

**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,)

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

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.)

**RESPONSIBLE TRANSPORTATION, L.L.C.’S RESPONSE TO
PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Responsible Transportation, L.L.C. (“RT”), by counsel Patrick J. Rogers LLC (Pat Rogers) and Simmons Perrine Moyer Bergman PLC (Kevin Visser and Kathleen Kleiman), hereby submits its response in opposition to Plaintiffs’ claim for injunctive relief and for the issuance of a temporary restraining order and as grounds therefore states as follows:

I. INTRODUCTION

Plaintiffs, countermanding both the executive and legislative branches of government, seek the extraordinary relief of grinding to a halt the long, deliberate, and safety-compliant plans of RT to begin operating an equine processing facility in Sigourney, Iowa. Plaintiffs seek to do so by circumventing RT's fundamental due process rights – depriving it of both notice and the right to be heard. RT now seeks to invoke its right to be heard, and asks that this Court refuse these disinterested Plaintiffs' request to, effectively, put compliant Iowa entrepreneurs out of business and employees out of work without the right to be heard (nor being even notified of the lawsuit which targets them, by name).

Based upon the extreme damage that will come to RT should Plaintiffs' motion be granted, the balance of harms weighs in favor of denying Plaintiff's request for injunctive relief. For these reasons, as more fully set forth below, RT requests that the Court deny Plaintiffs' motion for a preliminary injunction or temporary restraining order.

II. BACKGROUND

RT was founded in 2010 by three Iowa residents, Chase Greiner, Travis Bouslog and Keaton Walker (collectively the "Founders"), as students and after graduation from the University of Iowa. (*See* Declaration of Keaton Walker filed herewith in support of this Motion and in support of Responsible Transportation's Motion to Intervene ("Declaration"), ¶3.)

Following the restoration of funding by the United States Department of Agriculture ("USDA") for meat inspectors for equine processing plants in 2011, the Founders proceeded to raise equity capital of \$1.5 million from 22 local investors and obtained bank financing of approx. \$1.4 million to acquire, refurbish and start-up a humane, locally operated equine-

processing facility in Sigourney, Iowa. (Declaration, ¶3.) RT purchased the vacant meat processing plant in Sigourney, Iowa, which was formerly owned by West Liberty Foods, LLC and Protein Processing, L.L.C. in December 2012. (Declaration, ¶5.) The plant formerly employed approximately 150 people. (Id.) RT has spent more than \$1,000,000.00 over the last six months renovating the facility. (Id.)

The location of a local processing plant will avoid the current situation where equine are shipped in inhumane conditions to Mexico and Canada for processing outside the United States. (Declaration, ¶4.) RT will sell the processed meat domestically for use by zoos and outside the United States for human consumption. (Id.) The name “Responsible Transportation” reflects the Founders’ desire to present a more responsible solution to the excess supply of equine and need for local equine processing. (Id.)

RT currently has five full time employees and one part time employee. (Declaration, ¶6.) As of July 17, 2013, RT has received 161 completed job applications. (Id.) RT has extended 11 contingent offers to employees, but cannot commit to hiring them until the legal challenges to the USDA equine processing inspection program are cleared. (Id.) If the legal challenges are resolved favorably, RT plans to hire over 20 employees by the end of 2013. (Id.)

RT is prepared to commence operations immediately. (Declaration, ¶7.) RT has delayed its request for issuance of a USDA inspector in light of Plaintiff’s Motion to for a Temporary Restraining Order and Preliminary Injunction in this action (the “Action”). (Id.) RT is expressly named in footnote 1 in Plaintiffs’ Motion as a business that Plaintiffs seek to enjoin the USDA from issuing an inspector required by RT to commence operations.(Id.)

This is not the first time that Front Range Equine Rescue and the Humane Society of the United States have sought to prevent RT from commencing operations. (Declaration, ¶8.) The Plaintiffs, Front Range Equine Rescue and the Humane Society of the United States, previously filed a Petition for Rulemaking of over 140 pages (including affidavits and exhibits) on May 14, 2013 with the Iowa Department of Inspections and Appeals, Food and Consumer Safety Bureau requesting that the Department adopt a rule that all equine meat be deemed adulterated under Iowa law unless the processed equine had an “equine passport.” (Id.) Because RT was the sole target of the Iowa petition, RT incurred significant legal fees responding to this Petition. (Id.) The Petition was denied by the Iowa DIA on July 12, 2013. (Id.) Plaintiffs Front Range Equine Rescue and the Humane Society of the United States filed a similar request for rulemaking with the USDA on or about April 6, 2012. (Declaration, ¶9.) That request was denied by the USDA on or about June 28, 2013. (Id.) Plaintiffs’ Motion was filed on July 2, 2013. (Id.)

