IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KEVIN GUBBELS, ET AL.	:	
	:	CIVIL ACTION NO.: 4: 20-cv-3060
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SONNY PERDUE, ET AL.	:	
	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Plaintiffs Kevin Gubbels and Insure My Honey, Inc., move for a preliminary injunction pending trial in this matter against Defendants, Sonny Perdue, Secretary of Agriculture, Martin R. Barbre, Administrator U.S. Risk Management Agency, U.S. Department of Agriculture (USDA) and U.S. Risk Management Agency (RMA), vacating their February 21, 2020 Suspension and Proposed Debarment Order against Plaintiffs.

Unless enjoined Defendants will continue to deprive Plaintiffs of their "very economic life" without observing either the binding regulations or constitutional limits governing suspension and debarment procedures. *See Old Dominion Dairy Prod., Inc. v. Sec'y of Def.*, 631 F.2d 953, 968 (D.C. Cir. 1980). USDA, acting through the RMA has ignored these truisms and wielded its awesome power of suspension without observing the applicable regulatory requirements or following key constitutional protections. The agencies have indefinitely suspended Kevin Gubbels and his insurance agency, Insure My Honey, Inc., from participating in the latter's business of selling and servicing federal crop insurance policies. They imposed such suspension without clearly identifying a lawful basis for the decision and without providing

him with a hearing where he could contest disputed facts underlying the suspension, all while refusing to issue a final decision in a reasonable period of time. The agencies have even forbidden Mr. Gubbels's independent agents from issuing or renewing any crop insurance policies despite the fact that they were never named in the suspension order and they are not under Mr. Gubbels's control. Moreover, Mr. Gubbels has no hope of having a hearing in front of an impartial adjudicator, as the existing regulations consolidate the roles of both prosecutor and judge in the agency head.

Neither the applicable regulations nor the Fifth Amendment's Due Process Clause sanction the agencies' conduct. This situation is so dire and the Defendants' acts so egregious that they must be enjoined from continuing this unlawful conduct while this action is pending.

I. FACTS

A. Relevant Regulations Governing Suspension and Debarment

2 C.F.R. Part 180 sets out guidelines for agencies across the federal government in how to implement non-procurement debarment and suspension. USDA has fully implemented those guidelines in binding agency regulations as set out in 2 C.F.R. Part 417. USDA's regulations "give regulatory effect[] for" the standards enunciated in 2 C.F.R. Part 180. 2 C.F.R. § 417.10.

Both sets of regulations apply the basic premise that suspension and debarment proceedings must be "consistent with principles of fundamental fairness." 2 C.F.R. § 180.610; 2 C.F.R. § 417.60.

Suspension and debarment are escalating sanctions that bear on a contractor's present ability to complete contracts with the government. 2 C.F.R. § 180.605. Suspension is a "temporary status of ineligibility … pending completion of an investigation or legal proceedings." 2 C.F.R. § 180.605(a). Suspension can only be imposed if an agency official "(1)

Ha[s] *adequate evidence* that there may be a cause for debarment of a person; and (2) Conclude[s] that *immediate action* is necessary to protect the Federal interest." *Id*. (emphasis in original). Adequate evidence is "information sufficient to support the reasonable belief that a particular act or omission has occurred." 2 C.F.R. § 180.900. Suspension can be imposed even without "giving the person an opportunity to contest" the suspension. 2 C.F.R. § 180.605(c). Instead, an agency can suspend a person, and it is then up to the contractor to seek "an opportunity to contest the suspension and have it lifted." *Id*.

Suspension "is a serious action" that a suspending officer may impose "only when the official determines that "there exists" "adequate evidence to suspect" the contractor has violated a provision warranting debarment, and "[i]mmediate action is necessary to protect the public interest." 2 C.F.R. § 180.700(b), (c). When suspension is imposed without notice, an official must "promptly" send the contractor a Notice of Suspension advising him that he has been suspended, "that [his] suspension is based on" the specific "cause(s) upon which the suspending official relied under 180.700 for imposing suspension." 2 C.F.R. § 180.715. A "suspending official must make a written decision whether to continue, modify or terminate" a suspension "within 45 days of closing the official record." 2 C.F.R. § 180.755; *see also* 2 C.F.R. § 417.755 ("The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record."). A suspension may last "until the conclusion" of any follow-on debarment proceedings. 2 C.F.R. § 180.760(a).

A contractor can "contest a suspension" by providing "the suspension official with information in opposition to the suspension." 2 C.F.R. § 180.720. A contractor "*will* have an opportunity to challenge the facts" supporting the suspension order unless the "presentation in opposition to the suspension are not factual in nature, or are not material to the suspending

official's initial decision to suspend, or the official's decision whether to continue the suspension." 2 C.F.R. §§ 180.735(a)(3), (b) (emphasis added).

Debarment is a "final determination that a person is not presently responsible" to contract with the government. 2 C.F.R. § 180.60. An agency official "[m]ust conclude, based on a *preponderance of the evidence*, that the person has engaged in conduct that warrants debarment." *Id*. (emphasis in original). An agency official may only impose debarment "*after* giving the respondent notice of the action and an opportunity to contest the proposed debarment." *Id*. (emphasis in original).

As relevant here, debarment may only be based on a "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction[.]" 2 C.F.R. §§ 180.800(b); 417.800(b).[1]

If a debarring official proposes to debar a contractor, he must send a "Notice of Proposed Debarment," which must advise the respondent:

> (a) That the debarring official is considering debarring you;
> (b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;
> (c) Of the cause(s) under § 180.800 upon which the debarring official relied for proposing your debarment;
> (d) Of the applicable provisions of this subpart, subpart F of this part, and any other agency procedures governing debarment; and
> (e) Of the government wide effect of a debarment from procurement and nonprocurement programs and activities.

2 C.F.R. § 180.805.

[1] Debarment may be premised on other grounds, such as a conviction for certain offenses involving fraud or dishonesty, or other causes "so serious or compelling [in] nature that it affects your present responsibility" to contract with the government. 2 C.F.R. § 180.800(a), (d). However, the notice at issue in this case cited only 2 C.F.R. § 180.800(b) as a basis for debarment. *See* Exhibit B (Notice of Suspension and Proposed Debarment).

The "agency has the burden to prove that a cause for debarment exists." 2 C.F.R. § 180.855(a). To meet that burden, it "must establish the cause for debarment by a preponderance of the evidence." 2 C.F.R. § 180.850(a). Only if the initial "cause for debarment is established" does the burden shift to the respondent of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary." 2 C.F.R. § 180.855(b).

The regulations provide a respondent the "opportunity to contest the proposed debarment," including the opportunity to submit "information in opposition." 2 C.F.R. §§ 180.810, 180.815. A contractor "*will* have an additional opportunity to challenge the facts" at a contested hearing unless there is no "genuine dispute over facts material to the proposed debarment." 2 C.F.R. § 180.830(a), (b) (emphasis added). Nevertheless, the hearing is "informal" and may be conducted by the same debarment official who issued the initial suspension and notice of proposed debarment. 2 C.F.R. §§ 180.835, 180.840. "The debarring official must make a written decision whether to debar within 45 days of closing the official record." 2 C.F.R. §§ 180.870(a), 417.870(a).

