IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ARGUS LEADER MEDIA, d/b/a Argus Leader, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	File No. 4:11-cv-04121-KES **FOOD MARKETING INSTITUTE'S BRIEF IN SUPPORT OF ITS EMERGENCY MOTION TO INTERVENE, TO STAY THE JUDGMENT, AND FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL**

Food Marketing Institute (FMI) submits this brief in support of its Emergency Motion to Intervene, to Stay the Judgment, and for an Extension of Time to File a Notice of Appeal. The Court should grant FMI's motion because FMI seeks to protect its members' interests in confidential records relating to the Supplemental Nutrition Assistance Program (SNAP). FMI's intervention, although post-judgment, is timely because FMI's members received notice only about a week ago that the United States Department of Agriculture (USDA) intended to release the previously withheld SNAP records, effectively indicating that USDA itself would not appeal. The Court should stay its judgment to allow FMI to pursue the appeal since USDA's release of the information pursuant to the Court's judgment would moot any appeal. And since FMI has acted timely but the deadline to appeal is imminent, the Court should grant an extension for FMI to file a notice of appeal.

INTRODUCTION

On November 30, 2016, the Court entered a final judgment rejecting the applicability of certain FOIA exemptions to records in the possession of the USDA's Food and Nutrition Service (FNS) relating to the Supplemental Nutrition Assistance Program (SNAP) that USDA had withheld from production to plaintiff Argus Leader. FMI is a trade association whose members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. A large number of FMI's members' stores were SNAP-authorized retailers during the period for USDA intends to release SNAP information.

The current deadline for USDA to file a notice of appeal of the Court's judgment is Monday, January 30, 2017. On January 19, 2017, USDA informed relevant SNAP-authorized retailers, many of which are FMI members, that it intended to release the requested information pursuant to the Court's judgment, effectively indicating that the agency would not appeal the Court's judgment. *See* Ex. 2, Declaration of H-E-B ¶ 5; Ex. 4, Declaration of David Mitchell ¶ 9. Thus, FMI members, who until January 19, 2017 believed that USDA fully and adequately represented their interests in this lawsuit and would continue to fight to preserve the confidentiality of SNAP redemption data, were suddenly advised that USDA would make such information public in less than two weeks. In its notice to retailers, USDA stated that it would wait just 12 calendar days before releasing the SNAP data so that retailers could consider "possible judicial intervention." *See See* Ex. 2, Declaration of H-E-B ¶ 5; Ex. 4, Declaration of David Mitchell ¶ 9.

FMI now seeks leave to intervene as a defendant in this matter in order to appeal the Court's November 30, 2016 judgment. Although this motion to intervene is being filed post-judgment, it is nonetheless timely. FMI and its members only became aware of USDA's

decision to release the SNAP retailer data about seven days ago, and the time period for the parties to the litigation to file a notice of appeal has not yet expired.

Since disclosure of the requested records would moot any appeal filed by FMI, FMI respectfully requests that the Court stay its November 30, 2016 judgment during the pendency of FMI's appeal. Out of an abundance of caution given the impending deadline to appeal, FMI also asks the Court to grant a thirty-day extension to file a notice of appeal.

MOTION TO INTERVENE

1. **FMI has standing to intervene.**

As a threshold matter, FMI has standing to intervene in this lawsuit. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833-34 (8th Cir. 2009) (noting that a prospective intervenor must establish Article III standing in addition to the requirements of Rule 24). To demonstrate standing in the Eighth Circuit, a plaintiff must clearly allege facts showing an injury to a legally protected interest that is concrete, particularized, and either actual or imminent. *Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transp.*, 831 F.3d 961, 966 (8th Cir. 2016). An association has standing to sue on behalf of its members when (a) its members would have standing to sue in their own right; (b) the interest it seeks to protect is germane to the organization's purpose; and (c) the participation of individual members in the lawsuit is not required. *Id.* at 967 (quoting *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The harm facing FMI's members gives FMI standing. If FMI is not permitted to intervene, this Court's judgment that USDA must release the relevant SNAP related records will cause FMI's members real and unavoidable harm. As laid out in the attached declarations, incumbent grocers will be disadvantaged competitively by market entrants who will use SNAP

data not only to understand SNAP sales at each store but also to reverse-engineer overall sales by store. *See* Ex. 1, Declaration of FMI ¶ 6; Ex. 2, Declaration of H-E-B ¶ 9; Ex. 3, Declaration of NGA ¶ 9; Ex. 4, Declaration of David Mitchell ¶ 11-12.[1] The gravity of this harm conveys standing. Moreover, the interests FMI seeks to protect are germane to the organization's purpose: advocacy for food retailers and protection of their commercial interests. *See* Ex. 1, Declaration of FMI ¶ 2.

