To be argued by: Michael McCormick
Time requested: 10 minutes

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

Meadowsweet Dairy et al ,

Appellants,

v

Case No. 507679

Patrick Hooker, as Commissioner of the Department of Agriculture and Markets of the State of New York,

Respondent

RESPONDENT'S BRIEF

December 4, 2009

Ruth A. Moore,
Attorney for Respondent
Michael McCormick, of counsel
10B Airline Drive
Albany, New York 12235
(518) 457-2449

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Questions Involved

1 Is this proceeding barred by the doctrine of *res judicata*?

The Court below held that it was.

2. Are the production and distribution for consumption of raw milk and dairy products made from raw milk and those persons responsible for that production and distribution subject to the jurisdiction of and regulation by the Respondent under New York's Agriculture and Markets Law and regulations duly promulgated under that Law?

The Court below held that raw milk and dairy products made from raw milk and those responsible for the production and distribution of those products were subject to the jurisdiction of and regulation by the Respondent under New York's Agriculture and Markets Law and regulations duly promulgated under that Law

3. Were the Appellants entitled to a preliminary injunction prohibiting the Respondent from enforcing New York's Agriculture and Markets Law against them and the raw milk and dairy products which they made from raw milk?

The Court below held they were not.

Proceedings Below

The action was commenced in Supreme Court Seneca County, converted to a special proceeding seeking prohibition and transferred to Supreme Court Albany County, together with the Appellants' motion for a preliminary injunction, by order of Supreme Court Seneca County (Bender, A.J.S.C.) dated March 17, 2008 and entered on April 16, 2008 R. 347*

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* Numbers preceded by "R" refer to the pages of the Record on Appeal

After joinder of issue, the Appellants re-noticed their motion for a preliminary injunction (R 376) and the Respondent cross-moved to dismiss the petition upon *res judicata* grounds or, alternatively, for summary judgment R 380

By decision and order dated and entered November 20, 2008 Supreme Court Albany County (Egan, Jr , J) denied Appellants' motion for a preliminary injunction and dismissed their petition upon the grounds of *res judicata*, and upon finding that the Appellants and the raw milk and dairy products made from raw milk which they produced and distributed were subject to regulation by the Respondent under New York's Agriculture and Markets Law and regulations promulgated under that Law. R 6

This Appeal

Issue Deemed Abandoned

While the Appellants' Notice of Appeal states that they appeal from each and every part of Supreme Court's November 20, 2008 order (R. 1), their brief does not address denial of their motion for a preliminary injunction, therefore that issue is deemed abandoned upon this appeal See, *Rochester Linoleum and Carpet Center, Inc v. Cassin, 61 A D 3d 1201, 1202, n 1, 878 N Y S 2d 219 (3rd Dept 2009), Rosenblatt v Wagman, 56 A D 3d 1103, 1104, n 876 N Y S 2d 780 (3rd Dept 2008)*

Issue Raised First Time on Appeal

On their appeal, appellants argue for the first time that 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" and reference specific sections of New York's Constitution (Appellants' Brief, p 8) That issue is not raised in the Appellants' first amended complaint, was not argued before the Court below and was not addressed by the Court in its November 20, 2008 decision and order R 6 Accordingly, review of this issue on appeal is precluded *Savage v Desantis, 56 A D 3d 1013, 1015, 868 N Y S 2d 787, lv app den., 12 N Y 3d 709, 908 N E 2d 927, 881 N Y S 2d 19 (2008), State v Butti, 304 A D 2d 917, 757*

N Y S 2d 644, lv app den , 92 N Y 2d 923, 703 N E 2d 276, 680 N Y S 2d 464 (1998) Berich v Ithaca Police Benevolent Assoc., Inc , 23 A D.3d 904, 804 N Y S 2d 833 (3rd Dept 2005)

PRIOR ADMINISTRATIVE PROCEEDINGS

I Agriculture and Markets Law §202-b Hearing

Upon learning that the Appellants were producing and distributing raw milk and dairy products made from raw milk in violation of the AML and its regulations, the Respondent seized violative products, pursuant to AML §202-b, in October of 2007 and scheduled a hearing to consider disposition of them R 39, 42 Despite being duly noticed and Appellants' counsel corresponding with the Respondent's counsel prior to the hearing, neither the Appellants, nor their counsel, appeared at the hearing R. 89-98. Based upon the hearing record, the Respondent issued a final determination on December 12, 2007 ordering destruction of the seized products. R. 191 That final determination was served by mail upon the Appellants and their counsel on December 13, 2007

The Appellants did not seek Article 78 review of that final determination

II. Agriculture and Markets Law §258-e Hearing

Since the Appellants did not appear at the seizure hearing (above) and continued to operate in violation of the AML, the Respondent noticed a hearing pursuant to AML §36 and §258-e to determine whether an order should be issued directing the Appellants to comply with the AML

The Appellants, with counsel, appeared at and participated in the hearing held on January 17 and 18, 2008 Testimony and evidence was received from the parties, cross-examination afforded to each, and a record made R. 478-869.

In a May 16, 2008 report, the hearing officer recommended issuance of an order directing the Appellants to comply with the AML with respect to their raw milk operations R 909

On July 23, 2008, the Respondent substantially adopted the hearing officer's recommendations and ordered the Appellants to either comply with the AML, or discontinue any operation which was subject to the AML R 905

The Respondent's July 23, 2008 order was served by mail upon the Appellants and their counsel on July 28, 2008 R 933

Appellants did not obtain Article 78 review of that order.

Statement of the Case

On December 13, 2007 the Appellants commenced this action in Supreme Court Seneca County seeking a declaratory judgment that their raw milk and dairy products made from raw milk were not subject to the Respondent's jurisdiction under the AML R 28 Eight days later, on December 21, 2007 Appellants applied for an order to show cause and temporary restraining order, moved for a preliminary injunction to enjoin the Respondent from enforcing the AML against them, and filed and served their first amended complaint. Their request for the TRO was denied, and their preliminary injunction motion made returnable on January 22, 2008. R 75, 77. Their amended complaint differed from their original complaint by the addition of a request for permanent injunctive relief, prohibiting the Respondent from enforcing the AML against them. R. 86.

The Respondent cross-moved to dismiss pursuant to CPLR 3211(a)(5) and (7) or, alternatively, to convert the action to a special proceeding and transfer venue to Albany County pursuant to CPLR 506(b)(2) R. 130 By order dated March 7, 2008, Supreme Court Seneca County granted the Respondent's motion to convert and transfer and denied the Respondent's motion to dismiss. R 349.

No appeal was taken from that order.

Upon transfer to Albany County, the Respondent answered the first amended complaint, raised the defense of *res judicata* and interposed three counterclaims R 353 Appellants

replied, re-noticed their motion for a preliminary injunction and moved to "supplement the record" R 368, 373, 376

The Appellants motion to "supplement the record" was a request that the Court below allow them to introduce the transcript of the Agriculture and Markets Law §258-e hearing (above) in support of their request for the injunctive relief The Respondent did not object to that request, provided that the hearing officer's report and recommendation and the Respondent's order were also placed on the "record" The hearing transcript, the hearing officer's report and recommendation and the Respondent's order were then provided to the Court below.

On November 18, 2008 the Court below dismissed the petition on the grounds of *res judicata* and upon finding that the Appellants' raw milk operations were subject to the AML and to the Respondent's jurisdiction The Court also denied the Appellants request for a preliminary injunction

POINT I

SUPREME COURT PROPERLY DISMISSED THIS PROCEEDING UPON THE GROUND OF *RES JUDICATA*

"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 The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter, 4 N Y 3d 260, 269, 827 N E 2d 269, 794 N Y S 2d 286 [2005]*) and, under New York's transactional approach to the rule, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy' *O'Brien v City of Syracuse, 54 N Y 2d 353, 357, 429 N E 2d 1158, 445 N Y S 2d 687 (1987)*. *Res judicata* applies in cases of default and to all issues which were, or could have been, raised in the prior proceeding *Eagle Insurance Co. v Facey, 272 A D 2d 399, 400, 707 N Y S 2d 238 (2nd Dept. 2000)* ("The doctrine is applicable to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised "), *Allstate Ins. Co v Williams, 29 A D 3d 688, 816 N Y S 2d 497 (2nd Dept 2006)*, *Zayatz v Collins, 48 A D 2d 1287, 851 N Y S 2d 797 (4th Dept 2008)*

