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Pro Se

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

MARK BAKER,

Plaintiff,

vs.

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,

Defendants

Case No.: 2:24-CV02558-DJC JDP (PS)

PLAINTIFF PETITION FOR WRIT OF MANDATE, RULE 26(F).

I. INTRODUCTION

1. On December 8, 2024, Plaintiff Mark Baker ("Plaintiff"), submitted a request to Department of Justice attorney Scott Kennedy, requesting a Federal Rules of Civil Procedure Rule 26(f) conference to discuss requirements for the government to automatically provide discovery information for this case.

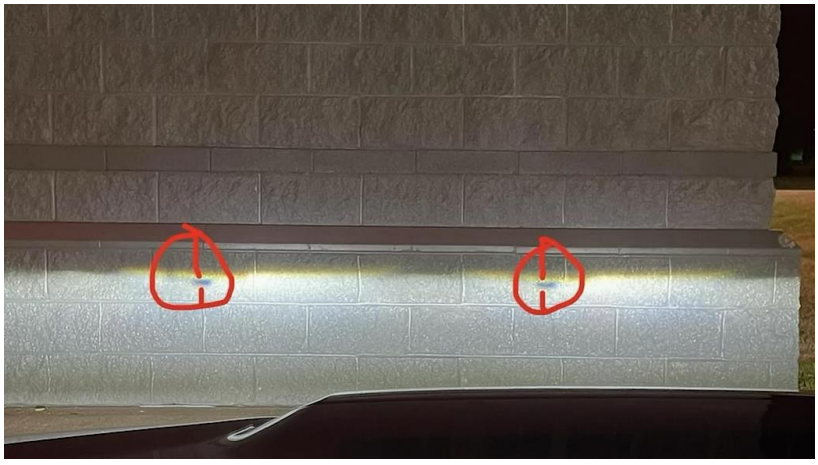
2. Mr. Kennedy responded that the government was not obligated to comply with Rule 26(f) because this is an Administrative Procedure Act case, and that judicial review is limited to the administrative record that is before the court. Plaintiff and Mr. Kennedy then held a Meet and Confer on December 12, 2024, where Mr. Kennedy confirmed the government's

decision to not comply with Rule 26(f) requirements and declined to provide discovery documents.

II. HEADLIGHTGATE

3. The Administrative Procedure Act relies on the government acting in good faith. In this case, the government has clearly acted in bad faith, failing to comply with numerous statutes, withholding evidence from the court and conspiring with the automakers to cover up a massive, widescale fraud involving LED headlights called Headlightgate.

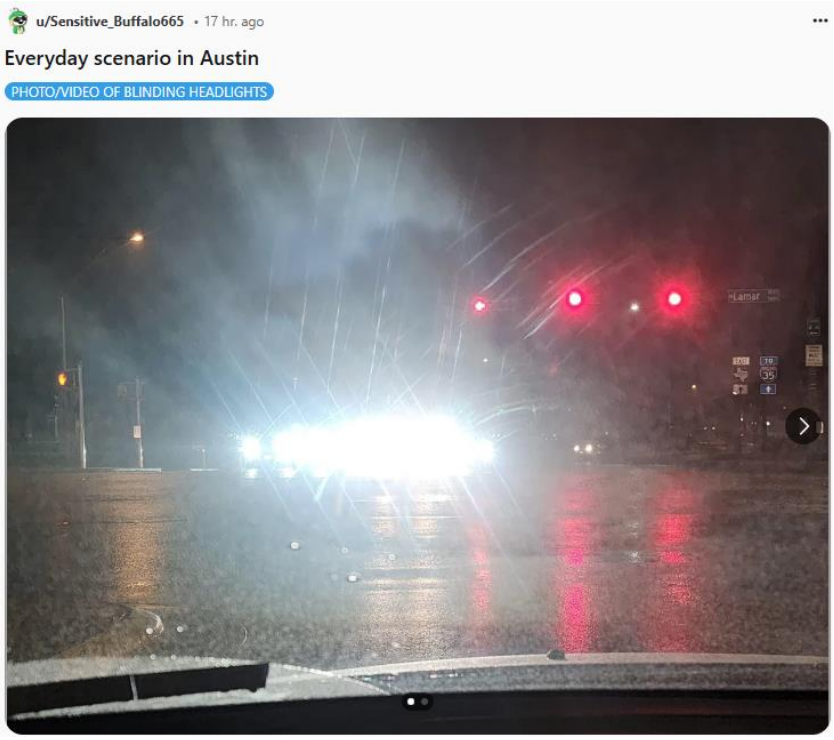
4. Headlightgate was first reported by auto journalist Jason Camissa on the Carmudgeon show on April 8, 2024.[1] Mr. Camissa reported on insider information from auto industry engineers who described how they circumvent NHTSA FMVSS-108 Table XIX headlight requirements by selectively turning off pixels at specific locations so that the headlamp, even thought is emits excessively bright light, will pass laboratory tests. An example of the black dots created by this engineering manipulation is shown in the figure below.



