UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 1:13-cv-00639-MCA-RHS**
TOM VILSACK, Secretary, U.S. Department of Agriculture, *et al.*,	)	
	)	**MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION**
Federal Defendants.	)	

PRELIMINARY STATEMENT

At the onset of this dialogue on which the court is about to embark is of critical importance that honesty about the harms and motivations of the parties be scrutinized by the court. There should be no doubt that the real issue of this litigation is a disagreement of the various parties is whether or not domestic processing of equine animals should resume. This is a subject that has recently been weighed by Congress[1] and addressed in the law[2]. In the summer of 2011, the federal government recognized the unintended, but devastating, impact the slaughter ban has had on the horse industry and on the welfare of horses in a 2011 GAO Report. This is the real issue sought to be addressed by this

[1] This change in the law was in response to 2011 GAO Report Congress that the failed policy of effectually banning US processing of horses was actually causing more harm to horse welfare. U.S. Government Accountability Office, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter* (June 2011), *available at* http://www.gao.gov/new.items/d11228.pdf.
[2]Congress restored funding for inspections in November of 2011 under Consolidated and Further Continuing *Appropriations* Act for *Fiscal Year 2012* ("FY2012 Resolution") (PUBLIC LAW 112–55—NOV. 18, 2011)

litigation initiated by Plaintiffs. Plaintiff HSUS has been patently clear that their intention is to block, delay, and interfere with this process since Congress rejected the failed policy of the last six years. (See Exhibit A, *HSUS website*, attached hereto) It is in this disagreement as to that policy that that this request for a temporary restraining order actually arises from, there can be no mistake that the real goal of HSUS is to "end horse slaughter" and not out of concern for the environment or of human health. There can be no question that the actual personal property (horses) of the Plaintiffs is threatened nor that plaintiffs would be required to consume equine products. Plaintiffs are in reality, attempting to impose their belief system upon the general public because they believe that is in the public interest. This belief ignores differing cultural, moral, and financial belief systems of other people across the world. There is no threat of real financial or physical harm to plaintiffs, much less a threat to the loss of their property. And as to the threat to the environment, such claims have no basis in fact. Despite the salacious claims of plaintiffs no evidence exists of environmental harm caused by any of the proposed facilities. In fact, in spite of the slanderous inaccurate statements by plaintiffs the facts actually support the Federal Defendants position that any threats to the environment have been evaluated and accounted for. For instance, plaintiffs allege gross environmental harm by Intervenor Valley Meat Company, LLC, a company which has been processing livestock for human consumption at its facility for over 20 years, where no such fact exists. It is beyond dispute that as to the items they cite in their motion instead of being evidence of gross environmental harm are actually regulatory reporting and procedure violations, i.e., on one hand, a failure to register a compost site and on the other a failure to timely renew a permit. There has been no finding of environmental harm caused by

any of the proposed facilities or even a finding upon evaluation of the slight possibility that such a harm might occur. On the other hand, the threat of real substantial economic loss and harm to property of small local businesses by the granting of any injunction is a reality. (*See, Affidavit of Ricardo De Los Santos, Affidavit of David Rains and Affidavit of Sue Wallis,* attached hereto as Exhibits B, C, and D)

The honest reality of this litigation and more specifically Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction is that it is interposed to interfere and delay on a matter of public policy that is currently the source of a political question being debated in the United States Congress. The true motivations of plaintiffs are not to protect the environment, or out of concern for human health, but are to destroy the industry thru delay or attempting to delay long enough on the hope that Congress will again change the law. This current attempt to delay has already been tried by plaintiffs in the regulatory process by petitioning for rulemaking on the same grounds of food safety and environmental harm.[3] These attempts at delay have already been rejected with good basis[4], such that plaintiffs avoided appealing that rejection in the denial of their rulemaking petition, instead choosing to file this litigation.

LEGAL STANDARD

The Tenth Circuit Court of Appeals in examining actions involving Federal Rule of Civil Procedure 65 held that "preliminary injunctions are extraordinary equitable remedies designed to 'preserve the relative positions of the parties until a trial on the merits can be held.' *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). For a district court to grant a preliminary injunction, it must comply

[3] *See Rule Making Petition by FRER and HSUS,* http://www.fsis.usda.gov/horses/Petition_SchiffHardin_040612.pdf

[4] *See Letter from USDA denying Petition for Rule Making,* attached hereto as Exhibit E

with the procedural requirements of Rule 65 of the Federal Rules of Civil Procedure. Further, the moving party must demonstrate that four equitable factors weigh in favor of the injunction: (1) irreparable injury in the absence of the injunction; (2) the threatened injury to the moving party outweighs the harm to the opposing party resulting from the injunction; (3) the injunction is not adverse to the public interest; and (4) the moving party has a substantial likelihood of success on the merits. Schrier, 427 F.3d at 1258. Three types of preliminary injunctions are disfavored: (1) preliminary injunctions altering the status quo, (2) mandatory preliminary injunctions, and (3) preliminary injunctions granting the moving party all the relief it could recover at the conclusion of a full trial on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir.2004) (en banc), aff'd on other grounds, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). These injunctions require strong showings of the likelihood of success on the merits and the balance of harms. Id. at 976. (internal quotations included) *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009)