Res judicata is generally applicable to quasi-judicial administrative determinations that are "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures similar to those used in a court of law" (*Ryan v New York Tel Co , 62 N Y 2d 494, 499 [1984])* *Josey v Goord, 9 N Y 3d 386, 880 N E 2d 18, 849 N Y S 2d 497, (2007)* "[S]ecurity of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible Indeed, it is the instruct of our jurisprudence to extend court principles to administrative or quasi-judicial hearings insofar as they may be adapted to such procedures " *Matter of Evans v Monaghan, 306 N Y 312, 323-324 (1954)* quoted in *Jason B v Novello, 12 N Y 3d 107, 113, 904 N E 2d 818, 876 N Y S 2d 862 (2009)* "Before we will apply res judicata to an administrative decision, however, it is necessary to determine whether to do so would be consistent with the function of the administrative agency involved, the peculiar necessities of the particular case, and the nature of the precise power being exercised " (*Matter of Venes v Community School Board of Dist 26, 43 N Y 2d 520, 524 [1978]* [internal quotation marks and citations omitted]) "Consequently, the rule should give conclusive effect to an agency determination only if such application is consistent with the nature of the particular administrative adjudication (id see also Borchers and Markell, New York State Administrative Procedure and Practice §3 23, at 76 [2d ed] [observing that 'preclusion must make sense within the overall context of the agency's procedures'" (internal quotation marks and footnote omitted)]) *Josey, 389*

October 2007 Hearing

Prior to the October 2007 hearing, in an exchange of correspondence with Department's counsel, Appellants' counsel stated, "So I take it this means you consider the Smiths and Meadowsweet Dairy LLC under the Department's continuing jurisdiction, subject to more monthly inspections, more search warrants and more destruction notices?" R 47 To which Respondent's counsel replied, "We take the position that the dairy operations at the Smiths' farm fall within our jurisdiction " R 48

Neither the Appellants, nor their counsel, appeared at the October 2007 hearing and the Appellants did not seek Article 78 review of the final determination which ordered destruction of the seized product R 191

December 2007 Hearing

After issuance of the December 2007 hearing notice, referred to as a "complaint" in AML §258-e, its authorizing legislation, the Appellants responded in two ways They commenced the action underlying this appeal and they appeared with counsel and defended against the complaint's allegations The complaint afforded them the opportunity to "show cause why an order should not be entered by the Commissioner pursuant to Agriculture and Markets Law section 36 and 258-e [requiring the Appellants to discontinue their raw milk operations which were in violation of the AML and regulations] R. 109. The hearing extended over two days, included the testimony of five witnesses, including Appellants' manager, took into evidence twenty exhibits and produced a record of 366 pages.

The hearing officer issued a report on May 16, 2008 finding the Appellants subject to the AML and regulations relating to raw milk and recommending issuance of the order as described in the hearing notice R 909

On July 23, 2008 the Respondent accepted the hearing officer's report and recommendations, with minor exceptions, and issued the order R 905

The Appellants did not obtain Article 78 review of that order.

Each hearing notice, each hearing's procedures and its underlying statutory authority fully comport with the requirements necessary to afford the resulting administrative determinations *res judicata* effect here The Respondent is authorized and directed to carry out the provisions of the AML with respect to food distributed in New York (AML §16, subd 1) and, specifically, milk and dairy products (AML Art 4-B) This broad jurisdictional mandate is refined by AML Article 17, which provides the Respondent with jurisdiction over food, including food sanitation, production, distribution and, in many instances, composition. (AML §214-b) ("The commissioner is hereby authorized (1) to adopt, in so far as practicable, the regulations fixing and establishing definitions and standards of identity and/or standards of quality, and tolerances for food or food products from time to time promulgated under the federal act or acts. ..") Other Articles of AML address particular foods, or types of food, including milk and dairy products. AML Art 4, 4-B In each Article, whether Article 17 or

another, the Respondent is given broad authority to adopt regulations dealing with food AML §46-a

