

EXHIBIT A

**TO THE THIRD DECLARATION
OF JENNIFER A. SORENSON**



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street, 3rd floor
New York, New York 10007*

November 7, 2011

BY FACSIMILE

The Honorable Theodore H. Katz
United States Magistrate Judge
United States District Courthouse
500 Pearl Street, Room 1660
New York, NY 10007

Re: NRDC et al. v. US FDA et al., 11 Civ. 3562 (THK)

Dear Judge Katz:

This Office represents the defendants (collectively, the "Government") in this action pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, in which plaintiffs seek to compel Government action that they claim is required the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*. I am writing on behalf of the Government to request a 60-day extension of time to oppose plaintiffs' motion for summary judgment (which they filed on October 6, 2011), and file a cross-motion for summary judgment. With that extension the Government's opposition and cross-motion would be due January 9, 2012. As explained below, the requested extension is both necessitated and warranted in light of a recent administrative development and the possibility of a further such development.

In this action, plaintiffs bring two APA claims: (1) that the Government has unlawfully failed to withdraw approval for certain uses of penicillin and tetracycline antibiotics in livestock because the Government proposed such withdrawal through two notices of opportunity for hearing that were issued in 1977,¹ (the "NOOH Claim"), and (2) that the Government has unreasonably delayed ruling on citizen petitions filed by several of the plaintiffs that requested that the Government withdraw approval for certain uses of certain antibiotics in livestock (the "Citizen Petitions Claim"). Today, the Government responded to those citizen petitions and, accordingly, plaintiffs' Citizen

¹ In 1978 and 1980, the House Committee on Appropriations requested that the Food and Drug Administration ("FDA"), before taking action on its withdrawal proposals, conduct further research on the bases for those proposals. *See* H.R. Rep. No. 9501289, at 99-100 (1978), H.R. Rep. 96-1095, at 105-606 (1980). In 1981 the Senate Committee on Appropriations made the same request to FDA. S. Rep. No. 97-248, at 79 (1981).

Petitions Claim is now moot. *E.g., In re Int'l Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) (APA claim of unreasonable delay moot after agency had performed the very action that plaintiffs alleged the agency had delayed unreasonably by failing to perform).

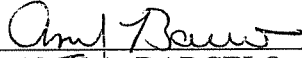
The Government requests a 60-day extension, until January 9, 2012, to oppose plaintiffs' motion for summary judgment and file a cross-motion because it anticipates a significant administrative action that should moot plaintiffs' only remaining claim in this action—the NOOH Claim. This is the Government's first request for an extension, and plaintiffs do not consent to the Government's request, because it is their position that without more information from the Government they do not have any basis to consent to the request.

The Government recognizes that the current briefing schedule was the result of negotiations between the parties, and, at the time of those negotiations, the Government had hoped to be able to take action with respect the NOOH Claim by tomorrow's filing deadline. Although the Government now needs more time than it previously anticipated, the Government has used the time negotiated by the parties to work towards a resolution of the NOOH Claim, and now anticipates being able to implement action that should moot that claim within 60 days. One important reason that the Government has not yet taken action with respect to the NOOH Claim is that it must harmonize such action with policies articulated in the citizen petition responses. Now that those responses have been issued, the Government may move forward with further action with respect to the NOOH Claim. Thus, despite plaintiffs' objection, we respectfully request that the extension be granted because doing so will promote the efficient and timely resolution of this matter by litigating, if at all, only after anticipated agency actions have occurred. If the extension is not granted, the parties will waste resources briefing issues presented against a procedural backdrop that is likely to significantly change either before or shortly after the earliest possible ruling by the Court. A proposed scheduling order, setting forth a revised briefing schedule if the Court grants the Government's request, is attached.

Thank you for your consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney

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cc: Mitchell S. Bernard, Esq. *counsel for plaintiffs* (by electronic mail)
Jen Sorenson, Esq. *counsel for plaintiffs* (by electronic mail)

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE)
 COUNCIL, INC.; CENTER FOR SCIENCE)
 IN THE PUBLIC INTEREST; FOOD)
 ANIMAL CONCERNS TRUST; PUBLIC)
 CITIZEN, INC.; and UNION OF)
 CONCERNED SCIENTISTS, INC.,)

Plaintiffs,)

v.)

11 CIV 3562 (THK)
ECF Case

UNITED STATES FOOD AND DRUG)
 ADMINISTRATION; MARGARET)
 HAMBURG, in her official capacity as)
 Commissioner, United States Food and Drug)
 Administration; CENTER FOR)
 VETERINARY MEDICINE; BERNADETTE)
 DUNHAM, in her official capacity as)
 Director, Center for Veterinary Medicine;)
 UNITED STATES DEPARTMENT OF)
 HEALTH AND HUMAN SERVICES; and)
 KATHLEEN SEBELIUS, in her official)
 capacity as Secretary, United States)
 Department of Health and Human Services)

Defendants.)

The briefing schedule for the parties' cross-motions for summary judgment shall be revised as follows:

1. Defendants' cross-motion for summary judgment ("defendants' summary judgment motion") and opposition to the motion for summary judgment filed by plaintiffs on October 6, 2011 ("plaintiffs' summary judgment motion"), will be timely if filed on or before January 9, 2012.
2. Plaintiffs' reply in support of plaintiffs' motion for summary judgment and opposition to defendants' motion for summary judgment will be timely if filed on or before February 2, 2012.

3. Defendants' reply in support of defendants' summary judgment motion will be timely if filed on or before February 16, 2012.

Dated: New York, NY
November __, 2011

SO ORDERED:

THE HONORABLE THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE