

FARM-TO-CONSUMER LEGAL  
DEFENSE FUND, GRASSWAY  
ORGANICS FARM STORE, LLC,  
GRASSWAY ORGANICS  
ASSOCIATION, and KAY and  
WAYNE CRAIG d/b/a  
GRASSWAY FARM,

Plaintiffs,

v.

Case No. 09-CV-6313

Declaratory Judgment: 30701

WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION,

Defendant.

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ANSWER

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The defendant, Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"), by its attorneys, J.B. Van Hollen, Attorney General, and Robert M. Hunter, Assistant Attorney General, hereby appears in this action, demands that all documents hereafter filed in this action be served upon it at their office, located at Post Office Box 7857, Madison, Wisconsin 53707-7857, and answers each and every allegation of the complaint as follows:

1. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations contained in paragraphs one and two of the complaint.
2. DATCP ADMITS the allegations of paragraph three of the complaint.

3. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations contained in paragraphs four and five of the complaint.

4. DATCP ADMITS the allegations contained in paragraph 6 of the complaint but AFFIRMATIVELY STATES that Grassway Organics Farm Store LLC, Milk Producer License Number 191666-D2, lists only Wayne Craig and Kay Craig as the members who are the responsible persons for producing milk to be sold to a licensed dairy plant.

5. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations contained in paragraphs seven through nine of the complaint.

6. DATCP DENIES the allegations contained in paragraph ten of the complaint.

7. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations contained in paragraphs eleven through thirteen of the complaint.

8. The allegations contained in paragraph fourteen of the complaint are conclusions of law which DATCP need neither ADMIT or DENY.

9. DATCP ADMITS the allegations contained in paragraph fifteen of the complaint.

10. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations of paragraphs sixteen and seventeen of the complaint.

11. DATCP ADMITS the allegations contained in paragraph eighteen of the complaint, but AFFIRMATIVELY STATES that the basis for the issuance of the Order of Exemption by the Wisconsin Department of Financial Institutions (“DFI”), referred to in paragraph eighteen, allowing the offer and sale of membership interests in the store as a method of obtaining a way to legally obtain unpasteurized milk, was no longer available

with DATCP's adoption and promulgation of Wis. Admin. Code § ATCP 60.235, effective February 1, 2008.

12. DATCP ADMITS the allegations contained in paragraph nineteen of the complaint, but AFFIRMATIVELY STATES that, effective February 1, 2008, Wis. Admin. Code § ATCP 60.235, reinstated the interpretation of "incidental sale" of unpasteurized milk that had existed for the prior 50 years.

13. DATCP DENIES the allegations contained in paragraphs twenty through twenty-two of the complaint.

14. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations contained in paragraphs twenty-three through twenty-five of the complaint.

15. The allegations contained in paragraphs twenty-six through twenty-nine of the complaint are conclusions of law which DATCP need neither ADMIT or DENY.

16. DATCP DENIES the allegations contained in paragraph thirty of the complaint.

17. The allegations contained in paragraph thirty-one of the complaint are conclusions of law which DATCP need neither ADMIT or DENY.

18. DATCP ADMITS the issuance of the orders alleged in paragraphs thirty-two through thirty-four of the complaint, and AFFIRMATIVELY STATES that the documents referred to therein speak for themselves and DENIES all other allegations of such paragraphs.

19. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations of paragraphs thirty-five through thirty-six of the complaint.

20. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations of paragraphs thirty-seven through thirty-nine of the complaint.

21. DATCP ADMITS the issuance of the documents alleged in paragraphs forty through fifty-nine of the complaint and AFFIRMATIVELY STATES that the documents referred to therein speak for themselves and DENIES all other allegation of such paragraphs.

22. DATCP DENIES the allegations contained in paragraph sixty of the complaint.

#### FIRST CAUSE OF ACTION

23. In response to the allegations of paragraph sixty-one of the complaint DATCP REALLEGES the answers to paragraphs one through sixty of the complaint set forth above as if fully set forth herein.

24. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations of paragraphs sixty-two through sixty-four of the complaint.

25. The allegations contained in paragraphs sixty-five through sixty-seven of the complaint are conclusions of law, which DATCP is not required to ADMIT or DENY.

#### SECOND CAUSE OF ACTION

26. In response to the allegations of paragraph sixty-eight of the complaint DATCP REALLEGES the answers to paragraphs one through sixty-seven of the complaint set forth above as if fully set forth herein.

27. DATCP lacks sufficient knowledge to ADMIT and therefore DENIES the allegations of paragraphs sixty-nine through seventy of the complaint.

28. The allegations contained in paragraphs seventy-one through seventy-seven of the complaint are conclusions of law which DATCP need neither ADMIT or DENY.

#### FIRST AFFIRMATIVE DEFENSE

1. Wis. Stat. § 97.09(4) provides:

The department [of agriculture, trade and consumer protection] may, by rule, establish and enforce standards governing the production, processing, packaging, labeling, transportation, storage, handling, display, sale, including retail sale, and distribution of foods that are needed to protect the public from the sale of adulterated or misbranded foods.

