



December 14, 2009

Mr. Carlo Esqueda
Dane County Clerk of Courts
Dane County Circuit Court
215 S. Hamilton Street
Madison, WI 53703-3285

VIA PERSONAL DELIVERY

Re: *Farm-to-Consumer Legal Defense Fund, Grassway Organics Farm Store LLC, Grassway Organics Association, Kay Craig and Wayne Craig v. Wisconsin Department of Agriculture, Trade and Consumer Protection*

Dear Mr. Esqueda:

Enclosed for filing is a Complaint in the above-referenced matter, together with a check in the amount of \$164.00 for the applicable filing fee.

Very truly yours,

ELIZABETH GAMSKY RICH & ASSOCIATES SC

Elizabeth Gamsky Rich

Cc: David Cox, Esq.

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

FARM-TO-CONSUMER LEGAL DEFENSE FUND,
8116 Arlington Blvd. Suite 263
Falls Church, VA 22042, and

GRASSWAY ORGANICS FARM STORE LLC,
N600 Plymouth Trail Road
New Holstein, WI 53061, and

Case No. _____

GRASSWAY ORGANICS ASSOCIATION,
N600 Plymouth Trail Road
New Holstein, WI 53061, and

Declaratory Judgment

Kay and Wayne Craig,
d/b/a GrassWay Farm,
N600 Plymouth Trail Road
New Holstein, WI 53061

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION,
Rod Nilsestuen, Secretary
2811 Agriculture Drive
Madison, WI 53708-8911,

Defendant.

COMPLAINT

Now come Plaintiffs Farm-to-Consumer Legal Defense Fund, GrassWay Organics Farm Store LLC, GrassWay Organics Association, and Kay and Wayne Craig, husband and wife, d/b/a GrassWay Farm, by their attorneys, David G. Cox and Elizabeth Gamsky Rich,

and as and for their complaint against Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection allege as follows:

Parties

1. Plaintiff Farm-to-Consumer Legal Defense Fund (hereinafter “the Fund”) is an Ohio nonprofit organization with tax exempt status under Section 501(c)(4) of the Internal Revenue Code, with its principal place of business at 8116 Arlington Blvd., Suite 263, Falls Church, VA 22042.
2. The Fund has approximately 1,900 members nationwide, with 111 members residing in the State of Wisconsin.
3. Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) is a Wisconsin governmental agency with its principal place of business located at 2811 Agriculture Drive, Madison, WI, 53708-8911.
4. Plaintiffs Kay Craig and Wayne Craig are members of the Fund and reside at and are the owners of a dairy farm located at N600 Plymouth Trail Road, New Holstein, Wisconsin.
5. Plaintiffs Kay Craig and Wayne Craig, d/b/a GrassWay Farm, allow the use of their farm, including their land, building and equipment to GrassWay Organics Farm Store, LLC, pursuant to a Custom Hire Agreement with GrassWay Organics Farm Store LLC.
6. Plaintiff GrassWay Organics Farm Store LLC (hereinafter “the Store”) is a Wisconsin limited liability corporation holding a milk producer license issued by Defendant, with its principal place of business located at N600 Plymouth Trail Road, New Holstein, WI, 53061.

7. The Store owns a herd of dairy cows, a store building, store inventory, and other assets.
8. The Store has a Custom Hire Agreement with Wayne Craig and Kay Craig to board, manage, milk and take care of the herd of dairy cows.
9. Plaintiff GrassWay Organics Association (hereinafter "the Association") is a private member association and is a member of the Store.
10. Members of the Association have an ownership interest in the Store.
11. The Store owns and operates a private store that is not open to members of the public.
12. Only members of the Association may purchase products from the private store.
13. One of the products available to members of the Association at the private store is unpasteurized milk (herein sometimes referred to as "fresh milk").

