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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA,

Plaintiff,

v.

TOM VILSACK, in his official capacity as Secretary of Agriculture; and UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants.

CV 16-00041-BMM-JTJ

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY THE CASE

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INTRODUCTION

Pursuant to the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. § 2901 *et seq.*, the Secretary of Agriculture imposes a $1-per-head assessment (or "checkoff") that is collected each time cattle are sold. The assessments are used to fund beef-related research projects and promotional campaigns. Typically, the checkoff is collected by a qualified State beef council ("QSBC") in each state, which forwards 50 cents to the national Cattlemen's Beef Promotion and Research Board ("Beef Board") and retains the remaining 50 cents for activities of the QSBC that are authorized by the Beef Act. Plaintiff brought this action against Defendants, Tom Vilsack, in his official capacity as Secretary of Agriculture, and the United States Department of Agriculture ("USDA"), based on mistaken "information and belief" that USDA does not have "a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board." Compl. ¶ 74, ECF No. 1 (May 2, 2016). Plaintiff alleges that forcing its cattle producer members to subsidize the speech of the Montana Beef Council, with which they disagree, violates the First Amendment.

Defendants have now made clear that, in accordance with USDA's longstanding policy, cattle producers in states like Montana may decline to contribute to a QSBC and instead direct the QSBC to forward the full amount of

their federal assessment to the Beef Board. Defendants also have initiated a rulemaking to explicitly include this option in the governing regulations. During the rulemaking process, plaintiff and other stakeholders have the opportunity to comment on all aspects of the proposed procedure.

In light of defendants' clarification of their policy, this case should be dismissed for lack of standing and failure to state a claim upon which relief may be granted. Plaintiff's complaint relies largely on allegations of associational standing. But plaintiff does not identify a single member of the organization who has purportedly suffered harm, as plaintiff must do to establish standing on their behalf. Moreover, to the extent plaintiff's members are contributing to the Montana Beef Council against their wishes, they are doing so only because they have failed to avail themselves of the option of directing the Montana Beef Council to forward the full amount of their federal assessment to the Beef Board. Such self-inflicted injuries do not satisfy the causation requirement for standing. Similarly, because plaintiff's members are not compelled or forced to contribute to the Montana Beef Council, plaintiff cannot satisfy the threshold element of its compelled-subsidy claim. Plaintiff's members may direct the Montana Beef Council to forward the full amount of their federal assessment to the Beef Board, and thus, plaintiff has failed to state a claim under the First Amendment.

As an alternative to dismissal, in the event plaintiff seeks to amend its complaint or otherwise rely on its current complaint to challenge the procedure cattle producers may use to direct the full amount of the checkoff to the Beef Board, the Court should stay this case pending completion of the ongoing rulemaking. It would be inefficient and a waste of judicial and party resources to litigate issues that may be mooted or, at the very least, impacted by the ongoing rulemaking.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Beef Act authorized the establishment of "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). The Act specifically directs the development of projects and plans of promotion and advertising, research, consumer information, and industry information. *Id*. § 2904(4)(B). Congress specified that the Act's program would be financed "through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States." *Id*. § 2901(b).

The Beef Act directs the Secretary of Agriculture to promulgate an order to implement the Act's program, *id*. § 2903, and to conduct a referendum among

cattle producers on its continuation within 22 months of the issuance of the order, *id*. § 2906(a). In 1986, the Secretary promulgated the Beef Promotion and Research Order ("Beef Order"), 7 C.F.R. Pt. 1260. *See* 51 Fed. Reg. 26,132 (1986). A large majority of cattle producers who voted in the referendum approved continuing the order in 1988. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 554 (2005). The Beef Act authorizes the Secretary to conduct a subsequent referendum on the program's continuation when at least 10% of cattle producers request one. 7 U.S.C. § 2906(b).