A debarring official has discretion for how long the debarment may last, but it "should not exceed three years" barring extraordinary circumstances. 2 C.F.R. §§ 180.865(a), 417.865(a).

The suspension and debarring official need not be a neutral party. Indeed, the official is either the "agency head" or any "official designated by the agency head." 2 C.F.R. §§ 180.930, 180.1010. For USDA, this can include the "head or an organizational unit within USDA[.]" 2 C.F.R. §§ 417.930(b), 417.1010.

The official only has the power to "exclude" a person who "has been, is, or may reasonably be expected to be a participant or principal in a covered transaction." 2 C.F.R. §

180.150. The official does so by initiating the action against a "respondent," which is, by definition, "a person against whom an agency has initiated a debarment or suspension action." 2 C.F.R. § 180.1000. Once disqualified, a respondent "is prohibited from participating" in federal transactions. 2 C.F.R. § 180.935. Moreover, the suspension or debarment is effective against "all of [the] divisions and other organizational elements" of a respondent unless otherwise limited. 2 C.F.R. § 180.625(a). Such disqualification can be effective against an "affiliate of a participant" *only if* that affiliate is "(1) Officially name[d] … in the notice; and (2) Give[n] the … opportunity to contest the action." *Id*. at (b). Affiliates are limited to those who are under the "control" of the respondent. 2 C.F.R. § 180.900.

An "excluded person" "may not be a participant or principal in [a covered] transaction[.]" 2 C.F.R. § 180.205(c). A "principal" is "an officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction." 2 C.F.R. § 180.995(a).

B. Mr. Gubbels's Suspension and Proposed Debarment

Kevin Gubbels is a native of Nebraska who has been involved with agriculture his entire life. (Exhibit A (Affidavit of Kevin Gubbels).) He began his own farming operation at the age of 12 and has worked either as a farmer or in adjacent roles ever since. (Exhibit A.)

Mr. Gubbels began selling crop insurance in 2009, slowly developed his own business. (Exhibit A.) In 2016 he began selling Apiculture Pilot Insurance and Pasture, Rangeland, Forage (PRF) programs through the Federal Crop Insurance Program (FCIP), administered by USDA's RMA. He sold these policies through his corporate entity, Insure My Honey, Inc. (Exhibit A.)

In 2019, Insure My Honey, Inc. had independent contractor relationships with 60 crop insurance agents operating in 25 different states. (Exhibit A.) Mr. Gubbels never had direct

management or supervisory authority over the contracting agents. (Exhibit A.) Together the agents sold more than $12 million in FCIP insurance premiums. (Exhibit A.) Insure My Honey, Inc. had net revenues of approximately $1.7 million in 2019. (Exhibit A.)

As an FCIP agent Mr. Gubbels agreed to be bound by the Standard Reinsurance Agreement issued by the Federal Crop Insurance Corporation (FCIC). Section IV(h)(2) of the applicable agreement provided a catchall saying, "[T]he Company and its affiliates shall comply with FCIC procedures[.]"

PRF policies help protect farmers against loss due to a lack of precipitation. For 2020 policies, the sales closing date *to agents* was November 15, 2019. However, agents were then required to submit the policy applications to an approved insurance provider (AIP) by December 9, 2019. RMA's processing date *from AIPs* to RMA was December 15, 2019.

On December 3, 2019, Mr. Gubbels made a presentation at an Imperial County Farm Bureau meeting in Imperial County, California. At the meeting, Mr. Gubbels represented to farmers that they could still apply for 2020 PRF policies, but insisted that they apply no later than December 5, 2019, so that he could submit and process the applications to RMA before the December 9th deadline.

At the meeting Mr. Gubbels noted that prior PRF policies had "paid out" in California for 8 out of 10 years and that it resulted in a "profit over premium cost" of $3.60 per acre over the last 20 years. (Exhibit B (March 11, 2020 Affidavit of Kevin Gubbels).) Mr. Gubbels made sure to describe the program as a "safety net" and a risk mitigation strategy. (Exhibit B.) Mr. Gubbels also discussed multiple crop insurance programs but did not assert that a producer could participate in both the PRF program and the Forage Production program. (Exhibit B.)

On February 21, 2020, Martin R. Barbre, Administrator for the RMA, sent Mr. Gubbels a Notice of Suspension and Proposed Debarment from Participation in United States Government Programs. (Exhibit C (Notice of Suspension and Proposed Debarment).) Pursuant to the notice Administrator Barbre "immediately excluded [Mr. Gubbels] from participating as either a participant or a principal in covered transactions under United States non-procurement and procurement programs through the executive branch of the United States Government." (Exhibit C at 3.) Administrator Barbre further "propose[d] to debar [Mr. Gubbels] for three years from participating in programs of the United States Federal government, to commence upon the issuance of a final notice of government-wide debarment." (Exhibit C at 3.) The suspension was ongoing "pending the completion of debarment proceedings." (Exhibit C at 3.)

Administrator Barbre alleged that Mr. Gubbels merited suspension pursuant to 2 C.F.R. § 180.800(b)(3) and 2 C.F.R. §§ 180.700(b),(c), which permitted suspension based on a "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction[.]" (Exhibit C at 2.)

Administrator Barbre made three allegations. First, he alleged that Mr. Gubbels violated the catchall provision at Section IV(h)(2) of the Standard Reinsurance Agreement, when he "misrepresented the PRF application deadline as December 6, 2019, which is three weeks later than the actual deadline." (Exhibit C at 2-3.) Second, he alleged that Mr. Gubbels "misrepresented FCIC policy and procedure during your presentation by falsely claiming that producers may double-insure their alfalfa crop through yield protection and rainfall index protection," when "section 17 of the Rainfall and Vegetation Index Plan Common Policy, producers must not double-insure their alfalfa crop through yield protection and rainfall index

protection." (Exhibit C at 3.) Third, Administrator Barbre alleged that Mr. Gubbels "publicly advocated that the FCIP is not a risk management tool, but rather an investment tool." (Exhibit C at 3.) The administrator did not assert that the advocacy allegations violated any provision of the Standard Reinsurance Agreement or any other law or regulation. (*See* Exhibit C at 3.)

Administrator Barbre concluded "that adequate evidence exists to support cause for debarment and that immediate action is necessary to protect the public interest[.]" (Exhibit C at 2.) Specifically, Administrator Barbre said that he had reviewed an email sent by the Imperial County Farm Bureau that had summarized *what it expected* Mr. Gubbels to present at the December 3, 2019, meeting and "information from individuals who attended" the presentation, which he considered to be "adequate evidence." (Exhibit C at 2.) Administrator Barbre also concluded that these were "past misrepresentations" and since Mr. Gubbels had "ongoing involvement" with FCIP, "immediate action [wa]s necessary to protect the public interest." (Exhibit C at 2.) Ultimately the administrator determined that Mr. Gubbels's actions "indicate[] a serious lack of business honesty and integrity demonstrating that [Mr. Gubbels is] not presently responsible, which poses a significant risk to the government." (Exhibit C at 4-5.)