With respect to raw milk, the Respondent has adopted regulations and implemented procedures to minimize, to the greatest extent possible, the health hazard posed by the consumption of raw milk One who makes available raw milk for consumption by consumers must meet specific sanitation requirement, obtain a permit from the Respondent, provide the milk directly to the consumer on the farm where produced in a single-service or consumer provided container, and post a prescribed notice See, 1 NYCRR §2 3(b) Also, dairy products such as those made available by the Appellants, set out in the October 2007 hearing notice (R 154), may not be made from raw milk See, 1 NYCRR §17 18 incorporating by reference federal standards of identity for those products which require that the products be made from pasteurized milk.

The *Josey* criteria necessary to give *res judicata* effect to an administrative determination have been met here There is no question that the Respondent has the requisite "adjudicatory authority", *Josey, 390* In addition to the statutory authority set out above, AML §202-b specifically authorized the October 2007 (food held or produced under insanitary conditions deemed adulterated) hearing while AML §258-e was propoer basis for the January 2008 hearing (hearing and order authorized where person in violation of AML with respect to milk)

Each hearing employed "procedures similar to those used in a court of law" (*Josey, supra*) including notice, an opportunity to be heard, the opportunity to be represented by counsel, to cross-examine witnesses and present evidence and testimony, and the offer to accommodate any disability which may affect the plaintiffs' participation.

Each hearing met both the "peculiar necessities of the particular case" and "precise power" test of *Josey*. Respondent is the State officer responsible for the regulation of New York's dairy industry and he exercised his specific power with respect to milk and dairy products provided for in the AML, in noticing and holding each hearing

Respondent's action with respect to each hearing is completely consistent with "the nature of the particular administrative adjudication," there being no other State entity conferred

with the particular power over milk and dairy products distributed in New York as is conferred upon the Respondent by the AML

Each administrative determination was an appropriate and lawful exercise of jurisdiction over the Appellants Each determination meets the requirements necessary to give *res judicata* effect to it, and foreclose the Appellants here from challenging the defendants' jurisdiction over them. Having had an opportunity to raise the issue of jurisdiction in the context of an Article 78 review of each of the Respondent's prior administrative determinations, and not having done so, the Appellants are bared by *res judicata* from bringing this proceeding See, *Insurance Co of State of Pennsylvania v HSBC Bank USA, 10 N Y 3d 32, 852 N Y S 2d 812 (2008)* (*Res judicata* applies not only to issues actually litigated, but also to those that could have been litigated because New York's "transactional" approach to *res judicata* is broader than the principles adopted by the federal courts, holding that the central issue litigated in the prior litigation was central to the instant litigation and controlling)

The Court below properly dismissed the petition upon the ground of *res judicata*

POINT II

MEADOWSWEET DAIRY LLC IS SUBJECT TO THE DEFENDANTS' JURISDICTION UNDER NEW YORK'S AGRICULTURE AND MARKETS LAW

A Appellant Meadowsweet Subject to Jurisdiction

Appellants argue that they are not subject to the Respondents' regulatory jurisdiction because Appellant Meadowsweet is a New York limited liability company and its distribution of raw milk and dairy products made from raw milk to its members is "private conduct" and a return of their "ownership share" in Meadowsweet App Br. pp 12-19.

The Appellants' argument ignores the fact that "membership interest in [a New York limited liability company] constitutes personal property" and an LLC member has "no interest in specific property of the [LLC]" *Yonaty v. Glauber, 40 A D 3d 1193, 1195, 834 N Y S 2d 744 (3rd Dept 2007), Ricatto v Ricatto, 4 A D 3d 514, 515, 772 N Y S 2d 705 (2nd Dept 2004),*

(Pursuant to Limited Liability Company Law §601, the defendant's membership interest in the LLC is considered personal property)

Despite their assertions to the contrary, Appellants members do not own the raw milk and dairy products made from raw milk which Appellants produce and distribute. Rather, those members own an interest in Appellant Meadowsweet, the limited liability company, which interest is essentially the cash value of Meadowsweet at any given time

Since the Appellant Meadowsweet owns the products it produces, the raw milk and dairy products made from raw milk which it distributes to its members, the issue is simply whether Appellant Meadowsweet is subject to the Respondent's regulation.

