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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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; <i>et al.</i> ,)	
Respondents/Defendants.)	

**REPLY BRIEF IN SUPPORT OF
PLAINTIFFS’ REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION TO
COMPEL RESPONSIVE PLEADING OR, ALTERNATIVELY, PERMIT DISCOVERY**

Plaintiffs Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* (collectively “R-CALF”) are seeking reconsideration of the Magistrate Judge’s October 13, 2020 denial of all opportunity for discovery in this case. The *sole* ground for the Magistrate’s denial of R-CALF’s discovery motion was his erroneous finding that it was untimely. In their opposition to the reconsideration motion, Defendants U.S. Department of Agriculture, *et al.* (collectively, “USDA”), do not defend the Magistrate’s decision with regard to Plaintiffs’ discovery request, thereby conceding that his untimeliness ruling in that regard was wrong. Not even USDA could

plausibly defend that finding, since R-CALF had filed its discovery motion 42 days before the deadline established by this Court for doing so, and 11 days before USDA submitted supplemental documents as part of what it refers to as the “Administrative Record” in this case.

Instead of arguing the merits of R-CALF’s motion (the validity of the Magistrate’s decision), USDA argues that discovery is unwarranted, despite failing to cite a single case in which discovery was denied in a FACA case. USDA has also chosen to ignore the fact that its record is wholly inadequate to permit the Court to intelligibly rule on R-CALF’s FACA claims. As USDA concedes, the documents produced to date (the majority being produced on August 28, after USDA’s response to an R-CALF FOIA request revealed huge gaps in its “Administrative Record”) include no relevant citations to FACA and do not explain why USDA concluded that FACA was inapplicable to the advisory committees in question. These documents indicate that USDA played a major role both in establishing and utilizing the two committees. While these documents show that USDA officials served as committee members, helped select committee members, participated in the committees’ organizational and other meetings, and engaged in numerous telephone calls with committee members, they don’t tell the whole story nor represent the whole record. Without discovery focused on those events (many of which were not memorialized in writing), Defendants will be able to shield from scrutiny their behind-the-scenes work with these committees to develop the 2019 Factsheet for the purpose of forcing livestock producers to convert to radio frequency identification (RFID) eartags. Discovery is necessary to expose Defendants’ violation of FACA in relation to those efforts. As importantly, discovery is necessary to ensure that this Court has an adequate record and basis for determining the two key legal issues: whether USDA “established” and/or “utilized” the two committees.

USDA devotes much of its brief arguing that, under its version of the facts, it was not required to comply with FACA. Opp. Br. 7-10. Suffice it to say that merits-based arguments are premature and out of place in a discovery motion. USDA will have an opportunity to argue the merits of its case when the parties file cross motions for summary judgment. In the meantime, and although R-CALF disagrees with USDA's rendition of FACA's requirements, the only issue now before the Court is whether R-CALF is entitled to discovery—an entitlement recognized by *every* FACA court decision of which Plaintiffs are aware.

R-CALF's August 17 motion sought two forms of relief: (1) an order requiring USDA to respond to the amended complaint by filing a responsive pleading, as required by Fed.R.Civ.P. 12(a)(2); and (2) an opportunity to engage in limited discovery regarding USDA's interactions with the two advisory committees to ascertain the basis for its assertion that those interactions were not subject to FACA. The Magistrate denied the motion in its entirety, on the sole ground that R-CALF supposedly waited too long to file. Order at 4. The Order did not address the merits of R-CALF's requests for relief. In opposing Plaintiffs' request for this Court's reconsideration, USDA has defended the untimeliness ruling with respect to the first request for relief (an order requiring USDA to file a responsive pleading).¹ USDA has failed to defend the Magistrate's finding that the second request for relief (an opportunity for limited discovery) was untimely, thereby conceding the error of that ruling. Indeed, there are no grounds upon which USDA could have defended the untimeliness ruling; it is uncontested that R-CALF filed its motion *42 days before* the deadline that this Court set for doing so. Because that untimeliness ruling was the sole

¹ There can be no question that R-CALF's responsive-pleading request was timely filed. USDA's focus on the first issue obscures a larger point. The purpose of the two claims for relief was identical: to ensure that R-CALF could learn, through discovery, the full extent of USDA's involvement in establishing and utilizing the two advisory committees at issue.

basis for the Magistrate's Order, it cannot stand. USDA's contention that the untimeliness ruling "was not clearly erroneous or contrary to law" is without merit.

