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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KATHRYN FLANIGAN, et al.,

Plaintiffs,

v.

WESTERN MILLING, LLC,

Defendant.

Case No. 1:18-mc-00024-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DENYING
PETITIONERS MOTION TO COMPEL

(ECF No. 2)

ORDER DIRECTING CLERK OF THE
COURT TO RANDOMLY ASSIGN THIS
ACTION TO A DISTRICT JUDGE

FOURTEEN DAY DEADLINE

On April 26, 2018, Petitioners¹ Kathryn Flanigan; Cambria Ross; Courtney Gebhart; Debra Guiffrida; Denise Taylor; Emily Mcneil; Kenneth Snell; Mary Everett; Kerry Urquhart; Linda Rubio; Lynn Groundwater; Rachel Winch; Noah Olmstead; Kimberly Girard; Brad Young; Adrienne Young; Ashley Young, a minor, by and through her guardian Ad Litem, Adrienne Young; Cathryn Belmont; Grace Belmont, a minor, by and through her Guardian ad Litem, Cathryn Belmont; Christine Saunders; Kim Saunders, a minor, by and through her Guardian ad Litem, Christine Saunders; Clair Hilchie Schmidt; Lauren Hilchie Schmidt, a minor, by and through her Guardian ad Litem, Clair Hilchie Schmidt; Dena Amador; Reagan Amador, a

¹ While Petitioner filed this action as a plaintiff and named Western Drilling as a defendant, it is the Food and Drug Administration that would be the respondent in the current motion. Therefore, the Court addresses the issues between Petitioners and the respondent.

1 minor, by and through her Guardian ad Litem, Dena Amador; Jeanette Burson; Taylor Burson, a
2 minor, by and through her Guardian ad Litem, Jeanette Burson; Karen Erickson; Sally Erickson,
3 a minor, by and through her Guardian ad Litem, Karen Erickson; Kimberly Sarkhosh; Francesca
4 Sarkhosh, a minor, by and through her Guardian ad Litem, Kimberly Sarkhosh; Rene Polanco;
5 Payton Polanco, a minor, by and through her Guardian ad Litem, Rene Polanco; Tyce Ferguson;
6 Kathy Ferguson; Riley Ferguson, minor, by and through her Guardian ad Litem, Tyce Ferguson;
7 Neil Burson; Brenda Burson; Jessica Marje Burson, a minor, by and through her Guardian ad
8 Litem, Neil Burson; John Jacobi; Morgan Jacobi, a minor, by and through her Guardian ad
9 Litem, John Jacobi; Gemma Blumenshine, a minor, by and through her Guardian ad Litem,
10 Nadine Blumenshine; Sydney Loucks, a minor, by and through her Guardian ad Litem; Aaron
11 Loucks; and Kenna Scott, a minor, by and through her Guardian ad Litem, Shera Scott
12 (“Petitioners”) filed a miscellaneous action seeking to compel the United States Food and Drug
13 Administration (“FDA”) to produce a witness for deposition. The matter was assigned to a
14 United States magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

15 Petitioners have filed an action in Fresno County Superior Court against Western Milling
16 LLC (“Western Milling”). The state court action alleges injury caused to Petitioners’ horses due
17 to consuming allegedly contaminated and toxic horse feed manufactured by Western Milling.
18 Thomas Gordon of the United States Food and Drug Administration (“FDA”) was assigned to
19 investigate Western Milling regarding this matter. Petitioners contend that Western Milling was
20 sanctioned and, in part due to that investigation, the State Attorney General’s Office filed a
21 lawsuit in 2016 for state law violations. Petitioners sought to take the deposition of Mr. Gordon
22 in the state action and served a deposition subpoena.

23 The FDA rejected Petitioners subpoena pursuant to 21 C.F.R. § 20.1. Petitioners
24 subsequently submitted a request to the agency to depose Mr. Gordon which was denied by the
25 agency. On April 26, 2018, Petitioners filed the instant motion in federal court to compel the
26 FDA to produce Mr. Gordon for deposition.

