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,	)	11 CIV 3562 (JCF) ECF Case
v.	)	
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.	)	

PLAINTIFFS' OPPOSITION TO THE GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

On March 22, 2012, this Court granted plaintiffs' motion for summary judgment and ordered the U.S. Food and Drug Administration (FDA) to conduct administrative proceedings to withdraw its approval for certain nontherapeutic uses of penicillin and tetracyclines in animal feed. Mem. Op. & Order (1st Order) 54, Mar. 22, 2012 (Dkt. 70). The Court held that the agency's 1977 findings that these drug uses had not been shown to be safe for human health—because they promote the development of antibiotic-resistant bacteria that can be transferred from animals to humans—triggered mandatory withdrawal proceedings under a provision of the Federal Food, Drug, and Cosmetic Act (Food and Drug Act), 21 U.S.C. § 360b(e)(1)(B).

FDA now seeks a stay of the order pending appeal, but it has failed to justify the imposition of that extraordinary remedy. The agency offers no strong argument that this Court erred in ordering the agency to comply with its statutory duty to withdraw approval of drugs that have not been shown to be safe. FDA contends that it will suffer irreparable harm if it is forced to devote resources to withdrawal proceedings, rather than to its preferred strategy for addressing the problem—encouraging drug manufacturers *voluntarily* to discontinue the marketing of medically important antibiotics for livestock production purposes. But the expenditure of agency resources to comply with a court order is not the sort of harm that courts recognize as irreparable. Moreover, FDA's asserted harm is speculative, as there is no evidence that withdrawal proceedings would detract from, rather than complement, FDA's voluntary program, and there is no evidence that the voluntary program will be effective. Finally, a stay would injure plaintiffs' members and disserve the public interest, by prolonging FDA's inaction on this critical issue and allowing serious human health risks to continue unabated.

BACKGROUND

Statutory and Regulatory Framework

The Secretary of the U.S. Department of Health and Human Services (HHS), "through the Commissioner" of Food and Drugs, 21 U.S.C. § 393(d)(2), regulates antibiotics in animal feed as "new animal drugs" under section 512 of the Food and Drug Act, 21 U.S.C. § 360b. The statute directs FDA to conduct proceedings to withdraw its existing approval of a "new animal drug application" if the agency finds that the drug is not shown to be safe:

> The Secretary *shall*, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an application . . . if the Secretary finds . . . that new evidence not contained in such application . . . evaluated together with the evidence available to the Secretary when the application was approved, *shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved* . . . .

21 U.S.C. § 360b(e)(1)(B) (emphasis added). FDA considers an animal drug "safe" for human health if it concludes that "there is reasonable certainty of no harm to human health from the proposed use of the drug in food-producing animals." FDA, Guidance for Industry No. 152, at 2 (2003), Ex. M to Decl. of Jennifer A. Sorenson (1st Sorenson Decl.), Oct. 6, 2011 (Dkt. 33-13).

Factual Background

Antibiotics "have saved countless lives." 1st Order 3. But the "improper use and overuse of antibiotics has led to a phenomenon known as antibiotic resistance." *Id.* "People who contract antibiotic-resistant bacterial infections are more likely to have longer hospital stays, may be treated with less effective and more toxic drugs, and may be more likely to die as a result of the infection." *Id.* at 4. FDA "considers antibiotic resistance 'a mounting public health problem of global significance.'" *Id.* (quoting 1st Am. Compl. ¶ 38; Answer ¶ 38).[1]

[1] As this Court has noted, "the parties do not dispute the essential facts," only the "legal conclusion resulting from those facts." 1st Order 20.

Since the 1950s, FDA has "approved the use of antibiotics to stimulate growth and improve feed efficiency in food-producing animals, such as cattle, swine, and chickens." *Id.* Research has since "shown that the use of antibiotics in livestock leads to the development of antibiotic-resistant bacteria that can be—and [have] been—transferred from animals to humans through direct contact, environmental exposure, and the consumption and handling of contaminated meat and poultry products." *Id.* at 5.

Starting in the "mid-1960s, the FDA became concerned that the long-term use of antibiotics, including penicillin and tetracyclines, in food-producing animals might pose threats to human and animal health." *Id.* at 6. After convening a task force to study the problem, in 1973 FDA issued a regulation "providing that the agency would propose to withdraw approval of all subtherapeutic uses of antibiotics in animal feed unless drug sponsors and other interested parties submitted data within the next two years 'which resolve[d] conclusively the issues concerning [the drugs'] safety to man and animals.'" *Id.* at 7-8 (quoting 21 C.F.R. § 558.15). FDA defined "subtherapeutic" uses to include "increased rate of [weight] gain, disease prevention[,] etc." 21 C.F.R. § 558.15(a).[2]

In 1977, after FDA had evaluated the information submitted by drug manufacturers, the Director of FDA's Bureau of Veterinary Medicine (BVM) issued "notices of an opportunity for hearing . . . on proposals to withdraw approval of all subtherapeutic uses of penicillin in animal feed . . . and, with limited exceptions, all subtherapeutic uses of oxytetracycline and chlortetracycline in animal feed." 1st Order 10. The Director found that these drug uses were

[2] Today, such drug uses may also be referred to as "nontherapeutic." *See, e.g.*, FDA, Draft Guidance No. 209, at 4 (2010), 1st Sorenson Decl. Ex. O (Dkt. 33-15) (noting that "the use of medically important antimicrobial drugs in food-producing animals for production or growth-enhancing purposes" is often referred to as "nontherapeutic" or "subtherapeutic" use).

