STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION

Petitioners request 30 minutes of oral argument.

COUNTY OF ALBANY

Meadowsweet Dairy, LLC	:	**Index No. 2277-08**
	:	**RJI No. 01-08-092475**
and	:	
	:	
Steven and Barbara Smith	:	**Assigned Judge:**
	:	**Hon. John C. Egan, Jr.**
Petitioners	:	
	:	
against	:	
	:	
Patrick Hooker, Commissioner Department of Agriculture and Markets of the State of New York	:	
	:	
Respondent	:	

BRIEF OF PETITIONERS

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Questions involved:

1. Does the State's police power under Agriculture and Markets Law (A&ML) Section 20 extend to private conduct that involves the private production, processing and distribution of dairy foods for one's personal choice?

Answer: Supreme Court erroneously held that yes, the police powers under A&ML Section 20 do extend to the private production, processing and distribution of dairy foods for one's personal choice.

2. Does the term "for consumption by consumers" as used in 1 NYCRR 2.3(b) mean only the mere act of eating, drinking or consuming food and nothing more, i.e., a purchase or a sale, such that Petitioners' were required to obtain a raw milk permit?

Answer: Supreme Court erroneously held that yes, it means nothing more, does not require a purchase or a sale, and thus Petitioners were required to obtain a raw milk permit.

3. Does the State's police power under A&ML Section 199-a apply to the private production, processing and distribution of dairy foods for one's personal choice when there is no finding that those dairy foods are sold or offered for sale?

Answer: Supreme Court erroneously held that yes, it does apply to the private production, processing and distribution of dairy foods for one's personal choice even when there is no finding that those dairy foods are sold or offered for sale.

4. Are Petitioners a "milk plant" even though they do not receive prepasteurized milk, commingled milk or milk products such that a general milk plant permit is required for their conduct?

Answer: Supreme Court erroneously held that yes, all of these regulatory definitions apply to Petitioners even though they do not pasteurize their milk.

5. Was Petitioners' declaratory judgment action precluded by *res judicata*?

Answer: Supreme Court erroneously stated in *dicta* that yes, it was precluded.

Nature of the Case

Petitioners are engaged in private conduct and have exercised their inalienable right to privately produce and share dairy foods among like-minded, informed adults. Petitioners believe they can produce a superior quality dairy product despite government warnings that raw (unpasteurized) milk and raw milk products may be harmful to their health. Petitioners willingly produce and willingly consume raw milk and raw milk products and have every right to do so free from regulatory interference, harassment and intimidation. Eating the foods of one's choice is a fundamental right that government has no right to legislate or regulate. Thus, when ruling on the merits of their appeal, Petitioners ask this Court to recognize this fundamental right, i.e., the production and consumption of the foods of one's choice.

Usually, Limited Liability Companies are created for "business" purposes in order to "make a profit" or in order to "sell" products to purchasers or to "consumers." However, Petitioner Meadowsweet Dairy LLC ("LLC") was not formed to do business or make a profit off third party consumers or purchasers. As described below in the next section on Statement of Facts, Petitioners Steven and Barbara Smith (with the assistance of a local attorney) formed Meadowsweet Dairy LLC ("the LLC") in order to make raw milk and raw dairy products available exclusively to the LLC's members who are all like-minded individuals collectively associating together in an effort to take control of the food that enters their bodies. In essence, the LLC members as well as the Smith's were fed up with the highly processed milk and dairy products produced by existing agribusiness

conglomerates that are sold on New York grocery store shelves.

Specifically, the LLC purchased a herd of dairy cows and appointed Steve and Barbara Smith as managing members to tend the herd. The milk that is produced by the LLC's herd is for the sole and exclusive use of the LLC members. Steve and Barbara also convert the milk into other dairy products, such as kefir, yogurt, cheese and buttermilk, and these other dairy products are also for the sole and exclusive use of the LLC members. Consequently, the LLC is not engaged in the "business" of "selling" a product and its conduct does not impact the "public's" health, safety or welfare. Therefore, the police power of the State should not extend to this type of private enterprise.

The LLC members contribute working capital to the LLC that is used for paying the expenses associated with maintaining the herd. These expenses include supplies, equipment, fencing, pasture, seed and various other sundry expenses associated with managing a herd of dairy cows. These expenses also include paying the Smiths for the services they render to the LLC, for example, their management of, tending to and boarding of the LLC's herd of dairy animals. All of these parameters are spelled out in the LLC's operating agreement and there is nothing in New York law that prohibits this type of conduct.

All of the raw milk and raw dairy products produced by the LLC's cows are distributed in the form of return of equity to the LLC members and to the LLC members only. Nobody else has access to these dairy products. None of the milk or dairy products produced by the herd is sold to anybody and "consumers" do not buy or "purchase" anything from the LLC. Since there is nothing in New

York's Limited Liability Company laws that prohibit this type of arrangement it is not illegal.

Therefore, Supreme Court made the following errors of law: (1) the Department has jurisdiction over Petitioners pursuant to A&ML Sections 20 and 199-a; (2) Petitioners are required to obtain a raw milk permit and a general milk plant permit; (3) Petitioners are a "milk plant" and they produce "raw milk;" (4) the LLC members are "consumers;" and (5) *res judicata* should serve as a basis to dismiss Petitioners' action.

In addition, Supreme Court also made the following error of fact: (1) Petitioners' "sold" raw milk.

Statement of Facts

Petitioners Steve and Barbara Smith ("the Smiths"), husband and wife, reside at a dairy farm owned by them located at 2054 Smith Rd, Lodi, New York (the "farm"). The Smiths have 9 children, ranging in age from 8 to 27, six of whom reside with them at their farm. (Affidavit of Barbara Smith, Record pages 69-74, ¶1).

The Smiths have been dairy farmers since 1995. From 1995 to March 2007 the Smiths sold milk to dairy processors, made yogurt with their milk and sold it through retail outlets and sold raw milk at their farm. During this time they had all the required permits from the State of New York: a milk dealer's license, a grade A permit, a raw milk permit, and a milk processing permit. Therefore, the Smiths were inspected and regulated by Respondent. (Record pages 69-74, ¶2).

On March 1, 2007, however, Petitioner Meadowsweet Dairy, LLC was duly

formed in the State of New York as a limited liability company. Currently, the LLC has 121 members with an office and business located at 2054 Smith Rd, Lodi, New York. The only assets of the LLC are dairy cows that are used for the production of raw milk and raw milk products. (Record pages 69-74, ¶3).

In March 2007, the Smiths relinquished all of their dairy permits and surrendered them to the State of New York. Since March 2007, the Smiths have become Operating Managers of the LLC and provide boarding services for the dairy cows owned by the LLC. The LLC's cows are kept at the Smiths' farm and the Smiths tend to, manage and take care of the cows on behalf of the LLC. The LLC's cows produce raw milk, some of which is converted by the Smiths into raw milk yogurt, raw milk butter, raw milk cheese and raw milk buttermilk, none of which is pasteurized. (Record pages 69-74, ¶4).

The LLC's members want raw, unpasteurized milk and milk products from the dairy cows they invest in. The only people that have access to the raw milk and raw milk products produced by the LLC's dairy cows are the LLC members and their respective families. Neither the LLC nor the Smiths "sell," "offer for sale," or "otherwise make available" to any member of the consuming public any of the raw milk or raw milk products that are produced by the LLC's dairy cows. (Record pages 69-74, ¶5).

Petitioners' raw milk products have been tested for pathogens since at least 1998. During this time the milk and yogurt produced by the Smiths was always in compliance with New York State health standards for pathogens. (Record pages 69-74, ¶6). All of the LLC members have expressly been made

aware of any alleged risk of consuming raw dairy products and have willingly assumed the risk. Record, pgs. 806-807. Nobody using the dairy products from the Smith farm or the LLC's herd have ever complained about becoming sick. Record, pgs. 819-820. This absence of sickness goes back to 1998 when Petitioners first began distributing their raw milk. Record, pgs. 819-820.

Each member of the LLC pays an initial fee of $50 to become a member. Once they become a member, each member contributes additional capital on a quarterly basis to the LLC. Each member receives an equity share in the LLC based on the amount of capital contributions they make to the LLC. (Affidavit of Barbara Smith, Record pages 342-346, ¶6).

The capital contributions, both the initial and the quarterly, paid by each member are allocated by the LLC toward the activities described below, to wit: Steve and Barbara provide boarding services for the dairy cows owned by the LLC; the LLC's cows are kept at the Smiths' farm; the Smiths tend to, manage and take care of the cows on behalf of the LLC; and the LLC's cows produce raw milk, some of which is converted by Steve and Barbara into raw milk yogurt, raw milk butter, raw milk cheese and raw milk buttermilk, none of which is pasteurized. Record pages 342-346, ¶7.

Members of the LLC receive their proportionate share of the equity of the LLC in the form of raw milk and raw dairy products. There is no sale or purchase of raw milk or dairy products to LLC members. Record pages 342-346, ¶8. The LLC does not make its raw milk or raw dairy products available to any person except for LLC members. The LLC operates strictly in private and does not

injure or impact the public's health, safety or welfare. Record pages 342-346, ¶9.

1 NYCRR § 2.2(bb) defines "*milk plant*" as "any place, premises or establishment engaged solely or predominately in the receipt of prepasteurized milk. . . ." Neither Steve or Barbara nor the LLC receives prepasteurized milk from anyone or from any entity. Steve and Barbara do not even own any dairy cows. The LLC's dairy cows produce all of the LLC's own milk and the LLC does not receive any prepasteurized milk from any outside sources. Record pages 342-346, ¶10.

1 NYCRR § 2.2(mm) defines "*prepasteurized milk*" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which is to be pasteurized prior to being processed into milk." Steve and Barbara do not pasteurize any milk. In addition, the LLC does not pasteurize any of the milk produced by its dairy cows. Record pages 342-346, ¶11. Steve and Barbara and the LLC are not "milk plants." Record pages 342-346, ¶12.

1 NYCRR § 2.2 (y) defines "milk" as "food that meets the definition for milk provided for in section 17.18 of this Title which has been pasteurized." Record pages 342-346, ¶13. None of the milk produced by the LLC's dairy cows is pasteurized. Record pages 342-346, ¶14.

1 NYCRR § 2.2 (pp) defines "raw milk" as the "lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which will not be pasteurized prior to being sold or offered for sale to consumers." Record pages 342-346, ¶15. Steve and Barbara and the

LLC do not sell or offer for sale or otherwise make available any raw milk or raw dairy products to any consumer. Record pages 342-346, ¶16.

The only raw milk or raw dairy products that Steve or Barbara or the LLC make available to anyone is to the LLC members, and even then it is in the form of an equity distribution commensurate with each LLC members' proportionate share of their capital contribution. Record pages 342-346, ¶17.

Agriculture and Markets Law Section 199 provides, in part, that adulteration and misbranding applies only to "the manufacture, production, processing, packing, transportation, exposure, offer, possession, and holding of any such article for sale." Record pages 342-346, ¶18. Steve and Barbara and the LLC do not sell anything to anybody. Record pages 342-346, ¶19.

The conduct that Steve and Barbara and the LLC are engaged in is purely private conduct that does not injure the public's health, safety or welfare. Record pages 342-346, ¶20. Nowhere at no time during this proceeding has the State of New York identified what injury the public will suffer if Steve, Barbara or the LLC are not subject to New York's Agriculture and Markets Law. Record pages 342-346, ¶21. There is no relationship between the conduct of Steve, Barbara and the LLC and the public's health, safety or welfare. Record pages 342-346, ¶22.

ARGUMENT

I. The State's police powers under A&ML Section 20 do not extend to the regulation of what foods people can privately produce and consume of their own free choice.

Article 1 Section 1 of the New York Constitution provides, in part, that "No member of this state shall be disfranchised or deprived of any of the rights or

privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers . . . ." These protected privileges and immunities are beyond the scope of the State's police power, and such protections include but are not limited to the following:

- the right to possess or view pornography in the privacy of one's own home. *See Stanley v. Georgia*, 394 U.S. 557 (1969);
- the right to receive contraceptives, since all persons have the fundamental right to beget or not beget a child. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972);
- the right to have children. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942);
- the right to abort a child. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992);
- the right of parents to raise their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000);
- the right to the education and raising of one's own children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923);
- the right to marry, whether within or outside of one's own race. *See Loving v. Virginia*, 388 U.S. 1 (1967);
- the right to marital privacy and to be left alone. *See Griswold v. Connecticut*, 381 U.S. 479 (1965);
- the fundamental right to be free from bodily invasions. *See*

Rochin v. California, 342 U.S. 165 (1952);

- the right to refuse medical treatment, even life saving treatment. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

Article 1, Section 14 of the New York Constitution provides, in part, that the common law in New York as it existed in 1777 "shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same." At this time, some of the protected common law rights, which are also constitutionally protected rights, that are beyond the scope of the State's police power include but are not limited to the following:

- the right to freedom from restraint and to adopt and follow such lawful industrial pursuits that are not injurious to the community. *See People v. Marx*, 99 N.Y. 377 (N.Y. 1885);
- the right to erect billboards on the roofs of buildings upon private property for the display of advertisements. *See People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 195 N.Y. 126 (N.Y. 1909);
- the right of an employer to be free from liability for an injury to an employee when the employee is at fault. *See Ives v. South B. R. Co.*, 201 N.Y. 271 (N.Y. 1911);
- the right to sell goods and to tell the truth about them. *See People ex rel. Moskowitz v. Jenkins*, 202 N.Y. 53 (N.Y. 1911);

- the right to determine what shall be medically done with one's own body, including the right to refuse emergency medical treatment. *See Schloendorff v. Soc'y of N.Y. Hospital*, 211 N.Y. 125 (N.Y. 1914);
- the right to sell evaporated skim milk. *See Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537 (N.Y. 1956);
- the right to sell magazines. *See People v. Bunis*, 9 N.Y.2d 1 (N.Y. 1961);
- the right to be a vagrant. *See Fenster v. Leary*, 20 N.Y.2d 309 (N.Y. 1967);
- the right to engage in consensual sexual behavior. *See People v. Onofre*, 51 N.Y.2d 476 (N.Y. 1980);
- the right to engage in sodomy. *See People v. Uplinger*, 58 N.Y.2d 936 (N.Y. 1983);
- the right to possession in a public place of an open or unsealed container of an alcoholic beverage, without any intent to consume. *See People v. Lee*, 58 N.Y.2d 491 (N.Y. 1983);
- the right of committed mental patients to refuse antipsychotic medication. *See Rivers v. Katz*, 67 N.Y.2d 485 (N.Y. 1986);
- the right to determine the course of one's own medical treatment. *See Fosmire v. Nicoleau*, 75 N.Y.2d 218 (N.Y. 1990).

The right to produce and consume the foods of one's choice should also be a protected, fundamental right that is beyond the scope of the police power. What good are all the fundamental rights mentioned above if a person cannot produce and consume the food of their own choice? In essence, the food system engaged in by Petitioners is a direct one-to-one transaction that is beyond the interests of the public. To prevent a person from producing and processing the foods of their own choice is a denial of liberty. Therefore, because Petitioners are engaging in a fundamental right and their conduct does not involve the public's health, safety or welfare, the Department lacks jurisdiction over them.

As described in more detail below, the State's police powers do not extend to Petitioners' conduct for two major reasons. First, it makes sense that the Department's regulatory program deals with the traditional, industrial scale model of dairy production because there are so many links in the chain of distribution, but it does not make sense with the type of production in which Petitioners are engaged because there is only one such link, directly from producer to LLC member. Second, Petitioners are not engaged in business in order to "make a profit" or to "sell a product" to the consuming public but instead exist to produce food for people belonging to a private entity who have chosen to consume foods of their own choice and who have opted-out of the government sanctioned food production system.

To begin, the Department's regulatory program deals with the traditional dairy industry in this state, whereby producers milk their cows, producers sell the milk to processors or co-ops who hire milk haulers to haul the milk in stainless

steel containers, picking up hundreds and thousands of gallons of milk from other producers all over the state, who then mix and commingle that milk with milk from those dozens of other producers, who then process hundreds of thousands of gallons of milk in huge vats, mixing and commingling milk from multiple producers from across the state (which qualifies them as "milk plants") and perhaps even the region, pasteurizing the milk so that it can be sent off to a packaging and labeling facility, where the milk is then packaged in containers, then sold to retail grocery stores all over the northeastern portion of the United States, and ultimately sold to retail consumers in grocery stores under artificial lighting and cooling conditions. That is the industrial, government supported, highly regulated and sanctioned dairy system to which most people are accustomed.

However, that regulatory program has no application to a private group of citizens who have decided to produce and consume their own food of their own free choice; who have chosen to be members of a group of like-minded individuals that have invested in a legal business entity (an LLC) to own and manage a herd of pasture-based dairy cows, and who contribute working capital to and receive returns of their equity from the LLC. The Department's regulatory program has no application to Petitioners' conduct because Petitioners are engaged in purely private conduct and they are not endangering the public's health, safety or welfare.

If anyone is being harmed in this case it is Petitioners because their government is preventing them from exercising their fundamental right to have

access to and consume the food of their choice. In essence, Petitioners are being denied their liberty and are being forced by their government to participate in a system that produces pasteurized dairy products that they truly believe are harmful to their health.

Moreover, Petitioners are citizens who have formed a Limited Liability Company so that they themselves can produce and consume milk and other dairy products of their own free choice. While the modern dairy industry efficiently produces and distributes pasteurized dairy products, Petitioners believe pasteurized dairy products are harmful to their health and believe raw dairy products fresh from healthy, pasture fed, organically raised cows are better for their health.

Although this is a minority opinion among milk drinkers, Petitioners assert that they have the right to access and consume the food of their choice, to food they believe is best for their health and well being, as well as the health and well being of their families and children. That is why the LLC was formed, that is why the Smiths have been appointed to manage the dairy herd, and that is why the LLC has so many members.

However, Supreme Court on page 16 of its Decision and Order stated that the Department "has jurisdiction over [Petitioners] pursuant [to] A&ML 20" because of the "broad language of the [Department's] powers." Section 20 provides as follows, quoted verbatim:

> The commissioner, each deputy commissioner and the directors, counsel, experts, chemists, agents and other officers and employees of the department shall have full access to all places of business, factories, farms, buildings, carriages, cars and vessels

> used in the production, manufacture, storage, sale or transportation within the state of any dairy products or any imitation thereof, or of any article or product with respect of which any authority is conferred by this chapter on the department. They may examine and open any package or container of any kind containing or believed to contain any article or product, which may be manufactured, sold or exposed for sale in violation of the provisions of this chapter, or of the rules of the department, and may inspect the contents therein, and take therefrom samples for analysis.

The Court's interpretation of Section 20 is overly broad and results in an impermissible denial of Petitioners' liberty.

For example, under the Court's rationale, anybody that "produces" or "manufactures" a dairy product is subject to the Department's jurisdiction, regardless of whether that dairy product is sold or offered for sale. Specifically, a person that owns one dairy animal (cow, goat or sheep) and who drinks the milk from that animal would be subject to the Department's jurisdiction because they have a "dairy product" that is being "produced," "manufacturer" or "stored" within the state.

In addition, a person that owns a dairy animal, milks that animal and keeps that milk at their home *without even drinking it* would be charged with "manufacturing" or "production" or "storage" of that milk, thus subjecting the person to the Department's jurisdiction. Consequently, Supreme Court's interpretation of A&ML Section 20 is an impermissible extension of the State's police power to private conduct that does not impact the public's health, safety or welfare.

So it is with Petitioners. They do not make any dairy product available for sale to anybody. Indeed, *nobody* other than the LLC members even has access

to any of the dairy products produced by the LLC's herd. Consequently, Supreme Court's interpretation of Section 20 as against Petitioners is an overly broad reach of the State's police power and was error.

Supreme Court also relies on the case of *Tuscan Dairy Farms, Inc. v. Barber*, 45 N.Y.2d 215 (1978), to state on page 3 of its Decision and Order that "the milk industry within New York is a proper subject for regulation. . . ." However, the fact pattern in *Tuscan Dairy Farms* is vastly different from the fact pattern in this case.

In *Tuscan*, the entity did not produce its own milk but instead processed for pasteurization milk that was received from other dairy producers. The *Tuscan* entity was also a distributor that distributed wholesale to supermarkets, schools, hospitals and "mom and pop" stores. Thus, the entity in *Tuscan* was completely different than the Petitioners in this case.

The entity in *Tuscan* needed to be "subject to regulation" because the milk in that case passed through so many hands; milk producers, milk haulers; milk processor; milk packager; milk distributor; grocery store; retail consumer. Each of those steps involves the potential for contamination, thus creating a risk to the retail consumer who does not even know where their milk comes from, let alone how it is produced and processed. Hence, regulatory oversight in *Tuscan* was necessary to protect the public's health, safety, and welfare.

In this case, however, the Petitioners are the producer, processor, and end user; there is no intermediary. In other words, it is the LLC's milk that goes directly and solely to the LLC members. Moreover, all of the LLC members know

exactly where their milk comes from and they all know exactly how their milk is produced and processed. All of the LLC members are made aware of this before they even become LLC members. Record, pgs. 806-807.

In addition, if there are any risks associated with Petitioners' arrangement, it is merely hypothetical and all of the LLC members have expressly been made aware of this alleged risk and have willingly assumed the risk. Record, pgs. 806-807. In any event, there is no actual risk because nobody using the dairy products from the Smith farm or the LLC's herd has ever complained about becoming sick. Record, pgs. 819-820. This absence of sickness goes back to 1998 when Petitioners first began distributing their raw milk. Record, pgs. 819-820. Thus, there is no reason for the State to treat these LLC members as wards, persons who are incapable of making their own decisions for themselves in their own best interests. Consequently, the *Tuscan* case is not on point.