27 Petitioner moves to compel deposition testimony, however as Petitioners recognize in
28 their motion, the FDA cannot be compelled to comply with the state court subpoena because they

1 have sovereign immunity. (ECF No. 2 at 7.²) Petitioners argue that the Court has the authority
2 to review the FDA’s decision to deny the deposition of Mr. Gordon under the Administrative
3 Procedure Act (APA), 5 U.S.C. §§ 551, et seq. However, for the reasons discussed herein, the
4 Court finds that the current motion must be denied for lack of subject matter jurisdiction.

5 Federal courts are courts of limited jurisdiction and their power to adjudicate is limited to
6 that granted by Congress. U.S. v. Sumner, 226 F.3d 1005, 1009 (9th Cir. 2000). Under 5 U.S.C.
7 § 706, the Court can review the agency decision to determine if it is “arbitrary, capricious, an
8 abuse of discretion, or otherwise not in accord with law[.]” 5 U.S.C. § 706(2)(A). In making
9 this determination the court reviews the administrative record. 5 U.S.C. § 706. “The scope of
10 review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its
11 judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut.
12 Auto. Ins. Co., 463 U.S. 29, 43 (1983). “However, the agency must examine the relevant data
13 and articulate a satisfactory explanation for its action including a ‘rational connection between
14 the facts found and the choice made.’ ” Motor Vehicle Mfrs. Ass’n of U.S., Inc., 463 U.S. at 43
15 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). Courts reviewing
16 the agency determination must “consider whether the decision was based on a consideration of
17 the relevant factors and whether there has been a clear error of judgment.” Motor Vehicle Mfrs.
18 Ass’n of U.S., Inc., 463 U.S. at 43 (citations omitted). Petitioners have not filed an action under
19 the APA here, but are moving to compel the APA to allow the deposition of Mr. Gordon.
20 However, the Court has no federal case pending to confer jurisdiction in this matter.

21 In U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951), the Supreme Court held that
22 federal regulations which authorize the head of a federal agency to determine if a subordinate
23 may produce documents are valid regulations. These regulations are known as Touhy
24 regulations. In re Vioxx Prod. Liab. Litig., 235 F.R.D. 334, 343 (E.D. La. 2006). The FDA has
25 promulgated a Touhy regulation, 21 C.F.R. § 20.1, id., which Petitioners contend was used to
26 deny the request to depose Mr. Gordon.

27 _____
28 ² All references to pagination of specific documents pertain to those as indicated on the upper right corners via the
CM/ECF electronic court docketing system.

1 Pursuant to section 20.1, the FDA shall respectfully decline to testify to subpoenas as
2 prohibited by the section. 21 C.F.R. § 20.1(b). To obtain the deposition of an FDA employee,
3 the requesting individual may make a written request and the FDA may grant the request if it is
4 determined that the testimony will be in the public interest and will promote the objectives of the
5 act and the agency. 21 C.F.R. § 20.1(c). Here, Petitioners contend that the grounds for resisting
6 discovery are arbitrary and capricious and lack any substantive basis. (ECF No. 2 at 1.) Since
7 there is no federal case pending, the Court finds that this matter must be filed as an action
8 seeking review of the FDA's decision to deny discovery.

9 In federal court, a litigant can seek to obtain records from a third party under Rule 45 of
10 the Federal Rules of Civil Procedure. The federal government has waived its sovereign
11 immunity in federal court under the APA, 5 U.S.C. § 702, and courts have held that a federal
12 litigant can compel a federal agency to comply with a subpoena issued under Rule 45 of the
13 Federal Rules of Civil Procedure in the action in which the subpoena was initiated, In re Vioxx
14 Prod. Liab. Litig., 235 F.R.D. at 343 (collecting cases); Johnson v. Folino, 528 F.Supp.2d 548,
15 550 (E.D. Pa. 2007); Williams v. C. Martin Co. Inc., No. CIV.A. 07-6592, 2014 WL 3095161, at
16 *4 (E.D. La. July 7, 2014). Courts that have considered the issue hold that analyzing the plain
17 text of the relevant APA provisions, a federal litigant need not file a collateral action to compel
18 compliance with a Rule 45 subpoena addressed to the federal government. Ceroni v. 4Front
19 Engineered Sols., Inc., 793 F.Supp.2d 1268, 1275 (D. Colo. 2011); Lamb v. Wallace, No. 7:16-
20 CV-44-FL, 2018 WL 847242, at *2 (E.D.N.C. Feb. 13, 2018) (collecting cases); Spence v. NCI
21 Information Systems, Inc., 530 F.Supp.2d 739, 744 (D.Md. 2008). However, there is no federal
22 action pending here; and Petitioners are not seeking to compel compliance with a Rule 45
23 subpoena issued in a federal case.

