

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

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Feeding Our Future,

Case No. 62-CV-20-5492

Plaintiff,

Honorable John H. Guthmann

v.

MOTION HEARING

Minnesota Department of

OFFICIAL COURT TRANSCRIPT

Education,

Defendant.

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The above-entitled matter came on before the  
Honorable John H. Guthmann, District Court Judge, Ramsey  
County District Court, Second Judicial District, State of  
Minnesota, by Zoom during the COVID-19 Pandemic on  
Wednesday, April 21, 2021.

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REPORTED BY: Lori Morrow, RDR, RMR, RPR, CRR, CRC

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## A P P E A R A N C E S:

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ALSO PRESENT: Aimee Bock, Feeding Our Future

Emily Honer, Minnesota Dept. of Education

Monica Herrera, Minnesota Dept. of

Education

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1 (The following proceedings were had and made of  
2 record commencing at approximately 2:07 p.m.):

3 THE COURT: All right. Good afternoon. My  
4 name is John Guthmann. I'll be the presiding judge in  
5 this particular case. Let's officially call the case.

6 THE CLERK: Calling page one, line two, Feeding  
7 Our Future v. Minnesota Department of Education.

8 THE COURT: Appearances by counsel starting  
9 with the Plaintiff.

10 MR. WATKINS: Good afternoon, your Honor.  
11 We've got Rhyddid Watkins on behalf of Feeding Our  
12 Future. And with me is my client, the executive  
13 director, Ms. Aimee Bock.

14 THE COURT: All right. Thank you.  
15 For the defense.

16 MS. NOGOSEK: Good afternoon, your Honor.  
17 Kristine Nogosek from the Minnesota Attorney General's  
18 Office. Also with me is Assistant Attorney General Marty  
19 Casserly, as well as Emily Honer, last name is H-o-n-e-r,  
20 who is a supervisor with the Minnesota Department of  
21 Education. Also in Ms. Honer's room is Monica Herrera.  
22 Last name is H-e-r-r-e-r-a. And Ms. Herrera is a  
23 director at MDE.

24 THE COURT: All right. Thank you.

25 Before we begin talking about the merits, the

1 last time we were together things got worked out. Are we  
2 in a position to work things out, or are we going to take  
3 off the gloves and start swinging?

4 MR. WATKINS: Gloves are off, your Honor. We  
5 would love to work things out, but we don't see how  
6 that's possible. It's extremely unfortunate given that  
7 we're trying to feed needy children, but given the  
8 developments of the last month or so, last couple of  
9 weeks, it's really difficult to see how we work this out.  
10 We're amenable to hearing options, of course, we're here  
11 to hear options, but we have yet to see any so far.

12 THE COURT: Ms. Nogosek.

13 MS. NOGOSEK: Your Honor, I think that there is  
14 an opportunity to work things out. And as has been laid  
15 out in the Department of Education's memorandum of law,  
16 there is a process that is in place for Feeding Our  
17 Future to provide the proper documentation for the claims  
18 and to give the Department of Education time to look at  
19 those and pay valid claims. I'm told that Feeding Our  
20 Future is in the process of doing that. There is  
21 currently upwards of 155 documents that have been  
22 provided to MDE, which is about 50 claims, because each  
23 claim needs three documents, and MDE has assembled a team  
24 of people to start reviewing this documentation. So I  
25 think what is in place is not only workable, but, as you

1 know from reading the Department of Education's  
2 memorandum of law and looking at the statutes or federal  
3 regulations, that is what is called for during this  
4 deficiency process that Feeding Our Future is in. That,  
5 I think, is a workable and doable resolution.

6 THE COURT: The characterization of Feeding Our  
7 Future is that this action doesn't involve any  
8 allegations of any shortcomings with any particular  
9 claim, that the concerns that have been raised are  
10 umbrella concerns about the overall management of the  
11 organization apart from any particular claim. Do you  
12 agree or disagree with that?

13 MS. NOGOSEK: I disagree with that, your Honor.

14 THE COURT: I don't see anything in your brief  
15 supporting your disagreement. You didn't say a thing in  
16 your brief about any deficiency with respect to any  
17 particular claim. All the deficiencies you listed  
18 related to the way they run the organization overall.  
19 What am I missing? Point me to the page in your brief.

20 MS. NOGOSEK: Your Honor, it's not in the  
21 Department of Education's brief, but it is definitely in  
22 Ms. Herrera's affidavit -- I'm sorry, declaration. And  
23 it's on page 2 -- I'm sorry, page 5 at the very top,  
24 subparagraph e, which is part of the deficiency letter  
25 dated March 31, 2012 [sic] that went out to Feeding Our

1 Future and specifically lists three different instances  
2 where MDE has received information from site operators  
3 that indicate that claims are being submitted and meals  
4 are either not being provided by that site operator or  
5 that the operator is not sure that it is operating  
6 correctly under the CACFP program.

7 THE COURT: Right. But those are  
8 unsubstantiated allegations. I guess, do they -- they  
9 are complaints, so you're taking the position that if you  
10 receive a complaint, you can unilaterally stop making  
11 payment pending investigation of that complaint?

12 MS. NOGOSEK: Um, no, your Honor. I think  
13 it -- I think we're -- number one, we're getting a little  
14 bit into the substantive claims, but I'm going there with  
15 the Court because I feel like that's where you want me to  
16 go. With that said, what MDE is doing is simply putting  
17 an administrative stop pay, which is different than the  
18 suspension of payments or the stop pay that you see in  
19 some of the USDA guidance where no payment is made during  
20 the serious deficiency, none, until the deficiency is  
21 either corrected or until the termination of the  
22 agreement is completed.

23 In MDE's situation, what it is doing is putting  
24 a stop pay, so Feeding Our Future is able to go into  
25 CLiCS and enter the information to submit its claim. The

1 stop pay on that system simply stops the payment from  
2 going out to Minnesota Management and Budget for payment.  
3 And verifying the validity of the claim is exactly what  
4 the federal regulations tell MDE it is supposed to do  
5 under these circumstances. And this is what USDA told  
6 MDE it should be doing in the situation of the  
7 deficiencies that Feeding Our Future have found  
8 themselves in. So not only does MDE believe that it is  
9 in line with what is required of MDE during these  
10 deficiency proceedings but has been told that by USDA.

11 THE COURT: And that's also in the declaration?

12 MS. NOGOSEK: It is, your Honor.

13 THE COURT: All right. With that, Mr. Watkins,  
14 why don't you state your case. I've read the briefs. I  
15 have not read all the regulations in chapter and in  
16 verse. That is a specialty, and it's not --

17 MR. WATKINS: That's --

18 THE COURT: It's not casually done.

19 MR. WATKINS: That's certainly true,  
20 your Honor. I've been doing this for five, seven years  
21 on these specific regulations for this food program and  
22 would agree with you they're not immediately pickupable  
23 on the first reading for the first time.

24 I would like to start by just apologizing to  
25 the Court and Ms. Neuman as well. I filed a reply brief

1 late this morning about 11:00. I don't know that it was  
2 officially accepted. I assume the Court and Ms. Neuman  
3 have not had the opportunity to read that. I did --

4 THE COURT: I did read it.

5 MR. WATKINS: I'm sorry?

6 THE COURT: I did read it.

7 MR. WATKINS: Oh, still my apologies for the  
8 lateness of that. But thank you, your Honor, for taking  
9 the time on that. I do appreciate it.

10 If I could, I would like to start with sort of  
11 a background of what happened, because this may be  
12 striking the Court in the same way that it's striking me.

13 I was just in trial for just over two weeks on  
14 a long, complicated case here in Colorado. And when I  
15 got out of trial, I was introduced and I immediately  
16 connected with Ms. Bock, and all of a sudden this case  
17 had just exploded. Everything had changed. We have been  
18 operating for a number of years as Feeding Our Future.  
19 We've done tens of millions of dollars throughout the  
20 years to feed the most -- you know, the most disparately  
21 impacted minority community in the state. And then all  
22 of a sudden in the span of two weeks while I was in  
23 trial, Feeding Our Future had been terminated from  
24 participation in the food program; Ms. Bock had  
25 personally been terminated from participation in the food

1 program; she had been put on a national disqualified  
2 list, meaning she could never participate again within  
3 the next seven years; and the president of the board of  
4 directors had been put on the national disqualified list  
5 and terminated from participating in the program. In  
6 addition to that, there was a second letter sent making  
7 the same allegations as in the termination and then  
8 adding as well that not only have they all been  
9 terminated but that MDE was simply keeping all of the  
10 money it's been receiving from the Federal Government  
11 that's supposed to be paid to the community partners that  
12 feed and operate the federal food program under  
13 contractual promises and regulatory promises by MDE and  
14 the USDA.

15 So this was kind of hitting me in the same way  
16 I'm sure it hit the Court. This isn't the case that I  
17 left it when I went to trial. We're in a very different  
18 ballgame. So that's where I tell the Court, to mix  
19 metaphors, the gloves are off. We are in a dire  
20 situation.

21 What has happened since, your Honor, is really  
22 important to understand. Several sites have not had  
23 their money paid. To date, as of today, it's about 17  
24 and a half million dollars, as we pointed out in our  
25 briefing. As of tomorrow, that becomes \$20.5 million of

1 federal funds that USDA is simply keeping. The people  
2 who operate these programs, your Honor, are non-profits.  
3 They are non-profits that specifically dedicate  
4 themselves to serving the minority, disproportionately,  
5 socially, economically disadvantaged community. Those  
6 centers, those sites have now gone without federal funds  
7 for several weeks. They cannot afford to operate. As a  
8 result of that, we have had at least three sites  
9 terminate their participation. Their caterers have fired  
10 them saying, I'm sorry, I cannot provide you food without  
11 payment, I cannot continue to provide you food. And as  
12 of today, as of about a week ago and today as well, there  
13 are at least 5,000 children per day that are no longer  
14 being served because of MDE's stop payment. So we've had  
15 three sites close their doors. For about a week now they  
16 have been closed. Collectively, those three sites were  
17 serving about 5,000 children per day, and each one of  
18 those 5,000 children per day are now going without food.  
19 So we've been getting phone calls, we've been getting  
20 questions, we've been getting "how are we supposed to  
21 feed the community." We're getting outreach from  
22 congressmen, from legislatures trying to figure out  
23 what's going on, why these sites are closing, why we're  
24 not able to continue operation.

