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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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|---|---|-----------------|
| RANCHERS CATTLEMEN ACTION |) | |
| LEGAL FUND UNITED |) | |
| STOCKGROWERS OF AMERICA; |) | |
| TRACY and DONNA HUNT, d/b/a THE MW |) | |
| CATTLE COMPANY, LLC; and KENNY and |) | |
| ROXY FOX, |) | No. 19-CV-205-F |
| |) | |
| Petitioners/Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | |
| UNITED STATES DEPARTMENT OF |) | |
| AGRICULTURE; ANIMAL AND PLANT |) | |
| HEALTH INSPECTION SERVICE; |) | |
| SONNY PERDUE, in his official |) | |
| capacity as the Secretary of Agriculture; |) | |
| and KEVIN SHEA, in his official |) | |
| capacity as Administrator of the Animal |) | |
| and Plant Health Inspection Service, |) | |
| |) | |
| Respondents/Defendants. |) | |

BRIEF IN SUPPORT OF
PETITIONERS' SUPPLEMENTAL RULE 60 MOTION SEEKING
RELIEF FROM ORDER DISMISSING CASE FOR LACK OF JURISDICTION

On February 18, 2020, the Petitioners filed a Fed.R.Civ.P. 60 motion requesting this Court to issue a supplemental order denying Respondents' motion to dismiss their claim brought pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 (1972). That motion is pending before this Court.

Petitioners have recently come into possession of additional information related to the ongoing effort to require livestock producers to use radio frequency identification ("RFID") eartags for cattle and bison. Although the agencies argued to this Court that "there can be no reasonable expectation that the alleged violation will recur," (ECF 11 at 15), we now have evidence that it already has, and it is scheduled to recur again next month. Having learned that Respondents have not actually changed course, Petitioners find it necessary to seek relief from the entirety of the Court's Order Dismissing Case for Lack of Jurisdiction (ECF No. 21). The purpose of this Supplemental Rule 60 Motion is to bring this new-found information to the Court's attention, and to request that the Court withdraw its previous Order so that this matter may proceed.

HISTORY OF PROCEEDINGS TO DATE

Petitioners filed their Petition for Review on October 4, 2019. ECF No. 1. The primary target of that lawsuit was a "Factsheet" that the United States Department of Agriculture ("USDA") and the Animal and Plant Health Inspection Service ("APHIS") issued in April 2019. The Petition challenged that Factsheet as violating the 2013 Final Rule related to animal identification and traceability (found at 9 C.F.R. Part 86) (Count I); the Administrative Procedure Act, 5 U.S.C. §§ 553, 701 *et seq.* ("APA") (Count II); the Congressional Review Act, 5 U.S.C. §§ 801-808 ("CRA") (Count III); and the FACA (Count IV).

At some unknown point after the Petition for Review was filed the agencies removed the unlawful Factsheet from their website. On October 25, 2019 they posted a "Statement" claiming that the Factsheet "is no longer representative of current agency policy." The Respondents then

filed a motion to dismiss on January 15, 2020 arguing lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. (ECF No. 10). They claimed that by removing the “Factsheet” from their website, and replacing it with the “Statement,” that the Petitioners’ claims were mooted. ECF No. 11 at 7. The agencies supported their motion by arguing that because they did not intend to implement the RFID plan there was no “case or controversy”:

The effect of this statement (‘the October 2019 Statement’) is that APHIS has withdrawn the April 2019 Factsheet.

... APHIS withdrew the Factsheet because (a) industry feedback, and (b) changes in executive branch policy, in the form of Executive Orders 13891 and 13892, which were issued on October 9, 2019.

Here, as a result of the agency’s [sic] withdrawal *of the policy announced in the Factsheet*, and its *commitment* to notice and comment procedures before implementing *any* future changes in approved animal identification devices, none of the alleged harms caused by the Factsheet are occurring. (Emphasis added).

In light of the agency’s [sic] statements, *there can be no reasonable expectation* that the alleged violation will recur, as the agency [sic] has stated that it will not proceed with any change in animal identification devices without notice and comment. (Emphasis added).

