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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*,

Plaintiffs,

and

STATE OF NEW MEXICO

Plaintiff-Intervenor,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture, *et al*.,

Federal Defendants,

and

VALLEY MEAT COMPANY, *et al.,*

Defendant-Intervenors,

and

INTERNATIONAL EQUINE BUSINESS ASSOCIATION, *et al.,*

Proposed Defendant-Intervenors.

No. 1:13-cv-00639-MCA-RHS

PROPOSED DEFENDANT-INTERVENORS' PROPOSED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO MAGISTRATE'S ORDER REQUIRING INJUNCTION BOND

COME NOW, Proposed Defendant-Intervenors International Equine Business Association, New Mexico Cattle Growers' Association, South Dakota Stockgrowers Association, Ranchers-Cattlemen Action Legal Fund United Stock Growers of America, Marcy Britton, Bill and Jan Wood, LeRoy and Shirley Wetz, Doug and Judy Johnson, Kujyukuri, Ltd., United Horsemen, and Scenic View Ranch, by an through their undersigned attorneys Karen Budd-Falen and Kathryn Brack Morrow, of the Budd-Falen Law Offices, LLC, and hereby respond in opposition to Plaintiffs' Motion to Modify the Temporary Restraining Order and Objection to Magistrate's Order Requiring Injunction Bond.[1]

On August 14, 2013, Plaintiffs moved to modify the terms of the Court's Temporary Restraining Order. See Order Granting Pls.' Mot. for TRO, ECF No. 94 (Aug. 2, 2013), (TRO Order). Plaintiffs claim that their causes of action–violation of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA)–and their request for injunctive relief were only directed at the Federal Government Defendants.[2] Therefore, they argue, the TRO

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[1] Proposed Defendant-Intervenors submit this document as a "Proposed Response," recognizing that they have not been granted leave to intervene in the above captioned matter. Proposed Defendant-Intervenors filed their Motion to Intervene on August 9, 2013. See Proposed Defendant-Intervenors' Mot. to Intervene, ECF No. 105 (Aug. 9, 2013).

[2] Proposed Defendant-Intervenors agree that the only appropriate issues before this Court are in the nature of NEPA and APA claims. Therefore, the Court's review of this matter should necessarily continue as an administrative record review. Accordingly, this entire matter is more appropriately handled pursuant to the procedure outlined in Olehnouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), whereby the applicable rules are the Federal Rules of Appellate Procedure. Under those rules, no motion for a TRO/PI exists and the Plaintiffs' relief should have been a request for a stay of the Administrative Order (i.e. the Grant of Inspection) while the merits of their argument are decided. See Fed.R.App.P. 18. However, Proposed Defendant-Intervenors provide the following Proposed Response and will proceed according to

Order specifically enjoining Defendant-Intervenors Valley Meat and Responsible Transportation is inappropriate and invalid. Plaintiffs are incorrect in their claims.

Similarly, Plaintiffs raise a number of objections concerning Magistrate Judge Scott's Order Requiring Injunction Bond. See Order Requiring Inj. Bond, ECF No. 102 (Aug. 8, 2013) (Bond Order). Plaintiffs argue that the size of the Bond Order was based on speculative damage calculations, the damage was self-inflicted, and the Court failed to consider appropriate mitigation of the potential damages. Additionally, Plaintiffs claim that any Bond Order should be further reduced, or waived, to account for a public interest exception. Again, the Plaintiffs are incorrect.

Proposed Defendant-Intervenors find fault with the Plaintiffs' position, and hereby respond in opposition. The grounds supporting this response are set forth below.

I. INTRODUCTION

In early July 2013, Plaintiffs filed the above captioned action alleging that the Defendants United States Department of Agriculture's Food Safety and Inspection Service ("USDA FSIS") failed to complete the necessary environmental review, pursuant to the National Environmental Policy ("NEPA") Act, 42 U.S.C. § 4321 et seq., prior to issuing grants of inspection to domestic equine processing facilities. See e.g. Am. Comp., ECF No. 54 (July 19, 2013). Accordingly, Plaintiffs sued the Federal Defendants under the Administrative Procedure Act, 5 U.S.C. §

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the Court's Orders and Schedules, including the TRO Order, the Bond Order, and the upcoming preliminary injunction hearing.

