

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

LYSTN, LLC d/b/a ANSWERS™ PET FOOD, Plaintiff,	:	
	:	Civ. No. 19-cv-1943
	:	
v.	:	
	:	
FOOD AND DRUG ADMINISTRATION	:	
	:	
ASSOCIATION OF AMERICAN FEED CONTROL OFFICIALS	:	
	:	
COLORADO DEPARTMENT OF AGRICULTURE	:	
	:	
KATE GREENBERG, INDIVIDUALLY AND OFFICIALLY IN HER CAPACITY AS COMMISSIONER OF THE COLORADO DEPARTMENT OF AGRICULTURE	:	
	:	
LAUREL HAMLING, INDIVIDUALLY AND OFFICIALLY IN HER CAPACITY AS FEED PROGRAM ADMINISTRATOR FOR THE COLORADO DEPARTMENT OF AGRICULTURE	:	
	:	
SCOTT ZIEHR, INDIVIDUALLY AND OFFICIALLY IN HIS CAPACITY AS FEED PROGRAM REGULATORY ADMINISTRATOR FOR THE COLORADO DEPARTMENT OF AGRICULTURE	:	
	:	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES Defendants.	:	

MOTION TO INTERVENE

_____ (“Movant”) moves
this Court for leave to intervene in this action as of right, pursuant to Federal Rule of
Civil Procedure 24(a)(2) or, alternatively, in permissive intervention pursuant to Federal

Rule of Civil Procedure 24(b). As grounds therefore, the United States Federal Rule states as follows:

1. Movant's Motion to Intervene is timely because the litigation is in its early stages, intervention will not create any delay, and, thus, intervention at this juncture will not prejudice the existing parties.
2. Movant has a substantial legal interest in the subject matter of the action because: **(insert reasons you believe your interests are and/or will be affected by this action)**
3. Disposition of the action without the Movant's participation may impede its interests.
4. Movant also satisfies the requirements for permissive intervention because its claims against the defendant(s) have questions of law and fact in common with the claims and facts at issue in the main action.
5. Pursuant to Local Rule 7.1, Movant conferred with counsel for the defendant by telephone on _____ concerning this motion to intervene. Counsel for defendant **(did or did not)** _____ consent to Movant's request for intervention.
6. Counsel for plaintiff consents to this Motion to Intervene.
7. As further support for this Motion, Movant respectfully directs the Court to the following Memorandum of Law, which is attached hereto and incorporated herein by reference.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE**

I. INTRODUCTION

Keith A. Hill, President of Lystn, LLC, Fleetwood, PA manufacturer of “ANSWERS™ Pet Food”, announced that the company filed this Declaratory Judgement Complaint and is seeking Injunctive Relief which challenges the Food and Drug Administration’s (FDA) decision to enforce and lawfulness of their actions, through its own actions and with the cooperation of the Association of American Feed Control Officials (AAFCO) – a voluntary membership association of local, state and federal agencies charged by law to regulate the sale and distribution of animal feeds/foods, and certain participating states in their own official capacities and actions, a nationwide zero-tolerance Compliance Policy Guide standard for *Salmonella* presence in pet food that is in non-compliance with the Food, Drug and Cosmetic Act (FD&C ACT) and unsupported by science and ultra vires of powers delegated to it by Congress.

Among other outcomes, ANSWERS is seeking and entitled to a declaration that the rule is unconstitutional and illegal, and an injunction is warranted preventing FDA from promulgating that guidance or enforcing that standard.

II. ARGUMENT

A. Movant Satisfies the Requirements for Intervention of Right

Federal Rule of Civil Procedure Rule 24(a) provides that upon timely application, anyone shall be permitted to intervene in an action:

When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so

situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24 (a)(2). The Tenth Circuit has directed that a "liberal" approach to intervention be taken and, thus, favors granting motions to intervene. *See, e.g., Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996).¹

Movant's request for intervention satisfies the requirements of Rule 24(a)(2) for intervention as of right. Movant has a substantial legal interest in the subject matter of the action because this case directly impacts them as follows: **(insert – in your words, why your legal interests are implicated in these proceedings).**

Movant is timely seeking to intervene in this action, as the case is still in its early stages, and its intervention will not disrupt the proceedings or prejudice either party.

