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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.,) Case No.: 2:18-cv-00688-JAM-EFB  
13 a Canadian corporation, )

) Assigned to Judge John A. Mendez

14 Plaintiff,

) **DECLARATION OF DR. CHARLES  
15 LAMBERT IN SUPPORT OF**

16 vs.

) **PLAINTIFF'S REPLY IN SUPPORT OF**

17 SONNY PERDUE, Secretary of the U.S.  
Department of Agriculture; U.S. Department  
18 of Agriculture; KEVIN SHEA, Administrator  
of the U.S. Department of Agriculture's  
19 Animal and Plant Health Inspection Service;  
U.S. Department of Agriculture Animal and  
20 Plant Health Inspection Service; KEVIN K.

) **EX PARTE MOTION FOR:**  
) **(1) TEMPORARY RESTRAINING**  
) **ORDER;**  
) **(2) ORDER TO SHOW CAUSE RE:**  
) **PRELIMINARY INJUNCTION; AND**  
) **(3) EXPEDITED DISCOVERY**

21 MCALEENAN, Commissioner of U.S.  
Customs and Border Protection; U.S.  
Customs and Border Protection,

) [Reply, Supplemental Declaration of Michael  
22 Corbett filed concurrently herewith]

23 Defendants.

) [L.R. 231]

) Action Filed: March 29, 2018  
24 )  
25 )  
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28 )

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**DECLARATION OF DR. CHARLES LAMBERT**

I, Dr. Charles Lambert, declare and state as follows:

1. I am agricultural consultant and economist with significant experience in agricultural trade and agricultural policy. I am over the age of eighteen and competent to make this declaration as an expert in support of Sunrise’s Reply in support of its *Ex Parte* Motion for a Temporary Restraining Order, Order to Show Cause re: Preliminary Injunction, and Expedited Discovery filed in this action. I have personal knowledge of the matters set further herein and if called upon and sworn to do so, I could and would testify truthfully about its contents. I have reviewed the moving and opposition papers and supporting documents in this matter and am familiar with its contents.

2. I am a specialist in the field of agricultural policy and economics. I earned my Ph.D. in Economics at Kansas State University in 1987, with a specialty in agricultural policy, development and international trade. Prior to that, I earned my Masters of Science degree in Animal Science and Industry in 1982, and my Bachelor of Science in Animal Science and Industry in 1969 both at Kansas State University. A true and correct copy of my curriculum vitae is attached as **Exhibit A**.

3. In 1983, I became the Executive Director and Research Associate at the Kansas Governor’s Agricultural Policy Working Group, where I developed agricultural policy for the State of Kansas and worked for a national trade association developing and implementing policy from 1987 to 2002.

4. Notably for purposes of my testimony in this case, beginning in 2002, I served as the Deputy Under Secretary of Marketing and Regulatory Programs at the United States Department of Agriculture (“USDA”) for six years. As the Deputy Under Secretary, I worked closely with the administrators of various agencies under the USDA, including the Plant Protection Quarantine Program and the Agriculture Quarantine Inspection division, to ensure that the policies and positions on various issues were consistent with the agenda of the USDA Secretary. I was also responsible for overseeing international agricultural trade under a number of trade agreements including NAFTA, and negotiated to resolve international trade restriction issues, and developed agricultural inspection policies. Through this position, I became familiar with Animal and Plant

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1 Health Inspection Service (“APHIS”) regulations and inspection protocols governing the import of  
2 agricultural products, including cracked corn.

3 5. From 2007 to 2008, I served as the Acting Under Secretary of the USDA Marketing  
4 and Regulatory Programs and provided oversight of the administration of APHIS, Agricultural  
5 Marketing Service, and Grain Inspections, Packers and Stockyards Administration. My primary  
6 responsibilities included prioritizing policies and policy guides for these USDA divisions. In this  
7 capacity, I oversaw the regulatory rulemaking procedures for APHIS, among other agencies. I was  
8 also responsible for prioritizing key regulations, advised on interpreting these regulations, and  
9 facilitated the implementation of these regulations.