B Appellant Meadowsweet Subject to Regulation

New York's Regulatory Scheme

New York has authorized the Respondent to carry into effect its laws relating to dairy products and the production, transportation, storage, marketing and distribution of food AML §16, subd. 1. New York has also declared that its dairy industry is of vital importance to the State, and that in the interest of the consuming public, there be uniformity in the standards of milk products and the labeling of milk and milk products AML §46.

New York has determined when food is deemed adulterated and/or misbranded, has prohibited the sale, manufacturing and distribution of such food in the State (AML Art. 17, §198, 199-a, 200 and 201), and has provided a procedure for dealing with food which appears to violate a statutory or regulatory prohibition, or fails to meet a statutory, or regulatory, mandate AML §202-b Within this pervasive statutory scheme -- "all articles of food or drink. used or intended for use by men" (AML §198, subd 1) is deemed adulterated by New York "[I]f it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health " AML §200, subd. 4. New York has deemed food to be misbranded if the food "is represented as a food for which a standard of quality has been prescribed [and the food fails to meet that standard]. AML §201, subd 8

New York has provided the Respondent with broad authority to adopt rules and regulations implementing its "food" statutes, including carrying into effect New York's laws relating to food generally (AML §18, subd 2) and "for the efficient enforcement" of Article 17 of the AML which prohibits the adulteration and misbranding of food, and provides for the establishment of standards of identity for food AML §214-b New York has also specifically authorized the Respondent to adopt regulations relating to the definition of milk and milk products and to establish standards for each and the Respondent has adopted regulations relating to milk and dairy products including dairy farm sanitation, milk and milk production, processing and manufacturing (Official Compilation of Codes, Rules and Regulations of the State of New York [NYCRR] Title 1, Part 2, *Requirements for the Production, Processing, Manufacturing and Distribution of Milk and Milk Products* [NYCRR]) and standards of identity for milk and dairy products 1 NYCRR 17 18, *Additional Standards of Identity for Milk and Milk Products*

Meadowsweet Is Subject to Regulation

New York requires that every person who sells or otherwise makes available raw milk for consumption by consumers hold a permit issued by the Respondent The tightly controlled circumstances under which raw milk can be "made available;" only directly to a consumer, on the dairy farm where produced, in a single service container or a container provided by the consumer, accompanied by posted warning that raw milk does not provide the protection of pasteurization, recognize the potential threat to public health posed by raw milk

The Respondent has adopted a definition of "milk" (1 NYCRR §17 18; 21 CFR §131,110 (1994), "Milk is the lacteal secretion, practically free from colostrums, obtained by the complete milking of one or more healthy cows ") and two "subcategories"; prepasteurized milk, which is milk that will be pasteurized prior to processing (1 NYCRR §2.2(mm)) and raw milk, which will not be pasteurized prior to being sold or offered for sale to consumers 1 NYCRR §2.2(pp) Every person who "sells, offers for sale or otherwise makes available raw milk for consumption by consumers "must obtain and maintain a permit issued by the Department (1 NYCRR §2 3(b)) and every person who operates a "milk plant", a place where milk products are manufactured, must hold a "general permit". 1 NYCRR §2 3(a); §2 2(bb), (cc)

Supreme Court below held that the Appellants were subject to the Respondent's jurisdiction, were operating a "milk plant" and were required to hold a general permit R 23 Appellants argue, as they did before the Court below, that their conduct, the production and distribution of raw milk and raw milk products to over 100+ members, is not subject to the Respondent's jurisdiction, but point to no error in the Court's decision and order