Nature of the Action

14. This is an action brought under the Uniform Declaratory Judgments Act , Wis. Stat. §806.04, and the mandamus provisions of Wis. Stat. §783.01. Plaintiffs seek, in part, a declaration that Plaintiffs are not in violation of Wis. Stat. §97.24(2)(b) and DATCP regulations promulgated thereunder; a declaration that no retail food establishment license is required for the Store; and seek, in part, an order prohibiting suspension, revocation or refusal to re-issue the milk producer license of the Store based on the distribution of fresh milk to the members of the Association.
15. The Store has held a milk producer license since at least March of 2005.
16. Since approximately December of 2005, the Store has distributed fresh milk to the members of the Association.

17. At all time periods relevant to this Complaint, DATCP was fully aware of the Store's activities, including its distribution of fresh milk to members of the Association.
18. DATCP worked in cooperation with the Wisconsin Department of Financial Institutions (DFI) to assist DFI in issuing an Order of Exemption to allow the offer and sale of membership interests in the Store.
19. The provisions of Wis. Stats. §97.24(2)(b) have not changed since 2005; however, DATCP has since April of 2009 interpreted the statute to prohibit the identical activities that have occurred with DATCP's approval since 2005.
20. DATCP's actions in this regard are arbitrary and capricious; DATCP's interpretation of the statute is incorrect.
21. DATCP's actions are causing injury to the Plaintiffs.
22. As described below, Plaintiffs have a case or controversy with Defendant DATCP. They do not have any other adequate remedy at law, they are suffering injury as a result of DATCP's arbitrary and capricious and unlawful interpretation of Wis. Stats 97.24, and the issue is ripe for review given the threat of an enforcement action against Plaintiffs.

Standing

23. The FTCLDF is a nation-wide non-profit organization dedicated to protecting and promoting sustainable, environmentally sound farming practices and direct farm-to-consumer transactions which the FTCLDF believes furthers the common good and general welfare of all Americans. The FTCLDF defends and protects the right of farmers to directly provide, and for consumers to directly obtain, unprocessed and processed farm foods. Toward this end, the FTCLDF provides advocacy, education

and legal services for farmers and consumers against any local, State, and federal government interference with the legal transfer of products produced and processed on the farm.

24. In addition, agrarian-based communities are an integral part of the fabric of American custom and culture and all Plaintiffs help to preserve and protect that culture.

25. All Plaintiffs have chosen to support: the preservation and protection of America's agricultural heritage and traditional farming techniques; the maintenance and protection of heirloom varieties of plants and animals constituting a valuable genetic resource which may help to protect America's food supply in the event of a disease outbreak; and the contribution to the national security benefit founded in a diverse and sustainable agricultural system in the event of a terrorist attack or natural disaster that interrupts the distant transportation of centrally-produced food across the country.

26. All of the individual Plaintiffs will be damaged and will suffer an injury in fact by DATCP's differing and changing interpretations of Wis. Stats. §97.24(2)(b). Specifically, all individual Plaintiffs are now subject to civil, criminal and/or administrative penalties and/or sanctions for allegedly being in violation of Wis. Stats. §97.24(2)(b).

27. The threat of an enforcement action by DATCP guarantees standing to the individual Plaintiffs. *See Houston v. Hill*, 482 U.S. 451, 459, n. 7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785, n. 21

(1978); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

28. A declaratory judgment action is the appropriate action to bring when faced with a Hobson's choice, i.e., either comply with an unlawful interpretation of a statute or ignore the unlawful interpretation and face the possible consequences of noncompliance. *See Abbott Laboratories v. Gardner*, 386 U.S. 136, 152-153, (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967).
29. A favorable ruling on the claims presented in this Complaint would redress Plaintiffs' injury in fact. Specifically, a ruling that DATCP's differing interpretations of Wis. Stats. §97.24(2)(b) would allow the individual Plaintiffs to make raw milk available to their members.
30. The Fund Plaintiff has standing because Plaintiffs Wayne and Kay Craig have standing to sue in their own right. The interest at stake in this suit, namely the halting of an arbitrary and capricious agency interpretation of Wis. Stats. §97.24(2)(b) that interferes with farmers' ability to raise food and consumers' ability to obtain such foods, is germane to the Fund's purpose and mission. None of the claims asserted nor the relief requested require the participation of individual members.

