IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BURNETTE FOODS, INC., a Michigan corporation, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE and SONNY PERDUE, Secretary of Agriculture, Defendants.	)	Case No. 1:16-cv-21-GJQ-ESC

DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(a), OR IN THE ALTERNATIVE, TO AMEND THE JUDGMENT UNDER RULE 59(e)

For the reasons set forth in the accompanying memorandum, and in light of the Court's "Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment" ("Order"), ECF No. 47, Defendants U.S. Department of Agriculture and Secretary Sonny Perdue, in his official capacity (collectively "Defendants"), by and through undersigned counsel, hereby move for relief from the Court's Order under Federal Rule of Civil Procedure 60(a), or in the alternative, to amend the judgment in this case pursuant to Federal Rule of Civil Procedure 59(e). As required by Local Civil Rule 7.1(d), on February 20, 2018, undersigned counsel contacted counsel for Plaintiff, who stated that Plaintiff is unable to provide a concurrence to this motion.

Dated: February 20, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ERIC WOMACK
Assistant Director, Federal Programs Branch

/s/ *Jason Lee*
JASON LEE (CA Bar No. 298140)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
(202) 514-3367
(202) 616-8470 (fax)
Jason.Lee3@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BURNETTE FOODS, INC., a Michigan corporation, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE and SONNY PERDUE, Secretary of Agriculture, Defendants.	)	Case No. 1:16-cv-21-GJQ-ESC

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(a), OR IN THE ALTERNATIVE, TO AMEND THE JUDGMENT PURSUANT TO RULE 59(e)

The Court's "Opinion Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment," dated January 24, 2018 (ECF No. 47) [hereinafter "Opinion"], concluded that the administrative record lacks substantial evidence to support the Judicial Officer's conclusion that CherrCo, a federated grower cooperative, is not a "sales constituency" as defined in 7 C.F.R. § 930.16. Defendants respectfully disagree with that conclusion. This filing, however, addresses only the Court's statement concerning the purported consequences of that decision. According to the Opinion, because this Court has held that CherrCo qualifies as a sales constituency, it "cannot have more than one seat on the [Cherry Industry Administrative Board ('CIAB')]." PageID.6702 (citing 7 C.F.R. § 930.20). This conclusion, however, is not required by, and is indeed inconsistent with, § 930.20.

Section 930.20(g) only limits the affiliation of a sales constituency to members on the CIAB within "those *districts* having more than one seat on the Board." As such, it limits a sales

constituency to one seat per district, not one seat on the CIAB itself. The CIAB is composed of members hailing from multiple districts, and therefore, a sales constituency may still be affiliated with multiple seats on the CIAB without running afoul of § 930.20(g). Indeed, the regulation expressly states that "[t]here is no prohibition on the number of [CIAB] members from differing districts that may be elected from a single sales constituency which may have operations in more than one district." *Id.* And even in individual districts, § 930.20(g) instructs that the limitation on affiliation "[does] not apply in a district where such a conflict cannot be avoided."

Defendants thus respectfully request that the Court clarify under Federal Rule of Civil Procedure 60(a), or in the alternative, amend its Opinion under Rule 59(e) to state, that the impact of the Court's Opinion is limited to CherrCo's affiliation with seats on the CIAB within individual districts, and only where such a conflict can be avoided.

BACKGROUND

Plaintiff filed an administrative petition with the United States Department of Agriculture pursuant to 7 U.S.C. § 608c(15)(A) challenging a federal marketing order that regulates tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin ("Tart Cherry Order" or "Order"). *See* 7 C.F.R. pt. 930. In those administrative proceedings, the Judicial Officer rejected each of Plaintiff's challenges. PageID.81.

Plaintiff initiated the instant action pursuant to 7 U.S.C. § 608c(15)(B), challenging the Judicial Officer's decision on a number of bases. Specifically, Plaintiff asserted that (1) application of the Tart Cherry Order to the canned segment of the tart cherry industry is "confiscatory," (2) the Tart Cherry Order is unconstitutional insofar as it fails to consider imported tart cherries in setting reserve requirements, (3) CherrCo's affiliation with multiple seats on the CIAB violates agency regulations and the Constitution, (4) the Tart Cherry Order is

unconstitutional because it is not applied to all states, and (5) the reserve requirement imposed by the Tart Cherry Order effects an unconstitutional taking. PageID.9-18. In an order issued on September 9, 2016, the Court dismissed all of Plaintiff's claims, save for the one challenging CherrCo's affiliation with multiple members on the CIAB. PageID.602.

After the parties filed cross-motions for summary judgment on Plaintiff's remaining claim, the Court issued its Opinion holding that the administrative record lacks substantial evidence to support the Judicial Officer's conclusion that CherrCo does not constitute a "sales constituency" as defined in 7 C.F.R. § 930.16. PageID.6702. The Court further stated that "CherrCo, as a sales constituency, cannot have more than one seat on the CIAB," citing 7 C.F.R. § 930.20. *Id*.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 60(a), a 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." This rule permits a court to "correct mistakes or oversights that cause the judgment to fail to reflect what was intended at the time of trial." *In re Walter*, 282 F.3d 434, 441 (6th Cir. 2002) (quoting *Vaughter v. E. Air Lines, Inc*., 817 F.2d 685, 689 (11th Cir. 1987)). Courts may grant relief under Rule 60(a) in their discretion "when they undertake to 'make the judgment or record speak the truth' rather than to say 'something other than what was originally pronounced.'" *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 8223066, at *2 (S.D. Ohio Mar. 17, 2016) (quoting *In re Walter*, 282 F.3d at 441).

