IN THE CIRCUIT COURT OF GASCONADE COUNTY, MISSOURI

DONALD HILL, et al.,

Plaintiffs

vs.

MISSOURI CONSERVATION COMMISSION, et al.

Defendants

Cause No. 150S-CC00005-01

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Plaintiffs Donald Hill, Oak Creek Whitetail Ranch, LLC, Travis Broadway, Winter Quarters Wildlife Ranch, LLC, Kevin Grace, and Whitetail Sales and Service, LLC submit the following post-hearing proposed Findings of Fact and Conclusions of Law regarding their request for an Injunction as to Defendants' regulations banning importation of farmed cervids and imposing other restrictions on Plaintiffs' businesses:

FINDINGS OF FACT

The Plaintiffs

1. Plaintiffs all are participants in Missouri's farmed-cervid industry. Cervids are hoofed animals of the family *Cervidae*, whose males annually shed their antlers. White-tailed deer and elk are examples of cervids. Both are native to Missouri.

2. Plaintiffs have invested extensive financial resources, time and energy into Missouri's farmed-cervid industry. Plaintiffs are affiliated with various industry groups including the Missouri Deer Association.

3. Plaintiffs' industry relies on two main types of activities: (a) the selective breeding and marketing of privately owned white-tailed deer and other cervids for a desirable genetic characteristic—namely, giant "trophy" antler racks; and (b) "destination" hunting on spacious, privately owned reserves, where hunters might pay tens of thousands of dollars for the privilege of hunting and taking trophy bucks, paying a premium for those with the largest antler racks as measured by commonly used scoring standards.

4. In light of the high consumer demand for private hunting experiences and the high value placed on trophy bucks by hunters, cervids used for breeding are extremely valuable.

5. Plaintiffs' industry relies on a thriving interstate market in farmed cervids to be able to secure the animals needed for their breeding operations and to meet customers' demand for hunting on preserves.

6. All of the Plaintiffs have a vested interest in maintaining the health of their animals, which are collectively worth millions of dollars.

7. Plaintiff Donald Hill is the co-owner of Oak Creek Whitetail Ranch, LLC ("Oak Creek") a 1,300-acre hunting preserve and white-tailed deer breeding operation in Bland, Missouri. According to a June 12, 2015 appraisal, Oak Creek is located in "a very picturesque" part of central Missouri and contains a herd of deer valued at approximately $6.45 million: approximately 500 "breeding stock" deer that live in Oak Creek's 40-acre breeding area; and an estimated 300 deer (100 does and 200 bucks) which have been released into the property's fenced, privately owned hunting preserve. (Defendants' Ex. CC.) Hill owns and operates the business along with his wife, Angela.

8. Plaintiff Travis Broadway is owner of Winter Quarters Wildlife Ranch LLC ("Winter Quarters"), a private, 3,000-acre hunting preserve and luxury lodge in Ethel, Missouri.

Winter Quarters offers three-day guided hunts of animals including elk, priced based on the size of the animal taken.

9. Plaintiff Kevin Grace, through his business Whitetail Sales and Service, LLC, conducts a variety of brokering, sales and breeding operations involving white-tailed deer, red deer and sika deer. He brokers large transactions between breeders and sales to hunting preserves, breeds deer of his own, and since 2000 has presided over a series of internationally known captive-cervid auctions each year, including the "Top 30 Whitetail Extravaganza" held each January in Illinois.

10. Plaintiffs now face a series of new regulations promulgated by the Missouri Conservation Commission. These regulations will completely prohibit the importation of white-tailed deer into Missouri, preventing Plaintiffs from using live white-tailed deer in their breeding operations to continue developing the valuable bloodlines of their breeding stock.

11. The regulations will also prohibit any live cervids imported into Missouri from being held on a private hunting preserve, leaving Plaintiffs Hill and Broadway unable to meet customer demand for trophy bucks.

12. Plaintiffs have brought this action seeking to enjoin the Defendants from enforcing their regulations, on grounds including that the animals at issue are not "game ... [or] wildlife resources of the state" (Count I), and that the regulations interfere with Plaintiffs' fundamental right to engage in farming and ranching practices (Count II). The Court makes these Findings of Fact and Conclusions of Law following (a) a hearing on July 23-24, 2015 on Plaintiffs' request for a preliminary injunction regarding Count I, which this Court granted on Aug. 13, 2015; and (b) a hearing on June 8-9, 2016 on the full merits of both Counts I and II.

The Missouri Department of Agriculture's
oversight of Missouri's farmed-cervid industry

13. The Missouri Department of Agriculture has various regulations regarding "captive cervids," including rules for cervids' interstate and intrastate movement and disease-testing requirements. 2 CSR 30-2.010(10)(A).

14. Pursuant to its authority under the Missouri Livestock Disease Control and Eradication Law, Sections 267.560 through 267.660 RSMo., the Missouri Department of Agriculture has power to promulgate rules needed to regulate the entry and movement of "animals" in Missouri, including captive cervids. (Plaintiffs' Exs. 52 & 53). The term "animal" is defined in statute as "an animal of the equine, bovine, porcine, ovine, caprine, or species domesticated or semidomesticated." Section 267.565(2) RSMo.

15. Pursuant to the Missouri Department of Agriculture's rules, any captive cervid brought into the state must have an entry permit, undergo a certified veterinary inspection, be individually identified by an ear tag that conforms to Title 9 of the Code of Federal Regulations, and have various health-related documentation regarding diseases including brucellosis and tuberculosis, as well Chronic Wasting Disease ("CWD") – the disease that is the purported catalyst of the regulations challenged by Plaintiffs in this action.

16. CWD is a central-nervous system affliction that affects *Cervidae*. It was first observed in Colorado in 1967. (Defendants' Ex. DD at 3.) No one knows the origin of CWD.

17. There is no USDA-approved live test for CWD. The USDA-approved test is post-mortem, most typically utilizing laboratory sampling of lymph nodes for the disease-causing agent.

18. The Missouri Department of Agriculture's rules relating to CWD mandate that captive cervids may not enter the state if they originate from a herd that has tested positive for

CWD within the last five years or if they originate from an area that has been reported as a CWD-endemic area in the past five years. 2 CSR 30-2.010(10)(E)(1). Further, any captive "Elk, elk-hybrids, red deer, roe deer, white-tailed deer, mule deer, sika deer, and moose" entering Missouri from out-of-state must have participated in a CWD certification program for five consecutive years, with the original anniversary date listed on a Certificate of Veterinary Inspection. *Id.* at 30-2.010(10)(E)(2). (*See, e.g.*, Plaintiffs' Ex. 7.)

19. The Missouri Department of Agriculture's rules further address any captive cervids "exchanged, bartered, gifted, leased, or sold in Missouri," requiring that they be individually identified by an ear tag in compliance with 9 C.F.R. 71, and be listed on a Certificate of Veterinary Inspection of Breeder's Movement Certificate. 2 CSR 30-2.020(6)(A). (*See, e.g.*, Plaintiffs' Ex. 7.) The rules provide that all cervids over one (1) year of age within the state must be enrolled in a CWD program sponsored by the Missouri Department of Agriculture, with the anniversary date listed on a Certificate of Veterinary Inspection or Breeder's Movement Certificate. *Id.* at 30-2.020(6)(D).

