

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.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS

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 submits its reply brief in support of motion for judgment on the pleadings.

ARGUMENT

In response to the motion for judgment on the pleadings, filed by the defendant, DATCP, the plaintiffs, Farm-to-Consumer Legal Defense Fund, GrassWay Organics Farm Store, LLC, GrassWay Organics Association and Kay and Wayne Craig (collectively referred to hereinafter as "plaintiffs"), have filed a response opposing DATCP's motion. As the basis for their opposition to DATCP's motion, plaintiffs first assert that DATCP's motion should fail for

several reasons. First, plaintiff argues that the complaint herein places at issue DATCP construction and enforcement of the statute (Wis. Stat. § 97.24) and not DATCP's construction of its own rules (Wis. Admin. Code § ATCP 60.235, effective February 1, 2008). Second, plaintiffs assert that in considering DATCP's motion this Court must confine its inquiry to the terms of the complaint and may not properly consider DATCP's May 18, 2009 letter, quoted by DATCP in its motion for judgment. Third, and last, plaintiffs assert that granting the motion for judgment on the pleadings would be improper because there are issues that cannot be resolved without a factual inquiry—specifically plaintiffs allege that the question presented for determination is whether the distribution of milk to GrassWay's members falls within the incidental sales exemption of Wis. Stat. § 97.24 and/or whether GrassWay's members are “consumers” within the meaning of Wis. Stat. § 97.24. With respect to each of the reasons articulated by plaintiffs, however, DATCP submits that a review of the *pleadings*, which necessarily include the answer as well as the complaint, reveals that no material facts are placed at issue by the pleadings and that DATCP is entitled to judgment.

I. DATCP'S MOTION MUST BE DECIDED UPON THE BASIS OF MATTERS SET FORTH IN PLAINTIFFS' COMPLAINT AND DATCP'S ANSWER, AS WELL AS THOSE OF WHICH THIS COURT MAY TAKE JUDICIAL KNOWLEDGE.

In its motion DATCP asserts that it promulgated Wis. Admin. Code § ATCP 60.235, effective February 1, 2008, under the authority of Wis. Stat. § 97.24, and that the terms of that regulation and its construction of that regulation governed the conduct placed at issue in the complaint herein. Plaintiffs seek to avoid the Court's consideration of DATCP's regulations by asserting that their claims solely seek a declaratory ruling as to the underlying statute, *viz.*, Wis. Stat. § 97.24. Despite plaintiffs' assertion, however, Wisconsin case law has made it clear that, when deciding a motion for judgment on the pleadings, the court must take into account not just

the complaint, but all of the pleadings including the answer. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988).

Judgment on the pleadings has long been recognized as an available procedure and its use was specifically sanctioned by the Wisconsin Supreme Court in 1968. *All Electric Service, Inc v. Matousek*, 46 Wis. 2d 194, 198, 174 N.W.2d 511 (1970). Recently, the Legislature revised the terms of Wis. Stat. § 802.06(3), to basically provide that a motion for judgment on the pleadings is the same as a summary judgment motion without the use of affidavits or other supporting materials. By its terms Wis. Stat. § 802.06(3) allows any party to move for judgment on the pleadings after issue is joined between all parties but within time so as not to delay trial.

The courts have held that:

¶ 5. Judgment on the pleadings is proper only if there are no genuine issues of material fact. *See Bantz v. Montgomery Estates, Inc.*, 163 Wis.2d 973, 984, 473 N.W.2d 506, 510 (Ct. App. 1991). It is essentially summary judgment, minus affidavits and other supporting documents, where we apply the first two steps of summary judgment methodology. *Schuster v. Altenberg*, 144 Wis.2d 223, 228, 424 N.W.2d 159, 161 (1988) (citation omitted). We first examine the complaint to determine whether it states a claim. *Id.* We then turn to the responsive pleadings to ascertain whether a material factual issue exists. *Id.* If the complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact, judgment on the pleadings may be appropriate.

Windsor v. Village of DeForest, 2003 WI App 114, ¶ 5, 265 Wis. 2d 591, 666 N.W.2d 31 (2003).

Consequently, the trial court's inquiry is strictly limited to the pleadings: "However, '[w]hen a document is attached to the complaint and made part thereof, it must be considered a part of the pleading, and may be resorted to in determining the sufficiency of the pleading.'" *Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, 281 Wis. 2d 39, 49, 697 N.W.2d 61 (2005) (quoting *Friends of Kenwood Green*, 2000 WI App. 217, ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271).