On March 11, 2020, through counsel, Mr. Gubbels opposed the suspension and proposed debarment in a letter and affidavit. (Exhibits B, D (Letter in Opposition).) Mr. Gubbels also requested a hearing to challenge the suspension. (Exhibit D at 1.) Mr. Gubbels did not contest that he accepted applications after the November 15th deadline for PRF, although he argued that any misrepresentations were not materially misleading because all applications were submitted to RMA by the December 9th deadline. (Exhibit D at 3.) Mr. Gubbels challenged the evidence that he had informed producers that they could double-insure their alfalfa crops, and included a sworn affidavit saying that he had not made that representation or, if he had, he had misspoken

while discussing multiple programs. (Exhibits B at ¶ 19, D at 3.) Third, Mr. Gubbels noted that the allegation regarding the use of terms "returns" and "profits" was both taken out of context and not a violation of any agreement, regulation or statute. (Exhibit D at 4.) In his sworn affidavit, Mr. Gubbels said that he had merely noted truthfully that PRF programs had "paid out" in 8 of 10 previous years, and yielded a "profit over premium cost" of $3.60 per acre over the last 20 years. (Exhibit B at ¶ 20.) Mr. Gubbels attested, however, that he always represented the program as a "risk mitigation strategy" not an income opportunity. (Exhibit B at ¶ 21.)

On March 13, 2020, Administrator Barbre issued a letter entitled "Important Clarification Regarding Your February 21, 2020 Notice of Suspension and Proposed Debarment From Participation in United States Programs." (Exhibit E (Clarification Letter).) In the letter, Administrator Barbre purported to clarify the scope of the suspension and proposed debarment because Mr. Gubbels was the "principal" of Insure My Honey, Inc. (Exhibit E at 1.) Thus, the administrator concluded that Mr. Gubbels's "ownership and control over Insure my Honey, Inc. [] qualifies [him] as a principal under the suspension and debarment regulations." (Exhibit E at 1.) Administrator Barbre asserted that neither entity could "issue or renew any crop insurance policies." (Exhibit E at 1.) Administrator Barbre cited to 7 C.F.R. §§ 180.205(c), and 180.995 as the basis for his conclusion. (Exhibit E at 1.)

On March 25, 2020, Administrator Barbre conducted a telephone hearing with Mr. Gubbels's counsel concerning the suspension. No testimony was taken at the hearing, and the administrator did not engage in a factfinding proceeding.

On March 31, 2020, Sandy Sanchez, Director of RMA's Western Regional Compliance Office, sent a letter to all of Mr. Gubbels's independent contractor insurance agents. (Exhibit F (Director Sanchez Letter).) The letter asserted that "as an employee or affiliate of Kevin

Gubbels, you may not issue or renew any crop insurance policies on behalf of Mr. Gubbels" at his insurance agency. (Exhibit F at 1.)

On April 2, 2020, Mr. Gubbels provided Administrator Barbre with a supplemental letter and video expressing contrition for accepting PRF applications after the deadline. Administrator Barbre responded by email saying, "My problem isn't just the sales after SCD but the way he has presented this program. Mr. Gubbels has made a grave error and I've got to figure out how to deal with it. I really don't want to make any more comments yay or nay until the Compliance office has finished their investigation." (Exhibit G (Administrator Barbre Email).)

To date, Administrator Barbre has not issued either a notice of modification or continuance of the suspension order, or any action on the proposed debarment order. He has also not held an evidentiary hearing on any matter.

II. ARGUMENT

A. Jurisdiction

The Administrative Procedure Act (APA) entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... to judicial review thereof." 5 U.S.C. § 702. 5 U.S.C. § 706(2)(A) directs a court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" "Thus, under the APA, a challenged agency action—including the debarment decision of an agency's debarring official—must be set aside if it is found to be, inter alia, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 52 (D. D.C. 2017) (citation omitted); *see also Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994) ("Our review of [an agency]'s

debarment decision is ... governed by the traditional 'arbitrary and capricious' standard set forth in the APA[.]").[2]

The APA also requires courts to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). The agency gets no deference on questions of constitutional law. *Id*. at § 706(2) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Servs.*, 852 F.3d 990, 999-1000 (10th Cir. 2017) ("[W]e review de novo claims alleging constitutional abuse by an agency.") (citations omitted); *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1179 (D.C. Cir. 2014) ("constitutional challenge" to agency action was "subject to *de novo* review").[3]

The APA further provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court ... may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705; *see also B & D Land &*

[2] "[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Thus, a person suspended or debarred may generally seek intervention in federal court even if informal administrative channels of relief still exist within the agency. *See id.* at 142.

[3] Alternatively, the Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" federal officials violating federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, --- U.S. ----, 135 S. Ct. 1378, 1384, 191 L.Ed.2d 471 (2015); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. Moreover, while "the APA is the general mechanism by which to challenge final agency action" "this does not mean the APA forecloses other causes of action." *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019). Thus, a court has the equitable power to entertain a constitutional claim even if it is not reviewable under the APA—"claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." *Id*. To the extent that any of Mr. Gubbels's constitutional claims are not cognizable under the APA, he brings them here as a matter of equity under this Court's inherent jurisdiction.

Livestock Co. v. Conner, 534 F. Supp. 2d 891, 905 (N.D. Iowa 2008) ("5 U.S.C. § 705 permits a reviewing court to enjoin agency action pending judicial review and that the standards for a preliminary injunction pending judicial review under the statute are the same as the standards for issuance of a preliminary injunction under the Federal Rules of Civil Procedure."). Accordingly, courts have preliminarily enjoined agency debarment orders upon an appropriate showing. *See Phillips v. Mabus*, 894 F. Supp. 2d 71, 78 (D. D.C. 2012) (entering preliminary injunction related to *de facto* debarment order); *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191, 192 (D. D.C. 1990) (granting *permanent* injunction on APA debarment claim upon application for preliminary injunction); *Art-Metal-USA, Inc. v. Solomon*, 473 F. Supp. 1, 8 (D. D.C. 1978) ("Accordingly, a preliminary injunction will issue to enjoin further unlawful acts of debarment against Art Metal and to restrain defendants from perpetuating its prior unlawful acts of debarment."). Courts have also entertained requests for preliminary injunctions in federal district court on the merits when an agency issues a temporary suspension order. *See, e.g.*, *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 210 (D. D.C. 2012) (reviewing request for preliminary injunction against suspension order on the merits under the APA); *Novelty Distributors, Inc. v. Leonhart*, 562 F. Supp. 2d 20, 28 (D. D.C. 2008) (same); *Keysource Med., Inc. v. Holder*, No. 1:11-CV-393, 2011 WL 3608097, at *9 (S.D. Ohio Aug. 16, 2011) (same).

Mr. Gubbels is entitled to a preliminary injunction upon a showing of: (1) a likelihood of success on the merits; (2) a likelihood that he will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008); *accord* Fed. R. Civ. P. 65; *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

B. Mr. Gubbels Has a Likelihood of Success on the Merits

1. As Set Out in Count I of Plaintiffs's Complaint, USDA's Suspension and Proposed Debarment Order Was Arbitrary and Capricious as It Was Issued Contrary to the Agency's Regulations

"It is 'axiomatic,' … 'that an agency is bound by its own regulations.'" *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (citation omitted). "Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect." *Id*. (citation omitted). "Thus, an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations." *Id*. (citation omitted). Indeed, when an agency "ignores its own regulations and imposes a debarment that does not adhere to the procedural due process mandates of [its regulations], it has acted arbitrarily and capriciously, no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be." *Friedler*, 271 F. Supp. 3d at 61.

USDA did not follow its own regulations before imposing an indefinite suspension order against Mr. Gubbels, Insure My Honey, Inc., and all of the independent contractor insurance agents. The suspension and proposed debarment order was arbitrary and capricious agency action and is therefore invalid as a matter of law. [4]

First, Mr. Gubbels lacked adequate notice of the specific charges against him that served as the basis for the suspension order and proposed debarment. The regulations unequivocally

[4] USDA is not entitled to any deference to its interpretation of the suspension and debarment regulations. "[R]eviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administrate." *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991) (citation omitted). The suspension and debarment regulations apply across the entire federal government for non-procurement matters and are thus outside of USDA's expertise. *See Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) (explaining that "we do not defer to the agency either—at least with respect to its interpretation of the [procurement debarment regulations]—because that regulation was the joint product of, and must be interpreted by, three different agencies"); *Friedler*, 271 F. Supp. 3d at 53 (deference to agency concerning debarment regulations was "inappropriate" because they applied across government). Thus, this Court must construe the relevant regulations *de novo*.

require that, "consistent with principles of fundamental fairness," 2 C.F.R. §§ 180.610. 417.60, when a suspension order is issued without notice the suspension official must "promptly" send the contractor a Notice of Suspension advising him that he has been suspended, and "that [his] suspension is based on" the specific "cause(s) upon which the suspending official relied under 180.700 for imposing suspension." 2 C.F.R. § 180.715. In turn, 2 C.F.R. § 180.700(b) allows, as relevant here, for a suspension based on the provisions justifying debarment—a "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction[.]" *See* 2 C.F.R. §§ 180.800(b), 417.800(b). The "Notice of Proposed Debarment" must also "advise the respondent" of "the cause(s) under §180.800 upon which the debarring official relied for proposing your debarment[.]" 2 C.F.R. § 180.805.

The notice regulations serve a critical due process role, so as to ensure a contractor has a fair opportunity to respond to the allegations against him. *See Friedler*, 271 F. Supp. 3d at 57 (discussing parallel non-procurement regulations). The regulations provide that the procedures must be "consistent with the principles of fundamental fairness," 2 C.F.R. §§ 180.610, 417.60, "and fundamental fairness unquestionably includes the basic right to notice and an opportunity to respond[.]" *Friedler*, 271 F.Supp. 3d at 59. As a result, if an agency proposes to debar a contractor for reasons not listed in the initial notice, it violates its regulations and any suspension or debarment order must be vacated. *See id*. This is because the contractor has no ability to demonstrate that the agency's "conclusion were factually and legally deficient" before suffering the major sanction of preclusion from government contracts. *Id*.

Here, Mr. Gubbels did not receive fair notice of all of the bases for his suspension and proposed debarment. The Notice of Proposed Debarment, which also served as the suspension order, purported to set out three bases for the suspension and proposed debarment. (Exhibit C at 2-3.) The notice also purported to rely on 2 C.F.R. § 180.800(b)(3) and 2 C.F.R. §§ 180.700(b),(c), which permitted suspension based on a "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction[.]" (Exhibit C at 2.) Yet one of the three allegations has no basis in any "statutory or regulatory provision or requirement" and cannot serve as an adequate basis for suspension or debarment. *See* 2 C.F.R. §§ 180.800(b), 417.800(b). While the allegation related to Mr. Gubbels's alleged misrepresentation of the deadline for insurance applications and ability to double-insure their alfalfa crop seems to rely on a violation of the catchall provision at Section IV(h)(2) of the Standard Reinsurance Agreement, Administrator Barbre did not set out any basis for concluding that Mr. Gubbels's alleged representation that "the FCIP is not a risk management tool, but rather an investment tool" violated the SRA or any regulation. (Exhibit C at 2- 3.) Instead, the notice makes an unsupported assertion that truthfully noting that producers can generate income instead of total losses if they take care to insure their crops somehow "indicates a serious lack of business honesty and integrity demonstrating that [Mr. Gubbels is] not presently responsible, which poses a significant risk to the government." (Exhibit C at 4-5.) Because Administrator Barbre failed to identify what authority, if any, might support this basis for suspension and debarment, Mr. Gubbels had no opportunity to challenge that allegation. This omission directly violated the requirements that the administrator advise Mr. Gubbels of the "causes" "upon which the [] official relied." *See* 2 C.F.R. §§ 180.715, 180.805.

The record also shows that this lack of notice was harmful to Mr. Gubbels and jeopardized his ability to defend against the suspension and proposed debarment. Mr. Gubbels objected to the lack of notice concerning the "returns" and "profit" language. (Exhibit D at 4.) Yet in correspondence after the informal telephone hearing on suspension Administrator Barbre emphasized that his "problem isn't just the sales after SCD but the way he has presented this program." (Exhibit G.) Administrator Barbre classified this as a "grave error" that he needed "to figure out how to deal with" (Exhibit G), despite its lack of a regulatory basis. Clearly the administrator based the suspension and proposed debarment in significant part on Mr. Gubbels's terminology, but never provided him with any notice of what, if any, requirement that language violated. As a result, the notice was invalid, and the suspension and proposed debarment order should be vacated in its entirety. *See Friedler*, 271 F. Supp. 3d at 63 (vacating debarment order where there was inadequate notice of violations and suggestion that order was based in part on violations not contained in the notice).

Next, Administrator Barbre improperly denied Mr. Gubbels an evidentiary hearing on the disputed facts underlying his suspension and proposed debarment. He refused such a hearing despite the fact that the allegations against Mr. Gubbels were nothing but hearsay, with the inherent reliability of a game of "telephone." When a contractor opposes a suspension order, the regulations guarantee that he "*will* have an opportunity to challenge the facts" supporting the suspension order unless the "presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension." 2 C.F.R. §§ 180.735(a)(3), (b) (emphasis added). The same is true of any final debarment order. *See* 2 C.F.R. § 180.830(a), (b). Just as with the analogous regulations concerning procurement contracts, "in the event of a genuine factual

dispute … a contractor facing debarment is entitled to an evidentiary hearing." *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1154 (9th Cir. 1998). If there is a genuine factual dispute, and the agency nevertheless denies the contractor a hearing, it has violated its own regulations. *See id*. Such a violation is so severe that it "violate[s] the [contractor's] constitutional right to due process in failing to comply with binding regulations" and warrants vacating the order even without a showing of prejudice. *Id*.