[1] https://www.youtube.com/watch?t=697&v=MkwjMV2of_8&feature=youtu.be

5. Investigative journalist Nate Rogers, then reported on Headlight gate in an article in The Ringer.[2] In Mr. Roger's article, Mr. Camissa compared Headlightgate to the Volkswagen emissions cheating scandal Dieselgate. Mr. Roger's quoted Chris Techter, an auto industry lighting engineer as saying that Mr. Camissa's account of Headlight gate is "100 percent real".

6. The real world result of the automakers bad faith, fraudulent actions has resulted in dangerous glare from LED headlights such as shown in the photo below.



III. GOVERNMENT BAD FAITH

[2] https://www.theringer.com/2024/12/03/tech/headlight-brightness-cars-accidents

7. The refrain from NHTSA over the past many years is that LED headlights are simply misaligned. The refrain from the FDA is that are no indications that LED light has no adverse health or safety impacts. The FDA and NHTSA have failed to establish and maintain a liaison on LED vehicle headlamps as required by 21 U.S.C. 360ii(a)(6)(A).

8. We now know that these stated positions by the government are not just wrong but are conscious and willful bad faith actions to mislead the public about Headlightgate and the dangers of LED headlamps. Plaintiff alleges that the automakers, NHTSA, and the FDA have formed an unwritten conspiracy to defraud the public about LED headlights.

IV. GOVERNMENT WITHHELD EVIDENCE

9. In the government's Motion to Dismiss for this case, Mr. Kennedy withheld several critical pieces of information from the Court: 1) Headlightgate; 2) Notification of Defects, 3) FDA wanting performance standards for LED products; 4) TEPRSSC Charter; and 5) Secret Review Organization. This withheld evidence thus denies the Court the ability to engage in a judicial review of the full administrative record.

10. **Headlightgate** – Mr. Kennedy made no mention of Headlightgate in the government's Motion to Dismiss, even though the Headlightgate scandal was first published on April 8, 2024, by Carmudgeon. LED headlights are not misaligned, as claimed by NHTSA and the auto industry. LED headlights are excessively bright, and the automakers have deceitfully circumvented the headlamp validation process by cheating. NHTSA has been aware of Headlightgate since at least April 8, 2024, because the Soft Lights Foundation notified NHTSA of this scandal (EXHIBIT A). The fact that Mr. Kennedy withheld this evidence

from the Court is an act of bad faith and denied the Court access to the full Administrative Record for judicial review.

11. **Notification of Defects** - 49 U.S.C. 30118(c)(1) states, "A manufacturer of a motor vehicle or replacement equipment shall notify the Secretary by certified mail or electronic mail, and the owners, purchasers, and dealers of the vehicle or equipment as provided in section 30119(d) of this section, if the manufacturer learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety."

12. Mr. Kennedy did not notify the Court of 49 U.S.C. 30118(c)(1) in his Motion to Dismiss and thus, again, the Court was denied access to the full administrative record. Both NHTSA and the automakers have received tens thousands of reports of harm and injury from exposure to LED headlamps. As per 49 U.S.C. 30118(c)(1), the automakers and NHTSA must communicate with each other about these LED headlight safety defects. Yet, because of the conspiracy between the FDA, NHTSA and the automakers as alleged by Plaintiff, this communication is not occurring. Mr. Kennedy withheld this evidence from the Court.

13. **LED Performance Standards** – The Technical Electronic Product Safety Standards Committee ("TEPRSSC") has met just once in the past 21 years. One of Mr. Kennedy's main points in the Motion to Dismiss is that TEPRSSC is not required to meet regularly and is only required to meet before the FDA is considering publishing performance standards. However, Mr. Kennedy failed to inform the Court that the FDA already

established that they are considering performance standards for LED products during the 2016 TEPRSSC meeting. The transcript[3] from the 2016 TEPRSSC meeting states:

> For today's agenda, the Committee will discuss and make recommendations regarding possible FDA performance standards for the following topics: radiofrequency or RF radiation products, such as microwave ovens and wireless power transfer; laser products, including an update to amendments to the laser rule, light detection and ranging, also known as LiDAR, laser data, light fidelity (Li-Fi), energy transfer, illumination applications, and infrared applications; sunlamp products, including an update on the performance standards amendments; noncoherent light sources such as LEDs and UVC lamps, including new initiatives

14. The evidence from the 2016 TEPRSSC meeting transcripts proves that the FDA is considering performance standards for LED products, and yet Mr. Kennedy withheld this evidence from the Court in the Motion to Dismiss, attempting to have the Court believe that TEPRSSC is not required to meet because the FDA is not considering performance standards for LED products. This is a bad faith action by Mr. Kennedy and the government.