As established above, FMI's members have standing to sue in their own right. It is unnecessary, however, for any individual FMI member to participate in this suit. Given that FMI will presumably be held to the existing record, individual grocery retailers need not intervene in order to provide individual facts. *Cf. Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993) (permitting intervention by association where there was no need for individualized facts). Furthermore, FMI not only has standing on its own, it is also better positioned to intervene than individual grocers. If some individual grocers were to intervene, that might cause many other grocers to seek to intervene out of fear that USDA would release all SNAP data except for the data of those grocers that intervened. FMI's intervention obviates the need for individual grocers to intervene.

2. FMI is authorized to intervene as a matter of right.

Federal Rule of Civil Procedure 24(a)(2) authorizes intervention as a matter of right if (1) the application is timely; (2) the movant has a recognized interest in the subject matter of the litigation; (3) the interest may be impaired by the disposition of the action; and (4) the interest is not adequately represented by existing parties. *S.D. ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003). In FOIA cases, the submitters of information at issue are generally permitted to intervene. *E.g., 100Reporters LLC v. United States Dep't of*

[1] FMI will likely be providing additional declarations from concerned grocery retailers in support of its motion.

Justice, 307 F.R.D. 269, 277 (D.D.C. 2014); *Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252–53 (S.D.N.Y. 1995) (Sotomayor, J.). Rule 24 should be liberally construed, resolving all doubts in favor of the proposed intervenor. *Id.* FMI meets each of the requirements of Rule 24(a)(2) and is therefore entitled to intervene as a matter of right in this case.

a. FMI's motion is timely.

Timeliness is based on the circumstances of the case, including (1) the stage of litigation; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) any possible prejudice to the parties already in the litigation. *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011). Even a post-judgment intervention may be timely. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 402-03 (1977) (permitting post-judgment intervention). In particular, where the government has represented the potential intervenor's interests until the government determined that it would not appeal, intervention is timely if filed within the time period for appeal. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (holding that district court clearly erred in deeming post-judgment intervention motion untimely because "the potential inadequacy of representation came into existence" only after judgment was entered and the intervenors learned "that the Government might not appeal"); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) ("[C]ourts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court."), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848, 865-66 (2009).

FMI's motion to intervene promptly follows its receipt of notice from USDA that the agency intended to release the SNAP retailer data pursuant to this Court's November 30, 2016 judgment, and the motion to intervene has been filed within the 60-day window for filing a

notice of appeal in civil cases where a government agency is a party. *See* FED. R. APP. P. 4(a)(1)(B)(ii); *see* Ex. 2, Declaration of H-E-B ¶ 5. Intervention was permitted at a nearly-identical stage of a FOIA case in *Dow Jones & Co. v. United States Dep't of Justice*, 161 F.R.D. 247, 252–53 (S.D.N.Y. 1995) (Sotomayor, J.). The court there found that the intervenor reasonably believed that her interests were adequately represented by the government until the government indicated it might not appeal. *Id.* Moreover, there was no prejudice because the intervenor did not intend to offer new evidence. *Id.* at 253. In this matter, FMI's members similarly believed that USDA would continue to represent their interests by appealing this Court's final judgment. *See* Ex. 2, Declaration of H-E-B ¶ 4. The earliest indication that FMI had that USDA no longer adequately represented FMI's interests was USDA's January 19 notice of its intention to comply with the Court's judgment, apparently choosing to release the records rather than appeal. *Id.*

FMI's intervention will not cause delay or unfairly prejudice any existing party. FMI is not seeking to reopen discovery or moving for reconsideration. FMI merely wishes to avail itself of the appellate process that USDA has declined. Argus will be no more prejudiced than if USDA exercised its rights to appeal, and in any event, delay caused by an appeal is not prejudicial. *See, e.g.*, *Dow Jones*, 161 F.R.D at 253 (acknowledging "the delay inherent in an appeal" when a party intervenes post-judgment to pursue an appeal, but rejecting the argument that "the delay involved in an appeal in which no new evidence will be proffered amounts to prejudice" since "appellate review is central to our judicial system.").

b. FMI has a recognized interest in the subject matter of this litigation.

As a trade association whose members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion, FMI

has a recognized interest in the subject matter of this litigation. FMI seeks to preserve the confidentiality of sensitive data about the performance of its members' stores. Preventing the disclosure of commercially-sensitive information "is a well-established interest sufficient to justify intervention under Rule 24(a)." *100Reporters*, 307 F.R.D. at 275-76 (collecting cases).

c. FMI's interests will be impaired if it is not allowed to intervene.