20. The Missouri Department of Agriculture's rules further provide that to move within Missouri, a cervid must have a specified CWD "Status Level"; that all suspected or confirmed cases of CWD must be reported to the state veterinarian; and that "all captive cervids from infected or source herds will be quarantined." *Id.* at 30-2.020(6)(D). The Missouri Department of Agriculture's rules require hunting preserves to maintain records of all purchased and harvested cervids for five years, including the name and address of the individual harvesting the animal, identification and origin of the harvested animal, and the necessary Certificate of Veterinary Inspection or Breeder's Movement Certificate for each animal harvested. *Id.* at 30-2.020(6)(E).

21. In 2013, the Missouri Department of Agriculture's CWD-monitoring program was designated an "Approved State Chronic Wasting Disease Herd Certification Program" by the U.S. Department of Agriculture.

22. Defendants' expert witness, Dr. Colin Gillin, acknowledged that the Missouri Department of Agriculture representatives who oversaw Missouri's CWD herd certification program were "very good scientists," even though their program allows for controlled interstate movement of deer opposed by Dr. Gillin. Another expert witness called by Defendants, Bryan Richards, testified that the USDA herd-certification program was based on good science and minimizes risk of transmission of CWD.

23. In February 2012, Missouri Department of Conservation Deputy Director Tom Draper described the authority of the relevant state agencies as follows: "The [Missouri] Department of Agriculture has the regulatory responsibility of overseeing disease issues and inter and intra state movement associated with captive cervids. The [Missouri] Department of Conservation is responsible for the permitting of hunting preserves." (Feb. 22, 2012 Email from T. Draper to L. Hickam).

24. As the captive-cervid industry in Missouri developed in recent decades, the Missouri Department of Conservation has purported to require breeders of farmed cervids to be permitted as "wildlife breeders" under that agency's Wildlife Code. One of the sources from which MDC claims it draws its authority over Plaintiffs' animals is the Missouri Department of Agriculture's adoption of a regulation in June 2012 purporting to require hunting preserves like Plaintiffs' to "be permitted with the Missouri Department of Conservation (MDC) and comply with all regulations of the Wildlife Code." Yet as discussed in Plaintiffs' opposition to Defendants' Motion for Partial Summary Judgment, the Department of Agriculture's attempt to

delegate authority to MDC is not a valid statutory enactment authorizing MDC to regulate Plaintiffs' animals, nor does it comply with notice and comment provisions of the Missouri Administrative Procedure Act, RSMo 536.021.

25. It is a series of newly promulgated revisions to the Wildlife Code that are the subject of this action. The regulations seek to usurp the Missouri Department of Agriculture's authority over importation, transportation and sale of farmed cervids—banning importation of privately owned cervids for hunting and completely banning importation of privately owned white-tailed deer—while forcing both breeding operations and hunting preserves owners to comply with burdensome new herd-monitoring and enclosure requirements.

Chronic Wasting Disease in Missouri

26. It is unknown whether Chronic Wasting Disease's presence in Missouri originated in its wild populations or in captive cervids. The first reported case of Chronic Wasting Disease in Missouri was detected in February 2010 at a private hunting ranch in Linn County owned by Heartland Wildlife Ranches, LLC ("Heartland"). During the resulting response efforts, an additional 10 white-tailed deer out of 356 were found to be CWD-positive at a facility in Macon County that was also owned by Heartland. There was no evidence presented that any of the deer that tested positive at Heartland's facilities were imported to Missouri from other states.

27. Because of the CWD detections, the remainder of Heartland's herd was "depopulated," or killed, between 2011 and 2012, and Heartland entered into a herd management program in conjunction with the state's Departments of Agriculture, Conservation and Health and Senior Services, which imposed various cleaning and decontamination requirements and set guidelines for the gradual restocking of the property with farmed deer. Plaintiff Travis Broadway later purchased some of the assets of Heartland through his business, agreed to

continue the herd-management plan which remains in effect, and renamed the property Winter Quarters Wildlife Ranch. (Plaintiffs' Ex. 35).

28. Since the detection of 11 CWD-positive captive cervids at Heartland, there has not been a single detection of CWD in a privately owned cervid in Missouri. In the same time, there have been 33 cases of CWD detected in Missouri's free-ranging deer population (in Adair, Macon, Cole, Franklin and Linn counties). While some of these positives are near the Heartland facilities, it is not known whether these instances of CWD in wild populations are related to the CWD detections at the Heartland property.

29. CWD has an incubation period of approximately 18 months. The precise mode of transmission of CWD is uncertain, but it is believed to occur through deer-to-deer contact and environmental contamination. (Defendants' Ex. DD at 6-8). It is unknown what proportion of transmission of CWD in Missouri has occurred through deer-to-deer contact versus through contact with infected material in the environment (such as soil, hay, carcasses, etc.).

30. Although CWD is described as "always fatal," Defendants' witnesses admitted that there is no evidence that any cervid in Missouri has died of CWD. Rather, cervids that were killed by hunting or died of other causes have tested positive for CWD.

31. In the 10 years following the first detection of CWD in Illinois in 2002, the prevalence rate of CWD in white-tailed deer in Illinois remained at approximately one percent, using a strategy of increased hunting, or culling, in high-risk areas. (Defendants' Ex. NN at 7-8). Throughout this time, Illinois allowed importation of privately owned deer for farming and hunting. (*See* Defendants' Ex. LL).

32. In the last year, the prevalence rate of CWD in free-ranging white-tailed deer sampled in Missouri was appoximately $1/10^{th}$ of one percent.

33. The Plaintiffs in this litigation have never had a CWD detection in the cervid populations at their facilities, with the exception of the detections at Heartland prior to Plaintiff Broadway taking over part of that facility.

34. Plaintiff Kevin Grace's breeding operation was quarantined by the Missouri Department of Agriculture in 2013. (Plaintiff's Ex. 20). His "livestock" (a term used by the Department in its quarantine order) were quarantined because a deer that tested positive for CWD was found in a hunting preserve in Wisconsin, and Mr. Grace had imported a doe from a related breeding facility in 2009. (Plaintiffs' Ex. 41). After further investigation by the Department, that quarantine was lifted. (Plaintiffs' Ex. 20). Defendants' expert witness Dr. John Fischer testified that there have been four instances nationwide of a USDA-certified herd later being determined to have a case of CWD following exportation of cervids to other states (*see* Defendants' Ex. DD at 12). He testified that in "maybe one" one of these cases, it is suspected that a CWD-positive cervid was exported to another state. Defendants provided no evidence that any of these four instances resulted in importation of a known CWD-positive cervid into Missouri.

35. By contrast, a documented and present threat of CWD transmission across state lines is occurring along Missouri's southern border, where the State of Arkansas has recently detected CWD in free-ranging elk and deer at prevalence rates of more than 20 percent.