Appellants operate a milk plant, as evidenced by the unchallenged prior administrative determinations showing that they produced milk products at their premises The October 2007 final determination found that the Appellants had produced raw milk yogurt, raw milk buttermilk and raw milk (R 191), and the 2008 determination found the same R 905 Appellants also admit, in paragraph 13 of their underlying complaint, that they manufacture milk products R 31 Their argument that their operation as a limited liability company "exempts" them from regulation is without merit (see above) Therefore, Appellant Meadowsweet must obtain a general permit Appellants' argument that they do not operate a milk plant (App Br p 20) focuses only on one aspect of their operations, their production of raw milk, and overlooks their manufacture of dairy products, for which they must hold a general permit

Appellants' argument that the Respondent's raw milk permit requirements does not apply to them is similarly short-sighted App Br p 23 There is no question that Appellants produce milk as defined by 1 NYCRR §2 2(y) Highlighting what they perceive as an "inherent contradiction" between the definition of raw milk, "[milk which will not be pasteurized prior to being sold or offered for sale to consumers" (1 NYCRR §2 2(pp)), and the language in the raw milk permit regulation, 1 NYCRR §2 3(b), which requires that every person "who sells, offers for sale or otherwise makes available raw milk for consumption by consumers [shall hold a raw milk permit]", Appellants conclude that absent a sale or offering of raw milk, the permit requirement does not apply to them

The Court below properly rejected their argument First, there is a sale of raw milk to the Appellants' members, non-withstanding Appellants' incorrect assertion that its members "own" the raw milk Section 601 of New York's Limited Liability Company Law simply and clearly states "A member has no interest in specific property of the limited liability company." McKinney Consol Laws NY, West, 2007 The amount paid by Appellant-Meadowsweet's members for its products is, in fact, a purchase of products

Secondly, the Court below properly looked at the statutory underpinning of the AML, the protection of the public health with respect to raw milk production and sales, and concluded that the Appellants' raw milk and products made from raw milk were under the jurisdiction of and subject to regulation by the Respondent in the discharge of his statutory obligation.

POINT III

THE APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION WAS PROPERLY DENIED

[Notwithstanding Respondent's position that this issue has been abandoned on appeal, should the issue be considered, the Court below was correct]

The Appellants sought a preliminary injunction against the Respondent to prevent him from exercising any regulatory jurisdiction over Appellants' production, manufacture and distribution of raw milk and dairy products made from raw milk However, Appellants did not, and cannot, meet the requirements of CPLR 6301 necessary to obtain the relief requested, let alone the "high" standard that must be met when seeking to enjoin a governmental official acting in his or her official capacity The Court below found the Appellants had failed to establish a likelihood of success on the merits, that any harm to them occasioned by the Respondent's exercise of regulatory jurisdiction was "speculative" and any financial injury was not "irreparable". R 23-24. This is not only because the Court below rejected the Appellants construction of the AML.

In seeking the preliminary injunction, the Appellants incorrectly claimed that they do not have an "administrative remedy" available to them to contest the Respondent's exercise of AML regulatory jurisdiction R 64-68 Their remedy at law is readily available: commence and prosecute an Article 78 proceeding seeking review of any administrative action taken by the Respondent This remedy at law was, in the case of both the October, 2007 and January 2008 hearings (above), readily available, but Appellants did not avail themselves of it Since any administrative determination of the Respondent is subject to Article 78 review, Appellants had an adequate remedy at law warranting denial of their motion for a preliminary injunction. *Grogan v. St Bonaventure University, 91 A D2d 855, 458 N Y S 2d 410 (4th Dept 1982).*

The Appellants did not show likelihood of ultimate success on the merits, the prospect of irreparable injury if the provisional relief is withheld and a balance of equities tipping in the moving party's favor (*Grant Co v Sgroi, 52 N Y 2d 517*) in *Doe v. Axelrod, 73 N Y 2d 748, 750, 536 N Y S2d 44 (1988)* The Appellants provided no evidence that they will succeed on the merits, other than their allegation, based upon their clearly errouneous argument that the LLC members own the LLC's property and therefore they are not subject to the Respondent's jurisdiction because their conduct is private

