IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, ROMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN and BARBARA SINK, Plaintiffs, vs. TOM VILSACK, Secretary U.S. Department of Agriculture, ELIZABETH HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture, Defendants.	No. 1:13-cv-00639-MCA-RHS

RESPONSIBLE TRANSPORTATION, L.L.C.'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO THE MAGISTRATE JUDGE'S ORDER REQUIRING INJUNCTION BOND

Responsible Transportation, L.L.C., by counsel Patrick J. Rogers LLC (Pat Rogers) and Simmons Perrine Moyer Bergman PLC (Kevin Visser and Kathleen Kleiman), hereby opposes Plaintiffs' Motion to Modify the Temporary Restraining Order and Objection to the Magistrate Judge's Order Requiring Injunction Bond.

I. INTRODUCTION

Throughout the brief pendency of this matter,[1] Plaintiffs have continuously implicated (and wrongfully impugned) the actions of defendant/intervener Responsible Transportation, L.L.C. ("RT") (including by name in the Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief). Any claim that the plaintiffs never sought a remedy against RT is, at best, a disingenuous technicality. It is beyond dispute that enjoining the federal Defendants from conducting inspections would have the financially disastrous result of endangering RT's business – the exact consequence sought by Plaintiffs and the reason intervention was appropriately permitted under Fed. R. Civ. P. 24. Plaintiffs have cited no authority that the injunctive relief entered against RT is invalid.[2] Further, the only "consequence" of the Court's collective orders which was "unintended" by Plaintiffs was being required to post a bond – as required by the express language of Fed. R. Civ. 65(c). And, unlike the cases cited by Plaintiffs, the requirement of a bond was proper given the financial harm certain to befall RT by the Temporary Restraining Order. The amount of the bond as to RT, if anything, was too low, especially in light of the damages to RT and Plaintiffs' considerable financial resources.

[1] See brief summary of prior challenges lodged by Plaintiffs in an effort to thwart RT's legal and authorized endeavor. ECF Dkt. 46 (RT's Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary injunction).

[2] RT respectfully submits that the TRO was not adequately supported by admissible evidence demonstrating a likelihood of success on the merits, likelihood of irreparable harm by the movant, that the balance of equities tipped in favor of movant, or that the injunction was in the public interest. See Winnebago Tribe of Nebraska v. Stovall, 341 F.3d 1202, 1205 (10th Cir. 2003). To the contrary, RT respectfully but vigilantly maintains its position that the TRO was improvidently granted, as would be a preliminary injunction, which is the exact rationale supporting the express requirement for security under Fed. R. Civ. P. 65(c).

II. ARGUMENT

A. Plaintiffs' Attempt to "Un-Enjoin" Responsible Transportation is a Transparent and Disingenuous Attempt to Avoid the Security Requirement Expressly Provided for by Fed. R. Civ. P. 65(c).

From the commencement of this lawsuit Plaintiff has implicated RT and sought to put a halt to its operations, be it directly or indirectly. See Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief (ECF Dkt. #54) at ¶ 7 (including RT of Sigourney, Iowa, by name, as one of the six applicants for horse slaughter inspections); ¶ 25 (identifying Barbara Mohror, a member of HSUS and resident of Keota, Iowa as someone who will be injured if RT begins horse slaughter operations as her family recreates in the Sigourney, Iowa area); ¶ 27 (alleging that setting aside the grant of inspection will prohibit horse slaughter plants from operating and there will be no "detrimental health, environmental, aesthetic, or economic impacts felt by the members of The HSUS" in Iowa); ¶ 146 ("On June 28, 2013, USDA denied FRER's and HSUS' rulemaking petition, and issued a grant of inspection for Valley Meat, announced that it would be granting inspection to horse slaughter facilities in Iowa and Missouri, so that the companies could begin slaughtering horses for human consumption."). See also ECF Dkt. # 94 p. 4 wherein the Court "acknowledges the concerns expressed in the pleadings and oral argument as to the welfare of horses" – such concerns Plaintiffs conveniently abandon in their Motion to Modify the TRO, which instead focuses solely on the enjoining of federal inspections necessary for human consumption. Accepting as true Plaintiffs' current position, Plaintiffs would apparently have no objection to RT's commencement of its horse slaughter operation for non-human consumption, i.e., the sale of equine product to zoos, even though the potential environmental impact would remain unchanged regardless of the end consumer. This

disconnect in logic demonstrates the speciousness of Plaintiffs' present motion and argument.