The Beef Act and Beef Order establish two administrative entities to assist in developing and implementing beef promotion and research projects: the Beef Board and the Beef Promotion Operating Committee ("Operating Committee"). 7 U.S.C. § 2904(1)-(5); 7 C.F.R. §§ 1260.141-1260.151, 1260.161-1260.169. The Operating Committee is responsible for "develop[ing] plans or projects of promotion and advertising, research, consumer information, and industry information." 7 U.S.C. § 2904(4)(B). The Beef Board, in turn, reviews and approves the Operating Committee's annual budget and submits the budget to the Secretary for approval. *Id*. § 2904(4)(C).

The Beef Board also is responsible for certifying qualified State beef councils. 7 C.F.R. § 1260.181; *see* 7 U.S.C. § 2902(14). A QSBC is "a beef promotion entity that is authorized by State statute or a beef promotion entity

organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the [Beef Board] as the beef promotion entity in such State." 7 C.F.R. § 1260.115; *see* 7 U.S.C. § 2902(14). To obtain certification, a QSBC must meet specified requirements. *See* 7 C.F.R. § 1260.181(b). As relevant here, a QSBC must certify that it will "collect assessments paid on cattle originating from the State or unit within which the council operates" and that it will "remit to the [Beef Board] assessments paid and remitted to the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3)." *Id.* § 1260.181(b)(3)-(4).

The Beef Act and Beef Order also require domestic cattle producers to pay a $1-per-head assessment on the producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, or for export purposes, in order to fund the Beef Act's program. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a). The assessment is remitted to the QSBC or, in States where there is no QSBC, directly to the Beef Board. *See* 7 U.S.C. § 2904(8); 7 C.F.R. § 1260.172(a). Some state laws also require cattle producers to pay to the applicable QSBC a state law assessment on the sale of cattle. *See, e.g.*, TEX. AGRIC. CODE ANN. § 41.151 *et seq.* (2016); OHIO REV. CODE ANN. § 924.01 *et seq.* (West 2016). The remaining QSBCs receive voluntary

assessments or contributions. *See* 7 C.F.R. § 1260.115 ("[I]n determining the [federal] assessment due from each producer pursuant to [the Beef Act and Beef Order], a producer who is contributing to a [QSBC]," whether under compulsion of state law or voluntarily, "shall receive a credit from the [Beef Board] for contributions to such Council, but not to exceed 50 cents per head of cattle assessed." 7 C.F.R. § 1260.172(a)(3); *see* 7 U.S.C. § 2904(8)(C). For a producer to receive the credit, "the [QSBC] . . . must establish to the satisfaction of the [Beef Board] that the producer has contributed to a [QSBC]." 7 C.F.R. § 1260.172(a)(4). As a result of these provisions, QSBCs typically send 50 cents of every $1-per-head federal assessment they collect to the Beef Board and retain the remainder for activities of the QSBC that are authorized by the Beef Act, subject to the Beef Board's and the Secretary's supervision. *See Johanns*, 544 U.S. at 554 n.1 (citing 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3)).

But neither the Beef Act nor the Beef Order requires cattle producers to contribute a portion of the $1-per-head checkoff to a QSBC. *See* 7 U.S.C. § 2904; 7 C.F.R. Pt. 1260; *see also* Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments, 81 Fed. Reg. 45,984, 45,986 (proposed July 15, 2016). Therefore, in circumstances where there is no state law requiring cattle producers to contribute to the QSBC, USDA has

always understood and interpreted the Beef Act and Beef Order to permit a cattle producer who does not wish to voluntarily contribute to a QSBC to submit a redirection request to the QSBC. *See* 81 Fed. Reg. at 45,986. QSBC that receives such a request must forward the full amount of that producer's federal assessment to the Beef Board. *See id*.

Recognizing that all producers may not have been aware of the option to direct their full federal assessment to the Beef Board (particularly in light of language that was inadvertently removed from the Beef Order in 1995), USDA recently issued a Notice of Proposed Rulemaking ("NPRM") that proposes to make this option and the procedures for exercising it explicit in the Beef Order. *Id*. Specifically, the proposed rule would make clear that producers may "choose to direct the full $1.00-per-head federal assessment to the Beef Board . . . in States where State statutes do not require producers to contribute a portion of the $1.00-per head federal assessment to the State beef council." *Id*.; *see id*. at 45,991. The proposed rule includes a proposed form that cattle producers must use to indicate that they are choosing not to contribute to the QSBC and instead want the full amount of the checkoff directed to the Beef Board. *Id*.; *see also* https://www.ams.usda.gov/sites/default/files/media/QSBC-1%20-%20CBB%20Producer%20Redirection%20of%20Checkoff%20Assessments%20F

orm.pdf (proposed form). Comments on the proposed rule and proposed form are due by September 13, 2016. *See* 81 Fed. Reg. at 45,984.

In addition, on July 29, 2016, at the direction of USDA, the Beef Board sent a memorandum to QSBCs reminding them of their obligation to honor redirection requests "even before" the rulemaking process is complete "in accordance with current agency policy." Memorandum from Polly Ruhland, CEO, Cattlemen's Beef Promotion and Research Board 1 (July 29, 2016), *available at* http://www.beefboard.org/library/files/redirection-memo-072916.pdf (hereinafter "Ruhland Memo"). The memorandum notes that "[i]t is already [USDA's] policy that, in states where payments to a QSBC are not specifically required by state law, producers have the opportunity to choose to direct their full assessment to [the Beef Board]." *Id*. It also reminds QSBCs that they agreed to honor such requests in their application for certification as a QSBC. In addition to sending this memorandum to QSBCs, the Beef Board also posted the memorandum on its website to ensure that cattle producers are aware of their right to decline to contribute to a QSBC where state law does not require it and instead to redirect the full amount of their federal assessment to the Beef Board. *Id*.

The Montana Beef Council is a qualified State beef council. 7 C.F.R. § 1260.315. Defendants are not aware of any Montana state law or regulation that

requires cattle producers to contribute to the Montana Beef Council. *See* Compl. ¶ 63.

II. *JOHANNS V. LIVESTOCK MARKETING ASSOCIATION*

The Supreme Court addressed a First Amendment challenge to the Beef Act and Beef Order in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). The plaintiffs in that case—several associations of cattle producers as well as individual cattle producers—alleged that the use of the beef checkoff to fund advertisements and promotional campaigns with which they disagree violated their right not to be compelled to subsidize a private message. The Supreme Court rejected the challenge. The Court held that the beef checkoff funds government speech, and thus, it is exempt from First Amendment scrutiny. *Id*. at 559-62. In concluding that the advertisements and promotional campaigns of the Beef Board and Operating Committee are government speech, the Court relied on the fact that Congress and the Secretary specified the overarching message of the promotional campaigns; the members of the Beef Board and Operating Committee are subject to removal by the Secretary; and the Secretary has final approval over the content of promotional campaigns. *Id*.

The Court in *Johanns* did not specifically address advertisements and promotional campaigns of QSBCs. It did note, however, that then (as now), "[i]n most cases, only 50 cents per head is remitted to the Beef Board, because the Beef

Act and Beef Order allow domestic producers to deduct from their $1 assessment up to 50 cents in voluntary contributions to their state beef councils." *Id.* at 554 n.1 (citing 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3)).

III. PLAINTIFF'S COMPLAINT

Plaintiff, Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America, alleges that it is a "political advocacy and trade organization representing independent cattle producers across the United States, including in Montana." Compl. ¶ 2. Plaintiff asserts that "[a]ll of its members who are cow-calf producers raise their cattle domestically," "advocate for 'USA Beef,'" and "object to . . . communications espousing that all beef is equal and/or that fail to distinguish between domestic and foreign beef." *Id.* ¶¶ 2, 5.

Plaintiff alleges that "the operation of the federal Beef Checkoff in Montana" violates the First Amendment rights of its members because it forces them to "subsidize the speech of the private Montana Beef Council," with which they disagree. *Id.* ¶¶ 6, 96. Specifically, plaintiff asserts that its members are "required" to contribute 50 cents of every $1-per-head federal assessment to the Montana Beef Council, *id.* ¶ 10; *see id.* ¶¶ 46-50, and that, "on information and belief, neither USDA nor the Montana Beef Council has established a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef

Board," *id*. ¶ 74; *see also id*. ¶ 89 ("On information and belief, the Montana Beef Council does not provide cattle producers the opportunity to either recoup or redirect the money retained by the council."). Plaintiff contends that this purported compelled subsidy violates the First Amendment because, unlike the advertisements of the Beef Board and Operating Committee at issue in *Johanns*, the advertisements created by the Montana Beef Council are not sufficiently controlled by the federal (or state) government to constitute government speech. *See id*. ¶¶ 91-95.