Further the Tenth Circuit has held that if the Trial Court determines that an injunction should issue "Rule 65(c) quite clearly states: 'No ... preliminary injunction shall issue except upon the giving of security by the applicant.' As we analyze the significance of the rule in light of what has transpired thus far in this case, the trial judge's consideration of the imposition of bond is a necessary ingredient of an enforceable order for injunctive relief. The plain language of the rule permits no other analysis." *Coquina Oil Corp. v. Transwestern Pipeline Co.* 825 F.2d 1461, 1462 (10th Cir. 1987) And even in the event the movant is a public interest group the injunction is alleged to be in the public interest "the argument that nonprofit entities, at least those

devoted to public goods of great social value, such as the protection of the environment, should be exempted from having to post injunction bonds. The argument flies in the face of Rule 65(c), which not only contains no such exception but also states flatly that 'the court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.'" *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453,458 (7th Cir.2010) And upon further examination the Courts have examined that the ability of the movant should be balanced against the losses incurred by the non-moving parties. See *Id.* at 458. Further helpful guidance can found from the Court in *Habitat* going on to state they "especially wish to emphasize our rejection of the rule proposed by Habitat that nonprofit entities should be exempt from having to post injunction bonds, or a slightly narrower rule that would pick and choose among them on the basis of likely contribution to the overall public welfare. Preliminary injunctions, because issued before a full adjudication, often turn out to have been issued in error, and when that happens the costs imposed on the party against whom the injunction ran are costs incurred by an innocent person (at least innocent in the preliminary-injunction phase of the litigation). The innocent may be a private firm or a government agency or a hapless individual (or even another nonprofit), but that doesn't make it or him or her unworthy of the law's protection." *Id.* at 459.

ARGUMENT

A. PLAINTIFFS DO NOT MEET THE BURDEN OF SUFFERING IRREPERABLE HARM NECESSITATING PRELIMINARY RELIEF

As discussed above, no real showing of injury to plaintiffs has been provided

to the court. The truth of the matter is that plaintiffs disagree with the law. That dissatisfaction with the law has led them to search for excuses to support their position that equine animals should not be processed human consumption. Intervenor Valley Meat Company, LLC and Proposed Intervenors Rains Natural Meats/Chevaline, LLC quickly contend that Federal Defendants are correct that the categorical exclusion relied upon by FSIS in issuing Grants of Inspection for facilities processing equine animals for human consumption in compliance with the law and regulations. Further, there is no threat of harm to human health from a food safety standpoint with regard to the National Drug Residue Program and USDA FSIS's actions thereunder with regard to equine product food safety requirements. Intervenor and Proposed Intervenors seek to support the position of Federal Defendants that upon the merits there is no threat of irreparable injury to plaintiffs necessitating preliminary relief nor is the claim of plaintiffs likely to ultimately succeed on the merits because Federal Defendants have not failed to comply with the law when they issued the Grants of Inspection.

B. INTERVOR AND PROPOSED INTERVENORS WILL BE SUFFER LOSS IF A PRELIMINARY INJUNCTION ISSUES AND PLAINTIFFS ARE CAPABLE OF POSTING SECURITY AS SHOULD BE REQUIRED BY THE COURT

1. VALLEY MEAT COMPANY, LLC, RAINS NATURAL MEATS, CHEVALINE, LLC AND OTHER SIMILAR COMPANIES WILL SUFFER ECONOMIC LOSS IF A PRELIMINARY INJUNCTION IS ORDERED

As Justice Stevens explained in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) "[s]ince a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his