15. **TEPRSSC Meetings** – Another main point in Mr. Kennedy's Motion to Dismiss is that there are no requirements for how often TEPRSSC should meet. However, again Mr. Kennedy withheld evidence from the Court. Mr. Kennedy did not provide the Court with the TEPRSSC Non-discretionary Charter (EXHIBIT B), which states, "Meetings shall be held approximately once every other year." During the Meet and Confer, Mr. Kennedy

[3] https://public4.pagefreezer.com/browse/FDA/12-01-2022T02:57/https://www.fda.gov/media/101284/download

claimed that the TERPSSC Charter is not "germane" to this case. In fact, the TERPSSC Charter is fundamental in this case and directly rebuts Mr. Kennedy's assertion that TEPRSSC is free to meet once every 21 years. Mr. Kennedy's action of withholding this critical document from the Court is an act of bad faith by the government.

16. **Secret Review Organization** – The TEPRSSC is a non-discretionary committee, mandated by 21 U.S.C. 360kk(f)(1). The TEPRSSC includes members of the public and the meetings are required to be transparent. The decision by the FDA to circumvent TEPRSSC input, and instead contract with a secret, outside organization to perform a literature review on LED products is an act of bad faith.

V. LEGAL ANALYSIS

17. In an email to Plaintiff, Mr. Kennedy wrote, "As you know, the claims in your Complaint arise under the Administrative Procedure Act ("APA"). Judicial review under the APA is limited to the "administrative record that was before [the agency] at the time [it] made [its] decision." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). Therefore, this case is exempt from the discovery conference requirement under Federal Rules of Civil Procedure 26(f)(1) and 26(a)(1)(B)(i). The conference is also unnecessary because in an APA case, "the standard discovery tools of civil litigation . . . do not apply." Comprehensive Cmty. Dev. Corp. v. Sebelius, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012).

18. What Mr. Kennedy left out, however, is that *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012) states, "However, a court may review extra-record evidence only where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of the agency decision-maker or where the absence of formal administrative findings makes such investigation necessary in order to determine

the reasons for the agency's choice." Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir.1997) (citing Overton Park, 401 U.S. at 420, 91 S.Ct. 814)."

19. The reason Mr. Kennedy's claims fail is because the government has acted in bad faith. For the Court to be able to perform a judicial review of the administrative record that was available to the federal government at the time the government made its decisions, the Court must be provided with a copy of the administrative record. Mr. Kennedy's decision to withhold the information about Headlightgate, 49 U.S.C. 30118(c)(1), the 2016 TEPRSSC meeting about LED performance standards, the TEPRSSC Charter, and the secret review organization, prevents the Court from viewing the full administrative record.

20. Because the government acted in bad faith, Mr. Kennedy's claim that the government does not need to comply with Rule 26(f) and provide discovery evidence is disproven. The discovery evidence is now more critical than ever, due to the government's efforts to hide the administrative record from Plaintiff and the Court.

VI. CONCLUSION

21. Plaintiff has made a strong showing in support of a claim of bad faith and improper behavior by the FDA, NHTSA, and the DOJ.

22. Based on the acts of bad faith by the government, Plaintiff respectfully requests that this Court direct Mr. Kennedy and Defendant to comply with Rule 26(f) and automatically provide all discovery information for this case.

Dated: December 17, 2024

Respectfully Submitted,

By: /s/ Mark Baker

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Gmail

Mark Baker <mbaker@softlights.org>

Headlightgate

1 message

Mark Baker <mbaker@softlights.org> Mon, Apr 8, 2024 at 1:49 PM
To: sophie.shulman@dot.gov, Pete Buttigieg <SecretaryScheduler19@dot.gov>, NHTSA Whistleblower <NHTSAWhistleblower@dot.gov>, Elizabeth Mazzae <Elizabeth.Mazzae@dot.gov>, Otto Matheke <otto.matheke@dot.gov>, Ryan Posten <ryan.posten@dot.gov>, Cem Hatipoglu <cem.hatipoglu@dot.gov>, "HOTLINE, DOT-OIG" <hotline@oig.dot.gov>

Dear Sophie Shulman,

On April 8, 2024, the automotive experts on the Carmudgeon Show have exposed "Headlightgate". The hosts of this show have uncovered how auto engineers have purposely turned off tiny areas of the LED headlight so that the headlight system can pass the inspection tests, while remaining blindingly bright everywhere else. This cheating scandal exactly parallels the Volkswagen Dieselgate scandal which resulted in a $25 Billion payout by Volkswagen.