706(2)(A), which provides that reviewing courts shall set aside an agency action "that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Concurrent with its original Complaint, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that the Court issue the temporary restraining order to enjoin Defendants from authorizing horse processing at a domestic horse processing facility pending consideration of the merits of Plaintiffs' claims. See Errata to Notice of Mot. and Mot. for TRO and Prelim. Inj.; Mem. of Points and Authorities in Supp. Thereof, ECF. No. 16 (July 2, 2013). Subsequently, multiple parties, including Defendant-Intervenors, Valley Meat and Responsible Transportation, moved to intervene in the matter and were granted status as parties to the action. See Order by Chief Judge Christina Armijo Granting Motions to Intervene, ECF No. 43 (July 16, 2013) and ECF No. 90 (July 31, 2013). Following the appropriate briefing by all parties to the matter, the Court held a hearing on the motion for temporary restraining order and issued an order enjoining the Federal Defendants from dispatching inspectors to the horse processing facilities, ordering the Federal Defendants to suspend or withhold the provision of meat inspection services to Defendant-Intervenors, and enjoining Defendant-Intervenors from commercial horse processing operations. See Order Granting Pls.' Mot. for TRO, ECF No. 94 (Aug. 2, 2013).

Because Defendant-Intervenors were enjoined and restrained from operating, Plaintiffs' were required, pursuant to Federal Rule of Civil Procedure 65(c), to post a security bond in an amount sufficient to "pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." See Fed.R.Civ.P. 65(c). Following a full and fair evidentiary

hearing in front of Magistrate Judge Scott, Plaintiffs were ordered to enter the necessary bond. See Order Requiring Inj. Bond, ECF No. 102 (Aug. 8, 2013). Plaintiffs now move to modify the TRO and raise multiple objections concerning the Bond Order. For the following reasons, Plaintiffs' Motion to Modify the TRO and Objection to Magistrate's order should be denied and overruled.

II. ARGUMENT

A. Standard of Review

When ruling on motion to modify a TRO, pursuant to Federal Rule of Civil Procedure 54(b), the Court is guided by a presumption against revisiting prior orders. See Bergerson v. New York State Office of Mental Health, Central New York Psychiatric Center, 652 F.3d 277, 288 (2d Cir. 2011) (noting the district court's strong presumption against amendment of prior orders); see also National Business Brokers, Ltd. V Jim Williamson Productions, Inc., 115 F.Supp.2d 1250, 1256 (recognizing a court's inherent power to alter or amend interlocutory orders but noting that such requests "should be denied unless it clearly demonstrates manifests error of law or fact or represents newly discovered evidence") (internal citations omitted). In order to succeed, the moving party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." See National Business Brokers, 115 F.Supp.2d at 1256 (citing California v. Summer Del Caribe, 821 F.Supp 574, 578 (N.D.Cal. 1993)).

With respect to objections raised pursuant to Federal Rule of Civil Procedure 72, "the district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." Id. (emphasis added); see also Allen v. Sybase,

Inc., 468 F.3d 642, 658 (10th Cir. 2006) (citing Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir 1997) "the district court is required to 'defer to the magistrate judge's ruling unless it [was] clearly erroneous or contrary to law.'"). Under the clearly erroneous standard, "the reviewing court [must] affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" See Allen, 468 F.3d at 658 (citing Ocelot Oil Corp. v. Sparrow, Indus., 847 F.2d 1458, 1464 (10th Cir. 1988)). The "contrary to law" standard is applied when "the district court conducts a plenary review of the magistrate judge's purely legal determinations, setting aside the magistrate judge's order only if it applied an incorrect legal standard." Jensen v. Solvay Chemicals, Inc., 520 F.Supp.2d 1349, 1351–52 (D.Wyo. 2007) (citing Wyoming v. United States Department of Agriculture, 239 F.Supp.2d 1219, 1236 (D.Wyo. 2002) (emphasis added).

