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SUNRISE FOODS INTERNATIONAL INC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SUNRISE FOODS INTERNATIONAL INC., a Canadian corporation, Plaintiff, vs. SONNY PERDUE, Secretary of the U.S. Department of Agriculture; U.S. Department of Agriculture; KEVIN SHEA, Administrator of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service; U.S. Department of Agriculture Animal and Plant Health Inspection Service; KEVIN K. MCALEENAN, Commissioner of U.S. Customs and Border Protection; U.S. Customs and Border Protection, Defendants.	Case No.: 2:18-cv-00688-JAM-EFB Assigned to Judge John A. Mendez **PLAINTIFF SUNRISE FOODS INTERNATIONAL INC.'S REPLY IN SUPPORT OF *EX PARTE* MOTION FOR: (1) TEMPORARY RESTRAINING ORDER; (2) ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; AND (3) EXPEDITED DISCOVERY** [Supplemental Declaration of Michael Corbett, Declaration of Charles Lambert filed concurrently herewith] [L.R. 231] Action Filed: March 29, 2018

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I. INTRODUCTION

Despite fully complying with APHIS's import regulations and successfully clearing 12 prior imports of the same product, Sunrise faces over $8 million in unrecoverable, irreparable damage due to the Defendants' unlawful rejection of the Mountpark Shipments. To misdirect from the fact that they misapplied APHIS regulations, Defendants proffer a series of red herrings and incorrect facts to defend their actions. Among them, Defendants baldly accuse Sunrise of misidentifying a prohibited commodity and the country of origin on shipping documents, when in fact both the commodity and country of origin were identified correctly. They label Sunrise's processed, cracked corn as "prohibited, potentially high-risk corn" based on the country of harvest information they obtained from the National Organic Program (NOP) (*see* Defendants' Opposition ("Opp."), Dkt. 13, 1), yet they routinely allow entry of the non-organic versions of the same kind of product. They raise permitting issues (Opp. 7, 8, 15), obfuscating the fact that no permit is needed to import cracked corn and that processed corn is not subject to any country restrictions. They characterize CPB's clearance of the Mountpark Shipments on March 7th as "conditional" (Opp. 15 n.3) when in fact no conditions were imposed. *See* Declaration of Dr. Charles Lambert ("Lambert Decl."), ¶ 30.

While engaging in this misdirection, Defendants ask the Court to not "second guess" its CBP inspectors, yet they entirely ignore the fact that the same CBP previously cleared 12 shipments of the same product. They also fail to dispute that in pre-import discussions with Sunrise, CBP explained that processed seeds are governed by *Miscellaneous and Process Products*. Now, however, Defendants focus on the crackage percentage as a foothold into applying *Seeds Not for Planting*, but the crackage percentage is irrelevant to "processed seed" which is governed by *Miscellaneous and Process Products*. At bottom, the CBP officers got the 12 prior clearances right. But now, Defendants misapply APHIS's own regulations in an attempt to justify their arbitrary and capricious rejection of the Mountpark Shipments.

II. SUNRISE PROPERLY AND EXPEDIENTLY MOVED FOR A TRO AFTER NEGOTIATIONS FAILED

"In the Ninth Circuit, a delay of several months that gives the plaintiff an opportunity to investigate its claim and attempt to resolve the dispute out of court is not unreasonable such that

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(temporary) injunctive relief should be denied on that ground alone." *Warner Bros. Ent. v. Global Asylum, Inc.*, No. CV 12-9547, 2012 WL 6951315, at *21 (C.D. Cal., Dec. 10, 2012).[1] Here, Sunrise engaged in negotiations immediately after the EANs were issued, which continued even after the final agency decision was issued on March 19, 2018, in order to exhaust its administrative remedies. Plaintiff's TRO Motion ("Mot."), Dkt. 8 at 10-13. Even after filing the Complaint on March 29, Sunrise continued to engaged with the Defendants to seek possible resolution until Defendants made clear on April 5, 2018, that a TRO would be necessary.[2]

Moreover, in characterizing Sunrise's TRO as one for "mandatory" injunction, Defendants entirely ignore the 12 prior shipments that CBP cleared without issue. These prior shipments, together with the current shipments at issue, demonstrate that the "last uncontested status" between the parties is, in fact, clearance. *See Lopez v. Heckler*, 725 F.2d 1489, 1509 (9th Cir. 1984), *vacated on other grounds in* 469 U.S. 1082 (1984). Defendants also mischaracterize the March 7, 2018 clearance as "conditional," in an attempt to create uncertainty as to the status. But that clearance clearly had no conditions and were identical to the clearances of the 12 previously cleared shipments. *See* Lambert Decl., ¶ 30; Supplemental Declaration of Michael Corbett, ¶ 2.

