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SUNRISE FOODS INTERNATIONAL INC.

8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
11 **SACRAMENTO DIVISION**

12 SUNRISE FOODS INTERNATIONAL)
INC., a Canadian corporation,)

13)
14 Plaintiff,)

15 vs.)

16 SONNY PERDUE, Secretary of the U.S.)
Department of Agriculture; U.S. Department)
17 of Agriculture; KEVIN SHEA,)
Administrator of the U.S. Department of)
18 Agriculture's Animal and Plant Health)
Inspection Service; U.S. Department of)
19 Agriculture Animal and Plant Health)
Inspection Service; KEVIN K.)
20 MCALEENAN, Commissioner of U.S.)
Customs and Border Protection; U.S.)
21 Customs and Border Protection,)

22 Defendants.)

Case No.: 2:18-cv-00688-JAM-EFB)
)
Assigned to Judge John A. Mendez)
)
PLAINTIFF SUNRISE FOODS)
INTERNATIONAL INC.'S EX PARTE)
MOTION FOR:)
(1) **TEMPORARY RESTRAINING ORDER;**)
(2) **ORDER TO SHOW CAUSE RE:**)
PRELIMINARY INJUNCTION; AND)
(3) **EXPEDITED DISCOVERY;**)
MEMORANDUM OF POINTS AND)
AUTHORITIES IN SUPPORT OF)
MOTION)
) [Declarations of Jacob Neufeld, Michael)
) Corbett, Ron Oleynik, Vince Farhat, and)
) exhibits thereto; Request for Judicial Notice;)
) [Proposed] Order; and Temporary Restraining)
) Order Checklist, filed concurrently herewith])
) [L.R. 231])
) Date Requested: April 11, 2018 or as soon as)
) possible as set by the Court)
) Time: TBD)
))
))
))

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EX PARTE MOTION

1
2 Plaintiff SUNRISE FOODS INTERNATIONAL INC. (“Sunrise”) respectfully submits
3 this *Ex Parte* Motion for a Temporary Restraining Order (“TRO”) and for a preliminary
4 injunction enjoining Defendants Sonny Perdue in his official capacity as the Secretary of the
5 USDA (“USDA”); USDA; Kevin Shea in his official capacity as USDA’s Animal and Plant
6 Health Inspection Service (“APHIS”); APHIS; Kevin K. McAleenan in his official capacity as
7 the Commissioner of U.S. Customs and Border Protection (“CBP”); and CBP (collectively,
8 “Defendants”) from enforcing certain Emergency Action Notifications (“EANs”) issued to
9 Sunrise until this Court can rule on Defendants’ decision to revoke Sunrise’s clearance.

10 This *Ex Parte* Motion is necessitated by Defendants’ sudden and unjustified issuance of
11 four EANs rejecting Sunrise’s shipments of cracked corn aboard the vessel Mountpark (the
12 “Mountpark Shipments”), even though the shipments already had been fully cleared for entry by
13 CBP, for itself and on behalf of the USDA, just the week before. As discussed below, the
14 Defendants’ decision to reject the Mountpark Shipments is arbitrary and capricious, and contrary
15 to law. Moreover, the decision exceeds APHIS’s authority under the Plant Protection Act, 7
16 U.S.C. §§ 7701 *et seq.*, and the Defendants failed to observe APHIS’s own standard procedures
17 in the inspection of imported cracked corn, resulting in the EANs being improperly issued.
18 Sunrise has already incurred \$ 255,560.00 in losses from Defendants’ improper issuance of the
19 EANs, and each day that passes pending resolution of this dispute, Sunrise sustains
20 approximately \$11,500 in additional losses. In addition, the risk of further product deterioration
21 increases, as well as the prospect of compromised business relationships. An order restoring the
22 *status quo*, *i.e.*, restoring the CBP clearance and allowing the Mountpark Shipments to be
23 discharged—is necessary until the Court can rule on the propriety of Defendants’ issuance of the
24 EANs.

25 This Motion is supported by the attached Memorandum of Points and Authorities, the
26 concurrently filed Declarations of Jacob Neufeld, Michael Corbett, Ron Oleynik, Vince Farhat,
27 and exhibits thereto; the Request for Judicial Notice; the Proposed Order prepared in compliance
28 with Local Rule 231 and Federal Rule of Civil Procedure 65(b); and the Temporary Restraining

1 Order Checklist in compliance with Local Rule 231.

2 Sunrise hereby advises the Court that on Thursday, April 5, 2018, Sunrise's counsel gave
3 *ex parte* notice to counsel for Defendants, and advised that Sunrise would be seeking a TRO
4 pending the Court's resolution of Defendants' unlawful decision to rescind clearance by issuing
5 the EANs, an order to show cause regarding preliminary injunction, and allowing expedited
6 discovery to ascertain the true facts related to Defendants' decision revoking clearance of the
7 Mountpark Shipments. Declaration of Vince Farhat ("Farhat Decl."), ¶¶ 2-3. In a follow up
8 conversation at approximately 2:00 p.m. PST on Friday, April 6, 2018, counsel for Defendants
9 stated that Defendants will oppose this Motion. *Id.* at ¶ 4. This motion could not have been
10 brought earlier. *Id.* at ¶ 5. Sunrise hereby requests that the Court set this motion for hearing on
11 Wednesday, April 11, 2018, or as soon as possible thereafter.

12
13 Dated: April 8, 2018

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/ Stacey H. Wang

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Sunrise Foods International, Inc. (“Sunrise”) brings this *Ex Parte* Motion to seek immediate relief from Defendants’ sudden and unjustified issuance of four Emergency Action Notifications (“EANs”) rejecting Sunrise’s shipments of cracked corn aboard the vessel Mountpark (the “Mountpark Shipments”). Even though twelve separate shipments of similar cracked corn were recently cleared for entry, and the Mountpark Shipments at issue were likewise cleared for entry on March 7, 2018 by CBP, for itself and on behalf of the USDA, Defendants issued EANs on March 12, 2018, effectively overriding the initial decision to permit entry. However, as discussed below, the Administrative Procedures Act requires the Court to aside unlawful agency actions like the improper issuance of the EANs. Defendants’ decision was arbitrary and capricious, and contrary to law. Defendants’ decision was also improper in that it exceeded APHIS’s authority under the Plant Protection Act (“PPA”), 7 U.S.C. § 7701 *et seq.*, and Defendants further failed to observe USDA’s Animal and Plant Health Inspection Service’s (“APHIS”) standard procedures in inspecting imported cracked corn. Sunrise has suffered and continues to suffer mounting irreparable harm each day. As of this filing, Sunrise faces \$ 255,560.00 in losses from the delay in discharging the Mountpark Shipments, with an additional \$11,500 for each day that this matter remains unresolved. Sunrise also risks further product deterioration and potential lost business relationships. Thus, a temporary restraining order is necessary to prevent further irreparable harm to Sunrise until the Court can rule on the merits of this dispute. Finally, allowing expedited discovery into Defendants’ decision-making process in rejecting the Mountpark Shipments will assist the parties and the Court in adjudicating the propriety of Defendants’ rejection of the Mountpark Shipments.

II. RELEVANT REGULATORY BACKGROUND

A. USDA Regulation of Imported Agricultural Products

Federal regulations require the inspection of plants and seeds imported into the U.S. at the ports of entry. *See* PPA, 7 U.S.C. § 7701 *et seq.*, authorizes the U.S. Department of Agriculture (“USDA”) to regulate imported agriculture and animal products to protect the

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1 nation’s agriculture from dangerous foreign animal and plant pests, noxious weeds, and diseases.
 2 7 U.S.C. §§ 7701–7786; *see* 7 U.S.C. § 7711(a) (PPA authorizes the USDA to issue regulations
 3 “to prevent the introduction of plant pests into the United States or the dissemination of plant
 4 pests within the United States”). The Secretary of Agriculture has delegated the authority to
 5 issue importation regulations to APHIS. 7 C.F.R. § 371.3(b)(2)(x). APHIS and the Deputy
 6 Administrator of Plant Protection and Quarantine (“PPQ”) are delegated with the responsibility
 7 to oversee plant protection under the PPA, and are permitted to effectuate the statutory purpose
 8 of the PPA with discretion. 7 C.F.R. § 371 *et seq.*; 7 U.S.C. § 7712(a) and (c).

