ABD

A. Blair Dunn, Esquire,

6605 Uptown Blvd. Ste 280, Albuquerque, NM 87110

505-881-5155

abdunn@abiairdunn-esq.com

Licensed in New Mexico and South Dakota

September 20, 2013

The Honorable Robert Hayes Scott
United States Courthouse
333 Lomas Blvd. N.W., Ste 620
Albuquerque New Mexico 87102

RE: Case 1:13-cv-00639-MCA-RHS Front Range Equine Rescue et al v. Vilsack et al

Dear Judge Scott:

In compliance with the Order of the Court that the only matter to be addressed in these position letters is the ability of plaintiffs, or any combination of them, to pay for the continuing injunction bond in this matter, Defendant-Intervenor Valley Meat Company respectfully offers that this should be addressed in the following points:

1. **The amount of the continuing bond;**
2. **The actual cost to plaintiffs to post the bond for the remainder of the time; and**
3. **The financial capacities of the various plaintiffs to obtain a bond.**

But, before jumping into a discussion of the financial capability of certain Plaintiffs to obtain the requisite injunctive bond is important to note that this appears to be an exercise of irrelevancy at the request of Plaintiffs. This Court's order on the bond of the previous 30 days clearly places responsibility on all Plaintiffs to jointly post the requisite bond. This includes the State of New Mexico. No credible argument can be made that the State of New Mexico does not have the financial capacity or credit worthiness to obtain a surety in the amounts required for compliance with Rule 65. And it is wholly appropriate that the State of New Mexico, supporting and seeking to enjoin the lawful businesses of Valley and Responsible, be required to take responsibility for that request.

1. Based upon the statement by Judge Armijo at the status conference of September 3, 2013 that it made sense that if the TRO was extended through her decision at the end of October that the injunctive bonds should also be enlarged commensurate with extended period

of time. Valley submits that the previous findings of the Court should simply be extrapolated as far as a continuing bond for Valley is concerned.

For Valley: 60 additional days of calendar time = additional 40 days of lost work

40 working days X 121 horses per day = 4,840 horses

4,840 horses X $180.00 net profit per horse = $871,200.00

$871,200.00 is the additional amount of potential loss by Valley thru the end of October that should posted as bond and that we must consider against the ability of any combination of Plaintiffs to pay. This amount is supported by the 2nd Declaration of Ricardo De Los Santos, ECF. No. 119 filed in conjunction with the Response to the Motion to Modify the TRO and to Set Aside the Order Requiring the Bond.

However, as counsel for both Valley Meat Company and Rains Natural Meats it is incumbent in the interests of efficiency and respect for the Court to alert the Court that a Motion has been filed by Plaintiffs to add Rains to the TRO, ECF No. 156 and should that occur, it would follow that in the law of the case thus far that a bond will also need to be posted for Rains losses. Therefore, in order to address holistically the ability of Plaintiffs to pay the amounts of the continuing bond we respectfully offer the amounts of Rains losses for consideration assuming, *arguendo,* that Rains will be enjoined thus requiring the posting another bond by a combination of Plaintiffs.

For Rains: 90 days of calendar time (Aug., Sept., Oct.) = 60 days of lost work

60 working days X 20 horses per day = 1,200 horses

1200 horses X $250 net retail[1] profit per horse = $300,000.00

$300,000.00 is the amount of potential loss by Rains thru the end of October that should posted as bond and that we must consider against the ability of any combination of Plaintiffs to pay. This amount is supported by the Affidavit of David Rains, ECF. No. 161-1, filed as Exhibit A to Response to the Motion to Modify the TRO to Include Rains Natural Meats.

Again for purposes of continuing the bond for Valley and Rains, assuming *arguendo* that both Valley and Rains will be enjoined and the current bond continued at the current rate, $1,171,200.00 is the amount of the bond that should be required and should be considered in evaluation of the ability of any combination of Plaintiffs to pay.

2. While the ~$1.1 million figure represents the amount of the bond it does not represent the actual cost to any combination of Plaintiffs to obtain a surety in that amount. We know

[1] The divergence between Valley at $180 and Rains at $250 is due to a difference in wholesale margins for Valley versus retail margins for Rains. Rains has agreements in place for retail sales.