24 In Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of
25 Treasury, 86 F.3d 1208 (D.C. Cir. 1996), the court was faced with a similar situation to that
26 presented here. The Houston Business Journal filed a state court libel action and sought
27 documents from the Comptroller who was not a party to the underlying action. Houston Bus.
28 Journal, Inc., 86 F.3d at 1210. After the Comptroller responded that the documents needed to be

1 sought through the agency’s administrative request procedure rather than a subpoena, a request
2 was made and limited documents were produced in the state court proceedings. Id. The Houston
3 Business Journal moved to compel production of the documents in the state action and the
4 Comptroller removed that part of the action seeking enforcement of the subpoena to the federal
5 court. Id. at 1211. The Houston Business Journal then served a Rule 45 subpoena requesting the
6 documents. Id. The district court denied the motion on various grounds and the Houston
7 Business Journal appealed. Id.

8 On appeal, the court held that “a state-court litigant must request the documents from the
9 federal agency pursuant to the agency’s regulations” and if “the agency refuses to produce the
10 requested documents, the sole remedy for the state-court litigant is to file a collateral action in
11 federal court under the APA.” Houston Bus. Journal, Inc., 86 F.3d at 1212. The question the
12 court considered was “when the underlying litigation is in state court, can a litigant eager to
13 avoid the limitations on the state court’s subpoena power obtain a federal-court subpoena
14 instead?” Id. The court held “that in such circumstances the federal court lacks subject-matter
15 jurisdiction to issue the subpoena.” Id.

16 Other courts have held that where a state court litigant seeks to compel a federal agency
17 to comply with discovery requests in federal court subject matter jurisdiction is lacking. In re
18 Dwayne E. Hopkins, 162 F.3d 1172 (10th Cir. 1998) (unpublished); see also COMSAT Corp. v.
19 Nat’l Sci. Found., 190 F.3d 269, 277 (4th Cir. 1999) (“a federal court may not compel a third
20 party to comply with an arbitrator’s subpoena for prehearing discovery, absent a showing of
21 special need or hardship”); Swett v. Schenk, 792 F.2d 1447, 1452 (9th Cir. 1986) (even on
22 removal from state court subject matter jurisdiction was lacking). The appropriate means for
23 challenging a federal agency’s decision is to file an action under the APA in federal court. In re
24 Ben Siminoe, Assistant Forest Supervisor, U.S. Dept. of Agric., Forest Serv., 109 F.3d 554, 557
25 fn.1 (9th Cir. 1997); United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999); Boron Oil Co.
26 v. Downie, 873 F.2d 67, 71 (4th Cir. 1989); Ceroni, 793 F.Supp.2d at 1275.

27 Similarly, the Court finds here that it lacks subject matter jurisdiction to order the FDA to
28 present Mr. Gordon for deposition in the state court action. For Petitioners to obtain review of

1 the FDA's decision to deny discovery in Petitioners' state court case, Petitioners must file an
2 action in federal court under the APA.

3 Based on the foregoing, IT IS HEREBY RECOMMENDED that Petitioners' motion to
4 compel be DENIED.

5 This findings and recommendations is submitted to the district judge assigned to this
6 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen
7 (14) days of service of this recommendation, any party may file written objections to this
8 findings and recommendations with the Court and serve a copy on all parties. Such a document
9 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The
10 district judge will review the magistrate judge's findings and recommendations pursuant to 28
11 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
12 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th
13 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

14
15 IT IS SO ORDERED.

16 Dated: April 30, 2018


UNITED STATES MAGISTRATE JUDGE

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