9 The U.S. Customs and Border Protection (“CBP”), a federal agency within the U.S.
 10 Department of Homeland Security, collaborates with APHIS to prevent harmful plant and animal
 11 pest and diseases from entering U.S. borders. 7 U.S.C. § 231. APHIS is charged with setting
 12 regulations governing agricultural imports to ensure that all imported agricultural products
 13 shipped from abroad meet the USDA’s entry requirements to exclude agricultural pests and
 14 diseases, and CBP is responsible for conducting inspections to prevent foreign pest and disease
 15 introductions in compliance with APHIS regulations and procedures. *See* U.S. DEP’T OF AGRIC.:
 16 ANIMAL AND PLANT HEALTH INSPECTION SERV., IMPORT EXPORT,
 17 <https://www.aphis.usda.gov/aphis/ourfocus/importexport> (last visited Apr. 6, 2018).

18 **1. Secretary of Agriculture’s Role Under the Plant Protection Act.**

19 Section 7711 of the PPA governs the regulation of plant pests, authorizing the Secretary
 20 to regulate the importation, entry, exportation, or movement of plant pests to prevent the
 21 introduction of plant pests into the United States or the dissemination of plant pests within the
 22 United States. The Secretary may regulate such activities by requiring permits, certificates of
 23 inspection, quarantine for inspection, or remedial measures “necessary to prevent the spread of
 24 plant pests.” 7 U.S.C. § 7711(e)(4). Similarly, Section 7712(a) of the Act authorizes the
 25 Secretary to regulate the movement of plants, plant product, biological control organism, noxious
 26 weed, article, permitting the Secretary to issue regulations to prohibit the importation, entry,
 27 exportation, or movement in interstate commerce “if the Secretary determines that the
 28 prohibition or restriction is necessary to prevent the introduction into the United States or the

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1 dissemination of a plant pest or noxious weed within the United States.”

2 When necessary, the Secretary “may hold, seize, quarantine, treat, apply other remedial
3 measures to, destroy, or otherwise dispose of any...plant product, article, or means of
4 conveyance that” (1) “the Secretary has reason to believe is a plant pest or noxious weed or is
5 infested with a plant pest or noxious weed at the time of the movement” or otherwise violates the
6 PPA; (2) “has not been maintained in compliance with a post-entry quarantine requirement;” or
7 (3) “is the progeny of any plant [or] plant product...” 7 U.S.C. § 7714. Critically, the Secretary
8 must implement the “least drastic action.” 7 U.S.C. § 7714(d). That is, a plant product cannot be
9 “ordered to be destroyed, exported, or returned to the shipping point of origin under this section
10 unless, in the opinion of the Secretary, there is *no less drastic action* that is feasible and that
11 would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not
12 known to be widely prevalent or distributed within and throughout the United States.” *Id.*
13 (emphasis added).

14 Importantly, both Sections 7711 and 7712 provide safeguards for process, requiring that
15 the Secretary “shall ensure that the processes used in developing regulations under [this section]
16 governing consideration of import requests are based on sound science and are transparent and
17 accessible.” 7 U.S.C. §§ 7711(b) and 7712(b).

18 **2. CBP’s Role in Regulating the Import of Corn Products.**

19 The Code of Federal Regulations (“CFR”) authorizes regulatory action to be taken and
20 enforced by the CBP. Two CFRs regulate the import of corn and corn products to prevent the
21 entry of corn diseases and corn pests: 7 C.F.R. §§ 319.24 and 319.41. 7 C.F.R. § 319.24,
22 entitled “Notice of Quarantine,” addresses potential corn diseases by prohibiting the import of
23 “raw or unmanufactured corn seed” from “southeastern Asia (including India, Indochina, and the
24 People’s Republic of China), Malayan Archipelago, Australia, New Zealand, Oceania, Philippine
25 Islands, Manchuria, Japan, and adjacent islands.” 7 C.F.R. § 319.24(b). Notably, Moldova,
26 Russia, and Kazakhstan are not among the list of prohibited countries. *Id.*

27 7 C.F.R. § 319.41-5, entitled “Condition of Entry,” addresses corn pests by requiring the
28 inspection of corn products at the port of arrival by the “inspector of the Plant Protection and

1 Quarantine Programs, in order to determine their freedom from such insects and diseases and
 2 from contaminating materials, and to such sterilization, grinding, or treatment in accordance with
 3 part 305 of this chapter, as the inspector may prescribe.” 7 C.F.R. § 319.41-5(a). If such
 4 shipments of shelled corn and seeds, excluding those from Canada, Mexico, Central America,
 5 South America, the West Indies, the Bahamas, and Bermuda, are discovered to be “appreciably
 6 fouled with cobs or other portions of the plants the inspector may require sterilization or other
 7 treatment in accordance with part 305 of this chapter or may refuse entry.” 7 C.F.R. § 319.41-
 8 5(d)(3).

9 **B. APHIS Manuals Regulate CBP’s Agricultural Import Inspection Process.**

10 As explained above, APHIS regulates the import of cracked corn and other agricultural
 11 products pursuant to the PPA. 7 U.S.C. §§ 7701–7786. Pursuant to this rulemaking authority,
 12 APHIS publishes manuals to guide import inspections of processed plants. 7 U.S.C. §§ 7711-
 13 7712. These manuals establish the inspection process of agricultural products for training and
 14 use by CBP agricultural officers, Compliance Management Program agricultural specialists, and
 15 PPQ officers, among others.

16 Two APHIS manuals are critical to understanding the regulations and inspection
 17 procedures for processed seed product, including cracked corn: *The Seeds Not for Planting*
 18 *Manual* (“*Seeds Not for Planting*”) and *Miscellaneous and Processed Products Import Manual*
 19 (“*Miscellaneous and Processed Products*”). See Declaration of Vince Farhat (“Farhat Decl.”),
 20 ¶¶ 6-7, Exhs. A-B; Request for Judicial Notice (“RJN”) Nos. 1 and 2. *Seeds Not for Planting*
 21 provides context and APHIS’s operative definition for cracked corn, and directs the CBP
 22 inspector to *Miscellaneous and Processed Products* as the instructive guide for inspecting
 23 cracked corn. As recognized in the manuals, the “regulatory authority for taking the actions
 24 listed in this manual is contained in The Plant Protection Act (PPA).” *Miscellaneous and*
 25 *Processed Product*, at 1-5; *Seeds Not for Planting Manual*, at 1-6. It further states that the “Code
 26 of Federal Regulations (CFR) provide the authority for the regulatory action taken and are
 27 enforced by CBP and PPQ.” *Miscellaneous and Processed Products*, at 1-5; *Seeds Not for*
 28 *Planting*, at 1-6.

1 **1. Seeds Not for Planting Manual**

2 APHIS’s *Seeds Not for Planting* sets forth procedures for regulating unprocessed whole
3 seeds that are imported for purposes other than planting or growing and for protecting
4 endangered plants. *Seeds Not for Planting*, at 1-1. The Introduction section provides
5 information about the purpose, scope, application, and directions for using the manual, and
6 clarifies that the manual covers “seeds not processed beyond harvesting,” but not “seeds
7 processed beyond harvesting.” *Id.* at 1-3. The latter falls within the scope of APHIS’s
8 *Miscellaneous and Processed Products*, which does cover “seeds processed beyond harvesting.”
9 *Id.* at 1-3 and 1-4.


10 To be clear, *Seeds Not for Planting* defines “processed seed” as “[t]hat which has been
11 subjected to any degree of alteration beyond harvesting, e.g. cracked corn.” *Id.* at Glossary-4.
12 The Procedures section, which provides prerequisites and directions for sampling, inspecting,
13 and regulating these seeds, further states that “[s]eeds that are not intended for propagation must
14 be unprocessed beyond harvesting and free from fleshy pulp or leathery husks.” *Id.* at 2-2.
15 Unprocessed corn regulated under *Seeds Not for Planting* is prohibited if the corn was harvested
16 in certain countries as identified in Table 3-11, including Moldova, Russia, and Kazakhstan. *Id.*
17 at 3-18. Corn from a region other than those listed may be imported with a permit after
18 inspection. *Id.*

19 **2. Miscellaneous and Processed Products Import Manual**

20 APHIS’s *Miscellaneous and Processed Products* provides information and procedures
21 for regulating imported processed plant and nonplant sources. Specifically, it regulates
22 “[p]roducts that result from the harvesting and milling of field crops—principally corn, cotton,
23 rice, sugarcane, and wheat.” *Miscellaneous and Processed Products*, at 1-2. For purposes of
24 determining whether the product at issue is processed and regulated by this manual, “‘process’
25 means the plant or plant part was prepared, treated, or converted by being subjected to some
26 physical or chemical procedure beyond harvesting.” *Id.*, at 1-3. Just as in *Seeds Not for*
27 *Planting*, *Miscellaneous and Processed Products* also defines “processed seed” as “seed
28 subjected to any degree of alteration beyond harvesting (e.g., cracked corn is considered

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Table 3-36 Grains locator¹

If:	And is:	Then:
Beans, peas, and lentils		SEE Table 3-131
Corn ²	Fodder, silage, or stover (stems and leaves) harvested in Canada	SEE Table 3-37
	Fodder, silage, or stover harvested in a country other than Canada	SEE Table 3-38
	Ears of corn, shucked or unshucked	SEE Table 3-39
	Corn products and by-products of grain milling (e.g., commeal, cracked corn, grits, oil, samp, and starch)	INSPECT and RELEASE ³

processed).” *Id.*, Glossary-13.

Pursuant to *Miscellaneous and Processed Products*, CBP inspectors are required to inspect cracked corn by sampling the shipment and inspect for all categories of pests as stated under the “General Inspection Procedures Leading to Final Action” section of *Miscellaneous and Processed Products*. Notably, photographs are not listed as a method of inspection.

Figure 2-1 Inspection Process summarizes the general inspection process for products governed by this manual:

- Step 1: Determine the makeup of the shipment**
- Step 2: Determine the admissibility of and restrictions on the contents of the shipment**
- Step 3: Determine whether pests, prohibited packaging, or contaminants are associated with the shipment**
- Step 4: Act upon the shipment based on pest findings and the regulatory authority**

Figure 2-1 Inspection process

Id., at 2-2. Table 3-36 of *Miscellaneous and Processed Products* describes a two-step procedure for inspecting cracked corn: (1) inspect; and (2) release, as shown below:

Id., at 3-28. Cracked corn, as indicated in Table 3-36, falls within the Table’s definition of a “[c]orn product and by-products of grain milling (e.g. corn meal, cracked corn, grits, oil, samp, and starch)” and, as stated in the fourth row, the actions required are “INSPECT and RELEASE.” *Id.* Significantly, corn regulated by *Miscellaneous and Processed Products* is not subject to restrictions on countries of origin as provided in *Seeds Not For Planting*. *Id.* at 3-30.

1 **C. FGIS’s Marketing Definition of Cracked Corn**

2 The Federal Grain Inspection Service (“FGIS”) is a division within the Grain Inspection,
3 Packers and Stockyards Administration (“GIPSA”) and is responsible for facilitating the
4 marketing of grains for domestic shipments and exports. 7 C.F.R. § 800.1. FGIS establishes
5 grain grading standards, certifies grain quality, inspects and measures grain quality and
6 weighing. *Id.* Parties to grain contracts may incorporate the permissive FGIS standards into
7 their agreements; it is not a regulatory standard.

8 FGIS is wholly separate from APHIS and operates pursuant to the authority provided
9 under the United States Grains Standards Act (“USGSA”) and the Agricultural Marketing Act
10 (“AMA”) of 1946 to “protect the integrity of the official inspection system and the market at
11 large to ensure markets for grain and related products are fair and transparent.” *See* U.S. DEP’T
12 OF AGRIC.: AGRICULTURAL MARKETING SERVICE., FEDERAL GRAIN INSPECTION SERVICE,
13 <https://www.ams.usda.gov/about-ams/programs-offices/federal-grain-inspection-service> (last
14 visited Mar. 31, 2018). Accordingly, FGIS established directives to inspect and test different
15 grains, including cracked corn. U.S. DEP’T OF AGRIC.: GRAIN INSPECTION, PACKERS AND
16 STOCKYARDS ADMINISTRATION, FEDERAL GRAIN INSPECTION SERVICE DIRECTIVE 9180.70,
17 INSPECTION OF CRACKED CORN, <https://www.gipsa.usda.gov/laws/directives/9180-70.pdf> (last
18 visited Mar. 31, 2018).

19 FGIS Directive 9180.70 defines cracked corn as “Not Standardized Grain that consists of
20 broken kernels of shelled dent corn and/or shelled flint corn.” *Id.* at 3. Cracked corn as defined
21 by FGIS does not require 100 percent crackage and instead presumes that the shipment is
22 integrated with whole corn kernels. *Id.* To qualify as cracked corn, “[t]he sample must not meet
23 the definition of corn (*i.e.*, grain consisting of 50 percent or more of whole kernels of shelled
24 dent corn and/or shelled flint corn and not more than 10 percent of other standardized grains) to
25 be considered as cracked corn.” *Id.* Section 10 provides a detailed methodology to determine
26 “the percentage of whole kernels, cracked corn, and other material in a sample using a 250-gram
27 portion of the original sample.” *Id.* at 5.

28 ///

1 **III. STATEMENT OF FACTS**

2 **A. Sunrise’s Cracked Corn & Import Compliance**

3 Sunrise is one of the largest wholesalers of organic agrifood commodities in the world,
 4 specializing in certified organic and conventional products. Declaration of Jacob Neufeld
 5 (“Neufeld Decl.”), ¶ 4. Based in Saskatoon, Saskatchewan, Canada, Sunrise sources high-quality
 6 grains from an extensive network of producers and suppliers and delivers them to customers in
 7 the United States and worldwide. *Id.* Sunrise trades over 500,000 metric tons of products
 8 including cereal grains, feed grains, oil seeds, and pulses a year. *Id.* Pertinent here, Sunrise has
 9 been a regular importer of organic cracked corn to the United States. *Id.*, ¶ 5.

10 Cracked corn is typically used as a high-energy feed for livestock. *Id.*, ¶ 3. Cracked corn
 11 is corn that is processed into smaller corn particles by running the grain through a roller mill
 12 after harvest. Neufeld Decl., ¶ 3. This processing method exposes the seed coat, increasing
 13 access to the interior starch and nutrients. *Id.*, ¶ 3.