Moreover, the entity in *Tuscan* did not dispute the State's jurisdiction over it. In this case, however, Petitioners do dispute that the State has jurisdiction over it because Petitioners are not engaged in any conduct that impacts the public's health, safety or welfare. Petitioners do not produce, manufacture, process or distribute any dairy products to anybody except themselves. It is axiomatic, therefore, that this conduct does not involve the public.

Where is the public interest in preventing Petitioners from exercising their fundamental right in producing and consuming the foods of their own, free choice? The Department has not identified any. How is the public being impacted or harmed by Petitioners' conduct? The Department has not described

any because there is no such public interest and there is no such public harm. If there were evidence that the public is being adversely impacted or somehow harmed by Petitioners' conduct the Department would have introduced such evidence. The Department's failure to present any evidence of how the public is being impacted or harmed in this case is telling and is fatal to its case.

It has long been held by the Court of Appeals in this State that the rights and privileges of its citizens are paramount to the authority of the legislature to pass laws. These fundamental rights stem not from the Constitution itself, but come from a higher power, a higher source of law that guarantees to every citizen "life, liberty and the pursuit of happiness." As artfully stated by the New York Court of Appeals as long ago as 1911, these fundamental rights have their:

> foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words.

Ives v. South B. R. Co., 201 N.Y. 294-295 (N.Y. 1911).

For the Department and Supreme Court to argue that Petitioners do not have the right to choose the types of food they can produce and consume for themselves is to insist that these citizens are wards of the State who do not have

the ability to decide what is in their own best interests. And that defies our fundamental form of government.

Consequently, Petitioners enjoy a fundamental right to produce and consume the foods of their own choice, and this fundamental right extends to the members of the LLC who are like-minded and willingly wish to participate in this venture. Therefore, the Department lacks jurisdiction over Petitioners' private conduct and Supreme Court erred by ruling otherwise.

II. The term "for consumption by consumers" as used in 1 NYCRR 2.3(b) must mean something more than the mere act of eating, drinking or using up food.

This appeal and the underlying case hinged on what exactly constitutes a "consumer" and a "milk plant." The words are important because if Petitioners were "selling, offering for sale or otherwise making available" raw milk to paying consumers then Petitioners needed to obtain a raw milk permit. In addition, if Petitioners were engaged predominately in receiving prepasteurized milk, commingled milk or milk products then they would need to obtain a milk plant permit.

Petitioners argued below they were not selling or offering for sale or otherwise making available raw milk to paying consumers nor were they operating a milk plant. The Department argued otherwise. Supreme Court, after reviewing the applicable definitions contained in the regulatory framework, concluded that a 'consumer" is anybody who "consumes" regardless of whether there is a sale, a purchase or an offer for sale or purchase. Supreme Court therefore found that Petitioners were operating a milk plant. However, Supreme

Court did not explain the basis for its conclusion that Petitioners were required to obtain a milk plant permit. Petitioners believe both of these findings were erroneous.

To understand the import of Supreme Court's erroneous conclusion, and why it was erroneous, it is necessary to review not only the regulatory definitions at play in the case but also to review the evidence presented by Petitioners and the admissions made by witnesses who are employees of the Department. This portion of Petitioners' brief goes to the heart of the underlying case and to this appeal.

A. Petitioners do not require a milk plant permit.

On page 18 of its Decision and Order, Supreme Court finds that Petitioners are "required to hold a 'milk plant' permit pursuant to NYCRR 2.3(a)." However, Supreme Court does not explain anywhere in its Decision the basis for this conclusion. Also, and as described below, that decision is erroneous.

1 NYCRR 2.3(a) provides, in part, that "Every person who operates a * * * milk plant * * * in the State shall hold a general permit issued by the commissioner." Thus, if a person is not operating a milk plant, no such permit is necessary. 1 NYCRR 2.2(bb) defines "milk plant" as "any place, premises or establishment engaged solely or predominately *in the receipt of prepasteurized milk, commingled milk or milk products* * * *." Prepasteurized milk, in turn, is defined by 1 NYCRR 2.2(mm) as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep *which is to be pasteurized* prior to being processed * * *." Thus, if an

entity does not pasteurize its milk, it is not a milk plant.

This was confirmed by Will Francis, the Department's witness, who testified as follows at an administrative hearing held on January 18th and 19th, 2009:

> Q. Correct. 2.3(a), that only refers to pasteurized products?
>
> A. Pre-pasteurized milk, receiving pre-pasteurized milk that's intended to be pasteurized, that's correct.

(Record, pg. 537).

Department witness Will Francis also basically admitted that Petitioners do not need a general milk plant permit when he testified as follows:

> Q. What evidence do you have that any of the Respondents pasteurize their milk, first of all?
>
> A. I have no evidence to indicate that the milk is pasteurized at all, and in fact, I think we agree that it's all non-pasteurized milk.

(Record, pg. 531). The Department even stipulated that Petitioners do not pasteurize their milk. (Record, pg. 531). Thus, because Petitioners do not produce "prepasturized milk" they are not a "milk plant" under applicable law and are not required to obtain a milk plant permit pursuant to 1 NYCRR 2.3(a).

Again, 1 NYCRR 2.2(bb) defines "milk plant" as "any place, premises or establishment engaged solely or predominately *in the receipt of prepasteurized milk, commingled milk or milk products* * * *." Department witness Will Francis then admitted during the January 2008 administrative hearing that Petitioners are not a milk plant when he testified as follows:

Q. What evidence do you have that Meadowsweet Dairy, LLC or the Smiths are engaged solely or predominantly in the receipt of pre-pasteurized milk?

A. I am not aware of any pre-pasteurized milk that the Smiths are receiving at that facility.

Q. Are you aware of whether they are engaged in solely or predominantly receiving commingled milk?

A. I'm not aware that they're receiving commingled milk.

Q. Are you aware of whether or not they are engaged in solely or predominantly receiving milk products?

A. I'm not aware that they're receiving milk products.

(Record, pgs. 530-531). Thus, because Will Francis admitted that Petitioners do not receive prepasteurized milk, commingled milk or milk products, they cannot be a "milk plant."

The Department did not present any evidence through any other witness at the January 2008 hearing that Petitioners receive prepasteurized milk, commingled milk or milk products. To the contrary, Petitioner Barbara Smith provided unrebutted testimony that Petitioners do not receive any prepasteurized milk, commingled milk or milk products. Record, pg. 839.

Thus, there was no reason for Supreme Court to find that Petitioners needed to obtain a general milk plant permit. Accordingly, Supreme Court erred when it concluded that Petitioners needed to obtain a general milk plant permit.

B. Petitioners do not require a raw milk permit.

1 NYCRR 2.3(b)(1) provides that "Every person who sells, offers for sale or otherwise makes available raw milk *for consumption by consumers* shall hold a permit to sell raw milk issued by the commissioner." Consequently, a permit is required under this Rule only if "raw milk" is being sold or made available to consumers.

1 NYCRR 2.2(pp) defines "raw milk" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which will not be pasteurized *prior to being sold or offered for sale to consumers*." Thus, if the raw milk is not "sold or offered for sale to consumers" then it does not meet the definition.