B. This Court Should Not Modify Its TRO Order Because The Plaintiffs' Requested Relief Does, In All Practical Terms, Enjoin And/Or Restrain Non-Federal Defendant Parties

According to the Federal Rules of Civil Procedure, a temporary restraining order binds "only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Fed.R.Civ.P. 65(d)(2). The rule's language and intent follows the common law doctrine, which stresses that a "decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." See Regal Knitwear Co. v. Nat'l Labor Relations Bd., 324 U.S. 9, 13–14 (1945).

Therefore, it is apparent that FRCP 65(d) contemplates a broader group of individuals than Plaintiffs would have this Court suppose. Practically speaking, Defendant-Intervenors are the parties restrained by the Court's TRO Order. It is their significantly protectable interests–operating their fully permitted and authorized facilities–that have been set aside by the Order.[3]

This fact was not lost on the Plaintiffs, as a cursory review of the Plaintiff's First Amended Complaint reveals that many, if not most, of Plaintiffs' statements and affidavits to support standing are based on alleged harms that will speculatively occur at the Valley Meat location. See Am. Compl., ECF No. 54, ¶¶ 55-61 (describing Plaintiff Krystle Smith's residence near Valley Meat and her belief that Valley Meat's operations will cause her injury and distress); ¶¶ 62-66 (explaining Plaintiff Ramona Cordova's concern with Valley Meat's operation of an equine processing facility); ¶¶ 67-72 (noting that Plaintiff Deborah Trahan lives within six miles of the Valley Meat processing facility and she remains extremely worried about the facilities impact to local waterways); ¶¶ 73-81 (describing Plaintiff Cassie Gross' potential for aesthetic and recreational injury because of Valley Meat's equine processing operation).

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[3] Proposed Defendant-Intervenors note that it was these significantly protectable interests that presumably proved sufficient for the Court to grant the Defendant-Intervenors' Motions to Intervene and made them official parties to the action. See Mem. In Support of Motion to Intervene by Valley Meat, LLC, ECF No. 25, at 4–5 ("Proposed Intervenor's Grant of Inspection and the issuance or the restraint from issuance of that Grant of Inspection is the very substantive object of this case. In fact, Proposed Intervenor's lawful operation of its business is entirely dependent on the issuance of the Grant of Inspection."); see also Brief in Support of Motion to Intervene by Responsible Transportation, L.L.C., ECF No. 48, at 4 ("RT is interested by virtue of its reliance upon the Grant of Inspection to operate its business. The effect of a grant of injunctive relief is to keep RT's doors closed.").

Notably, the same statements of potential harm form the basis of Plaintiffs claims of irreparable harm. See Pls.' Errata to Notice of Mot. and Mot. for TRO and Prelim. Inj.; Mem. of Points and Authorities in Supp. Thereof, ECF No. 16, at 25–26 ("[t]hey will be subjected to regular viewing of horses going to slaughter, waiting to be slaughtered, and to viewing trucks leaving Valley Meat" and "[a]ll of these lakes and streams connect with the waterways closest to Valley Meat, such that any contamination from the slaughter facility will eventually get into the lakes and streams"). Plaintiffs also cite to Valley Meat's alleged "history of environmental violations" to support its argument that "Valley Meat's operations, as well as other horse slaughter plant's operations, should be subjected to heightened environmental scrutiny." See Am. Compl., ECF No. 54, ¶¶ 147-48 (emphasis added). The request for heightened environmental scrutiny is exactly what Plaintiffs are requesting this Court impose on the Federal Defendants.