Plaintiff seeks declaratory and injunctive relief. *See id*. ¶ 102.

STANDARD OF REVIEW

Defendants move to dismiss this case for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(1), (b)(6). Plaintiff bears the burden to show subject matter jurisdiction, *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008), and the Court must determine whether it has jurisdiction before addressing the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). But "the tenet that a court must

accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. Moreover, mere "labels and conclusions" and "naked assertion[s] devoid of further factual enhancement" are not sufficient. *Id*. Rather, a court must disregard "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and determine whether the remaining "well-pleaded factual allegations . . . plausibly give rise to an entitlement to relief." *Id*. at 679.

To the extent plaintiff seeks to amend its complaint or otherwise rely on its current complaint to challenge the procedure by which cattle producers can direct QSBCs to forward the full amount of their federal assessment to the Beef Board, defendants move in the alternative to stay the case pending completion of the ongoing rulemaking that is addressing those procedures. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979). "This rule applies whether the separate proceedings are judicial, administrative, or

arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Id.*

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION OR FAILURE TO STATE A CLAIM

A. Plaintiff Lacks Standing

To establish standing to sue on behalf of its members, an organization must demonstrate that, among other things, "its members would otherwise have standing to sue in their own right." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In particular, the organization must make "specific allegations establishing that at least one *identified member*" has (1) suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). The requirement of a causal connection between the defendant's conduct and the alleged injury means that the injury must be "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff "cannot manufacture standing merely be inflicting harm on [itself]," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013), because a "purely self-inflicted injury is not fairly traceable to the actions of another," *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 189 (D.C. Cir. 2012). An injury is self-

inflicted if it is "so completely due to the plaintiff's own fault as to break the causal chain." *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000). For an injury to be redressable, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561.

Plaintiff's complaint fails to establish that plaintiff has associational standing for three reasons. First, the complaint does not identify a single member of the organization who has allegedly suffered harm. This failure is "fatal to [plaintiff's] attempt to plead associational standing." *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 452 F. Supp. 2d 924, 934 (N.D. Cal. 2006); *see, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) (The "requirement of naming the affected members" cannot be "dispensed with in light of statistical probabilities."); *Associated Gen. Contractors*, 713 F.3d at 1194-95 (holding that organization lacked standing where it did "not identify any affected members by name"); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands*, LLC, 713 F.3d 175, 184 (4th Cir. 2013) (affirming dismissal for lack of associational standing where organization "failed to identify a single *specific member* injured by [the challenged action]").

Second, the alleged injury to plaintiff's members is self-inflicted. Plaintiff asserts that its members are injured because 50 cents of every $1-per-head federal assessment they pay goes to the Montana Beef Council to fund speech with which

they disagree. *See* Compl. ¶¶ 1, 21, 46-50. But defendants are not the cause of this alleged injury. Neither the Beef Act, nor the Beef Order, nor any action of defendants requires plaintiff's members to contribute any portion of their federal assessment to the Montana Beef Council. *See* 81 Fed. Reg. at 45,986. Indeed, plaintiff points to no federal law imposing such a requirement. *See* Compl. ¶¶ 46-50. Instead of contributing to the Montana Beef Council, plaintiff's members (and any other cattle producer who pays the beef checkoff in Montana or any other state where state law does not require contributions to a QSBC) may submit a request to the Montana Beef Council (or other QSBC) to direct the full amount of their federal assessment to the Beef Board. 81 Fed. Reg. at 45,986; *see* 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). Upon receiving such a request, the Montana Beef Council (or other QSBC) must forward the entire federal assessment from that producer to the Beef Board and may not retain any portion of the assessment. 81 Fed. Reg. at 45,986; *see* 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). Therefore, to the extent plaintiff's members are contributing to the Montana Beef Council against their wishes, they are doing so only because they have failed to avail themselves of this procedure for directing the full amount of the checkoff to the Beef Board. Such self-inflicted injuries do not satisfy Article III standing requirements. *See, e.g.*, *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (concluding that States that extended tax credits to their residents for