14 Sunrise procures organic cracked corn through a Turkish supplier called Tiryaki Agro
 15 Food Industry and Trade Inc. (“Tiryaki”), specifically through its organic division called Diasub.
 16 Neufeld Decl., ¶ 5. Tiryaki produces cracked corn by shipping harvested corn to Turkey. *Id.*, ¶
 17 6. The product is first processed through a Ruberg RSV 300 Cleaning & Exhauster System as
 18 part of a four-part cleaning system to eliminate any potential pests and foreign materials such as
 19 weeds, leaf, soil, sand, shell, immature seeds, *etc.* *Id.*, ¶ 7. Once cleaned, the product is then
 20 processed through a roller-mill crushing system where the corn is subject to cracking, cutting and
 21 pressing forces that crack the corn. *Id.* The cracked corn is then cleaned, sprayed with organic
 22 sunflower oil, and polished. Coating the cracked corn with organic sunflower seed oil prevents
 23 dust, extends storage life, and prevents insect contamination. *Id.* As a final step, Tiryaki
 24 conducts quality control of the product by inspecting the processed corn to ensure that the
 25 processed corn is sufficiently “cracked” to meet the agreed-upon threshold standard for purchase.
 26 *Id.*, ¶ 7, Exh. A.

27 Diasub uses a third-party shipper to load the product from Turkey and deliver it by way
 28 of a merchant vessel to the destination. *Id.*, ¶ 8. Once unloaded in the United States, Sunrise

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1 distributes the cracked corn to various customers, who then further process it into animal feed.
 2 *Id.* In general, the cracked corn is used for both poultry and dairy feed. *Id.* The cracked corn
 3 would either be ground and mixed with other ingredients (*e.g.*, ground soybean and nutritive
 4 additives) and turned into pellets, or would be heated and steamed through a roller mill to create
 5 a “pancake” type feed. *Id.*

6 Since December 2017, Sunrise has imported twelve shipments of cracked corn to various
 7 U.S. destinations in the manner detailed above. Declaration of Michael Corbett (“Corbett
 8 Decl.”), ¶¶ 9-10. Each of these shipments were cleared for entry at one of four different CBP
 9 entry points after undergoing an inspection and sample-testing process. *Id.* These entry points
 10 were Wilmington, Delaware; Morehead City, North Carolina; New Orleans, Louisiana; and San
 11 Francisco, California (the same jurisdiction which rejected the shipment that is the subject of this
 12 action). *Id.* Prior to importing these shipments of cracked corn, Sunrise met with the CBP and
 13 APHIS officials at each of these CBP locations to discuss import requirements for cracked corn
 14 to ensure compliance with import regulations, including CBP and APHIS regulations. *Id.*, ¶¶ 10-
 15 12; *see* Corbett Decl., ¶¶ 4-8. Notably, during a meeting at Morehead City, North Carolina, CBP
 16 inspected a sample of the cracked corn processed by Tiryaki and informed Sunrise that cracked
 17 corn and whole corn are subject to different APHIS regulations and inspection procedures, and
 18 that a shipment that meets the FGIS definition is sufficiently cracked. Corbett Decl., ¶¶ 5-6;
 19 Neufeld Decl., ¶ 12.

20 CBP explained to Sunrise that cracked corn is considered a “processed” product, and
 21 further confirmed that the corn’s pre-harvest country of origin is irrelevant for import inspection
 22 purposes. Neufeld Decl., ¶¶ 11-12; Corbett Decl., ¶ 8. As a processed or manufactured product,
 23 cracked corn is governed by *Miscellaneous and Process Products* and that, as such, the country
 24 of origin does not matter. Neufeld Decl., ¶ 11; *see* Corbett Decl., ¶ 8. Accordingly, the
 25 operative definition of “cracked corn” was a “processed seed that [] has been subject to any
 26 degree of alteration beyond harvesting.” *Miscellaneous and Processed Products*, at Glossary-4.

27 Sunrise developed a compliance process to ensure that cracked corn shipments were
 28 imported consistent with APHIS regulations and manuals, as instructed by CBP. Neufeld Decl.,

1 ¶¶ 13, 15; *see* Corbett Decl., ¶ 4. Sunrise substantially relied on these past representations made
 2 by CBP and APHIS, and the published APHIS regulations and manuals to prepare 16 shipments
 3 of cracked corn, 12 of which were cleared by CBP and APHIS. Neufeld Decl., ¶ 14; Corbett
 4 Decl., ¶¶ 4-16. The Mountpark Shipments, which are the subject of this action, similarly were
 5 procured from Tiryaki in accordance with the procedures described above and prepared for
 6 import in accordance with Sunrise’s compliance program. *Id.*, ¶ 14. In addition, the shipments
 7 also satisfied the FGIS standard for cracked corn. *Id.*, ¶¶ 13, 15, Exh. B.

8 **B. The Mountpark Shipments**

9 The Mountpark Shipments at issue arrived at the Port of San Francisco on or about
 10 February 26, 2018, containing several shipments of organic cracked corn, totaling approximately
 11 27,558 U.S. tons. Neufeld Decl., ¶¶ 16, 22. After the product was sampled and inspected, CBP
 12 cleared the shipments for entry on or about March 7, 2018, advising Sunrise that the product was
 13 acceptable. Corbett Decl., ¶ 7, Exh. H. After the shipments were cleared, Mountpark headed
 14 towards the Port of Stockton to unload the shipments for delivery to Eastern California. *Id.*, ¶
 15 23. As the Mountpark was en route, and nearly a week later, on March 12, 2018, CBP contacted
 16 Sunrise informing them that the shipments were back on hold, and contacted Sunrise later again
 17 to notify them that the shipments were now rejected. *Id.*, ¶¶ 23-27, Exh.I. On or about March
 18 12, 2018, the CBP, on behalf of APHIS, issued four Emergency Action Notifications (“EANs”)
 19 declaring that “[t]he commodity does not meet the requirements for cracked corn” because the
 20 raw material originated from Russia, Moldova and Kazakhstan, countries prohibited by 7 CFR
 21 319.24 and 7 CFR 319.41. *Id.*, ¶ 28, Exh. J. The EANs instructed Sunrise to re-export or
 22 destroy the shipment within 24 hours and referred Sunrise to speak with an Agriculture Officer
 23 to discuss options. *Id.* ¶ 30. No further explanation was provided as how the corn failed to meet
 24 the requirements for “cracked corn.” *Id.*

25 **C. Sunrise’s Efforts to Appeal Defendants’ Decision**

26 In the following days, Sunrise made numerous attempts to appeal the decision, asking
 27 CBP, APHIS, and USDA Headquarters to reconsider its decision and provide clarification.
 28 Neufeld Decl., ¶ 19; Corbett Decl., ¶¶ 31-40. In the course of these communications, Sunrise

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1 had learned that although CBP had originally cleared the shipment, USDA “Headquarters”
2 apparently requested a further review the shipment and decided to override the clearance and
3 reject the shipment based on its review of Sunrise’s shipping paperwork and a photograph of a
4 sample of the cracked corn. Corbett Decl., ¶¶ 25, 39. Sunrise believes that it is the only
5 agricultural importer that has been subject to this unapproved method of inspection, *i.e.*, by way
6 photograph. Corbett Decl., ¶ 26.

7 Sunrise continued to press CBP and APHIS to explain the basis for the reversal and
8 received inconsistent and conflicting explanations for the rejection. Corbett Decl., ¶¶ 35-40.
9 APHIS suggested that Sunrise’s cracked corn is prohibited because the raw corn was harvested
10 from a prohibited country, even though the cited regulations, 7 C.F.R. § 319.24 and 7 C.F.R. §
11 319.41, do not support this conclusion. Corbett Decl., ¶¶ 28, 30, 38. CBP, APHIS, and/or
12 USDA informed Sunrise that the shipments did not meet the standards used to define “cracked
13 corn.” *Id.*

14 APHIS implausibly offers that the shipments did not meet APHIS standards because
15 there cannot be any whole kernels in the shipment. *Id.*, ¶ 42, Exh. M. But Sunrise is not aware
16 of any industry standard that requires the cracking of every single corn kernel, and no processing
17 plant can, as a practical matter, ensure or meet this standard. This unfounded definition of
18 cracked corn contradicts APHIS’s own published definition, as stated in *Miscellaneous and*
19 *Processed Products*, which specifically defines cracked corn as “processed seed that [] has been
20 subject to any degree of alteration beyond harvesting.” *Miscellaneous and Processed Products*,
21 at Glossary-4.

