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Velva L. Price
District Clerk
Travis County
D-1-GN-17-000878
Ruben Tamez

Cause No. D-1-GN-17-000878

WILD BOAR MEATS, L.L.C.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
TEXAS DEPARTMENT OF	§	
AGRICULTURE and SID MILLER, in	§	
his Official Capacity as Commissioner of	§	
the Texas Department of Agriculture ,	§	250TH
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF'S VERIFIED ORIGINAL PETITION FOR DECLARATORY JUDGMENT
AND APPLICATION FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

NOW COMES Wild Boar Meats, L.L.C. ("Wild Boar Meats") and files this verified original petition complaining of actions taken by the Texas Department of Agriculture ("TDA") and Sid Miller, in his Official Capacity as Commissioner of TDA (the "Commissioner"), and for cause of action shows as follows:

I. THIS LAWSUIT

1. On February 21, 2017, the Commissioner announced an "emergency" rule change to allow the use of a warfarin-based poison for use on feral hogs in Texas. See Exhibit 1 attached hereto and incorporated herein by reference for all purposes. In essence, the Commissioner proposes to flood Texas with rat poison in an ill-advised, counterproductive program. If not stopped, the program will damage Texas hunters, the Texas feral-hog meat industry, ranchers and other landowners, wildlife, and the environment. In fact, the program will damage, rather than assist, the effort to control feral hogs in Texas. Additionally, the rule is illegal on its face: no legal "emergency" existed to authorize a dark-of-night "emergency rule" that will favor a sole-provider manufacturer of a single warfarin-based product for use on feral

hogs, Kaput®. Scimetrix Ltd. Corp., a Colorado based company, is the sole manufacturer of the product.

2. TDA ignored its legal limitations as a state agency, pronounced an emergency where none existed and issued an emergency rule in violation of the Texas Administrative Procedure Act (“APA”). Accordingly, Wild Boar Meats asks for declaratory relief from the Court declaring that the TDA’s emergency rule is invalid and enjoining enforcement of the emergency rule.

II. DISCOVERY

3. Wild Boar Meats, L.L.C. intends to conduct discovery under Level 2 of Texas Rules of Civil Procedure 190.3.

III. PARTIES AND SERVICE OF PROCESS

4. Wild Boar Meats is a Texas company domiciled in Hubbard, Texas doing business in Hill County, Texas.

5. The Texas Department of Agriculture is the state agency charged with administration and classification of pesticides. Sid Miller is being sued solely in his official capacity as the Commissioner of TDA and the Attorney General’s office has agreed to accept service on behalf of the Commissioner.

IV. JURISDICTION AND VENUE

6. Wild Boar Meats brings this suit for declaratory relief under the authority of TEX. GOV’T. CODE § 2001.038 and the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE § 37.001 et seq. Wild Boar Meats brings its application for injunctive relief under the authority of TEX. GOV’T. CODE § 2001.038 and TEX. CIV. PRAC. & REM. CODE § 65.001, *et seq.*

V. FACTS

A. Why Warfarin Will Not Work in Texas—The Key Logical Flaw

7. Overwhelmingly Texas lands are owned by private landowners—that is true for approximately 95.8% of Texas land (based on a Google search). Thus, if a private landowner poisons feral hogs on his or her ranch, eventually the feral hogs on adjoining properties will move in. Upon information and belief, poisoning an entire region of ranches is unfeasible for several reasons:

- Many property owners want to hunt and consume feral hogs, or lease their land to feral-hog hunters—not poison the feral hogs.
- Many property owners do not like or trust poison or the effects and risks of poison on domestic animals (e.g., dogs, cats), livestock, wildlife, and the environment.
- Many property owners do not want to incur the expense of a program that is doomed to failure or, at best, minimal, temporary success.

8. The sole-source product that the Commissioner has proposed, Kaput®, according to its own instructions (see Exhibit 2 attached hereto and incorporated herein by reference for all purposes), cannot be used in grazing areas. For example, a rancher who owns 1,000 acres would have to move livestock from the pasture designated for poison. First, according to the product instructions, several weeks of separation would be necessary to “condition the hogs” to learn to “open” the poison containers. (As discussed below, those containers are flawed and potentially expose children and animals to the poison.) Second, the separate pasturing would have to continue for a substantial period to address the inevitable, continuing influx of hogs from surrounding properties. In fact, that influx would never end. Third, according to Kaput® instructions, the separation would have to continue for 90 days after the last use of the poison.