income taxes paid in other states were suffering from self-inflicted injuries, "resulting from decisions by their respective state legislatures"); *Mendia v. Garcia*, 768 F.3d 1009, 1013 n.1 (9th Cir. 2014) (holding that the plaintiff lacked standing to seek damages for his detention where he chose to remain in state custody even after court granted him release on his own recognizance).

Defendants recognize that plaintiff and its members previously may not have been aware of the option to direct the full federal assessment to the Beef Board. *See, e.g.*, Compl. ¶ 74 (alleging, "on information and belief," that USDA has not "established a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board"). But USDA has now made plaintiff and its members (as well as other cattle producers) aware that producers in states like Montana can request that the full amount of their federal assessment be directed to the Beef Board and that QSBCs must honor such requests. USDA has explained that its current policy permits redirection to the Beef Board, *see* 81 Fed. Reg. at 45,986; proposed a rule to codify the policy and to clarify the procedures for requesting redirection, *id*. at 45,991; and instructed the Beef Board to make clear to QSBCs that redirection requests must be honored during the ongoing rulemaking process, consistent with USDA's current policy, *see* Ruhland Memo. In light of USDA's efforts, any failure on the part of plaintiff's members to avail

themselves of the procedure for directing the Montana Beef Council to forward their entire checkoff to the Beef Board cannot be attributed to defendants. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (concluding injury was self-inflicted when the association could have resolved an alleged conflict between a statute and a regulation by inquiring about the conflict with the agency responsible for administering the regulation).

Third, plaintiff has not shown that the alleged injury is likely to be redressed by a favorable decision. Plaintiff explains that it and its members disagree with the promotional campaigns of the Montana Beef Council because they "suggest an equivalency between all beef" and "communicate[] that consumers should just eat more of it, regardless of where the beef was produced." Compl. ¶ 7; *see id.* ¶ 6, 8. But plaintiff and its members disagree with the promotional campaigns of the Beef Board for the same reasons. Specifically, plaintiff alleges that the Beef Board "inevitably use[s]" checkoff funds "to promote the lowest common denominator of beef, no matter the cattle it came from," *id.* ¶ 28, and that the goal of the Beef Board's promotional activities is to "encourag[e] more beef consumption, regardless of the nature and characteristics of the producer or cattle," *id.* ¶ 29. Accordingly, directing the full amount of the federal assessments paid by plaintiff's members to the Beef Board—which, plaintiff acknowledges, is the only remedy available to it and its members, *see, e.g.*, Compl. ¶¶ 74, 88—would not

redress the alleged injury. Plaintiff's members still will be funding similar speech to which they object on the same grounds. For all of these reasons, plaintiff has not established standing to sue on behalf of its members.

Plaintiff devotes only one paragraph of its complaint to an attempt to establish organizational standing. *See* Compl. ¶ 22. This effort fails as well, as plaintiff has not demonstrated any of the elements necessary to establish standing in its own right. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (explaining that an organization suing on its own behalf must establish (1) injury in fact, (2) causation, and (3) redressability). Plaintiff alleges that it "has had to expend resources to attempt to influence and work against the message of the Montana Beef Council," which communicates that all beef is equal. Compl. ¶ 22. But this expenditure is consistent with plaintiff's alleged mission: to promote the virtues of domestic beef over foreign beef in order to ensure the continued profitability of domestic cattle producers. *Id.* ¶ 17. Thus, plaintiff's alleged expenditures do not constitute a "diversion of [] resources" or "frustration of [] mission" as needed to establish injury in fact. *La Asociacion de Trabajadores*, 624 F.3d at 1088. Rather, plaintiff continues to devote resources to its mission of promoting "USA Beef." Compl. ¶ 17.