"'not shown to be safe'" for human health. *Id.* at 11 (quoting Penicillin-Containing Premixes, 42 Fed. Reg. 43,772, 43,792 (Aug. 30, 1977), 1st Sorenson Decl. Ex. A (Dkt. 33-1)); *see id.* at 12 (quoting Tetracycline (Chlortetracycline and Oxytetracycline)-Containing Premixes, 42 Fed. Reg. 56,264, 56,288 (Oct. 21, 1977), 1st Sorenson Decl. Ex. B (Dkt. 33-2)). He made these findings pursuant to his delegated authority to "issue notices of an opportunity for a hearing on proposals . . . to withdraw approval of new animal drug applications." 21 C.F.R. § 5.84 (1977), Ex. M to Decl. of Amy A. Barcelo (1st Barcelo Decl.), Jan. 9, 2012 (Dkt. 44-13); *see* FDA, Staff Manual Guides § 1410.503 (2011), 1st Barcelo Decl. Ex. A (Dkt. 44-1).

Following the publication of the notices, "Congressional committees issued three reports that contained statements that the FDA interpreted as requests to postpone the withdrawal hearings pending further research." 1st Order 13. Although the agency completed the requested research, "the FDA never held hearings on the proposed withdrawals." *Id.* at 13-15. For more than thirty years, the agency "took little action on the still-pending 1977 [notices]." *Id.* at 15. In 1983, the Commissioner of Food and Drugs "denied requests from several drug sponsors to rescind the 1977 [notices]." *Id.* (citing Penicillin and Tetracycline in Animal Feeds, 48 Fed. Reg. 4,554, 4,556 (Feb. 1, 1983), 1st Sorenson Decl. Ex. DD (Dkt. 33-30)). The Commissioner explained that the notices "represent[ed] the Director's formal position that use of the drugs is not shown to be safe," and that the Commissioner had reviewed the Director's decision not to withdraw the notices and "concur[red]" with it. 48 Fed. Reg. at 4,555-56.

Since the 1970s, "the scientific evidence of the risks to human health from the widespread use of antibiotics in livestock has grown, and there is no evidence that the FDA has changed its position that such uses are not shown to be safe." 1st Order 3. HHS, FDA's parent agency, has concluded that "there is a preponderance of evidence that the use of antimicrobials in

food-producing animals has adverse human consequences." U.S. Gen. Accounting Office (GAO), *Antibiotic Resistance: Federal Agencies Need to Better Focus Efforts to Address Risk to Humans from Antibiotic Use in Animals* 89 (2004), 1st Sorenson Decl. Ex. Y (Dkt. 33-25). FDA's sister division within HHS, the Centers for Disease Control and Prevention (CDC), has cited the "compelling body of evidence" demonstrating the "link between antibiotic use in food animals and antibiotic resistance in humans." Letter from Thomas R. Frieden, Director, CDC, to the Honorable Frank Pallone, Jr., Chairman, Subcommittee on Health, House Committee on Energy and Commerce 1 (July 13, 2010) (Frieden Letter), 1st Sorenson Decl. Ex. W (Dkt. 33-23). Meanwhile, the use of antibiotics in livestock production has proliferated: between 1970 and 2009, the volume of antibiotics used annually in U.S. livestock quadrupled, from 7.3 million pounds to 28.8 million pounds. *See* Antibiotic and Sulfonamide Drugs in the Feed of Animals, 38 Fed. Reg. 9811, 9812 (Apr. 20, 1973), 1st Sorenson Decl. Ex. D (Dkt. 33-4); FDA, *2009 Summary Report on Antimicrobials Sold or Distributed for Use in Food-Producing Animals*, at tbl.1, 1st Sorenson Decl. Ex. P (Dkt. 33-16).

Rather than act on its 1977 findings and withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed, FDA has published a series of nonbinding guidance documents. In 2010, FDA issued Draft Guidance No. 209, which concluded that "using medically important antimicrobial drugs for [livestock] production purposes is not in the interest of protecting and promoting the public health." FDA, Draft Guidance No. 209, at 13.[3] In April 2012, FDA finalized Guidance No. 209 and issued Draft Guidance No. 213, which "encourages"

[3] "Medically important antimicrobial drugs" are "antimicrobial drugs that are important for therapeutic use in humans." FDA, Draft Guidance No. 209, at 3 n.1. FDA considers penicillin and tetracyclines to be medically important. Gov't Resp. to Pls.' Statement of Facts ¶ 22, Jan. 9, 2012 (Dkt. 45).

drug manufacturers "voluntarily" to "withdraw approved production uses of their medically important antimicrobial new animal drugs." FDA, Draft Guidance No. 213, at 5, 7 (2012), Ex. C to Supplemental Decl. of William T. Flynn (2d Flynn Decl.), June 1, 2012 (Dkt. 94-3). Like all of FDA's guidance documents, Guidance No. 209 and Draft Guidance No. 213 "do not establish legally enforceable responsibilities." *Id.* at 2.