25 Now, in addition to that, we've got ten to --

1 about, sorry -- about twenty sites now that are about to  
2 close their doors, and they collectively serve roughly  
3 30,000 children per day. Those ten [sic] sites, some of  
4 them are participating in this call and listening in. As  
5 I pointed out to Ms. Neuman before the start of the call,  
6 we assume this to be public, so let us know if that's not  
7 the case. They are waiting to hear a determination from  
8 the Court.

9 In the absence of an injunction requiring  
10 release of the federal funds, most, if not all, of those  
11 sites will terminate, and 45 [sic] additional children  
12 will go without funds. These are non-profits that cannot  
13 afford to pay for the federal food program.

14 So that's where we are, your Honor. And again,  
15 I apologize. I know you've read the briefing, but let me  
16 back up and explain a little bit about how we got here  
17 and what sort of happened.

18 So initially, as part of this lawsuit, there  
19 was an allegation that Feeding Our Future failed to file  
20 its 501(c)(3) tax status with the Federal Government.  
21 That was a misunderstanding on MDE's part. Feeding Our  
22 Future had an extension. It timely filed its taxes.  
23 There was no problem. So that allegation disappeared.

24 The next allegation was, "well, you didn't  
25 conduct an independent audit." Well, we did that, too.

1 So what we did is we hired an independent auditing  
2 company to come in, audit all of our financials, and  
3 confirm where every dollar has gone. We did that. We  
4 had the audit. We submitted it to MDE. We provided it,  
5 though it is true there was one mistake. The accountant,  
6 the CPA that conducted the audit, did not file the audit  
7 with what's called the Federal Audit Clearinghouse, which  
8 is a federal website in which, if you're receiving grant  
9 money from the federal government under complex  
10 regulations, you're supposed to file that there so the  
11 federal government can see the audit. The audit was  
12 done, the audit was complete, the audit was accurate, the  
13 audit was given to MDE, but the audit was not filed on  
14 the website. So Feeding Our Future when that was called  
15 to our attention, we tried to correct that. We tried to  
16 reach out to the CPA. But unfortunately, because of  
17 COVID, he's been out of the country and unreachable, so  
18 Feeding Our Future hired an entirely new auditing firm,  
19 one with impeccable credentials, another CPA who is  
20 formerly an investigator for the IRS, to conduct a second  
21 independent audit and file that with the FAC.

22 That, your Honor, is the sum total of all  
23 alleged violations of federal regulations, period.

24 THE COURT: Has that been done? Has the audit  
25 been finished, or is that still ongoing?

1 MR. WATKINS: The second audit is in the  
2 process of being done. The initial audit, of course, was  
3 completed. The second one is ongoing. I understand it's  
4 close to completion and will then be filed to the FAC as  
5 soon as it's completed.

6 THE COURT: So I'm looking at the deficiencies  
7 on paragraph 5 of the declaration. You believe you've  
8 satisfied a and b and that you're, as you characterize,  
9 it's basically a technicality of uploading the first  
10 audit on the SharePoint site, but you're doing a second  
11 audit just to be sure?

12 MR. WATKINS: Well, yes. But just to clarify,  
13 SharePoint -- we did provide the first audit. The  
14 SharePoint is an internal website that MDE houses that we  
15 have access to --

16 THE COURT: The FAC.

17 MR. WATKINS: Exactly, correct, your Honor.  
18 Now, that can -- we understand that the FAC can only be  
19 done by a CPA, so we have the CPA signed, sealed audit.  
20 But as a non-CPA, I understand we don't have the ability  
21 to file that on the FAC's website, and no auditor --

22 THE COURT: And the CPA who is out of the  
23 country doesn't have any CPA associates? He's a sole  
24 practitioner?

25 MR. WATKINS: He was a sole practitioner, so,

1 your Honor, the federal regulations require that Feeding  
2 Our Future do its best to work with smaller, minority  
3 businesses, so when spending the federal dollars, that's  
4 one of the requirements. So in compliance with that, we  
5 opted for a smaller shop to do the initial audit, and  
6 that's where we were. So to remedy that, we sort of  
7 hired a second auditing company to come in and perform a  
8 second independent audit. Now, we're talking the fiscal  
9 year of 2019 keep in mind, your Honor, which had  
10 substantially smaller operating expenses and budget.  
11 That was about 2.5 to \$3 million in total spend for  
12 fiscal year 2019 because, you know, the organization was  
13 younger, newer, and smaller in participation. So that's  
14 the extent of the allegations. And again, that's --  
15 everything within Feeding Our Future's power to remedy  
16 that has been done -- is in the process of being done and  
17 will be finalized as soon as capable. So that's that.

18 Now, as the Court knows, there was a second  
19 letter called -- and again, I'll tell the Court that  
20 issue is being appealed. We have submitted our notice of  
21 appeal. We are challenging that through the  
22 administrative process. And we think that the evidence  
23 is going to show MDE has had far more egregious  
24 violations in its history that have not risen to the  
25 level of a termination of an organization. But that's

1 what the evidence will show as part of that appeal, and  
2 it need not concern the Court at this time. And we'll  
3 come back. But for now, it's gone. It's part of the  
4 administrative process and, in my mind, the relevance of  
5 this motion.

6 The second and only relevant letter is this  
7 March 31, 2020 [sic] serious deficiency letter attached  
8 as our Exhibit 1. And in that is what we've been talking  
9 about. There were a total of five allegations. The  
10 first allegation was the same one we just talked about  
11 that led to the termination of Feeding Our Future. So  
12 they have made it again for some reason in the new  
13 serious deficiency letter.

14 The other four allegations, as the Court  
15 acknowledged or noted, had nothing whatsoever to do with  
16 any particular claim. There is no allegation of  
17 suspicion, there is no allegation of fact, there is not a  
18 single site, there is not a single claim, there is not a  
19 single dollar identified that MDE has any reason to even  
20 be suspicious of, nothing. They have not identified  
21 anything to us, nothing, period. Those four complaints,  
22 not three that counsel was referencing, are vague,  
23 general, unclear to us, and apparently, according to MDE,  
24 have been lodged since January 1 of 2021. So they have  
25 been pending for several months. We have never seen

1 those complaints. We don't know what they are. We  
2 certainly don't know what factual support, if any, there  
3 may be, and we doubt very much there is any factual  
4 support for any of them. For example, one of them says  
5 that they have been told they cannot operate the Summer  
6 Food Program and instead have to do CACFP. Yeah. That's  
7 because MDE limited our summer participation. As a  
8 result, people have to participate in CACFP. It's not a  
9 complaint against us. That's a complaint against MDE  
10 arbitrarily limiting the number of people we can feed  
11 during the time of the pandemic.

12 Another one of them concerns multiple property  
13 owners expressing concerns. Now, what's happening here,  
14 your Honor, is you've got several buildings that may  
15 house different non-profit organizations. So you can  
16 imagine it as what if there's a church where the church  
17 owns the building, and then you've also got the Boy  
18 Scouts or the Girl Scouts that may come rent the building  
19 and then have their after-school programs or their  
20 programs there. If that happens, both people are using  
21 the same address to serve meals. There's nothing wrong  
22 with that in the federal regulations. There's nothing  
23 inappropriate about that at all. It happens all the  
24 time. In fact, MDE has approved dozens and dozens and  
25 dozens of places to operate out of the same address. For

1 some reason, they don't like it when our community does  
2 it. But there's nothing inappropriate about it. There's  
3 nothing in violation of the regulations about it. It's  
4 neither here nor there.

5 So I don't know what those allegations are.  
6 They have been apparently made for the last five months.  
7 I haven't seen them. I don't know what supports them. I  
8 don't know what investigation MDE has done, but it hasn't  
9 asked us anything, at least not much. So that's part of  
10 it.

11 The other thing that they complained about was  
12 we haven't updated our budget worksheet. So your Honor  
13 should be clear about this. A budget worksheet is  
14 effectively our expected budget over the proposed fiscal  
15 year. So we have a budget listing out, explaining our  
16 expected expenses through a number of categories as  
17 mandated by policy handbooks and so on. We conduct an  
18 exhaustive review of that. That's typically reviewed by  
19 our bookkeepers and CPAs. MDE's complaint is that we  
20 didn't update that. Well, you're only required to update  
21 it when you cross an MDE threshold that they are supposed  
22 to say if you grow a certain percent or add a certain  
23 number of sites, then you've crossed a threshold that  
24 requires you to update your budget. To my knowledge,  
25 they have never told us to update our budget. They have

1 not told us we've crossed a threshold. We don't know  
2 what the threshold is. But they're now saying we're  
3 seriously deficient because we didn't proactively update  
4 our budgets. Now, maybe it would be a better practice if  
5 we had updated our budget, but it's certainly not a  
6 violation of any federal regulation that I can see. They  
7 didn't site any federal regulations being in violation of  
8 the allegation.

9 The third complaint was typos, the allegation  
10 being that in our new application there were too many  
11 mistakes, that they were unable to process the  
12 application or something. I'm not really sure what the  
13 allegation was. Again, no support for it, no specificity  
14 for it, no clarity behind it. I'll note we have  
15 submitted discovery requests that are pending for over  
16 five and a half months in which we've asked these  
17 questions. And despite pending discovery requests, I  
18 have not received a single document related to this at  
19 all. So imagine my surprise that MDE is suddenly now  
20 terminating our people and withholding our money based on  
21 allegations that there are typos that they hadn't  
22 disclosed as part of the discovery process. We're still  
23 waiting on those documents.

24 The next allegation is that we failed to hire  
25 an outside bookkeeper or an accountant, again, perhaps

1 best practices, too. Feeding Our Future is in the  
2 process of doing that. We've interviewed a number of  
3 independent firms, and again, we've talked to a number of  
4 CPAs. We've interviewed them. We've met with them with  
5 the board of directors and are in the process of hiring a  
6 CPA who would be an outside consultant employed by us  
7 responsible for pursuing our -- you know, ensuring our  
8 books are properly kept. Again, though, nothing about  
9 that has a violation of any federal regulation, USDA  
10 policy, or MDE policy. And again, the first time they  
11 made that was when we submitted our annual management  
12 budget. They said, you should consider hiring an  
13 accountant. We said, we will. They then approved it.  
14 They approved our operations with the staff we had. Now  
15 all of a sudden we're being terminated, and our money is  
16 being withheld because we didn't hire an accountant. If  
17 they had wanted us to hire an accountant, they could have  
18 asked; we could have talked about it. Same with the  
19 bookkeeping, if you want us to update that, we could have  
20 talked about that. You didn't.