As the Hearing Examiner concluded at the January 2008 hearing (Record, pg. 917), there is an inherent contradiction between 1 NYCRR 2.3(b)(1) (raw milk permit) and 2.2(pp) (definition of "raw milk") because 2.3(b)(1) requires a permit if a person makes available "raw milk for consumption by consumers" yet 2.2(pp) defines raw milk as something that must be "sold or offered for sale to consumers." Consequently, if "raw milk" must be "sold or offered for sale" before it is considered raw milk (as mandated by 2.2(pp)), then it is questionable whether a permit is required when raw milk is merely "made available" to a consumer but not sold to the consumer (as suggested by 2.3(b)(1)).

In any event, the questioning at the January 2008 hearing then turned to the issue of what constitutes a "consumer." Again, according to Department witness Will Francis:

Q. But you don't have a definition of consumer?

A. In this section [1 NYCRR 2.3(b)] I don't see a definition of consumer.

(Record, pgs. 539-540).

* * *

Q. And Section 253 [of the A&ML] contains the definition of milk that we talked about before, which means skim milk and butterfat; right?

A. Correct.

Q. Section 253 also has a definition for consumer; right?

A. Correct.[1]

(Record, pgs. 540-541)

* * *

Q. So if somebody under this definition does not *purchase* fluid milk, then they're not a consumer; right?

A. That is correct.

(Record, pg. 541).

The Department did not present any evidence at the hearing that anybody "purchased" Petitioners' raw milk. To the contrary, Barbara Smith expressly testified that all of the milk produced at the farm is available only to members of Meadowsweet Dairy LLC and to no other person, and that none of the milk produced by Petitioners is sold or offered for sale to or purchased by anybody.

[1] Article 21 entitled "Milk Control" defines "consumer" at Section 253(9) as follows: "Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

Record, pgs. 834-839. Therefore, if there is no "purchase" by consumers then there is no "raw milk" involved and consequently there is no need for a raw milk permit under 1 NYCRR 2.3(b).

As explained below in Section C., Petitioners do not sell, offer for sale or otherwise make available any raw milk or raw dairy products to consumers. Because of this, they do not need to obtain a raw milk permit. Therefore, and as explained below in Section C., Supreme Court's conclusion that Petitioners need a raw milk permit whether or not they engaged in a sale was erroneous.

C. Petitioners do not sell, offer for sale or otherwise make available raw milk or raw dairy products to consumers.

1 NYCRR 2.2(pp) defines "raw milk" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which will not be pasteurized prior to being sold or offered for sale to consumers." 1 NYCRR 2.3(b)(1) requires a raw milk permit if any person "sells, offers for sale or otherwise makes available" raw milk to a consumer. Assuming for the sake of argument that there is no inherent contradiction between 2.3(b)(1) and 2.2(pp), this whole Appeal turns on the word "consumer." If raw milk is not sold, offered for sale or otherwise made available to consumers then it is not regulated. If it is sold or offered for sale or otherwise made available to consumers, then it is regulated.

"Consumer" is not defined anywhere in the 1 NYCRR Part 2 regulations. However, there is a definition in New York's Milk Control Law, A&ML section 253(9), which defines "consumer" as "any person other than a milk dealer who

purchases milk for fluid consumption."[2] Therefore, in order for the raw milk provisions to apply there must be a "sale" of raw milk because consumers must purchase

A major issue at the January 2008 administrative hearing was whether Petitioners "sold or offered for sale" any raw milk. The evidence demonstrated that no, there was not any sale. The closest the Department could come was the testimony of an undercover agent, a Department employee, who "joined" the LLC merely to collect evidence against Petitioners.

The Department's undercover agent, Dennis Brandow, testified on direct examination that he "obtained" some milk from Petitioners on two occasions. Record, pg. 660. On cross examination, Mr. Brandow again admitted that he "obtained" but did not "purchase" the milk and dairy products because he had obtained them as a member of the LLC. Record, pg. 682. Mr. Brandow also admitted that he did not know how the LLC operated; how capital contributions and equity distributions were made; how income and expenses were accounted for; nor who had authority to make decisions for the LLC or how the LLC's assets, i.e., the herd of dairy cows, was managed or maintained. Record, pgs. 685-686. Consequently, the Department could not put on any evidence of a "sale" of raw milk.

In contrast, Petitioner Barbara Smith testified during the administrative

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[2] The only other place Petitioners can find a definition for "consumer" is in New York's egg laws, A&ML Section 160-a, which defines consumer as "any person *purchasing* eggs for his or her own family use or consumption, or a restaurant, hotel, boarding house, bakery or other institution purchasing eggs for serving to guests or patrons, or for its or their use in cooking or baking."

hearing as to how the LLC operates. Record, pgs. 303-314, 317-319. In essence, Barbara Smith testified as follows:

- members who join the LLC contribute working capital to the LLC;

- working capital is used to offset the costs of maintaining the herd;

- the herd is owned by the LLC itself and not the members;

- the LLC has two managing members, she and her husband Petitioner Steve Smith;

- the LLC has authorized she and her husband to maintain and manage the herd;

- the members receive returns of their equity share in the LLC in the form of raw milk and other dairy products;

- the LLC does not make its raw milk and dairy products available to anybody but LLC members;

- the LLC has never sold or offered for sale to any consumer any of the milk or dairy products produced by the herd.

However, Supreme Court on page 14 of its Decision and Order twice makes the erroneous finding that "Mr. Brandow purchased" raw dairy products. Supreme Court's finding is not supported by the evidence in the record and should be vacated and reversed. Moreover, Supreme Court's Decision and Order turned on its interpretation of the word "consumers" as used in 1 NYCRR 2.3(b) and whether a consumer had to be somebody that purchased or bought something.

Specifically, Supreme Court on page 16 of its Decision and Order queried

"Are the LLC members 'consumers?'" and on page 17 stated it would look to the "ordinary meaning of the word." Supreme Court then ignored the definition of "consumer" at A&ML Section 253(9) and instead looked up various definitions from various Internet websites, all of which referred to "use" or "utilize" or "eat or drink up; devour" or to "use or use up consumer goods," all of which were in stark contrast to A&ML Section's use of "purchase."

Supreme Court concluded on page 17-18 that none of those Internet definitions "indicates that to be a consumer, a purchase or sale is required." Instead, Supreme Court held that the LLC members were "consumers" as defined by the Internet because they "consume." Such reasoning is not only circular, it is erroneous for two major reasons.

To begin, Supreme Court's interpretation is overly broad and results in every single dairy animal owner in the State of New York being defined as a "consumer." In other words, anyone who owns a dairy animal and drinks or "consumes" the milk from their own dairy animal is now subjected to the licensing and all other regulatory requirements of the A&ML simply because they own a dairy animal, whether or not they sell the milk or dairy products from that dairy animal to third parties. In other words, a "consumer" is a "consumer" because they "consume."

In addition, Supreme Court's reasoning basically rewrites 1 NYCRR 2.2(pp) and 2.3(b)(1). For example, the raw milk permitting language of 2.3(b)(1) has now been rewritten to state: "Every person who sells, offers for sale or otherwise makes available raw milk for consumption *by anyone who consumes,*

uses up or drinks the raw milk shall hold a permit to sell raw milk issued by the commissioner." Moreover, 1 NYCRR 2.2(pp)'s definition of raw milk has now been rewritten as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, goats or sheep which will not be pasteurized prior to being *drunk, used up or consumed by consumers*."

