STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

Meadowsweet Dairy LLC
2054 Smith Road, Lodi, NY 14860,

and

Steven Smith and Barbara Smith
2054 Smith Road, Lodi, NY 14860,

Plaintiffs,

against Index No. 40558

Patrick Hooker, Commissioner, Department
of Agriculture and Markets of the State of
New York, 10 B Airline Drive, Albany, NY 12235,

and

Will Francis, Director, Division of Milk Control
and Dairy Services, 10 B Airline Drive, Albany,
NY 12235,

Defendants.

MEMORANDUM OF LAW

Ruth A. Moore, Counsel
New York State Department
of Agriculture and Markets
Attorney for Defendants

Larry A. Swartz, Esq.
of Counsel

PRELIMINARY STATEMENT

The above-captioned action for declaratory judgment was commenced by the filing of the summons and complaint in the Seneca County Clerk's office on December 13, 2007.

This memorandum of law is submitted in support of defendant's motion to dismiss the causes of action in the Complaint, pursuant to paragraphs (5) and (7) of CPLR section 3211(a), upon the ground that it fails to state a cause of action (or, alternatively, to convert the above-captioned action to a special proceeding and dismiss; or, in the alternative, to convert said action to a special proceeding and transfer venue to Supreme Court, Albany County) and upon the ground that it is barred by collateral estoppel.

FACTS

The Commissioner of Agriculture and Markets of the State of New York ("Commissioner") is authorized by the Agriculture and Markets Law ("A&ML") to regulate the State's dairy industry to protect the public health, safety, and welfare. Specifically, the Commissioner is authorized, pursuant to A&ML section 20, to ". . . have full access to all factories, farms [and] buildings . . . used in the production, manufacture . . .[and] sale . . . of any dairy products . . . ." The Commissioner is also authorized to enforce A&ML 199-a(1) which provides that "No person, firm, association . . . shall within this state manufacture, produce . . . possess, sell, offer or expose for sale . . . any article of food which is adulterated or misbranded." When the Commissioner has probable cause to believe that food is adulterated or misbranded, he is authorized, pursuant to A&ML section 202-b, to quarantine such food. If the owner or custodian of such quarantined food does not agree to its destruction, the Commissioner is required, pursuant to such section, to hold a hearing to permit the owner to show cause why such food should not be destroyed.

The Commissioner has also promulgated regulations, authorized by statute, that regulate certain aspects of the dairy industry. The Commissioner has promulgated Title One of the Official Compilation of Codes, Rules and Regulations of the State of New York ("1 NYCRR") section 2.3(a) which requires that "Every person who operates a . . . milk plant shall hold a general permit . . . ." ("milk plant permit"). The Commissioner has also promulgated 1 NYCRR section 2.3(b)(1) which requires that "Every person who sells, offers for sale or otherwise makes available raw milk for consumption by

consumers shall hold a permit" ("raw milk permit").* This requirement allows a raw milk producer to consume his or her own raw milk without having to possess a permit but requires such a person to have a permit if he or she sells, offers for sale or makes available such food to anyone else (i.e., to consumers).

The plaintiffs, Meadowsweet Dairy LLC ("Meadowsweet") and Barbara and Steven Smith, own and operate a dairy farm and milk plant located at 2054 Smith Road, Lodi, New York ("the dairy farm and milk plant") wherein raw milk, as defined in A&ML section 2.2(pp), is produced, and raw milk products are manufactured. The Department of Agriculture and Markets ("Dep't") determined, after investigation, that Meadowsweet was selling, offering for sale and making available raw milk to consumers, without possessing a raw milk permit. The Department also determined that Meadowsweet and/or Mr. and Mrs. Smith were operating a milk plant and distributing raw milk products such as raw butter, raw buttermilk, raw heavy cream, raw milk kefir and raw milk yogurt to consumer-members of Meadowsweet, without possessing a milk plant permit. Finally, the Department determined that such raw milk and raw milk products were adulterated, within the meaning of A&ML section 200(3), because they had been produced and manufactured by plaintiffs without the required permits, and that such raw milk products were misbranded, within the meaning of A&ML section 201(7), because they were made from raw milk in violation of the applicable standards of identity for such foods which require that those products be made from pasteurized milk.**

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* The "person" referred to in 1 NYCRR section 2.3(b)(1) is a "raw milk producer", defined in 1 NYCRR section 2.2(qq), to mean ". . . a person who operates a dairy farm and produces raw milk."

**A standard of identity for a particular milk product is a regulation set forth in Title 21 of the Code of Federal Regulations Part 131 (and incorporated by reference in 1 NYCRR section 17.18(a)), that requires the milk product to be made with only certain required or permitted ingredients. The standards of identity for the milk products referred to above do not require or permit raw milk to be an ingredient therein.

