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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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|---|---|-----------------|
| RANCHERS CATTLEMEN ACTION |) | |
| LEGAL FUND UNITED |) | |
| STOCKGROWERS OF AMERICA; |) | |
| TRACY and DONNA HUNT, d/b/a THE MW |) | |
| CATTLE COMPANY, LLC; and KENNY and |) | |
| ROXY FOX, |) | No. 19-CV-205-F |
| |) | |
| Petitioners/Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | |
| UNITED STATES DEPARTMENT OF |) | |
| AGRICULTURE; ANIMAL AND PLANT |) | |
| HEALTH INSPECTION SERVICE; |) | |
| SONNY PERDUE, in his official |) | |
| capacity as the Secretary of Agriculture; |) | |
| and KEVIN SHEA, in his official |) | |
| capacity as Administrator of the Animal |) | |
| and Plant Health Inspection Service, |) | |
| |) | |
| Respondents/Defendants. |) | |

PETITIONERS' RULE 60(a) MOTION
RELATED TO FEDERAL ADVISORY COMMITTEE ACT CLAIM

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”); Tracy and Donna Hunt, d/b/a The MW Cattle Company, LLC (“Hunt”); and Kenny and Roxy Fox (“Fox”), by and through their attorneys, Harriet M. Hageman and the New Civil Liberties Alliance, and pursuant to Fed.R.Civ.P. 60(a), hereby request the Court to correct the February 13, 2020 “Order Dismissing Case for Lack of Jurisdiction” (ECF No. 21) specifically to address their claim based upon the Federal Advisory Committee Act. In support of this Motion Petitioners state as follows:

1. Petitioners filed their Petition for Review on October 4, 2019 (ECF No. 1).
2. Respondents filed their motion to dismiss on January 15, 2020 (ECF No. 10).
3. Respondents’ motion to dismiss was based on Federal Rule of Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim upon which relief can be granted).
4. Respondents’ Rule 12(b)(1) argument relates solely to Counts I (violation of 9 C.F.R. Part 86) and II (violation of the Administrative Procedure Act (“APA”), 5 U.S.C § 500 *et seq.*). The agencies claimed that by removing the offending “Factsheet” (imposing radio-frequency identification (“RFID”) requirements on the livestock industry) from their website and posting a statement announcing that “[the factsheet] is no longer representative of current agency policy” that the Petitioners’ claims challenging that document were moot. ECF No. 11 at 7. According to Respondents:

As discussed below, this latest action by APHIS has rendered Plaintiffs’ case moot because the agency is not proceeding with the action which forms the basis for Plaintiffs’ allegations of harm: the plan announced in the April 2019 Factsheet and its accompanying timeline.

Id.

5. Petitioners filed a brief in response to the agencies' motion to dismiss arguing that the "voluntary cessation" exception applies in this case and that Counts I and II were not moot.
6. On February 13, 2020, this Court entered its Order Dismissing Case for Lack of Jurisdiction, finding that "there is no live controversy at issue...." ECF No. 21 at 2. According to this Court: "... Petitioners' Petition seeking relief from the 2019 Factsheet is moot and this Court lacks subject matter jurisdiction to review *the agency decision to issue the Factsheet*, which is no longer effective." *Id.* at 8. (Emphasis added).
7. The Court's conclusion in that regard is based upon the fact that the agencies withdrew the Factsheet and that "it is not recognized as agency policy and DOA-APHIS has unambiguously stated that the requirements of the 2019 Factsheet **will not be implemented.**" *Id.* at 7. (Bolded emphasis in original). The Court also concluded that it was significant that the "corrective action taken by DOA-APHIS completely and irrevocably eradicated the effects of the alleged violations associated with *issuing the 2019 Factsheet.*" *Id.* at 8. (Emphasis added).
8. The Court's decision finding that Petitioners' claims were moot was based solely upon the agencies' withdrawal of the 2019 Factsheet and unambiguous representation that it does not represent current policy, the agencies' assurance that they would not implement its requirements, and that "any new proposal will afford ample opportunity for stakeholders to comment...." *Id.* at 7.
9. The agencies' action in withdrawing the 2019 Factsheet, as well as their assurances as summarized above, resolve only a portion of Petitioners' claims—Counts I and II.

