets Law and 1 NYCRR Part 2.

Turning to the issue of irreparable harm, the Court finds the plaintiffs' allegations that they "run the risk of" losing product, being searched at any time and having their personal belongings seized at any time, speculative. Furthermore, any financial injuries sustained as a result of the loss

of product do not establish irreparable harm. Thus, plaintiffs have failed to establish irreparable harm if a preliminary injunction is not granted.

Finally, this Court holds that a balancing of the equities weighs the State's favor, based on the broad powers of the Department of Agriculture and Markets and the State's interest in regulating the dairy industry for the safety of consumers.

Based on the forgoing, the plaintiffs' motion seeking a preliminary injunction is denied. Furthermore, the relief requested by plaintiffs is denied and the petition is dismissed.

While the Court need not address the merits of the Department of Agriculture and Markets' motion pursuant to CPLR §3211 since the petition is dismissed on the merits, the Court finds that the petition should also be dismissed based on the doctrine of *res judicata*. *Josey v. Goord* 9 N.Y.3d 386 (2007); *Hunt Bros. Contractors Inc. v. Glennon*, 218 A.D.2d 862 (3rd Dept.,1995); *Jason B. v. Novello*, 44 AD3d 761 (2nd Dept.2007)(citing *Matter of Evans v. Monaghan*, 306 N.Y. 312, 323-324 (1954)). The issues to be addressed at the October 2007 hearing expressly included whether the Department of Agriculture and Markets' seizure of 260 pounds of raw milk products was justified and whether the seized products should be destroyed. The hearing notice invites the plaintiffs to show cause why such action should not be taken in accordance with A&ML §202-b, and alleges violations of A&ML §199-a, as evidenced by violations of 1 NYCRR §2.3, §2.9-2.28, §2.29-2.65, and violations of A&ML §201(7) - the same provisions that plaintiffs contest in this litigation. The record is clear that plaintiffs had the requisite full and fair opportunity to litigate the Department of Agriculture and Markets' jurisdiction over Meadowsweet's activities, but that they did not do so. Indeed, prior to the October 2007 hearing, plaintiffs forwarded e-mail correspondence to the Department of Agriculture and Markets dated October 19, 2007, stating that the "Smiths and

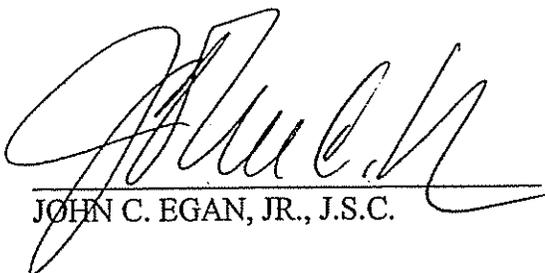
Meadowsweet Dairy, LLC have decided not to challenge the show cause order. The Smiths and Meadowsweet Dairy, LLC will not be in attendance at the hearing scheduled for October 23rd." Prior to the October 2007 hearing, plaintiffs attempted to confirm the Department of Agriculture and Markets' position with respect to jurisdiction over the Smiths and Meadowsweet, but still did not appear at the hearing or present any objection to jurisdiction. Whether the plaintiffs actually advanced their jurisdictional argument, and whether the Hearing Officer actually considered it, is irrelevant. All that matters is that the argument could have been made, but was not. *O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981); *New York Site Development Corporation v. New York State Department of Environmental Conservation*, 217 A.D.2d 699 (2nd Dept.1995); *Boorman v. Deutsch* 152 A.D.2d 48, 53 (1st Dept.,1989); *Freddolino v. Village of Warwick Zoning Bd. of Appeals* 192 A.D.2d 839, 840-841 (3rd Dept.,1993); *446 Realty Co. v. New York State Div. of Housing and Community Renewal* 165 A.D.2d 778, 779 (1st Dept.,1990).

Accordingly, the petition is dismissed and the relief requested therein is in all respects denied.

This memorandum shall constitute both the decision and the order of the Court. All papers are being returned to the Counsel for the New York State Department of Agriculture and Markets. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

IT IS SO ORDERED.

Dated: November 18, 2008
Albany, New York


JOHN C. EGAN, JR., J.S.C.



The Court considered the following papers:

By Plaintiffs:

Motion to Appear Pro Hac Vice, sworn to on December 13, 2007;
Order of the Honorable Dennis F. Bender, dated December 18, 2007;
Summons with Notice, dated December 13, 2007;
Complaint, undated with Exhibits A-I;
First Amended Complaint, undated with Exhibits A-I;
Department of Agriculture and Markets Administrative Complaint, dated December 13, 2007;
Order to Show Cause, dated December 21, 2007;
Affidavit of David G. Cox, Esq., sworn to on December 20, 2007;
Affidavit of Barbara Smith, sworn to on December 18, 2007;
Memorandum of Law in Opposition to Motion to Dismiss, undated, but served January 11, 2008;
"Affirmation" of David G. Cox, Esq., sworn to on January 11, 2008;
Plaintiff's Motion for a Stay, undated with Memorandum in Support, with Exhibits;
Affirmation of Sam C. Bonney, Esq., dated January 10, 2008
Order of the Honorable Dennis F. Bender, dated March 7, 2008;
Notice of Motion to Supplement Record, dated July 23, 2008;
Motion to Supplement Record and Memorandum in Support, dated July 23, 2008, with transcript of January 17, 2008 and January 18, 2008 proceedings;
Notice of Motion for a Preliminary Injunction, dated July 23, 2008;
Affirmation of Barbara Smith in rebuttal of Dennis Brandow, sworn to on January 16, 2008;
Affirmation of Barbara Smith in rebuttal of Will Francis, sworn to on January 16, 2008;
Memorandum in Support of Preliminary Injunction, undated;
Reply in Support of Preliminary Injunction, undated, with Attachment;
Plaintiffs' Memorandum on opposition to Defendants' motion to dismiss and for Summary Judgment, undated;
Affidavit of David G. Cox, Esq., sworn to on September 18, 2008, with attached transcript of the January 17, 2008 and January 18, 2008 hearing;

By Defendants:

Notice of Motion, dated January 3, 2008;
Memorandum of Law, dated January 3, 2008;
Affirmation of Larry A. Swartz, Esq., dated January 3, 2008, with Exhibits A-E;
Defendants' Answer, verified on July 28, 2008, with Exhibit A;
Memorandum of law, dated January 15, 2008, with Exhibit A;
Affidavit of William Francis, sworn to on January 15, 2008, with Exhibit A;
Affidavit of Dennis C. Brandow, Jr., sworn to on January 15, 2008, with Exhibits A-B;
Notice of Cross-motion, dated July 29, 2008;
Affirmation of Michael McCormick, dated July 29, 2008, with Exhibits A-C;
Memorandum of Law, dated July 30, 2008;
Affirmation of Michael McCormick, dated September 26, 2008, with Exhibits A-C;
Reply Memorandum of Law, dated September 26, 2008.