III. SUNRISE'S SHIPMENTS CONSTITUTE "PROCESSED SEED" GOVERNED BY THE *MISCELLANEOUS AND PROCESSED PRODUCTS* MANUAL

Defendants ignore the threshold fact that Sunrise fully satisfies APHIS's definition of "processed" seeds, which APHIS defines as "being subjected to some physical or chemical procedure beyond harvesting." *Miscellaneous and Processed Products*, at Glossary-4. Shipments containing "processed seed" are indisputably subject to the *Miscellaneous and Processed Products* manual. *See* Opp. 17. Here, the entirety of the Mountpark Shipments were subject to a number of alterations in undergoing Tiryaki's cracking process, including thorough cleaning and spraying. *See* Mot. 8; *see also* Lambert Decl., ¶¶ 18, 20. Once that is established, the processed seed is not

[1] *See, e.g., Fidelity Brokerage Serv. LLC v. McNamara*, No. 11-CV-1092, 2011 WL 2117546, at *5 (S.D. Cal., May 27, 2011) (Plaintiff's endeavor to informally resolve matter with Defendant was not undue delay); *Posdata Co. Ltd. v. Kim*, No. C-07-02504RMW, 2007 WL 1848661, at *7 (N.D. Cal., June 27, 2007) (no undue delay due to failed negotiations).
[2] *Occupy Sacramento v. City of Sacramento*, No. 2:11-cv-02873, 2011 WL 5374748, at *4 (E.D. Cal. Nov. 4, 2011) and *Murphy v. U.S. Forest Serv.*, No. 2:13-cv-2315, 2013 WL 12174044, at *1 (E.D. Cal. Nov. 15, 2013), cited by Defendants (Opp. 12) are inapposite. In each of these cases, the plaintiff either failed to seek alternative forms of relief or just simply failed to justify the delay. In contrast, here, Sunrise worked diligently to engage Defendants to informally resolve the matter, as explained at length in the declarations submitted in support of its Motion.

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subject to country of origin restrictions, nor is a permit required.[3] *See* Opp. 15. Sunrise's 12 prior shipments were cleared using this very standard.

Defendants' current focus on the crackage percentage, and the *Seeds Not for Planting* manual, is in direct conflict with the definition of "processed seed" as any alteration beyond harvest. Indeed, the Declaration of Marie Martin at paragraph 17 sets forth a "definition" of crackage without any authority. That unfounded definition is then used to support Defendants' argument that the shipments were "not sufficiently ground" and that there were unspecified "significant quantity" of whole kernels, leading to the twisted conclusion that the shipments are considered "raw" or "unprocessed" and, therefore, subject to *Seeds Not for Planting*. Opp. 15-16. Nowhere in the APHIS manuals or regulations supports this construct. Just because some kernels appear uncracked does not mean that it is "unprocessed," as further evidenced in the photographs that Defendants took of the Mountpark Shipments. *See* Lambert Decl., ¶ 19. In arguing that the corn was not "processed" because it was not visibly cracked or chipped, APHIS erroneously requires that processing result in visibly perceptible change, which is not required by the manuals.

Moreover, despite the fact that Sunrise requested testing from the outset, Defendants did not do so until April 10, 2018, *after* Sunrise's TRO was filed. When testing was finally done, it was done without Sunrise's participation and described in vague terms in the Chun declaration. In any event, it is clear that *at the time the EANS were issued*, Defendants failed to observe established inspection standards by relying on a photograph rather than testing. *See* Opp. 9-10.

Accordingly, in rejecting the Mountpark Shipments, Defendants exceeded their statutory authority and failed to observe PPA's procedural safeguards under 7 U.S.C. §§ 7711(b) and 7712(b) by implementing new and ambiguous cracked corn standards and inspection procedures.

IV. TREATMENT, NOT PROHIBITION, IS THE "LEAST DRASTIC ACTION"

Assuming *arguendo* the whole kernels in the shipments somehow constitute prohibited "contaminants," Defendants cannot reject the shipments. Instead, PPA requires that the least drastic option be implemented. 7 U.S.C. § 7714(d). Tables 2-8 and 2-10 in *Seeds Not For Planting*

[3] Defendants' reliance on Tables 3-153 and 3-136 is misplaced as these tables do not apply to processed cracked corn at issue in this case. See Table 3-153 (hulled seeds and manufactured corn articles); and Table 3-136 (commercially freeze dried or microwaveable popcorn).

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expressly address the pathways for evaluating otherwise allowable cargo contaminated with prohibited seeds. "Inspect and release" is the appropriate regulatory action for plant contaminants subject to subsequent milling, as is the case here. *See Seeds Not for Planting*, Table 2-10.

Defendants assert that the purported dangers of unknown risks caused by "domestic processing of prohibited product from foreign countries" that do not have a Pest Risk Assessment (PRA) prohibit entry. Opp. 10; Declaration of Osama El-Lissy ("El-Lissy Decl."), ¶ 36 (speculating of risks of plant pests associated with shipments, and concerns regarding adequate safeguards in the unloading, storage, milling, and disinfection process associated with unfamliar plant pet risks). But, these unknown risks are not actual risks, and in fact, domestic processing is permitted even for "noxious weeds." *See* Lambert Decl., ¶ 27; *Seeds Not For Planting*, Table 2-10. El-Lissy overstates the potential magnitude of risk contamination by grinding at the facility and minimizes Penny Newman's ability to undertake necessary precautions to prevent such cross-contamination. Lambert Decl., ¶ 25. Importantly, CBP already determined that there are no pest or pathogen risks in the Mountpark Shipments, a fact which has not been disputed. *See* Corbett Decl., ¶ 39. Accordingly, even under Defendants' own interpretation, Defendants abused their discretion by unreasonably requiring destruction or re-export and failing to permit mitigation measures at Penny Newman. *See* Lambert Decl., ¶¶ 25-28.

V. DEFENDANTS IGNORE SUNRISE'S IRREPARABLE HARM AND HARDSHIPS

If Defendants waive sovereign immunity on the record in this action, and admit that Sunrise is fully able to recover its monetary losses—to the tune of $8 million in lost product—then perhaps this would be a closer call. But, as it currently stands, Defendants' reference to the general rule that economics losses are insufficient does not apply here because sovereign immunity bars monetary relief. *See* Mot. 19. Such unrecoverable losses are irreparable. *Id.* (cases cited therein).

Over $8,422,000, the estimated value of the Mountpark Shipments, is at stake. Neufeld Decl., ¶¶ 23-29. This, in addition to lost contracts and reputational injury, is irreparable. *See Rent-A–Center, Inc. v. Canyon TV & Appl. Rental, Inc*. 944 F.2d 597, 603 (9th Cir. 1991). In contrast, Defendants identified no harm. Thus, the balance of hardships tips sharply in Sunrise's favor.

VI. INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

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Defendants' claim that a TRO presents a risk to the public simply because no pest risk assessment from the prohibited countries was ever performed is an unfounded scare tactic. Opp. 22-23; *see* Lambert Decl. ¶ 23. These purported risks concern *unprocessed* corn seed, not *processed* corn seed. In any event, even unprocessed corn from these countries are admissible with a permit. *See* Opp. 8, 16-17. *Processed* (*e.g.*, cracked) corn is admissible from any country, including the countries at issue, a fact that Defendants do not dispute. *See* Opp. 15. In fact, had these shipments involved non-organic corn, Defendants would not have had access to or considered their country of harvest. *See* Lambert Decl., ¶¶ 13-14. Indeed, the United States regularly imports non-organic processed corn from these allegedly "prohibited" countries. *See* Lambert Decl., ¶ 15. Thus, corn seeds, in processed and unprocessed forms, already enter this country every day. CBP has even admitted there are no actual pest or pathogens in these shipments, 12 of which were previously cleared and, thus, already in the U.S. Corbett Decl., ¶ 39. Defendants' imagined fears of setting a precedent and exposing the public to risks are far removed from reality. The public interest factors, as discussed in the Motion—none of which are refuted—favors granting relief.

VII. THE GOVERNMENT SHOULD EXPEDITE FILING ITS RECORD

Defendants are wrong that discovery is inappropriate in APA matters.[4] For the sake of judicial efficiency, Sunrise requests that the Court order Defendants to immediately file its administrative record. *See* 5 U.S.C. § 706. Because this Court's review will be based on the record in place at the time of the agency's decision, Defendants' request for a prolonged extension to assemble the record should be denied.[5]

VIII. CONCLUSION

Accordingly, Sunrise respectfully requests that a TRO be issued.

Dated: April 16, 2018

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By: */s/ Stacey H. Wang*
Attorneys for Plaintiff SUNRISE FOODS INTERNATIONAL INC.

[4] *See Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (discovery permitted to assess record's completeness); *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (supplementation required if evidence of bad faith or improper conduct). Sunrise reserves the right to request supplementation once the agency record is filed.

[5] Judicial review of administrative action "should normally be based on the full administrative record that was before a decision maker at the time the challenged action was taken." *Cmty. for Creative Non–Violence v. Lujan*, 908 F.2d 992, 998 (D.C.Cir. 1990).[5]

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PROOF OF SERVICE

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 South Hope Street, 8th Floor, Los Angeles, California 90071.

On **April 16, 2018,** I served the document described as **PLAINTIFF SUNRISE FOODS INTERNATIONAL INC.'S REPLY IN SUPPORT OF EX PARTE MOTION for TEMPORARY RESTRAINING ORDER;(2) ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; AND (3) EXPEDITED DISCOVERY** on the interested parties in this action:

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In accordance with Federal Rules of Civil Procedure 5, Local Rule 135, I uploaded via electronic transfer a true and correct copy scanned into an electronic file in Adobe "pdf" format of the above-listed documents to the United States District Court Eastern District of California' Case Management and Electronic Case Filing (CM/ECF) system on this date. It is my understanding that by transmitting these documents to the CM/ECF system, they will be served on all parties of record according to the preferences chosen by those parties within the CM/ECF system. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on **April 16, 2018,** at Los Angeles, California.

/s/ Janet Chung
Janet Chung