

**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	:	FIRST AMENDED COMPLAINT
	:	
and	:	
	:	
Will Francis, Director Division of Milk Control and Dairy Services	:	Assigned Judge: Hon. Dennis F. Bender
	:	
Defendants	:	

Plaintiffs, complaining of the defendants and seeking a declaratory judgment per CPLR 3001, hereby file their First Amended Complaint pursuant to NY CLS CPLR R 3025:

GENERAL ALLEGATIONS

Factual background

1. Plaintiff Meadowsweet Dairy LLC (“Dairy LLC”) is a limited liability company with 121 members duly formed in the State of New York on March 1, 2007 with an office and business located at 2054 Smith Rd, Lodi, New York.
2. Plaintiffs Steve and Barbara Smith (“the Smiths”), husband and wife, reside at a dairy farm owned by them located at 2054 Smith Rd, Lodi, New York and are also members of the Dairy LLC.

3. The Smiths have 9 children, ranging in age from 8 to 27, six of whom reside with them at their farm.
4. Defendant Hooker is the Commissioner of the New York State Department of Agriculture and Markets (“Commissioner”), which is responsible for regulating the New York State agricultural industry, including the dairy industry.
5. Defendant Francis is the Director of the division of Milk control and Dairy Services (“Director”), a division of the New York State Department of Agriculture and Markets, which division is responsible for regulating aspects of the New York State dairy industry.
6. The Smiths are the Operating Managers of the Dairy LLC and provide boarding services for the dairy cows owned by the Dairy LLC.
7. The Dairy LLC’s cows are kept at the Smiths’ farm and the Smiths tend to, manage and take care of the cows on behalf of the Dairy LLC.
8. The Dairy LLC’s cows produce raw milk, some of which is converted by the Smiths into raw milk yogurt, raw milk butter, raw milk keifer, raw milk cheese and raw milk buttermilk, none of which are pasteurized.
9. The Dairy LLC’s members want raw, unpasteurized milk and milk products from the dairy cows they own.
10. 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.

11. Neither the Dairy LLC nor the Smiths “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.

Nature of the case or controversy

12. On October 11, 2007, Defendant Director and other representatives from the New York Department of Agriculture and Markets (hereinafter “the Department”) inspected the Smiths’ farm and issued to the Smiths “seizure form S10409” that pertained to 260 pounds and 7.5 gallons of raw milk buttermilk, raw milk, and raw milk yogurt that were seized by the Department on the Smiths’ farm. See Attachment A attached hereto.

13. These 260 pounds of raw milk products were manufactured by the Dairy LLC’s dairy cows.

14. On Friday, October 12, 2007, at 5:00 p.m., the Department faxed to Plaintiffs’ counsel a “Notice of Hearing” that was scheduled for October 23, 2007 to commence at 11 a.m. in Albany, NY. See Attachment B attached hereto.

15. The Notice was issued to “show cause” why the 260 pounds of raw milk products “should not be destroyed or otherwise disposed of.”

16. The Department scheduled the hearing for that time and date even though the Smiths had not requested a hearing.

17. The October 12th Notice of Hearing claims that the 260 pounds of raw dairy products are adulterated and/or misbranded because they were produced without a license or permit and were produced from milk that was not pasteurized.

18. Counsel for Plaintiff's informed the Department that the Plaintiffs would not be seeking a hearing on the proposed destruction of their 260 pounds of raw milk products. See Attachment C attached hereto.

19. In response, Counsel for the Department stated that Plaintiffs' waiver of their right to a hearing "without an agreement to destroy the seized items is not an option that we are willing to consider. We will proceed tomorrow with the hearing." See Attachment D attached hereto.

20. Counsel for Plaintiffs inquired whether it was the Department's position that they would continue to regulate and exert continuing jurisdiction over Plaintiffs. See Attachment E attached hereto.

21. In response, Counsel for the Department stated that the Department would "continue to enforce New York's laws regarding the production of milk and milk products" against Plaintiffs. See Attachment F attached hereto.