The Appellants must meet a higher standard in order to obtain the requested injunction because they are challenging governmental action taken in a governmental, as opposed to a proprietary, capacity. *Time Warner Cable of New York, a division of Time Warner Entertainment Co , L P v Bloomberg L P , 118 F 3d 917, 923, 924 (2nd Cir. 1997)* "Where the moving party seeks a preliminary injunction that will affect governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard (*No Spray Coalition, Inc v City of New York, 252 F.3d 148, 149 [2nd Cir. 2001)*, quoting, *Beal v Stern, 184 F 3d 117, 122 [1999]* (internal quotations and citation omitted)" *Chatham Towers, Inc v Bloomberg, 6 Misc 3d 814, 826, 793 N Y S.2d 670* aff'd *18 A D 3d 395, 795 N Y S 2d 577 (1st Dept 2005); lv den 6 N Y 3d 704, 811 N.Y S 2d 337 (2006).*

Appealants showed no irreparable injury if their motion is denied because any administrative action against them is subject to Article 78 review and any adverse legal action is subject to review by appeal under the CPLR. Finally, the equities do not favor the Appellants here. They seek a preliminary injunction prohibiting the enforcement against them by the governmental official charged with protecting the public health by regulating the production and distribution of raw milk and dairy products made from raw milk, of the very regulatory scheme enacted to provide that protection.

POINT IV

NEW YORK'S REGULATION OF THE PRODUCTION, DISTRIBUTION AND MANUFACTURE OF RAW MILK AND DAIRY PRODUCTS MADE FROM RAW MILK IS A PROPER EXERCISE OF THE STATE'S POLICE POWER

[While the Respondent maintains that the Appellants' first-time challenge on appeal to New York's raw milk regulatory scheme in some way violates their constitutional rights is not properly before this Court, the Respondent submits this Point should this Court find the issue was properly raised and addressed below and preserved for appeal.]

There is a presumption that an act of the Legislature is constitutional and that presumption can only be defeated by proof beyond a reasonable doubt There is also a presumption that the Legislature has investigated and found facts necessary to support the legislation at issue. *Hotel Dorset Company v. Trust for Cultural Resources of City of New York, et al., 46 N.Y.2d 358, 370, 385 N.E.2d 1284, 413 N.Y.S.2d 357 (1978)* While unclear here, it appears from Appellants' brief that the Appellants view the Respondent's exercise of jurisdiction and regulation over their activity to interfere with their "fundamental right" to produce and consume "the foods of one's choice." App. Br. p.2. If so, this would implicate a due process claim, assuming that the Appellants established their claimed "fundamental right."

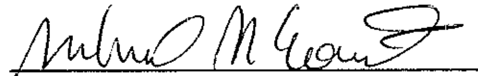
The Appellants cannot establish the "right" allegedly infringed upon by the Respondent's regulatory program because that program, the regulation of raw milk and dairy products made from raw milk does not prohibit any individual from producing and consuming the products of that individual's own choice Rather, the Respondent's regulation reaches the Appellants' conduct, the distribution of raw milk and dairy products made from it, to the public at large, that public being Meadowsweet's members Regardless of how the Appellants phrase their argument, neither the Appellant LLC Meadowsweet, or the Appellant manager, the Smiths, have shown any "fundamental right" to produce and distribute to the public, a product which the Legislature has invested the Respondent with the duty and obligation to regulate.

There need only be a reasonable connection between the regulatory program and the promotion of the public health and safety *People v. Johnson, 38 A.D.3d 1057, 1059, 832 N.Y.S.2d 312 (3rd Dept. 2007)*. As the Court below recognized, the AML's enactment was, and is, an exercise of the State's police power and promotion of the general welfare. R. 23. This, coupled with the statutory presumption (above) of Legislative knowledge and the complete absence of any evidence presented by the Appellants to overcome that presumption, clearly shows New York's regulation of raw milk and raw milk products to be constitutional in all respects

CONCLUSION

The order of Supreme Court Albany County dated November 18, 2008 should be affirmed.

December 4, 2009



Ruth A. Moore,
Attorney for Respondent
Michael McCormick, of counsel
10B Airline Drive
Albany, New York 12235
(518) 457-2449