adversary from loss in the event that future proceedings prove that the injunction issued wrongfully. The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction." *Id.* at 649, 102 S.Ct. 2629 (Stevens, J., concurring in part and concurring in the judgment) (footnote omitted); *see also Northeast Airlines, Inc. v. Nationwide Charters & Conventions, Inc.*, 413 F.2d 335, 338 (1st Cir.1969) (explaining that a security issued under Rule 65(c) protects against damages "suffered by reason of the [wrongfulness] of [a] preliminary injunction"). Should an injunction be ordered by this court Intervenor Valley Meat Company, LLC will be prevented from operating its lawful business. This would be the only bar that would prevent the company from operating and would cause a loss of $6,606,600.00 (156 days X 121 head per day X $350.00 per head) based upon unrealized contracts. If Valley is enjoined for twelve months Valley will suffer an economic loss of $13,213,200.00. (See *Affidavit of Ricardo De Los Santos,* Exhibit B ¶ 5) By August 5, 2013 Valley will have suffered a loss of $423,000.00 (10 days X 121 horses X $350.00 per head) based upon unrealized contract amounts and will be unable to realize the benefit of well over $150,000.00 in expense it has incurred in preparation for opening. (See *Affidavit of Ricardo De Los Santos,* Exhibit B ¶¶ 3,4) Likewise Proposed Intervenor Rains Natural Meats will suffer the loss of $1,600,000.00 (10% domestic wholesale, 140 head X $1,143 = $160,000; 5% domestic retail 47 head X $1,715.00 = $80,000; 85% export, 1,689 head X $805 a head = $1,360,000) of revenue loss based upon unrealized contracts. If the Rains is enjoined for twelve months RAINS will suffer an economic loss of $9,700,000.00 (10% domestic wholesale, 849 head X $1,143 = $970,000; 5% domestic retail 283 head X $1,715.00 = $486,000; 85% export, 10,242 head X $805 a head = $8,245,000). (See *Affidavit of*

David Rains, Exhibit D ¶ 5) This figure does not include the unrealized benefit of the over $12,000.00 expended to prepare the facility for opening. (See *Affidavit of David Rains*, Exhibit C ¶ 3) Proposed Intervenor Chevaline, LLC is closely tied to both the Iowa plant (Responsible Transportation) and Rains Natural Meats, it has agreements to market and broker with both facilities. If the plants are enjoined from opening Chevaline will suffer $409,600.00 (projected 10% marketing fees from sales from Rains and Responsible Transportation) based upon unrealized contracts. If the delay continues for twelve months Chevaline will suffer an economic loss of$1,469,200.00 (projected 10% marketing fees.) (See *Affidavit of Sue Wallis*, Exhibit D ¶ 5) By August 5, 2013 Chevaline will have suffered a loss of$48,000.00 (10 days X 60 horses X $800.00 per head X 10% marketing fee) based upon unrealized contract amounts and will be unable to realize the benefit of well over $106,000.00 in expense it has incurred in preparation for the opening of the plants. (See *Affidavit of Sue Wallis*, Exhibit D ¶¶ 3,4)

If USDA is enjoined by order of the Court these companies will suffer a total loss of **$9,205,350.00** over 6 months and after 12 months will have suffered **$24,971,550.00** in loss. The Court should order that a security be issued by the plaintiffs adequate to cover the amounts of loss that will be suffered if a preliminary injunction has wrongfully been sought and ordered. The amounts claimed by Intervenor and Proposed Intervenors are the reasonable amounts of losses they may suffer and in determining "the amount of security, district courts should err on the high side." *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir.2000).

2. THE AMOUNT OF SECURITY REFLECTING THE LOSS OF NO-MOVANTS WHEN BALANCED AGAINST ABILITY OF MOVANTS TO PAY SUPPORTS THE REQUIRMENT OF A SECURITY OF THE FULL

AMOUNT OF CLAIMED BY ALL NONMOVANTS SUFFERING A LOSS

The ability of that movant to give the opposing party absolute security against incurring any loss from the injunction would exceed the applicant's ability to pay is a consideration of the Courts. See e.g. *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453,458 (7th Cir.2010) However, in the present case virtually identical to the case in *Habitat* the movants have the ability to issue security necessary to offset the potential loss of all affected non-movants should court grant the movants request for preliminary relief even if may take 12 months to secure a decision on the final merits of the action. Plaintiff HSUS is a multi-million dollar organization with gross revenues exceeding its total expenditures by **well over a $100,000,000 annually.** (See *partial HSUS 2011 IRS 990 Report*, attached hereto as Exhibit F[5].) Similarly, Plaintiff FRER is an organization with that had almost $2,000,000 in gross revenues in 2011. (See *parital FRER 2011 IRS 990 Report*, attached hereto as Exhibit G[6])

II. CONCLUSION

For the above reasons, Valley Meat Company, LLC, Rains Natural Meats and Chevaline, LLC respectfully asks the Court to deny the Motion for Temporary Restraining Order and Preliminary Injunction and in the alternative require movants to issue security in an amount commensurate to loss that will be suffered if the injunction is found to be wrongfully entered of not less than $25,000,000.00.

[5] See http://www.humanewatch.org/downloads/2011-Form-990-HSUS.pdf; See also http://www.humanewatch.org/unpacking_the_hsus_gravy_train_2012_edition/

[6]See http://frontrangeequinerescue.org/documents/2011.990.pdf

Dated: July 19, 2013

By: *- Electronically Signed by –A. Blair Dunn*
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CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on July 19, 2013 using the ECF System, which will send notification to all parties of record.

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