Plaintiffs filed no opposition either to RT's Motion to Intervene, or to the terms of the Court's August 2, 2013 order granting Plaintiffs' Motion for TRO, *until* Plaintiffs were required to post a bond. The fact that Plaintiffs did not name RT as a party in its lawsuit is of no consequence to RT's entitlement to have security posted pursuant to Rule 65(c); or to RT's ability to recover against same. This Court appropriately allowed RT and VM to intervene, just as three (3) equine processing companies were allowed to intervene as defendants in HSUS' 2006 NEPA challenge to the USDA's proposed inspection system. HSUS v. Johanns, 520 F. Supp.2d 8 (D.D.C. 2007). See also WildEarth Guardians v. United States Forest Service, 573 F.3d 992, (10th Cir. 2009) (reversing district court's denial of a private company's motion to intervene in NEPA suit, noting that company's operations will be "impaired, or even halted" should plaintiffs prevail – "The threat of economic injury from the outcome of the litigation undoubtedly gives a petitioner the requisite interest.") (quoting Utahns for Better Transp. V. U.S. Dep't of Transp., 295 F.3d 1111, 1115 (10th Cir. 2002)). See also Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975 (11th Cir. 2000) (noting language of Rule 65(c) "specifically states that the bond is to be used 'for the payment of such costs and damages as may be incurred or suffered by *any party* who is found to have been wrongfully enjoined or restrained' and Milan [defendant/intervener] is certainly such a party and is thus entitled to sue for the value of the bond"); Glaxo Group, Ltd. v. Leavitt, 481 F. Supp.2d 434 (D. Md. 2007) (plaintiff Glaxo sought and obtained a TRO enjoining the approval by the FDA of an application by intervening defendant; intervening defendant was entitled to recover against injunction bond for damages that

"naturally and proximately result from the injunction."). The same threat of economic injury providing RT the right to intervene in this matter supports the requirement of a bond.

Finally, Plaintiffs' citation to Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1178 (9th Cir. 2011) for the proposition that "the federal government is the *only* proper defendant in a NEPA compliance action" is misplaced and misleading.[3] The Ninth Circuit in Wilderness Soc'y revisited *and abandoned* the "so-called 'federal defendant' rule.

> Such a bright-line rule is inconsistent with the text of Rule 24(a)(2), which requires only "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). In stating that "private parties do not have a 'significant protectable interest' in NEPA compliance actions," Kootenai Tribe, 313 F.3d at 1108, the "federal defendant" rule mistakenly focuses on the underlying legal claim instead of the property or transaction that is the subject of the lawsuit. No part of Rule 24(a)(2)'s prescription engrafts a limitation on intervention of right to parties liable to the plaintiffs on the same grounds as the defendants.
>
> The "federal defendant" rule's limitation on intervention of right in NEPA actions also runs counter to the standards we apply in all other interventions of right cases . . . In applying a technical prohibition on intervention of right on the merits of all NEPA cases, it eschews practical and equitable considerations and ignores our traditionally liberal policy in favor of intervention. It also fails to recognize the very real possibility that private parties seeking to intervene in NEPA cases may, in certain circumstances, demonstrate an interest "protectable under some law," and a relationship between that interest and the claims at issue. Courts should be permitted to conduct this inquiry on a case-by-case basis, rather than automatically prohibiting intervention of right on the merits in all NEPA cases . . .
>
> We now abandon the "federal defendant" rule. When considering motions to intervene of right under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions. To determine whether putative interveners demonstrate the "significantly protectable" interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the "interest is protectable under some law" and whether "there is a relationship between the

[3] The language selectively quoted by Plaintiffs is plucked from the Ninth Circuit's discussion tracing its "unique interpretation of intervention of right in NEPA cases" to Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir. 1989) and subsequent cases in which the Ninth Circuit "interpreted Portland Audubon to hold that the federal government is the *only* proper defendant in a NEPA compliance action" but later clarified that the "federal defendant" rule does not prohibited limited intervention of right in the remedial phase of NEPA litigation.

> legally protected interest and the claims at issue." Sierra Club, 995 F.2d at 1484. A putative intervener will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if "it will suffer a practical impairment of its interests as a result of the pending litigation." California ex rel. Lockyer, 450 F.3d at 441.

Id. at 1179-80.

B. Requiring a Bond was Appropriate; the Amount as to RT is Insufficient.

The "well-established public interest exception" to the security requirement of Rule 65(c), as argued by Plaintiffs, is wholly inapplicable to this case. Aside from counsel's argument, there is no evidence in the record that requiring a posting of security of $60,000 in this matter (as to RT) would have any "potential chilling effect" on public interest litigation, or that such a bond is unsustainable.[4] A review of HSUS' 2011 Form 990 (Return of Organization Exempt from Income Tax – attached as Exhibit A) reveals that the HSUS reported net assets in excess of $183 million (in contrast to RT's total gross assets of approximately $3 million). HSUS' 990 further reveals that HSUS claimed to have spent over $1.6 million in legal fees for 2011. Similarly, FRER's 2011 Form 990 shows reported net assets in excess of $2.6 million (See ECF Dkt. # 56-7, attached as Exhibit B). There has been no showing that the $60,000 bond as to RT was either higher than necessary nor beyond Plaintiffs' financial capacity. In fact, the bond is inadequate to cover RT's damages. See Exhibit C (August 7, 2013 Declaration of Keaton Walker, received and reviewed without objection by Magistrate Judge Scott on August 8, 2013, attached).

In Habitat Education Ctr. v. United States Forest Service, Judge Posner for the United States Court of Appeals for the Seventh Circuit addressed a similar attempt by a

[4] Plaintiffs' Motion to Modify TRO alleges that Magistrate Judge Scott's order requires Plaintiffs to post an injunction bond of $495,000 *per month*. See ECF Dkt. #112 at 8 (emphasis in original). Nowhere in the court's bond order does it so state that Plaintiffs must post the bond every month, but rather until September 1, 2013, at which time the bond issue would need to be revisited and (should further injunctive relief enter) the amount increased.

well-funded non-profit and rejected the request of the plaintiff ("Habitat") – a nonprofit enterprise dedicated to promoting environmental equality – to reconsider the District Court's bond order. 607 F.3d 453 (7th Cir. 2010). Habitat argued that a nonprofit enterprise should not have to post an injunction bond. Id. at 455.

> We are not persuaded by Habitat's 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."
>
> In seeming contradiction of the rule, a number of cases allow a district court to waive the requirement of an injunction bond. In some of these cases the court is satisfied that there's no danger that the opposing party will incur any damages from the injunction . . . 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 . . . This case fits neither category.

Id. at 458 (internal citations omitted).

> 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.

Plaintiffs cannot and do not argue that the bond as to RT would effectively deny them access to judicial review or deny them their day in court. Compare People of the State of California v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985)

("The court has discretion to dispense with the security requirement or to request mere nominal security, where requiring security would *effectively deny access to judicial review . . .*") (emphasis added). See also Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb, 2013 WL 1960856 (E.D. Wis. 2013) (noting line of cases holding district court's discretion to balance relative cost to opponent of smaller bond against cost to applicants having to do without a preliminary injunction they may desperately need).

> In the present case, the plaintiffs may be able to show that their financial resources are so scarce that they could not afford to post a bond in an amount that would be adequate to compensate the defendants for any delay-related harm they may suffer. If that turns out to be the case, then I might allow the plaintiffs to post a smaller bond or, perhaps, no bond at all.

Id. at *18; Save Strawberry Canyon v. Dep't of Energy, 613 F. Supp.2d 1177 (N.D. Cal. 2009) (exercising discretion to dispense with security requirement where the proposed bond requirement would effectively deny access to judicial review, noting that plaintiff is a *small* non-profit organization and has indicated it would have difficulty posting the bond) (emphasis added); Colorado Wild, Inc. v. United States Forest Service, 523 F. Supp.2d 1213. 1230-31 (D. Colo. 2007) (declining to impose a bond based on plaintiffs' status as non-profit environmental groups and on "declarations by their executive directors stating that they will not be able to proceed with this case if a bond is required.").

Plaintiffs in the instant matter cannot, based on the sizable financial resources at their disposal, credibly argue that they will be unable to proceed with the case if the $60,000 bond as to RT is required. Plaintiffs have, in fact, filed the bond. And should a preliminary injunction issue, the size of the security required should be greatly increased. Likewise, plaintiffs cannot and do not contend that RT will be left unscathed by the TRO. Rather, the

evidence as outlined below, demonstrates that RT may well be irreparably harmed by the injunction and that the bond amount is insufficient to protect its interests.