Based on the pleadings, it is abundantly clear that the Plaintiffs identified the Defendant-Intervenors, Valley Meat and Responsible Transportation, with the Federal Defendants. Yet, the Federal Defendants also recognized this fact when it argued that "a bond is required and appropriate" because "[i]f an interim injunction were to issue, Valley Meat, Responsible Transportation, and other establishments that are prevented from securing inspections from FSIS as a result of the injunction will undeniably be harmed because they will not be able to operate their facilities." See Federal Defs.' Opp'n to Pls.' July 2, 2013 Mot. for Prelim. Inj., ECF No. 66 at 40 (July 19, 2013) (emphasis added).

Thus, there is no mistaking that in real and practical terms, the Defendant-Intervenors, Valley Meat and Responsible Transportation, represent truly enjoined or restrained parties. They

were each issued a grant of inspection, which are now set aside. Both facilities were scheduled to operate, but now sit idle. Because the TRO Order holds the facilities idle, this Court should deny Plaintiffs' motion to modify the TRO Order and maintain any and all appropriate bond security.

C. The Court Should Uphold and Maintain Magistrate Judge Scott's Order Requiring Injunction Bond

Plaintiffs next argue that even if the TRO Order is maintained and Defendant-Intervenors remain subject to its restraint, the Court should, nonetheless, set aside Magistrate Judge Scott's Bond Order as clearly erroneous or contrary to law. Plaintiffs raise four principal objections: failure to incorporate a public interest exception; speculative damage calculations; self-inflicted harms; and, failure to consider Defendant-Intervenors ability to mitigate. For the following reasons, the Plaintiffs' objections lack merit and should be overruled.

As an initial matter, it is noted that the Magistrate Judge is accorded substantial deference when reviewing and deciding nondispositive orders, particularly bond requirements. See Dominion Video Satellite, Inc. v. Echo Star Satellite Corp., 269 F.3d 1149, 1158 (10th Cir. 2001) (noting the trial court or magistrate judge's "'wide discretion' in setting amount of the preliminary injunction bond."). Accordingly, such deference should be accounted for and the Plaintiffs' objections should be overruled unless the reviewing court, on the entirety of the evidence, "is left with the definite and firm conviction that a mistake has been committed" or that the incorrect legal discretion has been applied. See Allen, 468 F.3d at 658; see also Jensen, 520 F.Supp.2d at 1351–52.

Plaintiffs' first objection cites Magistrate Judge Scott's decision to forego, or disregard, what Plaintiffs refer to as the "public interest exception." Plaintiffs claim that Magistrate Judge Scott's decision to not "even mention the public interest exception, nor the importance of private enforcement of NEPA and the chilling effect on NEPA and other types of public interest litigation" renders the Bond Order "erroneous and contrary to law." See Pls. Mot. to Modify the TRO, at 8. However, the Plaintiffs can point to no authority that would require Magistrate Judge Scott to incorporate such an exception. In fact, the primary case upon which Plaintiffs rely states only that, "where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." See Davis v. Mineta, 302 F.3d 1104, 1126 (10th Cir. 2002) (emphasis added). At best, the Plaintiffs's citation suggests that Magistrate Judge Scott should have considered the exception–not adopted and incorporated it. Even then, Plaintiffs provide no evidence or support showing Magistrate Judge Scott failed to consider the exception.

Furthermore, Plaintiffs' assertion that "Courts in every federal circuit have applied the public interest exception to avoid the chilling future public interest litigation with massive bond requirements" overlooks a more recent decision in the Seventh Circuit. See generally Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453 (7th Cir. 2010). There, Justice Posner correctly stated that there is no public interest exception to Rule 65(c) and persuasively noted that any argument that nonprofit entities (even those "devoted to public goods of great social value, such as protection of the environment") should be exempted from having to post injunction bonds:

> flies in the face of Rule 65(c), which not only contains no exception but also states flatly that 'the court may issue a preliminary injunction or temporary restraining order only if the movant gives a security in an amount that the party considers

> proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Id. at 457. It appears, therefore, that any objection raised on a belief that the "public interest exception" requires the waiver or reduction of a bond, ordered after a full and fair hearing of all relevant evidence, is inappropriate and should be overruled.

