NEW YORK STATE SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

Meadowsweet Dairy, LLC	:	
	:	
and	:	
	:	
Steven and Barbara Smith	:	
	:	
Petitioners	:	**Case No. 507679**
	:	
against	:	
	:	
Patrick Hooker, Commissioner	:	
Department of Agriculture and	:	
Markets of the State of New York	:	
	:	
Respondent	:	

REPLY BRIEF OF PETITIONERS

David G. Cox
(OH Sup. Ct. No. 0042724)
4240 Kendale Road
Columbus, Ohio 43220
Tel: (614) 457-5167
Email: dcoxlaw@columbus.rr.com

Counsel for Petitioners

Michael McCormick
Associate Attorney, State of New York
Department of Agriculture & Markets
10B Airline Drive
Albany, NY 12235
Tel: (518) 457-1059

Counsel for Respondent

Sam C. Bonney
20 West Main Street
P.O. Box 316
Waterloo, NY 13165
Tel: (315) 539-9211

Local Counsel for Petitioners

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I. The issue of whether the State's police power extends to Petitioners' conduct has been an issue in this case since at least January 2008.

As an initial matter, Respondent argues on page 4 of its response brief that the issue of whether the State's police power extends to Petitioners' conduct is being raised for the first time in this appeal and thus "review on this issue on appeal is precluded." Respondent's allegation is not true. The extent of the State's police power was expressly raised at least twice during these proceedings and at the very minimum has been implicit in the claims brought by Petitioners.

To begin, Petitioners have argued from the inception of this case that the State does not have jurisdiction over their conduct. Lack of jurisdiction was alleged several times in the first amended complaint (Record, pg. 77, paragraphs 22, 34, 38, 40, 41, 50, 51, 52, 58-61) and is simply another way of saying that the State's police powers do not extend to Petitioners' conduct.

Consequently, Respondent is playing semantics when it argues that the issue of the State's police powers is being raised for the first time in this appeal. Respondent's argument is like saying "they argued before the trial court that the light was not the correct color when the motorist sped through the intersection, and now they're saying on appeal that the light was red when the motorist sped through the intersection." Respondent's argument lacks merit and it should be rejected.

Moreover, the issue of the State's police powers was squarely addressed by Supreme Court Seneca County at the initiation of this case. Specifically, Respondent moved Supreme Court Seneca County in January 2008 (Record,

pg. 130, *et seq*.) to dismiss the amended complaint on the basis of *collateral estoppel*. Petitioners opposed that motion (Record, pg. 231, *et seq*.) and in their opposition Petitioners stated as follows: "Defendants' motion does not address the merits of this case and goes to lengths to avoid the sole issued presented by Plaintiffs' complaint: do the state's police powers, i.e., New York's Agriculture and Market Laws, apply to the private conduct engaged in by Plaintiffs?" (Record, pg. 231). Thus, this issue has been raised in this proceeding since at least January 2008.[1]

In addition, the issue of the State's police powers was also squarely addressed by Supreme Court Albany County. For example, Respondent filed a second motion to dismiss in July, 2008 with Supreme Court Albany County. (Record, pg. 379 *et seq*.). Because its first motion to dismiss based on *collateral estoppel* grounds was denied, Respondent changed tactics and based its second motion to dismiss on *res judicata* grounds, a tactic which is not authorized pursuant to CPLR 3211(e). Petitioners filed an opposition to that second motion (Record, pg. 449, *et seq*.) and in their opposition stated as follows: "Moreover, the State's police power does not extend to the fundamental right of a person to produce and consume the food of one's choice." (Record, pg. 450). Thus, this issue has been addressed at least twice during this proceeding.

Furthermore, Petitioners' opposition before Supreme Court Albany County devoted an entire section of its memo to the issue of the State's police powers. (Record, pg. 468 – 472). Indeed, the cases cited by Petitioners in their

[1] Significantly, Respondent's first motion to dismiss based on *collateral estoppel* grounds was denied.

opposition to Respondent's second motion to dismiss are the same cases they cited in their Opening Brief before this Court. (Record, pg. 471). Thus, the issue of the extent of the State's police powers has already been expressly raised and briefed in this case, twice.

Finally, Respondent itself admits on page 17 of its brief that "the Court below recognized, the AML's enactment was, and is, an exercise of the State's police power …."

Consequently, Respondent's argument at page 4 of its response brief that "this issue on appeal is precluded" lacks merit and is not credible. To the contrary, this issue has been a part of these proceedings for nearly two years, or since at least January 2008. Therefore, it is an issue that is ripe for review.

Accordingly, this Court should consider the issue of whether the State's police power extends to Petitioners' conduct. As argued by Petitioners in their brief, the State's police power does not extend to their private conduct.

II. Petitioners have cited numerous instances where the lower committed error.

The next preliminary matter that must be disposed of is Respondent's claim on page 14 that Petitioners "point to no error in the [lower] Court's decision and order." Again, that is also not true.

In their opening brief, Petitioners describe in several places the errors the trial court made in rendering its opinion. For example, Petitioners make the following claims of error on the following issues on the following pages of their opening brief: pgs. 15-16, the lower court's interpretation of A&ML Section 20 is overbroad, erroneous, and an impermissible extension of the State's police

power; pgs. 19-20 and 22, the lower court's conclusion that Petitioners need a milk plant permit is erroneous and unsupported by any evidence; pgs. 22, 25 and 27, the lower court's conclusion that Petitioners needed a raw milk permit is erroneous and inconsistent with the evidence; pgs. 28 and 29, the lower court's interpretation of the word "consumer" ignores the statutory definition, relies on internet definitions, rewrites applicable statutory provisions, contravenes legislative intent, and is overly broad; pgs. 31 and 32, the lower court's interpretation of A&ML 199 and 199(a)(1) leads to absurd results and is erroneous; and, pg. 32, the lower court erred in dismissing Petitioners' action based on *res judicata*.

Thus, the lower court committed a whole host of errors, contrary to Respondent's bald assertion.

III. Respondent does not deny that the lower court's interpretation of the word "consumer" is overly broad.

Respondent suggests on page 17 of its brief that its regulatory program "does not prohibit an individual from producing and consuming the products of that individual's own choice." In other words, Respondent takes the position that a farmer who owns a cow can consume the milk from his/her own cow without requiring a permit or license.

However, Respondent's interpretation of its own regulatory program is contradicted by the lower court's interpretation of the word "consumer." According to the lower court, "consumer" means anyone who "use[s]" or "utilize[s]" or "eat[s] or drink[s] up; devour[s]" or who "use[s] or use[s] up consumer goods." In other words, anyone who "consumes" is a "consumer."

Consequently, the lower court's interpretation of the word "consumer" would require a farmer who owns a cow and who drinks the milk from that cow to obtain a milk plant permit and a raw milk plant permit. Therefore, the lower court's interpretation of the word "consumer" contradicts Respondent's interpretation of the word "consumer."

Significantly, Respondent does not dispute that the lower court's interpretation is overly broad. Indeed, Respondent does not even address the lower court's interpretation of the word "consumer." Instead, Respondent puts forth an interpretation of "consumer" that is flatly contradicted by the lower court's interpretation. Therefore, Respondent cannot deny that the lower court's interpretation is overly broad because it is an interpretation that is inconsistent with the interpretation put forth by Respondent itself.

For this reason, Respondent did not deny that the lower court's interpretation of the word "consumer" is overly broad.

IV. Respondent does not deny that the October 2007 administrative hearing had nothing to do with whether Respondent has jurisdiction over Petitioners' conduct.

Nowhere in its response brief does Respondent deny any of the arguments raised by Petitioners in their opening brief on the issue of *res judicata*, i.e.: (1) the October 2007 hearing did not litigate or address with finality any of the issues that are raised in this case; (2) 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; (3) *res judicata* does not apply to executive acts of administrative agencies, which is what the

October 2007 proceeding was; and (4) It was futile for Petitioners to participate in the October 2007 administrative hearing before the Department. Consequently, Respondent is deemed to have abandoned its challenges to these arguments. *See Rochester Linoleum and Carpet Center, Inc. v. Cassin*, 61 A.D.3d 1201, 1202, n.1 (3rd Dept. 2009); *Rosenblatt v. Wagman*, 56 A.D. 3d 1103, 1104, n. (3rd Dept. 2008).

Respondent cites in its brief to two of the same cases cited by the lower court in its decision and order, i.e., *Josey v. Goord*, 27 NY Slip Op. 9963 (N.Y. 2007) and *O'Brien v. Syracuse*, 54 N.Y.2d 353, 356 (N.Y. 1981). As explained in Petitioners' opening brief, neither of these cases apply.

Subject matter jurisdiction is determined by courts of law, not by administrative agencies, and an action of an agency that is beyond its statutory authority is a legal nullity. *See Stapf v. Flacke*, 80 A.D.2d 927 (3rd Dept. 1981). In other words, the doctrine of *res judicata* does not even apply to issues that are beyond the jurisdiction of an administrative agency. *See Lane Const. Corp. v. Winona Const. Co., Inc.*, 49 A.D.2d 142, 146 (1975) ("The doctrine of *Res judicata* has no application to issues not within the jurisdiction of an administrative agency."). *See also Jennings v. New York City Council*, 10 Misc.3d 1073(A), *3 (2006) ("It is "inherent in a society of laws that the Court make such an initial determination, not the legislature nor the executive, nor an administrative agency, nor the military."). Thus, if Respondent lacks subject matter jurisdiction over Petitioners' conduct, then the *res judicata* effect of Respondent's October 2007 hearing is a complete red herring because

Respondent did not even have jurisdiction over Petitioners' conduct. Therefore, if *Josey* were applied it would have the perverse effect of authorizing Respondent, not the courts, to rule on the questions of jurisdiction and the reach of the State's police power.

