

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF SENECA

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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.

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## MEMORANDUM OF LAW

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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.