10 6. Since retiring from the USDA, I have provided and continue to provide consulting  
11 services to various organizations in the area of agricultural import and export policies and  
12 procedures. I have served as a trade policy leader for a number of consulting companies including  
13 AECOM, Inc. and Deloitte Consulting LLP.

14 7. Most recently, I served as the National Policy Advisor for Chemonics International,  
15 where I advised the Minister and Deputy Minister of Afghanistan on establishing plant and animal  
16 import and export procedures and policies comparable to USDA’s.

17 8. In my capacity as a consultant, I remain informed of current developments in the  
18 USDA and keep abreast of major changes to USDA policies and initiatives.

19 **Agricultural Import Inspection by Customs and Border Protection**

20 9. Shipments of agricultural commodities from overseas are subject to import  
21 inspection by the U.S. Customs and Border Protection (“CBP”) upon arrival to a U.S. port. CBP is  
22 responsible for inspecting imported goods in compliance with APHIS regulations on import  
23 inspections and protocols, and acts under the authority of APHIS and consistent with regulatory  
24 manuals prepared for CBP. Separate from its responsibilities to inspect agricultural products, CBP  
25 is responsible for enforcing U.S. trade laws and, in this capacity, requires importers to complete  
26 customs paperwork to accompany imported products. This paperwork is typically submitted to  
27 customs prior to the product’s arrival at port of entry to facilitate CBP clearance.  
28

1           10.     CBP imposes specific criteria for determining country of origin to comply with  
2 certain tariffs and, accordingly, requires importers to identify country of origin on shipping  
3 manifests. Notably, there is no requirement to disclose, nor is there a place on any of the shipping  
4 documents to disclose or otherwise identify the cracked corn shipment’s pre-harvest country of  
5 origin in the shipping documents. CBP is the face at seaports and border crossings for inspecting  
6 and approving imports of agricultural products consistent with APHIS regulations.

7           11.     APHIS has statutory authority to promulgate, implement, and enforce regulations  
8 that govern import inspections of agricultural goods to prevent the introduction of pests and  
9 pathogens into the U.S. borders.

10           **Country of Origin**

11           12.     I have reviewed the documents attached as Exhibit G to the Declaration of Michael  
12 Corbett, which are the CBP shipping documents for the four Mountpark shipments at issue in this  
13 case (“Mountpark Shipments”). These shipping documents properly identify Turkey as the country  
14 of origin, as correctly reflected in the Bills of Lading, because the goods were processed in Turkey,  
15 and the port of origin is Turkey. The country of origin required on the import form refers to the  
16 port from where the shipment originated, which would be the port of last processing.

17           13.     Based on my review of the materials and my understanding of the information  
18 maintained by APHIS and CBP, the only reason that APHIS was able to learn of the country of  
19 *harvest* as being from Russia, Moldova, and Kazakhstan is because that information is separately  
20 required and maintained by the National Organic Program (“NOP”) for organic certification and  
21 marketing post-entry. As APHIS acknowledges in the Declaration of Marie Martin at paragraphs  
22 13 15, it obtained the country of harvest information from NOP.

23           14.     For commercial shipments of non-organic cracked corn, APHIS and CBP would not  
24 have had the ability to obtain the country of harvest information. In other words, APHIS and CBP  
25 were only able to single out the Mountpark Shipments because they contained organic product. For  
26 non-organic cracked corn, APHIS and CBP would have ended the inquiry at the port of origin, *i.e.*,  
27 Turkey, per its own rules and regulations. The product would then have been inspected and  
28 released per Table 3-36 of the *Miscellaneous and Processed Products* manual.

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1           15.     Moreover, there is no absolute prohibition against the import of unprocessed corn  
2 from Russia, Moldova, and Kazakhstan because APHIS allows the import of unprocessed corn from  
3 these countries with a permit. A true and correct copy of PPQ Form 588, the application for this  
4 permit called Application for Controlled Import Permit (CIP) to Import Restricted Or Not  
5 Authorized Plant Material, is attached as **Exhibit B**.

6     **Unprocessed Versus Processed Corn**

7           16.     Based on a review of the Complaint, the Plaintiff’s Motion and Defendants’  
8 Opposition, it appears to me that the central dispute in this action is whether the Mountpark  
9 Shipments are considered cracked corn or unprocessed corn.

