IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI
CIRCUIT DIVISION

STATE OF MISSOURI ex rel. CHRIS KOSTER, the MISSOURI DEPARTMENT OF AGRICULTURE, and the MISSOURI STATE MILK BOARD Plaintiff, v MORNINGLAND OF THE OZARKS, LLC, d/b/a MORNINGLAND DAIRY Defendant.	)	Case No 10 AL-CC00135

JUDGMENT IN CONTEMPT

On June 13, 2011, came Plaintiff by Assistant Attorneys General Jessica L. Blome and Laura Bailey Brown, and Defendant by attorneys David G. Cox and Jaired B. Hall and corporate representative Denise Dixon, for hearing on plaintiff's Verified Second Amended Application for Order to Show Cause. Evidence and argument were taken and the issues submitted to advisement. Now, upon due advisement, the court does find, conclude, order and adjudge as follows.

On October 22, 2010, Plaintiff sued to enjoin defendant, Morningland of the Ozarks LLC d/b/a Morningland Dairy, from selling or manufacturing cheese absent compliance with various requirements. After trial and advisement, the court on February 23, 2011, entered its Final Order of Permanent Injunction ("Final Order"), containing both mandatory and prohibitory provisions. Execution of the mandatory portion, compelling destruction of embargoed cheese, was later stayed pending appeal, but the prohibitory provisions, forbidding production, sale, or offer for

sale of cheese absent compliance, have remained in full force and effect from and after February 23.

Plaintiff's Verified Second Amended Application alleges defendant's violation of the injunction in three respects. First, failure to allow inspection of defendant's facility as required by ¶ 11 of the Final Order. Second, failure to implement the practices specified by ¶¶ 8, 9, 10 prior to producing or marketing cheese. Third, sale of cheese condemned by the Board (condemnation ratified by the court on February 23). These in turn.

I. FAILURE TO ALLOW INSPECTION

The court's Final Order granted the Board "authority to enter any facility covered by th[e] Order at all reasonable times and without notice, including all times in which production other than ripening is occurring, for the purposes of monitoring the progress of activity required by th[e] Order, for taking inventory of Defendant's products, and for obtaining samples" (Final Order, ¶ 11).

The evidence showed that on April 13, 2011, Don Falls and Roger Neill of the Board visited defendant's facility for the purpose of conducting a compliance inspection. Finding no one at the cheese plant, the inspectors on a nearby county road encountered Jedediah York, known to them as manager of the plant. Corporate co-principal Joseph Dixon was then reached by telephone. Dixon explained that the entity subject to the court's order (Morningland of the Ozarks LLC d/b/a Morningland Dairy) had ceased business operations, and that all current operations were being conducted by "Morningland Dairy," a "private association" not licensed by the State nor subject to Milk Board inspection by court order or otherwise. Dixon permitted the inspectors, accompanied by York, to enter the cooler housing embargoed product and an adjacent room identified at the hearing as "Room E," but specifically denied them entry to

Rooms "B" and "D" where cheese had been produced in the past and where facilities and equipment subject to the court's order had been stationed and used.

By way of showing cause, defendant's co-principal Denise Dixon and her son Isaac Dixon testified that no cheese had been produced at the plant proper, under corporate authority or otherwise, since August 2010. Instead, a detached structure identified as "new cooler" (plaintiff's Ex. #1) was being used for storage, cutting, packaging and labeling of cow milk cheese acquired from a plant in Kansas and goat milk cheese acquired from a plant in Wisconsin. These cheeses were being sold only to members of a "private association" conveniently called "Morningland Dairy" (also the defendant corporation's registered fictitious name). Mrs. Dixon acknowledged she sought no advice from licensed counsel as to the propriety of using, as the name of her "private association," the very same registered d/b/a under which the enjoined corporation, then still legally extant in good standing, had sold cheese for many years.

The court received in evidence defendant's Ex. 1, "Articles of Association of Morningland Dairy (A Private Raw Milk Membership Association)," dated January 10, 2011. According to defendant, because the corporation had ceased doing business and the only business conducted on the premises after August 2010 was that of the "private association" entirely within the "new cooler" as opposed to the cheese plant, the condition precedent to the Board's power of inspection ("future production of cheese products," ¶¶ 8, 9, 10) was not met.

The court finds, however, that these facts, even if true, could not defeat the Board's power of inspection under the Final Order. The Board was not obliged to accept Mr. Dixon's word that the corporate defendant had ceased producing cheese. ***The inspectors knew that cheese marked "Morningland Dairy" – the corporation's registered d/b/a name, under which it had sold large volumes of cheese in the past – was being offered at retail at Clover's in Columbia. They knew***

the label was virtually identical to that used by defendant prior to August 2010. They knew the label contained no announcement of the dairy's new "private association" status and no "Not For Resale" marking. They knew the corporation had not been dissolved and presumably possessed the same ownership or usage rights in the cheese plant facility as formerly. Given this knowledge, the Board's representatives were entirely justified in demanding to inspect the premises, and defendant, through its authorized representatives, wrongfully forbade such inspection in violation of this Court's order.

So far as is shown, the Dixons never sought or received advice from licensed counsel as to the conditions under which the cheese plant would or would not remain subject to Board inspection pursuant to the court's order. Acting without benefit of qualified legal advice on a subject plainly requiring such advice marks defendant's actions as contumacious.

II FAILURE TO IMPLEMENT PRACTICES

The Court's Final Order also enjoined Defendant to observe various sanitation, good manufacturing, and bacteriological testing practices prior to resuming production of raw milk cheese and thereafter. Final Order, ¶¶ 8, 9, 10. The evidence was undisputed that defendant has not implemented these practices. However, by their terms the requirements governed "all ***future production*** of cheese products." Because the cheese sold to Clover's (nominally, to its employee only) and unnamed others was manufactured by independent producers in Kansas and Wisconsin, and the Wisconsin cheese already on hand was expressly exempted from the condemnation, the court must consider whether, and to what extent, these requirements were meant to govern (merely) ageing, cutting, packaging, labeling, selling and shipping cheese manufactured by others.

Plaintiff seemingly interprets "production" broadly to include post-manufacture merchandising of third-party product, while defendant interprets the word as strictly coextensive with "self-manufacturing " The court finds it unnecessary to resolve this definitional question. Rather, we find that ***most*** of the injunctive requirements contemplate only manufacturing cheese on the subject premises, and that the remainder, although in some cases logically applicable to secondary marketing beyond contemplation at the time of judgment, were not shown to have been violated by the defendant corporation.

III. SALE OF CONDEMNED CHEESE

Defendant was further enjoined to "destroy all of its cheese products condemned by the Missouri State Milk Board on August 26, 2010 , save and except for eleven blocks said to have been imported from Wisconsin . . " Final Order, ¶ 7. Although execution of this order was stayed, the stay was premised on defendant's express assurance that no condemned product would be sold until or unless the injunction were lifted, as well as defendant's acknowledgement that any such sale would be unlawful and subject to sanction ORDER ON MOTION TO DISMISS COUNTERCLAIMS AND STAY EXECUTION, 3/9/2011, pp. 2-3

Despite original appearances, the evidence failed to identify any cheese distributed after February 23 by the defendant corporation, the Dixons, or the "private association" to the condemned inventory in the cooler on the cheese plant premises. While room for suspicion remains, civil contempt should not be adjudged absent preponderating evidence of knowing disregard of court orders. Defendant offered satisfactory proof that all cheese distributed under the "Morningland" name after February 23 was product obtained from the Kansas and/or Wisconsin producers

IV AMENABILITY OF DEFENDANT TO CONTEMPT JUDGMENT

Mrs. Dixon testified on June 13 that corporate dissolution proceedings were then underway, and the Secretary of State now confirms the dissolution as of that date. Inasmuch as the court's jurisdiction extends only to a now-defunct corporate entity, it may be asked whether and to what extent that entity, or any successor or trustee, may be subject to a judgment in civil contempt designed to coerce compliance with court orders.

The evidence has never established who owns the cheese plant. We do know, however, that at least through the dates of trial, defendant enjoyed (at a minimum) the right to use the facility for the production, storage, and packaging of cheese. From such a right, the power to afford access to inspectors would necessarily flow. But the continuation of that power may become difficult to ascertain where the underlying right has been abandoned by disuse, corporate dissolution, or otherwise.

Be that as it may, the court finds these questions premature for exploration and merely cautions that (1) no subterfuge to circumvent Missouri laws and court orders will be countenanced, and (2) proof of strict compliance with all laws governing the rights, powers, and duties of corporations and their successors and trustees will be demanded should the enforcement of court orders be resisted on the grounds that the contemnor is defunct.

V MOTION TO REOPEN THE EVIDENCE

During the advisement period, defendant filed a "Motion to Admit Newly Discovered Evidence." The evidence in question purports to be a certificate relating to bacteriological testing of a cheese sample from Mt. Sterling Creamery in Wisconsin. Whether or not the purported certificate bears on *Staph aureus* levels in cheese distributed after February 23, the court finds no such evidence would affect the results here. Because we cannot say that this

defendant sold the cheese, we cannot hold this defendant in contempt for doing so (though contempt might have been premised on this defendant's having knowingly permitted cheese bearing its d/b/a name to be sold, without license or compensation, by a "private association").

WHEREFORE, having so found, the court does now ORDER, ADJUDGE, AND DECREE:

1. Defendant Morningland of the Ozarks LLC, d/b/a Morningland Dairy has, willfully and without lawful excuse, committed contempt of this court's judgment by refusing the request of Milk Board inspectors for access to its plant facility at a reasonable time under authority of such judgment.

2. In purgation of its contempt, Defendant shall, at any reasonable time, upon request of authorized representatives of the Missouri State Milk Board, permit inspection of all parts of the cheese plant facility and equipment subject to this court's Final Order of February 23, 2011, including all adjacent structures, whether permanent or temporary, now or formerly used for the production, storage, ageing, packaging, or shipment of cheese, as well as

    a. All sales records from February 23, 2011, through the present;

    b. All production records from February 23, 2011, through the present;

    c. All sanitation records from February 23, 2011, through the present;

    d. All bacteriological test records from February 23, 2011, through the present;

    e. All sales records for the period February 23, 2011, through the present.

3. For each day following notice to the court of defendant's breach of any such requirements, and continuing until satisfactory proof of compliance, in the form of

plaintiff's acknowledgement or defendant's evidence, shall be submitted to the court, defendant shall incur a civil penalty in the amount of $100.00.

4. All costs associated with this proceeding in contempt are assessed against Defendants.

SO ORDERED THIS 29TH DAY OF JUNE, 2011.

JUDGE DAVID DUNLAP
Howell County Circuit Court

6/29/11
DATE