Background

31. Wis. Stat. §97.24(2) generally prohibits the sale and distribution of unpasteurized milk to consumers, with certain enumerated exceptions.
32. On October 30, 2002, DATCP issued an order ("2002 Order") providing in pertinent part, "Under the long-standing interpretation of s. 97.24, Wis. Stats., the

Respondents are free to devise valid agreements sharing ownership in their milk producer license under applicable law that may include allowing actual owners to take a share of the ungraded raw milk produced under the license.”

33. The DATCP interpretation of §97.24 was again addressed in 2004, resulting in the Order attached as Exhibit 1 (“2004 Order”).

34. The 2004 Order specifically authorized the use of agreements sharing ownership in a milk producer license and specifically acknowledged that investments in such entities could also be for the purpose of purchasing non-pasteurized milk or milk products, though purchasing such products could not be the sole purpose of the investment.

35. On March 22, 2005, the Store obtained a Conditional Use Permit from the Calumet County Planning Department’s Planning and Zoning Committee for operation of the farm store (“County Permit”). A copy of the County Permit is attached as Exhibit 2.

36. The County Permit requires that the business be a “members only” type of store and that it not be open to the general public.

37. On December 15, 2005, DFI issued a letter to the Craigs regarding an Order of Exemption under §551.23(18) of the Wisconsin Uniform Securities Law (“DFI letter of December 15, 2005”), allowing the offer and sale of membership interests in the Store “to persons in Wisconsin to enable them—as membership interest holders and, therefore, owners of the LLC—to purchase unpasteurized dairy products under the Wisconsin Milk Producer License #191666-D2 currently owned by the LLC.” A copy of the DFI letter of December 15, 2005 is attached as Exhibit 3.

38. The Order of Exemption was issued on January 5, 2005, and stated that it was valid for a two-year period. A copy of the Order of Exemption is attached as Exhibit 4.
39. Upon information and belief, the DFI letter of December 15 and the Order of Exemption were issued with the participation and approval of DATCP, and specifically provided, "As you are aware, this type of Exemption Order treatment has been used by the Division with respect to several prior filings by farming operations looking to sell unpasteurized milk to purchasers under the Orders, and our Division has worked with representatives from the Wisconsin Department of Agriculture in developing this Exemption Order process and procedure."
40. On March 20, 2007, DATCP issued a warning letter to the Store ("DATCP letter of March 20, 2007"). A copy of the letter is attached as Exhibit 5.
41. The DATCP letter of March 20, 2007 specifically provided that owners in a valid agreement sharing ownership in a milk producer license may receive distributions of raw milk. The alleged violation was not that the distributions were occurring, but rather that "raw milk distributions to owners cannot occur in a retail food store licensed by this Department."
42. On March 23, 2007, the Store sent a written response to DATCP, explaining that milk distributions do not occur in the store ("GrassWay Response of March 23, 2007"). The GrassWay Response of March 23, 2007 is attached as Exhibit 6.
43. On September 14, 2007, DATCP issued a Final Order regarding its proposal to revise regulations relating to the sale and distribution of fresh milk.
44. The revised regulation was presented as a final order in DATCP Docket No. 05-R-04, and included a statement that the purpose of the revised regulation "clarifies

current statutory prohibitions against the sale of raw milk to consumers, consistent with administrative law judge decisions.” A copy of the statement is attached as Exhibit 7.

45. On April 16, 2009, Jacqueline Owens of DATCP sent a letter to the Store alleging that unpasteurized milk was being sold at the store in violation of Wis. Stats. §97.24 (“Owens letter of April 16, 2009”) and that the store’s Retail Food Establishment License Application was rejected because of the violation. The Owens letter of April 16, 2009 is attached as Exhibit 8.