In opposing the suspension and proposed debarment Mr. Gubbels contested the facts supporting two of the three bases for the order—the statements concerning double-insuring alfalfa crops and the "returns" and "profits" language—and requested an evidentiary hearing. Mr. Gubbels submitted a sworn affidavit directly contradicting the evidence relied on by the administrator, attesting first that he had not informed producers that they could double-insure their alfalfa crops, or, if he had, he had misspoken while discussing multiple programs. (Exhibit B at ¶ 19.) Second, contrary to the allegation that he "publicly advocated that the FCIP is not a risk management tool, but rather an investment tool" (Exhibit C at 3), Mr. Gubbels attested that he truthfully said that PRF programs had "paid out" in 8 of 10 previous years, and yielded a "profit over premium cost" of $3.60 per acre over the last 20 years and that he always represented the program as a "risk mitigation strategy" not an income opportunity. (Exhibit B at ¶¶ 20, 21.) Thus, at a minimum, there was a material factual dispute about what was said. Mr. Gubbels submitted a sworn and truthful affidavit completely contradicting the basis for the suspension order and the proposed debarment. The regulations thus entitled him to an evidentiary hearing. *See* 2 C.F.R. §§ 180.735(a)(3), (b), 180.830(a), (b). Because Administrator Barbre never held a hearing, the suspension and proposed debarment order must be invalidated. *See Sameena Inc.*, 147 F.3d at 1154.

Third, Administrator Barbre has refused to issue a final decision upholding or modifying the suspension order and acting on the proposed debarment within the time period required by the regulations. The regulations are unequivocal—a "suspending official *must* make a written decision whether to continue, modify or terminate" a suspension "within 45 days of closing the official record." 2 C.F.R. § 180.755 (emphasis added); *see also* 2 C.F.R. § 417.755 ("The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record."). And while they allow for an extension "for good cause," the regulations plainly contemplate that the official make an explicit finding of need that justifies failure to comply with the deadlines. *See id.*

These timelines serve an important due process function—while constitutional protections "may accept a temporary suspension for a short period, not to exceed one month" "that cannot be sustained for a protracted suspension." *Horne Bros. v. Laird*, 463 F.2d 1268, 1270 (D.C. Cir. 1972). Due process does not allow a contractor "whose economic life may depend on his ability to bid on government contracts" to "dangle in suspension" indefinitely. *Id.* at 1271. The regulations are meant to insure that only a "short period of delay" elapses between the suspension and full opportunity to challenge it and receive a final decision. *See Old Dominion Dairy Prod., Inc. v. Sec'y of Def.*, 631 F.2d 953, 966 (D.C. Cir. 1980) (finding due process violation for indefinite suspension order).

Here, Administrator Barbre has violated the strict timelines set out by the regulations, seriously and indefinitely threatening Mr. Gubbels's economic life. The suspension and proposed debarment order was issued on February 21, 2020, and Mr. Gubbels submitted all of his opposition papers on March 11, 2020. (Exhibits C, D.) Although the administrator held an *informal* hearing on March 25, 2020, it was not an evidentiary hearing and no testimony was

taken. Mr. Gubbels nevertheless followed up with an informal supplement to his earlier communications in an April 2, 2020 email. (Exhibit G.) Thus, the record officially closed on March 11, 2020, with the evidentiary submissions in opposition. Even if one grants Administrator Barbre the maximum possible flexibility, the latest the record could be considered closed would be April 2, 2020. As of the time of this filing nearly 60 days have elapsed from that last date—in excess of the strict 45-day limit set out in the regulations. *See* 2 C.F.R. §§ 180.755; 417.755. Mr. Gubbels has thus been held in limbo under a suspension order for more than 90 days. This is nearly three times the strict "one month" limit considered by the Court in *Horne Bros.*, 463 F.3d at 1270, to be the benchmark of what procedural due process requires. For this reason as well, the suspension and proposed debarment order must be vacated.

Finally, the suspension and proposed debarment order improperly bars Mr. Gubbels's affiliated independent contractor insurance agents from renewing existing crop insurance policies and selling new policies in contravention of the applicable regulations. Consistent with the due process requirements that a contractor be "notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit," *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968, the regulations provide that the suspension and debarment official may only "exclude" a person who "has been, is, or may reasonably be expected to be a participant or principal in a covered transaction." 2 C.F.R. § 180.150. He does so by initiating the action only against a "respondent," which is "a person against whom an agency has initiated a debarment or suspension action." 2 C.F.R. § 180.1000. Only a respondent "is prohibited from participating" in federal transactions. 2 C.F.R. § 180.935. This disqualification can only be effective against an "affiliate of a participant" if the affiliate is

"(1) Officially name[d] … in the notice; and (2) Give[n] the … opportunity to contest the action." 2 C.F.R. § 180.625(b). Affiliates are those under the "control" of the respondent. 2 C.F.R. § 180.900.

Administrator Barbre never named anyone other than *Mr. Gubbels* as the respondent in this matter, yet he has unlawfully claimed the authority to suspend Insure My Honey, Inc., which is a distinct corporate entity. The suspension and proposed debarment order never mentions that separate business entity, and RMA has never named it as a respondent to the suspension and proposed debarment action. Yet in a "clarification" letter, Administrator Barbre extended the suspension and proposed debarment to that corporate entity based on the assertion that Mr. Gubbels was a "principal" in the corporation. (Exhibit E at 1.). While that assertion has limited relevance for other purposes, it does not allow an independent action against a respondent not "[o]fficially name[d] … in the notice" and "[g]iven the … opportunity to contest the action." *See* 2 C.F.R. § 180.900. The clarification letter was sent *after* Mr. Gubbels filed his opposition papers with the agency—making it essentially impossible to challenge the action against Insure My Honey, Inc. (*See* Exhibits D, E.)

Administrator Barbre also violated related regulations concerning the scope of the suspension. Only an "excluded person" is barred from participating or being a "principal in [a covered] transaction[.]" 2 C.F.R. § 180.205(c). A "principal" is "an officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction." 2 C.F.R. § 180.995(a). The agency has issued letters to the independent contractor insurance agents warning them that "as an employee or affiliate of Kevin Gubbels, you may not issue or renew any crop insurance policies on behalf of Mr. Gubbels" at his insurance agency, yet the agency has never explained its basis

for concluding that these independent contractors somehow fall under Mr. Gubbels's suspension order. (Exhibit F). The regulations suggest that Mr. Gubbels may not act as a "principal" of a covered transaction, but they say nothing about whether his affiliated independent agents can write and service policies where Mr. Gubbels is not the principal. *See* 2 C.F.R. § 180.995(a). The regulations say only that he is barred from acting with "management or supervisory responsibilities related to a covered transaction." *See id*. But Mr. Gubbels has no management or supervisory responsibilities for his agents. (Exhibit A.) And he would have established this fact if he had been given *any* notice of the administrator's notion that all 60 independent agents were forbidden from working on their own contracts. Mr. Gubbels never even received the agency's notice that the independent agents were forbidden from renewing their existing contracts or selling new ones, as the letter was sent to the agents not to Mr. Gubbels. (*See* Exhibits A, F). This plainly violated the applicable regulations and provides yet another reason why the suspension and proposed debarment order must be vacated.

