**IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI**
**DIVISION I**



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| State ex rel. Chris Koster, Attorney General; Missouri Department of Agriculture; and Missouri State Milk Board, | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 10AL-CC00135 |
| Morningland of the Ozarks, LLC, d/b/a Morningland Dairy | ) | |

## JUDGMENT AND ORDER

The above cause came on for trial January 11-12, 2011, whereafter the record was left open with leave granted for post-trial briefs in lieu of closing argument. Now, all briefs being filed and the record closed, and advisement being completed, the court does find, conclude, order and adjudge as set forth hereinafter. Neither party having requested findings on specified issues per Rule 73.01, and any review of this judgment being largely *de novo*, the court addresses only those matters necessary to a full disposition.

I. Legal and Situational Facts.

On and between January and October, 2010, defendant was engaged in the production and sale of artisanal cheeses made from raw cow and goat milk. Defendant's products were sold in over 100 retail stores throughout the United States as well as by direct order to individual customers.

The milk used by defendant in making its cheeses was regulated by R.S.Mo. §§196.520 – 196.610 as "manufacturing milk." Pursuant to that law, defendant at all

relevant times was licensed by the Milk Board to handle and process manufacturing milk and was subject to the Board's enforcement of the pertinent statutes. R.S.Mo. §196.545 labels as "unlawful sale of dairy products," *inter alia*, commerce in cheese made from the milk of "animals afflicted with a contagious or infectious disease deleterious to man or detrimental to milk quality" or "produced in unhealthy or unsanitary surroundings." Pursuant to §196.570, the Board or its agent may condemn any offending product which is "offered, exposed for sale, or sold for human food purposes." In addition, §196.580 empowers the Board (as agent for the director of the Department of Agriculture) to order the destruction of condemned product.

On August 26, 2010, the Board learned from the State of California that two samples of defendant's cow milk cheese, a garlic Colby and a hot pepper Colby, had tested positive for the bacteria *Listeria monocytogenes* and *Staphylococcus aureus*. The Board's agents then promptly occupied defendant's facility and condemned all current inventory by installing a placard on the door of its storage room. Soon thereafter, all cheese manufactured by defendant and previously distributed, but remaining at retail or unconsumed by ultimate purchasers, was recalled.

In an effort to absolve its product and resume business, defendant selected for commercial laboratory testing seven samples each of mature cow and goat cheese awaiting shipment to customers. Unhappily, testing reported six of the seven cow cheese samples positive for *L. monocytogenes*, and all 14 positive for *Staph aureus*. After further discussion and negotiation to little avail, the Board on October 1, 2010, ordered that all cheese in defendant's inventory be destroyed.

On October 22, the State filed the present action, seeking a determination that the Board acted lawfully in condemning defendant's cheese and ordering its destruction, and further enjoining defendant's compliance with orders and regulations. Defendant answered and filed certain counterclaims, all but two of which were severed for separate trial pending determination of plaintiff's claims.

II. Burden of Proof

The Board's actions initiated an uncontested case within the meaning of R.S.Mo. §536.150. In uncontested cases, judicial review probes only the lawfulness of an agency's order without consideration of its reasonableness and without ascertainment of competent and substantial evidence in support. *State ex rel. Public Counsel v. Public Service Comm'n*, 259 S.W.3d 23 (Mo App. 2008). In such cases, administrative bodies act upon discretion or on evidence not formally adduced or preserved. *Id.* The reviewing court asks only whether the administrative action was authorized by statute, while granting no deference to the agency's belief concerning the lawfulness of its own actions. *Id.*

Because the Board's action must be approved if authorized by statute, the salient question is whether the statutory requisites were triggered. Thus it is the state's burden to prove, by a preponderance of the evidence, that defendant's cheese offended one or more of the proscriptions of §196.545, and, to the extent applicable, that the cheese was "offered, exposed for sale, or sold for human food purposes."