46. The Owens letter stated that the Retail Food Establishment License would not be re-issued unless the Store signed the Conditional License Agreement enclosed with the Owens letter of April 16, 2009. The Conditional License Agreement is attached as Exhibit 9.

47. The Conditional License Agreement included a new interpretation of Wis. Stats. §97.24(2)(b) against the sale or distribution of unpasteurized milk and milk products, which interpretation provided in part, “Sale or distribution includes any distribution to any person through any agreement other than that person being a member of the partnership, cooperative or corporation organized pursuant to chs. 178, 180, 183 or 185, Wis. Stats., to hold the Respondent’s milk producer license and operate the facility.”

48. On May 4, 2009, the Store responded through counsel, stating that its members were not “consumers” or “members of the public” and that the store was therefore not required to obtain a retail food establishment permit and was not illegally

selling unpasteurized milk (“GrassWay Response of May 4, 2009”).¹ The GrassWay Response of May 4, 2009 is attached as Exhibit 10.

49. On May 8, 2009, counsel for DATCP responded with another new interpretation of Wis. Stats. §97.24 (“Daniels letter of May 8, 2009”). The Daniels letter of May 8, 2009 is attached as Exhibit 11.

50. The new interpretation was that in order for an ownership interest to qualify as a “bona fide ownership interest in the milk producer,” the ownership interest must have been acquired with an expectation of financial profit.

51. Counsel for the Store responded on June 1, 2009, protesting that the language of the new interpretation, i.e., expectation of financial profit, appears nowhere in Wis. Stat. §97.24 nor in the regulation promulgated thereunder at Wis. Admin. Code ATCP 60.235 (“GrassWay Response of June 1, 2009”) nor in the administrative law decisions referenced in the September 14, 2007 Final Order (see pars. 43 and 44). The GrassWay Response of June 1, 2009 is attached as Exhibit 12.

52. On June 16, 2009, Randall Schumann, counsel for the Wisconsin Department of Financial Institutions, sent a letter to Kay and Wayne Craig attaching the new interpretation and stating that the now-expired Securities Exemption Order would not be re-issued (“Schumann letter of June 16, 2009”). The Schumann letter of June 16, 2009 is attached as Exhibit 13.

¹ WI ADC Ch. ATCP 75, App. 1-201.10(B)(16) defines consumer as “a PERSON who is a member of the public, takes possession of FOOD, is not functioning in the capacity of an OPERATOR of a FOOD ESTABLISHMENT or FOOD PROCESSING PLANT, and does not offer the FOOD for resale.” (Capitals in original).

53. On June 20, 2009, DATCP issued a notice of change in inspection frequency to the Store. (“Inspection Notice of June 20, 2009”). The Inspection Notice of June 20, 2009 is attached as Exhibit 14.
54. The Inspection Notice of June 20, 2009 stated that the inspection frequency of the dairy farm would be reduced, with the reason stated as “Good Job—No violations.”
55. On June 22, 2009, counsel for DATCP issued another letter to counsel for the Store which included another interpretation of “bona fide ownership”(“Daniels letter of June 22, 2009”). The Daniels letter of June 22, 2009 is attached as Exhibit 15.
56. The new interpretation of “bona fide ownership” required that owners taking unpasteurized milk for personal use do so only if the use is incidental to their business of producing milk, which would include an analysis of whether they have actual responsibilities and make decisions of an owner or, if they are passive owners, whether they receive any type of annual statements of profit/loss and official forms for filing with their tax returns.
57. Counsel for the Store responded on July 17, 2009, by stating that the Store was considering a re-structuring whereby the profits of the Store would be shared by the passive owners of the entity (“GrassWay Response of July 17, 2009”). The GrassWay Response of July 17, 2009 is attached as Exhibit 16.
58. On July 20, 2009, counsel for DATCP issued a letter to counsel for the Store. (“Daniels letter of July 20, 2009”). The Daniels letter of July 20, 2009 is attached as Exhibit 17.