2. As Set Out in Count II of Plaintiffs's Complaint, USDA's Suspension and Proposed Debarment Order Violated Due Process Because It Did Not Follow the Applicable Regulations

"A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations." *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 947 (D.C. Cir. 1986); *accord Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942); *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016). Indeed, "courts have long required agencies to abide by internal, procedural regulations even when those regulations provide more protection than the Constitution or relevant civil service laws." *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 246 (D.C. Cir. 2003) (internal citation and quotation marks omitted). If an agency disregards rules governing its behavior, this deprives an affected entity of the constitutionally

guaranteed "due process." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see also Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 57 (D. D.C. 1998) (Green, J.) ("[H]istory, precedent, and application of the doctrine to all branches of government demonstrate that it is the fundamental concept of due process expressed in the Fifth and Fourteenth Amendments that gives life to the *Accardi* doctrine."). This constitutional guarantee is "most evident when compliance with the regulation is mandated by the Constitution or federal law[.]" *United States v. Caceres*, 440 U.S. 741, 749 (1979).

These principles, often referred to generally as the "*Accardi* doctrine," are so fundamental that an agency's disregard of rules that "afford greater procedural protections" upon parties will void agency action even without a showing of prejudice. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *see also Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) ("[When an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."); *Lopez*, 318 F.3d at 247 (agency may not modify its procedural rules if they are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion," regardless of prejudice) (quoting *Am. Farm Lines v. Black Bell Freight Serv.*, 397 U.S. 532, 538-39 (1970)). Where "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Thus, if an agency rule "confer[s] a procedural benefit to a class to which complainant belongs," then a court must

"invalidate" any action done in disregard of the rule. *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986).

The regulations governing suspension and debarment are intended to preserve the minimum constitutional procedural due process standard under the *Accardi* doctrine. *See Sameena Inc.*, 147 F.3d at 1153 (invalidating deviation from suspension and debarment regulations without a showing of prejudice under the *Accardi* doctrine). Indeed, long ago then-Judge Warren Burger concluded for the D.C. Circuit that "summary debarment" "could not lawfully be taken without safeguards which satisfy the demands of fairness." *Gonzalez v. Freeman*, 334 F.2d 570, 579 (D.C. Cir. 1964). This conclusion avoided the harder question of the due process limits of suspension and debarment proceedings, and instead left it up to the agency to "resolve in the first instance" the "scope and detail" of "regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of appellants." *Id*. at 580. The applicable suspension and debarment regulations filled that gap by setting "governmentwide debarment and suspension system for nonprocurement programs and activities," and are intended to be "consistent with principles of fundamental fairness." 2 C.F.R. §§ 180.5, 180.610.

Moreover, the specific provisions at issue here all have important due process functions. The notice regulations serve the critical due process role ensuring that a respondent is "notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit[.]" *See Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968. Second, the regulations requiring an evidentiary hearing ensure that a contractor has a meaningful opportunity to contest the serious allegations against him. *Sameena Inc.*, 147 F.3d at 1154. They have specifically been recognized as procedurally protective

regulations under the *Accardi* doctrine. *See id*. Finally, the regulations governing the duration of a temporary suspension order are meant to enforce the constitutional guarantee that only a "short period of delay" elapses between the time of the suspension and a full opportunity to challenge it and receive a final decision. *See Old Dominion Dairy Prod., Inc.*, 631 F.2d at 966.

As discussed in greater detail above, Administrator Barbre violated several regulatory provisions, each of which independently constitute due process violations under the *Accardi* doctrine. First, the administrator violated the notice provisions of 2 C.F.R. §§ 180.715, 180.805, because he never provided any regulation, contract or other law that Mr. Gubbels violated by allegedly using the "returns" and "profits" language at a seminar. (Exhibit C at 2-3.) While Administrator Barbre emphasized that his "problem" with Mr. Gubbels "isn't just the sales after SCD but the way he has presented this program," using that alleged language, Mr. Gubbels has never been informed what, if any, regulatory provision this language might violate. (*See* Exhibit G.) This does not live up to the requirement that the agency advise Mr. Gubbels of the "causes" "upon which the [] official relied," 2 C.F.R. §§ 180.715, 180.805, and because of their core protective functions, the administrator's violation of these regulations also constitutes a due process violation.

Next, the administrator's refusal to grant an evidentiary hearing despite the material dispute of facts underlying the suspension and proposed debarment violated due process. Despite Mr. Gubbels's affidavit contradicting two of the three bases for suspension (Exhibit B), Administrator Barbre has not held an evidentiary hearing, and his refusal to do so contravenes the applicable regulations. 2 C.F.R. §§ 180.735(a)(3), (b), 180.830(a), (b). Violating nearly identical procurement regulations in this same fashion has been held to violate the *Accardi*

doctrine, and so too here, the suspension and proposed debarment order must be vacated. *See Sameena Inc.*, 147 F.3d at 1154.

The third due process violation is Administrator Barbre's failure to issue a final written decision on the suspension and proposed debarment order despite the passage of more than 90 days from issuance and more than 45 days after the closure of the record. Such failure violates 2 C.F.R. §§ 180.755 and 417.755. Because Mr. Gubbels has had his business, including his independent contractor agents, completely shuttered well beyond the applicable time limits, the agency has yet again violated the *Accardi* doctrine. *See Horne Bros.*, 463 F.3d at 1270 (procedural due process requires that only a "short period of delay" elapse between suspension order and subsequent process).

Finally, the scope of Administrator Barbre's suspension and proposed debarment order violated the regulations governing who is bound as a respondent and the scope of the suspension order against Mr. Gubbels. The administrator never named Insure My Honey as a respondent, yet has suspended that entity indefinitely without ever giving it the opportunity to contest the action, in violation of 2 C.F.R. §§ 180.900 and 180.935. (*See* Exhibit E at 1.) Relatedly, Administrator Barbre has purported to suspend all independent contractor agents from renewing existing crop insurance contracts or selling new policies despite the fact that Mr. Gubbels has no management or supervisory responsibilities over those independent contractors. (Exhibit F.) This suspension violates the limits set out in 2 C.F.R. §§ 180.205(c) and 180.995(a). By unlawfully expanding the scope of the suspension beyond those with adequate notice of the charges, the administrator has yet again violated the due process protections afforded by the *Accardi* doctrine.

Even if the applicable regulations were not meant to protect core due process principles, the suspension and proposed debarment order violated due process because Mr. Gubbels suffered

prejudice from the violations of the regulations. Even lesser rules governing only the agency's "orderly transaction of business" may not be disregarded if it results in "substantial prejudice" to a party. *Am. Farm Lines*, 397 U.S. at 539. In such circumstances, the prejudicial administrative action must be vacated entirely. *Lopez*, 318 F.3d at 247.