On October 11, 2007, dairy products specialists ("DPS's") employed by the Department visited the dairy farm and milk plant, in the regular course of their duties, to conduct an inspection thereof. At that time, they quarantined raw milk and certain raw milk products that they had probable cause to believe were adulterated and misbranded. Because Mr. and Mrs. Smith, the custodians of such raw milk and raw milk products, would not agree to voluntarily destroy such foods, a Notice of Hearing was issued that scheduled a hearing to allow Meadowsweet and Mr. and Mrs. Smith to show cause why such quarantined foods should not be destroyed. A copy of the Notice of Hearing is annexed to the Affirmation of Larry A. Swartz, Esq., as Exhibit B.

The administrative hearing was scheduled to commence and was held on October 23, 2007 after consultations with plaintiffs' attorney resulted in an agreement that such date was mutually convenient. Neither the plaintiffs nor their attorney appeared at the hearing. After the hearing was completed, the hearing officer made findings of fact, conclusions of law, and a recommendation regarding disposition of the quarantined foods, as set forth in the Hearing Officer's Report, dated November 20, 2007. Thereafter, the Commissioner adopted such findings of fact, conclusions of law, and recommendation, as set forth in his Final Determination, dated December 12, 2007. A copy of the Hearing Officer's Report and Commissioner's Final Determination are annexed to Mr. Swartz's Affirmation as Exhibit C, collectively.

ARGUMENT

THE CAUSES OF ACTION IN THE COMPLAINT HEREIN SHOULD BE DISMISSED

POINT ONE

THE CAUSES OF ACTION IN THE COMPLAINT SHOULD BE DISMISSED, PURSUANT TO CPLR SECTION 3211(a)(5)

The Complaint herein seeks a declaration that, in essence, the Department has no authority to enforce the provisions of A&ML and 1 NYCRR referred to above. The Complaint should be dismissed, however, because plaintiffs are collaterally estopped from claiming that the Department has no such authority.

The doctrine of collateral estoppel ". . . precludes a party from relitigating in a subsequent action or preceding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunal or causes of action are the same (cit omit.)" Ryan v. New York Tel. Co., 62 N.Y. 2d 494, 500, 478 N.Y.S. 2d 823 (1984). Such doctrine clearly applies when a party in an action attempts to relitigate an issue already decided in an administrative proceeding. In Jeffreys v. Griffin, 1 N.Y.3d 34, 769 N.Y.S. 2d 184, 187 (2003), the Court of Appeals stated that

> Collateral estoppel . . . gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions have been met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal (cites omit.)

As set forth above, an administrative hearing was held on October 23, 2007, to consider whether raw milk and raw milk products produced and manufactured by plaintiffs, and quarantined during an inspection conducted of their dairy farm and milk plant, should be destroyed. Plaintiffs' attorney was consulted and agreed to a hearing date of October 23, 2007. Plaintiffs and their attorney were thereafter given adequate notice of the hearing, but failed to attend. After the hearing was concluded, the hearing officer recommended that such foods should be destroyed, and the Commissioner issued a Final Determination that concurred with the hearing officer's recommendation.

Plaintiff's' claim in the Complaint herein that they are not subject to certain provisions of the A&ML and 1 NYCRR and that defendants had no jurisdiction to perform certain acts was necessarily decided by the Dep't in the administrative hearing referred to above. Specifically, plaintiff's claim that the dairy farm and milk plant are not subject to inspection was decided because the Hearing Officer recommended, and the Commissioner agreed, that the raw milk and raw milk products that were the subject of the hearing should be destroyed. The hearing officer and the Commissioner could not have made such conclusion unless they necessarily had found that the inspection during which such foods were quarantined was indeed authorized by the provisions of A&ML section 20.

Plaintiffs also claim in the Complaint herein that they do not require any permits issued by the Commissioner because they do not sell, offer for sale or make available raw milk and raw milk products to the consuming public, but, rather, only make such foods available to Meadowsweet's members. This issue was, however, decided by the hearing officer and the Commissioner because they concluded that the quarantined foods were adulterated, within the meaning of A&ML section 200(3), because they had

foods were adulterated, within the meaning of A&ML section 200(3), because they had been produced and manufactured by Meadowsweet and by Mr. and Mrs. Smith who were required to but did not possess a milk plant permit or a raw milk permit. The claim that plaintiffs are not subject to the permit requirements set forth in 1 NYCRR section 2.3, quoted above, and that the Commissioner has no power to enforce such requirement by instituting administrative and/or judicial proceedings, has, therefore, already been decided against plaintiffs and they are collaterally estopped from relitigating such claim.

Plaintiffs further claim in the Complaint herein that they are not subject to the requirement set forth in A&ML section 199-a(1), quoted above, nor the provisions of A&ML section 202-b, summarized above. In the Notice of Hearing, the Department alleged that the quarantined foods were adulterated and misbranded, and therefore in violation of A&ML section 199-a(1). The hearing officer concluded, and the Commissioner determined, that such foods were indeed adulterated and misbranded as alleged in the Notice of Hearing and should be destroyed. The hearing officer and the Commissioner could not have made such conclusion unless they had necessarily determined that such foods had been properly quarantined and a hearing to consider their destruction properly brought, pursuant to A&ML section 202-b, and that A&ML section 199-a(1)'s requirement that no person may manufacture, produce, sell or offer or expose for sale adulterated or misbranded food does indeed apply to plaintiffs.