Consequently, a farmer who gives milk away to a neighbor needs to obtain a permit; a farmer who gives milk away to a family member needs to obtain a permit; a farmer who has a daughter in college who returns home from college and who let the daughter drink milk at the farm has to have a permit; a farmer who drinks his/her own milk needs to have a permit. This is the result of Supreme Court's interpretation of the word "consumer" and it is an erroneous interpretation.

Therefore, Supreme Court's interpretation of the word "consumer" as requiring nothing more than the mere act of drinking or using up the milk was erroneous and contravenes the legislative intent of the A&ML.

III. Petitioners are not subject to the adulteration or misbranding provisions of Article 17 of the A&ML.

A&ML Section 199-a(1) provides, in part, that "No person or persons, firm, association or corporation shall within this state manufacture, compound, brew, distill, produce, process, pack, transport, possess, sell, offer or expose for sale, * * * any article of food which is adulterated or misbranded within the meaning of this article." However, Section 199-a(1) is subject to the general provisions of A&ML Section 199, which provides, in part, that it pertains to "the manufacture, production, processing, packing, transportation, exposure, offer, possession, and

holding of any such article for sale."

The only way to read Section 199 is for the words "for sale" to modify each of the activities described in that section, e.g., "manufacture for sale, production for sale, processing for sale, packing for sale" etc. Moreover, the only way to read Section 199-a(1) is for the words "for sale" to modify each of the activities described in that section, e.g., "manufacture for sale, compound for sale, brew for sale, distill for sale, produce for sale, process for sale, pack for sale, transport for sale, possess for sale" etc. Otherwise, a person who milks their own dairy animal and drinks their own milk is violating the "adulteration" provision because they are drinking milk that is not pasteurized.

Again, Section 199-a(1) is subject to the conditions of Section 199, i.e., "the manufacture, production, processing, packing, transportation, exposure, offer, possession, and holding of any such article for sale." Moreover, there is no evidence that Petitioners are engaged in a "sale" of raw milk or other dairy products. Because there is no "sale" there cannot be any "adulteration" or "misbranding."

Supreme Court, however, on page 16 of its Decision and Order found that Petitioners were subject to Section 199-a(1) because "the clear language of the statute applies to persons, firms, associations or corporations which manufacture, produce or process food." However, Supreme Court failed to recognize that Section 199-a(1) also includes the words "sell, offer or expose for sale" and thus has impermissibly broadened this provision. Moreover, Supreme Court also failed to acknowledge that Section 199 governs the applicability of

Section 199-a(1), which pertains to "any such article *for sale*."

Thus, Supreme Court has advanced an interpretation of the misbranding/adulteration statute that subjects every single producer of food in the State of New York to its provisions, whether that person be a backyard gardener, a basement brewer of beer, a personal winemaker, a baker, a gourmet chef, a parent (sibling) who makes peanut butter and jelly sandwiches for their children (sibling), or otherwise. This is so because these "persons" "manufacture, produce or process food." Consequently, Supreme Court's interpretation leads to absurd results and should not stand.

Petitioners are the only entities that have access to the raw milk and raw milk products produced by the LLC's dairy cows. For the Department to allege that they are "protecting" the public from the alleged inherent dangers of raw milk is arrogant in the extreme because there is no "public" that is being impacted. In essence, the Department considers Petitioners as "wards" of the State who are unable to make decisions for themselves.

While Petitioners sympathize with the Department's belief that "we're just doing our job," Petitioners believe that they have access to a superior product and that no public policy interest is served by *prohibiting* private citizens of the State from engaging in an activity that they believe ensures their health and freedom of choice. For the Department to allege that the public would be served by shutting down the Petitioners legal operation is to suggest that citizens have no right to band together in a common enterprise, and that such matters (i.e., producing food) should be left to far away business interests and corporations

rather than to a dedicated group of local individuals who serve a local need. Consequently, there is no policy reason to subject Petitioners to the Department's jurisdiction.

Therefore, Supreme Court erred by concluding that Petitioners are subject to the Department's jurisdiction under Section 199-a.

IV. *Res judicata* should not serve as a basis for dismissing Petitioners' action.

On page 19 of its Decision and Order, Supreme Court initially denies Petitioners' request for a preliminary injunction, denies the relief requested by Petitioners, and then dismisses the petition in its entirety after it finds that the Department has jurisdiction over Petitioners' conduct pursuant to A&ML Sections 20 and 199-a. After dismissing the petition, however, Supreme Court then goes on in *dicta* to state "the petition should also be dismissed based on the doctrine of *res judicata*" and refers to a prior administrative hearing that was conducted in October 2007 before this case was ever filed. As described below, *res judicata* does not apply to the facts of this case for a number of reasons and it was error for Supreme Court to use *res judicata* as an additional reason to dismiss Petitioners' action.

First, the October 2007 hearing did not litigate with finality any of the issues that are raised in this case. Second, the evidence at the January 2008 hearing constitutes a judicial admission and newly discovered evidence that the Department lacks jurisdiction over Plaintiffs. Third, the Department's October 2007 action was "executive action" which is not subject to *res judicata*. Fourth, it would have been futile for Petitioners to participate in any administrative hearing

before the Department because it had already concluded that it had jurisdiction over Petitioners' conduct.

Each of these reasons will be explained in detail below.

A. The October 2007 hearing did not litigate or address with finality any of the issues that are raised in this case.

Res judicata applies only when the parties to a case have already litigated the same issues in question. "Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (N.Y. 2005). If the matter in question has not been litigated with finality then *res judicata* does not apply. As explained below, the issues in this case were not previously litigated and there has not been any prior judgment on the merits.

To begin, Supreme Court alleges in its Decision and Order that the October 2007 hearing already litigated the issue of whether the Department had jurisdiction over the Plaintiffs.[3] That is not true. The only issue in that October hearing was whether or not 260 pounds of Petitioners' dairy products seized by the Defendants should be destroyed. That hearing did *not* address whether the Department had jurisdiction over Petitioners' conduct. A review of the record demonstrates conclusively that there was nothing at that October 2007 hearing which addressed whether New York's A&ML apply to Petitioners' conduct.

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[3] The Department made this exact same argument under principles of collateral estoppel before the Seneca County Supreme Court in their motion to dismiss Plaintiffs' complaint for declaratory judgment, i.e., the October 2007 hearing serves as collateral estoppel against this proceeding. (Record, pgs. 133-143). Seneca County Supreme Court rejected that collateral estoppel argument. Record, pgs. 349-351.

For example, the "hearing notice" referenced by Supreme Court on page 19 of its Decision and Order states the purpose of the hearing was to determine whether 260 pounds of Petitioners' dairy products "should not be destroyed or otherwise disposed of." Record, pg. 384. The notice does not indicate that the purpose of the hearing is to determine whether New York's A&ML applies to Petitioners' conduct. Since Petitioners realized it would have been futile to appear at that hearing the issue of jurisdiction was not raised at that time.

In addition, the Hearing Officer's report of the October 2007 hearing (Record, pgs. 424-431) as well as the Defendant Commissioner's Final Determination (Record, pgs. 422-423) are both completely devoid of any finding of how the LLC operates, how it was formed, how it produces dairy products, how equity in the LLC is distributed, what qualifies a person for membership in the LLC, what the rights or duties or obligations of LLC members are, how capital contributions are made to the LLC, etc.