59. The Daniels letter of July 20, 2009 stated that profits are not the issue; and that owners in the milk producing business may only incidentally take milk for their own use.

60. DATCP's responses to counsel for the Store demonstrates it would be futile for Plaintiffs to exhaust their administrative remedies.

**FIRST CAUSE OF ACTION—AGENCY ACTIONS *ULTRA VIRES*
AND INCONSISTENT WITH APPLICABLE LAW**

61. Paragraphs 1-60 of the Complaint are incorporated as if fully set forth herein.

62. The members of the Association receive fresh milk by virtue of their ownership interest in the Store.

63. Kay and Wayne Craig receive revenue from the Store by virtue of their lease agreement with the Store.

64. The Store receives revenue from the Association by virtue of its making raw milk available to members of the Association.

65. The provision of fresh milk to the members of the Association is not a violation of Wis. Stats. §97.24 or any rule promulgated thereunder.

66. Based on DATCP's long-standing interpretation of the requirements of Wis. Stat. §97.24 and Wis. Admin Code ch. 75.04, and on well-established Wisconsin corporate law, the Association members have a bona fide ownership interest in the Store.

67. DATCP's new interpretation of Wis. Stat. §97.24, first articulated by letter on April 16, 2009, is arbitrary and capricious and not consistent with applicable law.

**SECOND CAUSE OF ACTION—DATCP LACKS JURISDICTION TO
REGULATE THE FARM STORE**

68. Paragraphs 1-67 of the Complaint are incorporated as if fully set forth herein.

69. The Store operates a private store that is not open to the public..
70. Only members of the Association are permitted to purchase items from the store.
71. Members of the Association are not “consumers” within the meaning of WI ADC Ch. ATCP 75, App. 1-201.10(B)(16).
72. If the Store is found to be a retail food establishment, the Store will not be able to make raw milk available to the Association members.
73. If the Store is found to be a retail food establishment, the Association members will not be able to acquire raw milk from the Store.
74. If the Store is found to be a retail food establishment, the Craig’s will not receive the benefit of their lease with the Store.
75. The Store is not a “retail food establishment” within the meaning of Wis. Stat. §97.30, because no retail sales to consumers take place there.
76. Wis. Stat. §97.24 governs the sale or distribution of milk to consumers.
77. The members of the Association are not consumers within the meaning of Wis. Stat. §97.24, and therefore DATCP does not have jurisdiction to regulate the members’ use of milk produced by the Store.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request:

- A. A declaration that Wayne and Kay Craig, GrassWay Organics Farm Store LLC, or GrassWay Organics Association and its individual members have not violated Wis. Stats. §97.24 or any regulation promulgated thereunder;
- B. A declaration that no retail food establishment license is required for GrassWay Organics Farm Store LLC;

- C. A declaration that it is legal to provide, distribute or otherwise make available at GrassWay Organic Farm Store LLC raw milk and raw dairy products to GrassWay Organics Association and its individual members;
- D. A declaration that GrassWay Organic Farm Store LLC does not need a retail food establishment license to distribute or otherwise make available raw milk and raw dairy products to GrassWay Organics Association and its individual members;
- E. An injunction restraining DATCP from taking enforcement action of any kind, including without limitation the suspension, revocation or failure to issue any licenses or permits, against GrassWay Organics Farm Store LLC, GrassWay Organics Association, and Wayne and Kay Craig, based on the distribution or sale of fresh milk to the members of Plaintiff GrassWay Organics Association;
- F. For the Plaintiffs' costs and disbursements for this action, including reasonable attorneys' fees; and
- G. For such other relief as the Court may deem appropriate.

Dated this 12th day of December, 2009.

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