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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL GROCERS, CITIZENS FOR GMO LABELING, LABEL GMOS, RURAL VERMONT, GOOD EARTH NATURAL FOODS, PUGET CONSUMERS CO-OP, NATIONAL ORGANIC COALITION, AND CENTER FOR FOOD SAFETY,

Plaintiffs,

v.

TOM VILSACK, Secretary of the United States Department of Agriculture; BRUCE SUMMERS, Administrator of the Agricultural Marketing Service; and the UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants.

Case No. 20-5151-JD

PLAINTIFFS' UNOPPOSED MOTION FOR INDICATIVE RULING

INTRODUCTION

Plaintiffs commenced this action to obtain judicial relief from Defendant United States Department of Agriculture (USDA)'s Disclosure Standard, which provides regulations for genetically engineered (GE) food labels under the National Bioengineered Food Disclosure Act. Plaintiffs argued that the Disclosure Standard's narrow scope, use of QR code labels, prohibition on state GE seed labeling laws, and limited terminology violate the Administrative Procedure Act (APA), as well as the First, Fifth, and Tenth Amendments. Accordingly, Plaintiffs asked this Court to vacate the Disclosure Standard as well as to declare invalid unconstitutional portions of the Act.

The Court issued its decision on September 13, 2022, granting summary judgment on Plaintiffs' claim that USDA's standalone QR code labeling option violated the Act. However, the Court denied summary judgment on all other claims under the APA and the Constitution. As a result, two months after this Court issued the Order, Plaintiffs filed a notice of appeal, transferring jurisdiction to the Ninth Circuit. However, upon conferring with all parties, Plaintiffs determined that, because this Court only granted summary judgment on one claim for Plaintiffs but did not have a cross-motion before it to grant summary judgment to Defendant on the other claims, Plaintiffs are presently unable to appeal and seek relief from the Disclosure Standard they contend is unlawful. Plaintiffs' appeal is currently stayed, *see Nat. Grocers, et al. v. USDA*, No. 22-16770 (9th Cir.), ECF 16.

To allow Plaintiffs to appeal before the Disclosure Standard causes further harm, this Court should issue an indicative ruling pursuant to Federal Rule of Civil Procedure 62.1 that, if it had jurisdiction, it would modify the Order pursuant to Rule 60(a) by clarifying that its decision to deny Plaintiffs summary judgment on multiple counts was a final, appealable judgment. Assuming the Ninth Circuit agrees to remand the matter, the parties can then proceed to briefing the appeal.

Defendants do not agree with Plaintiffs' characterization of the underlying facts and their assertion of harm in this Motion. Defendants, however, consent to the entry of the attached stipulated proposed order pursuant to Federal Rules of Civil Procedure 62.1 and 60(a) and Local Rules 7-11 and 7-12. Intervenors concur with Defendants' position.

BACKGROUND

I. Plaintiffs Challenged USDA's Disclosure Standard.

In July 2020, Plaintiffs, consisting of several food labeling nonprofits and retailers, challenged the Disclosure Standard in this Court under the APA, as well as the Disclosure Act's provisions prohibiting state laws labeling GE seeds under the Fifth and Tenth Amendments, and the Act's and final rule's restrictions on speech under the First and Fifth Amendments. *See* Compl., ECF 1. Specifically, Plaintiffs challenged the Disclosure Act and Disclosure Standard, which (1) allowed for QR code labeling instead of mandating accessible on-package labeling, Am. Compl. ¶¶ 132-42, ECF 19; (2) limited mandatory terminology for disclosure to "bioengineered" instead of the familiar, widely used terms, GE and GMO; *id.* ¶¶ 204-10; (3) did not require labeling of the majority of GE foods, *id.* ¶¶ 270-79; and (4) prohibited state governments from issuing laws labeling GE seeds despite not promulgating any regulations for GE seed labeling. *Id.* ¶¶ 360-67. The Disclosure Standard also prohibited certain forms of voluntary GE food disclosures beyond the limited scope of USDA's new standard, raising First Amendment issues with retailers that sought to continue using the familiar terms, GE and GMO. *Id.* ¶¶ 316-33.

Several of these deficiencies continue to harm Plaintiffs and their members. For example, Plaintiffs' consumer members seek to avoid purchasing foods with GE ingredients for environmental and health reasons but are denied mandatory disclosure for foods that contain ingredients a manufacturer deems "undetectable" based on a testing method of the manufacturer's choice. *See* Witherspoon Decl., ECF 54-14; Woodcock Decl., ECF 54-15; Glover Decl., ECF 54-16. And retailer plaintiffs must continue to undergo expensive testing and investigation of highly refined foods to determine if they are GE to avoid selling those GE products to customers. *See, e.g.*, Lewis Decl., ECF 54-1.

II. The District Court Granted Summary Judgment for Plaintiffs on One Claim and Denied It on All Other Claims.

On September 13, 2022, this Court issued its Order, finding in USDA's favor on several claims and in Plaintiffs' favor on one claim. *See* Order, ECF 64. First, the Court granted summary judgment in favor of Plaintiffs on their first claim, agreeing that USDA's standalone QR code

labeling option violates the Act. *Id.* at 9-12. Second, the Court sided with USDA over its restriction on terminology to "bioengineered" for mandatory disclosures and denied Plaintiffs summary judgment on this claim largely because "[t]he term 'bioengineering', and any similar term, as determined by the Secretary," does not mandate that the Secretary determine similar terms. *Id.* at 12. And third, the Court sided with USDA on its exemption for GE foods without "detectable" GE material and denied Plaintiffs summary judgment. *Id.* at 12-13. The Court determined that USDA could limit the disclosure scope to only "detectable" GE material because the statute requires USDA to "determine the amounts of a bioengineered substance that may be present in a food, as appropriate, in order for the food to be a bioengineered food." *Id.* (quoting 7 U.S.C. § 1639b(b)(2)(B)). The Court found USDA's exemption reasonable because USDA will assume all foods on its List of Bioengineered Foods are GE unless a regulated entity provides records demonstrating otherwise. *Id.* at 13.

Turning to Plaintiffs' constitutional claims, the Court determined that Congress's preemption provision prohibiting state-level GE seed labeling adheres to the Tenth Amendment and denied Plaintiffs summary judgment because the Court found this provision may be best read as regulating private actors. *Id.* at 14. The Court also found Congress intended to provide private actors with a right to label GE seeds without any federal regulation. *Id.* And finally, the Court held Plaintiffs lack standing to pursue their First Amendment claims primarily because of USDA's explanation in its Opposition that retailers may still voluntarily use the terminology GE/GMO. *Id.* at 7-9.

ARGUMENT

I. This Court Should Issue an Indicative Ruling That, if the Ninth Circuit Remands the Case, This Court Will Modify the Order on Summary Judgment to Specify It Is Final and Appealable.

A. Rule 62.1 Authorizes This Court to Issue an Indicative Ruling It Would Clarify the Order Under Rule 60(a) if It Had Jurisdiction.

Under Rule 62.1, the district court may consider a "timely motion . . . for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R.

Civ. P. 62.1(a). The court may issue an indicative ruling "that it would grant the motion if the court of appeals remands for that purpose." *Id.* 62.1(a)(3). If the court issues an indicative ruling, the movant must notify the court of appeals. *Id.* 62.1(b). The court of appeals may then make a limited remand of the matter to the district court for further proceedings. *Id.*; *see also* Fed. R. App. P. 12.1(b) (court of appeals may remand, but retains jurisdiction).

Plaintiffs' Motion here meets the prerequisites for a Rule 62.1 indicative ruling. First, this Court would have jurisdiction to consider a motion to re-open the Order under Rule 60(a), which allows district courts to clarify intent. However, by filing a notice of appeal, Plaintiffs have divested this Court of its jurisdiction to grant a Rule 60(a) motion. *See Toliver v. Cnty. of Sullivan*, 957 F.2d 47, 49 (2d Cir 1991); *accord Winter v. Cerro Gordo Cnty. Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991); *cf. Nat. Res. Def. Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (filing of notice of appeal generally divests district court of jurisdiction). In this circumstance, the correct procedure is for Plaintiffs to seek an indicative ruling pursuant to Rule 62.1 that, if this Court had jurisdiction, it would grant a Rule 60(a) motion. *See, e.g.*, *Out of the Box Enters., LLC v. El Paso Jewelry Exchange*, 737 Fed. Appx. 304, 304-305 (9th Cir. 2017). Moreover, neither USDA nor Intervenors have been prejudiced by the timing of this Motion: briefing at the Ninth Circuit has not yet begun, and Defendants' Disclosure Standard remains largely in place while this Motion is briefed and decided.

B. This Court May Modify Its Order Under Fed. R. Civ. P. 60(a) to Include Express Language Reflecting the Contemporaneous Intent of the Court to Issue a Final, Appealable Decision.

This Court's September 13, 2022 Order makes plain that the Court's decision to grant summary judgment to Plaintiffs on one count and deny it on all others is a final, appealable judgment. Plaintiff therefore requests that the Court use its authority under Federal Rule of Civil Procedure 60(a) to modify its Order to include an express finding to this effect. See Fed. R. Civ. P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."); *Garamendi v. Henin*, 683 F.3d 1069, 1079, 1081 (9th Cir. 2012) (observing that Rule 60(a) permits "explanations and

clarifications of the district court's original intent" and correction of "a failure to memorialize part of its decision" (internal quotation marks omitted)). Specifically, the parties ask that the Court clarify as follows:

> Pursuant to Federal Rule of Civil Procedure 58, and the summary judgment order, ECF 64, judgment is entered for plaintiffs on the Administrative Procedure Act claim for the text message regulations at 7 C.F.R. §§ 66.106 & 66.108, which are remanded to the United States Department of Agriculture without vacatur for further consideration. Because plaintiffs' summary judgment motion is denied in all other respects, judgment is entered for defendants and intervenors on all other claims pursuant to Federal Rules of Civil Procedure 56(f)(1) and 58.

This Court's Order already contains the Court's reasoning as to why it denied Plaintiffs summary judgment on numerous counts. The Court assessed USDA's decision to exempt highly refined foods from disclosure and to limit mandatory terminology to "bioengineered" and found neither decision was arbitrary and capricious under the APA. *See supra* at 2-3. The Court also found that the Disclosure Act and Disclosure Standard did not violate the First, Fifth, and Tenth Amendments and, as a result, chose not to declare invalid the challenged provisions. *See supra* at 3.

As a result of these final conclusions from this Court, Plaintiffs ask the Court to make an indicative ruling under Rule 62.1 that it would grant a Rule 60(a) motion to modify its Order to specifically state that its decision to deny summary judgment on several counts is a final, appealable action. Such modification is appropriate under Rule 60(a) because it would not alter the substantive terms of the Order; instead, it would include additional language that "reflect[s] the contemporaneous intent of the district court as evidenced by the record." *Garamendi*, 683 F.3d at 1080 (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, this Court should issue an indicative ruling pursuant to Rule 62.1 that, if this Court had jurisdiction, it would modify the Order pursuant to Rule 60(a) by clarifying that its denial of summary judgment for Plaintiffs on all counts but one is a final, appealable judgment.

Respectfully submitted this 30th day of March, 2023.

/s/ George Kimbrell
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