The court finds no authority suggesting the State must prove defendant's cheese unfit for human consumption. Subsec. (1) requires only that the disease of dairy animals – *not* the resulting products -- be "deleterious to man or detrimental to milk quality." The

"deleterious" and "detrimental" characteristics of mastitis need not be separately proven, this being officially declared by numerous regulations and conceded at trial. Subsec. (5) requires only production in "unsanitary surroundings," again notwithstanding the quality of the resulting cheese. The court must therefore disregard the absence of sickness among consumers of defendant's cheeses. §196.545 requires no adverse health effects or particular contaminating substances, but simply condemns five *conditions capable* of yielding unwholesome dairy products.

III. Legality of Condemnation and Destruction Orders

At the time of condemnation, the Board knew only that two small samples of defendant's cow cheese in California were alleged to contain unspecified quantities of the potentially pathogenic bacteria *L m* and *S a*. No evidentiary warrant existed for a global conclusion that the entire inventory of over 20,000 pounds – comprising many varieties of both cow and goat cheese produced on various dates over a period of many months – was similarly tainted. In this uncontested case, however, substantial evidence is not required, and agency discretion is broad.

More particularly, the court finds it implausible that a condemnation order should require separate testing of each individual batch of suspect cheese. The statutory scheme can protect public health only if a finding of tainted samples effectively shifts the burden of establishing lawfulness to the manufacturer. Application of this rule in the present case required that all of defendant's cheese presently in commerce be recalled, and that no further product be released except upon a showing of product wholesomeness and compliance with statutory and regulatory mandates.

In fact, both the Board and defendant observed this commonsense interpretation. All previously sold cheese was recalled, and representative samples of warehouse cheese were submitted for testing in order to refute or verify the suspicion of contamination. While we can't be sure that the Board would have released the inventory in the event of a clean laboratory report, no such report was obtained. When it became clear that the problem of contamination was widespread and perhaps endemic, the Board had ample warrant to maintain the condemnation status and to explore the propriety of forced destruction.

A. Cow Cheese

In this proceeding to *enforce* the Board's orders, the State is obliged to prove the cheese condemnable under one or more of the five subparagraphs of §196.545. Prior to the testimony of defense witness Tim Wightman, no particular evidence suggested that any cheese had been made from the milk of diseased animals. Mr. Wightman, however, recounted, and Ex. #24 showed, greatly elevated somatic cell counts for cow milk from the herd supplying defendant's operation during the period February – August 2010. The witness added, and courts have noticed, that elevated somatic cell counts in raw milk signal a likelihood of disease in the contributing herd. *United States v. Union Cheese Co.*, 902 F.Supp. 778, 782 (N.D. Ohio 1995).

Mr. Wightman explained that mastitis is an infectious disease and that cows afflicted with *S. aureus* must be culled. Denise Dixon, the dairy principal and co-owner of the subject herd, indeed culled several cows in September 2010 – just after the persistently high somatic cell counts, the California findings, the condemnation order, and the St. Louis laboratory results.

It is more than a fair inference that, during the period when the condemned cheese was produced, there existed within the source dairy herd "animals afflicted with a contagious or infectious disease deleterious to man or detrimental to milk quality," namely mastitis. For this reason, the court finds that the condemned cheese was ineligible for sale pursuant to §196.545(1), whether or not the Board could have known this fact at the time of condemnation. The court is therefore constrained to uphold the Board's condemnation and destruction orders as to the cow's milk cheeses.

B. Goat Cheese

Evidence concerning the source of goat milk, and the health of the source goats, was less satisfactory. 2 CSR 80-6.011(C)11 prescribes a screening for goat milk using the California and Wisconsin Mastitis Tests, but no somatic cell test data for the goat milk was received in evidence. Plaintiff relies instead on certain findings of "unhealthy or unsanitary surroundings" in the cheese plant. Several of these conditions had persisted over time and had been noted in prior inspections, although no enforcement actions were taken. Don Falls testified that the goat cheese was made on the same equipment as the cow cheese, and the presence of *Staph aureus* in cheese indicates poor sanitation in the plant environment. Revealingly, all seven goat cheese samples tested positive for *S.a.* On this basis the Board could lawfully have condemned the goat cheese as likely produced in "unhealthy or unsanitary surroundings" per subsec. (5).