The methodology for considering a motion for judgment on the pleadings is to first examine the complaint and determine whether it states a claim, and then to review the responsive

pleading to see whether it presents any issue of material fact. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). “[T]he allegations contained in the pleadings of the moving party must be disregarded where they conflict with the allegations contained in the pleading of the opposite party . . .” *All Electric Service, Inc. v. Matousek*, 46 Wis. 2d 194, 199, 174 N.W.2d 511 (1970). The moving party will then only be entitled to judgment, as a matter of law, if it is clear that no issue of material fact remains. *Id.*

In the instant case, DATCP asserted in its answer that with the approval of the Legislature, it had promulgated Wis. Admin. Code § ATCP 60.235, effective February 1, 2008. DATCP’s answer further set forth the terms of Wis. Admin. Code § ATCP 60.235. (As an aside, DATCP also notes that irrespective of whether the Court takes cognizance of DATCP’s assertion of the terms of Wis. Admin. Code § ATCP 60.235 in its answer, in rendering a decision on this motion the Court is authorized, pursuant to Wis. Stat. § 902.01, to take judicial notice of DATCP’s promulgation of Wis. Admin. Code § ATCP 60.235.) Consequently, the terms of the regulation are properly before and must be considered by the Court in ruling on DATCP’s motion.

More to the point, however, DATCP notes that *in their complaint* plaintiffs attached, as Exhibit 11, the letter, dated May 18, 2009 from Cheryl Daniels to plaintiffs’ then attorney, Peter D. Kennedy. In its answer DATCP quoted from the text of a letter, dated May 18, 2009, which it had forwarded to plaintiffs’ then attorney, Peter D. Kennedy, stating:

- 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 consume 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 consumes 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.

Thus, plaintiffs’ assertions to the contrary notwithstanding, the text of DATCP’s May 18, 2009 letter, DATCP’s promulgation of Wis. Admin. Code § ATCP 60.235 and DATCP’s construction of the regulation (which is articulated in the May 18, 2009 letter), are part of plaintiffs’ complaint and must be considered part of the pleadings herein. *Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, 281 Wis. 2d 39, 49, 697 N.W.2d 61 (2005). Therefore, when considering DATCP’s motion for judgment on the pleadings, the Court must take into consideration both plaintiffs’ complaint and DATCP’s answer, including the DATCP’s letter of May 18, 2009.

Concomitantly, inasmuch as the Court must consider DATCP’s construction of the terms of Wis. Admin. Code § 60.235, the Court must also apply the appropriate level of deference attendant to an agency’s construction of its own regulation, as previously set forth in DATCP’s answer—namely, the Court must defer to DATCP’s construction of its own regulation, as controlling, unless the Court determines that DATCP’s construction is plainly erroneous or

inconsistent with the language of the rule or regulation. *Hillhaven Corp v. DHFS*, 2000 WI App 20, 232 Wis. 2d 400, ¶ 12, 606 N.W 2d 572.

II. THERE ARE NO MATERIAL FACTS AT ISSUE IN THE PLEADINGS.

As the final basis for their opposition to DATCP’s motion for judgment on the pleadings, plaintiffs have asserted that there are factual matters at issue that cannot be determined on by a judgment on the pleadings (Pet. Resp. 7). Specifically, plaintiffs assert that:

The Complaint alleges that the Association members have a bona fide ownership interest in the GrassWay Organics Farm Store LLC (the “Store”) that entitles them to procure milk from the cows that they own by virtue of their membership in the Association.

The Complaint also alleges that the Store is private and not open to the public, and that members of the Association are not “consumers” within the meaning of the statute. The Complaint further alleges that the Store is not a “retail food establishment” within the meaning of the statute, because no retail sales to consumers take place there.

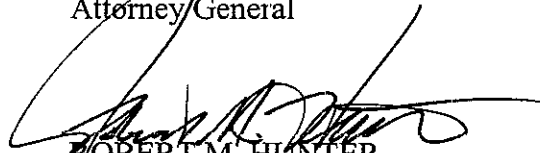
Id. Yet, DATCP must point out that the “facts,” which plaintiffs enumerate are actually conclusions of law, and not facts in themselves. The question before the Court is not whether the individual members of GrassWay Organics Association have an interest in GrassWay Organics Association, but rather whether that membership interest is of such a quality as would constitute “*bona fide* ownership” interests as DATCP has construed that term to be within the meaning of Wis. Admin. Code § ATCP 60.235.

CONCLUSION

Based on the foregoing, DATCP submits that the Court must grant it judgment on the pleadings and dismiss the complaint herein.

Dated this 7th day of June, 2010

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