Additionally, according to Kaput® instructions, the product also cannot be used near water or creeks. Finally, Kaput® instructions require “burial” of poisoned feral hogs. Upon information and belief, feral hogs can travel 5 to 20 miles in a day. A poisoned feral hog may well end up on neighboring property, and the property owner may have no idea that a poisoned hog is on the property, much less any program or desire for burial. That would expose the poison-containing carcass to other wildlife, including birds of prey, vultures, coyotes, raccoons, etc.—or even domestic dogs and cats.

B. Australia’s Experience with Warfarin:

9. The Commissioner’s press release cited the use of warfarin in Australia and stated that Warfarin, an anticoagulant, was used for many years as a feral swine toxicant in Australia. But in comparing the press release to a 1990 Australian study (attached hereto as Exhibit 3 and incorporated herein by reference for all purposes), important facts were omitted about the Australia experiment:

- Australia, in a government-conducted study, experimented with the use of warfarin in 1987 in the Sunny Corner State Forest.
- The study area was 60 square miles and the study period was 3 months.
- Over the course of 3 months, 187 of 189 feral hogs were poisoned to death, using 69 poison sites and placing the poison in wheat left in the open, not in containers.
- This application took an average of 2.7 man-hours per feral-hog poisoning.
- Ultimately, Australia concluded that the method of death was so cruel, that use of warfarin should be outlawed—even though Australia is not a culturally “squeamish” country and even though Australia has more feral hogs than

people. Warfarin is an anti-coagulant, so hogs die by bleeding to death—including bleeding out the eyes, nose, mouth, and other body orifices. The death is painful and gruesome.

- Australia found that the timeline for feral-hog death was 4-17 days.

In short, the Australian experience conclusively showed that warfarin poisoning is a badly flawed program.

C. Warfarin Poisoning Will Cause Substantial Economic Damage to Texas Hunters, the Hunting Industry, Meat Processors, and Other Industries from Warfarin Poisoning—and Will Reduce in the Effectiveness of Feral-Hog Control in Texas

10. Texas currently has a vibrant, growing economic segment focused on hunting feral hogs and on the consumption and use of feral-hog meat and byproducts. Thousands of Texas hog hunters participate in safe, reliable harvesting of feral hogs. Hunting is one of the two most effective means of controlling the feral-hog population. Ranchers and other property owners earn substantial revenues from hunting leases and guided hunts for feral hogs. Feral-hog meat processors have developed a sustainable, environmentally sensible industry to use feral-hog meat products for human consumption in the United States and abroad and for the pet industry. Feral-hog hides are even used for boot making.

11. Collectively, those industries result in harvesting tens of thousands of feral hogs annually in Texas. A warfarin-poisoning program will substantially reduce or destroy those businesses, including Wild Boar Meats. Given the flawed concepts on which warfarin-poisoning is based, that program will result in a net reduction in the number of feral hogs removed from Texas ranches annually. In short, the warfarin-poisoning program will reduce, not increase, the number of feral hogs killed each year in Texas. The program will make the feral-hog control problem worse not better.

D. The Cost of Warfarin Poisoning

12. The costs of a warfarin-poisoning program are substantial for any participating landowner. According to Exhibit 2, each hog feeder (poison-bait station) holds only 25-50 lbs. of poison. Upon information and belief, studies suggest that a feral hog would have to ingest the poison for 5 days to die. That means that a hunter or property owner could shoot and consumer a feral hog, not knowing that it contains poison. And, upon information and belief, Kaput® is the only known provider of the Kaput® products and feeder.

E. Dangers to humans, animals, and wildlife:

13. Kaput® instructions (Exhibit 2) state: “Harmful if swallowed,” “Keep away from humans,” “Keep Out of Reach of Children,” “If Swallowed: call a poison control center or doctor immediately for treatment advise.”