Yet here the plot thickens, for FDA seems to have collected samples of materials from the floors, walls, equipment, vats, drain, and other areas of the plant facility, which were then tested for the presence of *L.m.* and *S.a.*, and found *negative for both*. While these facts were not proven in evidence, that parties agree that during the pretrial

deposition of Don Falls (Vol II p. 104), plaintiff so stipulated. Plaintiff now argues that the stipulation was made for the limited purpose of expediting the deposition and was not meant to serve as an admission at trial.

Although the question may be somewhat doubtful, the court is persuaded by the recent U.S. Supreme Court plurality in *Christian Legal Society v. Martinez*, ___ U.S. ___, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010), that a pretrial stipulation of fact not expressly limited to a lesser effect will bind the stipulator at trial. In that case a stipulation entered for purposes of summary judgment proceedings was sought to be varied on appeal. The Court reiterated its longstanding view that "[l]itigants . . . "[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established," and quoted approvingly the general rule expressed by 83 C.J.S. Stipulations §93 (2000):

"[Factual stipulations are] binding and conclusive . . ., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, . . . or to maintain a contention contrary to the agreed statement, . . . or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated."

At trial, plaintiff did not contend that the stipulated fact was false or incapable of proof by competent extant evidence. Moreover, given the seeming materiality of such fact, it is likely that, but for the stipulation, defendant would have adduced the necessary proof. The court therefore finds no direct evidence that *L.m.* or *S.a.* inhabited defendant's facility at the time of inspection and testing, and undertakes to explore the importance of this fact.

"Unhealthy" and "unsanitary" conditions are not defined by statute, but are functionally instantiated by the elaborate and detailed regulatory scheme of 2 CSR 80-6. Plant conditions are deemed "unsanitary" to the extent they deviate from the regulatory prescriptions. Here the evidence shows that in several respects the plant conditions failed to satisfy the stated requirements. These deficiencies had not led Mr. Falls to initiate any enforcement action in 2008 or 2009, likely because at that time no evidence suggested that contaminated cheese was being produced. Rather, it was the *coincidence* of contamination with "unsanitary" conditions that led the Board to act. This action was not arbitrary or capricious, but evidence-based and within the Board's broad discretion.

Nor can the court convict the Board of arbitrariness or caprice in ordering destruction of the cheese. After condemning the product and thereby preserving the status quo pending further action, Board Secretary Gene Wiseman consulted with knowledgeable academic specialists and state officials who, he attests, uniformly recommended that course of action. Mr. Wiseman did not impose his own admittedly subexpert judgment upon the question, but solicited and considered the informed views of persons reasonably believed to possess requisite expertise conferred by education, training, and experience. This, too, evinced a sound exercise of discretion.

IV. <u>"Offered, Exposed for Sale, or Sold"</u>

Defendant doesn't deny that the recalled cheese had been "sold" as required for condemnation per §196.570, nor that the approximately 1,000 pounds of storehouse cheese readied for shipment was at least "offered" or "exposed for sale." However, defendant argues quite reasonably that the remaining 20,000 pounds of unripened cheese never reached the commercial stage and was therefore not subject to condemnation. For

its part, the State maintains that because the cheese was made to be sold, it was perforce "offered" or "exposed" for that purpose *merely by existing*.

Intriguing though this question may be, we are not obliged to answer it. Though commerce is the precursor of condemnation, §196.570, and condemnation of destruction, §196.580, §196.545 *preëmpts* nascent or incipient commerce by specifically declaring it *unlawful* to sell or offer *any* cheese within categories (1) – (5). Because *all* of defendant's August 26 inventory (except the 11 blocks imported from Wisconsin)[1] was either derived from infected milk or made in "unsanitary" conditions (**and** presumably contaminated by one or both bacteria), it could never be sold. And because all precommercial product (immature cheese) would incur immediate condemnation upon its offer for sale, the destruction order was justified as a prospective concomitant.[2]

V. Trial By Consent

Defendant objects to any consideration of evidence suggesting the subject cheese was made from the milk of diseased cows, because plaintiff never pled §196 545(1) as a basis for the Board's action. However, all the key evidence on this point came from *defendant's own witnesses*. While a party surprised by the testimony of his own witness may be allowed to impeach that witness, the witness's relevant testimony will not be excluded or stricken. To call and interrogate a witness is to tender that witness for cross-examination, and to enjoy the benefit of the witness's testimony is necessarily to bear its risks as well.

