

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

FARM-TO-CONSUMER LEGAL
DEFENSE FUND, LAURIE
DONNELLY, JENNIFER ALLEN, DR.
JOSEPH HECKMAN, DANE MILLER,
CYNTHIA LEE ROSE, ERIC
WAGONER, ANNE COOPER, and
MICHAEL BUCK,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official
capacity as Secretary, United States
Department of Health and Human
Services, UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, MARGARET
HAMBURG, in her official capacity as
Commissioner, United States Food and
Drug Administration, and UNITED
STATES FOOD AND DRUG
ADMINISTRATION,

Defendants.

No. C 10-4018-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION UNDER ALL WRITS
ACT**

This case is before me on the plaintiffs' December 27, 2011, Verified Motion For Preliminary Injunction Under All Writs Act (docket no. 72). In their motion, the plaintiffs seek a preliminary injunction enjoining the FDA from enforcing the provisions of 21 C.F.R. §§ 1240.61 and 131.110 against persons located throughout the United States and,

specifically, the continued prosecution of any and all existing enforcement actions, civil, criminal, administrative, or otherwise, pending in any tribunal or court. The plaintiffs assert that, although this court has jurisdiction over their claims that the cited regulations are unconstitutional when applied against the three categories of plaintiff in this case (that is, “direct purchaser plaintiffs,” “principal and agent plaintiffs,” and “producer plaintiffs,” as described in my Memorandum Opinion And Order Regarding Defendants’ Motion To Dismiss (docket no. 27) (published at *Farm-to-Consumer Legal Defense Fund v. Sebelius*, 734 F. Supp. 2d 668 (N.D. Iowa 2010))), the FDA has continued to enforce the regulations in a manner that “challenges” and “usurps” this court’s jurisdiction to decide whether the conduct described by the plaintiffs is or is not legal. Plaintiffs’ Verified Brief In Support Of Motion For Preliminary Injunction Under All Writs Act (docket no. 72-1), 1-2, 5. The plaintiffs identify three purported enforcement actions by the FDA against persons, none of whom are parties here, in other jurisdictions, as challenges to this court’s jurisdiction. The plaintiffs argue that, until this court decides differently, the activity of the people subject to these enforcement actions is legal and, if this court decides that they are correct, then the enforcement actions by the FDA would be inconsistent with this court’s ruling. In a Resistance (docket no. 73), filed January 13, 2012, the defendants argue that the plaintiffs’ motion for a preliminary injunction pursuant to the All Writs Act should be denied. They challenge the plaintiffs’ standing to litigate the constitutional claims of third parties; the applicability of the All Writs Act here; and the plaintiffs’ ability to satisfy the substantive requirements for a preliminary injunction. In their Reply (docket no. 74), filed January 17, 2012, the plaintiffs reject the defendants’ arguments and assert that this court must put a stop to the FDA’s “effrontery” and “audacity” in pursuing enforcement actions in other jurisdictions when this court has “primary” jurisdiction over

constitutional challenges to the regulations on which those enforcement actions are based and should decide those issues first.

“The All Writs Act empowers federal courts to issue ‘all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.’” *United States v. Yielding*, 657 F.3d 722, 726 (8th Cir. 2011) (quoting 28 U.S.C. § 1651(a)). Thus, “the All Writs Act authorizes federal courts to issue extraordinary writs to the extent that ‘the issuance of process [is] “in aid of” the issuing court’s jurisdiction.’” *USCOC of Greater Missouri, L.L.C. v. County of Franklin, Mo.*, 636 F.3d 927, 932 (8th Cir. 2011) (quoting *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999), in turn quoting 28 U.S.C. § 1651(a)); *see also Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821 (8th Cir. 2009) (the All Writs Act authorizes federal courts to issue extraordinary writs, “but only to the extent that ‘the issuance of process [is] ‘in aid of’ the issuing court’s jurisdiction” (also citing *Clinton*, 526 U.S. at 534)). An injunction “in aid of” the issuing court’s jurisdiction is appropriate, for example, when it is necessary for adjudication or settlement of a case. *See Liles v. Del Campo*, 350 F.3d 742, 746-47 (8th Cir. 2003) (citing *White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994), and finding such an injunction appropriate to preserve settlement funds). It is also appropriate to prevent a disappointed litigant who selected the federal forum in the first instance from recycling the same claims and issues in different courts, hoping to achieve the result they desired, thereby impeding the judgment of the federal court. *See Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1018 & 1020 (8th Cir.