22 CBP and APHIS then further alleged that whole processed kernels identified in the
23 shipment were considered “contaminants.” Corbett Decl., ¶ 36. When asked, USDA refused to
24 permit Sunrise to treat the corn at an APHIS-approved grain treatment facility called Penny-
25 Newman on the basis that USDA requires processing be completed prior to import and USDA
26 considered the corn “unprocessed” due to the existence of some whole kernels in the shipment.
27 *Id.*, ¶ 38.

28 Sunrise, through its counsel, further attempted to reach resolution with officials at APHIS

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1 headquarters. *See* Declaration of Ron Oleynik (“Oleynik Decl.”), ¶¶ 2-4. During these
 2 discussions, APHIS officials continued to shift the justification for refusing entry for the
 3 Mountpark Shipments, variously attributing its decision to, *inter alia*, the origin of the raw corn
 4 product, the processing of the whole kernels, and the ratio of cracked corn to whole kernels in
 5 the shipment. *Id.*, ¶ 5. Even under its own theory that the whole kernels somehow were
 6 “contaminants,” APHIS could not articulate why the entire shipment must be rejected and could
 7 not be treated; instead, APHIS alleged that CBP had determined that treatment at Penny-
 8 Newman was not feasible. *Id.*, ¶ 6. This was contrary to the information Penny-Newman
 9 relayed to Sunrise, in which it provided estimates to APHIS to “treat” or grind the shipments.
 10 Corbett Decl., ¶¶ 41-43, Exh. M. To date, CBP, APHIS, and USDA have failed, and continue to
 11 fail, to provide Sunrise with any consistent explanation for issuing the EANs, despite Sunrise’s
 12 efforts. Oleynik Decl., ¶ 7.

13 On March 19, 2018, CBP notified Sunrise that USDA denied Sunrise’s request to sample
 14 test the cracked corn and Sunrise’s request to “treat” the “contaminants” at a nearby APHIS-
 15 approved treatment facility. Corbett Decl., ¶ 39. CBP informed Sunrise that USDA’s decision
 16 rejecting the shipments was a final decision and refused to offer Sunrise any recourse to “treat”
 17 the whole processed corns. *Id.* Sunrise has thus exhausted all available administrative remedies;
 18 there are no further procedures to appeal or otherwise contest the USDA’s final decision.

19 CBP, APHIS, and USDA have presented Sunrise with two impractical options to comply
 20 with the improperly issued EANs: destroy the shipment or re-export the shipment to Turkey at a
 21 loss of millions of dollars. Sunrise has incurred \$ 255,560.00 and continues to incur
 22 approximately \$11,500 per day, risking product deterioration despite Sunrise’s attempt to
 23 mitigate its losses by recently undocking the vessel from the Port of Stockton and now anchoring
 24 the vessel in the Port of San Francisco to reduce the daily costs by \$12,000 as the shipments
 25 remain anchored awaiting resolution of this matter. Neufeld Decl., ¶ 24. Re-exporting the
 26 shipment to Turkey or destroying the shipment, as suggested by Defendants, are not viable
 27 options and would result in well over several million dollars in losses. *Id.*, ¶¶ 28-29. Further
 28 delays in delivery or Sunrise’s failure to deliver the cargo will result in irreparable harm to

1 Sunrise's business relationships with its agricultural customers. *Id.*, ¶ 27.

2 **IV. LEGAL STANDARD**

3 In the Ninth Circuit, the standards for granting a temporary restraining order ("TRO")
4 and preliminary injunction are one and the same. *See Stuhlberg Int'l Sales Co. v. John D. Brush*
5 *& Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The purpose of both is to preserve the *status*
6 *quo* pending a final determination of the merits of the action. *See Lopez v. Heckler*, 725 F.2d
7 1489, 1509 (9th Cir. 1984) (purpose of preliminary injunction is to preserve status quo pending
8 final determination), vacated on other grounds in 469 U.S. 1082 (1984).

9 "Status quo" means the "last uncontested status which preceded the pending
10 controversy." *Id.* (citations omitted); *see also GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d
11 1199, 1210 (9th Cir. 2000) (in the trademark context, describing the "last uncontested status" as
12 the status prior to Disney's use of the allegedly infringing logo and requiring that Disney cease
13 use pending resolution of the case on the merits). A party is entitled to a preliminary injunction
14 if it meets the factors laid out by the Supreme Court in *Winter v. Natural Resources Defense*
15 *Council, Inc.*, 555 US 7, 20 (2008). Under *Winter*, a movant must establish that (1) it is "likely
16 to succeed on the merits"; (2) the "balance of equities tips in [the party's] favor"; (3) it is "likely
17 to suffer irreparable harm in the absence of preliminary relief"; and (4) a preliminary injunction
18 is in the public interest. *Winter*, 555 U.S. at 20. As implemented in the Ninth Circuit, the *Winter*
19 factors may be applied on a "sliding scale," that is, although the test "requires the [party] to make
20 a showing on all four prongs," the showing on each prong need not be equally strong. *See*
21 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Rather, the test
22 lies on a "continuum," pursuant to which "a preliminary injunction could issue where the
23 likelihood of success is such that 'serious questions going to the merits were raised and the
24 balance of hardships tips sharply in [plaintiff's] favor.'" *Id.* at 1131. This approach is also
25 referred to as the "serious questions" test. *Id.*

26 **V. DEFENDANTS SHOULD BE TEMPORARILY RESTRAINED AND**
27 **PRELIMINARILY ENJOINED FROM ENFORCING THE EANS**

28 Sunrise requests an immediate temporary restraining order pending this Court's

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1 consideration of its request for a preliminary injunction. Specifically, Sunrise challenges
2 Defendants’ decision to issue EANs to override CBP’s clearance of the Mountpark Shipments.
3 A temporary restraining order here would preserve the “last uncontested status” by restraining
4 the EANs and permitting the CBP’s clearance to stay in place. *See, e.g., Lopez*, 725 F.2d 1489 at
5 1509 (issuing a preliminary injunction enjoining the Secretary of Health and Human Services
6 from terminating social security benefits: “The district court’s injunction merely instructs the
7 Secretary to reinstate that earlier final decision pending determination of the validity of the
8 revocation”). Such an Order is necessary to alleviate the irreparable harm that Sunrise continues
9 to suffer each day that the EANs are in place.

10 **A. Sunrise is Likely to Succeed on the Merits of its Administrative Procedures**
11 **Act and Declaratory Relief Claims.**

12 Sunrise alleges four causes of action against the Defendants: three violations of the
13 Administrative Procedures Act (“APA”) 5 U.S.C. § 706(2) and Declaratory Relief pursuant to 28
14 U.S.C. § 2201(a). Dkt. 1. As explained below, Sunrise is likely to succeed on the merits of its
15 claims.

16 **1. Defendants’ Decision to Issue EANs Is Arbitrary, Capricious, and**
17 **Contrary to Law.**

18 A court may declare unlawful an agency action that is “arbitrary, capricious, an abuse of
19 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency action is
20 considered arbitrary and capricious if the agency “relied on factors which Congress has not
21 intended it to consider, entirely failed to consider an important aspect of the problem, offered an
22 explanation for its decision that runs counter to the evidence before the agency, or is so
23 implausible that it could not be ascribed to a difference in view or the product of agency
24 expertise.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA*,
25 415 F.3d 1078, 1093, (9th Cir. 2005) as amended (Aug. 17, 2005)(citations omitted).