F. “Burial” problems:

14. According to the manufacturer of Kaput®, when a feral hog dies from warfarin poisoning, the property owner must bury the hog 18” below the ground. See Exhibit 2. That is impractical (and often impossible) because the death-by-bleeding that results from warfarin poisoning is slow. Upon information and belief, it can take up to 4-17 days. See Exhibit 5. Feral hogs can travel 5 to 20 miles per day. It is highly likely that feral hogs that die from warfarin poisoning will be on some other property owner’s property. That owner well may not know that someone else has a poison program underway, much less have any desire to bury the feral hog. The dead feral hog will mostly likely remain exposed to being consumed by other animals, birds of prey, or even dogs or cats.

15. Even if the carcass of a poisoned hog is found, and even if the person who finds it has the motivation to bury it, burying a feral hog that weighs 200 pounds (or more) is not easy, simple, or cheap. At a minimum, it requires a backhoe. In some soils, burial is not feasible at all.

It can be prohibitively difficult, expensive, labor-intensive, and time-consuming. In short, often it will not happen at all.

G. Problems with Poison Bait Stations

16. The sole-source manufactured bait stations for use of Kaput® warfarin-based poison have many problems. First, the doors weigh only ten pounds. See Exhibit 2. Many animals can lift ten pounds. Texas Parks and Wildlife has documented raccoons lifting 28 pounds with just their front paws, so a raccoon can open the bait station, remove and distribute the poison, therefore putting other wildlife at risk. See Texas Park and Wildlife report attached as Exhibit 4 and incorporated herein by reference for all purposes. In addition, Kaput® requires posting bilingual signs in the treated areas, specifically public roads, trails, and pathways. See Exhibit 2. Unfortunately, young children, raccoons, dogs, cats, deer, goats, and cows do not read.

H. Other Environmental Hazards from Warfarin Poison

17. Kaput® itself lists in Exhibit 2 these Environmental Hazards to wildlife (including domestic dogs and cats):

- “This product may be toxic to fish, birds, and other wildlife”
- “Dogs and other predatory and scavenging mammals and bird might be poisoned if they feed upon animals that have eaten the bait”
- “Do not apply this product directly to water, to areas where surface water is present or to intertidal areas below the mean high-water mark”

I. Alternatives to Warfarin Poisoning:

18. Texas Parks and Wildlife Department has been studying a safer alternative to warfarin: Sodium Nitrite. Sodium nitrite is used to cure bacon. See Exhibit 4. Humans consume it. It does not harm humans, but can be lethal to feral hogs. Thus, it would not cause the collateral economic damage to the hunting industry and the feral-hog meat industry in Texas.

Studies show that with properly administered sodium nitrite, feral hogs typically die within 2 hours of consumption. See publication entitled “Poison baiting for feral pig control in Australia” attached via the following link: <http://www.pestsmart.org.au/poison-baiting-for-feral-pig-control/> as Exhibit 6 and incorporated herein by reference for all purposes. But sodium nitrite is not harmful to humans or pets. Secondary-poisoning risks from sodium nitrite are much less than from warfarin.

J. Why the Warfarin-poison Program Would Likely Increase the Feral Hog Population In Texas:

19. Currently the most common feral-hog-control programs result from the kill-to-eat motivation of the majority of Texas hog hunters. Because of the risks from warfarin poisoning, harvesting for human consumption will inevitably decrease. (The Texas Hog Hunters Association opposes the warfarin-poisoning program.) The result will be removal of fewer feral hogs in Texas. The feral-hog population will actually increase.

20. The same is true of the burgeoning kill-to-sell feral-hog industry in Texas. Warfarin poisoning will reduce or eliminate that industry entirely, eliminating thousands of Texas jobs.

21. The same is true of the trap-to-sell industry in Texas. Trapping is one of the most effective means of feral-hog control in Texas. But many trappers sell the hogs for human or pet-products consumption. That will no longer be feasible. Warfarin can remain in a feral hog for up to 17 days. See report entitled “**A project that investigates current options for managing feral pigs in Australia and assesses the need for the development of more effective and humane techniques and strategies**” attached via the following link: <http://www.pestsmart.org.au/wp-content/uploads/2010/03/DEHstage1.pdf> as Exhibit 5 and incorporated herein by reference for all purposes. Thus, to be safe, trappers and feral hog

processors would have to feed feral hogs for three weeks to be used for human consumption. That is cost prohibitive.