21 So those are the allegations, your Honor. And  
22 as the Court pointed out, not a single one pertains to a  
23 single site. This is not Feeding Our Future's  
24 \$20.5 million that's being withheld. It's our sites. It  
25 belongs to the communities. It belongs to the people

1 that have out-fronted the money, have put forth the  
2 millions of dollars to feed the tens of thousands of  
3 children. It's their money. It is not our money. It is  
4 theirs. And MDE is now withholding that without any  
5 allegation that in any way correlates to those dollars.

6 And again, the Court should understand a really  
7 important thing here. We have been operating at the same  
8 levels we have now for six, nine, twelve months, for a  
9 long time. All of a sudden, MDE for the first time in  
10 its decades-long history -- now, the federal food program  
11 was enacted in 1968. I don't know how long MDE has been  
12 operating it, but it's decades. MDE all of a sudden for  
13 the first time created a validation process. This is  
14 new. They have never -- to our knowledge, never in the  
15 history of MDE's program has it ever refused to issue  
16 payment until it goes through a painstaking process to  
17 validate a claim. And by validate a claim, they don't  
18 mean was the food served. They don't mean was the food  
19 appropriately served or was it served to needy, deserving  
20 recipients. What they mean is can you provide all of the  
21 documentation necessary that's required. This is the  
22 first time they have ever said we are going to condition  
23 a release of the funds on you validating, proving, and  
24 confirming not that you're serving the meals but that we  
25 have all the I's dotted, the T's crossed, and all the

1 documents in order. Never has that been done until now.  
2 So this whole policy, this whole practice, this whole  
3 procedure is brand new, never been done. No allegation  
4 to explain why it's being done, what specific sites  
5 they're concerned about, what dollars they're concerned  
6 about. That's not happened. It's a blanket, universal,  
7 100 percent of your money is frozen until you can  
8 validate through an entirely new process. Now, I submit  
9 to the Court that violates not only past practices but  
10 federal regulations. The way it's supposed to operate  
11 and the way it has operated across the country since 1968  
12 is that MDE does periodic spot checks. So it has annual  
13 reviews where it goes into Feeding Our Future's offices;  
14 it takes a random sampling of ten percent of our sites;  
15 it goes through those ten percent of our sites and  
16 confirms we have the menus, we have attendance records,  
17 we have what we call meal counts where we tick off and  
18 count the number of meals being served; and we have  
19 enrichment activities when they are required for some of  
20 the after school programs, and we're showing the  
21 documentation to support all the claims and that we have  
22 all of the receipts and that everything shows, everything  
23 matches up. We do that. MDE does that to us annually.  
24 We comply, and we come out just fine every time without  
25 complaint, without concern, without deficiency. Never

1 been an issue.

2 So now MDE has switched the process. They have  
3 created this entirely new process without any  
4 explanation, without any notice, without any rulemaking,  
5 without any public comment of any kind. And it is  
6 suddenly telling us that it will not release any of our  
7 funds until we validate our process. I am strongly  
8 suspicious that this has happened to two sponsors, us and  
9 another one called Partners in Nutrition. Collectively,  
10 Feeding Our Future and Partners in Nutrition are the only  
11 two sponsors that cater exclusively to the minority  
12 population. Those are the only two sponsors that have  
13 been asked, to my knowledge, to validate their claims.  
14 Discovery will show that. And maybe we'll hear evidence  
15 today that will allow us to figure that out. That's my  
16 suspicion, and I would love to hear more about it. But  
17 again, no allegations to connect the two, no federal law  
18 that allows it, no regulation that allows a validation  
19 process before paying the claims.

20 So again, where we sit now is, because that  
21 money has been frozen, we are talking about thousands and  
22 thousands of children this morning and this evening that  
23 will not get fed. And if the Court denies our motion and  
24 MDE is allowed to withhold our money without even so much  
25 as an allegation, 45,000 children every day starting next

1 week will go without food. Feeding Our Future and all of  
2 its community participants that are non-profit  
3 organizations, they will go bankrupt. They owe  
4 collectively about \$20 million to food vendors. Without  
5 that money that the federal government promised, they  
6 cannot support their communities. They cannot pay their  
7 providers. They cannot pay their employees. They cannot  
8 continue to operate.

9 So with the Court's permission, I would like to  
10 talk just a little about bit about the law because I do  
11 think it's incredibly important. So again, first of all  
12 is the history, how this has always worked. And again,  
13 what happens is we submit our claims; we get paid for our  
14 claims. That's what happened in January, in February and  
15 in March and in April -- I'm sorry, in January and  
16 February. Then all of a sudden March 31 we're given a  
17 notice that says we've changed everything; we are not  
18 going to pay your claims; we're going to create a new  
19 process for you guys before we'll allow your claims to be  
20 paid, no rulemaking, no comment, no notice. The first  
21 time we got notice, your Honor, was April 15, two days  
22 after we filed our motion, two weeks after we got the  
23 suspension notice. Two weeks was the first time MDE said  
24 we've been holding your money for two weeks now. Now  
25 we're going to tell you -- because you filed a motion to

1 hold us in contempt of court and for a restraining order,  
2 now we're going to tell you how you can come off it; now  
3 we're going to tell you some process that we think is a  
4 reasonable, workable process. First time, two days after  
5 we filed our motion, two weeks after the letter, that's  
6 when they told us here are the documents we would like  
7 you to provide. And as counsel noted, it's 155  
8 documents, which consist in some cases of hundreds of  
9 pages. It's thousands and thousands of documents where  
10 it has a menu and dozens and dozens of receipts and  
11 children's attendance records and enrichment activities.  
12 And I can only imagine how much time it's going to take  
13 MDE to go through, cross-reference, and determine what it  
14 considers a valid claim and what it considers a claim  
15 which may have some paperwork missing or some paperwork  
16 deficiency within the tens of thousands of pages we're  
17 producing. And the reason I can only imagine it is  
18 because, despite our repeated requests, they have  
19 remained absolutely silent on what they're doing with  
20 that information, how long it's going to take, and when  
21 we may get this money.

22 Now, that's been the historic practice. As  
23 you've seen, there's a USDA 2002 policy memo that makes  
24 very plain how this works. And if the Court has had the  
25 opportunity to review that, it does say the only time in

1 which a state agency can withhold funds is on an  
2 allegation of knowingly submitting a fraudulent claim, a  
3 hearing on that, and a determination by a fair hearing  
4 officer by a preponderance of the evidence that there was  
5 in fact a knowing submission of a fraudulent or wrongful  
6 claim. Those are the only times MDE is allowed to  
7 withhold funds, period. That's it. That's USDA policy.  
8 MDE has again not made those allegations, they certainly  
9 have not given us a chance to respond, they certainly  
10 have not gone forward with a fair hearing, and there most  
11 certainly is not a preponderance of the evidence that any  
12 of our claims are even mistaken, much less knowingly  
13 fraudulent.

14 So that's the USDA policy.

15 In response to that, MDE says, yeah, we know  
16 we're violating the policy, but it's just a policy, so  
17 we're cool to violate it. Instead, they're looking in a  
18 footnote. They say, let's look at 2 CFR § 200.339.  
19 That's the regulation that they cite. That's a general  
20 regulation applicable to how federal grants are to be  
21 distributed and what the requirements are.

22 Several points to note about that. That  
23 regulation says absolutely nothing about the ability to  
24 withhold federal grants based on an unexpressed  
25 suspicion. That regulation does not allow MDE to

1 withhold \$20.5 million because it wants to create an  
2 entirely new validation process that violates 50 years of  
3 history, violates federal regulation, violates MDE  
4 policy. It doesn't allow that. What it says is, if  
5 there are violations of federal rules, the agency can  
6 impose additional conditions to payment. They're  
7 entitled to impose additional conditions. Those  
8 additional conditions are spelled out in the regulations.  
9 MDE has not done that. MDE has not availed itself of any  
10 right they may have to impose additional conditions.

11 Now, the regulation also says that if any --

12 THE COURT: Cite the regulation number again.

13 MR. WATKINS: 2 CFR § 200.339.

14 THE COURT: Okay.

15 MR. WATKINS: There's a typo or two in MDE's  
16 brief where they call it 399, but it's 339. And again,  
17 that's quoted in our reply brief as well, your Honor.  
18 You'll see the block quote. The only part we've omitted  
19 from our block quote is options B, C, D, and so on. We  
20 felt the only applicable one was option A, so the  
21 explicit text is in our reply brief.

22 In any event, your Honor, that, again, makes  
23 very clear that the only time MDE can withhold money is  
24 when they make a determination that there is  
25 noncompliance with the federal regulations that cannot be

1 remedied by the imposition of additional conditions. So  
2 there has to be the case that, look, it's not a  
3 remediable issue. Nothing we can do in terms of these  
4 conditions can remedy the violation; therefore, you can  
5 withhold money if it's not possible to correct any issue,  
6 but again, it has to be under the regulation, the  
7 condition that the noncompliance cannot be remedied. And  
8 that's the explicit language of the reg. It says that  
9 MDE must, quote, determine that noncompliance cannot be  
10 remedied by imposing additional conditions. That's the  
11 pre-condition to withholding any federal funds of any  
12 kind.

13 So in this case what are the violations and how  
14 is it that MDE could possibly say they cannot be remedied  
15 by additional conditions? If you read MDE's serious  
16 deficiency letter and if you read MDE's brief, they are  
17 explicitly telling the Court and telling us, as  
18 Ms. Nogosek just said, these can be remedied. We can  
19 release the funds. She just said we have a viable  
20 procedure, which is to allow us to validate the claims,  
21 and then they're happy to at some point in the late  
22 future conceive of, possibly produce and release the  
23 money.

24 THE COURT: So your position is then that, to  
25 the extent MDE's position is valid, they have not yet

1 reached the point at which the regulations would allow  
2 them to withhold funds?

3 MR. WATKINS: I would have said it more  
4 harshly, but that's a generous way of phrasing it.  
5 Correct, your Honor. And then --

6 THE COURT: There's a distinction between our  
7 two roles of processing.

8 MR. WATKINS: I think you're better for it,  
9 your Honor. I'm not in the mindset today where I can be  
10 charitable in my language as I should be and ordinarily  
11 would be. But you're exactly right, your Honor. And I  
12 think the other part that needs to be considered here is  
13 that they cannot get there. It's not just that they  
14 haven't gotten there. It's that the nature of the  
15 allegations make it impossible to get there. So the  
16 allegation isn't we think there's some noncompliance that  
17 you are not going to remedy. The allegation is we're  
18 suspicious for reasons we have not articulated about an  
19 issue that we have not specified. That is not a  
20 violation. So because they're withholding the money, the  
21 idea is we're holding money because you haven't  
22 sufficiently demonstrated the validity of the claims.  
23 You've complied with every federal regulation that's  
24 applicable to the demonstration of their validity, but  
25 we're still not satisfied. And I'll query why they're

1 not satisfied with our claims but they are with everybody  
2 else's, but that's for another day.