Mr. Gubbels has suffered significant prejudice from Administrator Barbre's failure to adhere to the applicable regulations. Although he deemed Mr. Gubbels' alleged violation a "grave error" that might be more significant than the other alleged deficiencies (Exhibit G), because he alleged no regulatory basis underlying the alleged "risks" and "profits" violation, Mr. Gubbels had no ability to meaningfully challenge it. Moreover, when Mr. Gubbels did factually dispute the allegations against him, with sworn affidavits no less, Administrator Barbre's denial of an evidentiary hearing made it impossible for Mr. Gubbels to prove his innocence. Instead, the administrator has allowed the suspension order to remain in effect indefinitely—completely stopping Mr. Gubbels's and his independent contractor agents' business in the process. That suspension has remained in effect well beyond the permissible deadlines for issuing a final decision. (*See* Exhibit A.) And, to make matters even worse, the administrator has unlawfully expanded the scope of the suspension beyond what was alleged, to a group of non-respondents who were never given the chance to dispute the charges or their connection to Mr. Gubbels. (Exhibit F.) As Mr. Gubbels has now attested, he lacks the requisite control over those contractors, but neither he nor they have ever been given a chance to dispute the administrator's conclusions. (Exhibit A.) This prejudice requires a remedy.

2. As Set Out in Count III of Plaintiffs's Complaint, USDA's Suspension and Proposed Debarment Order Violated Procedural Due Process Because It Was Issued with Inadequate Notice and No Opportunity to Defend the Charges Before an Impartial Adjudicator

Alternatively, if USDA followed its regulatory requirements, then those requirements denied Mr. Gubbels procedural due process. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law[.]" "Procedural due process claims require a two-step analysis. Initially, a plaintiff must demonstrate that the state deprived him of some 'life, liberty, or property' interest. If successful, the plaintiff must then establish that the state deprived him of that interest without sufficient 'process.'" *Krentz v. Robertson*, 228 F.3d 897, 902 (8th Cir. 2000).

When the government suspends or debars a contractor it interferes with a liberty interest protected by the Fifth Amendment. *See Trifax Corp. v. D.C.*, 314 F.3d 641, 643 (D.C. Cir. 2003) ("formally debarring a corporation from government contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause"); *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 962-63 (contractor has a "cognizable liberty interest" in not being stigmatized as "nonresponsible" due to a "lack of integrity" in debarment proceeding); *Wilk v. Barr*, No. CIV 10-3024, 2010 WL 3081264, at *2 (W.D. Ark. Aug. 4, 2010) ("Similarly stated, suspension or debarment from bidding on government contracts may violate a liberty interest if based upon charges of wrongdoing which compromise future employment opportunities.") (citation omitted). This liberty interest is premised on two concepts. First, "a person's 'right to ... follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' ... concept[ ] of the Fifth Amendment.'" *Trifax Corp.*, 314 F.3d at 643 (quoting *Greene v. McElroy*, 360 U.S. 474, 492 (1959)). "Second, persons whose future employment prospects have been impaired by government defamation 'lack ... any constitutional protection for the

interest in reputation.'" *Id*. (quoting *Siegert v. Gilley*, 500 U.S. 226, 234 (1991).) In other words, where "a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential" and a person's liberty interests are implicated. *Old Dominion Dairy Prods., Inc.*, 631 F.2d at 963.

Administrator Barbre's suspension and proposed debarment order undoubtedly affected Mr. Gubbels's protected liberty interest in his future employment prospects and his good name because it not only indefinitely prohibited him from continuing in his chosen profession, but it did so on the dubious and entirely unproven premise that he lacks honesty and integrity. The suspension and proposed debarment order concluded that Mr. Gubbels's alleged actions "indicate[] a serious lack of business honesty and integrity demonstrating that [Mr. Gubbels is] not presently responsible, which poses a significant risk to the government." (Exhibit C at 4-5.) Mr. Gubbels has thus satisfied the first step of the relevant analysis. *See Krentz*, 228 F.3d at 902.

"To determine what process is required, three factors must be weighed: (1) the nature and weight of the private interest affected by the challenged official action; (2) the risk of an erroneous deprivation of such interest as a result of the summary procedures used; and (3) the governmental function involved and state interests served by such procedures, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought." *Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Weighing those factors Mr. Gubbels was denied procedural due process.

First, Mr. Gubbels has a significant interest in fair procedures and the risk of erroneous deprivation is high. "Government contracting has become an economic mainstay for a number of commercial enterprises. It goes without saying, therefore, that disqualification from government contracting is a very serious matter for these businesses." *Sloan v. Dep't of Hous. & Urban Dev.*,

231 F.3d 10, 17 (D.C. Cir. 2000). Thus, under a due process analysis, the liberty and property interests of a contractor are of the utmost importance in suspension and debarment contexts because "the very economic life of the contractor may be in jeopardy." *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968. Suspension and debarment expose a contractor to "economic losses, professional indignities, and injuries to their reputations, and these sufferings no doubt will continue to linger so long as [the contractors] are tarnished by an official record suggesting that they engaged in 'serious irregularities' in their business dealings with the Government." *Sloan*, 231 F.3d at 17.

The viability of Mr. Gubbels's business, and the livelihood of his four full-time employees and 60 independent contractor insurance agents have been completely upended by the summary suspension and proposed debarment order. (Exhibit A.) The suspension even prevented Insure My Honey, Inc. from applying for $77,000 in forgivable Paycheck Protection Program loans to pay the salaries of his four full-time employees. (Exhibit A.) Furthermore, Mr. Gubbels's corporate entity, Insure My Honey, Inc., which has also been suspended without proper notice, went from carrying more than $12 million in insurance premiums in Reinsurance Year 2020, to now being prohibited from renewing or selling policies for *any* premiums at all. (Exhibit A.) All of the company's independent contractor agents have been forbidden from renewing any existing contracts or entering new ones with Mr. Gubbels's entities. (Exhibits A, F.) And the losses are irreparable. Mr. Gubbels and his independent agents have already lost the opportunity to sell crop insurance policies related to spring corn, which he estimates has cost him more than $1.1 million in lost premiums. (Exhibit A.) He also faces the inability to sell crop insurance policies with July 15, 2020 enrollment deadlines, potentially missing out on another $500,000 in insurance premiums. (Exhibit A.) The suspension order has also devalued Mr.

Gubbels's business by approximately $1.6 million. (Exhibit A.) Every single day that the suspension remains in place, the financial damage increases.

In these circumstances, due process requires several protections that were lacking here. First, "due process in this case includes the right to be notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit." *Old Dominion Dairy Prod., Inc.*, 631 F.2d 953, 968 (D.C. Cir. 1980). "This requirement to give notice will impose absolutely no burden on the Government." *Id*. While "conceivably a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation;" such a period should only be "for a short period, not to exceed one month[.]" *Id*. (quoting *Horne Bros.*, 463 F.2d at 1270 and *Gonzalez*, 334 F.2d at 578-79). When suspension extends unreasonably, due process requires notice. *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 967.

