

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SENECA

Meadowsweet Dairy, LLC

Index No. 40558

and

Steven and Barbara Smith

Plaintiffs

against

Patrick Hooker, Commissioner
Department of Agriculture and
Markets of the State of New York

Affirmation of Barbara Smith
In Support of Motion for
Preliminary Injunction and in
Rebuttal of Dennis Brandow

and

Will Francis, Director
Division of Milk Control and
Dairy Services

Assigned Judge: Dennis F. Bender
JSC Acting

Defendants

STATE OF NEW YORK :
COUNTY OF SENECA :

I, Barbara Smith, being duly sworn, do hereby make the following statements based on my personal knowledge, belief and understanding.

1. I and my husband, Plaintiff Steve Smith, reside at a dairy farm owned by us located at 2054 Smith Rd, Lodi, New York (the "farm"). Steve and I have 9 children, ranging in age from 8 to 27, six of whom reside with us at our farm.
2. Steve and I have been dairy farmers since 1995. From 1995 to March 2007 we sold milk to dairy processors, made yogurt with their milk and sold it through retail outlets and sold raw milk at our farm. During this time Steve and I had all the required permits from the State of New York: a milk dealer's

license, a grade A permit, a raw milk permit and a milk processing permit.

Therefore, we were inspected and regulated by Defendants.

3. On March 1, 2007, however, Plaintiff Meadowsweet Dairy, LLC ("Dairy LLC") was duly formed in the State of New York as a limited liability company. Currently, the Dairy LLC has 121 members with an office and business located at 2054 Smith Rd, Lodi, New York. The only assets of the Dairy LLC are dairy cows that are used for the production of raw milk and raw milk products.
4. In March 2007, Steve and I relinquished all of our dairy permits and surrendered them to the State of New York. Since March 2007, Steve and I have become Operating Managers of the Dairy LLC and provide boarding services for the dairy cows owned by the Dairy LLC. The Dairy LLC's cows are kept at our farm and we tend to, manage and take care of the cows on behalf of the Dairy LLC. The Dairy LLC's cows produce raw milk, some of which is converted by us into raw milk yogurt, raw milk butter, raw milk cheese and raw milk buttermilk, none of which are pasteurized.
5. The Dairy LLC's members want raw, unpasteurized milk and milk products from the dairy cows they own. The only people that have access to the raw milk and raw milk products produced by the Dairy LLC's dairy cows are the Dairy LLC members and their respective families. Neither the Dairy LLC nor Steve or I "offer," "distribute" or "otherwise make available" for sale to any member of the consuming public any of the raw milk or raw milk products that are produced by the Dairy LLC's dairy cows.

6. Each member of the LLC pays an initial fee of \$50 to become a member. Once they become a member, each member contributes additional capital on a quarterly basis to the LLC. Each member receives an equity share in the LLC based on the amount of capital contributions they make to the LLC.
7. The capital contributions, both the initial and the quarterly, paid by each member are allocated by the LLC toward the activities described in paragraph 4 of this Affirmation, to wit: Steve and I provide boarding services for the dairy cows owned by the LLC which are kept at our farm; we tend to, manage and take care of the cows on behalf of the LLC; and the LLC's cows produce raw milk, some of which is converted by Steve and I into raw milk yogurt, raw milk butter, raw milk cheese and raw milk buttermilk, none of which are pasteurized.
8. Members of the LLC receive their proportionate share of the equity of the LLC in the form of raw milk and raw dairy products. There is no sale or purchase of raw milk or dairy products by LLC members.
9. The LLC does not make its raw milk or raw dairy products available to any person except for LLC members. The LLC operates strictly in private and does not injure or impact the public's health, safety or welfare.
10. Dennis Brandow was at one time a member of the LLC. I have read and reviewed the Affirmation Dennis Brandow submitted in opposition to our motion for preliminary injunction.
11. Dennis Brandow makes several incorrect statements in his Affirmation. The specific incorrect statements are identified below:

- a. At paragraph 3, Mr. Brandow states: "Steven and Barbara Smith * * * own and operate a milk plant." This is not correct. 1 NYCRR § 2.2(bb) defines "*milk plant*" as "any place, premises or establishment engaged solely or predominately in the receipt of prepasteurized milk. . . ." We do not receive prepasteurized milk from anyone or anything. We do not even own any dairy cows. The LLC's dairy cows produce all of the LLC's own milk and the LLC does not receive any prepasteurized milk from anyone or anything. Moreover, 1 NYCRR § 2.2(mm) defines "*prepasteurized milk*" 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 into milk." We do not pasteurize any milk. In addition, the LLC does not pasteurize any of the milk produced by its dairy cows.
- b. At paragraph 4, Mr. Brandow states: "One of the stalls was operated by Meadowsweet and by Mr. and Mrs. Smith, at which raw milk and raw milk products were sold, offered for sale and made available to Meadowsweet's consumer-members." This is not correct. Steve and I rent the market stall and sell meat from our farm at the stall to the public. At the same time, as LLC members, Steve and I also distribute equity in the form of raw milk and raw milk products to other LLC members. Further, the LLC does not sell, offer for sale or make available to the public any raw milk or raw dairy products at the stall or elsewhere. In addition, the raw milk and raw dairy products that are made available to

LLC members is their equity distribution in an amount that is proportionate to the members' capital contribution to the LLC.