C. The Evidence Supporting the Bond was Not Speculative and the Amount of the Bond, if Anything, is Insufficient to Protect RT from an Improvidently Granted TRO.

Plaintiffs' brief (pp. 8-10) does not argue that the bond ordered as to RT was speculative or otherwise unsupported. Nor could Plaintiffs so contend, based on the record evidence established by the August 7, 2013 Declaration of Keaton Walker, President and founder of RT (attached as Exhibit C - received and reviewed without objection the August 8, 2013 bond hearing). Per Mr. Walker, RT was formed in 2010 and has invested nearly $3 million in acquiring a processing plant and renovating the facility as needed for equine processing. Like VM, RT had employees hired and horses ready to enter the facility in early August when the TRO was entered. Poised to commence operations, Mr. Walker calculates that RT will suffer damages in excess of $250,000 as a result of being enjoined from operating until the hearing on the preliminary injunction. Moreover, to mitigate its damages and stay afloat, RT will be forced (at costs approaching $600,000) to convert its facility to a beef processing operation, the market for which is much lower in profits and higher in competition (and is dominated by large, experienced competitors), to attempt to mitigate its damages during the pendency of this matter. Mr. Walker calculates lost profits from the conversion from equine to beef to cost RT between $3.3 million to $4.4 million in lost profits during the expected 18 to 24-month pendency of the lawsuit. On top of these sums, RT has incurred and will continue to face significant legal fees to defend its position. RT is acting diligently to mitigate its losses, but will nonetheless incur substantial financial hardship by entry of the TRO, which evidences both the need for the injunction bond and

that the amount ordered is, in fact, too low for any period beyond the 30 days covered by the TRO.

D. RT Has Done Absolutely Nothing to Self-Inflict its Damages

A review of the record as a whole, as outlined in Mr. Walker's July 19, 2013 Declaration (ECF Dkt. # 48-1, attached as Exhibit D), reveals that RT has acted wholly within the confines of the law and applicable rules and regulations in attempting to commence its equine processing operations. The Iowa Department of Inspections and Appeals, Food and Consumer Safety Bureau denied both HSUS and FRER's 140-page Petitions for Rulemaking, which had requested that the Department adopt a rule that all equine meat be deemed adulterated under Iowa law unless the processed equine had an "equine passport." That horse slaughter may be at odds with the Plaintiffs' sensitivities does not mean that RT is not entitled to engage in the business of its choosing, especially when it has gone to painstaking lengths to comply with all USDA rules and requirements, as well as all environmental requirements. There is no evidence that any damages to befall RT are the result of anything but Plaintiffs' actions in obtaining the TRO which, in turn, halted RT's operations.

III. CONCLUSION

Plaintiffs' back-door attempt to circumvent the legislative and administrative processes (as well as the workings of the government of the State of Iowa) should not be rewarded with the issuance of an injunction prohibiting the dispatch of inspectors to RT's facility. Should the relief provided via the TRO remain in effect, the practical result is to force RT into an entirely different and vastly more expensive market, thereby mandating a bond in an amount of no less than $3 million, as supported by the Declarations of Keaton Walter

(Exhibits C and D). The purpose of Rule 65(c) is to require a party seeking the suspension of due process to put their money where their mouth is. Plaintiffs have plenty of money; if they obtain the stark and "extraordinary relief" of a TRO, they must be required to post sufficient security.

WHEREFORE, Responsible Transportation respectfully requests that the Court issue an Order *denying* Plaintiffs' Motion to Modify the Temporary Restraining Order and Objection to Magistrate's Order Requiring Injunction Bond, and grant whatever further relief is deemed just and necessary, including an increase in the current TRO bond.

/s/ Patrick J. Rogers
Patrick J. Rogers
Patrick J. Rogers, LLC
20 First Plaza Center #725
Albuquerque, NM 87102
505-938-3335; patrogers@patrogerslaw.com

and

Kevin J. Visser
Kathleen A. Kleiman
SIMMONS PERRINE MOYER BERGMAN PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Tel: 319-366-7641; Fax: 319-366-1917
Email: kvisser@simmonsperrine.com
kkleiman@simmonsperrine.com
Pro Hoc Vice applications pending

ATTORNEYS FOR RESPONSIBLE TRANSPORTATION, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2013, I filed the foregoing **RESPONSIBLE TRANSPORTATION, L.L.C.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO THE MAGISTRATE JUDGE'S ORDER REQUIRING INJUNCTION BOND** with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

/s/ Patrick J. Rogers