2. Wis. Stat. § 97.20(2)(a) provides:

*License requirement.* Except as provided in par. (e), no person, including this state, may operate a dairy plant without a valid license issued by the department [of agriculture, trade and consumer protection] for that dairy plant. . . .

3. Pursuant to its authority under Wis. Stat. §§ 97.09(4) and 97.20(2)(a), DATCP has issued Milk Producer License No. 191666-D2 to Grassway Organics Farm Store, LLC (“Store”).

4. The terms of Wis. Stat. § 97.30(2)(a) provide:

*Requirement.* Except as provided under par. (b), no person may operate a retail food establishment without a valid license issued by the department [of agriculture, trade and consumer protection] or an agent city or county. . . .

5. The term “Retail food establishment” is defined in Wis. Stat. § 97.30(1)c) to mean:

[A] permanent or mobile food processing facility where food processing is conducted primarily for direct retail sale to consumers at the facility, a mobile facility from which potentially hazardous food is sold to consumers at retail or a permanent facility from which food is sold to consumers at retail, whether or not that facility sells potentially hazardous food or is engaged in food processing.

“Retail food establishment” does not include a restaurant or other establishment holding a permit under s. 254.64, to the extent that the activities of the establishment are covered by that permit.

6. In pertinent part, Wis. Stat. § 97.24(2) provides, as follows:

**(2) REQUIREMENTS FOR MILK AND FLUID MILK PRODUCTS; GRADE A REQUIREMENT.**

**(a) No person may sell or distribute any milk unless that milk is produced, processed and distributed in compliance with standards established by the department by rule under this chapter.**

**(b) No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to consumers, or to any restaurant, institution or retailer for consumption or resale to consumers. Grade A milk and grade A milk products shall be effectively pasteurized, and shall be produced, processed and distributed in compliance with standards established by the department by rule under this chapter.**

**(c) No person may sell or distribute milk or fluid milk products which are labeled or otherwise represented as grade A milk or grade A milk products unless the milk and fluid milk products comply with this chapter and with standards established by the department by rule under this chapter.**

**(d) This section does not prohibit:**

**1. The sale of milk or fluid milk products which are heat sterilized in hermetically sealed containers.**

**2. Incidental sales of milk directly to consumers at the dairy farm where the milk is produced.**

**3. Incidental sales of pasteurized milk at a dairy plant licensed under s. 97.20.**

**4. The sale of grade A milk or grade A milk products which are produced and processed under equivalent laws or rules of another state or a local governmental unit, as provided under sub. (4) (b).**

**(3) Rules. The department, in consultation with the department of health services, shall issue rules governing the production, transportation, processing, pasteurization, handling, identity, sampling, examination, labeling and sale of milk and fluid milk products; the inspection of dairy herds, dairy farms and dairy plants; the issuing and revocation of permits to milk producers and milk haulers, and of licenses to dairy plants and milk distributors. Insofar as permitted by the laws of this state, such rules shall be in reasonable accord with the minimum standards and requirements for milk and fluid milk products currently**

recommended and published by the U.S. public health service as a milk ordinance and code, except that the requirements for bottling and sterilization of bottles in such standards shall not apply to milk sold by a producer, selling only milk produced by the producer on the producer's dairy farm under the producer's own supervision, and selling such milk only in the producer's own milk house, which milk meets the requirements of grade A standards as set forth by the department of agriculture, trade and consumer protection, to a purchaser who has provided his or her own container, which has been sanitized in a manner comparable to the sanitizing of the utensils used in the production of milk by the producer, if the purchaser is purchasing milk for his or her own consumption.

7. On April 16, 2009, DATCP's Division of Food Safety denied an application for a Retail Food Establishment License filed on April 7, 2009, by the store. The basis for DATCP's denial was the observation by DATCP personnel, while conducting a pre-licensing inspection, of the sale of unpasteurized milk at the store. The store failed to appeal the denial of its application for a retail food establishment license as required under Wis. Stat. § 93.06(7) and Wis. Admin. Code ch. ATCP 1.

8. Under the terms of Wis. Stat. ch. 227, DATCP's April 16, 2009, decision is now final. The store is thereby precluded from raising any issue to this Court which was actually determined by DATCP in the context of its denial of the license application filed by the store. *Lindas v. Cady*, 175 Wis. 2d 270, 279, 499 N.W.2d 692 (Ct. App. 1993), aff'd as modified by 183 Wis. 2d 547, 515 N.W.2d 450 (1999). See also, *Masko v. City of Madison*, 2003 WI App 124, ¶ 4, 265 Wis. 2d 442, 665 N.W.2d 391.

#### SECOND AFFIRMATIVE DEFENSE

9. DATCP REALLEGES paragraphs one through eight of its FIRST AFFIRMATIVE DEFENSE as if set out in full herein.

10. Pursuant to its authority under Wis. Stat. § 97.24 and with the approval of the Legislature, DATCP promulgated Wis. Admin. Code § ATCP 60.235, effective February 1, 2008.

11. The terms of Wis. Admin. Code § ATCP 60.235, provide as follows:

No person may sell or distribute unpasteurized milk or fluid milk products to consumers, or to any person for resale or redistribution in unpasteurized form to consumers. This section does not prohibit any of the following:

(1) The sale or distribution of milk or fluid milk products that are heat sterilized in hermetically sealed containers.

(2) The distribution of unpasteurized milk, produced on a dairy farm, to any of the following:

(a) The milk producer who is licensed under s. ATCP 60.02(1) to operate that dairy farm, and who, as license holder, assumes legal responsibility for dairy farm operations.

(b) An individual who has a bona fide ownership interest in the milk producer under par. (a), if the milk producer is a legal entity other than an individual or married couple.

(c) A family member or nonpaying household guest who consumes the milk at the home of an individual operator or bona fide owner under par. (a) or (b).

(3) The sale or distribution of unpasteurized milk, produced on a dairy farm, to the employees of that dairy farm.

(4) The incidental sale of unpasteurized milk to a consumer, for delivery to the consumer at the dairy farm where the milk is produced, for consumption by the consumer, the consumer's family, or the consumer's nonpaying guests. A sale is not incidental if it is made in the regular course of business, or is preceded by any advertising, offer or solicitation made to the general public through any communications media.

12. As the agency charged by the Legislature with the authority to regulate the retail sale of food within the state of Wisconsin, DATCP has construed the terms of Wis. Admin. Code § ATCP 60.235, as set forth in its letter, dated May 18, 2009, to Attorney Peter D. Kennedy, to prohibit the sale or distribution of unpasteurized raw milk to consumers, except for "incidental sales" of raw milk, which DATCP construed to mean:

- [M]ilk that is delivered in person to the consumer at the dairy farm where the milk is produced, for consumption by the consumer, the consumer's family, or the consumer's nonpaying guests. A sale does not qualify as an exempt "incidental" sale if it is made in the regular course of business, or



is preceded by any advertising, offer or solicitation made to the general public through any communications media (including the internet).

- Licensed milk producers (dairy farm operators) may consume their own milk production without violating the statute or rules (they are not selling or “distributing” the milk, in the statutory sense, when they consumer it themselves). However, that exemption may not be used to justify what is in fact an illegal sale or distribution to consumers who do not operate the dairy farm. Section ATCP 60.235(2), Wis. Admin. Code, allows distribution of raw milk for consumption by the following persons *and no others*:
  - (a) The milk producer who is licensed under s. ATCP 60.02(1)9 to operate the farm and who, as license holder, assumes legal responsibility for dairy farm operations.
  - (b) An individual who has a *bona fide* ownership interest in the milk producer, if the milk producer is a legal entity other than the individual or married couple.
  - (c) A family member or nonpaying household guest who consumers the milk at the home of an individual operator or bona fide owner under par. (a) or (b).

*A bona fide ownership interest under par. (b) means an actual ownership interest in the legal entity (for example, a shareholder interest in the corporation or member interest in the LLC) that actually operates and is licensed to operate the dairy farm, where the ownership interest is acquired with an expectation of financial profit (an actual business investment “investment”). It does not include “cow shares”, “license shares” or other devices that are merely designed to facilitate the illegal sale or distribution of raw milk to consumers who do not have a genuine ownership interest in the licensed business entity that operates the dairy farm.*

13. DATCP’s construction of the terms of Wis. Admin. Code § ATCP 60.235, as set forth in its letter, dated May 18, 2009, to Attorney Peter D. Kennedy, is not plainly erroneous or inconsistent with the language of the rule or regulation.

14. DATCP’s construction of the terms of Wis. Admin. Code § ATCP 60.235, as set forth in its letter, dated May 18, 2009, to Attorney Peter D. Kennedy, is therefore controlling. *Hillhaven Corp. v. DHFS*, 2000 WI App 20, 232 Wis. 2d 400, ¶ 12, 606 N.W.2d 572.

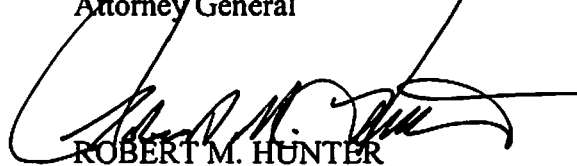
**DEMAND FOR RELIEF**

Based on the foregoing, DATCP demands judgment against the plaintiffs:

1. Dismissing the complaint herein,
2. Granting DATCP judgment against the plaintiffs for the costs and reasonable attorney fees incurred by DATCP in defending against the complaint herein, and
3. Such other relief as the Court may deem necessary and/or reasonable.

Dated this 5<sup>th</sup> day of March, 2010.

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