

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 8

DANE COUNTY

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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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NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

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TO: Elizabeth Gamsky Rich  
Elizabeth Gamsky Rich & Associates, SC  
637 Walton Drive, Suite 1  
Plymouth, WI 53073

PLEASE TAKE NOTICE that 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, will appear before the Honorable Patrick J. Fiedler, Circuit Court Judge, sitting at the Dane County Courthouse, 215 S. Hamilton Street, Madison, Wisconsin, on such date and at such time as is set by the Court, and will move and hereby does move the Court for an order as follows:

## MOTION

Pursuant to Wis. Stat. § 802.06(3), DATCP moves the Court for an order granting it judgment on the pleadings. As the basis for its motion, DATCP states that, 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, which provides 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.

DATCP has construed the terms of Wis. Admin. Code § ATCP 60.235 to prohibit the sale or distribution of unpasteurized raw milk to consumers, except for "incidental sales" of raw

milk. As set forth in its letter, dated May 18, 2009, to Attorney Peter D. Kennedy, DATCP has construed the term “incidental sales” of raw milk 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.

DATCP’s construction of Wis. Admin. Code § ATCP 60.235 is not plainly erroneous or inconsistent with the language of the rule or regulation and is, therefore, controlling. *Hillhaven Corp. v. DHFS*, 2000 WI App 20, 232 Wis. 2d 400, ¶ 12, 606 N.W.2d 572.

WHEREFORE, DATCP submits that the Court must dismiss the complaint herein, unless and until proper service has been effectuated upon the Attorney General.

Dated this 3<sup>rd</sup> day of March, 2010.

J.B. VAN HOLLEN  
Attorney General



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