10          17.     I am familiar with two APHIS manuals relevant to this matter. Based on my review  
11 and understanding of these manuals, processed corn shipments falls under the purview of the  
12 *Miscellaneous and Processed Products* manual because it is a processed seed. APHIS defines  
13 cracked corn as a “seed subjected to any degree of alteration beyond harvesting (e.g. cracked corn is  
14 considered processed.)” *Miscellaneous and Processed Products*, Glossary-13. Table 3-36 Grains  
15 locator table governs the inspection of “corn products and by-products of grain milling (e.g.  
16 cornmeal, cracked corn, grits, oil, samp, and starch)” and requires that they be inspected and  
17 released. Cracked corn is imported without a permit under this manual and is not subject to any  
18 country restrictions. The manual does not impose any other specifications for cracked corn,  
19 including cracked corn to whole corn kernel ratios or percentages, or crackage thresholds to qualify  
20 the product as cracked corn.

21          18.     Based on my review and knowledge, Mountpark Shipments should be considered  
22 cracked corn and subject to *Miscellaneous and Processed Products*. I have reviewed the two  
23 photos taken of the Mountpark Shipments that were attached as Exhibit 4 to the Declaration of  
24 Marie Martin. Based on my review of these photos, it is evident that the shipments have been  
25 extensively processed and are not raw, unprocessed kernels. This is indicated by the many corn  
26 particles and powder reflected on the tray of the bottom photograph. It is evident that these kernels  
27 have undergone a cleaning, cracking and oiling process that the product could not be used as a seed,  
28 or for planting, or for other commercial whole grain channels. This type of product would not be

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1 considered whole grain because it has been sufficiently altered through processing that it could not  
2 be used for planting or marketed as whole grain, and but instead would have to be used as livestock  
3 feed or become ethanol, each with further processing.

4 19. In any event, photos are unreliable and misleading for determining crackage. That is  
5 because, for example, whole corn kernels tend to rise to the top and the sides in transit or storage,  
6 while cracked kernels sift to the bottom. In addition, if a corn kernel is partially cracked, it may  
7 appear to be a whole kernel if the cracked side is facing down. Because photographs are unreliable  
8 and particularly misleading, photographs are insufficient alternatives to sampling and testing  
9 cracked corn products.

10 20. But even assuming the shipments have varying levels of crackage, these shipments  
11 as a whole are processed corn, irrespective of the level or percentage of crackage, because each  
12 kernel was at least cleaned and oiled, if not cracked, as part of the cracking process. Therefore,  
13 they have been altered and are considered processed seeds under the manual. Because these  
14 shipments were processed, the *Seeds Not For Planting* manual does not apply.

15 21. Defendants state that the whole corn kernels in the Mountpark Shipments are  
16 unprocessed whole seed contaminants regulated by *Seeds Not For Planting*. Based on this analysis,  
17 Defendants further claim that these shipments are prohibited because they were harvested from  
18 certain prohibited countries, and therefore cannot be treated by a facility like Penny Newman.  
19 While I disagree with the underlying logic, but, assuming Defendants' position is true, Table 2-8  
20 under *Seeds Not For Planting* governs the appropriate regulatory action that must be taken based on  
21 contamination of plants or plant parts, and ultimately requires release. Defendants label these  
22 whole seeds as contaminants. Under the present facts, shipments are not likely to be released into  
23 the environment because it will be further processed, and not used as feed in its current form, and  
24 the shipments were harvested from a country other than Australia or New Zealand. As such, the  
25 reader is directed to refer to Table 2-10. Here, because these shipments are considered prohibited  
26 plant structures, Table 2-10 requires the shipments to be inspected and released.

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Table 2-8 Take Appropriate Regulatory Action Based on Contamination of Plants or Plant Parts

If the plant contaminant is:	And:	And:	And seeds were harvested in:	Then:
Corn, millets, or a corn relative specifically: <i>Chionachne</i> spp. <i>Coix</i> spp. <i>Echinochloa</i> spp. <i>Eleusine</i> spp. <i>Euchlaena</i> spp. <i>Miscanthus</i> spp.	Is not likely the seed will be released into the environment (such as seeds that will be used as spice, for manufacturing, or further processed)	28 or fewer seeds of contaminant per quart of seed	→	RELEASE
		29 or more seeds of contaminant per quart of seed	Australia	GO to Table 2-11
			New Zealand	GO to Table 2-12
			Other than Australia or New Zealand	GO to Table 2-10
<i>Panicum</i> spp. <i>Pennisetum</i> spp. <i>Polytoca</i> spp. <i>Sclerachne</i> spp. <i>Setaria</i> spp. <i>Sorghum</i> spp. <i>Triobachne</i> spp. <i>Tripsacum</i> spp.	Is likely that the seed will be released into the environment (such as bird seed or seed to feed to animals)	→	Australia	GO to Table 2-11
		→	New Zealand	GO to Table 2-12
		→	Other than Australia or New Zealand	GO to Table 2-10
		→		
		→		
		→		
		Hibiscus spp.)	→	
Okra ( <i>Abelmoschus</i> spp.)	→		INSPECT and RELEASE	
Wheat	You calculate the percent of wheat seed in commodity imported (see Table 2-9)	5 percent or more wheat seed contaminant in sample	→	TREAT the wheat as a component, not as a contaminant GO to Table 3-52 and regulate the shipment wheat
		Less than 5 percent wheat seed contaminant in sample	→	REGULATE the commodity seed not for planting; do not regulate the wheat
Plant contaminant that is not identifiable	→	→		GO to Table 2-10
Other than listed above	→	→		GO to Table 2-10



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**Table 2-10 Take Regulatory Action Based on Plant Contaminants Including Federal Noxious Weeds and Plants Regulated by 7 CFR 319, 7 CFR 330, or 7 CFR 360**

If the contaminants are:	And the seeds:	And:	And:	Then:
Federal noxious weeds 7 CFR 360	Can be freed from contaminants by cleaning, devitalizing (heat treatment), or grinding to mitigate pest risk of noxious weed contamination  (SEE Treatment Manual) and Special Procedures for Authorizing the Grinding of Commodities Contaminated with Federal Noxious Weed Seeds to determine appropriate method)	→	Seeds will be cleaned, devitalized, or grinding is an appropriate option to mitigate risk of noxious weed contaminants for nonpropagative commodities contaminated with Federal noxious weed seeds	AUTHORIZE movement of the shipment to a facility that will grind the seeds, remove the contaminant <sup>1</sup> , or devitalize (heat treatment)  If the seeds are freed from the contaminants or the seeds are ground or devitalized, then RELEASE
			Cleaning, heat treatment, and grinding are not appropriate options	PROHIBIT ENTRY
	Cannot be freed from the contaminants, cannot be devitalized or ground to mitigate the risk of noxious weed contamination, or the Importer disagrees	→	Is accompanied by a 588 Controlled Import Permit or Departmental Permit	RELEASE
			Lacks a 588 Permit	PROHIBIT ENTRY
Plant structures prohibited by 7 CFR 319 or 7 CFR 330 <sup>2</sup>	Is not likely to be released into the environment (e.g., used as a spool, for manufacturing, or for processing)		→	INSPECT and RELEASE
	Is likely to be released into the environment and is not processed (e.g., animal feed or bird seed)	Can be cleaned or treated (heat or irradiation)	→	HOLD the shipment NOTIFY local PPQ that the shipment must be cleaned or treated to meet entry requirements
		Cannot be cleaned or treated		Is accompanied by a 588 Controlled Import Permit or Departmental Permit
			Lacks a 588 Permit	PROHIBIT ENTRY
Other than listed in the cells above			→	RELEASE

1 Before the entire shipment is cleaned, encourage the Importer to have a sufficiently large sample run through the operation to verify that the contaminants can be removed.  
 2 Examples of prohibited seeds include those from bamboo, parasitic plants, and rice.

22. As Defendants note, APHIS does not impose any country restrictions on the import of cracked corn. This means, both non-organic commercial and organic cracked corn from any country, including Russia, Moldova, and Kazakhstan, is permitted to enter the U.S.

23. Thus, the fact that there is no Pest Risk Assessment for these three countries does not mean that any risk to the public, substantial or otherwise exists. Under APHIS's logic, the Mountpark Shipments somehow pose a risk greater than that already posed by the approved entry of corn from the same countries of harvest via permit or otherwise. APHIS's rejection based on the



1 percentage of crackage is not based on safety assessment, but merely on a difference in qualifying  
2 the commodity.

3 **Treatment Alternatives**

4 24. Based on my research, Penny Newman is a facility for drying, cleaning, and grinding  
5 grain inside its extensive bulk-cargo terminal at the Port of Stockton that regularly trades corn,  
6 among other grains, domestically and internationally.

7 25. While Osama El-Lissy in his Declaration suggests that treating the shipments at  
8 Penny Newman presents unacceptable risks, he significantly overstates the magnitude of the  
9 potential risk of grinding at the facility, the potential of cross-contamination, potential risk of  
10 releasing it to the environment, as well as the lack of adequate assurances to mitigate potential risk  
11 at Penny Newman. Penny Newman regularly treats contaminated crops on site including products  
12 contaminated with noxious weed seeds, a known contaminant. Simple efforts may be undertaken to  
13 mitigate any cross-contamination by placing the product in bonded storage, for example. Concerns  
14 about potential environment release by using onsite elevators are unlikely because environmental  
15 exposure is a concern only when the product is fed to livestock in its current processed state.

16 26. Moreover, any potential pest or pathogen risks that Mountpark Shipments may have  
17 are significantly reduced by the cleaning, cracking, and spraying process the kernels undergo as part  
18 of the cracking procedure, and are further reduced to the extent the kernels have been cracked or  
19 otherwise processed. Accordingly, because the risks that may be inherent in these kernels have  
20 been significantly reduced by cracking, it is my opinion that APHIS should have reasonably offered  
21 Sunrise remedial alternatives to treat the shipments.

22 27. Domestic processing is permitted as treatment for noxious weeds under the APHIS  
23 manual *Seeds Not For Planting*. Noxious weeds are a significant plant pest, and pose greater risks  
24 than a shipment of corn from a prohibited country, particularly if the shipment consists of cracked  
25 corn as explained above.

26 28. Typically, if APHIS questioned or otherwise had concerns about the shipments, it  
27 would have conducted a further inspection by reviewing and examining shipping documents and by  
28 testing or otherwise sampling the product to establish compliance with the regulations and the

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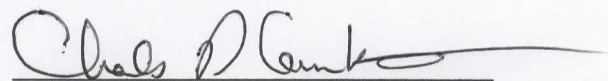
1 entrance of an article, as noted in the *Miscellaneous and Processed Products Manual* before  
2 deciding to reject the shipment.

3 29. From my assessment of what occurred with respect to the Mountpark Shipments, it  
4 appears that APHIS prematurely focused on the country of origin as the issue before performing  
5 any inspection to determine whether the corn was cracked corn or not. They decided to inspect the  
6 crackage of the shipments only after the EANs were issued and after the CBP, APHIS, and USDA  
7 rendered its final decision rejecting the shipments. This is highly atypical, and not provided for in  
8 the manuals, because all inspections should have occurred prior to rejecting the shipments and  
9 issuing the EANs.

10 **Conditional Approvals**

11 30. APHIS also asserts that the approval on March 7, 2018, was intended to be a  
12 conditional approval subject to further assessment. However, it is my experience and understanding  
13 that any conditions on approval would have been clearly identified and importers should and would  
14 have received notice of any conditional clearances. Based on my review of Exhibits B and C to the  
15 Corbett Declaration, it does not appear that there was any condition placed on the removal of the  
16 hold on the shipments dated March 7, 2018.

17  
18 I declare under penalty of perjury under the laws of the United States of America that the  
19 foregoing is true and correct. Executed this 16th day of April 2018, in Kai ulu, Hawaii.

20  
21   
22 Dr. Charles Lambert (PhD, MS)