Plaintiffs also claim that the currently ordered bond amount is "based on wishful thinking" and "fanciful projections," yet Plaintiffs fail to cite and, indeed, cannot cite to any concrete information to counter the sworn testimony and evidence concerning the Defendant-Intervenors' potential loss and damages. In fact, Plaintiffs' sole source of counterfactual financial loss information is derived from information contained in a series of press releases, whereby the Defendant-Intervenor Valley Meat provided general information regarding the operation of its facilities. In the absence of opposing evidence, the Magistrate Judge appropriately reviewed and considered the fact-specific evidence of damages that was presented to him.

Plaintiffs next object to the scope of the Bond Order by arguing that the Defendant-Intervenors' potential harms were self-inflicted. More specifically, the Plaintiffs assert that Defendant-Intervenors, despite meeting all necessary regulatory requirements, were on notice that their proposed equine processing activities were subject to litigation and injunctive relief and, therefore, their current harms are "self-inflicted." Such a proposition would effectively preclude any and all future security bonds because a party requesting relief could simply argue that the enjoined party inflicted the loss on itself by choosing to operate in a controversial business environment. Further, the Plaintiffs' cited authority provides little support, or shelter,

for their argument. Here, Defendant-Intervenors took no action that "increase[d] the potential for harm [when] the injunction was ordered against them." See Bad Ass Coffee Co. of Hawaii, Inc. v. JH Enterprises, LLC, 636 F.Supp. 2d 1237, 1251 (D.Utah 2009). In fact, the only actions taken by Defendant-Intervenors included seeking the advantage of changes in federal law by updating their facilities for equine processing, complying with all federal regulatory requirements, and waiting patiently for federal meat inspectors to begin work.

Finally, Plaintiffs allege that Magistrate Judge Scott clearly erred by failing to appropriately consider Defendant-Intervenors' ability to mitigate their potential damages. As with Plaintiffs' other objections, this particular claim lacks the sufficient showing to amend the Bond Order. Here, the argument presented by the Plaintiffs would require the Defendant-Intervenors, and similarly situated entities, to mitigate potential losses resulting from third party injunctions by simply foregoing its business plans and converting to another type of facility and operation. Requirements such as those presented by the Plaintiffs remain entirely too burdensome. See Div. No. 1, Detroit, Broth. Of Locomotive Eng's v. Consol. Rail Corp., 844 F.2d 1218, 1229 (6th Cir. 1988) (stating that the efforts of the parties and the court to investigate alternative, less costly methods of avoiding threatened losses "should not be overly burdensome."). As with the self-inflicted claim, this requirement would effectively preclude any and all future security bonds because a party suing for injunctive relief could simply argue that

the enjoined party may mitigate its loss by giving up its business and pursuing a new line of work.[4]

Because the Plaintiffs' objections fail to raise facts or law that would render Magistrate Judge Scott's Bond Order clearly erroneous or contrary to law, this Court should overrule the objections and uphold the Bond Order.

III. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Modify the Temporary Restraining Order and Objection to Magistrate's Order Requiring Injunction Bond should be denied and overruled.

RESPECTFULLY SUBMITTED this 21st day of August, 2013.

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[4] Plaintiffs note the recent decision by Responsible Transportation to forego plans to open a horse processing facility and instead apply for a permit to process cattle. While the new proposal may help get employees back to work, it is not a mitigation attempt; rather it represents a complete modification of business plans, business operations, new suppliers, new consumers and a different marketplace.

CERTIFICATE OF SERVICE

I certify that I filed the foregoing document on August 21, 2013, using the ECF System, which will send notification to all parties of record.

/s/Kathryn Brack Morrow
Kathryn Brack Morrow
BUDD-FALEN LAW OFFICES, LLC