26 While deference is given to agency decisions, the Court must conduct a thorough inquiry
27 to ensure that the agency decision does not contain a clear error of judgment. *Id.*; *Nat’l Ass’n of*
28 *Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). The agency must have “considered

1 the relevant factors and articulated a rational connection between the facts found and the choices
 2 made.” *Nat’l Ass’n of Home Builders*, 340 F.3d at 841. If an agency’s decision is not “founded
 3 on a reasoned evaluation of the relevant factors,” it cannot stand. *Marsh v. Or. Natural Res.*
 4 *Council*, 490 U.S. 360, 378 (1989).

5 Here, Defendants’ decision to reject the Mountpark Shipments was arbitrary and
 6 capricious and a clear abuse of discretion. CBP originally cleared the shipments after it passed
 7 CBP’s standard inspection process. Sunrise previously cleared twelve similar imports of cracked
 8 corn to the U.S. through several port of entries, including the Port of San Francisco. Neufeld
 9 Decl., ¶ 13; Corbett Decl., ¶¶ 9-10. Despite this, Defendants have offered no rational
 10 explanation for suddenly revoking that clearance nearly a week after the shipments were cleared
 11 for entry. In fact, to date, CBP, APHIS, and USDA have failed, and continue to fail, to provide
 12 Sunrise with any consistent explanation grounded in existing law or facts for rejecting the
 13 Mountpark Shipments.

14 Defendants initially contended the shipments contain prohibited commodities because
 15 “unprocessed raw corn grain of Russia, Kazakhstan, and Moldova production origin is prohibited
 16 entry into the U.S.,” citing 7 C.F.R. §§ 319.24 and 319.41. However, Moldova, Russia, or
 17 Kazakhstan are not prohibited sources under 7 C.F.R. §§ 319.24 and 319.41. *See* Discussion
 18 *supra*, Section II. B. Processed corn and raw corn are governed by separate APHIS standards
 19 (*i.e.*, the two separate manuals discussed *supra*, Section II. C. (i) and (ii)) and, notably,
 20 *Miscellaneous and Processed Products* does not impose restrictions based on countries of origin.
 21 This newly created standard does not exist in any APHIS publication or regulation and was never
 22 applied to any of Sunrise’s past imports or, to Sunrise’s knowledge, any other imports of corn.

23 Although the EANs identified “country of origin” as the basis for rejecting the shipments,
 24 in subsequent communications, Defendants informed Sunrise that the shipments did not qualify
 25 as “cracked corn” and offered a number of different definitions for “cracked corn,” all of which
 26 ignore APHIS’s stated definition of cracked corn as a processed seed “subjected to any degree of
 27 alteration beyond harvesting.” Neufeld Decl., ¶¶ 18, 20; Corbett Decl., ¶¶ 36-37, 38-39, 41-42.
 28 *Miscellaneous and Processed Products* is replete with specific references to cracked corn as a

1 “processed seed” subject to inspection and regulation in accordance with the standards set forth
2 in that manual.

3 Then, APHIS claimed that while the shipments met FGIS standards, they failed to meet
4 some unspecified USDA definition. Corbett Decl., ¶¶ 41-42. APHIS later proposed a new 100%
5 cracked corn definition, requiring crackage of every single kernel with no whole kernels left
6 intact. *Id.* This hundred percent standard is an implausible standard by any stretch of the
7 imagination. No industry standard exists that requires the cracking of every single corn kernel,
8 and no processing plant can, as a practical matter, ensure or meet this standard. Further, this
9 definition is not supported by existing regulations, stated in any APHIS regulation, or otherwise
10 publicized to Sunrise. Moreover, this new definition is contrary to the definition used in prior
11 inspections and clearances of Sunrise’s prior imports and contrary to Sunrise’s prior discussions
12 with CBP and APHIS that cracked corn is considered a processed seed. Corbett Decl., ¶¶ 41-42.
13 Further, APHIS determined that the Mountpark Shipments were not “cracked corn” based solely
14 on its review of a photograph, instead of conducting a visual inspection of the actual shipments
15 or sample testing the product. *Id.*, ¶¶ 25, 39.

16 Defendants have also contended that the shipments are “unprocessed seeds” subject to
17 *Seeds Not for Planting* because the shipments do not qualify as cracked corn. But, Sunrise’s
18 cracked corn fully satisfies APHIS’s definition of “processed seeds” because the product, in
19 undergoing Tiryaki’s cracking process, was subject to a number of alterations post-harvest (*i.e.*,
20 cleaning, processing through a roller-mill crushing system, spraying with organic sunflower oil,
21 polishing). Neufeld Decl., ¶¶ 6-7.

22 Defendants have further claimed that the whole kernels present in the shipments of
23 cracked corn are considered “contaminants,” and therefore denial of entry is warranted. Yet,
24 even under that circumstance, APHIS’s own rules do not automatically require denial of entry.
25 Instead, APHIS set clear guidelines on the appropriate actions that must be undertaken to treat or
26 handle the contaminant before release. *See Seeds Not for Planting*, at 3-18. CBP is directed to
27 take different actions based on the level of contamination and the potential disposition of the
28 shipment. *Id.*, at 2-21. If the corn will be subject to further processing, as is the case here, CBP

1 is required to simply “inspect and release” the product. *Id.*, at 2-18. Entry is denied only if the
2 corn is likely to be “released into the environment” and cannot be further processed, cleaned, or
3 treated. *Id.* But APHIS provided no justification as to why treatment of the shipments was not a
4 suitable alternative other than by pointing to CBP’s claim that treatment at the Penny-Newman
5 facility was not feasible, a claim which was refuted by Penny-Newman. Corbett Decl., ¶ 38.

6 For the reasons stated above, Defendants’ decision was arbitrary and capricious, based on
7 nothing more than *post hoc* rationalizations wholly unsupported by evidence, APHIS regulations,
8 or even APHIS’s own past conduct, and therefore, cannot stand.

9 **2. Defendants’ Decision Exceeds Their Statutory Authority.**

10 An agency decision made “in excess of statutory jurisdiction, authority, or limitations, or
11 short of statutory right” violates the APA. 5 U.S.C. § 706(2)(C). Defendants’ decision exceeded
12 their authority under the PPA by implementing ambiguous and vacillating standards, which were
13 neither transparent nor accessible, and requiring destruction or re-export instead of offering an
14 alternative to treat to the shipments.

15 Defendants’ process in rejecting Sunrise’s shipment was anything but transparent and
16 accessible. PPA sections 7711 and 7712 provide certain safeguards for process, requiring that
17 “the processes used in developing regulations under [this section] governing consideration of
18 import requests are based on sound science and are transparent and accessible.” 7 U.S.C. §§
19 7711(b) and 7712(b). Despite these safeguards, Defendants failed to follow established APHIS
20 standards and protocols to evaluate cracked corn imports, and instead, applied a number of
21 arbitrary and ambiguous standards as the bases for rejecting the Mountpark Shipments. In doing
22 so, Defendants could not articulate any coherent basis grounded in reason, facts, regulations, law
23 or past conduct for rejecting the Mountpark Shipments despite Sunrise’s persistent requests for
24 clarification.

25 Defendants exceeded their authority under the PPA by refusing to allow Sunrise to
26 engage in treatment alternatives. The PPA requires the implementation of the “least drastic
27 action.” 7 U.S.C. § 7714(d). A plant product cannot be “ordered to be destroyed, exported, or
28 returned to the shipping point of origin unless, in the opinion of the Secretary, there is no less

1 drastic action that is feasible and that would be adequate to prevent the dissemination of any
 2 plant pest or noxious weed new to or not known to be widely prevalent or distributed within and
 3 throughout the United States.” *Id.* Here, Defendants issued the EANs without even bothering to
 4 entertain possible alternatives to destruction or re-export. *See* Corbett Decl., ¶ 38. APHIS’s
 5 claim that CBP determined that treatment at Penny-Newman is not feasible was flatly
 6 contradicted by an email communication between Penny-Newman officials and APHIS. *Id.*, ¶¶
 7 41-42, Exh. M. Moreover, Defendants admit that the Mountpark Shipments do not risk pest or
 8 pathogen exposure, effectively undermining Defendants’ basis for issuing the EANs, which are
 9 intended to address such risks. Corbett Decl., ¶ 39; *see* 7 U.S.C. § 7714.

10 **3. Defendants Failed to Observe APHIS Procedures.**

11 The APA further prohibits an agency decision made “without the observance of
 12 procedure required by law.” 5 U.S.C. § 706(2)(C). Defendants unlawfully failed to observe
 13 existing procedures established by the APHIS on the evaluation and inspection of cracked corn.
 14 Defendants refused to apply the APHIS definition of cracked corn, and instead substituted and
 15 applied unfounded definitions for cracked corn to Sunrise’s products. Further, Defendants
 16 refused to follow the established protocol to assess cracked corn, which requires inspection and
 17 release. *See Miscellaneous and Processed Products* at 3-28. Moreover, Defendants further
 18 failed to observe established inspection standards by relying on a photograph instead of sample
 19 testing the product. *See Miscellaneous and Processed Products* at 2-2.

20 **4. A Declaration that Defendants Improperly Overturned the CBP’s** 21 **Clearance in Issuing the EANs Will Provide Sunrise Needed Clarity** 22 **and Afford Sunrise with Appropriate Relief.**

23 A judicial declaration that the EANs were improperly issued will provide Sunrise with
 24 necessary clarity and afford Sunrise with appropriate relief. *See Natural Res. Def. Council, Inc.*
 25 *v. U.S. Env’tl Prot. Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992). Such a declaration is
 26 necessary here because a present and continuing controversy exists between Sunrise and
 27 Defendants with respect to a determination of whether Defendants’ decision to reject Sunrise’s
 28 shipments were based on sound reason, and not arbitrary or capricious, were lawful, and

1 complied with APHIS regulations. This controversy will continue until a judicial determination
 2 resolves the dispute over the propriety of Defendants' decision. Sunrise is entitled to judgment
 3 declaring that Defendants' decision to reject Sunrise's shipment was an abuse of discretion,
 4 violated law and APHIS regulations. For the reasons explained above, Sunrise is likely to
 5 succeed on the merits.

6 **B. Sunrise Faces Certain and Irreparable Injury if the *Status Quo* Is Not**
 7 **Maintained Pending a Further Hearing on the Merits.**

8 Without an injunction, Sunrise faces actual, imminent, and irreparable harm. Unlike in
 9 civil suits between private individuals or entities, Sunrise is unable to recover damages from
 10 Defendants because sovereign immunity bars monetary relief. *See, e.g., Odebrecht Const., Inc.*
 11 *v. Sec'y, Fla. Dept. of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of
 12 preliminary injunctions, numerous courts have held that the inability to recover monetary
 13 damages because of sovereign immunity renders the harm suffered irreparable.") (citations
 14 omitted); *Chamber of Comm'ce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010)
 15 ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign
 16 immunity constitutes irreparable injury.")¹

17 Yet, Sunrise has incurred and continues to incur tens of thousands of dollars in daily fees
 18 as it remains anchored, carrying delayed shipments of cracked corn pending the resolution of this
 19 matter. Neufeld Decl., ¶ 24. Re-exporting the shipment to Turkey or destroying the shipment, as
 20 suggested by Defendants, are not viable options and would result in well over several million
 21 dollars in losses. This order is especially appropriate and necessary here given the magnitude of
 22 the potential harm to Sunrise and over \$ 8,422,000 million at risk. *See* Neufeld Decl., ¶¶ 23-29.

23 In addition to monetary damages, further delays in delivery or Sunrise's failure to deliver
 24 the cargo will result in irreparable harm to Sunrise's business relationships with its agricultural

25 ¹ Although the PPA permits an individual to seek damages from the Defendants, such relief is
 26 limited to recovery for destroyed goods. 7 U.S.C. § 7714 ("The owner of any plant...destroyed
 27 or otherwise disposed under [this section] or 7715...may bring an action against the United
 28 States to recover just compensation for the destroyed plant...*but only* if the owner establishes
 that the destruction...was not authorized") (emphasis added). While Sunrise is instructed to
 destroy or re-export its Mountpark Shipment, the shipment presently is docked in the Port of San
 Francisco and is intact. *See* Neufeld Decl., ¶ 25.

1 customers. *See id.*, ¶ 27. Moreover, Sunrise will suffer reputational harm in an industry where
 2 major business decisions are based on informal relationships and delays or unfulfilled purchase
 3 orders force grain wholesalers and farmers scrambling to find last minute feed alternatives.
 4 Damage or injury to the goodwill of a business is typically difficult to calculate, and thus
 5 supports a finding of irreparable injury. *See Rent-A-Center, Inc. v. Canyon TV & Appliance*
 6 *Rental, Inc.* 944 F.2d 597, 603 (9th Cir. 1991). Similarly, reputational damage or injury to a
 7 business may be irreparable, particularly if compensatory damages would be uncertain or
 8 inadequate. *See United Healthcare Ins. Co. v. Advance-PCS*, 316 F.3d 737, 741 (8th Cir. 2002).
 9 Thus, Sunrise will suffer irreparable harm in the absence of a TRO and preliminary injunction.

10 **C. The Balance of Hardships Strongly Favors Sunrise.**

11 Before a preliminary injunction may issue, the Court must identify the harm that a
 12 preliminary injunction might cause the defendant and weigh it against plaintiff’s threatened
 13 injury. *See Winter*, 555 U.S. at 24 (The Court “must balance the competing claims of injury and
 14 must consider the effect on each party of the granting or withholding of the requested relief.”).
 15 “[T]he real issue in this regard is the degree of harm that will be suffered by the plaintiff or the
 16 defendant if the injunction is *improperly* granted or denied.” *Scotts Co. v. United Ind. Corp.*, 315
 17 F.3d 264, 284 (4th Cir. 2002) (emphasis in original).

18 Here, the likelihood of irreparable harm entirely weighs in favor of Sunrise. Sunrise
 19 faces irreparable economic and noneconomic injuries with far-reaching and long-term
 20 consequences as its injuries continue to accrue. As discussed above, it has incurred tens of
 21 thousands of dollars and will continue to incur approximately \$11,500 per day in losses, and with
 22 each passing day, the risk of product deterioration increases. Further delays in delivery or
 23 Sunrise’s failure to deliver the cargo will damage Sunrise’s existing business relationships, cause
 24 extensive delays to the end-users, farmers, and likely lead to feed shortages throughout Eastern
 25 California. Moreover, Sunrise has no recourse against the Defendants to recover monetary
 26 damages. Thus, Sunrise will be severely prejudiced by a denial of the injunction.

27 By contrast, the likelihood of harm to Defendants with the issuance of an injunction is
 28 minimal, if any, particularly in light of the fact that prior, similarly situated, shipments have been

1 allowed to enter. Moreover, permitting CBP’s clearance to stand and allowing the Mountpark
2 Shipments to enter the U.S. does not risk exposing the public to plant pest or pathogen exposure,
3 which has not been raised as an issue. Corbett Decl., ¶ 39.

4 **D. Injunctive Relief Is in the Public Interest.**

5 Courts of equity “pay particular regard for the public consequences in employing the
6 extraordinary remedy of injunction.” *Winter*, 555 U.S. 7, 24. In analyzing whether the public
7 interest would be served by an injunction, the court will consider the potential impact of the
8 granting or withholding injunctive relief on nonparties. *League of Wilderness Defenders/Blue*
9 *Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014).