2002), *abrogated on other grounds by Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002).¹

Entitlement to a preliminary injunction under the All Writs Act requires consideration of the same factors as a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure, that is, (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the injury caused by granting the injunction; (3) the probability of succeeding on the merits; and (4) the public interest. *See Canady*, 282 F.3d at 1020 (citing *Dataphase Sys. v. C. L. Sys.*, 640 F.2d 109, 113 (8th Cir. 1981)). It does not, however, require “rigid” adherence to the procedures and prescriptions of Rule 65, “so long as the injunction is ‘specific and definite enough to apprise those within its scope of the conduct that is being proscribed.’” *Yielding*, 657 F.3d at 727 (quoting *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985)). “The power conferred by the All Writs Act ‘extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order.’” *Id.* at 728 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977)). The power extends to compelling persons not parties to the action to act or not to act. *USCOC*, 636 F.3d at 932.

The plaintiffs’ motion for a preliminary injunction under the All Writs Act will be denied. First, there is absolutely no showing that the supposed enforcement actions by the FDA against non-parties poses any threat of harm, let alone a threat of irreparable harm,

¹In *Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821–22 (8th Cir. 2009), the Eighth Circuit Court of Appeals recognized that *Canady* had been overruled by *Syngenta* to the extent that *Canady* held that the All Writs Act provides an independent grant of subject matter jurisdiction.

to the present plaintiffs. *Canady*, 282 F.3d at 1020 (first factor in consideration of a preliminary injunction under the All Writs Act is the threat of irreparable harm to the movant). This simply is not a case in which the other enforcement actions by the defendants are any threat to the jurisdiction of this court or any reason that those actions must be enjoined “in aid of” this court’s jurisdiction. *See USCOC*, 636 F.3d at 932. The plaintiffs have not cited, and I have not found, any authority for the proposition that the first federal court to entertain a challenge to a federal regulation has the power to forestall enforcement of that regulation by a federal agency in other jurisdictions and tribunals against non-parties even before the court resolves the challenge. Indeed, the plaintiffs’ entire theory is wrong-headed: The conduct of the persons targeted by the supposed enforcement actions of the FDA is not “legal” until this court decides otherwise, the FDA is entitled to adhere to its view that the conduct of those persons violates valid regulations until and unless a court of competent jurisdiction invalidates those regulations or bars application of those regulations to those persons. Moreover, none of the persons targeted by the supposed enforcement actions of the FDA is a party to this action, so that it is not clear how enforcement actions by the FDA against those persons trespass in any way on this court’s jurisdiction over the dispute between the present parties. This is also not a situation in which a party to this litigation, let alone a party that selected this forum in the first instance, is disappointed by a ruling of this court, and seeks to recycle the same claims and issues, involving the same parties and the same conduct or property, in different courts, hoping to achieve the result that party desired, thereby impeding the judgment of this court. *See Canady*, 282 F.3d at 1018 & 1020. Nor is there any *res*, such as a settlement fund, to be protected from interference or dissipation by other actions. *See Liles*, 350 F.3d at 746-47. I simply do not see any “usurpation” of this court’s

jurisdiction, nor any “effrontery” or “audacity” in the FDA’s continued enforcement of regulations that have not been invalidated.

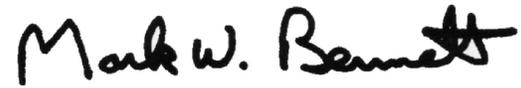
Moreover, I find that the balance of harms and the public interest, *see Canady*, 282 F.3d at 1020 (second and fourth factors relevant to issuance of a preliminary injunction under the All Writs Act), strongly weigh against the preliminary injunction that the plaintiffs seek. The FDA would be unduly hampered, and the public interest would be damaged, by enjoining enforcement of still-valid regulations intended to protect the public from food borne illnesses resulting from the consumption of raw milk. *See, e.g., United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964) (the Food, Drug, and Cosmetics Act (FDCA), pursuant to which 21 C.F.R. §§ 1240.61 and 131.110 were promulgated, was enacted to “safeguard the consumer from the time the food is introduced into the channels of interstate commerce to the point that it is delivered to the ultimate consumer”). The plaintiffs have shown no threat to them that would outweigh the threat to the agency’s legitimate enforcement actions and the public interest.

I find that the lack of any threat of irreparable harm to the plaintiffs here and the balance of the other factors against issuance of the requested preliminary injunction make it unnecessary for me to consider the plaintiffs’ likelihood of success on the merits of their claims, *see Canady*, 282 F.3d at 1020 (third factor), a matter of some complexity that will be addressed in a ruling on pending dispositive motions. Consideration of the pertinent factors lead decisively to the conclusion that no preliminary injunction should issue pursuant to the All Writs Act to enjoin enforcement actions pursuant to the regulations at issue here by the FDA against non-parties.

THEREFORE, the plaintiffs’ December 27, 2011, Verified Motion For Preliminary Injunction Under All Writs Act (docket no. 72) is **denied**.

IT IS SO ORDERED.

DATED this 23rd day of January, 2012.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA