UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

USA FARM LABOR, INC., et al. Plaintiffs, v. JULIE SU, et al. Defendants.	)	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO COMPLETE ADMINISTRATIVE RECORD** Civil Action No.: 1:23-96

Plaintiffs submit this reply in support of their Motion to Require Defendants to Complete Administrative Record, Doc. 64.

I. Plaintiffs Conferred on Their Motion

The government's opposition spends seven out of nine pages arguing that plaintiffs did not confer on the motion. Doc. 69 at 1-7. This argument is bizarre and not worthy of serious consideration by this Court. Plaintiffs did summarize their motion in an email to counsel for the government, who expressed her opposition. That was the natural end of the consultation. Plaintiffs were under no obligation to insist on further consultation after government counsel expressed her opposition.

Undersigned counsel Mark Stevens sent an email to Alexandra McTague, counsel of record for the government, on January 10, 2024, saying:

> Hello Alex,
>
> Happy new year, I hope you've been well.

> We intend to file two motions today. First, a motion to complete the administrative record. This motion identifies deficiencies in the administrative record, places where the Final Rule refers to considerations made by DOL for which there is no evidence in the record. We ask the Court to order completion of the record. Second, a motion for discovery to allow us to address Judge Reidinger's demand that we prove that consideration of illegal immigration would have led to a different outcome. You, Wendel, and I have discussed this before and I don't believe there will be much new in that motion.
>
> Could I please have your position on these motions?

Doc. 69-1 at 1. Ms. McTague replied three minutes later:

> Hi Mark,
> Happy New Year to you as well. Perhaps unsurprisingly, we oppose both motions.
>
> Best,
> Alex

Doc. 69-2 at 2. The government clearly expressed its opposition to the rule, signifying that further consultation would be fruitless. Government counsel said her position was even "unsurprising[]," meaning there really was no room to negotiate. Government counsel did not express any curiosity about the details of the motion or interest in narrowing the issues.

This email exchange is consistent with how the parties have conferred with each other throughout this case. For example, on August 18, 2023 the parties conferred with each other by email over scheduling deadlines, with plaintiffs requesting an extension over email and the parties negotiating to reach an agreement. Exh. 1, Consultation on Scheduling. On July 17, 2023 the parties conferred by email

on a motion for an expedited hearing on a preliminary injunction; plaintiffs' counsel summarized the motion, government counsel expressed their opposition, and that was the natural end of the exchange. Exh. 2, Consultation on Motion to Expedite. The parties have had other productive email exchanges as well. For example, when government counsel was unable to access pleadings on the docket, plaintiffs' counsel provided several pleadings upon request, going out of their way to be helpful and collaborative and even earning the government's gratitude "for the very prompt responses." Exh. 3, Consultation on Accessing Pleadings.

But now, all of a sudden, government counsel believes email consultations to be insufficient. It may be the case that government counsel regrets expressing her opposition without learning more about the motion, but that is not the plaintiffs' responsibility. The Court should assume that government counsel, as an employee of the Department of Justice's Office of Immigration Litigation, District Court Section, is capable of competently and responsibly taking positions on motions in immigration litigation. Plaintiffs have no duty to force further information on government counsel after she has expressed a position.

Local rule 7.1(b) provides, "Civil motions must show that counsel have conferred and attempted in good faith to resolve areas of disagreement, or describe the timely attempts of the movant to confer with opposing counsel. A motion that fails to show that the parties have properly conferred or attempted to confer may be

summarily denied." LCvR 7.1. Here, plaintiffs have met this low bar. They conferred and the government expressed its opposition. The result of this consultation is expressed in the motion, which states, "Defendants oppose this motion." Doc. 64 at 1. The motion is not subject to summary dismissal.

II. DOL Intends to Disclose Additional Documents

With respect to the merits, DOL has committed to providing the missing documents by February 1, 2024, although as a formal matter DOL does not concede that they were missing. Doc. 69 at 8 ("Defendants hope to have it completed by February 1, 2024, as requested in Plaintiffs' motion. Once complete, Defendants will re-file the Certified Administrative Record and re-serve it on Plaintiffs, on disk, via U.S. Mail, to avoid arguments that the download link was insufficient."). Plaintiffs cannot comment on the adequacy of this production until it has been received. Defendants must produce the "whole record," *i.e.*, "all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *In re United States*, 583 U.S. 1029, 1031, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting) (quoting *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in

original)); 5 U.S.C. § 706. Plaintiffs will await DOL's production before commenting on its completeness.[1]

One final aspect of DOL's Opposition deserves note. DOL states that agency decision-makers did not consider, directly or indirectly, any documents or materials supporting, or contrary to, DOL's ultimate position except for unspecified items in the Administrative Record. Doc. 69 at 7-8. Plaintiffs, of course, accept this statement. Whether a reference to unspecified items complies with DOL's duty to specify in the Final Rule what factors, reasons, and evidence it relied on for each of its judgments is an issue for another day. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

Dated: January 31, 2024

/s/ Mark Stevens
Mark Stevens, VA Bar # 86247
Clark Hill PLC

[1] Although not comprehensive, *see* Plaintiff's Motion to Complete, p. 7-8, Plaintiffs look forward to the inclusion of at least the following documents: (1) "technical manual describing what information is stored in and how to retrieve information from Defendants' Foreign Labor Certification Gateway database," *id.* at 1; (2) the evidentiary basis and analysis for DOL's baseline cost estimate of $27,420,270; *id.* at 14; (3) the original versions of the spreadsheets that appear in the record, *id.* at 15; as well as any other information needed to make the record "whole."

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Index of Exhibits

1. Consultation on Scheduling
2. Consultation on Motion to Expedite
3. Consultation on Accessing Pleadings