22. Counsel for the Plaintiffs inquired if this continuing jurisdiction and regulation would exist even if the conduct was private, and not public in nature, to which Counsel for the Department stated, in essence, yes. See Attachment G attached hereto.

23. At no time did the Department sample or otherwise analyze any of the 260 pounds of raw dairy products that it seized from Plaintiffs. See Attachment H attached hereto.

24. On October 31, 2007, a "Legal Assistant" of the Department sent a letter to the Dairy LLC and to the Smiths, alleging that they have been "selling, offering for sale, or otherwise making available raw milk for consumption by the consumers" in May, June

and July 2007. The letter also indicated that administrative penalties in the amount of \$1,000 have been levied. See Attachment I attached hereto.

25. The Department's conduct is capable of repetition yet evading review.

Applicable law

26. NY CLS Agr & M Section 199-a.1. provides, in part, that misbranding or adulterating food that is "for *sale*" is prohibited. Emphasis added.

27. 1 NYCRR Section 2.3(b) is captioned "permit to *sell* raw milk" and pursuant to Section 2.3(b)(1) applies to "[e]very person who *sells*, offers for *sale* or otherwise makes available raw milk for consumption by *consumers*." Emphasis added.

28. New York's dairy laws, its milk control laws and their respective implementing regulations do not define "consumer" anywhere.¹

29. 1 NYCRR 2.2(y) defines "milk" as milk "*which has been pasteurized*." Emphasis added.

30. The members of the Dairy LLC are not consumers; rather, they are owners of the Dairy LLC.

31. None of the milk or milk products produced by the Dairy LLC's dairy cows is or has been pasteurized.

32. None of the raw milk or raw milk products produced by the Dairy LLC's cows have been "sold," offered for "sale," made available to members of the consuming public, or otherwise purchased by anyone.

33. NY CLS Agr & M Section 16 provides the authority and power of Defendant Commissioner of Agriculture and Markets and Defendant Director.

¹ However, 1 NYCRR § 191.3 defines "consumer" as "(c) The term "consumer" whenever used in this Part shall mean any person *purchasing* eggs for his or her own family use or consumption." Emphasis added.

34. Nothing in NY CLS Agr & M Section 16 authorizes the Commissioner or Director to regulate private matters that do not involve the public's health, safety and welfare.

COUNT ONE
REGULATION OF THE DAIRY LLC

35. Paragraphs number 1 through 34 are incorporated in this Count as if rewritten herein.

36. The Dairy LLC does not sell, offer for sale, or otherwise make available "milk" or milk products to the consuming public.

37. None of the Dairy LLC's milk or milk products are purchased by anyone.

38. The Dairy LLC is a strictly private organization that does not make any raw milk or raw milk products available to the consuming public.

39. At all times relevant to this complaint, the milk produced by the Dairy LLC's dairy cows and the raw milk products produced from that raw milk have not been pasteurized.

40. The Defendants Commissioner and Director are authorized by law to regulate only in the matter of the public's health, safety and welfare.

41. The Commissioner and the Director do not have the authority to regulate the Dairy LLC when it provides raw milk and raw milk products only to its own members.

42. The Commissioner and the Director lacked the jurisdiction to issue the "seizure form S10409" to the Dairy LLC on October 11, 2007.

43. The Commissioner and the Director lacked the jurisdiction to issue the "Notice of Hearing" to the Dairy LLC on October 12, 2007.

44. The Commissioner and the Director lacked the jurisdiction to issue the letter of October 31, 2007 to the Dairy LLC seeking administrative penalties.

45. The Commissioner and the Director do not have jurisdiction to regulate the affairs of the Dairy LLC.

COUNT TWO
REGULATION OF THE SMITHS

46. Paragraphs number 1 through 45 are incorporated in this Count as if rewritten herein.

47. At all times relevant to this complaint, the Smiths have not owned any dairy cows.

48. The Smiths are the Operating Managers of the Dairy LLC whereby they manage the herd of dairy cows owned by the Dairy LLC and convert some of the raw milk from the cows into dairy products such as raw milk yogurt, raw milk butter, raw milk keifer, raw milk cheese and raw milk buttermilk.