And any effects of the agency’s alleged procedural errors in issuing the April 2019 Factsheet have been ‘completely and irrevocably eradicated’ by the withdrawal of the Factsheet. (Citation omitted).

In the present case, the withdrawal of the April 2019 Factsheet appears to be ‘entirely corrective.’” (*Quoting Southern Utah Wilderness Alliance v. U.S. Department of the Interior*, 250 F.Supp.3d 1068, 1090 (D. Utah 2017) (an “entirely corrective” action may be considered “a tacit acknowledgement of potential deficiency in the previous approval process.”))

Id. at 8, 13, 15, 16. APHIS Administrator Kevin Shea declared under “penalty of perjury” that “we will take the time to reconsider the path forward. We will take *no action* changing animal identification requirements *until* we have published a notice in the Federal Register with an opportunity for public comment. ECF No. 11-1 at 4 (Emphasis added).

This Court found the Respondents' representations to be persuasive and, on February 13, 2020 issued an Order dismissing Petitioners' case for "lack of jurisdiction." ECF No. 21. The ultimate basis for that decision is important, as it reflects the Court's understanding that the agencies were unequivocally withdrawing the *policy* and *plan* reflected in the 2019 Factsheet, as well as their commitment regarding what they will do *if* they decide to move forward with such an RFID plan in the future. According to the Court: "What is known is that the 2019 Factsheet *is not recognized as agency policy* and DOA-APHIS has *unambiguously stated that the requirements of the 2019 Factsheet will not be implemented.*" *Id.* at 7. (Italics added, bold in original). The Court emphasized that the decision to dismiss the Petition was based on the agencies' commitments:

Given DOA-APHIS's unambiguous statements that (1) the 2019 Factsheet is not agency policy; (2) DOA-APHIS will not implement its requirements; and (3) any new proposal will afford ample opportunity for all stakeholders to comment, the court concludes it can be said *with assurance* that there is *no reasonable expectation that DOA-APHIS will reverse course* and implement the 2019 Factsheet, *or revert to using the same process which resulted in the 2019 Factsheet.* (Emphasis added).

Id. at 7. The Court responded to the Petitioners' claims as to the effects of the 2019 Factsheet by stating: "The corrective action taken by DOA-APHIS completely and irrevocably eradicated the effects of the alleged violations associated with issuing the 2019 Factsheet." *Id.* at 8.

The Court's decision is significant in several respects, not the least of which is that it depends upon the Respondents' assurances in terms of promising that they were not just removing the Factsheet from the website, *but withdrawing the policy reflected therein*—a policy of requiring livestock producers *now or in the future* to use RFID to move or market their livestock across state lines. This Court, in other words, believed the agencies and issued an order accordingly.

Petitioners informed this Court that they were more skeptical of the agencies' reasons for withdrawing the 2019 Factsheet and were not convinced of either their sincerity or their commitment to "putting the brakes" on an RFID policy. Petitioners pointed out that the

“Statement” fell well short of being an effective retraction of the 2019 Factsheet. Petitioners argued that the voluntary cessation exception to their claim of mootness should apply here, explaining that Respondents intended to move forward with an electronic eartag requirement and that this temporary setback was only a short pause rather than a solid and enforceable roadblock to their stated desire to do it again. *See* ECF No. 16 at 9-18. According to Petitioners, “[t]he best that can be said for the current state of affairs is that the agencies have informally and reluctantly temporarily removed the 2019 RFID Factsheet from their website. More important, however, is the fact that [they] clearly intend to ‘return to their old ways.’” ECF No. 16 at 17-18. We now know that Petitioners were rightfully distrustful and that, by the agencies’ own admission, the “Statement” has failed as an adequate form of notice.