As discussed above, Mr. Gubbels lacked fair notice of the specific charges against him, and particularly against Insure My Honey, Inc. Administrator Barbre never provided any basis for the allegations concerning the "returns" and "profits" language, yet he considered Mr. Gubbels's alleged use of that language to be a "grave error" showing his, and the corporate entity's unfitness for federal contracting. (*See* Exhibits C, G.) The corporate entity was never even named as a respondent or given an opportunity to participate in the proceeding, yet it was summarily included in the suspension and proposed debarment order in a supplemental letter. (*See* Exhibit E.)

Mr. Gubbels also lacked a fair opportunity for a chance to persuade Administrator Barbre of the inaccuracy of the allegations against him. Despite the passage of more than 90 days since

the suspension and proposed debarment order was issued, Mr. Gubbels has not been afforded an evidentiary hearing, much less been given a final order. Yet he has been deprived entirely of his ability, and the ability of the independent agents with whom he has contracted, to carry on their chosen professions free of allegations of dishonesty and misconduct. He has already been found guilty and has never been given the chance to clear his name. Not only does this violate the applicable regulations, it violates the outer limits of procedural due process. *See Old Dominion Dairy Prod., Inc.*, 631 F.2d at 968.

In addition, Mr. Gubbels has been denied even the possibility of having this matter adjudicated by a fair and impartial hearing officer. A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see also Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46 (1950) (invalidating hearings conducted by active members of the investigative branch of agency who might be required to examine witnesses and present evidence on behalf of the Government)..

Administrator Barbre, the agency head of the RMA, can hardly be said to be a fair and impartial hearing officer. Administrator Barbre is intimately involved in the investigation and prosecution of the suspension and proposed debarment order and the regulations make no pretense about affording Mr. Gubbels a hearing brought by the agency before a neutral body. Instead, Administrator Barbre is tasked with adjudicating the charges without any representative from RMA prosecuting the matter or even present. *See* 2 C.F.R. §§ 417.930(b), 417.1010 (suspension and debarment official is head of the agency). Yet somehow, he is also tasked with ensuring that the agency carries its burden of proof to show present lack of fitness. *See* 2 C.F.R. §§ 180.850(a) (agency "must establish the cause for debarment by a preponderance of the

evidence"). Administrator Barbre, moreover, has already shown his unwillingness to be an impartial adjudicator—alerting Mr. Gubbels that his "problem isn't just the sales after SCD" that were properly alleged in the suspension and proposed debarment order, "but the way he has presented this program" which had no legal basis. (Exhibit G.) Despite the lack of any evidentiary hearing, or any action on the proposed debarment, Administrator Barbre has already concluded Mr. Gubbels "has made a grave error" that he has "got to figure out how to deal with." (Exhibit G.) The adjudicative procedures used in connection with Mr. Gubbels lack even the most basic due process safeguards to ensure an impartial decisionmaker.

C. Mr. Gubbels Will Suffer Irreparable Harm Absent the Injunction

To satisfy the irreparable harm requirement, Mr. Gubbels need only demonstrate that absent a preliminary injunction, he is "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (internal citation and quotation marks omitted).

"When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citation omitted); *see also Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights."); *Hughbanks v. Dooley*, 788 F. Supp. 2d 988, 998 (D. S.D. 2011) ("Hughbanks's allegation that his due process rights are being violated by the current notice policy is sufficient to establish a threat of irreparable harm.") (collecting cases).

Moreover, the D.C. Circuit has recognized that the harm resulting from the loss of opportunities to contract with the government "cannot be adequately corrected" because it is

often impossible to reconstruct the financial harm arising from these lost chances. *Old Dominion Dairy Prod., Inc.*, 631 F.2d at 969. The Court noted that in such cases "the injury was easier to avoid than it is to correct." *Id.*

Mr. Gubbels will suffer irreparable constitutional and economic injuries unless the USDA is enjoined in this action. As detailed above, Administrator Barbre's continued refusal to adhere to the basic requirements of the applicable regulations and otherwise afford Mr. Gubbels with critical procedural due process guarantees violates constitutional protections recognized in the *Accardi* doctrine and the Due Process Clause of the Fifth Amendment. These injuries are presumptively irreparable and warrant an injunction on their own.

Moreover, if this Court fails to enjoin the USDA, Mr. Gubbels, his four full-time employees and his 60 independent contractor insurance agents will suffer economic loss that cannot be corrected. (*See* Exhibit A.) Every day that passes under the suspension order prevents Mr. Gubbels, his employees and the independent agents from engaging in their existing business, either through soliciting new policies or renewing existing ones. (Exhibit A.) This has already devalued Mr. Gubbels's business by more than a million dollars and denied his employees and the independent contractor agents the opportunity to earn any income. (Exhibit A.) Mr. Gubbels and his corporation have lost out on more than a million dollars in insurance premiums for the spring season and could lose the opportunity to sell another $500,000 more in premiums for the summer season. (Exhibit A.) Worse, the reputational damage is impossible to quantify. Mr. Gubbels has been labeled as being dishonest despite never having had an opportunity to defend himself, causing his agency to lose relationships with affiliated agencies, frustrating his relationship with long-time customers, and making it impossible for him to recruit new independent contractor agents. (Exhibit A.) This unfair process has even taken a toll on Mr.

Gubbels's health. (Exhibit A.) But none of these harms can be recovered from the agency—they are simply lost. This is the definition of an ongoing irreparable harm.

D. The Balance of Equities Weighs Heavily in Favor of Mr. Gubbels

A party seeking a preliminary injunction must demonstrate both "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Thus, when a party seeks to protect his "constitutional rights" "the public interest weighs strongly in favor of issuing the preliminary injunction." *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *14 (E.D. Mo. Feb. 9, 2018).

The equities strongly favor an injunction as Mr. Gubbels seeks nothing more than to compel the agency to follow constitutional requirements and its own regulations. The agency has no interest in violating the constitution with impunity, and, as a corollary, it cannot have any interest in ignoring its own regulations. The injunction seeks nothing more than for the agency to follow the rules.[5]

III. CONCLUSION

For the reasons set out above, the Court should preliminarily enjoin Defendants from proceeding on their suspension and proposed debarment order against Plaintiffs and vacate the existing suspension.

[5] For largely the same reasons no bond should be required here. Federal Rule of Civil Procedure 65(c) says ,"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, 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." But the USDA will not suffer any damages for merely complying with its own regulations and basic constitutional protections. It is supposed to do so anyway.

June 1, 2020

Respectfully,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH WORD COUNT

I hereby certify that pursuant to District of Nebraska Local Civil Rule 7.1(d)(1)(A) and (3) this document contains 11,525 words.

I hereby certify that on June 1, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

I certify that a copy of the foregoing was also served by registered or certified mail upon the following:

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