22. The bottom line is that a warfarin-poison program is likely to result in a net decrease in the number of feral hogs harvested in Texas, and net increase in the population of feral hogs in Texas. That is the very definition of counterproductive!

23. Implementation of a warfarin-poisoning program in Texas is a bad idea that will have substantial adverse economic consequences for Texas hunters, Texas hunting-supply industries, Texas ranchers and other property owners, and the feral-hog meat processing industry. The program would cost Texas jobs and money, it would cause substantial damage to the Texas environment and wildlife—and ultimately, the program likely would make the problem of feral hogs in Texas worse, not better. In every sense, it is a lose-lose proposal for Texas. Texans and TDA should reject this bad idea.

K. No “Emergency”

24. On February 21, 2017, and without notice and comment, TDA adopted an amendment to 4 TAC §7.30 stating the “amendment adds regulations regarding “State-limited-use Pesticides Defined by Active Ingredient and Use,” including use and distribution of such products. The Department is adopting the emergency amendments to address the risk of inadvertent human consumption of warfarin-poisoned hogs and the risk of potential secondary poisoning of non-target animals. Amended §7.30 classifies the active ingredient warfarin, when used as a feral hog toxicant, as a state-limited-use pesticide.” See Exhibit 1.

VI. BRIEF IN SUPPORT

A. Imminent Peril

25. The APA § 2001.0034(a)(1)-(2), (b) and (d) requires an agency to set forth the following to adopt an emergency rule:

- (1) the rule adopted;
- (2) written reasons for the rule's adoption; and
- (3) written reasons for the agency's findings that
 - (a) an imminent peril to the public health, safety, or welfare exists

26. Judge Scott McCown defined imminent peril as follows:

The words suggest a soon-to-be-upon-us public disaster not merely a serious policy concern . . . Imminent means soon but not yet. If a problem is here, it is not imminent, but present. A present problem is not an imminent peril, regardless how serious. The legislature does not want an agency to address present problems with emergency rules . . . long standing problems . . . can not be classed as imminent peril . . . as a corollary, an agency can not allow a distant problem to become an imminent peril by inaction and then promulgate an emergency rule. . . the test is whether an agency reasonably could and should have foreseen the problem in time to address it by full procedure.¹

Courts in Travis County are familiar with the requirements for an agency to adopt an emergency rule as well as the consequences when an agency does not comply with the APA. See Temporary Restraining Order issued by the Honorable Gisela Triana and Temporary Injunction issued by the Honorable Orlinda Naranjo in Cause No. D-1-GN-15-000238, *Teladoc v. Texas Medical Board and Scott Freshour in his official capacity as General Counsel for Texas Medical Board*, in the 53rd Judicial District Court of Travis County, Texas.

B. TDA's purported "emergency" is no emergency

27. Notice, transparency, public participation, and reasoned justification must precede assertions of agency authority by adoption of rules. As the Austin Court of Appeals has stated, "We must give effect to these important safeguards, as the Legislature has intended." *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 623 (Tex. App.—Austin 2014, pet. denied).

¹ F. Scott McCown, Opinion on Temporary Injunction, 1 Tex. Admin. L.J. 16, 27-30 (1992)