Furthermore, even if plaintiff's alleged expenditures were sufficient to establish an organizational injury, plaintiff has not shown causation or redressability for reasons similar to those discussed above. Plaintiff's alleged expenditure of resources to counteract the Montana Beef Council's message is not caused by defendants. It instead results from the independent decisions of others—namely cattle producers in Montana who choose to voluntarily contribute a portion of their checkoff to the Montana Beef Council. *See Lujan*, 504 U.S. at 560 (explaining that a causal connection does not exist if the alleged injury is "the result of the independent action of some third party not before the court"). And plaintiff's alleged injury would not be redressed by a favorable decision. Even if all of plaintiff's members in Montana decline to contribute to the Montana Beef Council, there still would be numerous other cattle producers who choose to continue voluntarily contributing a portion of their checkoff to the Montana Beef Council. Thus, plaintiff would continue to "expend resources to attempt to influence and work against the message of the Montana Beef Council," even if it prevailed here. Compl. ¶ 22. And plaintiff would continue to expend resources to counteract the similar message of the Beef Board. Accordingly, plaintiff also has not established standing to sue on its own behalf.

B. Plaintiff's Complaint Fails To State A Claim Because Federal Law Does Not Compel Cattle Producers To Subsidize The Advertisements Of The Montana Beef Council

Even if plaintiff could establish standing, the case should be dismissed because plaintiff fails to state a claim upon which relief may be granted. Plaintiff's only claim is that "the operation of the federal Beef Checkoff in Montana" violates the First Amendment because it forces cattle producers to "subsidize the speech of the private Montana Beef Council." Compl. ¶¶ 6, 96. To state a compelled-subsidy claim, a plaintiff first must demonstrate that it is "required" to subsidize another's message. *Johanns*, 544 U.S. at 557; *see, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 408 (2001) (invalidating "mandatory assessments" on mushroom handlers that were used to fund promotion projects); *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005) ("[A] violation of the First Amendment right against compelled speech occurs only in the context of actual compulsion.").

Here, there is no compulsion. Cattle producers in Montana are not required or forced to contribute to the Montana Beef Council. They instead may request that the full amount of their federal assessment be directed to the Beef Board. *See* 81 Fed. Reg. at 45,986. In short, plaintiff cites no provision of the Beef Act or Beef Order or any other federal law that requires cattle producers to contribute any portion of their checkoff to the Montana Beef Council. Because the purported

subsidy that plaintiff challenges is not compelled, there is no First Amendment violation and the case should be dismissed. *See*, e.g., *C.N.*, 430 F.3d at 189 (rejecting compelled speech claim where the plaintiff failed to show "the compulsion necessary to establish a First Amendment violation"); *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 558 (10th Cir. 1997) (dismissing compelled speech claim where the plaintiff failed to allege "threshold element" of "compulsion").[1]

Plaintiff's complaint does not challenge the current procedure that cattle producers may use to direct QSBCs to forward the full amount of their federal assessment to the Beef Board. Indeed, as noted above, plaintiff's complaint appears to have been based on plaintiff's mistaken belief that such an option did not exist. *See* Compl. ¶¶ 74, 89. If plaintiff wishes to challenge that procedure, plaintiff would need to amend its complaint to do so.[2]

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[1] Cattle producers are required by law to contribute to the Beef Board. *See* 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a). But plaintiff does not challenge this requirement; nor could plaintiff prevail on such a claim, which would be foreclosed by *Johanns*, 544 U.S. 550.

[2] Even assuming, *arguendo*, that plaintiff's current complaint could be interpreted, contrary to its terms, to challenge the current procedure, such a challenge would fail to state a claim. As a legal matter, the current procedure complies with the First Amendment. *See, e.g., Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961) ("[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 261 (9th Cir. 1992) (rejecting claim that First Amendment requires "affirmative consent" by nonunion members before dues are deducted

II. ALTERNATIVELY, IF PLAINTIFF SEEKS TO CHALLENGE THE PROCEDURE FOR DIRECTING THE FULL FEDERAL ASSESSMENT TO THE BEEF BOARD, THE COURT SHOULD STAY THE CASE PENDING COMPLETION OF THE ONGOING RULEMAKING

Although plaintiff's complaint is not directed at the procedure that cattle producers may use to direct the full amount of their federal assessment to the Beef Board, plaintiff has indicated that it may amend its complaint or otherwise rely on its current complaint to challenge this procedure. If plaintiff does so, defendants move, in the alternative, to stay the case pending completion of the ongoing rulemaking that is designed to address that procedure. The rulemaking may result in amendments to the Beef Order that will moot plaintiff's concerns or, at a minimum, alter and clarify the issues to be decided by the Court.