1. Movant's Motion to Intervene is Timely

The Tenth Circuit has determined timeliness "in light of all of the circumstances, but three non-exhaustive factors are particularly important: (1) the length of time since the movants knew of their interests in the case; (2) prejudice to the existing parties; and

¹

Moreover, the Tenth Circuit has long recognized conservation and advocacy groups and dedicated individual advocates easily satisfy Rule 24(a)(2)'s requirements. *See, e.g. WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010); *WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009) ("[T]he burden to satisfy this condition is 'minimal,' and that '[t]he possibility of divergence of interest need not be great in order to satisfy the burden of the applicants.'" *quoting Coal. of Ariz./N.M. Ctys.*, 100 F.3d at 844-45)

(3) prejudice to the movants." *Western Energy Alliance v. Zinke*, 877 F.3d 1157 (10th Cir. 2017), citing *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996).

Applying these factors to the instant case, Movant's application for intervention is timely. This matter was only filed on July 5, 2019 and Movant has instantly motioned for Intervenor Status. See *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (considering "the relatively early stage of the litigation and the lack of prejudice to plaintiffs flowing from the length of time between the initiation of the proceedings and the motion to intervene."). Movant's decision to intervene at this point will not prejudice either party. See *Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. 1993) (allowing intervention "[a]lthough the case has been pending for more than two years, discovery on the merits has not been completed and dispositive motions have not been filed. As a consequence, there is no indication that this litigation is close to conclusion.").

While the existing parties to the litigation will not be prejudiced by Movant's intervention, Movant will be prejudiced if its request for intervention is denied. Its interests will undoubtedly be impaired if it is not permitted to intervene in this action. Moreover, Movant's extensive experience with the Guidance Policy(ies), AAFCO, and the subject statutes at issue will benefit the existing parties in presenting facts and arguments that will help frame the issues. Intervention will lend efficiency to the proceedings.

2. Movant has a Substantial Legal Interest in this Litigation

A protectable interest is one that "would be 'impeded by the disposition of the action.'" *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (en banc), *abrogated on other grounds by Hollingsworth v. Perry*, 570 U.S. 693, 133 S.Ct. 2652, 2659-65, 186 L.Ed.2d 768 (2013) (quoting *Allard v. Frizzell*, 536 F.2d 1332, 1334 (10th Cir. 1976) (per curiam)). Movant asserts the following protectable interests:

3. The Disposition of the Instant Litigation May Impair Movant's Ability to Protect Its Interest

Movant's ability to protect its substantial legal interest would be impaired absent intervention. This element "presents a minimal burden." *Western Energy Alliance* 877 F.3d at 1167, *citing WildEarth Guardians*, 604 F.3d at 1199. The Tenth Circuit requires merely that Movant shows it is "possible" that the interests they identify will be impaired. *Id.*; (citation omitted). The Tenth Circuit has found that this factor is easily met in environmental cases "where the district court's decision would require the federal agency to engage in an additional round of administrative planning and decision-making that itself might harm the movants' interests, even if they could participate in the subsequent

decision-making.” *Id.*, citing *WildEarth Guardians*, 604 F.3d at 1199. That is precisely the case because the Plaintiff is seeking relief that “would require the federal agency to engage in an additional round of administrative planning and decision-making.” *Id.*

4. The Existing Parties Do Not Adequately Represent Movant’s Interests

The fourth and final element to justify intervention of right is inadequate representation of the proposed intervenor’s interest by existing parties to the litigation. Plaintiff. Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action. *Lloyd v. Alabama Dep’t of Corrections*, 176 F.3d 1336, 1341 (11th Cir. 1999); *Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

In this case, Movant’s interest is in seeing the FDA engage in the formal Rulemaking they are Constitutionally charged with conducting. While Plaintiff also seeks such, it will be afforded complete relief upon the Court’s GRANT of Injunctive Relief, leaving Movant short.

B. Permissive Intervention

Rule 24(b)(1)(B) governing permissive intervention provides that, on timely motion, the court may permit anyone to intervene who “has a claim or defense that shares with the main action a common question of law or fact.” In exercising its discretion to permit a party to intervene, “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed.R.Civ.P. 24(b)(3).

Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Public Regulation Commission, 787 F.3d 1068 (10th Cir. 2015).

As discussed above, Movant's application for intervention in this litigation is timely and Movant's participation would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties. Additionally, Movant's claims against the Defendant—namely, that its failure to provide adequate Rulemaking based on actual science, renders them and their mission(s) at risk. Therefore, GRANT of intervention is proper.

III. CONCLUSION

For the foregoing reasons, the Court should grant Movant's motion to intervene (i) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Dated: _____

Respectfully submitted,

 /s/ _____

CERTIFICATE OF SERVICE

I hereby certify that on _____ a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of filing to the following:

/s/ _____