Based upon the preceding, the Court should dismiss the Complaint herein, pursuant to CPLR section 3211(a)(5), because the plaintiffs are collaterally estopped from seeking another determination of whether they are "covered" by certain provisions of the A&ML and 1 NYCRR.

POINT TWO

THE CAUSES OF ACTION IN THE COMPLAINT SHOULD BE DISMISSED, PURSUANT TO CPLR SECTION 3211(a)(7)

The above-captioned matter is framed as an action for declaratory judgment. Said action sets forth, in the "Prayer for Relief" portion thereof, a request that the Court issue a declaration that certain activities engaged in by plaintiffs are not "covered by" applicable provisions of the A&ML and 1 NYCRR. The Complaint should be dismissed, however, because plaintiffs have alleged no causes of action that can be adjudicated in a declaratory judgment action.

Notwithstanding the above-captioned matter being framed as an action for declaratory judgment, this matter should have been brought as a special proceeding pursuant to CPLR section 7803(2) since it is an effort to prohibit the Department of Agriculture and Markets from allegedly acting without or in excess of its jurisdiction (see State v. Wolowitz, 96 A.D. 2d 47, 468 N.Y.S. 2d 131, 138 (2nd Dep't., 1983); also see Weinstein, Korn and Miller, 5 New York Civil Practice sec. 3001.10a, wherein it is stated that "Article 78 proceedings provide judicial review of executive or administrative action in a specific fact situation directly affecting the petitioning party. Declaratory judgment actions, by contrast, seek to test the validity, applicability or construction of legislation empowering an officer or enabling a body to review the constitutionality or statutory validity of government action, or to stop official action which is likely to constitute a continuing policy, so that a ruling in the declaratory judgment would clearly affect other cases." (emphasis added)). Based upon the preceding, the Court should dismiss the Complaint herein, pursuant to CPLR section 3211(a)(7), because plaintiffs have failed to state a cause of action that can be adjudicated in a declaratory judgment action.

Notwithstanding the foregoing, if the Court decides not to dismiss the Complaint for the reasons set forth immediately above, it should, pursuant to CPLR section 103(c), "convert" the above-captioned action to a special proceeding brought pursuant to CPLR section 7803(2) and should thereafter order such special proceeding dismissed because:

> - The administrative hearing referred to on page 4 above was held on October 11, 2007 to consider whether the Commissioner, pursuant to A&ML section 202-b, should order the destruction of raw milk and raw milk products quarantined at the dairy farm and milk plant. A Hearing Officer's Report was issued on November 20, 2007; the hearing officer's findings, conclusions and recommendation were adopted by the Commissioner in his Final Determination, dated December 12, 2007; and the Commissioner's Final Determination was served on plaintiffs herein on December 13, 2007. All of the claims set forth in the Complaint herein were necessarily decided upon at such administrative hearing.
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> - After the administrative hearing to consider destruction of the quarantined foods was concluded, plaintiffs herein could have, but have not brought a special proceeding pursuant to Article 78 seeking judicial review of the Commissioner's Final Determination.

If the above-captioned action is converted to a proceeding brought pursuant to CPLR section 7803(2), in the nature of prohibition, such special proceeding should be dismissed because, as stated by the Court in Martinez 2001 v. NYC Campaign Finance Bd., 36 A.D.3d 544, 829 N.Y.S.2d 55, 60 (1st Dep't., 2007), ". . . prohibition is an extraordinary remedy . . . . [and] '. . . will not lie if there is available an adequate remedy at law which may bar the extraordinary remedy (cit. omit)'" (quoting Rainka v. Whalen, 73 A.D.2d 731, 732, 423 N.Y.S.2d 292 (3rd Dep't., 1979) wherein the Court held that such "adequate remedy at law" was a CPLR section 7803(4) proceeding). In other words, if the above-captioned action were converted to a CPLR section 7803(2) special

proceeding, it should nevertheless be dismissed because plaintiffs have an adequate remedy at law (i.e., a special proceeding brought pursuant to CPLR section 7803(4) to review the Commissioner's Final Determination referred to above).

If the Court decides to "convert" the above-captioned action to a special proceeding but not to dismiss it as requested above, the Court should transfer such special proceeding to Supreme Court, Albany County, because, pursuant to CPLR section 506(b), all special proceedings brought against the Department of Agriculture and Markets must be venued in such court. (see Cohen v. Dep't of Social Services, 37 A.D.2d 626, 323 N.Y.S.2d 603, 605 (2nd Dep't., 1971), aff'd, 30 N.Y.2d 571, 330 N.Y.S. 2d 789 (1972)).

CONCLUSION

Defendants' motion to dismiss the causes of action in the Complaint herein should be granted; or if such motion is not granted, the above-captioned action should be converted to a special proceeding, pursuant to CPLR section 7803(2), and dismissed; or, in the alternative, said action should be converted to a special proceeding and transferred to Supreme Court, Albany County.

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Dated: January 3, 2008

By: _____
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