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[1] The court finding no evidence that the 11 blocks from Wisconsin were made in defendant's facility, nor from, nor exposed to, the milk of animals believed diseased, nor otherwise contaminated or subject to condemnation, those blocks should be released from condemnation.

[2] Because "condemn" is not defined by statute, the word must be given a liberal construction consistent with the law's public safety purpose. Nothing in §196.570 forbids the Board from condemning offending product *prospectively*. Accordingly, the condemnation order may be understood as a recognition that the precommercial cheese had been rendered categorically unsalable by operation of §196.545.

"When the complaining party introduces or opens up an issue, the opposing party is entitled to inquire further so long as the inquiry has some reasonable bearing upon the issues in the case or tends to impeach or discredit that witness. * * * [citations omitted]. As the foregoing cases make clear, counsel for appellants may not proceed to question his own witness on an issue and then object when opposing counsel seeks to inquire into the same subject matter". *Petterson v State Farm Fire & Cas Co*, 745 S.W.2d 788 (Mo.App. 1988).

Because Wightman and Dixon were defendant's own witnesses, and plaintiff's cross-examination merely pursued the avenues opened by defendant, the court finds the issue of §196 545(1) violation was tried by implied consent.

VI. Disposition of Claims

WHEREFORE, in accordance with the foregoing, the court does order and adjudge as follows with respect to each pleaded claim.

A. Plaintiff's prayer for permanent injunction is granted and the court orders as per the attached Final Order of Permanent Injunction.[3]

B. Plaintiff's prayer for preliminary injunction is dismissed as moot

[3] While the case was under submission, defendant's principals, Joseph and Denise Dixon, purportedly in the capacity of "Trustees" for "Morningland Dairy, A Private Unpasteurized Whole Milk Membership Association," mailed to the Court a letter and separate "Notice" declaring that "any and all manufacturing and sale of our products to the public is hereby terminated . . . we will assume that a cease and desist order had (*sic*) been issued by your agency (*sic*) without any further action on your part . . . [ henceforth] "this association will be marketing products to our private members only in the private domain . . . Morningland Dairy . . . only has private contract members and does not involve public persons in any manner. Your Agency (*sic*) and others do not have jurisdiction or authority to even investigate our private unpasteurized whole milk association unless you have some reasonable suspicion or evidence that our private members are being subjected to a clear and present danger of substantive evil . . . . (emphasis in original)." To the extent this "notice" may be construed as a formal consent to the entry of injunctive relief, the court disregards it because defendant's counsel never ratified or formalized any such consent on his clients' part. And to the extent that defendant purports exemption of a new entity from regulatory requirements, the court notices both RSMO §196 595 to the contrary and the fact that Morningland of the Ozarks, LLC is the only party defendant in the present action.

C. Plaintiff's prayer that the costs of this action be taxed against defendant is sustained as to all costs hereinbefore incurred, but without prejudice to taxation of any costs hereafter incurred in separate prosecution of defendant's counterclaims.

D. Plaintiff's additional prayers, described variously in motions, suggestions, and briefs, but not contained in its petition, are deemed unpleaded and are therefore not ruled.

E. The issues of defendant's First counterclaim are found for plaintiff.

F. The issues of defendant's Second counterclaim are found for plaintiff.

G. Defendant's Third, Fourth, and Fifth counterclaims, to the extent not foreclosed hereby, shall be docketed for hearing of pending dispositive motions directed thereto on a date certain of which the clerk shall notify all parties or their counsel.

H. Plaintiff's motion to supplement the record with the affidavit of Dr. Frank is dismissed as moot.

I. All issues not expressly addressed herein are found concordantly with the results announced. All claims not otherwise expressly determined, and all motions and objections taken with the case and not heretofore ruled, are denied.

SO ORDERED this 23rd day of February, 2011.

DAVID DUNLAP
Senior Judge