Procedural Background

Plaintiffs filed this action in May 2011, seeking to compel FDA to complete withdrawal proceedings for penicillin and tetracyclines in animal feed, on the basis of the agency's own findings that these drug uses had not been shown to be safe. In their first claim for relief, plaintiffs alleged that FDA had "unlawfully withheld or unreasonably delayed" agency action by failing "to comply with its statutory duty, after notice and opportunity for hearing, to withdraw approval of subtherapeutic uses of penicillin and tetracyclines in animal feed," in violation of the Administrative Procedure Act, 5 U.S.C. § 706(1), and the Food and Drug Act, 21 U.S.C. § 360b(e)(1). Am. Compl. ¶¶ 97-98, July 7, 2011 (Dkt. 11).

"On December 16, 2011, nearly [thirty]-five years after their initial publication and during the pendency of this action, the FDA rescinded the 1977 [notices of opportunity for a hearing]." 1st Order 17. The agency "did not rescind its findings" that the drug uses at issue were not shown to be safe. *Id.* at 50. On the contrary, it explained that the withdrawal of the notices "'should not be interpreted as a sign that FDA no longer has safety concerns or that FDA will not consider re-proposing withdrawal proceedings in the future, if necessary.'" *Id.* at 17-18 (quoting Withdrawal of Notices of Opportunity for a Hearing, 76 Fed. Reg. 79,697, 79,698 (Dec. 22, 2011), 1st Barcelo Decl. Ex. L (Dkt. 44-12)). Nonetheless, FDA argued that plaintiffs' first claim was now moot. *See* Reply Mem. in Supp. of the Government's Mot. for Summ. J. (Gov't Summ. J. Reply Br.) 9-10, Feb. 10, 2012 (Dkt. 55). Additionally, the agency contended that even if it

had not withdrawn the notices, its 1977 findings did not obligate the agency to pursue withdrawal proceedings because it made the findings before, not after, a hearing. Mem. in Supp. of the Government's Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. (Gov't Summ. J. Br.) 12, Jan. 9, 2012 (Dkt. 41).

This Court disagreed. On March 22, the Court granted plaintiffs' motion for summary judgment on their first claim. The Court held that the "plain meaning" of the Food and Drug Act "requires the Secretary to issue notice and an opportunity for a hearing whenever he finds that a new animal drug is not shown to be safe," and "[i]f the drug sponsor does not meet his burden of demonstrating that the drug is safe at the hearing, the Secretary must issue an order withdrawing approval of the drug." 1st Order 33-34. Ruling that the agency "made the findings necessary to trigger mandatory withdrawal proceedings," *id.* at 46-47, the Court ordered FDA to conduct withdrawal proceedings for penicillin and tetracyclines in animal feed. *See id.* at 54.

The Court requested additional briefs from the parties on a schedule for FDA to comply with the March 22 Order. *Id.* at 55 n.19. Those briefs have been filed and are pending before this Court. (Dkts. 85, 89, 96).

In a second claim for relief, plaintiffs alleged that FDA had delayed unreasonably in issuing a final response to two citizen petitions. Am. Compl. ¶ 100. The petitions, filed in 1999 and 2005, requested that FDA withdraw approvals for *all* nontherapeutic uses of medically important antibiotics in livestock production. The 2005 petition specifically addressed penicillin, tetracyclines, and five additional drug classes. *Id.* ¶ 85. FDA denied both petitions in November 2011. In January 2012, this Court granted plaintiffs' motion to file a supplemental complaint challenging FDA's denial of the citizen petitions. *See* Order, Jan. 31, 2012 (Dkt. 49); 1st Supplemental Compl., Feb. 1, 2012 (Dkt. 53) (setting forth plaintiffs' third claim for relief). On

June 1, this Court issued a second memorandum opinion and order, granting plaintiffs' motion for summary judgment on their third claim for relief. Mem. Op. & Order (2d Order), June 1, 2012 (Dkt. 95). FDA's present motion for a stay concerns only the Court's March 22 Order.

ARGUMENT

I. Standard of Review

Courts consider four factors in deciding whether a stay is warranted: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (internal quotation marks omitted). It is the "movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The "burden of establishing a favorable balance of these factors is a heavy one," and "more commonly stay requests will be denied for not meeting the standard." *Barcia v. Sitkin*, No. 79 Civ. 5831 (RLC), 2004 WL 691390, at *1 (S.D.N.Y. Mar. 31, 2004) (citing 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2904 (2d ed.)).