Without intervention, FMI's interests will be impaired by the disposition of this action. FMI's members will never be able to claw back the confidential and proprietary SNAP retailer records once USDA releases them. *See 100Reporters*, 307 F.R.D. at 278–79. FMI acknowledges that the Court has ruled that FMI members' SNAP data is not confidential business information or otherwise exempt from disclosure under FOIA. Nevertheless, FMI should be allowed to appeal the Court's conclusion in order to protect its members' interest in maintaining the confidentiality of this information.

d. USDA will not adequately represent FMI's interests.

The Supreme Court has explained that the adequate representation requirement of Rule 24(a) is satisfied "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

FMI indisputably meets this "minimal" burden. As a general matter, the federal government's inability to adequately represent the interests of FOIA intervenors is well-documented. *See 100Reporters*, 307 F.R.D. at 279–80 (noting that the D.C. Circuit "often has concluded that governmental entities do not adequately represent the interests of aspiring intervenors . . . because the government entity's overarching obligation is to represent the interests of the American people, while the intervenor's obligation is to represent its own

interests," and that "[t]he divergence of interests. . . is especially evident in FOIA litigation") (citations and internal quotation marks omitted). But there can be no doubt that USDA no longer adequately represents FMI members' interests as of January 19, 2017, when USDA decided to release FMI's members' and other retailers' confidential data and evidently decided not to appeal a judgment adverse to FMI members.

3. Alternatively, the Court should allow FMI to permissively intervene.

Alternatively, Rule 24(b)(1)(B) authorizes permissive intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). A "claim or defense" requires only "some interest on the part of the applicant." *Dow Jones*, 161 F.R.D. at 254. The principal consideration is whether the intervention will prejudice or unduly delay the adjudication of the parties' rights. *Barnett*, 317 F.3d at 787. Neither Argus nor USDA will be unduly prejudiced by FMI's intervention. FMI seeks to intervene only to pursue an appeal that USDA has declined. FMI's interest in ensuring the confidentiality of the SNAP data, combined with USDA's recent and unexpected decision to abandon FMI's interests and forgo appeal, provide compelling reasons to permit intervention.

MOTION TO STAY JUDGMENT

FMI asks that the Court stay its judgment pending appeal. Without an immediate stay, USDA has indicated that it will release the previously withheld SNAP sales information. If that occurs, FMI's ability to maintain any appeal will be rendered moot. A stay is necessary, appropriate, and the only way to protect FMI's rights to meaningful appellate review. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (noting that if documents withheld by the FBI were surrendered before the FBI and an intervenor could appeal, the

documents' "confidentiality [would] be lost for all time" and that "[f]ailure to grant a stay [would] entirely destroy appellants' rights to secure meaningful review").

To warrant a stay, FMI must show that it has a likelihood of prevailing on appeal, that it will be irreparably harmed without the stay, that others will not likely be harmed by the stay, and that there is public interest in granting the stay. *See Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011). But when the likelihood of irreparable harm is very high, as it is here, courts do not require a strong showing of success on appeal. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002); *see also Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *Raffington v. Cangemi*, No. 04-3846JRTRLE, 2004 WL 2414796, at *1 (D. Minn. Oct. 22, 2004). "Probability of success is inversely proportional to the degree of irreparable injury evidenced." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

Courts routinely issue stays pending appeal in FOIA cases precisely because the likelihood of irreparable injury is so high. *See, e.g.*, *People for the Am. Way Found. v. United States Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *see also John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308–09 (1989) (issuing stay in FOIA case and finding irreparable injury); *Providence Journal*, 595 F.2d at 890 (same). As explained by the First Circuit,

> Where . . . the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.

Providence Journal, 595 F.2d at 890.

FMI respectfully submits that it will be able to show on appeal that the Court erred in concluding that the information requested is not exempt from disclosure under FOIA's

exemptions. Contrary to this Court's conclusions, the likelihood of competitive harm is high. In a highly competitive space like the grocery industry, even slight disadvantage can cause substantial competitive harm. The testimony of retailers and the USDA demonstrates the substantial harm that is likely to result. Sales volume by store is so confidential that even public companies are not required to disclose this information. *See* Declaration of Jacqueline Snyder ¶ 5 [Dkt. #59-15].

Moreover, the balance of equities weighs strongly in favor of a stay. FMI will be irreparably injured without an injunction. If USDA releases the SNAP data before FMI has the opportunity to appeal the Court's judgment, FMI will never be able to un-release the confidential information. The confidentiality of that information will be lost forever. Nor will Argus or USDA be substantially injured by a stay pending appeal. Any delay is surely outweighed by the irreversible harm that will be done to FMI's members if this Court refuses to stay its judgment. *E.g.*, *Providence Journal*, 595 F.2d at 890. While FOIA provides public access to certain information, it is also designed with consideration to the privacy needs of information submitters like FMI's members. *See Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) (describing FOIA Exemption 4 as striking a balance between legitimate governmental and private interests in confidentiality and the public's interest in disclosure). Until that balance has been determined following the resolution of all appeals, this Court should stay its judgment.

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

The Court entered a final judgment in this matter on November 30, 2016. [Dkt. #128]. USDA has 60 days to file a notice of appeal. *See* FED. R. APP. P. 4(a)(1)(B) ("The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is . . . a United States agency."). Sixty days from November 30, 2016

falls on Sunday, January 29, 2017, so the deadline to file a notice of appeal in this matter is Monday, January 30, 2017. *See* FED. R. APP. P. 26(a)(1). USDA's January 19 decision to release the confidential records and its evident decision not to appeal the Court's judgment has therefore placed FMI under tremendous time pressure to intervene and for the Court to consider and rule on FMI's motion. *See, e.g.*, *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719 (9th Cir. 1994) (noting that federal courts generally consider a post-judgment motion to intervene to be timely filed if it is filed within the time limitations for filing an appeal).

An extension of time to file a notice of appeal would substantially alleviate the time pressure caused by USDA's decision to decline to appeal. Federal Rule of Appellate Procedure 4(a)(5) provides that the Court may extend the time to file a notice of appeal for up to 30 days from the original deadline if a party moves for an extension no later than 30 days after the original deadline has expired, and, regardless whether the party moves for an extension before the original deadline or during the 30 days after the deadline, the party shows "excusable neglect or good cause." FED. R. APP. P. 4(a)(5).

Given the time pressure for the Court to consider and rule on FMI's motion to intervene if FMI's forthcoming notice of appeal is to be effective, FMI respectfully requests that the Court grant a 30-day extension of the time to file a notice of appeal. The Court has discretion to make an equitable grant of extension on a showing of "excusable neglect or good cause." *Gibbons v. United States*, 317 F.3d 852, 853–54 (8th Cir. 2003). The Court may consider "prejudice, length of delay, and good faith," though the critical factor is the reason for delay. *Id.* at 854 (internal quotation marks omitted).

As described above and stated in the declarations attached to this motion, FMI only learned on January 19, 2017 that USDA had decided to release the confidential SNAP retailer

data and thus would not appeal the Court's judgment. *See* Ex. 1, Declaration of FMI ¶ 5; Ex. 2, Declaration of H-E-B ¶ 5. FMI certainly has not delayed in filing this motion, having acted within about one week of learning of USDA's decision. Nor can any party to the litigation legitimately claim to be prejudiced by FMI's request to intervene in order to pursue an appeal. Delay caused by an appeal is not prejudicial. *See, e.g.*, *Dow Jones*, 161 F.R.D at 253.

Given the looming deadline by which FMI must both intervene and file a notice of appeal, an extension of time to file is necessary for FMI to fully exercise its right to intervene and pursue the appeal that USDA has abandoned.[2]

CONCLUSION & PRAYER

FMI and its members relied in good faith on USDA to protect their confidential information to the fullest extent permissible under FOIA. Neither FMI nor its members anticipated USDA's decision to forego an appeal of the Court's judgment, a judgment that is adverse to FMI members. FMI asks that it be allowed to intervene in order to appeal and protect its members' confidential business information. FMI also requests that the Court stay its November 30, 2016 judgment and grant an extension of time to file a notice of appeal.

[2] Even if the Court does not grant FMI's motion to intervene before the current January 30, 2017 deadline for the parties to file a notice of appeal, FMI's motion will not be moot. The Court can extend the notice of appeal deadline after it has passed by the longer of 30 days from the original deadline or 14 days from the date the Court grants a motion for extension of time. FED. R. APP. P. 4(a)(5)(C). Accordingly, the Court can still entertain and grant FMI's motion to intervene after the current January 30, 2017 deadline—provided that the Court extends the time for FMI to appeal, and further provided that the Court promptly stays its judgment and USDA otherwise does not produce the SNAP retailer data at issue prior to the Court ruling on FMI's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record via CM/ECF on January 27th, 2017, as follows:

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