Under Federal Rule of Civil Procedure 59(e), a court may "alter or amend" a judgment upon motion made within twenty-eight days after the entry of judgment. Relief may be granted under Rule 59(e) to "correct a clear error of law." *Turnpaugh v. Maciejewski*, No. CIV. 2:08-

12842, 2009 WL 588409, at *1 (E.D. Mich. Mar. 6, 2009). The decision of whether to grant such relief lies within the discretion of the district court. *Davis by Davis v. Jellico Cmty. Hosp., Inc*., 912 F.2d 129, 132 (6th Cir. 1990).

A timely motion under Rule 60(a) or Rule 59(e) tolls the time for filing a notice of appeal. *See, e.g., Peabody Coal Co. v. Abner*, 118 F.3d 1106, 1108 (6th Cir. 1997) ("[A] timely motion to alter or amend or for new trial tolls the time within which a notice of appeal must be filed."); *Hicks v. City of Barberton*, No. 5:11CV76, 2012 WL 5833401, at *5 n.5 (N.D. Ohio Nov. 15, 2012) ("A Rule 60 motion tolls the time for filing a notice of appeal so long as it is filed no later than 28 days after the judgment is entered.").

ARGUMENT

I. The CIAB and the Regulatory Limitation on the Affiliation of a Sales Constituency with Members of the CIAB

The Secretary of Agriculture issued the Tart Cherry Order in 1996 "to improve producer returns by strengthening consumer demand through volume control and quality assurance mechanisms." Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Order Regulating Handling, 61 Fed. Reg. 49939-01 (Sept. 24, 1996). The Order established the CIAB and vested it with general administration of the Order. *See* 7 C.F.R. §§ 930.20(a), 930.30(a). Members hailing from nine districts comprise the CIAB. *Id*. § 930.20(b)–(c). The number of seats on the CIAB allocated to a particular district is calculated based on the previous three-year average production level of that district. *See id*. § 930.20(a), (b). An additional member of the CIAB is elected by the CIAB from the general public. *Id*. § 930.20(a).

"In order to achieve a fair and balanced representation on the [CIAB], and to prevent any one sales constituency from gaining control of the [CIAB]," agency regulations provide that "not

more than one [CIAB] member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the [CIAB]." *Id*. § 930.20(g). To ensure each district's proper representation on the CIAB, this limitation "[does] not apply in a district where such a conflict cannot be avoided." *Id*. This means that, as a practical matter, a sales constituency may, in full compliance with agency regulations, be affiliated with multiple members on the CIAB, as long as those members are from separate districts.[1] *See id*. The regulation makes this point clear by expressly stating that "[t]here is no prohibition on the number of [CIAB] members from differing districts that may be elected from a single sales constituency which may have operations in more than one district." *Id*.

II. The Court Should Align Its Opinion with 7 C.F.R. § 930.20(g)

In its Opinion, the Court concluded that CherrCo "qualifies as a sales constituency under 7 C.F.R. § 930.16," and that "as a sales constituency, [it] cannot have more than one seat on the CIAB," citing 7 C.F.R. § 930.20. PageID.6702. Section 930.20 does not, however, require this limitation. Rather, as explained above, the restriction on affiliation set forth in 7 C.F.R. § 930.20(g) precludes a sales constituency from being affiliated with more than one member *within a given district* if that district "ha[s] more than one seat on the [CIAB]." *Id*. And even that preclusion does not apply "where such a conflict cannot be avoided." *Id*.

The conclusion set forth in the Court's Opinion is therefore not required by, and indeed is inconsistent with, the regulation that the Opinion cites, resulting in a more onerous restriction on affiliation than what 7 C.F.R. § 930.20(g) authorizes. Defendants therefore respectfully request that the Court clarify under Rule 60(a), or in the alternative, amend its Opinion under Rule 59(e) to state, that pursuant to the Court's Opinion, CherrCo's affiliation with members of the CIAB is

[1] Though this limitation does not apply "where such a conflict cannot be avoided." *Id*. § 930.20(g).

limited only within districts that are allocated more than one seat on the CIAB, and only where such a conflict can be avoided.

CONCLUSION

For the foregoing reasons, Defendants' motion for relief from judgment under Rule 60(a), or in the alternative, to amend the judgment under Rule 59(e) should be granted.

Dated: February 20, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ERIC WOMACK
Assistant Director, Federal Programs Branch

/s/ *Jason Lee*
JASON LEE (CA Bar No. 298140)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
(202) 514-3367
(202) 616-8470 (fax)
Jason.Lee3@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BURNETTE FOODS, INC., a Michigan corporation, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE and SONNY PERDUE, Secretary of Agriculture, Defendants.	)	Case No. 1:16-cv-21-GJQ-ESC

[PROPOSED] ORDER

Upon consideration of Defendants U.S. Department of Agriculture and Secretary Sonny Perdue's "Motion for Relief from Judgment Under Rule 60(a), or in the Alternative, to Amend the Judgment Under Rule 59(e)" and their supporting memorandum of points and authorities, it is hereby **ORDERED** that Defendants' motion is **GRANTED**. The Court clarifies that pursuant to its "Opinion Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment" (ECF No. 47), CherrCo's affiliation with members on the Cherry Industry Administrative Board is limited as set forth in 7 C.F.R. § 930.20(g).

SO ORDERED.

_____ _____

Date

JUDGE GORDON J. QUIST
United States District Judge