Here is a link to the Carmudgeon Show Headlightgate episode (warning: profanity): (**https://www.youtube.com/watch?v=MkwjMV2of_8**)

Everything the public has known about LED headlights is true. Everything that the auto industry mouthpieces have been saying about "misalignment" is false. The Carmudgeon hosts are asking us to share this video with the media and with Congress.

Sincerely,

Mark Baker
President
Soft Lights Foundation
www.softlights.org
mbaker@softlights.org

Exhibit B

C H A R T E R

TECHNICAL ELECTRONIC PRODUCTS RADIATIONS SAFETY STANDARDS COMMITTEE

COMMITTEE'S OFFICIAL DESIGNATION

Technical Electronic Product Radiation Safety Standards Committee

AUTHORITY

The Technical Electronic Product Radiation Safety Standards Committee is a permanent statutory committee established pursuant to the provisions of the Radiation Control for Health and Safety Act (21 USC 360kk) and is also governed by the provisions of Pub.L. 92-463, as amended (5 USC App. 2), which sets forth standards for the formation and use of advisory committees.

OBJECTIVES AND SCOPE OF ACTIVITIES

The Commissioner of Food and Drugs is charged with the administration of the Radiation Control for Health and Safety Act of 1968. This Act creates the Technical Electronic Product Radiation Safety Standards Committee (TEPRSSC) and requires the Commissioner to consult with the Committee before prescribing standards for radiation emissions from electronic products.

DESCRIPTION OF DUTIES

This Committee provides advice and consultation to the Commissioner of Food and Drugs on the technical feasibility, reasonableness, and practicability of performance standards for electronic products to control the emission of radiation from such products and may recommend electronic product radiation safety standards to the Commissioner for consideration.

AGENCY OR OFFICIAL TO WHOM THE COMMITTEE REPORTS

The Committee provides advice and consultation to the Commissioner of Food and Drugs.

SUPPORT

Management and support services shall be provided by the Center for Devices and Radiological Health.

ESTIMATED ANNUAL OPERATING COSTS AND STAFF YEARS

The estimated annual cost for operating the Committee, including compensation and travel expenses for members but excluding staff support, is $25,193. The estimated person years of staff support required is 0.50, at an estimated annual cost of $98,826.

DESIGNATED FEDERAL OFFICER

FDA will select a fulltime or permanent part-time Federal employee to serve as the Designated Federal Officer (DFO) to attend each Committee meeting and ensure that all procedures are within applicable statutory, regulatory, and HHS General Administration Manual directives. The DFO will approve and prepare all meeting agendas, call all the Committee and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest and chair meetings when directed to do so by the official to whom the Committee reports. The DFO shall be present at all meetings of the full committee and subcommittees.

ESTIMATED NUMBER AND FREQUENCY OF MEETINGS

Meetings shall be held approximately once every other year. Meetings shall be open to the public except as determined otherwise by the Commissioner or designee in accordance with the Government in the Sunshine Act (5 U.S.C. 552b(c)) and the Federal Advisory Committee Act. Notice of all meetings shall be given to the public.

DURATION

Continuing

TERMINATION

Unless renewed by appropriate action the Technical Electronic Product Radiation Safety Standards Committee will terminate two years from the date the charter is filed.

MEMBERSHIP AND DESIGNATION

The Committee shall consist of 15 voting members including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities knowledgeable in the fields of science or engineering applicable to electronic product radiation safety. Members will be invited to serve for overlapping terms of up to four years.

Voting members will include five members selected from governmental agencies, including State and Federal Governments, five members from the affected industries, and five members from the general public, of which at least one shall be a representative of organized labor. A quorum shall consist of 10 members, of which at least 3 shall be from the general public, 3 from the government agencies, and 3 from the affected industries.

SUBCOMMITTEE

Temporary subcommittees consisting of two or more Committee members may be established by the Commissioner or designee as needed to address specific issues within their respective areas of expertise.

Subcommittees make preliminary recommendations to the full Committee regarding specific issues for subsequent action by the full Committee. The Department Committee Management Officer shall be notified upon establishment of each subcommittee, and shall be provided information on its name, membership, function, and estimated frequency of meetings. Subcommittees must report back to the parent committee and must not provide advice or work products directly to the agency.

RECORDKEEPING

Meetings of the Committee and its subcommittees will be conducted according to the Federal Advisory Committee Act, other applicable laws and Departmental policies. Committee and subcommittee records will be handled in accordance with General Records Schedule 6.2, Federal Advisory Committee Records or other approved agency records disposition schedule. These records will be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552.

FILING DATE

December 24, 2022

Approved:

December 19, 2022
Date

/S/
Russell Fortney
Director, Advisory Committee Oversight
and Management Staff

U.S. Food & Drug Administration
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