II. FDA Has Failed to Justify the Extraordinary Remedy of a Stay Pending Appeal

A. FDA Has Not Demonstrated a Likelihood of Success on Appeal

To satisfy the first factor, the applicant must show more than a "possibility" of success on appeal. *Nken*, 556 U.S. at 434-35. FDA has not done so. The agency "has offered no new arguments in its motion, but rather rehashes arguments that have been rejected." *Shays v. Fed. Election Comm'n*, 340 F. Supp. 2d 39, 46 (D.D.C. 2004) (internal quotation marks omitted). FDA contends that (1) the Food and Drug Act does not require the agency to act on a finding that

an approved animal drug is "not shown to be safe" for human health; (2) the agency mooted plaintiffs' claim by withdrawing its 1977 notices of opportunity for a hearing; and (3) the decision whether to commence withdrawal proceedings is an unreviewable exercise of the agency's enforcement discretion. Mem. in Supp. of the Government's Mot. for a Stay Pending Appeal (Gov't Br.) 7-14, June 1, 2012 (Dkt. 93). In two thorough, well-reasoned opinions, this Court has rejected all three of FDA's arguments. The agency has failed to make the required "strong showing" that it is "likely" to succeed on appeal. *Nken*, 556 U.S. at 434 (internal quotation marks omitted).[4]

1. This Court Correctly Interpreted the Food and Drug Act

The Food and Drug Act directs that "[t]he Secretary shall, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an [animal drug] . . . if the Secretary finds . . . that new evidence . . . shows that such drug is not shown to be safe . . . ." 21 U.S.C. § 360b(e)(1)(B). This Court held that the "plain meaning" of the provision "requires the Secretary to issue notice and an opportunity for a hearing whenever he finds that a new animal drug is not shown to be safe. If the drug sponsor does not meet his burden of demonstrating that the drug is safe at the hearing, the Secretary must issue an order withdrawing approval of the drug." 1st Order 33-34.

The Court relied on established principles of statutory interpretation to reach a "common sense reading of the statute." *Id.* at 30. The Court analyzed "the text and grammar of § 360b(e)(1), as well as the structure of § 360b as a whole and the overriding purpose of the [Food and Drug Act]." *Id.* at 33; *see Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010)

[4] FDA argues that it "need only demonstrate a substantial case on the merits, rather than a strong likelihood of success," if the "other factors are satisfied." Gov't Br. 7 (internal quotation marks omitted). But, as explained below, FDA has satisfied none of the stay factors.

(noting that statutory construction must take into account the "structure and grammar" of a provision); *Cruz-Miguel v. Holder*, 650 F.3d 189, 193 (2d Cir. 2011) (approving the use of traditional canons of statutory interpretation to discern congressional intent). The Court noted that its interpretation was consistent with how other courts had interpreted 21 U.S.C. § 355(e), the parallel provision of the Food and Drug Act concerning the withdrawal of approval of human drugs. *See* 1st Order 34 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000); *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1281 (D.C. Cir. 2004); *Dobbs v. Wyeth Pharms.*, 797 F. Supp. 2d 1264, 1270-71 (W.D. Okla. 2011)).

FDA offers no strong argument in support of its contrary interpretation of the provision—i.e., that only a finding made *after* a hearing triggers the agency's duty to withdraw approval of an animal drug that is "not shown to be safe." Gov't Br. 8. The agency contends that the placement of the "notice and opportunity for hearing" phrase "near the beginning of the sentence" indicates that Congress intended for "any of the events described following that phrase," including any findings by FDA, to happen afterward. *Id.* But the agency points to no rule of grammar requiring the order of phrases in a sentence to correspond to the temporal order of the events they describe. In fact, English often does not work that way. For example, in the sentence "Students should ask for permission to leave the classroom if they begin feeling ill," the final phrase ("if they begin feeling ill") describes the event that happens first, the first phrase ("Students should ask for permission") describes the next event, and the middle phrase ("to leave the classroom") describes the last event. The animal drug withdrawal provision interpreted by this Court follows a similar pattern.

The additional arguments offered by FDA in a footnote are similarly weak. *See* Gov't Br. 8-9 n.4. The agency relies first on the "exigency clause" of section 360b(e)(1), which allows the

Secretary to suspend approval of an animal drug immediately, and afterward "afford the applicant the opportunity for an expedited hearing under this subsection," if the Secretary finds that the drug presents an "imminent hazard." 21 U.S.C. § 360b(e)(1). FDA concedes that this clause "clearly contemplates a pre-hearing 'finding'" and argues that Congress's use of "different language" in section 360b(e)(1)(B), the withdrawal provision at issue, supports a different interpretation of the timing of any findings made under that provision. Gov't Br. 8-9 n.4. But FDA does not explain how the different language of the exigency provision—allowing for suspension of approval prior to notice and opportunity for a hearing—has any effect on the timing of the findings *triggering* withdrawal proceedings. As this Court found, the exigency clause supports the Court's interpretation of section 360b(e)(1)(B) because it indicates that "findings pursuant to § 360b(e)(1) are made prior to a hearing." 1st Order 32-33. The reference in the exigency clause to a hearing "under this subsection" confirms that withdrawal proceedings under the exigency clause follow the same general pattern as the other proceedings contemplated by subsection 360b(e)(1), except that they also allow for pre-hearing suspension of approval.

FDA makes another anemic argument when it criticizes this Court's discussion of the agency's mission under the Food and Drug Act. *See* Gov't Br. 9 n.4. The agency argues that a "'broad statutory mandate' cannot provide a basis to compel specific agency action." *Id.* (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004)). But in ordering FDA to commence withdrawal proceedings, the Court did not rely simply on the agency's mission. Rather, the Court properly considered the "purpose" of the Food and Drug Act as an aid in interpreting the animal drug withdrawal provision at section 360b(e)(1)(B), which mandates *specific* agency action. *See* 1st Order 33.