A NEW “GUIDANCE” DOCUMENT IMPOSING RFID REQUIREMENTS

On February 19, 2020, just six (6) days after this Court’s Order, Petitioners discovered an “informational page” that was published on USDA/APHIS letterhead in the February 2020 NEBRASKA CATTLEMAN industry magazine. That document states that “[f]unding for the publication for this *informational page* is provided through a cooperative agreement between the **Nebraska Department of Agriculture** and **USDA’s Animal and Plant Health Inspection Service.**” *See* Declaration of Harriet M. Hageman (“Hageman Decl.”), Attachment A (italics added, bold in original). It contains the same title as the challenged 2019 Factsheet: “Advancing Animal Disease Traceability: A Plan to Achieve Electronic Identification in Cattle and Bison.” *Id.* The “informational page” retained the “April 2019” date and includes an “Implementation Timeline” similar to the 2019 Factsheet “Implementation Timeline,” merely replacing the hardwired dates (*e.g.*, January 1, 2023) with “Phase 1,” “Phase 2,” and “Phase 3.” *See Id.*

While the February 2020 publication does not include the second page of the 2019 Factsheet, it does include pictures of RFID eartags, and states that USDA/APHIS are implementing

the very policy that is the subject of 2019 Factsheet. *Compare* Hageman Decl, Attach. A with ECF No. 1-1, Exhibit 1. This “informational page” shows that RFID is required despite the agencies representing to this Court that such plan was withdrawn in October 2019 when they scrubbed the Factsheet from their website. The “Implementation Timeline” is likewise almost identical, with “Phase 3” stating that “RFID ear tags will be required for beef and dairy cattle and bison moving interstate that meet the above requirements.”¹ *See* Hageman Decl., Attach. A.

Petitioners created a document comparing the few minor differences between the 2019 Factsheet and the February 2020 “informational page” published in the NEBRASKA CATTLEMAN. *See* Hageman Decl., Attach. B. This comparison is striking and exposes the effort to make minimal changes to the 2019 Factsheet to hopefully avoid being accused of pushing the same policy forward, while hiding behind the “plausible deniability” that Petitioners decried in the first paragraph of their response to the motion to dismiss. *See* ECF No.16 at 1. In short, the content of the “informational page” is nearly identical to the “informal guidance” of the “Factsheet” itself, and it is unlawful for all of the same reasons—namely, it seeks to nullify the 2013 Final Rule and impose substantive obligations on the livestock industry in violation of the APA. This guidance also appears to violate the very Executive Orders USDA cited in withdrawing the Factsheet.

Counsel for the Petitioners reached out to Nick Vassalo, the attorney representing the agencies to find out what happened. *See* Hageman Decl. at ¶ 8. He reported that it was the Nebraska Department of Agriculture who “arranged” to have this page published in the NEBRASKA CATTLEMAN magazine without obtaining permission from APHIS. *See* Hageman Decl., Attach.

¹ The 2020 *Updated Member Media Guide & Rate Card* for the NEBRASKA CATTLEMAN magazine (Attach. C to the Hageman Decl.), shows that the deadline for submitting the announcement was January 1, 2020—two months *after* the agencies had issued the “Statement” ostensibly withdrawing the RFID policy. This situation confirms the need for a declaratory judgment notifying the public that RFID is not required and that the 2013 Final Rule controls.

H. He also reported that this same announcement will be running in the March edition of the NEBRASKA CATTLEMAN .and that there is nothing they can do about it. *Id.* He concluded by announcing that the agencies have no interest in discussing a way to fix this situation. *Id.*

There are several problems with Mr. Vassallo's response. Despite what the agencies may have "reported" to him, this explanation makes no sense and does not fix the problems that this renewed announcement of the RFID plan creates. First, the "informational page" is on USDA letterhead, using the USDA logo, and is, at least to the general public, an official USDA announcement. In contrast, the agencies refused to use the same official action in their tepid and unbranded "Statement" withdrawing the 2019 Factsheet, which is the very reason why the USDA's sister agencies apparently believe that it is "full steam ahead" with RFID. Second, *someone* made the decision to disseminate a modified 2019 Factsheet that, among other things, removed the deadlines, indicating an effort to side-step the withdrawal of that policy (and that version of the Factsheet). Third, it defies logic to believe that the agencies were unaware that they had cooperative agreements with state agencies to fund the publication of this type of "informational page." The *moment* that they withdrew the RFID plan they should have contacted every State and Tribal government to notify them. They did not do so. Fourth, the agencies told this Court that they had removed the 2019 Factsheet from the website and withdrawn the RFID policy. Such a withdrawal would, by definition, include notifying the entities responsible for implementing and overseeing the animal identification requirements, which in this case includes *inter alia* the state departments of agriculture. While they argued to this Court that their decision to withdraw the RFID policy was so definitive that it warranted a mootness determination, the agencies now appear to be claiming *that they forgot to tell anyone*. Finally, the best that can be said is that they have done such a poor job of notifying anyone, including one of the largest cattle-producing States in

the Nation,² of the changed policy that this type of guidance is still being published *five months after* they purportedly withdrew the RFID requirement.

The harm caused by the agencies' violation of the APA and the 2013 Final Rule is ongoing. They admit that the latest version of their guidance document, now designated an "informational page," has already been published once and will be published again in the March issue of the *NEBRASKA CATTLEMAN*. They have not offered to publish a retraction in a subsequent issue of the magazine or take other remedial measures, instead refusing to do anything at all, apparently being comfortable with Nebraska cattlemen believing that USDA/APHIS will soon require RFID use. Respondents argued in their motion to dismiss that by removing the 2019 Factsheet and withdrawing the RFID mandate that they had fixed the problem. Nebraska's publication of this "informational page" proves them wrong. The Petitioners in their lawsuit were not seeking a symbolic removal of the 2019 Factsheet, they were seeking a remedy commensurate with the scope of the injury, including making whatever public announcements were necessary to address the confusion, uncertainty and instability created by the unlawful guidance and related actions. Stated another way, while the agencies have represented to this Court that the 2019 Factsheet is no longer their policy, their response to the publication of the "informational page" in the *NEBRASKA CATTLEMAN* shows that they are uninterested in making sure that the cattle industry knows that.

Highlighting the agencies' failure to correct course and inform the public that the 2019 Factsheet is no longer operative is Jon Burtle's February 12, 2020 article, *Livestock software apps offer options for USDA traceability requirements* published by the *MIDWEST MESSENGER* Reporter, a farm trade publication. *See* Hageman Decl., Attach. D. The first sentence of the article shows that the livestock industry is still being led to believe that the agencies' RFID mandate

² *See* Hageman Decl., Attach. F. Petitioners Kenny and Roxy Fox sell their cattle in Valentine, Nebraska and face the risk of being denied access for failing to have RFID.

remains in place and that compliance is mandatory: “With mandatory USDA Animal Disease Traceability rules on the horizon, livestock management software has become more than useful, it has become necessary. According to a USDA announcement, official electronic radio-frequency identification ear tags *will be required as of Jan. 21, 2023.*” *Id.* at 1-2 (Emphasis added).

Confusion over the RFID mandate abounds. According to the Colorado State Veterinarian: “...*the USDA feels they already have rules in place to accomplish what they want to do, but are soliciting comments from producers, veterinarians, and external stakeholders before moving forward again with their timeline, calling this just a delay.*” See Hageman Decl., Attach. E.

These articles show that the Petitioners’ concerns have been proven true, *despite* what the agencies represented to this Court, *despite* their assurances that they were not pushing RFID, and *despite* the fact that they have no legal authority to require livestock producers to use RFID eartags. These articles also underscore the uncertainty, confusion and instability Respondents have created by their own actions in refusing to issue and publish an effective retraction of the 2019 Factsheet.

The agencies’ response to the current situation confirms that there remains a “case or controversy.” There remain important and justiciable questions regarding whether simply removing the 2019 Factsheet and issuing the unbranded “Statement” provide an adequate remedy for their unlawful acts. Their use of a guidance document in April 2019 to announce the RFID mandate continues to have legal repercussions to this day. Because they have so far refused to correct the situation, it falls to this Court to do so. This case is not moot.

RULE 60(b) STANDARD

Federal Rule of Civil Procedure Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; [or]

(6) any other reason that justifies relief.

“The district court has substantial discretion in connection with a Rule 60(b) motion.”

Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996) (citation and internal quotations omitted). According to the Court in *Villecco v. Vail Resorts, Inc.*, No. 1:16-CV-0009-SWS, 2017 WL 5247910 at *1 (D. Wyo. Jan. 23, 2017):

Federal Rule of Civil Procedure 60(b) permits a party to move the Court for relief from a judgment or order for mistake, inadvertence, excusable neglect, fraud or any other reasons justifying relief from the operation of the judgment. Relief under Rule 60(b) may only be granted in exceptional circumstances. (Citations omitted). ‘Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal.’ (Citation omitted).

“Rule 60(b)(6) has been described as a ‘grand reservoir of equitable power to do justice in a particular case.’ (Citation Omitted). However, a district court may grant a Rule 60(b)(6) motion only in extraordinary circumstances and only when necessary to accomplish justice.” *Cashner*, 98 F.3d at 579 (citations omitted).

Although the Respondents’ oft-repeated declarations of “RFID is great” raised red flags, Petitioners had no way of knowing when they filed their response to the motion to dismiss that there were USDA/APHIS-funded “informational” articles teed up for publication. Petitioners expect that the Court is likewise surprised considering the agencies’ repeated declarations that they had withdrawn the RFID mandate. The magazine articles and recently issued “informational page” are the very definition of “newly discovered evidence.” The Petitioners had no way of knowing that the agencies had agreements with sister agencies to publicize the RFID requirements. It is reasonable to assume that they have similar agreements with state departments of agriculture across the country. The agencies themselves knew of the agreements and, in this case, made no

effort to prevent the “informational page” guidance from being published in Nebraska. One purpose of the declaratory judgment as sought by the Petitioners was to notify all the States that the agencies’ RFID mandate is illegal and cannot be enforced. The agencies’ response to this situation shows that such a declaration is needed now more than ever.

There are numerous “other reasons” that justify relief here. First and foremost, the agencies’ response proves that Petitioners’ lawsuit is not moot. It instead remains a live “case or controversy” as a consequence of the ongoing attempts to implement and enforce “guidance” in violation of the law (*see* Petition for Review at 1-6, 32-40), the very same “guidance” in substance that the agencies claimed to have withdrawn. “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982).

To carry its burden, a defendant must do more than offer a mere informal promise or assurance ... that the challenged practice will cease or announce[] ... an intention to change. A defendant’s corrective actions that do[] not fully comport with the relief sought are also insufficient. Instead, a defendant must undertake changes that are permanent in nature and ‘foreclose a reasonable chance of recurrence of the challenged conduct.’ Such changes could include ‘withdrawal or alteration of administrative policies’ through a formal process, or a declaration under penalty of perjury, so that plaintiffs ‘face no credible threat of prosecution.’

Prison Legal News, 944 F.3d 868, 881 (10th Cir. 2019) (Citations and parentheticals omitted).

REQUESTED RELIEF

Justice requires setting this Court’s Order aside and allowing Petitioners to proceed with their lawsuit against Respondents to challenge the ongoing efforts to impose RFID requirements on livestock producers. The urgency has only increased since discovering that the 2019 Factsheet was converted to an “informational page” and actively disseminated through at least one widely read industry publication. While this case is pending, the Respondents must be required to take steps to address the uncertainty that they created by refusing to publicize their withdrawal of RFID

requirements. Our proposed order represents what we believe is the bare minimum of what actions must be taken.

Dated this 27th day of February, 2020.

Attorneys for Petitioners/Plaintiffs

/s/ Harriet M. Hageman

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on February 28, 2020, a copy of the foregoing document was filed with the Court's ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Harriet M. Hageman

Harriet M. Hageman