49. At all times relevant to this complaint, the raw milk and raw milk products produced, handled and managed by the Smiths have not been pasteurized.

50. The Smiths do not sell, offer for sale, or otherwise make available “milk” or “milk products” to the consuming public.

51. The Defendants Commissioner and Director are authorized by law to regulate only in the matter of the public’s health, safety and welfare.

52. The Commissioner and the Director do not have the authority to regulate the Smiths when they produce, handle and manage raw milk and raw milk products produced by the Dairy LLC’s cows when that raw milk and those raw milk products are made available only to the members of the Dairy LLC.

53. The Commissioner and the Director lacked the jurisdiction to issue the “seizure form S10409” to the Smiths on October 11, 2007.

54. The Commissioner and the Director lacked the jurisdiction to issue the “Notice of Hearing” to the Smiths on October 12, 2007.

55. The Commissioner and the Director lacked the jurisdiction to issue the letter of October 31, 2007 to the Smiths seeking administrative penalties.

56. The Commissioner and the Director do not have jurisdiction to regulate the affairs of the Smiths.

COUNT THREE
CONTINUED REGULATION OF THE DAIRY LLC AND THE SMITHS

57. Paragraphs 1 through 56 are incorporated in this Count as if rewritten herein.

58. The Commissioner and the Director should be prohibited in the future from conducting inspections of the Smiths and the Dairy LLC as long as the raw milk and raw milk products they produce are made available only to members of the Dairy LLC.

59. The Commissioner and the Director should be prohibited in the future from requiring any licenses or permits from the Smiths and the Dairy LLC as long as the raw milk and raw milk products they produce are made available only to members of the Dairy LLC.

60. The Commissioner and the Director should be prohibited in the future from issuing any notices or violations to the Smiths and the Dairy LLC as long as the raw milk and raw milk products they produce are made available only to members of the Dairy LLC

61. The Commissioner and the Director should be prohibited in the future from taking any administrative, civil or criminal enforcement action against the Smiths and the Dairy LLC as long as the raw milk and raw milk products they produce are made available only to members of the Dairy LLC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

- A. The Court should issue a declaration that the activity engaged in by either the Dairy LLC or the Smiths is not subject to regulation, either now or in the future, by Defendants;
- B. The Court should issue a declaration that the members of the Dairy LLC, including the Smiths, are not members of the consuming public;
- C. The Court should issue a declaration that neither the Dairy LLC nor the Smiths sell, offer for sale or otherwise make available raw milk and raw milk products to the consuming public;
- D. The Court should issue a declaration that neither the Smiths nor the Dairy LLC are subject to regulation under 1 NYCRR Section 2.3(b) (which requires a permit to sell raw milk to the consuming public) because neither the Dairy LLC nor the Smiths sell, offer for sale or otherwise make available raw milk and raw milk products to the consuming public;
- E. The Court should issue a declaration that the raw milk and raw milk products produced, handled and managed by the Smiths and the Dairy LLC can not be adulterated or misbranded as prohibited by NY CLS Agr & M Section 199-a.1 because they are not sold, offered for sale or otherwise made available to members of the consuming public;
- F. The Court should issue a declaration that the raw milk and milk products produced, handled and managed by the Smiths and the Dairy LLC are not regulated by

the Defendants because that milk and those products do not meet the definition of 1 NYCRR 2.2(y), which defines “milk” as milk “which has been pasteurized;”

G. The Court should issue a declaration that the members of the Dairy LLC can pick up their raw milk and their raw milk products from the Smiths’ farm or market stands free from harassment, intimidation, interference or hindrance by Defendants;

H. The Court should issue a permanent injunction enjoining Defendants from enforcing New York’s Agriculture and Market Law, NY CLS Agr & M Section 1 *et seq.*, against Plaintiffs;

I. The Court should award attorneys fees and costs to Plaintiffs;

J. The Court should award any other relief it deems just and appropriate.

Respectfully submitted,

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