3 Today the position from MDE is simple. We  
4 would like more information. We are suspicious for  
5 reasons we are not going to articulate about claims we  
6 will not identify, so provide an entire -- for all of  
7 your claims, provide every sheet of paper that the U.S.  
8 Government requires you to keep. So they cannot get to  
9 the point at which they would say additional conditions  
10 preclude or make it impossible to correct the issue  
11 because they haven't identified the issue. They haven't  
12 given us the opportunity to even demonstrate the validity  
13 of our claims yet. So if they wanted to do this, what  
14 they should have done is gone through the rulemaking  
15 process and said, you know what, here's how we're going  
16 to run the food program in Minnesota. We're not going to  
17 release funds until you go through a claim validation  
18 process. They should have provided comment, they should  
19 have given us the opportunity to respond, and then they  
20 should have uniformly applied that to all sponsors, not  
21 just those who serve a certain community. It should have  
22 been for everybody. The same rules should apply to  
23 absolutely everybody.

24 But anyway, our point, your Honor, is the law  
25 is very clear. You have a very specific USDA policy memo

1 that says no, no, no, no, no, you cannot withhold funds  
2 in this circumstance. You then have a generally  
3 applicable federal regulation that's not about the food  
4 program. It's about all federal grants and all federal  
5 funding. I can see, your Honor, that it applies to  
6 Feeding Our Future. It does apply to the food program.  
7 But it is not a food program specific regulation. So  
8 USDA, who is responsible for administering the program,  
9 is aware of that regulation obviously, and it has adopted  
10 its policy position notwithstanding that regulation. So  
11 our view is the more specific policy statement governs  
12 regardless. But second of all, the plain language of  
13 200 -- I'm sorry, of 2 CFR § 200.339, the plain language  
14 of that regulation says only when there's a determination  
15 that noncompliance cannot be rendered. How could you  
16 possibly have that when allegations haven't been made,  
17 the opportunity to show compliance has not been offered,  
18 and counsel starts this hearing by saying we've got a  
19 workable situation that allows for this to be rendered?  
20 It's completely inconsistent.

21 THE COURT: I would like you -- because we've  
22 been going for some time, one of the primary thrusts of  
23 the department's position is that I don't have any  
24 jurisdiction.

25 MR. WATKINS: Yeah.

1 THE COURT: They rightfully point out that the  
2 underlying lawsuit, which is the only source of  
3 jurisdiction that I have, complains solely about the  
4 application process, the processing of applications, the  
5 selectiveness in the processing of applications so as to  
6 discriminate against minorities in violation of the  
7 Minnesota Human Rights Act. Each cause of action in the  
8 complaint is couched in terms of the application process.  
9 So even if I assume that everything you're saying is  
10 correct, at this stage today, what right do I have to do  
11 anything unless I find that they are impeding the ability  
12 of your client to submit applications? And it looks like  
13 you are alleging that, too. They have shut you out of  
14 that. And to be honest, Ms. Nogosek, to the extent you  
15 are doing that, you're violating my order, and I would  
16 find you in contempt. But I'll give you a chance to  
17 address that. You have no right to stop them or prevent  
18 them from applying from anything because there's an order  
19 that says you can't do that. And if you wanted to do  
20 that, your only choice would have been to come to me, and  
21 you didn't do that.

22 But in terms of releasing money, that's outside  
23 the application process.

24 So, Mr. Watkins, address that, but then I want  
25 to turn it over to Ms. Nogosek because we have time

1 issues.

2 MR. WATKINS: I apologize, your Honor. I was  
3 going on a bit.

4 So with respect to that particular issue, to  
5 me, the Minnesota Supreme Court has been very clear we're  
6 talking about notice pleadings, period. The question for  
7 injunctions is whether or not you can preserve the status  
8 quo of the parties such that the litigation can proceed.  
9 It doesn't have to be a specific cause of action  
10 identified in the complaint. We will be amending the  
11 complaint. We will be moving to amend the complaint to  
12 add additional claims, and we are in the process of doing  
13 that, and we expect to have something filed this week.

14 But setting that aside, with the complaint as  
15 it stands now, the allegations were not limited to the  
16 application process. The specific claims were -- the  
17 general claim was, has always been, the gravamen of the  
18 complaint is you treat us differently because of who we  
19 serve. That should have become abundantly clear through  
20 that proceeding because we go through and list, explain  
21 who we are, who we serve, why we serve them, how we serve  
22 them and so on. The allegation was always you treat us  
23 differently. That's why we filed the access to human  
24 rights claim. That's why we brought all of our claims,  
25 tortious interference of business. They are all driven

1 in that context of discrimination against this particular  
2 segment of the community.

3 Now, I don't read the case law the way that MDE  
4 does. I don't think there's anything that requires that  
5 specific of an allegation. And again, the concern that  
6 I've got is you're elevating four modes of service. To  
7 require us to first file a second complaint to allege the  
8 new conduct, that really is just a change in tactic.  
9 First, you're not letting us apply. When the court says,  
10 no, you have to let us apply, then they approve us  
11 because they have to approve us. Then all of a sudden  
12 they say, well, you know what, we're not going to pay,  
13 how is that? That's exactly the same conduct by a  
14 different name, and it's absolutely the gravamen of what  
15 we've complained. And without the injunction -- and I've  
16 got Ms. Bock here to testify -- Feeding Our Future will  
17 go bankrupt. Its employees will lose their jobs. If  
18 their sites will close, their children will starve,  
19 period. We cannot progress this litigation. Our  
20 interest in this lawsuit cannot be protected without an  
21 injunction that allows us to continue serving the  
22 children that we've been serving and allows us to get the  
23 money that we've had. So I don't read anything in the  
24 state or federal law that is requiring so narrow an  
25 interpretation of the complaint or of such a direct

1 mapping of the complaint to the issues in the injunction.  
2 Nothing they've cited says you have to move to amend your  
3 complaint before you bring a TRO, nothing close to that.  
4 It just says it has to preserve the issues so that the  
5 liti- -- it has to be germane to the litigation so the  
6 interests of the parties can be protected. The point of  
7 the injunction is to protect our interests, and without  
8 it our interests can't be protected. That's the point.

9 And I don't know if the Court is interested,  
10 but just very quickly, there was an allegation we failed  
11 to exhaust administrative remedies. I would like to add  
12 to our reply brief that there is in fact also a federal  
13 regulation, as is pointed out to me by Ms. Bock, that  
14 makes very clear that -- it's 7 CFR 226.6(k)(3)(ii). So  
15 that's 226.6(k)(3)(ii). That specific regulation, as we  
16 pointed out -- well, we point it out in our reply brief  
17 as we're not entitled to appeal a serious deficiency.  
18 That regulation confirms that, as does USDA's handbook as  
19 well.

20 So with that, your Honor, if that answers your  
21 question, I will yield time.

22 THE COURT: Well, if you're not entitled to an  
23 administrative appeal, does that necessarily mean that  
24 you are entitled to go to court?

25 MR. WATKINS: Yes. It means that the

1 exhaustion of administrative remedy --

2 THE COURT: It's an impediment. I got that.

3 Okay.

4 Ms. Nogosek. You're muted. You've got Zoom  
5 fever.

6 MS. NOGOSEK: There we go. Your Honor, about  
7 how much time do I have so that I can use my time wisely?

8 THE COURT: What do you want?

9 MS. NOGOSEK: Oh, I'm sorry. I was just  
10 thinking maybe you had another hearing at 3:00.

11 THE COURT: I don't.

12 MS. NOGOSEK: Okay.

13 THE COURT: But I usually carefully guard my  
14 schedule for reasons apparent in your question.

15 MS. NOGOSEK: Well, your Honor --

16 THE COURT: Maybe I should never let  
17 Mr. Watkins go first.

18 MS. NOGOSEK: I ask because there are several  
19 things that I do have to take your time and correct that  
20 Mr. Watkins has provided the Court. And some have to do  
21 with the law, and some have to do with the facts. So I'm  
22 going to start with the facts because I think that's  
23 where Mr. Watkins started. And so I'm going to walk  
24 through his recitation of the facts and MDE's recitation  
25 of the facts.

1                   So this did not just start happening two weeks  
2                   ago. It is important to understand that MDE sent the  
3                   first deficiency letter to Feeding Our Future back on  
4                   January 15. Feeding Our Future has been in serious  
5                   deficiency status for over three months. The first two  
6                   items were relatively, you know, not as -- not as  
7                   important as the performance standards, but it had to do  
8                   with important management and financial aspects of  
9                   running a USDA program. One is that federal regulations  
10                  require that Feeding Our Future be a tax exempt status.  
11                  It's right there in the federal regulations. And MDE  
12                  learned that, based on the information on the IRS's  
13                  website, that Feeding Our Future lost its status back in  
14                  February of 2020. That is extremely important because it  
15                  wasn't until May of 2020 that Feeding Our Future  
16                  submitted an application to be a sponsor under the Summer  
17                  Food Program and certified it was tax exempt, and not  
18                  only certified it was tax exempt but provided the  
19                  Department of Education the tax exempt letter from the  
20                  IRS. So irrespective of whether this was some error on  
21                  behalf of the IRS that wasn't corrected until December 1  
22                  of 2020, Feeding Our Future should have told MDE that its  
23                  status had lapsed for either the reason that it failed to  
24                  file the Form 900 series for three years in a row or  
25                  someone at IRS hit the wrong -- hit the wrong button.