- c. At paragraph 5, Mr. Brandow states: "which document also set forth, *inter alia*, * * * the price of each container of raw milk and raw milk products offered for sale." That is not correct. There is no "price" associated with the raw milk and raw dairy products produced by the LLC. Raw milk and raw dairy products are valued in order to account for equity distributions to LLC members (also known as a return of capital or non-taxable dividend) for income tax purposes.
- d. At paragraph 5, Mr. Brandow goes on to state: "After becoming a member * * * I purchased foods." This is not correct. Mr. Brandow does not understand how the LLC operates. Mr. Brandow, as an LLC member who had contributed capital to meet the expenses of the LLC, received a return of capital based on his proportionate share of equity he had established in the LLC. Further, at the time Mr. Brandow joined the LLC, he stated to me that he lived in Catskill, NY, that he was in Ithaca to visit his brother, that he would not be visiting his brother again for another couple months, and that he would have to travel 5 hours to pick up his equity in the LLC. I informed Mr. Brandow at that time that the LLC does not allow members to join one day and receive a distribution of their equity on the day they join because to do so could be interpreted by the Department of Agriculture and Markets as conduct that would constitute a "sale." However, Mr. Brandow insisted that he be allowed to receive an equity

distribution on the day that he joined and became very adamant that this be so. I relented and allowed Mr. Brandow to pick up some raw milk and raw dairy products on the day he joined the LLC.

- e. At paragraph 6, Mr. Brandow states: "She told me that * * * raw milk and raw milk products * * * would be offered for sale." That is not correct. I never made this statement to Mr. Brandow. I know how the LLC operates, Mr. Brandow does not, and I would not have told him that the LLC "sells" or "offers for sale" something because to do so would subject the LLC's private conduct to the police powers of the State of New York and its Agriculture and Markets Laws. During the months that I distributed the LLC's equity to members at the Ithaca Farmer's Market I repeatedly had to tell non-members that they could not purchase raw milk or raw milk products from the LLC as raw milk was available only to LLC members.
- f. At paragraph 6, Mr. Brandow goes on to state: "I visited * * * and purchased." That is not correct. Mr. Brandow never purchased anything at Stick and Stone Farm. Mr. Brandow did not exchange any money for those products he picked up at Stick and Stone Farm. The only LLC products that are at Stick and Stone Farm are products that are available for pick up by LLC members. Stick and Stone does not "sell" any of the LLC's products to anyone. Stick and Stone merely allows LLC members to come to its farm to pick up their equity share.
- g. At paragraph 9, Mr. Brandow states: "The letter also indicated that I had purchased raw milk and raw milk products." This is not correct. Mr.

Brandow did not purchase anything from the LLC. Because he does not know how the LLC operates, Mr. Brandow's reference to "the letter" is actually an accounting statement showing Mr. Brandow's capital contributions to the LLC and his equity distributions, and since his distributions were less than his capital contributions he was entitled to a return of equity in the form of \$34 cash.

12. Mr. Brandow also makes misleading statements in his affidavit because he does not know how the LLC operates. For example, at paragraph 7 Mr. Brandow states that he has "not performed any of the work associated with or necessary for the proper operation of" the LLC. Mr. Brandow is not an operating manager. Steve and I are the operating managers of the LLC. Steve and I maintain, manage and tend to the LLC's dairy herd and make raw dairy products out of the dairy herd's raw milk. Mr. Brandow is not authorized to perform such work on behalf of the LLC.
13. In addition, Mr. Brandow states at paragraph 9 that he "paid a * * * \$20 payment for 'herd maintenance.'" Because Mr. Brandow does not know how the LLC operates he does not know what herd maintenance is. Steve and I own personal property in the form of milking equipment, tractors, fencing, hoses, etc. and we also own real property in the form of a 150 acre dairy farm. As operating managers, Steve and I are responsible for maintaining, managing and tending to the herd. For this Steve and I receive a "guaranteed payment" from the LLC, which is a common LLC transaction. In addition, the LLC rents our farm and equipment from us and pays us a rental fee. The

guaranteed payment and the rental fee are the expenses of the LLC covered under "herd maintenance".

14. At no time did Mr. Brandow, as an LLC member, ever indicate to Steve or I that he was a snitch working for the Department of Agriculture and Markets.
15. At no time did Mr. Brandow, as an LLC member, have the authority as an LLC member to sell his interest, equity interest or otherwise, in the LLC to a third person.
16. At no time did Mr. Brandow, upon seeking membership in the LLC, inform Steve or I or any of the other LLC members, that he was a snitch working for the Department of Agriculture and Markets.
17. At no time did Mr. Brandow, as an LLC member, attend any of the member meetings.
18. At no time did Mr. Brandow, as an LLC member, ever ask to see a copy of the LLC's operating agreement, nor did Steve or I ever provide a copy to him.

FURTHER AFFIANT SAYETH NAUGHT



Barbara Smith
Affiant

Sworn and subscribed before me this 16 day of January, 2008.



Notary public

Sheila Reynolds
Notary Public, State of New York
No. 01RE4984368 Seneca County
My Commission Expires July 22, 2009