10 Here, Defendants’ arbitrary application of APHIS’s import regulations and guidance has
11 far-reaching implications that threatens the entire agricultural industry and impacts consumers.
12 Uncertainty with respect to the applicable import regulations will cause significant delays in
13 shipments to the end purchaser of the products, resulting in substantial loss in revenue for U.S.
14 importers and farmers, and higher costs to consumers. *See Neufeld Decl.*, ¶ 27.

15 Granting an injunction will serve the public, who will be affected by the loss of this
16 significant shipment of organic grain feed needed for California organic livestock. *Id.*, ¶ 22. The
17 nondelivery of the organic cracked corn shipments will cause, and have already begun to cause, a
18 chain reaction and shortage of supply, affecting wholesale grain distributors to feed sellers to
19 organic farmers, all of whom rely on a limited number of organic feed suppliers to consumers of
20 organic dairy, cow, and chicken products. *See id.*

21 The public also has an substantial interest in ensuring federal agency compliance with its
22 governing statutes and regulations. *Bayer HealthCare, LLC v. U.S. Food and Drug Admin.*,
23 2013 WL 1777481, at *8 (D.D.C. Apr. 17, 2013). Because the Defendants’ decision to reject
24 Sunrise’s shipment is arbitrary and capricious, exceeded their statutory authority, failed to
25 observe established agency procedure, the public interest weighs strongly in favor of issuing
26 injunctive relief.

27 Accordingly, the public interest is served by granting injunctive relief.

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1 **E. At A Minimum, Injunctive Relief Is Warranted Because the Sunrise has**
2 **Raised Serious Questions Going to the Merits and the Balance of Hardships**
3 **Tips Sharply in the Sunrise’s Favor.**

4 Under the Ninth Circuit’s sliding scale approach to preliminary relief, Plaintiff’s
5 entitlement to an injunction is even clearer. *See Alliance for the Wild Rockies*, 632 F.3d at 1135
6 (9th Cir. 2011). Under this alternative test, “a stronger showing of irreparable harm to plaintiff
7 might offset a lesser showing of likelihood of success on the merits.” *Id.* at 1131.

8 Here, Sunrise has clearly established likelihood of success on the merits, as discussed
9 above. Thus, even if there is any doubt raised, there at least is a “serious question” on the merits.

10 Moreover, the balance of hardships indisputably tips sharply in Sunrise’s favor because it
11 already has suffered and will continue to suffer irreparable harm as discussed above. Not only
12 will Sunrise continue to suffer substantial monetary losses for which it has no recourse against
13 Defendants, but each passing day the risk of product deterioration increases. Further delays in
14 delivery or Sunrise’s failure to deliver the cargo will damage Sunrise’s existing business
15 relationships, cause extensive delays to the end-users, farmers, and likely lead to feed shortages
16 throughout Eastern California.

17 By contrast, Defendants already have previously admitted similarly situated shipments.
18 Permitting CBP’s clearance to stand and allowing the Mountpark Shipments to enter the U.S.
19 does not risk exposing the public to plant pest or pathogen exposure, which is not an issue here.
20 Given that monetary damages may not be recovered against Defendants, Defendants will suffer
21 no injury or monetary harm by the grant of injunctive relief here.

22 **F. The Court Should Dispense with the Need for the Sunrise to Provide**
23 **Security.**

24 Dispensing with the security requirement is warranted in this case because, as set forth
25 above, Defendants will not be harmed by the restoring or maintaining the *status quo* pending
26 resolution of the Parties’ dispute. Under these circumstances, there is no threat of harm, and the
27 Court should dispense with the requirement of security under Federal Rule of Civil Procedure
28 65(c). *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (stating “a district court may

1 dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the
 2 defendant from enjoining his or her conduct”); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237
 3 (9th Cir. 1999) (affirming a district court’s decision to forgo requiring a security bond when “any
 4 cost to the government, in the event it is found to have been wrongfully enjoined, would be
 5 minimal.”).

6 VI. GOOD CAUSE EXISTS FOR LIMITED EXPEDITED DISCOVERY

7 Sunrise seeks expedited discovery relating to the agency’s records regarding Defendants’
 8 decision to overturn CBP’s clearance of the Mountpark Shipments. Specifically, Sunrise seeks:
 9 (i) documents, including, without limitation, communications relating to the basis for
 10 Defendants’ rejection of the Mountpark Shipments; and (ii) a Rule 30(b)(6) deposition of APHIS
 11 on the topic of the basis for Defendants’ rejection of the Mountpark Shipments.

12 Expedited discovery is permitted upon a showing of good cause. *Semitool, Inc. v. Tokyo*
 13 *Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (applying the conventional “good
 14 cause” standard to requests for early or expedited discovery); *see* Advisory Committee Notes for
 15 Fed. R. Civ. Proc. 26(d) (1993 amendments) (“Discovery can begin earlier [than the Rule 26(f)
 16 conference] ... by local rule, order, or stipulation. This will be appropriate in some cases, such as
 17 those involving requests for a preliminary injunction...”). “Good cause may be found where the
 18 need for expedited discovery, in consideration of the administration of justice, outweighs the
 19 prejudice to the responding party.” *Semitool, Inc.*, 208 F.R.D. at 276. In determining whether
 20 good cause justifies expedited discovery, courts commonly consider factors including: “(1)
 21 whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the
 22 purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with
 23 the requests; and (5) how far in advance of the typical discovery process the request was made.”
 24 *Satmodo, LLC v. Whenever Commc’ns, LLC*, No. 3:17-CV-192-AJB-NLS, 2017 WL 4557214, at
 25 *3 (S.D. Cal. Oct. 12, 2017) (quoting *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 768 F. Supp. 2d
 26 1040, 1044 (N.D. Cal. 2011)). In particular, in cases involving governmental agency decisions,
 27 the Ninth Circuit has found discovery warranted (1) when the record needs be expanded to
 28 explain agency action; (2) when the agency has relied upon materials not included in the record;

1 (3) to explain or clarify technical matter involved in the agency action and (4) where there has
2 been a strong showing in support of a claim of bad faith or improper behavior on the part of the
3 agency decision makers. *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982).

4 Here, all of the good cause “factors” weigh in favor of expedited discovery. First, the
5 discovery is being sought in connection with a preliminary injunction proceeding. Second, the
6 discovery requests will be narrowly tailored to the needs of the preliminary injunction, *i.e.*, the
7 discovery necessary to determine the basis for Defendants’ rejection of Sunrise’s shipments,
8 such as what documents or materials APHIS and USDA referred to or relied on in determining
9 that Sunrise’s shipments contained prohibited commodities. Such requests are necessary because
10 the record lacks transparency in the Defendants’ actions, the Defendants have based its rejection
11 of the Mountpark Shipments on material not in the record, and there has been a strong showing
12 of improper behavior by APHIS. Third, the purpose of requesting the expedited discovery is tied
13 directly and narrowly to information needed for the preliminary injunction proceeding. Fourth,
14 given the recency of events—with all communications taking place on or after February 26, 2018
15 —the Defendants’ burden in complying with such requests are minimal. Fifth, while the
16 requests are being made in advance of the typical discovery process, they are sought precisely
17 because of the need for a preliminary injunction. Thus, where, as here, the discovery sought is
18 narrowly tailored to the needs of a preliminary injunction and Defendants will suffer minimal
19 prejudice, the Court should permit expedited discovery.

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1 **VII. CONCLUSION**

2 For the foregoing reasons, Sunrise respectfully requests that the Court grant the *ex parte*
3 Motion and issue a Temporary Restraining Order. Sunrise further requests this Court issue an
4 order to Defendants to show cause regarding the issuance of a preliminary injunction. Lastly,
5 Sunrise requests this Court issue an order authorizing expedited discovery.

6
7 Dated: April 8, 2018

Respectfully submitted,

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