1 That's not what Feeding Our Future did. It submitted a  
2 false application to MDE.

3 That's number one.

4 Number two is this audit. And it's important,  
5 and Mr. Watkins admitted, that the federal regulations  
6 required that the audit be completed by a CPA. MDE  
7 because of the form of the audit that was provided by  
8 Feeding Our Future, because it didn't indicate that  
9 either the account -- the company was registered or  
10 licensed by the Minnesota Board of Accountancy or that  
11 the actual individual that signed was a CPA, went to the  
12 website for the Minnesota Board of Accountancy. It's  
13 really easy to see who is licensed in Minnesota as an  
14 accountant. Neither the company nor the individual that  
15 signed that audit is a licensed accountant -- or a  
16 licensed accounting firm in the State of Minnesota. And  
17 that is one of the reasons why the serious deficiency  
18 went out. Feeding Our Future had an opportunity to  
19 correct its serious deficiency. So after the letter went  
20 out, there was some back and forth with MDE and Feeding  
21 Our Future to try to correct the serious deficiencies  
22 that were set forth in the January 15 letter because MDE  
23 wants Feeding Our Future to continue to be able to  
24 provide the services that it does in these communities.  
25 But Feeding Our Future has to do it in a way that

1 complies with the federal regulations. There's no way  
2 around that. And Feeding Our Future first said here's my  
3 letter from the IRS dated December 1, 2020 that says,  
4 hey, you've been reinstated; your tax exempt status has  
5 been reinstated. Okay? So we've taken care of that.  
6 Then, because MDE wasn't able to make sure that the  
7 individual or the accountant -- company that did the  
8 audit was licensed in Minnesota, there could be a  
9 possibility that the company is licensed in some other  
10 state. Well, all MDE asked was provide us with  
11 information, give us the number for that company, and  
12 we'll just call, and we can straighten it out, or you  
13 provide us that information. And what happens is Feeding  
14 Our Future doesn't help itself so that MDE can help it.  
15 It simply shut down, which ended up, because the serious  
16 deficiency wasn't corrected, there's now termination  
17 proceedings.

18 And so after the serious deficiency wasn't  
19 completed or wasn't corrected by the date in the letter,  
20 MDE by federal regulations is required to propose  
21 termination. That process has started. Termination is  
22 not done. It is a complete misstatement of the facts to  
23 say that Feeding Our Future has had its sponsorship  
24 agreement terminated or that either Ms. Bock or the chair  
25 of Feeding Our Future's board of directors, I believe his

1 last name is Stayberg, has been put on some national  
2 disqualification list. That is not true. There is a  
3 process. There has been a proposal to terminate because  
4 of the two issues raised in the January 15 letter.

5 THE COURT: Hold on.

6 MS. NOGOSEK: Feeding Our Future --

7 THE COURT: Hold on. Before you go further,  
8 you've indicated that issue number one in the January 15  
9 letter is now resolved and done with. The second issue  
10 involves the audit. Were you aware before today what  
11 Mr. Watkins said about --

12 MS. NOGOSEK: No.

13 THE COURT: -- the auditor? So you didn't know  
14 that the person was a CPA and was unavailable to complete  
15 this filing and they had to start from scratch? No  
16 one -- had they told you that?

17 MS. NOGOSEK: No, your Honor. No. And we  
18 still don't -- if the auditor is licensed as a CPA in  
19 some state, we don't know what state that is because we  
20 haven't been told, nor were we told before today's  
21 hearing that, for whatever reason, Feeding Our Future has  
22 enlisted another CPA to complete the audit.

23 THE COURT: And I would guess that's because a  
24 new CPA probably wouldn't agree to sign off on somebody  
25 else's work without redoing the work.

1 My deceased father was a CPA and was the  
2 president of the Minnesota Society of CPAs, and I can  
3 tell you that he wouldn't have done such a thing, so  
4 they --

5 MS. NOGOSEK: Right.

6 THE COURT: So if your CPA leaves the country  
7 for whatever reason and can't be reached to provide his  
8 qualifications and to submit his audit in the proper  
9 electronic format, they have no choice but to start from  
10 scratch. But, obviously, it would be incumbent upon  
11 Feeding Our Future to tell you that to determine --

12 And, Mr. Watkins, you claim that you did.

13 MR. WATKINS: I was about to, your Honor, yes.  
14 And so for one minute --

15 THE COURT: Really fast because this is  
16 Ms. Nogosek's time.

17 MR. WATKINS: I appreciate it, your Honor.

18 Just really quickly, we did not hear any  
19 concerns from MDE about any potential CPA licensing of  
20 that individual. This is the first I've ever heard of  
21 it. I've seen no documents about it. What happened is  
22 we --

23 THE COURT: Well, she said it's in the  
24 January 15 letter.

25 MR. WATKINS: It certainly doesn't say they're

1 concerned that he may not be a CPA, to my knowledge. We  
2 can look at it, but it's neither here nor there because  
3 that issue was resolved in part of the termination  
4 proceeding.

5 But I did just want to inform the Court that  
6 what Feeding Our Future did is we did tell MDE. We sent  
7 them a letter, and we provided all this information in  
8 the letter. They responded by saying they never got the  
9 letter. And then we provided a second supplement, I  
10 think it was recently, explaining all this again. But  
11 that's neither here nor there, but that's the record,  
12 your Honor.

13 THE COURT: Okay.

14 Go ahead, Ms. Nogosek.

15 MS. NOGOSEK: And, your Honor, it's important  
16 to understand that once Feeding Our Future got into a  
17 serious deficiency status on these two issues, it's not  
18 enough under the federal regulations just for Feeding Our  
19 Future to say, here, as of January 1, 2020, our tax  
20 exempt status has been reinstated, or here, we've now  
21 provided this new audit by a new CPA firm. What's  
22 required is that there is a corrective action plan that  
23 is provided to MDE that shows that Feeding Our Future has  
24 put into place procedures to make sure that a deficiency  
25 of this nature doesn't happen in the future. So you

1 can't just --

2 THE COURT: So your plan might be a document  
3 that says "Employee Jane Doe will be responsible for  
4 checking our tax exempt status every December"?

5 MS. NOGOSEK: Exactly.

6 THE COURT: Okay.

7 MS. NOGOSEK: Something like that. So that is  
8 dealing with the January 15 deficiencies.

9 Like I said, that is in an administrative  
10 appeal process. There is an appeal of the proposal to  
11 terminate that Feeding Our Future has filed. There will  
12 be a hearing in front of a, I believe, a three-person  
13 appeal panel. And either the appeal panel will uphold  
14 and have the agreement terminated or will say, no,  
15 whatever Feeding Our Future has done is sufficient and  
16 there's going to be no termination. It's not until there  
17 is a termination that is appealed to the Court of Appeals  
18 and is affirmed where the issues of the serious  
19 deficiency letter become final and the terminations  
20 become final.

21 THE COURT: So I guess --

22 MS. NOGOSEK: So there is --

23 THE COURT: I guess the real issue is, as they  
24 have posed it, is what right do you have to stop these  
25 reimbursements while the appeal process is ongoing?

1 MS. NOGOSEK: Right. Well, your Honor, let --  
2 I'll get to that.

3 So we've got a second deficiency letter. Has  
4 nothing to do with the first deficiency letter, although  
5 some of the issues raised in that deficiency letter show  
6 that Feeding Our Future is not meeting the performance  
7 standard. Performance standard, one of the components is  
8 financial management and viability. Okay? A company  
9 that is not watching its tax exempt status and is not  
10 filing timely an audit done by a CPA or providing enough  
11 information to show that the auditor is a CPA isn't  
12 meeting that number one performance standard.

13 The performance standards one, two, and three,  
14 they are set out in the March 31 letter. The ones that  
15 are really important and what is important to understand  
16 is those performance standards form the basis of the  
17 sponsorship agreement. So in its sponsorship agreement  
18 in every application that Feeding Our Future files with  
19 MDE, it is certifying that it is in compliance with the  
20 performance standards. The performance standards are  
21 part of the regulations. The citation to the CFR is in  
22 the department's brief. But they are the bare minimum of  
23 what a sponsor must do to operate a USDA food program  
24 under CACFP or Summer Food Program.

25 What is at issue here is the federal

1 regulations that apply to a serious deficiency. Now,  
2 when there is a false or fraudulent claim or there is  
3 imminent harm to a child, those are the two instances  
4 where, under the federal regulation, the state agency, so  
5 in this -- you know, MDE can suspend payment. And what  
6 that means, and you look at the 2002 letter for how USDA  
7 defines suspension of payment. And in those two  
8 instances, what happens is no claims are processed or  
9 paid while the sponsor is in deficiency status. In this  
10 case, there are not those two instances that has led MDE  
11 to do this stop pay. Instead -- and this is also  
12 supported by the federal regulations but also by that  
13 2002 letter, because what that letter says is that while  
14 the state agency cannot suspend payment, and it has to  
15 continue to pay valid claims, so there is a pro --  
16 there's a mandatory direction to MDE to pay valid claims  
17 and a specific prohibition from paying invalid claims.  
18 So what MDE has --

19 Were you going to ask a question, your Honor?

20 THE COURT: I just opened my mouth. I didn't  
21 even say anything. That's pretty good.

22 I didn't see anything in either deficiency  
23 letter indicating that there was an invalid claim.

24 MS. NOGOSEK: Okay. So going back again,  
25 your Honor, to what I pointed out before is -- well, and

1 before I go to the facts, your Honor, I want to address  
2 what I think is a mischaracterization of the law, because  
3 if the -- the right of MDE, or it's not even a right,  
4 your Honor. It's really an obligation of MDE as the --  
5 as kind of the regulator -- regulatory agency for this  
6 program once a company is in deficiency status to make  
7 sure it does not pay invalid claims. And the only way  
8 MDE can know whether a claim is valid or invalid is to  
9 have the sponsor provide the validation documentation.

10 THE COURT: Right. But the regulation doesn't  
11 allow you to withhold payment while you're seeking that  
12 information because 2 CFR § 200.339 doesn't list that as  
13 a basis not to pay. So what am I missing?

14 MS. NOGOSEK: Your Honor, I think what you're  
15 missing -- and I need to pull up this statute, the  
16 regulation -- is the 200.339 allows withholding of  
17 payment if there's not other conditions that could be  
18 implemented. And those other conditions are set forth in  
19 2 CFR § 200.208. That regulation is specifically  
20 referenced in 200.339. And one of those additional  
21 specific conditions is establishing additional prior  
22 approvals. So by having Feeding Our Future provide just,  
23 you know, three documents for each claim, that is the  
24 additional prior approval that MDE can go through to make  
25 sure it is paying valid claims and not paying invalid

1 claims.

2 THE COURT: Right. But that reference doesn't  
3 allow you to stop paying while those additional  
4 conditions are being imposed and complied with. Yes, you  
5 can establish additional conditions, but you can only  
6 stop paying if those additional conditions cannot -- if  
7 the deficiencies cannot be remedied by imposing those  
8 additional conditions. You can't impose the additional  
9 conditions and stop paying before you determine that  
10 those additional conditions won't work. You've put the  
11 cart before the horse.

12 MS. NOGOSEK: Your Honor, absent the validation  
13 documentation, which is by the regulations, and the  
14 citation is set forth in the brief -- I think I wrote  
15 it -- jotted it down here. It's 7 CFR § 226.10. That  
16 says that in submitting a claim, the institution, so  
17 Feeding Our Future, certifies the claim is correct and  
18 that, quote, records are available to support that claim.

19 THE COURT: Absolutely. And the criticism that  
20 you got during Mr. Watkins' time was that you've imposed  
21 a new system for conducting a validation that didn't  
22 previously exist. It's clear to me that you are  
23 supporting the imposition of that by citing  
24 2 CFR § 200.208, which allows you to establish these  
25 additional conditions and establish them only as to the

1 agency that you feel has the violation. So that would  
2 address the discriminatory claim that's been made that  
3 you only are imposing additional conditions against the  
4 agency that isn't following the rules, so you impose  
5 those additional conditions. But again, what you're  
6 saying doesn't address what the Code of Federal  
7 Regulations says, is that you can't stop payment while  
8 those additional conditions are being complied with. You  
9 can only stop payment if you determine that the  
10 additional conditions are insufficient to address the  
11 issue, which you can't do until they have been given a  
12 chance to comply because you don't know the answer yet.  
13 And I'm reading -- I got the regulation right in front of  
14 me.

15 MS. NOGOSEK: Your Honor, I want to while I  
16 have it on my mind here correct another misstatement by  
17 Feeding Our Future. Feeding Our Future is not the first,  
18 it's not the only right now, and it's probably not the  
19 last sponsor who has the stop pay put on their claims and  
20 CLiCS to allow the validation process to go forward.

21 THE COURT: Well, that --

22 MS. NOGOSEK: There's --

23 THE COURT: That doesn't help me because, you  
24 know, they're not before me. And just because you've  
25 done something doesn't make it right. I can only

1 consider a case that's in front of me based on what I  
2 see. And I mean, do you dispute my reading of the  
3 regulation? Right after the citation of 200.208, the  
4 very next sentence says you can't stop payment unless  
5 this determination gets made. And you haven't made it.  
6 You stopped payment first and then asked your questions.

7 MS. NOGOSEK: Well, your Honor, then this  
8 brings me to another couple very important points in the  
9 federal regulations. Okay? And one of them is that at  
10 7 CFR § 226.7(k), it specifically says valid claims are  
11 to be paid within 45 days of receipt. There are  
12 currently no claims pending at MDE that are 45 days from  
13 the date that Feeding Our Future uploaded them into  
14 CLiCS. So if the Court is concerned that MDE cannot stop  
15 payment, then as part of the valid claim, the 45-day  
16 processing, Feeding Our Future should continue to upload  
17 the documentation, and valid claims will be paid within  
18 45 days.

19 Now, the other thing I do want to address,  
20 your Honor, is that --

21 THE COURT: This is all so simple.

22 MS. NOGOSEK: And, you know, I -- it's kind of  
23 funny, because Mr. Watkins has such a severe reaction,  
24 and I am saying to the Court this is very simple. There  
25 are a set of regulations that Feeding Our Future and MDE

1 must comply with. They are not easy, and they are not  
2 simple, but you must comply with them. You must make  
3 sure you're a tax exempt status -- tax exempt  
4 organization. You have to upload your annual audit.  
5 That audit has to be done by a CPA. When you submit a  
6 claim, you have to make sure that you have the underlying  
7 documentation. When MDE says, hey, you're in serious  
8 deficiency, we're concerned about this, instead of  
9 fighting with MDE -- because this isn't where MDE wants  
10 to be. Feeding Our Future doesn't want to cooperate and  
11 provide what needs to be provided. And if -- honestly,  
12 if Feeding Our Future -- and keep in mind, your Honor, I  
13 keep pointing back, and I put the Court back in the part  
14 of the declaration where MDE has gone to the USDA and has  
15 gotten the advice of the USDA to do exactly what MDE is  
16 doing. Now, if MDE doesn't do what the USDA says MDE  
17 should be doing according to the regulations and  
18 according to the regulations that apply to MDE, MDE --  
19 I'm sorry, USDA may not give the money to MDE to pay  
20 these funds out --

21 THE COURT: Well --

22 MS. NOGOSEK: -- to Feeding Our Future.

23 THE COURT: -- you don't have to worry about  
24 that, because if, hypothetically, I were to issue an  
25 order, then I would be happy to provide you with cover.

1 MS. NOGOSEK: Well --

2 THE COURT: I've got to be good for something.

3 MS. NOGOSEK: -- you know, keep in mind,  
4 your Honor, the allegation that MDE is sitting on  
5 \$20.5 million that it's refusing to let out of its bank  
6 accounts isn't accurate either, because what happens is  
7 MDE pays the money up front and then seeks reimbursement  
8 from USDA. That's -- ultimately, all of these funds are  
9 going to be paid by the Federal Government, and that  
10 regulation system they apply -- there's oversight by USDA  
11 on MDE, and then MDE has oversight over Feeding Our  
12 Future, and then, ultimately, Feeding Our Future has  
13 oversight on the site's operators.

14 THE COURT: With regard to that 45 days, does  
15 the MDE typically pay sooner than 45 days? So  
16 Mr. Watkins appears to have an expectation that this  
17 would have been paid already, and you're saying, well, we  
18 haven't even taken the time that we can get. So do you  
19 typically reimburse sooner than 45 days, which is why we  
20 have a gap?

21 MS. NOGOSEK: Yes, your Honor. I think it  
22 would be accurate to say that MDE typically pays before  
23 the 45 days. But it's also important for the Court to  
24 understand that part of the performance standards, the  
25 first one, the financial viability is that if there is a

1 delay in having your claims paid by the state agency,  
2 that the sponsor can continue to function. This is part  
3 of MDE's concerns with Feeding Our Future is that there  
4 is this lack of financial viability, that it has really  
5 overextended itself and is in violation of a lot of  
6 different regulations that governs its operations. This  
7 is just one of them, this financial viability, financial  
8 management. There's other issues.

9 And it's very concerning, your Honor, when MDE  
10 receives calls from three site operators, three  
11 organizations that MDE says it's trying -- or that  
12 Feeding Our Future says it's trying to protect here  
13 today. Those operators are saying to MDE that we haven't  
14 provided any meals, but then MDE looks, and Feeding Our  
15 Future has been paid for meals that were allegedly  
16 provided at that site, that organizations have been  
17 trained under the Summer Food Program, but Feeding Our  
18 Future is submitting claims for reimbursement under  
19 CACFP. Those two programs do not have the same  
20 regulatory framework, and there's different conditions  
21 that have to be met in order to be paid.

22 THE COURT: Right.

23 MS. NOGOSEK: These --

24 THE COURT: But assuming the truth of all that,  
25 you still can't stop paying unless 2 CFR § 200.339 has

1 been met. Is that true, or is there a different  
2 regulation that allows you to cut them off while this  
3 investigation of those complaints takes place?

4 MS. NOGOSEK: Your Honor, there's nothing in  
5 the regulations that prohibit the state agency from  
6 asking for the documents that are supposed to already be  
7 available to support a claim before it pays a claim.

8 THE COURT: Well, doesn't --

9 MS. NOGOSEK: There's no --

10 THE COURT: This regulation seems to prohibit  
11 you from doing that. It says when you can, and if it  
12 doesn't say -- if it doesn't qualify under that, then you  
13 can't.

14 MS. NOGOSEK: Your Honor, are you referring to  
15 .339 and not .208?

16 THE COURT: .208 allows you to impose  
17 additional conditions.

18 MS. NOGOSEK: Yes.

19 THE COURT: Are you claiming that .208 --  
20 within the four corners of .208 has a separate  
21 authorization to withhold payments?

22 MS. NOGOSEK: No. And, your Honor, again, the  
23 Department of Education is not refusing to pay valid  
24 claims. It has simply, as allowed under 200.308 [sic]  
25 for the noncompliance, impose the -- and I've lost my

1 place here, your Honor.

2 THE COURT: Well, you said .308. It's .208.

3 MS. NOGOSEK: Yeah.

4 THE COURT: And you imposed additional  
5 conditions. Okay. Fine and good. But that regulation  
6 doesn't allow you to temporarily withhold payments while  
7 you're processing those additional conditions. You  
8 haven't argued that today. You haven't claimed that in  
9 your briefs. And the regulation doesn't say that you can  
10 do that. In fact, it only --

11 MS. NOGOSEK: Your Honor --

12 THE COURT: You can only do that if a  
13 determination is made that these additional conditions  
14 cannot remedy the problem, which you don't know yet  
15 because they're in the process of complying with those  
16 conditions. What am I missing?

17 MS. NOGOSEK: Your Honor, I think -- well, how  
18 I view this is -- so maybe I'm missing something. I  
19 don't want to say the Court is missing anything,  
20 your Honor, but --

21 THE COURT: I've invited it.

22 MS. NOGOSEK: If the federal regulations  
23 prohibits -- and it specifically says, your Honor,  
24 prohibits MDE from paying invalid claims, how can MDE not  
25 be able to require additional conditions in the claim

1 processing to determine whether or not it's paying valid  
2 or invalid claims?

3 THE COURT: Because the regulations say you  
4 can't. So if the claims are valid based on the currently  
5 existing conditions but you have reason to believe that  
6 there are problems with compliance, then the regulations  
7 allow you to impose additional conditions. And only if  
8 those additional conditions don't remedy the problem you  
9 suspect exists can you temporarily stop or permanently  
10 stop the payments under the regulation that everyone  
11 agrees applies.

12 MS. NOGOSEK: Your Honor, and I guess -- well,  
13 two things. Number one, the letter dated 2002, that USDA  
14 guidance specifically says it does not have the force and  
15 effect of law. We are --

16 THE COURT: I know that, but --

17 MS. NOGOSEK: Okay.

18 THE COURT: I'm just reading the regulation.  
19 The letter appears consistent with the regulation. And  
20 it's obvious from the letter where they got that idea.  
21 It's in the regulation. But the regulation isn't vague.  
22 I didn't -- you know, and people ask questions of the  
23 USDA all the time "does this really mean what it seems to  
24 say it means?" And the USDA said, yeah, it means what it  
25 says. So I just read it. It seems to mean what it says.

1 You haven't claimed that it doesn't mean what it says.

2 MS. NOGOSEK: Your Honor, I guess I am claiming  
3 that it doesn't -- or that I don't interpret .339 to say  
4 the same thing that the Court believes it says.

5 THE COURT: Well, where does it --

6 MS. NOGOSEK: When I look at --

7 THE COURT: Where does it say you can  
8 temporarily withhold payments even if the agency hasn't  
9 yet been given a chance to comply with the additional  
10 conditions? Where does --

11 MS. NOGOSEK: Feeding Our Future --

12 THE COURT: -- it say that?

13 MS. NOGOSEK: Sure. Feeding Our Future is  
14 being given the opportunity to comply with the additional  
15 condition of providing the documents that it has  
16 certified it has.

17 THE COURT: Okay.

18 MS. NOGOSEK: That's the additional condition.  
19 Now, MDE can impose that additional condition simply  
20 because Feeding Our Future is in deficiency status.  
21 It --

22 THE COURT: Right.

23 MS. NOGOSEK: -- doesn't require -- okay.

24 So --

25 THE COURT: Right. And I'm not -- I haven't

1 questioned the MDE's ability to do that. What I'm  
2 questioning is your ability to stop paying in the  
3 meantime because you don't -- you haven't cited me any  
4 authority to do that. And the only authority in front of  
5 me says you can't, and that's why I said show me how I'm  
6 wrong because you're more of an expert on this than me.  
7 But I'm assuming that if you could, it would be in a  
8 brief somewhere or you would have already cited it to me  
9 since I keep saying the same thing.

10 MS. NOGOSEK: Well, and, your Honor, I think  
11 when -- when I read 200.339, it specifically allows when  
12 there is noncompliance with the federal regulation for  
13 the state agency, for MDE, to temporarily withhold cash  
14 payments pending correction. That says that --

15 THE COURT: Yes.

16 MS. NOGOSEK: -- there will be no payments.  
17 And then -- but there are additional conditions that MDE  
18 has imposed --

19 THE COURT: Right.

20 MS. NOGOSEK: -- which is across the validation  
21 documentation.

22 THE COURT: Right.

23 MS. NOGOSEK: You're required to have it  
24 anyways. Okay?

25 THE COURT: But, you know --

1 MS. NOGOSEK: That --

2 THE COURT: -- with all due respect, you're  
3 talking in circles. Yes, you have imposed additional  
4 conditions. Yes, the regulation allows you to do that.  
5 But the next sentence says you can't withhold payments  
6 while that's happening. You can only withhold payments  
7 if you determine that the noncompliance cannot be  
8 remedied by imposing additional conditions. The  
9 regulation says only if that finding has been made can  
10 you take this additional action of withholding payments  
11 or more severe enforcement action. That's also on the  
12 table if they can't be remedied.

13 MS. NOGOSEK: And, your Honor, I think I  
14 finally understand what you're saying, but we need to  
15 look closer at 200.339(a), because what that says is that  
16 MDE could withhold cash payments pending correction of  
17 the deficiency. That would mean that until the  
18 deficiency has been corrected, during that whole time,  
19 MDE could withhold payment.

20 THE COURT: That's not --

21 MS. NOGOSEK: That's not what MDE is doing.

22 THE COURT: Paragraph (a) comes after a colon.  
23 The sentence before the colon creates the condition  
24 precedent for the action under (a). And you can't  
25 satisfy that condition precedent. You don't argue that

1 you can, and you haven't claimed that you can here today.  
2 The sentence before the colon is the condition precedent.  
3 You can't do (a) without doing the -- satisfying that  
4 condition.

5 MS. NOGOSEK: So let me put it to you this --  
6 let me say it a different way, your Honor. And  
7 hopefully, this will relay what MDE's argument is.

8 MDE's argument is that by imposing the  
9 additional conditions, that the deficiency can be  
10 remedied so that MDE does not have to suspend payments  
11 during the whole corrective action, serious deficiency  
12 process. So this is a less severe consequence that is  
13 sufficient to address the concerns raised in the  
14 noncompliance of the federal regulations.

15 THE COURT: Well, suspending payment is not a  
16 condition. It's an action. So it just is inconsistent  
17 with the plain language of the regulation. And in the  
18 absence of a different regulation that you're relying on,  
19 you've got a big problem. Mr. Watkins has a big problem,  
20 too. You can characterize the complaint any way you  
21 want, but that complaint doesn't even hint at a problem  
22 outside the scope of the application process. And  
23 Ms. Nogosek in her briefing is correct. The specific  
24 problem that you are complaining of here today, other  
25 than the application issue, which I'm about to have

1 Ms. Nogosek address, you either have to amend the  
2 existing lawsuit or file a new lawsuit with a new TRO.  
3 You know, and I assume they'll assign the case to me  
4 because they will probably run me out of the courthouse  
5 if some other judge had to take it over. But, you know,  
6 I would be happy to accept the briefing -- briefing on a  
7 new claim, or if you want to amend the claim and have a  
8 new TRO in front of me. Yes, it's form over substance,  
9 but I can't ignore form. It exists for a reason. Your  
10 lawsuit is an application lawsuit. All your causes of  
11 action, including the Minnesota Human Rights Act, talk  
12 about applications. My order only talks about  
13 applications. The reason my order only talks about  
14 applications is because the remedy that you stipulated to  
15 addressed your only complaint in the lawsuit. So  
16 Ms. Nogosek's briefing is right on the money.

17 So let me ask Ms. Nogosek: That being true,  
18 how could you refuse to allow them to process new  
19 applications without violating my order?

20 MS. NOGOSEK: Your Honor, my understanding is  
21 that MDE is not prohibiting new applications from being  
22 submitted. But the problem is that as part of that  
23 application submission, Feeding Our Future has to certify  
24 that it is in conformance with the performance standards.  
25 That's not a MDE regulation. That is a federal

1 regulation. So any application that Feeding Our Future  
2 would submit, number one, they're not going to be able to  
3 certify they're in compliance with the performance  
4 standards. But even if they did submit it otherwise and  
5 they checked the box that it conforms -- that they're  
6 conforming, it's not a correct and complete application  
7 that MDE will have to, you know, process within a  
8 reasonable time. What MDE is doing is allowing Feeding  
9 Our Future the opportunity to cure the deficiencies, to  
10 go through -- or don't cure the deficiencies and go  
11 through the termination proceedings, go through the  
12 administrative appeal in front of the appeal panel, go up  
13 to the Court of Appeals. But during this whole time,  
14 applications can't be approved because none of them are  
15 correct and complete.

16 The other --

17 THE COURT: So basically, what should happen  
18 then is that they submit them and then you reject them by  
19 providing the specific reasons for rejection, which would  
20 trigger an administrative appeal ability.

21 So yes or no, Mr. Watkins, has your client been  
22 locked out of the ability to even apply?

23 MR. WATKINS: Yes.

24 THE COURT: Yes or no.

25 MR. WATKINS: Yes. Effectively, yes, your

1 Honor.

2 THE COURT: Well, effectively is waffling. I  
3 mean --

4 MR. WATKINS: Well --

5 THE COURT: -- can it physically be done?

6 MR. WATKINS: -- no, because part of the  
7 application process requires a site ID, and MDE's letter  
8 explicitly says it will not issue any site IDs.

9 THE COURT: Okay.

10 MR. WATKINS: By not issuing any site IDs, we  
11 cannot physically submit applications --

12 THE COURT: Okay. Ms. Nogosek, you cannot  
13 prevent them from submitting an application even if  
14 you're convinced it will be denied later. Okay?

15 MS. NOGOSEK: Understood, your Honor.

16 THE COURT: All right. I do have another  
17 matter. But basically, the bottom line is this: You  
18 can't prevent them from submitting an application. And  
19 if you tell me you're going to instruct your client to  
20 permit these applications to be submitted and you're  
21 going to issue the IDs so they can do it, I won't issue  
22 another order. If you need an order, I'll issue an  
23 order. You tell me, Ms. Nogosek.

24 MS. NOGOSEK: Your Honor, the MDE will allow --  
25 and MDE believes that Feeding Our Future can go ahead and

1 make the submissions. They can ask --

2 THE COURT: That means your client --

3 MS. NOGOSEK: -- for -- no.

4 THE COURT: They have to issue the ID, or they  
5 can't do it.

6 MS. NOGOSEK: Or they have to deny it. When  
7 the request comes in, it's a denial because it's not  
8 correct and complete, and that will send Feeding Our  
9 Future into the administrative appeal process.

10 THE COURT: Right. I think what the --

11 MS. NOGOSEK: Right.

12 THE COURT: The problem here is that they're in  
13 administrative purgatory if they can't file the  
14 application to get it denied.

15 MS. NOGOSEK: Right.

16 THE COURT: So, Mr. Watkins, if you have a  
17 problem, I'll issue an order.

18 And if I have to issue an order, I'm going to  
19 assess attorneys' fees because you can't violate my  
20 orders. And it's obvious that you have up until now. If  
21 you're not issuing IDs so they can file an application,  
22 you're violating my order. My order says you can't  
23 prevent them from filing applications. You have to allow  
24 that, and you have to process it. If you deny it, you  
25 deny it, but you can't prevent them from filing an

1 application in the first place. That violates my order.

2 MS. NOGOSEK: And, your Honor, just so I can  
3 put it on the record, I do not believe that the facts are  
4 that Feeding Our Future is shut out of the ability to  
5 send MDE through the normal channels a request for a site  
6 ID with the right documentation. It's not as though  
7 Feeding Our Future is not able to do that. They have not  
8 been locked out. Their emails from MDE have not been  
9 blocked. Their access to CLiCS has not been blocked,  
10 either.

11 THE COURT: Well, you know, they claim that  
12 they have been blocked, and none of your submissions  
13 denied that. In fact, you were sort of proud to back  
14 what you were doing.

15 So, Mr. Watkins, if you're unable to submit an  
16 application, I want to know about it. You can submit a  
17 proposed order but with an affidavit of attorneys' fees.

18 Because you can't do that. And hopefully,  
19 we're not talking about semantics, but if they're unable  
20 to submit an application to get it denied, which my order  
21 allows you to do, if it's not -- if they don't meet  
22 program conditions, you can deny it, and then they can  
23 appeal, and those appeals can stack up, and you can hire  
24 a bunch more lawyers.

25 But on the other hand, Mr. Watkins, I don't

1 have jurisdiction over the issue of the withholding of  
2 pay. You're either going to have to file a motion to  
3 amend with a contemporaneous TRO motion or a new lawsuit  
4 with a contemporaneous TRO, which is how we all came  
5 together in the first place.

6 But at the same time, Ms. Nogosek, I think you  
7 got real problems under 2 CFR § 200.339 if they take  
8 these steps. Based upon the positions you've taken on  
9 behalf of the department, the law that's been given to  
10 me, you've got a real problem not reimbursing at this  
11 stage of the game. You may ultimately have every right  
12 to implement the suspension of payments under this  
13 regulation based upon whatever it is they're supposed to  
14 give you, but the standard that has to be met to entitle  
15 the department to stop paying is crystal clear in this  
16 regulation. If the federal awarding agency or  
17 pass-through entity determines that noncompliance cannot  
18 be remedied by imposing additional conditions, the  
19 federal awarding agency or pass-through entity may take  
20 one or more of the following actions: Based upon the  
21 record in front of me today, that state of affairs  
22 doesn't exist. No such determination has been made. So  
23 unless I have missed something, which you'll have an  
24 opportunity to develop because I'm not going to be  
25 issuing any rulings today on this issue, I think you've

1 got a problem. And I think the two of you ought to talk  
2 about it and work it through. If you didn't know that  
3 they had a new accountant, for example, that's a  
4 communication problem, and there have been other  
5 communication problems in your history.

6 Mr. Watkins, your client appears to have some  
7 management issues being able to marshal compliance with  
8 relatively rudimentary requirements. And it may be  
9 frustrating to see what you view as punitive actions  
10 being taken for what you view as simple things or typos,  
11 but the agency does have an obligation to demonstrate  
12 compliance with the law, or they're going to get whacked  
13 behind the woodshed by the USDA. And they're exposed,  
14 too, because they have got to front the money, and they  
15 have to go with their hand open to the Feds, and they  
16 could be in a similar position to you, Mr. Watkins, and  
17 your client if the Feds don't want to pay them because  
18 they haven't asked for enough from you. So it is a  
19 vicious circle. But that's going to be my ruling today.

20 Any questions?

21 Yes, Mr. Watkins.

22 MR. WATKINS: Just quickly for point of  
23 clarity, your Honor. I mean, first of all, if I could  
24 respond to that comment, I don't know there's been any  
25 management issues of any kind. The documents are all --

1 THE COURT: Not having your non-profit status  
2 up to date --

3 MR. WATKINS: Yeah, we did.

4 THE COURT: -- and not having your audit  
5 strictly comply with the requirements of the federal  
6 regulations is a problem. And whether it's the CPA's  
7 fault or whether it's management's fault or not for  
8 allowing the CPA to disappear before this got done, this  
9 is a complicated system, and there needs to be somebody  
10 who the buck stops with within the agency.

11 MR. WATKINS: Your Honor, and I agree with  
12 that. I'll just note for the record without belaboring  
13 the point, our 501(c)(3) status was never revoked, was  
14 never an issue. We were given an extension to file our  
15 tax return. We filed it within time. It was never  
16 revoked. That's neither here nor there, but just so the  
17 record is clear on that.

18 THE COURT: All right. Well, if --

19 MR. WATKINS: With respect --

20 THE COURT: -- that's the case, then it would  
21 have been very easy to demonstrate within days of that  
22 January 31 letter, and --

23 MR. WATKINS: And we did. And that --

24 THE COURT: Or January 15 letter. And when you  
25 send letters to the department addressing their concerns,

1 put in your letter that we would like an email or a phone  
2 call within five days of today's date indicating receipt.  
3 And if you don't get it, call them up and say why didn't  
4 you get my letter. I mean, to say that you sent a letter  
5 and then not know it ever got received demonstrates to me  
6 a certain lack of follow-up.

7 MR. WATKINS: But we did get that receipt  
8 received, your Honor, and MDE did respond by saying that  
9 it had accepted our filings and submissions on that  
10 issue. It's kind of beside the point, your Honor, but  
11 that's the record. They said we can send you back your  
12 501(c)(3). We provided the documents. They said, okay,  
13 we're no longer concerned about that. And as you pointed  
14 out, that's the issue that was resolved. But it's  
15 neither here nor there, your Honor. Your concerns are  
16 well-taken; your point is well made.

17 And the question I want to raise with the Court  
18 is simply a procedural one. I want to make sure I'm not  
19 creating more work. So I understand the Court's position  
20 today. I will be filing, with the Court's permission  
21 before I leave today, a motion to amend my complaint. I  
22 will be attaching to that an amended complaint. I will  
23 be also separately filing the same briefing as the TRO as  
24 part of today.

25 Is that procedurally acceptable to the Court?

1 I typically do not attach a proposed amended complaint  
2 with a motion to amend. But given the circumstance,  
3 requesting the Court's permission to include the amended  
4 complaint and the request to file it.

5 THE COURT: Well, a motion to amend the  
6 complaint, I think the rule requires you to include --

7 MR. WATKINS: Does it?

8 THE COURT: -- the proposed amended  
9 complaint --

10 MR. WATKINS: I'll --

11 THE COURT: -- so you are certainly encouraged  
12 to do that.

13 A scheduling order has not yet been issued in  
14 this case. There is no trial date. There is no  
15 discovery deadline. And in fact, I think the parties  
16 probably secretly hoped that none of that would become  
17 necessary. None of you have to answer that. But, you  
18 know, so there is no deadline to file a motion to amend  
19 that has passed yet. So, you know, typically, if the  
20 proposed amended complaint could have stood on its own as  
21 an original complaint with no prior litigation, the rules  
22 of amended pleadings would probably allow it. There is  
23 doctrine that if an amendment is futile, in other words,  
24 would be subject to a motion to dismiss, then that could  
25 potentially cause it to be denied on the merits. So the

1 only issue is timeliness. And, you know, in the context  
2 of an accompanying TRO motion, I would simply be  
3 considering what are the chances of you being able to  
4 prevail on your motion to amend on the merits as part of  
5 the overall prevailing on the merits.

6 Ms. Nogosek, what's your initial reaction?

7 MS. NOGOSEK: Your Honor, the department's  
8 reaction is that any motion to amend the complaint is  
9 going to be met with a motion to dismiss. The processing  
10 of claims are within the purview of the administrative  
11 review process and are outside of the scope of the  
12 Court's jurisdiction.

13 THE COURT: Okay. Well, if I determine that  
14 you discontinued funding in violation of federal  
15 regulations, and there's no right to appeal that  
16 decision, so there's no administrative remedies to  
17 exhaust, where does that put you?

18 MS. NOGOSEK: Your Honor, I feel like I'm  
19 drawing us back into the substance again, but the federal  
20 regulations give MDE 45 days to pay valid claims. There  
21 is no allegation in any of Feeding Our Future's papers  
22 that they filed to say that any claim, any valid claim is  
23 45 days past its submission. So, you know, if -- the  
24 other thing -- and the department can look at this, and  
25 there will be conversations after this. The possibility

1 of simply denying all of the claims that are currently  
2 submitted, that denial of claims puts us into the  
3 administrative review process because that is a agency  
4 action where the agency has to provide the administrative  
5 appeal. That's not where we want to go. I just want to  
6 highlight that both for Feeding Our Future and the Court.  
7 That's not -- that's not where we want to go is to deny  
8 \$20.5 million. But the department is in a position where  
9 the regulators have said you are prohibited under our  
10 regulations from paying these claims, and you have to  
11 validate them before you pay them. So I'm not -- like I  
12 said, I'm not sure where the department is going to be at  
13 after today's hearing. I'm hoping we can find a way, but  
14 we do understand the Court's position, and we'll act  
15 accordingly.

16 THE COURT: Yeah. And so you're not  
17 procedurally barred from doing this, Mr. Watkins, but  
18 depending upon the state of affairs that exists at the  
19 time we're back on a TRO motion, you know, if -- I don't  
20 know what your position is on the 45 days, for example,  
21 Mr. Watkins, but if the 45 days hasn't run, you know,  
22 there's a variety of scenarios that would influence the  
23 merits of your TRO motion. But if you want to bring a  
24 motion to amend, I'm not going to stop you, and  
25 Ms. Nogosek is going to argue that such a motion is

1 futile, and she would oppose the merits of the motion.

2 MS. NOGOSEK: Yeah. I heard a threat that she  
3 was going to deny all of our claims without any  
4 allegation that any of them are invalid. I heard that,  
5 and we will be responding to that, your Honor. I mean,  
6 again, gloves are off at this point, your Honor.

7 THE COURT: All right.

8 MR. WATKINS: I'm shocked that there would be a  
9 threat to just unilaterally stop and deny all funds  
10 without a single allegation of a specific claim being  
11 valid or a single factual basis to believe it. But I --  
12 again, your Honor, my people are going bankrupt. The  
13 kids are going without food. I don't have a choice in  
14 this matter. You will be getting a motion to amend from  
15 me before I leave my office today.

16 THE COURT: All right. And as always, we look  
17 forward to seeing you all again. And with regard to what  
18 I did act on today, if there is a new claim processing  
19 problem, then I expect I'll hear about it if it's  
20 necessary to issue an order. But, Ms. Nogosek, I'm  
21 comfortable at this point that that won't become  
22 necessary.

23 All right.

24 MR. WATKINS: All right. Thank you very much,  
25 your Honor. We do appreciate you and your staff. And to

1 Ms. Morrow, I apologize for my speed in particular today.

2 I do appreciate that I did that, and I apologize for it.

3 But thank you all.

4 THE COURT: All right.

5 MR. WATKINS: We appreciate it, your Honor.

6 THE COURT: Thank you. Keep talking.

7 MS. NOGOSEK: Thank you.

8 (The hearing was concluded at 4:55 p.m.)

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## REPORTER'S CERTIFICATE

STATE OF MINNESOTA)  
 ) ss.  
COUNTY OF RAMSEY )

The foregoing proceedings were held ONLINE BY ZOOM during the COVID-19 pandemic. Due to potential technology glitches for online proceedings, there may be word(s) that were misheard by the court reporter or not heard at all, a speaker talking while muted, background noise, the parties speaking at the same time and only one being heard, or other issues. With the above caveat, I, Lori Morrow, Official Court Reporter to the Honorable John H. Guthmann, in and for the County of Ramsey, Second Judicial District, State of Minnesota, do certify that the foregoing constitutes a true and accurate record of the proceedings had in the above-entitled matter heard and stenographically recorded by me.

Dated: April 30, 2021.



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RAMSEY COUNTY DISTRICT COURT  
SECOND JUDICIAL DISTRICT