Courts have long recognized (i) their power to stay cases in light of concurrent agency proceedings and (ii) the benefit of doing so:

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear on the case. This rule applies whether the separate proceedings are judicial, *administrative*, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.

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from their paychecks to support the union's political and ideological activities and explaining that "nonunion members' rights are adequately protected when they are given the opportunity to object").

Leyva, 593 F.2d at 863-64 (emphasis added); *see, e.g.*, *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (concluding district court did not abuse its discretion by staying case pending the results of a related arbitration).

Here, although plaintiff may object to USDA's current procedure for cattle producers to direct the full amount of their checkoff to the Beef Board, USDA is engaged in a rulemaking that could change the contours of that procedure. *See* 81 Fed. Reg. at 45,984. During the rulemaking process, plaintiff, its members, and other stakeholders have the opportunity to submit comments regarding whether and how the procedure should be modified and to influence any amendments to the Beef Order that USDA ultimately adopts. It would be inefficient and a waste of resources for the parties to brief and the Court to judge the constitutionality of the current procedure when aspects of that procedure may change in light of plaintiff's and others' comments during the rulemaking. It also would be improper for the Court to prejudge the NPRM or the options available to USDA before the agency has a chance to consider comments, finalize the rule, and explain its reasons for the course it ultimately chooses. *Cf. Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (discussing final agency action requirement).

A stay, moreover, will not harm plaintiff or its members. USDA has made clear that, during the rulemaking process, cattle producers in Montana and similar states can continue to direct QSBCs to forward the full amount of their federal assessment to the Beef Board, in accordance with USDA's current policy. *See* Ruhland Memo. Therefore, during the pendency of the stay, none of plaintiff's members will be required to contribute to the Montana Beef Council against their wishes.

In any event, even if plaintiff would suffer some harm because of a stay, the benefits to judicial economy that a stay would confer outweigh any conceivable harm. *See Landis*, 299 U.S. at 254-55 (The court "must weigh competing interests and maintain an even balance" when determining whether to stay a case.); *id*. at 256 (A party "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if . . . convenience will thereby be promoted."); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The procedure at issue—where QBSCs collect the federal assessment, retain up to 50 cents of each $1-per-head assessment in the absence of an objection by a cattle producer, and forward the remaining amount to the Beef Board—has been in place for 30 years, since the Beef Order was first promulgated in 1986. *See* 51 Fed. Reg. at 26,132; *see also Johann*, 544 U.S. at 554 n.1. It is sensible to permit that procedure to continue for a reasonable duration while USDA completes the ongoing rulemaking process, at

which time plaintiff can challenge any aspects of the final rule to which it objects. The alternative would be utterly inefficient. Even assuming the Court could adjudicate the merits of the current procedure before the rulemaking is complete (which is unlikely), the Court's decision likely would be rendered inapplicable once USDA finalizes amendments to the Beef Order. Thus, a stay of the case pending completion of the rulemaking is entirely appropriate to ensure that the Court and the parties do not unnecessarily expend resources litigating a case that will be overtaken by events. *See Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094, 1096 (E.D. Cal. 2008) (staying case in light of pending agency rulemaking "that may affect portions of Plaintiff's claims" because failure to do so would "waste party and judicial resources").

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss or, in the alternative, stay the case pending completion of the ongoing rulemaking.

Respectfully submitted this 4th day of August, 2016,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 5,968 words, excluding the caption, signature block, certificates of service and compliance, and table of contents and authorities.

Dated this 4th day of August, 2016.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michelle R. Bennett
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