C. The harm to Wild Boar Meats

28. The “emergency rule” will have an immediate and severe impact on Wild Boar Meats ability to do business in Texas in that it will severely impact Plaintiff’s business. Upon information and belief, there is no way to deactivate the chemical Warfarin in a dead feral hog; the antidote Vitamin K only works for a living animal. In Exhibit 2, Kaput states that a dye that accompanies the chemical Warfarin will turn the fatty tissues of a feral hog blue – thereby providing notice of Warfarin poisoning. Upon information and belief, the fatty tissues will not turn blue until the feral hog metabolizes Warfarin – which is between 1-2 days. Therefore, a feral hog could eat warfarin one day, the next day cross onto another ranch, be shot and brought to Wild Boar Meats, without any blue fatty tissues. Upon information and belief, individually testing each feral hog for Warfarin takes 2-3 days and is cost prohibitive. Given these unknowns, Plaintiff’s customers have expressed concerns about the “emergency” rule and are considering putting future orders on hold. Plaintiff had planned to begin construction of a new plant next month to substantially expand its facilities. Plaintiff has ongoing negotiations with one of the largest pet food manufacturers in the world. Now those negotiations have ceased and the new plant is in jeopardy. If the rule stays in effect, Plaintiff will lose contracts and may go out of business. Upon information and belief, the same is true for the Texas businesses that provide feral-hog meat for human consumption. The combined meat and hog hunting industry is in the millions of dollars annually. The financial impact on the thousands of hunters and trappers who sell feral-hog meat will be much greater, as will be the effect on the companies that operate as direct buyers from feral-hog hunters and trappers. (One of those companies that supplies Plaintiff is Hogs Gone Wild; which last year sold several million pounds of feral hogs.) In short, the adverse economic effects of the “emergency rule” will be massive. Many business failures are inevitable if this rule stays in effect. Upon information and belief, the net effect of this rule and

the associated program will be to decrease the annual harvest of feral hogs in Texas—the rule and program will make the feral-hog problem in Texas worse, not better.

VII. CAUSE OF ACTION

A. Request for declaration of rights under the Rule

29. Wild Boar Meats requests that the Court declare that TDA’s emergency rule is invalid for two reasons. First, there is no imminent peril to public health, safety or welfare and TDA has made no such finding. Second, TDA did not endeavor to state in writing reasons to support a finding of the requirements of APA § 2001.034(a)(1)-(2), (b), and imminent peril to the public health, safety or welfare if one had been made. *See Methodist Hospitals of Dallas v. Texas Industrial Accident Board*, 978 S.W.2d 651 (Tex. App. –Austin, 1990, no writ).

B. Application for TRO

30. Wild Boar Meats asks the Court to temporarily enjoin enforcement of the “emergency rule” adopted by TDA pending a trial on the merits. Wild Boar Meats has a probable right to the relief it seeks because no imminent peril to public health, safety or welfare exists and TDA did not follow the requirements of APA § 2001.034(a)(1)-(2), (b), and (d). Harm to Wild Boar Meats is imminent because TDA issued notice of the emergency rule on February 21, 2017. The “emergency rule” will have an immediate and severe impact on Wild Boar Meats’ ability to do business in Texas. Wild Boar Meats has no adequate remedy at law because it cannot recoup the loss of revenue caused by the implementation of the “emergency rule.”

C. Request for permanent injunction

31. Wild Boar Meats asks the Court for a permanent injunction after trial. TEX. GOV’T. CODE § 2001.038 authorizes suit to declare validity of a rule including an emergency rule. The emergency rule of February 21, 2017 is invalid because of absence of an imminent peril to the public health, safety, or welfare and failure of Defendants to adopt the rule pursuant

to TEX. GOV'T. CODE § Sections 2001.023, 2001.024, 2001.029, 2001.033 and 2001.034. Agency rules adopted without complying with proper rule-making procedures are invalid and affected persons are entitled to injunctive relief. *See El Paso Hosp. Dist. v. Texas Health and Human Servs. Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008) and *Combs v. Entertainment Publ'ns, Inc.*, 292 S.W.3d 712, 723-24 (Tex. App.—Austin 2009, no pet.).

VIII. PRAYER

WHEREFORE, premises considered, Wild Boar Meats, L.L.C. asks the Court to declare invalid the emergency rule adopted by TDA and to issue a temporary restraining order enjoining its enforcement, issue a temporary injunction pending a trial on the merits, and upon trial on the merits, a permanent injunction enjoining enforcement of the emergency rule. Wild Boar Meats, L.L.C. asks for costs of suit and all other relief, at law or in equity, to which it may be entitled.

Respectfully submitted,

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By: /s/ Matt Dow

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CERTIFICATE OF SERVICE

This is to certify that on this 1st day of March, 2017, a true and correct copy of the foregoing document was served via email on the parties listed below:

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/s/ Matt Dow
Matt Dow