RT has diligently completed and spent approximately \$1,000,000, considerable resources, and time in completing the process to receive a Grant of Inspection from the USDA with the result that the USDA approved RT for operation of the plant on July 2, 2013. (Declaration, ¶10.) RT also complied with numerous environmental requirements imposed in order to commence operations. (Declaration, ¶11-12.)

RT has proactively reached out to the local community in Sigourney, Iowa as a new employer and to address concerns the public may have to its operations. (Declaration, ¶15.) RT has held numerous public meetings in the area in which its Plant will operate to ensure that the community is aware of its operations and to keep open lines of communication with its community and its stakeholders. (Id.) Barbara Mohror, an individual referenced in

Plaintiffs' Complaint, is not known to have attended any such community outreach and is not believed to even be a resident of the area. The City of Sigourney has issued an impact statement that the operations of RT's plant will not have a negative impact. (Declaration, ¶16, Exhibit 1.)

RT cannot currently operate or generate revenue. (Declaration, ¶17.) This Motion has caused RT to stand idle. (Id.) As a result, RT has no revenues and is spending approximately \$60,000.00 per month in overhead expenses. (Id.) If this Motion is not dismissed – or injunctive relief denied – immediately, RT will exhaust its operating capital required to start operations and will not be able to open unless it raises additional funding. (Id.)

The Action has a direct and significant impact on RT's ability to operate and may cause the company to cease operations completely. (Declaration, ¶18.) The failure of RT to commence operations will have a detrimental impact on the local economy in Sigourney Iowa, on RT's investors, and on its current and future employees. (Declaration, ¶19.) RT's business has received significant support from various state, federal, and private agencies. (Declaration, ¶14.) These funds will be jeopardized if not lost completely if RT is unable to commence operations. (Declaration, ¶21.)

Each of the Founders has personally guaranteed the SBA loan of \$1.124 million as well as certain other financial obligations of the Company. (Declaration, ¶20.) If RT is unable to commence operations in the short term, the Company may be unable to repay the Loan and the Founders may become personally liable for repayment of the Loan which would result in financial devastation of the Founders. (Id.)

II. ARGUMENT

A. PRELIMINARY INJUNCTION STANDARD.

In determining whether or not to grant a preliminary injunction, the Court must consider the following factors:

- (1) the probability that the Plaintiffs will succeed on the merits;
- (2) the threat of irreparable harm to the Plaintiffs;
- (3) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; and
- (4) the public interest.

See *Awad v. Ziriox*, 670 F.3d 1111, 1125 (10th Cir. 2012)(citing *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir.2009)).

A preliminary injunction is an extraordinary remedy. *Fundamentalist Church of Jesus Christ of Latter–Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (citing *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir.2001)). Therefore, “the movant’s right to relief must be clear and unequivocal.” *Id.* Three types of preliminary injunctions are specifically disfavored: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *Id.* These three categories of disfavored preliminary injunctions place a heightened burden on the movant, requiring a showing that the four above-enumerated factors “weigh heavily and compellingly in its favor” in order to obtain a preliminary injunction. *Id.*

B. PLAINTIFF'S HAVE NOT SHOWN THEY ARE ENTITLED TO INJUNCTIVE RELIEF.

Plaintiffs seek to alter the status quo by requiring the government to cease its regularly conducted activities in relation to grants of inspection to equine abattoirs. The status quo is defined by “the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.” *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096 (10th Cir. 1991). The reality of the existing status in this case is the USDA's regularly conducted activities. Because Plaintiffs seek to alter the status quo, they must meet the heightened burden of showing the factors determining the right to injunctive relief weight heavily and compellingly in their favor. *Church of Jesus Christ of Latter-Day Saints*, 698 F.3d at 1301. Plaintiffs cannot meet the heightened burden showing they are entitled to injunctive relief. In fact, Plaintiffs have failed to carry their burden to meet even the minimum standards required to demonstrate the need for injunctive relief. Accordingly, their request must be denied.

In the interest of brevity, RT will defer any separate arguments it has to make with respect to the Plaintiffs' likelihood of success on the ultimate merits of their rather speculative claims (and expects to endorse and join in any arguments of the government or other intervenors in this regard). RT believes it is sufficient, as to this prong of the Rule 65 standard, to note that Plaintiffs are only now in this court, as a last ditch effort, having failed in each of the normal processes designed to address their supposed grievances. Most notably as to RT specifically, the State of Iowa has, within the past seven days DENIED the Petition for Rulemaking filed by Plaintiffs FRER and HSUS. (*See* Ruling, July 12, 2013, attached hereto as Exhibit A.) RT believes that Plaintiffs have commenced – and failed – in

sundry other efforts before those agencies of state and federal government charged with responsibility for oversight of the clean and safe production of meat. The likelihood of Plaintiffs' success seems foreshadowed by their uniform failure to date.

1. The potential injury to Responsible Transportation in granting the injunction far outweighs any potential harm to Plaintiffs.

Allowing Plaintiffs' request for an injunction would unfairly harm RT to an extent that far outweighs any speculative injury to Plaintiffs that denying the injunction would create.

As set forth above and in the accompanying Declaration, RT will suffer significant injury if Plaintiffs' request for injunctive relief is granted. (Declaration, ¶7, 17-21.) RT spent significant time and resources to gain support and approval for its equine processing facility in Sigourney, Iowa. (Declaration, ¶3-16.) In doing so, RT ensured its compliance with all USDA requirements and received a Grant of Inspection. (Declaration, ¶10, 12-13.) However, RT is unable to commence operations because of the ongoing threat of an injunction by Plaintiffs, but is still having to spend a significant amount of money in overhead expenses. (Declaration, ¶17.) If the injunction is granted, RT will be unable to operate its facility and may be forced to close down completely. (Declaration, ¶18.) Such a result would cause irreparable harm to RT, its Founders, as well as the community of Sigourney, Iowa. (Declaration, ¶19.)

A suspension of due process to allow the government to be enjoined could likely end the business and business development efforts of RT, resulting in the loss of \$1,500,000 in investment by 22 individuals, and the need to repay an almost like amount falling upon the shoulders of the three University of Iowa classmates who have borrowed this sum to finance a clean, safe, legally compliant equine abattoir. (Declaration, ¶3, 20.) While the loss of

\$3,000,000 by the Iowa entrepreneurs is significant, it is hardly the only harm which will result. The small community of Sigourney will lose a prospective employer (its citizens having had more than a dozen opportunities to inquire of RT's plans, face to face); at least 20 persons looking for work will be denied that work; and, despite the self-anointed angst of the Plaintiffs, equine animals destined to die will do so not under the rigorous watch of federal and state regulation, but by continued starvation in Southwestern deserts or by enduring transportation beyond American borders to die in largely unregulated situations. (Declaration, ¶4, 6, 15, 19.)

The balance of harms strongly favors denying the extraordinary relief sought. Barbara Mohror, the putative Iowa representative of the Humane Society of the United States in Plaintiffs' suit, does not even live in Sigourney, Iowa, where RT's plant is located. (*See* Complaint, Dkt. 1, p. 8, ¶25.) Plaintiffs claim that Ms. Mohror "regularly recreates with her family in the Sigourney area and will be injured if [RT] begins...operations." (*Id.*) Plaintiffs do not indicate *how* Ms .Mohror may be injured. This alleged "harm" is so speculative as to defy credulity and in any event does not approach the specific, concrete irreparable harm which will befall the workers and entrepreneurs who are the sub rosa victims of Plaintiffs' backdoor attempts to suspend the law. Morhor can avert her gaze or certainly recreate in the numerous other parks and streams of Iowa and can rely upon the governmental agencies which have ensured the cleanliness and safety of Iowa waterways.

Ms. Mohror is also not prohibited from lobbying her elected officials to actually change the law, which is the preferred and constitutionally recognized method of modifying the statutory rights of others. Plaintiffs were unable to shut down equine slaughter facilities for the reasons they seek during the 40 years prior to 2007; there is no reason to think the

exaggerated problems they claim should form the basis for a court to impose the statutory changes that Congress has not enacted.

The damages and injuries alleged by Plaintiffs are completely speculative in nature. Plaintiffs have not shown any link between Responsible Transportation's proposed equine processing facility in Sigourney, Iowa and any actual existing damage or harm. *See Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009) (denying injunction and finding no likelihood of success on the merits when the State of Oklahoma failed to establish a link between the land application of poultry litter and bacteria).

The Plaintiffs seek expansive and unwarranted relief. They ask this Court to disrupt the longstanding status quo of the government's highly effective meat safety program. The harm asserted, in RT's case, is that one of the individual member of the Humane Society of the United States, who is not a party to this action and who has not been deposed, might be required to recreate elsewhere or avoid RT's actual, legally-compliant, federally-inspected premises. This speculative "harm" pales in comparison to the effective bankruptcy of RT's nascent business. Even if Plaintiffs could argue a likelihood of success on the merits (which RT in no way concedes), the balance of harms is so strongly tilted, in RT's Iowa circumstances, that there is no justification for the imposition of the expansive and draconian relief Plaintiffs seek.

III. CONCLUSION

WHEREFORE, Responsible Transportation respectfully requests that the Court issue an Order denying Plaintiffs' request for injunctive relief against the Defendants and grants whatever further relief the Court deems just and necessary.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I CERTIFY THAT on this 19th day of July 2013 a true and correct copy of the foregoing was filed through the CM/ECF filing system which shall cause all counsel to receive notification of same.

By: s/ Patrick J. Rogers
Patrick J. Rogers