from the previous bonds ECF No. 115 and ECF No. 116 that Plaintiff HSUS was able to obtain through The Hartford company the sureties for the injunction bonds. The actual cost to Plaintiffs to obtain these sureties has not been shared but should actually be the amounts weighed against the ability of Plaintiffs to pay not the full amounts of the bonds. If these sureties are in keep with industry norms we can expect that the only cost Plaintiffs a percentage of the total amounts. Again, assuming *arguendo* because the actual cost has not been shared, that cost to obtain the surety is 25% of the amount total bond that would require that a combination of Plaintiffs procure $42,800.00 to obtain the bonds for Valley and Rains. A good discussion of the way in which this dynamic plays out was is found in the previously cited *Habitat Educ. Ctr. v. United States Forest Serv.* 607 F.3d 453, (7th Cir. 2010) stating:

> In another class of cases a bond that would give the opposing party absolute security against incurring any loss from the injunction would exceed the applicant's ability to pay, and the district court balances (often implicitly) the relative cost to the opponent of a smaller bond against the cost to the applicant of having to do without a preliminary injunction that he may need desperately. See, e.g., *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 701 (7th Cir.1977); *Temple University v. White*, 941 F.2d 201, 220 (3d Cir.1991); *People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir.1985); *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir.1981). This case fits neither category. The forest service may lose money as a result of the now-dissolved preliminary injunction (in fact it's bound to lose at least a little, as we'll see), and Habitat admits that posting the $10,000 bond caused it no hardship, let alone deterred it from asking for the injunction-it might have been able to buy a surety bond for as little as $300. See CourtBondNet, "Bonds for Judicial Proceedings," www. courtbondnet. com/ judicial.html (visited May 3, 2010). And while Habitat hasn't told us what its total assets or revenues are, one of its coplaintiffs has annual revenues of some $7 million. Environmental Law & Policy Center, "ELPC Is Financially Sound and Well-Managed," elpc.org/elpcs-financial-status (visited May 3, 2010).

3. Again, Valley must stress that in examining the ability of the various Plaintiffs to pay for the bond that even if we were to assume for the sake of argument that all other Plaintiffs other the State of New Mexico we unable to pay for the bond the State of New Mexico is most certainly able to obtain the requisite bonds. Over the course of the hearings no evidence was ever offered that controverted the ability of Plaintiffs HSUS, FRER and State of New Mexico to obtain the bond. No evidence was given, nor any argument made that controverted the financial wherewithal displayed on IRS Form 990's for 2011 for both HSUS and FRER that showed revenues in excess of $200,000,000.00 for HSUS and in excess of $2,000,000.00 for FRER. Going further, nothing has been offered that of the **$183,215,830.00 in net assets and funds** that HSUS had at the end of 2011 has evaporated and could not be looked to cover the comparatively paltry sum of $42K need to obtain a surety or even to find the full ~$1.1 million

of the bond. Looking further into a possible combination of the Plaintiff Foundation for the Protection of New Mexico Wildlife it is unclear what the funding of the organization is but it was created by former Governor Bill Richardson and Robert Redford for the purposes of entering this litigation and preventing the lawful business of Valley and Responsible. Both Mr. Richardson and Mr. Redford appear well heeled and could be looked to for funds to obtain a surety for the purpose of further the litigation that they appear to so staunchly support given their statements to the media. And while the argument that any one of the proceeding Plaintiffs is by the themselves unable to fund the bond seems unsustainable, certainly the argument that combination of the State of New Mexico, HSUS, FRER, Mr. Richardson and Mr. Redford can't scrape together the funds needed to obtain a few more sureties from The Hartford company is completely meritless. Again, this a situation considered by the Court in *Habitat* stating:

> Indeed, "when setting the amount of security, district courts should err on the high side. If the district judge had set the bond at $50 million, as Abbott requested, this would not have *entitled* Abbott to that sum; Abbott still would have had to prove its loss, converting the 'soft' numbers to hard ones. An error in setting the bond too high thus is not serious. (The fee for a solvent firm such as Mead Johnson or its parent Bristol-Myers Squibb Co. to post a bond, a standby letter of credit, or equivalent security is a very small fraction of the sum involved.) ... [A]n error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir.2000) (emphasis in original).

In conclusion it would seem to be undeniable that a combination of the Plaintiffs in this case have the ability without any level of real stress to post the bonds to cover the losses incurred by the companies they have sought to enjoin. No evidence exists in the record to suggest that several of the Plaintiffs lack the individual financial capability to obtain the sureties necessary for injunctive bonds in the amounts set forth above and likely for the amounts in the letter of Responsible Transportation.

Respectfully,

/s/Blair Dunn

A. Blair Dunn, Esq.

CERTIFICATE OF SERVICE

I certify that I filed the foregoing document on September 20, 2013 using the ECF System, which will send notification to all parties of record.

-Electronically Signed by – A. Blair Dunn
A. Blair Dunn, Esq.