Finally, FDA does not have a strong argument that the Court should have deferred to the interpretation of the animal drug withdrawal provision that the agency has advanced in this litigation. *See* Gov't Br. 9-11. The Court did not do so for two reasons: First, it found that the meaning of the provision was "plain." 1st Order 33-34. Second, it found that even if it were to defer to FDA's interpretation of the provision, it would reach the same result, because FDA's own regulation confirms the Court's interpretation. *Id.* at 35-36. The regulation states: "The Commissioner shall notify in writing the person holding an [animal drug] application approved pursuant to [21 U.S.C. § 360b(c)] and afford an opportunity for a hearing on a proposal to withdraw approval of such application if he finds . . . [t]hat . . . [n]ew evidence . . . shows that such drug is not shown to be safe . . . ." 21 C.F.R. § 514.115(b)(3)(ii). FDA now concedes that the regulation "contemplates" a "'finding' that triggers the withdrawal process," but it contends that the finding described in the regulation is different from the finding described in the statute. Gov't Br. 10. The Court rejected this argument, pointing out that the regulation "describes the requisite findings in exactly the same language as the statute." 1st Order 37. The Court properly declined to defer to FDA's interpretation of a regulation that does no more than "'parrot[]'" the statutory provision it implements. *Id.* at 38-39 (quoting *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006)).

2. Plaintiffs' Claim Is Not Moot

FDA's contention that the agency mooted plaintiffs' claim by withdrawing the 1977 notices of opportunity for a hearing during the pendency of this litigation is equally unpersuasive. As this Court held, "the trigger for FDA to initiate mandatory withdrawal proceedings is *not* the issuance of a [notice of opportunity for a hearing] but a finding that a drug has not been shown to be safe." 1st Order 49. The "record makes clear that the FDA did not rescind its findings when it rescinded the 1977 [notices]." *Id.* at 50. On the contrary, "in the

notice rescinding the 1977 [notices], the FDA emphasized its continuing concerns about the subtherapeutic use of penicillin and tetracyclines." *Id.* This Court found that "FDA has not issued a single statement since the issuance of the 1977 [notices] that undermines the original findings that the drugs have not been shown to be safe." *Id.* at 51-52. That remains true today. *See, e.g.*, Mem. in Supp. of the Government's Mot. for Summ. J. on Pls.' 1st Supplemental Compl. (Gov't Summ. J. Br. on Supplemental Compl.) 2, Mar. 21, 2012 (Dkt. 64) (conceding that "the phenomenon of antimicrobial resistance exists," that "antimicrobial resistance poses a threat to public health," and that "the overuse of antimicrobial drugs in food-producing animals can contribute to the development of antimicrobial resistance"). FDA asks this Court to defer to its "expert scientific judgment," Gov't Br. 11, but its judgment is that penicillin and tetracyclines in animal feed have not been shown to be safe for human health.

In pressing its argument that plaintiffs' claim is moot, FDA now relies on a rationale it offered when it withdrew the 1977 notices of opportunity for a hearing: if the agency were to pursue withdrawal proceedings, it would "update" the notices "to reflect current data, information, and policies." Withdrawal of Notices of Opportunity for a Hearing, 76 Fed. Reg. at 79,701. But FDA's acknowledgment that "the body of scientific information relevant to the use of penicillins and tetracyclines in animal feeds has grown since 1977," *id.* at 79,700, does not amount to a renunciation of the agency's findings that these drug uses have not been shown to be safe. This Court held that "[a]ny claim that the 1977 [notices] are out-of-date does not relieve the FDA of its obligation to proceed with the withdrawal process," because "the agency cannot, through its own prolonged inaction, create obstacles to its statutorily mandated obligation." 1st Order 51 n.16. Moreover, "while there have been additional scientific studies since the 1977 [notices] were issued, they all appear to support the FDA's original finding that the use of these

drugs has not been shown to be safe." *Id.* FDA has no strong argument that plaintiffs' claim is moot.

3. FDA's Failure to Complete Withdrawal Proceedings Is Reviewable

FDA now contends that its "decision not to proceed immediately with adversarial Withdrawal Proceedings should be unreviewable as a 'decision[] not to enforce' under *Heckler v. Chaney*, 470 U.S. 821, 828 (1985)." Gov't Br. 12. But in its briefing on this claim, FDA never even argued that animal drug withdrawal proceedings were enforcement actions. Only on reply at oral argument, and in its briefing on plaintiffs' third claim for relief, did the agency begin characterizing the decision whether to pursue withdrawal proceedings as a "classic example of FDA's enforcement discretion." Hr'g Tr. 42, Feb. 23, 2012, Ex. B to 3d Decl. of Jennifer A. Sorenson, May 25, 2012 (Dkt. 91-2); *see* Gov't Summ. J. Br. on Supplemental Compl. 1-2, 5, 10, 13-16, 27. The Court rejected this late-breaking argument in its June 1 Order granting plaintiffs' motion for summary judgment on their third claim. 2d Order 34-35.