36. MDC officials acknowledged that they are very concerned about the Arkansas outbreak and that CWD may have already been introduced into Missouri across the Arkansas-Missouri border by free-ranging animals. The elk that MDC itself imported recently from the State of Kentucky, before turning them loose near Missouri's southern border, are free and able

to cross the Arkansas border and mingle with CWD-positive animals. Yet Defendants' response to this known threat of CWD introduction has been, in the words of an MDC representative, to stay in "active communication" with Arkansas officials, to "be more aware," to attempt to collect roadkill or visibly sick animals for testing, and to plan for increased sampling of hunter-killed animals this fall along the Missouri-Arkansas border — but not to impose mandatory testing of hunter-killed animals commensurate with what the MDC regulations purport to require that Plaintiffs perform on their captive herds.

37. None of the detections in Arkansas have been in captive herds. In fact, Arkansas does not have any captive cervid herds.

38. In addition to movement of free-ranging animals and movement of animals by humans, the other means by which CWD potentially spreads across the landscape is through transportation and improper disposal of carcasses. Yet MDC has not imposed any restrictions on movement of carcasses within the state of Missouri, opting instead for increased education and outreach.

39. At the hearing of this matter on the merits, Dr. Gillin and Mr. Richards testified that they could only identify one possible instance anywhere of a captive deer transferred interstate that was later found to have Chronic Wasting Disease, and that Dr. Gillin did not know of a single instance in which a deer outside a laboratory had been killed by Chronic Wasting Disease.

40. Dr. Gillin further testified that in an "ideal world," a state would test all deer killed by hunters for Chronic Wasting Disease and allow no interstate movement of any animals, but acknowledged that states need to strike a balance of public-policy considerations when managing a disease such as CWD.

Defendants' Response to CWD detections in Missouri

41. The Missouri Department of Conservation responded to the state's first CWD detections by issuing, approximately two years after the first detection, a CWD "Surveillance and Management Plan." (Defendants' Ex. NN.) The Plan emphasized a targeted, population-thinning approach in the immediate area surrounding CWD detections, including increased surveillance, aerial surveys, and sampling of vehicle-killed deer, as well as a ban on feeding and placement of salt and minerals for wildlife. (*Id.* at 2-3). Defendants' witnesses admitted the Plan employs a strategy similar to that used by Illinois, which has maintained a relatively stable prevalence rate of CWD (about 1%) since 2002. (*Id.* at 7).

42. Defendants' expert Dr. Gretchen Greene opined that "[s]hould Chronic Wasting Disease be perceived to affect the population of deer in Missouri, over $1 billion in economic activity is placed at risk, as well as approximately $500 million in economic value to residents." (Defendants' Ex. JJ.) However, Defendants presented no evidence that Missouri's deer herd has declined significantly in the six years since CWD was first detected in the state, and MDC employee Jason Sumners admitted that there has also been no perceptible change in hunting patterns in Missouri in the years since the disease was detected in the state, except for in some target areas because of a herd reduction. (Plaintiffs' Ex. 46).

43. During the past hunting season, approximately 280,000 free-ranging white-tailed deer were killed by hunting in Missouri, an increase of more than 25,000 deer over the prior year. The Missouri Department of Conservation tested approximately 7,600 free-ranging white-tailed deer for CWD, including deer taken by private hunters, deer taken as part of the Department's culling efforts, and roadkill. Seven of these white-tailed deer tested positive for CWD – or less than $1/10^{th}$ of 1 percent of those deer tested.

44. Defendants' witnesses admitted at the July 2015 hearing on Plaintiffs' request for a preliminary injunction that they did not anticipate there would be a mass mortality of white-tailed deer in Missouri over the next six months as a result of CWD; in fact, no such mass-mortality event has occurred in the state since the July 2015 hearing.

45. In contrast to this lack of mass mortalities associated with CWD and the detection of CWD in only 33 free-ranging deer after their death, it is undisputed that at least 10,000 deer in Missouri, both captive and free-ranging, have been killed in recent years by a different disease, EHD, which is not a target of Defendants' regulations. EHD, a viral disease transmitted by the midge fly, has in fact decimated deer herds in Missouri, and creates the potential for further mass mortalities within Plaintiff's herds, potentially causing them to need to look outside the state's borders to replenish their herds.

46. On October 17, 2014, the Conservation Commission proposed a series of new regulations aimed at taking control of Missouri's farmed-cervid industry, claiming the regulations were necessary to manage the threat of CWD.

47. Defendant Commissioner Bedell testified that he was not aware of the Missouri Department of Agriculture's regulations regarding the interstate movement of cervids into Missouri when he voted to approve the regulations being challenged in this case.

48. The new regulations include a change to 3 CSR 10-4.110(1), which attempts to expand on the classifications of animals which the Commission is authorized to regulate by adding the phrase, "wildlife raised or held in captivity."

49. The new regulations prohibit out-of-state white-tailed deer from being shipped to breeding facilities inside Missouri and prohibit imported cervids of any kind from being held on hunting preserves. 3 CSR 10-9.353(2), (9) (excluding "white-tailed deer, white-tailed deer-

hybrids, mule deer" and "mule-deer hybrids" from types of animals that can be shipped to a Missouri breeder by non-residents; and 3 CSR 10-9.565(1)(B)(9) (stating that "Live cervids imported into the state shall not be held in a licensed big game hunting preserve. Only cervids born inside the state of Missouri may be propagated, held in captivity, and hunted on big game hunting preserves.") A hunting preserve with a limited inventory, or a need to obtain additional trophy-hunting stock for an upcoming hunt, would therefore be precluded from purchasing animals from anywhere other than within Missouri's borders.

50. Additional regulations the Conservation Department has recently modified or added within the Department of Conservation's "Wildlife Code," Title 3, Division, 10, Chapter 9, include the following:

a) Designating all white-tailed deer-hybrids, mule deer and mule deer-hybrids in the state, without regard to their ownership or whether they were bred and raised in captivity, as "Class I Wildlife." 3 CSR 10-9.220(2) (table).

b) Imposing a new series of fencing and confinement standards for facilities that hold cervids, whether for breeding or hunting purposes, including a requirement that all fences be 8 feet tall, not counting any barbed wire for the requisite height, that the right-of-way be cleared for six feet on either side of the fence, and that the fence be built according to the state's detailed specifications for materials, depth of posts, spacing of posts, and distance between vertical wires and wooden planks. 3 CSR 10-9.220(3). The state has estimated that the aggregate cost for private entities

statewide to come into compliance with these regulations could exceed $2.2 million.

c) Imposing a variety of permitting requirements relating to breeding cervids, including submitting to an on-site inspection prior to initiation of any on-site construction activities; reporting cases of mortality within the herd for animals more than six months of age; keeping detailed documentation about the age, gender, species, and origin of the animals including conducting an "annual physical herd inventory in the presence of an accredited veterinarian"; and requiring that all animals over six months old be identified with an official ear tag or similar device approved by the U.S. Department of Agriculture. 3 CSR 10-9.353 and 3 CSR 10-9.359;

d) Imposing comparable veterinary-testing and paperwork requirements for hunting preserves. 3 CSR 10-9.565(1)(B) and 3 CSR 10-9.566.

51. Despite the Conservation Commission's suggestion in materials accompanying the regulations that the rules are urgently needed to fight the spread of CWD, the regulations were under development for several years. In that time, no additional cases of CWD have been reported at privately owned deer farms or hunting preserves, despite the fact that a higher percentage of privately owned cervids are tested for CWD than their free-ranging equivalent.

Conservation's Elk Restoration Efforts

52. In recent years, the Missouri Department of Conservation imported approximately 110 elk from Kentucky – a state that has not had a cervid test positive for CWD. Those elk came from a herd of free-ranging elk that have been designated as "low risk" by the USDA. A witness

from the Missouri Department of Conservation described "low risk" status as the free-range equivalent of CWD-certification for a privately owned cervid herd.

53. The Missouri Department of Conservation considered proposing to the Conservation Commission that white-tailed deer could be imported from CWD-certified herds from states where CWD has never been detected (like Kentucky), but it rejected that idea in favor of an outright ban on importation.

54. The Missouri Department of Conservation publicized that it has performed a live animal test on the elk from Kentucky for CWD (Plaintiffs' Ex. 44), i.e., the rectal associated mucosal lymphoid tissue test. But that test is not a USDA-approved test for CWD. (Plaintiffs' Ex. 45.)

55. The elk imported by the Missouri Department of Conservation are free-ranging. Defendants' expert Dr. Fischer admitted that free-ranging cervids pose a greater risk of spreading CWD-causing prions than enclosed cervids like those owned by Plaintiffs.

56. In considering potential source states for the imported elk herd, a Missouri Department of Conservation representative requested that Arkansas be kept on the list of potential source states because it was "CWD free"; the state veterinarian at Missouri Department of Agriculture, however, cautioned against using any states west of the Mississippi River. As discussed above, Arkansas is now experiencing a CWD breakout with prevalence rates found to be over 20 percent.

57. Dr. Fischer also admitted that there is less risk of an imported cervid spreading CWD-causing prions if that cervid lives in an enclosed facility and is only alive for approximately two weeks after it is imported, for example.

Plaintiffs' ownership of farmed cervids for breeding and hunting

58. In support of its authority to enact these regulations of farmed cervids, the Conservation Commission relies primarily on one provision: Article IV, Section 40(a) which vests the Missouri Conservation Commission with authority over the "control, management, restoration, conservation and regulation of the bird, fish, *game*, forestry and *all wildlife resources of the state*." (Emphasis added.)

59. Defendants have taken the position that all cervids in Missouri are owned commonly by citizens of the state and managed by the Missouri Department of Conservation, whether those cervids are free-ranging or are kept in privately owned breeding or hunting facilities.

60. Plaintiffs' cervids (and the cervids they import) are born and bred on private property, remain on private property throughout their lives, and are bought, sold and auctioned by Plaintiffs on private property.

61. Other than cervids bred on Plaintiffs' property through either artificial insemination or natural means, any new cervids that come onto the properties are purchased from other private owners both inside and outside the state of Missouri.

62. Whether they are hunting stock or breeding stock, Plaintiffs' cervids are intended to be enclosed in fenced, private hunting preserves or breeding facilities from birth until death, without ever entering public lands.

63. The breeder deer on Plaintiff Don Hill's operation have been determined by the Missouri Court of Appeals to be "domestic animals" within the meaning of Missouri statutes, entitling Mr. Hill to pursue compensation for property loss caused by a neighbor's dogs getting into his property and killing 21 of his white-tailed deer in December 2006. *See Oak Creek*

Whitetail Ranch, LLC v. Lange, 326 S.W.3d 549, 550 (Mo. App. E.D. 2010). The question in *Lange* was whether the breeder deer at Oak Creek fell within the protections of § 273.020, RSMo., which creates liability for the owner or keeper of a dog that kills a sheep or "other domestic animal." Applying the Webster's Dictionary definition of "domestic" – meaning "[l]iving in or near the habitation of man; domesticated; tame; as, domesticated animals" – the Court of Appeals concluded that "[t]his plain language definition of 'domestic' describes Oak Creek's breeder deer. The deer killed have never been in the wild. They were all penned and hand-fed, raised in an environment that did not allow them to move freely beyond their confined area." *Id.*

64. The term "semidomesticated" is defined in Webster's dictionary as "of or living in semi-domestication." Semi-domestication, in turn, is defined as "a captive state (*as on a fur or game farm* or in a zoo) of a wild animal in which its living conditions and often its breeding are controlled and its products or services used by man [.]" Webster's Third New Int'l Dictionary 2063 (2002) (Plaintiffs' Ex. 66)

65. The Court in *Lange* concluded that the breeder deer owned by Oak Creek are "domestic." The deer are docile and approachable, and can be either bottle-fed or fed by hand. Photos from Hill's property show breeder deer in his house and licking the ear of one of the Hill children. (Plaintiffs' Ex. 18.) A video of Hill's facilities shows his son bottling feeding a doe. (Plaintiffs' Ex. 1.)

66. Plaintiffs expend hundreds of thousands of dollars each year on feed and veterinary care for both their breeding stock and hunting stock. The State of Missouri does not share in any of these expenses.

67. Defendants' expert witness Dr. Fischer stated that the federal government has in the past paid indemnity to owners of farmed cervids that had to be destroyed following a CWD positive, though he opined that this program currently does not have adequate funding. (Defendants' Ex. DD at 15.)

68. The Conservation Commission's own regulations regarding hunting preserves acknowledge that the privately owned cervids that occupy the preserves do not belong to the state, requiring hunting preserves to be fenced so as to "exclude all *hoofed wildlife of the state* from becoming a part of the enterprise." *See* 3 CSR 10-9.565(1)(B)(1) (emphasis added).

69. Defendants' expert witness, Mr. Richards, testified that because of how they are raised, captive deer are reliant on humans for food and protection, and that those animals would be less fit to be successful outside of the fence.

70. In a recent criminal case involving the alleged poaching of a white-tailed deer being held on a hunting preserve, Officer Caldwell of the Howell County Sheriff's Department stated as follows in his sworn probable cause statement: "The Missouri Department of Conservation states that any Whitetail Deer bought by and maintained by a private big game hunting preserve is considered by them to be the same as a domestic animal so the deer in question is the sole property of Vincent Wilson and Rack Attack Outfitters." (Plaintiffs' Ex. 47.) Missouri Department of Conservation Protection Division Chief Larry Yamnitz acknowledged that the Department has taken this position in other poaching cases.

71. In a recent, comparable case in Indiana, the Indiana Court of Appeals upheld a trial court's grant of summary judgment in favor of a private hunting reserve owner who challenged a state ban on deer hunting on private "high-fence" hunting preserves like those operated by Plaintiffs Oak Creek and Winter Quarters, concluding that the state's action "went

beyond the express power conferred upon it by the General Assembly in conjunction with its charge to [the State Department of Natural Resources] to manage Indiana's wildlife." *Indiana Dep't of Nat. Res. v. Whitetail Bluff, LLC,* 25 N.E.3d 218, 229 (Feb. 2, 2015).