Further, there is no finding anywhere in those two documents that the milk produced by the LLC's cows is pasteurized[4] or that it was sold or offered to sale to consumers.[5] In fact, nowhere do those two documents even discuss whether jurisdiction is appropriate. Finally, nowhere in those two documents is there any finding of Petitioner Steve or Barbara Smiths' involvement with or their relationship to the LLC. In short, the issue of jurisdiction was never raised or

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[4] Which it would have to be in order for 1 NYCRR Section 2.2(y) to apply, which defines "milk" as "food that meets the definition for milk provided for in section 17.18 of this Title *which has been pasteurized*."

[5] Which it would have to be in order for 1 NYCRR Section 2.2 (pp) to apply, which defines "raw milk" as milk that "will not be pasteurized *prior to being sold or offered for sale* to consumers."

addressed at the October 2007 hearing.

All of this evidence and all of these issues would had to have been introduced, addressed and raised at the October 2007 in order for the Hearing Officer and the Commissioner to conclude whether or not the A&ML applies to Petitioners' conduct. However, none of this evidence and none of these issues were raised at that hearing and the Commissioner did not address these issues in his December 2007 Final Determination. Consequently, the October 2007 administrative hearing cannot serve as *res judicata* because there was no evidence introduced that dealt with whether New York's A&ML applies to Petitioners' conduct.

Therefore, because the issues in this case were not previously litigated and there was no prior final judgment on the merits of jurisdiction, *res judicata* does not apply. Accordingly, Supreme Court erred in concluding that Petitioners' action should be dismissed on the basis of *res judicata*.

B. Judicial admissions made by the Department at the January 2008 hearing constitutes newly discovered evidence and demonstrate that res judicata does not apply to this case.

Res judicata also does not apply when, after the initial event has concluded, newly discovered evidence renders the first event inapplicable. This was the situation in the case of *Evans v. Monaghan*, 306 N.Y. 312 (N.Y. 1954).

In *Evans*, an administrative proceeding was brought against some police officers charged with illegal gambling. At the administrative proceeding, the police department's star witness refused to testify so the officers were released from the charges because there was no evidence against them. In a separate

and subsequent proceeding, however, the police department's star witness decided to testify Therefore, a second administrative hearing was brought against the same officers Based on the star witness' testimony, the result of the second administrative hearing was that the officers were discharged from the department and ultimately fired.

On appeal, the officers argued that the first administrative hearing (where the charges were dropped) should have operated as *res judicata* and barred the second administrative hearing. The court did not agree, stating "it would be beyond the spirit as well as beyond the letter of the doctrine of *res judicata*, as that doctrine is applied in court procedure, to bar the second departmental trial of petitioners. The unsealing of [the star witness'] lips after he had refused to testify at the first departmental trial, is tantamount to newly discovered evidence." *Evans v. Monaghan*, 306 N.Y. 312, 324 (N.Y. 1954). Thus, a change in circumstance can also defeat a *res judicata* claim.

In this case, there was a change in circumstances after the October 2007 hearing; the administrative hearing that was conducted in January 2008. At that January 2008 hearing, the Department's star witness, Will Francis, basically admitted that based on the facts of this case the Department lacks jurisdiction over Petitioners. The impact of Mr. Francis's testimony has already been detailed *supra* in Sections III and IV.

Suffice it to say, Mr. Francis' admissions make it clear that the Petitioners are not a "milk plant," they do not "sell, offer for sale or otherwise make available" any raw milk to consumers, and they do not need permits to operate the LLC.

Because these January 2008 judicial admissions were not available in October 2007 these changed circumstances should prevent the operation of any *res judicata* defense.

Moreover, the testimony of the Department's witnesses during the January 2008 constitutes judicial admissions. *See Mich. Nat'l Bank-Oakland v. Am. Centennial Ins. Co (in Re Union Indem. Ins. Co.)*, 89 N.Y.2d 94, 103 (N.Y. 1996) ("Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit."); *Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74, 80 (N.Y. App. Div. 1st Dep't 2003) ("prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a Petitioner's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)."). Judicial admissions may be used against the party making the admission, in this case, the Department. *See Cook v. Barr*, 44 N.Y. 156, 158-159 (N.Y. 1870) ("I can conceive of no principle or reason for holding that admissions made under such circumstances are not evidence against the defendant."). Those admissions go to the issue of the Department's lack of jurisdiction over Petitioners. Because these admissions were not available as of October 2007, *res judicata* should not be used as an excuse for dismissing Petitioners' action.

Accordingly, *res judicata* does not apply to this case and it was error for Supreme Court to dismiss Petitioners' action on this principle.

C. *Res judicata* does not apply to executive acts of administrative agencies, which is what the October 2007 seizure action and hearing were.

Res judicata is a doctrine associated with dispute-resolution rather than with administrative determinations in general. *Venes v. Community School Board*, 43 N.Y.2d 520, 523 (N.Y. 1978). In *Venes*, the issue was whether a school board that originally decided not to dismiss an employee could reconsider its decision and ultimately terminate the employee. In holding that *res judicata* did not apply, the *Venes* court stated "Executive acts have never been regarded as res judicata." (citation omitted). *Venes v. Community School Board*, 43 N.Y.2d 520, 525 (N.Y. 1978). The *Venes* court reached this conclusion even though the employee in question had administrative appeal rights and Article 78 rights. Consequently, even an administrative decision that is secured by appeal and Article 78 rights is an executive act that is not subject to *res judicata*.

In this case, the October 2007 hearing relied on by the Department was an executive act, i.e., should 260 pounds of dairy products be destroyed? Although "seizure and destruction" of dairy products is a matter that is within the discretion of the Department, it does not rise to the level of the Department's jurisdiction or whether the law applies to Petitioners' conduct.

Subject matter jurisdiction is determined by courts of law, not by administrative agencies. There is nothing in the A&ML that gives the Department the authority to determine its own jurisdiction and it is "possessed of only those powers expressly delegated by the Legislature, together with those powers

required by necessary implication." *Beer Garden, Inc. v. New York State Liquor Authority*, 79 N.Y.2d 266, 276 (N.Y. 1992). Consequently, only Supreme Court via Petitioners' declaratory judgment action (converted to an Article 78 proceeding) and not the Department could decide whether the A&ML applies to Petitioners conduct.

Therefore, the executive act associated with the October 2007 hearing could not have been used as *res judicata*. Accordingly, Supreme Court erred when it dismissed Petitioners' action for this reason.

Supreme Court cites to *Josey v. Goord*, 27 NY Slip Op. 9963 (N.Y. 2007) for the proposition that even administrative proceedings can have *res judicata* effect. However, *Josey* is also not on point because the actions in *Josey* also involved an executive act, not an issue of jurisdiction.

In *Josey*, a prisoner got into a fight with another inmate, stabbing and killing the other prisoner. For this conduct the prison imposed an administrative punishment on the prisoner. One year later, the State charged the prisoner with murder for killing the other prisoner and the prisoner pled guilty to the lesser included crime of manslaughter. Because the prisoner had now been convicted of a crime while being a prisoner (which was illegal), the prison initiated a second administrative punishment against the prisoner. The prisoner appealed the second administrative punishment under Article 78 and argued that the second punishment was based on the same conduct that led to his first administrative punishment, and thus was barred by *res judicata*. The court disagreed, stating:

> We therefore determine that *res judicata* does not preclude [the agency] from disciplining an inmate for being convicted of a Penal

> Law offense even though [the agency] previously assessed a penalty for the inmate's violation of disciplinary rules stemming from the same conduct. To conclude otherwise would impede [the agency's] ability to promote prison safety and have the perverse effect of encouraging [the agency's] hearing officers to impose more stringent disciplinary penalties initially, before any criminal investigation and proceedings are concluded.

Matter of Josey v. Goord, 2007 NY Slip Op 9963, 5 (N.Y. 2007). Thus, *res judicata* was not applicable even though the same set of facts and circumstances gave rise to two different proceedings.

In this case, if *Josey* were applied it would have the perverse effect of authorizing the Department, not Supreme Court, to rule on the questions of jurisdiction and the reach of the State's police power. Such result is not only an insult to the judicial system, it violates the notion of separation of powers. Therefore, it was improper for Supreme Court to dismiss Petitioners' action on the grounds of *res judicata*.

Supreme Court on page 20 of its Decision and Order cites to *O'Brien v. Syracuse*, 54 N.Y.2d 353, 356 (N.Y. 1981) for the proposition that Petitioners' jurisdiction argument "could have been made, but was not." However, *O'Brien* dealt with an initial action involving trespass and a subsequent action where the party artfully recast their claim as one for "*de facto* appropriation." The *O'Brien* court did not fall for this ruse and applied *res judicata* to the second action, stating "*de facto* appropriation may be characterized as an aggravated form of trespass." *Id.* at 357. Thus, *O'Brien* is not on point because this case does not involve a set of facts that give rise to multiple claims based on alternative theories. Rather, this case involves the single question of the extent of the

Department's jurisdiction, a matter that only the Courts and not the Department can resolve.

In the instant case, Petitioners' case turns on whether they are subject to the Department's jurisdiction and not on whether their dairy products were properly destroyed, which was the subject matter of the October 2007 hearing. These are two completely different issues. Therefore, the October 2007 hearing should not be used as *res judicata* in this case.

Consequently, Supreme Court erred when it dismissed Petitioners' action based on *res judicata*.

D. It was futile for Petitioners to participate in any administrative hearing before the Department.

Supreme Court states on page 19 of its Decision and Order that Petitioners "had the requisite full and fair opportunity to litigate the Department of Agriculture and Markets' jurisdiction over [Petitioners'] activities, but that they did not do so." Assuming for the sake of argument that Petitioners should have participated in the October 2007 hearing, such participation as explained below would have been futile.

Exhaustion of administrative remedies is unnecessary when it would be futile. *See Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (N.Y. 1978) (exhaustion not required "when resort to an administrative remedy would be futile."); *Counties of Warren & Washington Industrial Dev. Agency v. Hudson Falls Bd. of Health*, 168 A.D.2d 847, 848 (N.Y. App. Div., 3rd Dept., 1990) ("[E]xhaustion of remedies before the Board would be futile since the Board and its attorney have clearly demonstrated by their prior attempts to halt

the project (citations omitted) that petitioners are not likely to receive an unbiased review from the Board."); *Love v. Grand Temple Daughters, I. B. P. O. E. of W.*, 37 A.D.2d 363 (N.Y. App. Div., 1st Dept. 1971); *Fahey v. Perales*, 141 A.D.2d 934 (N.Y. App. Div., 3rd Dept., 1988) ("[T]he exhaustion rule is not inflexible and need not be followed where to do so would be futile."); *Amsterdam Nursing Home Corp. v. Commissioner of N.Y. State Dep't of Health*, 192 A.D.2d 945, 947 (N.Y. App. Div., 3rd Dept., 1993) ("It is axiomatic that administrative remedies need not be exhausted if resort to them would be futile").

In this case, counsel for Petitioners inquired whether the Department's position at the October 2007 hearing would make any difference if Petitioners' conduct was private and did not involve the public. Record, pg. 224. In other words, if Petitioners' conduct was private in nature and there was no public interest at stake, would the Department still believe it had jurisdiction? Defendants' counsel responded via email as follows: "I understand your position that the creation of the LLC takes the Smiths out of [the Department's jurisdiction]. I disagree." Record, pg. 226. Therefore, before the October 2007 hearing even commenced, the Department had already taken the position that New York's A&ML applied to Petitioners' conduct. It would have been futile, therefore, for Petitioners to show up and argue otherwise.

Moreover, the January 2008 administrative hearing *conclusively proves it would have been futile to appear before the Department in October 2007*. At the January 2008 hearing, Petitioners were subjected to an administrative Order that sought to shut down their operations and essentially dissolve the LLC. At the

January 2008 hearing, Petitioners vigorously challenged the Department's jurisdiction over their conduct, to no avail. At the conclusion of the hearing the Hearing Officer found that the Department did indeed have jurisdiction over Petitioners' conduct and the Commissioner himself issued a Final Administrative Order that found Petitioners were subject to the Department's jurisdiction. Record, pgs. 905-929.

Thus, the January 2008 hearing conclusively proves it is futile for Petitioners to argue before the Department, now, at anytime in the past, or at any time in the future, that they are not subject to the Department's jurisdiction. Consequently, *res judicata* cannot apply to this action and cannot serve as a basis for dismissing Petitioners' action.

V. Conclusion

As alleged in their complaint, Petitioners are citizens who have formed a Limited Liability Company so that they themselves can produce and consume milk and other dairy products of their choice. Petitioners believe that consuming pasteurized milk that comes from industrially managed cows damages their health and have taken legal steps to secure a source of raw, unprocessed dairy products for their sole use, which they believe contributes positively to the health of themselves and their families. Petitioners are not alone, for hundreds of other citizens in the State of New York are in the same situation.

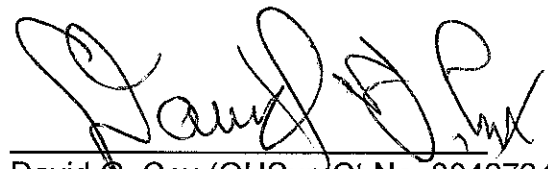
As alleged in their complaint, Petitioners are the only citizens who have access to the milk and dairy products that they themselves produce and consume. No one else has access to or consumes these products. Of

necessity, these citizens' conduct does not impact the public's health, safety or welfare. Consequently, Petitioners sought a declaration that New York's Agriculture and Market Laws do not apply to them because their conduct is beyond the police power of the State. This issue has far reaching effects throughout the entire State.

For the State to argue that these citizens do not have the right to choose the types of food they can produce and consume themselves is to insist that these citizens are wards of the State who do not have the ability to decide what is best for their private lives. And that defies our fundamental form of government.

Supreme Court's Decision and Order is fraught with error and should be vacated and reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic email and regular U.S. mail, postage prepaid, on September 15, 2009 to the following:

Michael McCormick
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10B Airline Drive
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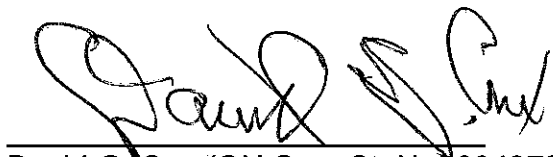
Counsel for the Department



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