10. This Court's Order dismissing this case is likewise limited to finding that the agencies have unequivocally stated that they have withdrawn and do not intend to enforce the requirements of the 2019 Factsheet and, as a result, there is no "case or controversy."
11. Petitioners, however, did not limit their claims to only challenging the existence and enforcement of the 2019 Factsheet. *See* ECF No. 1 at 32-46 (Counts I-V).
12. Petitioners also asserted independent claims under the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801-808; the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 (1972); and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq.* *See* ECF No. 1 at 40 (Count III alleging CRA violation); 40-44 (Count IV alleging FACA violation); 44-46 (Count V alleging RFA violation). In the course of briefing, Petitioners waived their claims under Counts III and V. Count IV, however, remains a live controversy.
13. Respondents sought dismissal of Count IV of the Petition pursuant to Rule 12(b)(6) arguing that Petitioners had failed to state a claim upon which relief can be granted. This Court did not address Plaintiffs' FACA claim in its Order dismissing the case for mootness.
14. While Petitioners asserted that Respondents violated the FACA *in the development of the 2019 Factsheet*, removal of the factsheet from the website did not moot this claim or the relief sought. *See* ECF No. 1 at 40-44 (Count IV alleging FACA violation); *see also id.* at 47 (seeking specific declaratory and other relief under FACA).
15. Petitioners' FACA claim stands on its own and is not dependent upon whether their claims under Counts I and II are moot as a result of Respondents withdrawing the 2019 Factsheet.
16. The FACA is directed to the *process, proceedings and activities* leading up to the policy underlying the 2019 Factsheet and its development, *e.g.*, who was in the room, who was

involved, who was “advising” the USDA and APHIS, how the policy came into existence, and what materials (studies, reports, memoranda, data, statistics, etc.) were developed in support and as a result of that allegedly defective process.

17. The FACA’s prohibitions, constraints, and requirements are separate and distinct from claims related to whether the agencies followed the proper notice-and-comment process. In fact, the FACA establishes entirely separate and distinct compliance obligations. In other words, the notice-and-comment requirements applicable to rulemaking procedures and the strictures pertinent to the FACA cannot be conflated into one procedural framework, with the idea that if an agency complies with one it has complied with both.
18. An agency can violate its notice-and-comment obligations and still comply with the FACA. Conversely, an agency can comply with the notice-and-comment requirement obligations of the APA, or moot an APA claim by withdrawing the offending document, while still violating the FACA by having relied upon an illegal advisory committee. That is the circumstance here. The agencies may have mooted their APA rulemaking violation by withdrawing the 2019 Factsheet, but that action cannot moot the FACA violation.
19. The issue here is not merely academic, especially given that the agencies have announced their intention to regroup and push forward with RFID requirements. While Petitioners agree that we do not know what those requirements may look like, we do know that the FACA prohibits the agencies from pursuing that stated goal by relying upon any of the work product that was generated in violation of that statutory scheme (discussed in greater detail below). The agencies, in other words, need to start over with work product completely untainted by any FACA violations. For us to ensure that happens Petitioners must obtain those documents that formed the foundation for the 2019 Factsheet.

20. The FACA imposes formal requirements on how an agency must conduct itself when it convenes an advisory committee. Section 2 of the FACA provides that “standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees[.]” and “the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees[.]” 5 U.S.C. App. 2 §§ (2)(b)(4) and (5). The FACA requires any agency that establishes an advisory committee to file a formal charter; publish notice of all meetings in the Federal Register; ensure that all meetings are open to the public; keep minutes of each meeting; make publicly available records, drafts, studies, and other documents; designate a Federal officer to attend each meeting; and ensure that membership of the committee is balanced and represents a cross-section of groups interested in the subject. *Id.*
21. Petitioners have alleged that Respondents violated the FACA by establishing several different “advisory committees” while failing to comply with the requirements set forth above. *See* ECF No. 1 at 40-48. Petitioners further allege that the agencies staffed these advisory committees with only “pro-RFID” individuals and that the livestock producers who opposed RFID-only requirements were excluded from the committees. *Id.* Petitioners claim that the agencies developed the 2019 Factsheet in meetings and calls with one or more small, focused, insular group or groups who represented only one limited special interest and perspective. *Id.* Those meetings and calls were conducted in violation of the requirements of the FACA. *Id.* Respondents conducted business in this manner for the sole purpose of precluding any other viewpoint, including that of the Petitioners, from being heard. *Id.*