This Court concluded that withdrawal proceedings are not "traditional enforcement actions" but rather FDA's "primary means of formally regulating approved drugs." *Id.* at 31. Unlike enforcement actions, "withdrawal proceedings are undertaken as a result of a finding by the FDA regarding the drug's safety or efficacy, and are not premised on the violation of any law or regulation." *Id.* at 31-32. Indeed, plaintiffs have not alleged that any regulated party is violating existing law, but rather that *FDA* has failed to comply with mandatory duties imposed on *it* by the Food and Drug Act.

This distinction is grounded in the statute, as the Court held. The organization of the Food and Drug Act separates the substantive provisions of the Act from its enforcement provisions. *Id.* at 27-28. Withdrawal proceedings are authorized by the "substantive regulatory provisions" of Subchapter V of the Act. *Id.* That subchapter is entitled "Drugs and Devices" and

"governs the regulation of human and veterinary drugs." *Id.* at 28. In contrast, the cases relied on by FDA—both in its briefing on plaintiffs' third claim and in its motion for a stay, *see* Gov't Br. 12—involved agency decisions not to take enforcement actions authorized under Subchapter III of the Act, entitled "Prohibited Acts and Penalties." That subchapter "governs enforcement proceedings." 2d Order 28. In holding that withdrawal proceedings are not enforcement actions, the Court "directly cited many of the cases upon which [FDA] now relies." *Shays*, 340 F. Supp. 2d at 46; *see* 2d Order 28-30 (distinguishing *Chaney*, 470 U.S. 821; *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249 (D.C. Cir. 2005); *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985)).

Moreover, the Court held that even if it "were to find that the withdrawal of approval of a new animal drug is an enforcement action, the [Food and Drug Act] provides sufficient 'guidelines for the agency to follow in exercising its enforcement powers' to rebut the presumption of unreviewability." 2d Order 35 (quoting *Chaney*, 470 U.S. at 832-33). This is particularly true when the agency has made a finding that an animal drug has not been "shown to be safe," 21 U.S.C. § 360b(e)(1)(B), as that finding triggers a nondiscretionary duty to commence withdrawal proceedings. *See* 1st Order 33-34.

The logic of FDA's *Chaney* argument would render unreviewable the agency's failure to withdraw approval of human and animal drugs that are no longer shown to be safe, as the Food and Drug Act requires it to do. *See* 21 U.S.C. § 360b(e)(1) (governing withdrawal of approval of animal drugs); *id.* § 355(e) (governing withdrawal of approval of human drugs). This Court has rejected that far-reaching contention. FDA has offered no reason to believe that the Court's ruling should be reversed.

B. FDA Has Not Demonstrated Irreparable Injury

To satisfy the second factor of the standard for granting a stay pending appeal, FDA must show more than "some possibility of irreparable injury" absent a stay. *Nken*, 556 U.S. at 434-35 (internal quotation marks omitted). An irreparable injury is "an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." *Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011) (internal quotation marks omitted). FDA fails to satisfy this factor for two reasons: first, the injury it alleges—expenditure of agency resources—is not the type of injury that courts have recognized as irreparable, and, second, the asserted injury is speculative.

FDA contends that complying with this Court's March 22 Order would require the agency to devote resources to withdrawal proceedings, rather than to other programs. In particular, the agency asserts that "reinitiating the Withdrawal Proceedings will compromise FDA's ability to finalize and implement" its strategy of asking drug sponsors voluntarily to discontinue the marketing of medically important antibiotics for livestock production purposes. Gov't Br. 16. The agency also avers that some employees involved in the withdrawal proceedings "would be diverted from working on" the agency's antibiotic-resistance monitoring activities. *Id.* at 18.

But an agency can almost always argue that complying with a court order will require it to expend resources that it would otherwise spend differently. "[P]otentially wasted and diverted staff resources" do not "constitute an 'irreparable harm.'" *Shays*, 340 F. Supp. 2d at 48 ("The key word in this consideration is *irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough.*" (internal quotation marks omitted; emphasis in original)); *cf. FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute

irreparable injury." (internal quotation marks omitted)). This is especially true here, where the agency's principal concern is that complying with its statutory mandate will jeopardize its ability to "adopt a voluntary program that is outside the statutory regulatory scheme." 2d Order 52-53; *see Shays*, 340 F. Supp. 2d at 49 ("The mere fact that a commission spends its initial resources acting as a super-legislature disregarding congressional intent does not insulate it from a later court order directing the reconsideration of its faulty regulations."). This Court has already held that the agency's pursuit of "'other ongoing regulatory strategies' . . . does not relieve it of its statutory obligation to complete withdrawal proceedings." 1st Order 52-53.

The two cases cited by FDA are inapposite. Neither addresses the expenditure or diversion of agency resources. Rather, in both cases, the court stayed a preliminary injunction prohibiting an agency from taking a particular action because it found that the inability to engage in *that action* would harm the agency. In *Ark. Peace Ctr. v. Ark. Dept. of Pollution Control*, 992 F.2d 145 (8th Cir. 1993), the court stayed a preliminary injunction barring the incineration of hazardous wastes because it found that incinerating the wastes would promote defendants' "interest in protecting the environment by cleaning up hazardous waste sites." *Id.* at 147. In *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982), the court stayed a preliminary injunction preventing the Department of Interior from constructing a pumping station in North Dakota, because otherwise the Department "could lose its opportunity to begin the project this season." *Id.* at 544. Neither case provides any support for FDA's argument that the expenditure of resources on statutorily mandated withdrawal proceedings, rather than an extrastatutory voluntary program, would irreparably harm the agency.

Moreover, the harm alleged by FDA is speculative, for two reasons: First, this Court has not yet set a deadline for the agency to conduct withdrawal proceedings. Second, there is no

evidence that withdrawal proceedings will detract from, rather than complement, FDA's other efforts to address antibiotic resistance. *See Dexter 345 Inc.*, 663 F.3d at 63 (stating that irreparable injury must be "actual and imminent," "not remote or speculative").

At the Court's request, *see* 1st Order 55 n.19, the parties have submitted briefs on the issue of a schedule for FDA to comply with the Court's Order. Plaintiffs' estimate of the amount of time that withdrawal proceedings should consume is significantly lower than FDA's estimate. *Compare* Br. in Supp. of the Government's Position on the Issue of Timing 6, 10-15, May 15, 2012 (Dkt. 85) (asserting that withdrawal proceedings will take "five to five and a half years"), *with* Pls.' Opp. to the Government's Br. Concerning a Schedule for Compliance with the Court's Order (Pls.' Remedy Br.) 14-25, May 25, 2012 (Dkt. 89) (proposing a schedule under which FDA would complete proceedings in "just over two years"). Until this Court orders a compliance schedule, the speed with which the agency will have to fulfill its obligations will not be known. Thus, FDA's predictions about how compliance will affect the agency and its programs are premature. Additionally, as plaintiffs have demonstrated, the agency's staffing projections are vague, as they fail to specify how much time agency employees will devote to the withdrawal proceedings. *See* Pls.' Remedy Br. 14, 16, 18. The supplemental declaration of Dr. William T. Flynn, an FDA official, is no more precise than his first one. *See* 2d Flynn Decl. ¶¶ 8-12, June 1, 2012 (Dkt. 94) (asserting, e.g., that FDA scientists "would need to commit significant amounts of time to the Withdrawal Proceedings"). This court has declined to find irreparable injury on the basis of a declaration "which merely asserts that burdens will be imposed [on an agency] without further documentation to suggest that a serious impact analysis was conducted." *Barcia*, 2004 WL 691390, at *2 n.8.

FDA's alleged harm is also speculative because there is no reason to believe that withdrawal proceedings will detract from the agency's voluntary program to address antibiotic use in livestock production. On the contrary, complying with the Court's order may allow the agency to reduce livestock antibiotic use more quickly and effectively than if it relied solely on its voluntary program. FDA says its plan is to "focus first on eliminating the injudicious use of such drugs voluntarily, with the potential for more compulsory regulatory action later, if needed." Gov't Br. 16-17. But the agency's repeated characterization of withdrawal proceedings as prohibitively time-consuming and expensive has robbed its threat of "compulsory regulatory action" of any force. As this Court has noted, "[o]ne can only wonder what conceding the absence of an effective regulatory mechanism signals to the industry which the FDA is obligated to regulate." 2d Order 45 n.23. By initiating binding withdrawal proceedings for penicillin and tetracyclines, FDA may encourage drug manufacturers to comply more readily with the agency's nonbinding recommendations regarding other antibiotics used in livestock production.

Moreover, as this Court has found, there is no evidence that the voluntary program will be effective. *See* 2d Order 49-51. Nor is there evidence that withdrawal proceedings would be more time-consuming than the voluntary program: "if any credence is to be given to the Agency's position that the drug industry intends to comply with the voluntary program, then it is unclear why the industry would contest formal withdrawal notices or require time consuming hearings." *Id.* at 51. For these reasons too, FDA's contention that conducting withdrawal proceedings for penicillin and tetracyclines would "compromise" its ability to implement its voluntary program—and thus to achieve "its ultimate goal of withdrawing growth promotion

indications" for all medically important antibiotics—is speculative. Gov't Br. 16. Complying with the Court's order may instead enable the agency to meet this goal more effectively.[5]

FDA has failed to demonstrate that it will suffer any irreparable harm in the absence of a stay.

C. Further Delay Would Injure Plaintiffs and Disserve the Public Interest

Further delay would substantially injure plaintiffs' members and disserve the public interest. Public health authorities around the world have warned that the routine use of antibiotics in livestock production threatens human health. CDC has cited the "strong scientific evidence of a link between antibiotic use in food animals and antibiotic resistance in humans." Frieden Letter 1. That evidence led the World Health Organization and the Institute of Medicine of the National Academy of Sciences to recommend banning antibiotic use for growth promotion if the same antibiotics are used in human medicine. World Health Org. (WHO), World Health Day 2011, Policy Brief No. 4D, *Reduce Use of Antimicrobials in Food-Producing Animals* (2011), 1st Sorenson Decl. Ex. AA (Dkt. 33-27); Inst. of Med., *Microbial Threats to Health: Emergence, Detection, and Response* 209-11 (Mark S. Smolinski, Margaret A. Hamburg & Joshua Lederberg eds., 2003), 1st Sorenson Decl. Ex. Z (Dkt. 33-26). HHS has concluded that "there is a

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[5] FDA could also meet its goal of withdrawing growth promotion indications for all medically important antibiotics by pursuing withdrawal proceedings for these drug uses. This Court has now held that FDA, in response to plaintiffs' citizen petitions, "must evaluate the safety risks of the petitioned drugs and either make a finding that the drugs are not shown to be safe or provide a reasoned explanation as to why the Agency is refusing to make such a finding." 2d Order 53. A finding that the drugs were not shown to be safe would trigger mandatory withdrawal proceedings under 21 U.S.C. § 360b(e)(1). FDA has exaggerated the resources that would be required if the agency were to undertake such proceedings. The agency frequently refers to "161 individual approved applications covering growth promotion uses for Medically Important Antimicrobials," Gov't Br. 16, but as this Court has noted, "[i]t is not clear why the withdrawal proceedings must be on a drug-by-drug basis . . . . Indeed, the FDA appears to accept that all of the classes of antibiotics at issue pose a similar threat, as its proposed voluntary approach makes no distinction." 2d Order 46 n.24.

preponderance of evidence that the use of antimicrobials in food-producing animals has adverse human consequences." GAO, *Antibiotic Resistance* 89 (2004). And FDA itself has declared that using medically important antibiotics for livestock production purposes "is not in the interest of protecting and promoting the public health." FDA, Draft Guidance No. 209, at 13.

These health threats are real, and they affect plaintiffs' members. For example, plaintiffs' members face an increased risk of contracting a drug-resistant infection as a result of handling or eating meat or poultry products from animals that were given routine doses of penicillin and tetracyclines. Decl. of Jasanna Britton ¶¶ 6-7, Sept. 30, 2011 (Dkt. 22); Decl. of Amanda J. Fleming ¶¶ 7-8, Sept. 28, 2011 (Dkt. 23); Decl. of Anne Kapuscinski ¶¶ 8-9, Oct. 3, 2011 (Dkt. 27); Decl. of Ilana Slaff-Galatan ¶¶ 4-5, 8, Sept. 28, 2011 (Dkt. 32); *see also* Pls.' Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J. ¶¶ 26-28, Oct. 6, 2011 (Dkt. 21) (citing 2009 data on percentages of retail meat contaminated with antibiotic-resistant bacteria). People exposed to antibiotic-resistant bacteria may become ill themselves or may pass resistant bacteria on to others. Gov't Resp. to Pls.' Statement of Facts ¶ 4. The results can be longer illnesses, treatment with less effective and more toxic drugs, and even death. 1st Order 4.

FDA's voluntary program for addressing these health risks is inadequate. It is passive, unenforceable, and lacks a definite time line. The agency "intends to work with sponsors *who approach FDA* and are interested in working cooperatively with the Agency to phase out production uses of medically important antimicrobials." FDA, Final Response to Citizen Petition, New Dkt. No. FDA-1999-P-1286, at 4 (Nov. 7, 2011), Ex. A to Decl. of Mitchell S. Bernard, Feb. 21, 2012 (Dkt. 59-1) (emphasis added). But the agency has offered "no hard evidence that the drug sponsors have agreed or will agree[] to the proposed measures." 2d Order 49-50. It is unclear what will happen if drug sponsors do not agree. Draft Guidance No. 213 says

only that FDA will "evaluate the rate of adoption of the proposed changes" and "consider further action as warranted." FDA, Draft Guidance No. 213, at 7. *When* FDA will "consider further action" is also unclear. At present, FDA's specific recommendations for voluntary withdrawal exist only in draft form, *see* FDA, Draft Guidance No. 213, and "[i]t is unknown when, if ever, the final version of Draft Guidance # 213 will be published." 2d Order 22 n.14.

The only sure means of ending the routine use of penicillin and tetracyclines in animal feed is for FDA to commence and complete binding withdrawal proceedings, in compliance with this Court's March 22 Order. "For over thirty years, the Agency has been confronted with evidence of the human health risks associated with the widespread subtherapeutic use of antibiotics in food-producing animals, and, despite a statutory mandate to ensure the safety of animal drugs, the Agency has done shockingly little to address these risks." 2d Order 52. A stay would prolong FDA's inaction on this critical issue. Further delay would allow serious and irrefutable human health risks to continue unabated, injuring plaintiffs' members and disserving the public interest.

* * *

FDA has failed to justify the "extraordinary remedy" of a stay pending appeal. *Cuomo*, 772 F.2d at 978. The agency has not made a strong showing that it is likely to succeed on the merits. The injury FDA asserts is not irreparable, is speculative, and is outweighed by the injury to plaintiffs and the disservice to the public interest that would result from a stay postponing withdrawal proceedings for drugs that have not been shown to be safe. For the same reasons, FDA has failed to justify an interim stay pending disposition of the agency's motion for a stay in the Court of Appeals. This Court should not sanction further delay.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny FDA's motion for a stay of the Court's March 22 Order pending appeal, and that the Court deny FDA's alternative request for an interim stay pending disposition of the agency's motion for a stay in the U.S. Court of Appeals for the Second Circuit.

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Respectfully submitted,

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