Without seeking a ruling from the Court, USDA unilaterally asserted that Local Rule 83.6 applies to this case and that review should be limited to the administrative record. Opp. Br. 6-7. As explained in R-CALF's motion, USDA's claim is incorrect. Regardless, even in administrative-record cases, discovery is often warranted to determine the completeness of the agency's record. The Administrative Procedure Act requires that such cases be determined on the basis of "the whole record." 5 U.S.C. § 706. The "whole" record in this case includes all actions taken by USDA to establish or utilize the two committees, regardless whether those actions are memorialized in written documents. Supplementation of the record will require USDA to respond to interrogatories, document requests and deposition questions designed to fill gaps in the information produced to date. Rule 83.6(b)(3) expressly recognizes that parties may seek to supplement the record in a case such as this, and this Court set a deadline for Plaintiffs to request such relief. Importantly, USDA *has admitted* both that its Administrative Record includes no relevant citations to FACA and that it never made any formal decision that FACA was inapplicable. Opp. Br. 7. Those concessions undermine USDA's claim that Rule 83.6 (which requires the "record" to include both "the final agency action sought to be reviewed or enforced" and "the findings or report on which it is based") applies. If, as USDA concedes, no "findings or report" exist regarding FACA, it cannot meet the prerequisites for applying Rule 83.6.

The record's utter silence regarding FACA is just one of the many reasons why there is serious reason to doubt the completeness of USDA's supposed record. On the original July 6 deadline for supplying a record, USDA certified to the Court that the 368 pages it was producing

encompassed all relevant documents. That declaration proved to be false; an R-CALF FOIA request brought to light a trove of additional documents directly related to USDA's involvement with the activities of the two advisory committees. USDA was forced to retract its previous declaration and submit a "supplemental" record of 811 pages—more than tripling the size of the administrative record produced. R-CALF has good reason to believe that USDA has many more documents relevant to its role in establishing and utilizing the two committees. One example is a USDA slide presentation regarding a September 2017 meeting in Denver—the meeting at which the first of the two advisory committees was formed. USDA claims that the meeting was run by a private organization, but the USDA slide presentation (*which was not produced by USDA as part of the "Administrative Record"*) contradicts that claim, instead referring to the meeting as "Our national forum." See www.youtube.com/watch?v=DP5ZGP3x370, at 33:50.

As noted above, much of USDA's opposition brief is devoted to arguing the merits of its case. Opp. Br. 7-10. Because such arguments are out of place in a discovery motion, R-CALF will not respond to USDA's inaccurate recitation of FACA law. Nor has USDA accurately characterized the contents of the limited number of documents produced to date. Contrary to USDA's characterization, those documents show USDA's role in "establishing" the two committees, including searching for and selecting committee members and co-chairs. See AR 370, 371-72; 373-74; 378, 385, 386, 412. They also include evidence that USDA "utilized" the committees and promised to fund the expenses of at least one of them. See AR 390, 408, 412.

CONCLUSION

R-CALF requests the Court grant its motion, require an answer, and authorize discovery from Defendants, including interrogatories, RFP's, and a limited number of depositions.

Dated this 12th day of November 2020.

Attorneys for Petitioners/Plaintiffs

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on November 12, 2020, a copy of the **REPLY BRIE IN SUPPORT OF PLAINTIFFS' REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION TO COMPEL RESPONSIVE PLEADING OR, ALTERNATIVELY, PERMIT DISCOVERY** was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman

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