With respect to *O'Brien v. Syracuse*, 54 N.Y.2d 353, 356 (N.Y. 1981), that case 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 the case *sub judice* 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 Respondent's jurisdiction, a matter that only courts and not Respondent can resolve.

Finally, Respondent argues that Petitioners failed to raise the issue of jurisdiction before the Hearing Examiner at the January 2008 hearing. This argument fails for two reasons. First, Petitioners filed their complaint for declaratory judgment in December 2007, a full month before the administrative hearing was even conducted. Thus, the *res judicata* effect of any administrative proceeding would not even apply since the issue had already been raised in *this* proceeding. Second, Petitioners did indeed argue at the January 2008 hearing (and the Hearing Officer agreed) that "the State should have no interest in regulating this essentially private activity." (Record, pg. 916). Thus, Petitioners

did raise the issue of *res judicata* below.

Consequently, the lower court erred when it dismissed Petitioners' action on the basis of *res judicata* after it had already dismissed Petitioners' action under Article 78.

V. Petitioners' members have an equitable interest in the dividends or profit of Meadowsweet Dairy, LLC.

Respondent argues on page 11 that the members of Petitioners' LLC have "no interest in specific property" of the LLC. While that may be true in and of itself, Respondent ignores the fact that the LLC members do have an interest in the *dividends* or *profits* of their investment in the LLC. Those dividends are just like the dividends of a shareholder of General Motors, i.e., a return on their investment. Consequently, Respondent cannot deny that the LLC members are entitled to their dividends.

Significantly, Respondent admits on page 12 that the interest the LLC members have in the LLC is "essentially the cash value of Meadowsweet at any given time." Exactly. That cash value is in the form of raw dairy and raw dairy products, an arrangement that the Hearing Examiner after the January 2008 hearing found was a perfectly legal arrangement under New York's LLC laws. (Record, pg. 918) ("The State's Limited Liability Company Law [LLCL], under which Meadowsweet Dairy LLC is operating, appears to authorize just such a construct as the [Respondent has] established."). Thus, because the cash value of the profit of the LLC is converted into raw milk and raw dairy products, Petitioners are obligated to allow the LLC members to take their share of their LLC investment in the form of raw milk and raw dairy products, since it is a

dividend that is owned by the LLC members.

Respondent argues that this cash dividend is "not property" of the LLC members and cites to *Yonaty v. Glauber*, 40 A.D.3d 1193, 1195 (3rd. Dept. 2007) and *Ricatto v. Ricatto*, 4 A.D.3d 514, 515 (2nd Dept. 2004) in support. However, *Yonaty* actually helps Petitioners while *Ricatto* is not even on point.

In *Yonaty,* the court expressly stated that although the LLC "itself owns its assets, such as real property" it went on to state that the LLC's shareholders actually "own the stock, which is personal-not real-property." *Yonaty v. Glauber*, 40 A.D.3d at 1194. Thus, *Yonaty* directly supports Petitioners' argument that their members are entitled to the dividends of their investment, i.e., they own the stock of the LLC which is in the form of raw dairy products.

In *Ricatto*, the issue was whether the issuance of a TRO against an LLC member constituted a TRO against real estate owned by the LLC itself. The trial court concluded that even though the member did not have an "interest in specific real property" of the LLC, the member and the LLC were essentially one and the same because of the way the LLC operated. Therefore, it was proper to issue the TRO against the member. Consequently, *Ricatto* does not even address the issue of whether Petitioners' members are entitled to a "cash dividend" in the form of raw dairy products.

Therefore, the LLC members do not constitute "consumers" since they do not purchase anything from the LLC. Accordingly, the lower court erred in holding that Petitioners are subject to the jurisdiction of the Respondent.

VI. Conclusion

For the reasons stated in their opening brief and in this reply brief, the lower court committed error in dismissing Petitioners' complaint.

Respectfully submitted,

David G. Cox (OHSup.Ct.No. 0042724)
4240 Kendale Road
Columbus, OH 43220
614-457-5167
dcoxlaw@columbus.rr.com
Trial Attorney of Record for Petitioners

Sam C. Bonney
20 West Main Street
P.O. Box 316
Waterloo, NY 13165
Phone: 315-539-9211
Local Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing was served by electronic email and regular U.S. mail, postage prepaid, on December 18, 2009 to the following:

Michael McCormick
Associate Attorney
Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235
Counsel for the Department

David G. Cox (OH Sup. Ct. No. 0042724)