22. As explained in their brief in response to the agencies' motion to dismiss: "The livestock producers bear the brunt and expense of any RFID mandate. They suffer the economic, budgetary, and operational consequences associated with RFID requirements. They are the targets of the Factsheet. They have suffered an 'injury in fact' by Respondents' failure to follow specific procedural requirements. (Citation omitted). They have every right to find out what Respondents did, why they did it, when they did it, who was involved, and who stands to benefit." ECF No. 16 at 24.
23. The Petitioners "enjoy these rights regardless of whether Respondents ultimately withdrew the Factsheet. This sordid history in fact underscores the reason as to why it is imperative that they proceed with discovery—so that they don't wake up in just a few short months with yet another heart-stopping unlawful federal mandate requiring them to fundamentally alter how they handle their livestock and manage their operations or be denied access to the interstate markets." *Id.*
24. Further, "[t]he FACA claim is designed to uncover the genesis and background of the Factsheet. It is imperative that Petitioners be allowed to proceed with prosecuting this claim and conducting discovery to find out what in the heck happened here." *Id.*

Through the passage of FACA, Congress sought to recognize the importance of having advisory committees to the Executive Branch be completely open to public observation and comment. *See generally Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 459, 109 S.Ct. 2558, 2569, 105 L.Ed.2d 377 (1989) (principal purpose to enhance public accountability of advisory committees); *Washington Legal Foundation v. United States Dept. of Justice*, 691 F.Supp. 483, 490 (D.D.C.1988) (central purpose to open to public scrutiny the manner in which the government obtains advice from private individuals), *aff'd sub nom. Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989).

Because FACA's dictates emphasize the importance of openness and debate, the timing of such observation and comment is crucial to

compliance with the statute. Public observation and comment must be contemporaneous to the advisory committee process itself. (Citation omitted). If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless. ... As the district court aptly pointed out:

A simple “excuse us” cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend.... The court sees no reason to retreat from its conclusion that FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural shortcomings are significant and the report potentially influential to the outcome.

Memorandum Opinion of December 23, 1993 (R2–61), 1993 WL 646410.

Alabama-Tombigbee Rivers Coal. v. Dep’t of Interior, 26 F.3d 1103, 1106–07 (11th Cir. 1994).

25. As we previously explained, Petitioners’ FACA claim serves another purpose as well—to prevent Respondents from relying upon the “fruit of the poisonous tree.”

We agree with the district court that to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act. Furthermore, “[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.” *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 2559, 61 L.Ed.2d 176 (1978). The broad equitable power necessarily encompasses the ability to fashion equitable relief in order to “adjust and reconcile public and private needs.” *United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225, 227, 89 S.Ct. 1670, 1671, 23 L.Ed.2d 263 (1969). We find injunctive relief as the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA’s clear requirements. Anything less would be tantamount to nothing.

Id.

26. Petitioners must be allowed to obtain information about the advisory committees, and Respondents must be enjoined from using or relying upon any of the work product, reports, and materials generated by the unlawful advisory committees.
27. Rule 60(a) provides in relevant part that “[t]he court may correct ... a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.”
28. The Court’s February 13th order has omitted addressing the Petitioners’ FACA claim. Plaintiffs believe that it is important to address Count IV of their Petition for the reasons stated above.
29. Petitioners request the Court to issue a supplemental order making clear that their FACA claims remain viable, that they have stated a claim upon which relief can be granted, and that they may proceed with discovery on those claims.
30. In the alternative, and to the extent there is any argument that Petitioners’ FACA claim is somehow inadequate under a Rule 12(b)(6) standard (failure to state a claim with all factual allegations presumed to be true), Petitioners should be allowed leave to amend the Petition for Review.
31. U.S.D.C.L.R. 7.1 CERTIFICATION: Counsel for Petitioners has conferred by telephone with Assistant United States Attorney Nicholas Vassallo, counsel for Respondents. He has stated that he opposes the relief requested herein.

WHEREFORE, Petitioners respectfully request that this Court enter a supplemental Order denying Respondents’ motion to dismiss as to their FACA claim, thereby allowing Petitioners to proceed with discovery as to Count IV, and for such other relief as is just under the circumstances.

Dated this 18th day of February, 2020.

Attorneys for Petitioners/Plaintiffs

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on February 18, 2020, a copy of PETITIONERS' RULE 60(a) MOTION RELATED TO FEDERAL ADVISORY COMMITTEE ACT CLAIM was filed with the Court's ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Harriet M. Hageman

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