Impact of Importation Ban

72. Plaintiffs face a loss of business and goodwill from the proposed importation ban. This economic harm is much more likely than the hypothetical harm that allowing the importation of white-tailed deer and allowing other imported cervids to be used for hunting purposes pursuant to the Missouri Department of Agriculture's importation regulations may cause. This economic harm includes cancellation of scheduled hunts and an inability to meet customer demand both for breeding operations and private hunting events.

73. Hill, for example, in each of the past two hunting seasons, imported about 100 white-tailed deer in for Oak Creek's hunting preserve — or roughly half of the stock that he purchases each year strictly for his hunting preserve. In the most recent season, Hill imported deer and elk from states including Indiana, Pennsylvania, Iowa and Minnesota, documenting each import with certificates of veterinary inspection mandated by the Missouri Department of Agriculture. These imports cost Hill almost $1 million dollars per year. (Plaintiffs' Ex. 15.) Almost all of the deer that Hill imports in a given year die during the hunting "season" on his hunting preserve. (Plaintiffs' Ex. 3.) Although Hill has a breeding operation that he uses to stock his hunting preserve and attempts to purchase deer in-state to suit his needs, Hill testified that this is not enough to sustain his operations for the upcoming season, and that importing deer from out of state is therefore necessary for the survival of his business. Hill faces competition from other hunting preserves for the available supply of white-tailed deer.

74. Prices for a white-tailed deer hunt at Oak Creek range from $3,900 to $24,900 and up. Oak Creek also arranges for private elk hunts, which range from $3,900 to $24,900 depending on the size of the elk taken.

75. Most of the hunting at Hill's property occurs from the middle of September through the end of December. Hill earned more than $2 million from hunts at Oak Creek in both 2014 and 2015 (Plaintiffs' Ex. 15, Defendants' Ex. DDD).

76. Each season Hill collects hundreds of thousands of dollars in customer deposits to reserve upcoming hunts. (*Id.*) If Hill is ever unable to purchase animals from out of state and import them to his preserve for a coming season, Hill will be forced to cancel some planned hunts and return reservation fees paid months ago. Canceling planned hunts would, in turn, cause Hill to lose the goodwill and repeat customers he has cultivated for years.

77. If Hill is unable to import cervids for hunting for any upcoming hunting season at Oak Creek and conduct business as usual, Oak Creek will not have sufficient cash flow to repay its loans or maintain sufficient cash flow to get the business through the season. Hill also testified that he would likely go bankrupt if he could not import deer.

78. Like Hill, Plaintiff Grace relies on the interstate market in cervids to support his business and ability to make a profit. He often brokers transactions for buyers such as Hill who are looking to import cervids from elsewhere in the United States into Missouri. Grace receives a commission upon the closing of the sale and is often paid for transporting the cervids he brokers into Missouri. If Grace is unable to continue arranging these private transactions for others, he will miss out on unique and fleeting business opportunities, and he will lose customer goodwill he has worked for years to cultivate. For example, Hill asked Grace to locate elk for hunts at Oak Creek during the 2015-2016 season. Grace testified that he would not have been

able to fulfill that order from in-state sources because of the competition for the limited supply of elk in Missouri. Grace testified that the Missouri Department of Agriculture told him he could import elk to fulfill the order. But under the new regulations promulgated by the Conservation Commission, the imported elk could not be placed on a hunting preserve, and Grace would have lost out on the commission from Hill's order.

79. The fact that the new regulations would not prohibit importation of semen taken from male deer will not prevent Grace or others from suffering irreparable harm because the ability to obtain genetically desirable does from the interstate market is just as important as obtaining semen from genetically desirable bucks, if not more important.

80. The irreparable harm faced by Plaintiffs Broadway and Winter Quarters includes the inability to obtain a sufficient supply of elk for upcoming hunting seasons. For example, in the past two years Winter Quarters has had about 10 customers hunt trophy elk at its property, but Winter Quarters currently has only five trophy elk on its premises and has not identified a viable in-state source to meet the anticipated customer demand for the upcoming season.

Impact of Proposed Fencing Regulations

81. All Plaintiffs are existing permit holders whose fencing enclosures, both for breeding and hunting operations, have previously been deemed sufficient to prevent escape after inspection by MDC agents. MDC considered "grandfathering" currently permitted facilities approved under the existing "sufficient to prevent escape" standard, exempting them from the new requirements, but ultimately rejected this idea, requiring all existing permit holders to comply with the regulations by summer 2016 at significant cost. For example, Winter Quarters Wildlife's director of operations, Jacques deMoss, testified that the cost to bring Winter Quarters' fencing into compliance with the new 6-inch spacing standard for vertical wires, as

opposed to the 10-inch spacing previously approved by MDC, would be approximately $450,000.

82. MDC officials claim that the new fencing regulations are necessary because of the reported escape of 150 cervids in the past three years, but MDC adduced no evidence suggesting that the escapes were caused by fencing deficiencies that would be remedied by the proposed regulations.

83. As discussed in paragraph 24 *supra,* in June 2012, the Missouri Department of Agriculture amended its regulations at 2 CSR 3-2.020(6)(E) to purport to require owners of private hunting preserves to comply with the enclosure standards set out in the Wildlife Code. (Plaintiffs' Ex. 51). At the time the Missouri Department of Agriculture adopted that regulation, the Wildlife Code provided only that any enclosure used to contain captive cervids must be 8 feet high and maintained in a manner sufficient to prevent escape. Further, MDC's own Wildlfe Code regulations in effect at that time, as amended in 2009, expressly deferred to the Missouri Department of Agriculture's "applicable Chronic Wasting Disease rules and regulations" to govern the "health standards and movement activities" of animals held in breeding operations and Big Game Hunting Preserves. (Plaintiff's Ex. 50 at 3 CSR 10-9.353(17) and 10-9.565(1)(B)(4)).

84. Plaintiffs Donald Hill and Travis Broadway purchased and/or developed their current properties with the assurance from the Missouri Department of Conservation that the fences used to contain their properties were sufficient to prevent escape and therefore compliant with MDC regulations.

85. Prior to proposing the disputed regulations, MDC did not conduct any formal training of agents on how to ascertain whether a fence meets the current standard of "sufficient to

prevent escape," nor did MDC discuss the possibility of being more stringent in enforcement of the existing standard.

86. Despite initially proposing to "grandfather" existing permit holders who built their existing fences to be "sufficient to prevent escape" in reliance on the previous regulations, the Conservation Commission in fall 2014 eliminated the proposed "grandfathering" of existing permit holders and shortened the time for existing permit holders to achieve compliance with the new, detailed fencing standards.

87. Should the proposed regulations go into effect, Plaintiffs will also face inconsistent and duplicative enforcement from an agency that is not authorized to regulate privately owned farmed cervids, but instead is limited to regulating "wildlife resources of the state."

88. The harm suffered by Plaintiffs is irreparable because they cannot recover damages from their losses against the Defendants in this action; thus they have no adequate remedy at law.

CONCLUSIONS OF LAW

Legal Standard for a Motion for a Permanent Injunction

1. In its findings of fact and conclusions of law following the July 2015 hearing on Plaintiffs' request for a preliminary injunction, the Court issued detailed findings of fact and conclusions of law which are incorporated herein by reference.

2. In considering a Motion for a Preliminary Injunction, Missouri Rule of Civil Procedure 92.02 affirms the Court's authority to grant a preliminary injunction when, as here, "the party against whom relief is sought is given prior notice and an opportunity to be heard." Mo. R. Civ. P. 92.02(c)(1).

3. Although "[t]here is relatively little Missouri case law concerning the elements required to obtain a preliminary injunction," Missouri courts follow the general principles of law applied in most other jurisdictions. *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). This Court must weigh "the . . . probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *Id.*

4. The Court should "carefully balance the interests of the litigants and the public," and "consider the extent to which those interests will be injured by the denial or grant of [preliminary or permanent] injunctive relief." *Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861, 866 (8th Cir. 1977).

5. At the preliminary-injunction stage, Plaintiffs demonstrated a probability of success on the merits as to Count I which warranted this Court's entry of a preliminary injunction.

6. The standard for determining whether a permanent injunction should issue "is essentially the same as the standard for a preliminary injunction, except that the Court determines the plaintiff's success on the merits rather than the plaintiff's likelihood of success on the merits." *Peabody Holding Co., Inc. v. Costain Group PLC,* 813 F. Supp. 1402, 1414 (E.D. Mo. 1993).

7. In consideration of all of the testimony and evidence presented at the two hearings in this matter, the Court concludes that Plaintiffs are entitled to judgment on the merits of Count I, as Defendants' proposed regulation of privately owned cervids is not authorized by the Missouri Constitution. Even if the proposed regulations were authorized, the Court also

concludes as to Count II that the proposed regulations do not survive the required strict-scrutiny analysis, as they significantly burden Plaintiffs' right to engage in farming and ranching practices but are not narrowly tailored to achieve a compelling governmental interest.

I. Plaintiffs' Count I is granted on the merits.

A. Plaintiffs have demonstrated that the proposed regulations are not authorized by the Missouri Constitution.

8. Plaintiffs have standing to bring this suit pursuant to Mo. Rev. Stat. § 536.053 because they are aggrieved by the rules promulgated by Defendants that are challenged herein.

9. Following a full hearing on the merits, the Court agrees with Plaintiffs that the evidence shows that the animals at issue are not "game . . . [or] wildlife resources of the state" but are privately owned by Plaintiffs.

10. Defendants have taken the position that, even though the animals in Plaintiffs' operations are privately owned, privately bred, enclosed on private property, and regulated as livestock by the Missouri Department of Agriculture, privately owned cervids are nonetheless "wild by nature," and therefore subject to their control and regulation as "game" or "wildlife."[3] Defendants appear to take this argument a step further in their Answer by asserting that the same deer bred, purchased and sold by Plaintiffs do not actually belong to Plaintiffs, but instead belong to the State. Ans. ¶ 53 (asserting that "the title to all game and wildlife, *including whitetail deer*, and hunted elk or elk bred for hunting, is and remains with the State of Missouri for purposes of control, management, restoration, conservation, and regulation") (emphasis added). *See also* § 252.020 RSMo., stating that any person who violates rules and regulations relating to "wildlife of and within the state" "shall not acquire or enforce any title, ownership or possessory right in any such wildlife."). The primary authority Defendants cite in support of

their claim that they own all deer in Missouri is *State v. Weber,* 102 S.W. 955 (Mo. 1907), a 108-year-old decision that predates the enactment of the Constitutional provision and the statutes at issue in this action.

11. Contrary to Defendants' assertion, *Weber* does not stand for the broad proposition that all deer in Missouri in 2015 are "game" and "wildlife" owned by the state, and in fact supports Plaintiffs' position. *Weber* recognized that even animals historically considered "game" and "wildlife" may be subject to private ownership, stating "There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control." 102 S.W. at 957 (citation omitted).

12. The sole issue in *Weber* was whether an act that made it unlawful "to have in possession or transport at any time the carcass of *any* deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex" (emphasis added) encompassed the deer carcasses possessed by Defendant, which were from deer raised in captivity and thus were "held by private ownership, legally acquired" and not owned by the state. 102 S.W. at 955-956. The defendant argued that the act's title "relating to the preservation, propagation and protection of game animals, birds and fish" signaled that the legislature did not intend to regulate his deer carcasses, an argument the Court rejected in part because the statute expressly spoke to "any deer." The decision did not interpret agencies' authority to regulate privately owned cervids or the term "resources of the state," and expressly noted that the regulations at issue (unlike here) "do not interfere in any way with his property rights in and use of the deer by the private owner." *Id.* at 957.

13. In essence, Defendants' argument that Plaintiffs' deer must be classified as "wildlife" and "game" is a circular and conclusory one: Defendants have authority to regulate "game" and "wildlife," and this authority extends to Plaintiffs' animals because all white-tailed deer categorically are "game" and "wildlife" and thus property of the State, even if they are privately owned and raised on enclosed private property.

14. This argument not only misreads *Weber,* overlooks the factual circumstances of Plaintiffs' cervids and seeks to nullify concepts of private property; it also overlooks legal authorities establishing that (a) what sovereign title the State of Missouri can claim in "wildlife" or "wild game" derives from animals' transitory nature and ability to move from property to property, a doctrine that originated with the monarchy and is wholly inapplicable here; and (b) even if a class of animals could be deemed "game and wildlife," that does not make them "resources of the state."

i. The doctrine of kingly ownership by the sovereign of "wild animals" or "wild game" is wholly inapplicable to Plaintiffs' deer, which have never lived in the wild and are not free to move from property to property.

15. Defendants have taken the position, in materials supporting their proposed regulations, that their authority to regulate Plaintiffs' deer derives from the common-law doctrine articulated in cases such as *Geer v. Connecticut,* 161 U.S. 519 (1896), holding that historically, "the right to reduce in animals *ferae naturae* to possession has been subject to the control of the lawgiving power."

16. The prerogative to pursue, take and destroy wild animals historically was "vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery." *State v. Heger,* 93 S.W. 252, 253 (Mo. 1906) (quoting Blackstone). Because animals in the wild were "*the property of nobody, but liable to be*

seized by the first occupant," society enacted laws to restrain citizens' right to pursue and capture them. *Id.* (emphasis added).

17. As further stated by the Missouri Supreme Court:

> This prerogative of the king as an attribute of government, recognized and enforced by the common law of England by appropriate, and oftentimes by severe, penalties and forfeitures, was vested in the colonial governments of this country, and when those governments threw off the yoke of the mother country that right of sovereignty passed to and was vested in the respective states... In such cases, *the common ownership of game*, which otherwise would remain in the body of the people, is lodged in the state[.]

Id. (emphasis added).

18. Other authorities have reinforced that it is the ability of wild animals to move from one private property to another, without constraint, that justifies the concept of common, public ownership of such animals. *See, e.g., Gratz v. McKee*, 270 F. 713 (8th Cir. 1920) ("The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use.")

19. For this reason, a trespasser who pursues a wild animal onto another's privately owned property cannot gain any ownership interest in the animal. *Id.; see also* The Hon. Hugh P. Williamson, *Restrictions and Rights of the Missouri Sportsman,* 18 J. Mo. B. 317 (1962) ("John Roe, as an individual, has no scintilla of ownership in the wild rabbit that gambols across his land or in the fish that swim in the creek below his barn. And neither does the sportsman who seeks to take that game with rod or gun."). Defendants emphasize that the dictionary definition of the term "game" includes "wild animals . . . hunted for food or sport" *See, e.g.*, American Heritage College Dictionary 559 (3d ed. 1993). Defendants then cite a 1992 Wisconsin Supreme Court decision, *Hudson v. Janesville Conservation Club,* 484 N.W.2d 132,

135-136 (Wis. 1992), in support of the "common understanding" of the term "wild animal." Like the *Weber* decision, *Hudson* actually supports Plaintiffs' position.

20. *Hudson* analyzed whether a statute granting immunity to property owners for injuries on their property for an "attack by a wild animal" encompassed a captive buck that attacked a man armed with a shovel. 484 N.W.2d at 136.

21. *Hudson* expressly declined to address the issue of ownership of the attacking buck, distinguishing the facts from a prior Wisconsin decision that concluded, "When... a wild animal or fish has been legally appropriated and reduced to possession, *it ceases to be a wild animal in the legal sense. The fox farmer has the same title to the foxes held in captivity upon his premises that he has to the horse standing in his stable* or that the circus exhibitor has to the animals confined in cages." 484 N.W.2d at 137 (emphasis added) (citing *State v. Lipinske,* 249 N.W. 289 (Wis. 1933). The court's prior decision in *Lipinske* further held that "When [an] animal or fish ceases to be wild in the legal sense, *the power of the state over it ceases except such power as the state has with respect to the general property of its citizens.* This seems elementary." 249 N.W. at 291 (emphasis added).

22. Missouri courts have similarly recognized that a statute protecting "game" birds only protected those "wild birds" which were "not subject to private ownership." *State v. Willers,* 130 S.W.2d 256 (St. Louis Ct. App. 1939) (unreported) (holding that statute did not extend to domesticated birds "such as are bred and raised in the lofts of farmers, for table consumption").

23. Two other cases cited by Defendants in support of their argument that all deer are by definition "wildlife" are also distinguishable because those cases did not address the issue of

privately owned cervids. *State v. Pollock,* 914 S.W.2d 1 (Mo. App. 1995); *State v. Hall,* 751 S.W.2d 403 (Mo. App. 1988).

24. *U.S. v. Condict,* 2006 WL 1793235 (E.D. Okla. June 27, 2006), is also distinguishable. In *Condict*, the district court interpreted the Lacey Act's express definition of "fish or wildlife" to broadly include *any wild animal...whether or not bred, hatched, or born in captivity, and includes any* part, product, egg, or *offspring thereof.*" Much as in *Weber,* the district court in *Condict* concluded that the statute "was intended to apply to and protect deer *of all varieties*, as it can hardly be argued that deer were not considered game *at least at that time* [of statute's enactment in 1900]." 2006 WL 1793235 at *3.

25. Much like the pigeons "raised in the lofts of farmers" in *Willers* or the foxes discussed in *Hudson* and in contrast to the scenarios described above involving animals roaming across the landscape, the animals in Plaintiffs' facilities are enclosed in fences on private property at all times, have been lawfully purchased from out-of-state or in-state sources, and have been bred by artificial insemination or through livestock-husbandry practices.

26. Missouri's Legislature has enacted statutes to vindicate private-property interests in these animals, including the statute under which Plaintiff Oak Creek Whitetail Ranch, LLC recovered after a neighbor's dogs came onto its property and killed its animals. It has also empowered the Missouri Department of Agriculture to regulate Plaintiffs' animals as livestock, on the basis that they are "domesticated or semidomesticated." Section 267.565(2) RSMo.

27. In addition, the animals owned by Plaintiffs for purposes of their hunting preserves fall within the legal definition of "semi-domesticated" animals. The animals live in a captive state, as on a "fur or game farm," with their living conditions controlled by man, and are

kept solely for the purpose of being hunted in Plaintiffs' business operations. Plaintiffs alone bear the cost of importation, feeding and care of these animals.

28. For Defendants to nonetheless invoke inherent, kingly authority over Plaintiffs' animals as commonly owned "game and wildlife" within the meaning of the Missouri Constitution flies in the face of property rights, Missouri statutes, and the common law. On this point alone, Plaintiffs have demonstrated more than a mere probability of success in showing that Defendants have not been granted valid rulemaking authority on this subject, and that a preliminary injunction is warranted.

ii. Even if Plaintiffs' animals could be deemed to be "wildlife" or "game," they are not "resources of the state."

29. In *Schley v. Conservation Commission of Missouri,* 329 S.W.2d 736 (Mo. 1959), the Missouri Supreme Court upheld a trial court's ruling that fish on privately owned "fee fishing lakes" located entirely on private property were *not* "wildlife" within the meaning of the Missouri Constitution, despite the Conservation Commission's now-familiar argument that it held sovereign title to all such fish.

30. The fish at issue in *Schley* shared characteristics with the deer at issue in this matter, having been "purchased out of the State of Missouri and transported into the State in specially built transport trucks and deposited in the lakes that are wholly owned and controlled by [respondents], upon premises of [respondents], and waters in which fish are held in captivity," with none of the expenses shared by the State. 329 S.W.2d at 737-738.

31. In reaching its decision that the Conservation Commission lacked authority to regulate the fish, the Supreme Court pointed out inconsistencies in the Commission's own rulemaking on the subject, which signaled that the Commission did not truly consider the fish to be "wildlife." *Id.* at 740.

32. The Supreme Court also took the analysis a step further, drawing a distinction between "wildlife" as a free-standing term and "wildlife resources of the state," and questioning in its ruling why the parties had not briefed the question of whether respondents' fish were subject to "*any regulation whatever* by a Commission whose authority under the Constitution is limited to 'The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all *wildlife resources of the state.*" *Id.* at 740-41 (second emphasis in original).

33. Clearly, there is a key distinction to be drawn between the terms "bird," "fish," "game," "forestry," and "wildlife"[4] standing alone, and those categories further defined in the relevant Missouri Constitution provision as "resources of the state."

34. In essence, Defendants ask this Court to read only a portion of the provision at issue, stopping just before the term "resources of the state."

35. Such a reading is unsupportable in light of statutory-interpretation principles and the Missouri Supreme Court's decision in *Schley.*

36. Plaintiffs have demonstrated that their animals are not "game" or "wildlife" "resources of the state" and that Defendants therefore have not been granted valid rulemaking authority on this subject. For this reason and those set out below, their request for a permanent injunction must be granted.

B. If the proposed regulations go into effect, Plaintiffs will suffer irreparable harm.

37. If the regulations at issue were to go into effect, Plaintiffs would suffer irreparable harm in the form of lost business, loss of customer goodwill, and being subject to unauthorized enforcement activities in a manner that intrudes upon their property rights.

38. The monetary losses suffered by Plaintiffs may not be recoverable against Defendants, who are generally immune from liability for damages. *See* RSMo. §§ 537.600 *et seq.*

39. As demonstrated by the information set out in the Findings of Fact *supra,* the types of irreparable harm faced by Plaintiffs which have been recognized in the context of injunctive relief include:

a) Loss of the ability to continue earning a way of living, *see Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.,* 60 F.3d 27, 37 (2d Cir. 1995) (citation omitted); *Packard Elevator v. I.C.C.,* 782 F.2d 112, 115 (8th Cir. 1986) (even where financial loss is recoverable, irreparable harm exists where "the loss threatens the very existence of the [petitioner's] business") (citation omitted).

b) Loss of ability to participate in specific business opportunities or transactions, *e.g., United Int'l Investigative Servs., Inc. v. United States,* 41 Fed. Cl. 312, 323 (1998); *Starlight Sugar, Inc. v. Soto,* 114 F.3d 330, 332 (1st Cir. 1997) (upholding trial court's finding of irreparable harm threatened by sugar-importation restrictions that prevented importers from taking advantage of sugar shortage, a "unique or fleeting business opportunity"). *Cf. Southgate Bank and Trust Co. v. May,* 696 S.W.2d 515,

521 (Mo. App. W.D. 1985) (holding that party would suffer irreparable injury from denial of opportunity to redeem vehicle at private auction).

c) Continued loss of customer goodwill based on continued uncertainty as to whether the regulations will be fully implemented, *Rogers Group, Inc. v. City of Fayeteville, Ark.*, 629 F.3d 784, 790 (8th Cir. 2010) (holding that sufficient evidence in record existed of threatened irreparable harm where challenged city ordinance would cause a loss of goodwill to business, prevent business from expanding, and be unable to "grow and accommodate its customers' demands," leading to likely permanent loss of customers); *Northgate Apartments, L.P. v. City of North Kansas City,* 45 S.W.3d 475, 480-81 (Mo. App. W.D. 2001) (irreparable harm may be shown where a threatened government action creates a cloud on title to a plaintiff's property, and causes potential customers to be reticent to do business with plaintiff).

d) Being required to continue preparations for compliance with regulations in a way that may ultimately prove unnecessary. *Corus Grp. PLC v. Bush,* 217 F. Supp. 2d 1347, 1354 (Court of Int'l Trade 2002) (irreparable harm may be shown where party is "required to fundamentally alter its business operations during litigation in order to comply with a challenged Government action"); *see also Dodson v. City of Wentzville,* 133 S.W.3d 528, 537 (Mo. App. E.D. 2004) (holding that trial court erroneously dismissed count of petition seeking injunctive relief where plaintiff faced irreparable harm if court did not enter injunction preserving the status quo

from government action likely to occur "while the merits of her challenges" were being decided). *See also Am. Amusement Machine Ass'n v. Kendrick,* 244 F.3d 572, 580 (7th Cir. 2001) (threat of irreparable harm exists where compliance with a proposed ordinance will "*impose costs on [plaintiffs] of altering their facilities* and will also cause them to lose revenue") (emphasis added).

e) Injury to their property rights because of a governmental action that they have established is unauthorized. *See Glenn v. City of Grant City,* 69 S.W.3d 126, 129-130 (Mo. App. W.D. 2002) (citing *State ex rel. Helujon, Ltd. v. Jefferson County,* 964 S.W.2d 531, 537 (Mo. App. E.D. 1998).

f) Lost profits that are not recoverable against government officials or agencies who are immune from liability for damages. *See DiMa Corp. v. City of Albert Lea,* No. A12-1284, 2013 WL 1500873 at *6 (Minn. App. April 15, 2013) (unpublished) (concluding that "it appears that the city would be immune from liability for damages and, thus, that [Plaintiff] will suffer irreparable harm from the denial of its motion for a temporary injunction").

g) Loss of guaranteed personal freedoms, including the right to own property and to engage in farming and ranching practices guaranteed by the Missouri Constitution. *Cf., Heidemann v. South Salt Lake City,* 348 F.3d 1182, 1190 (10th Cir. 2003) (loss of First Amendment freedoms can constitute irreparable injury).

C. The irreparable harm faced by Plaintiffs outweighs any interest in enforcement of the regulations at issue.

40. Without question, Plaintiffs will suffer irreparable harm as described above, up to and including the loss of their businesses should the regulations take effect, with no potential recourse for their business losses against the state agencies or officials who have promulgated these regulations. *DiMa Corp., supra,* 2013 WL 1500873 at *6.

41. By contrast, Defendants cannot show an imminent threat to Missouri's cervid population or other public interests that would justify the proposed regulations.

42. The existing regulations have been under development for years; the prevalence of CWD in Missouri remains extremely low; the Missouri Department of Conservation is actively managing CWD through measures shown to stabilize CWD prevalence in other states; no mass mortalities as a result of CWD have occurred since the regulations were proposed; there have been no new CWD-positive tests in captive facilities in the past five years; and there has been no effect on hunting patterns in Missouri since the CWD was first detected in the state, except in some target areas. In fact, the 280,000 dear harvested in the past hunting season is an increase of approximately 25,000 over the prior year.

43. *Bean v. Bredesen,* 2005 WL 1025767 (Tenn. App. 2005), cited by Defendants regarding Chronic Wasting Disease, is not relevant to the current proceeding. In *Bean*, the appellate court analyzed whether evidence supporting "the trial court's conclusion that Tennessee's interest in protecting its *indigenous* white-tailed deer population" outweighed the impact on interstate commerce of a ban on private possession of white-tailed deer. *Id.* at *1 (emphasis added). Here, Plaintiffs argue for an injunction because the regulations exceed the Conservation Commission's authority under Article IV, Section 40(a) of the Missouri

Constitution and impermissibly burden Plaintiffs' rights under Article I, Section 35 of the Missouri Constitution, not based on a violation of the Commerce Clause.

D. Any potential public interest in the enforcement of these regulations is outweighed by the certain irreparable harm that Plaintiffs will suffer as described above.

44. Plaintiffs have sufficiently demonstrated that the regulations are unauthorized, and there can be no public interest in enforcement of an unauthorized government action. *E.g., Loving v. I.R.S.,* 917 F. Supp. 2d 67, 81 ("[T]he public interest would be served by a permanent injunction because the IRS's new rule is *ultra vires.*"); *LCN Enters., Inc. v. City of Asbury Park,* 197 F. Supp. 2d 141, 154 (D.N.J. 2002) ("Generally, neither the government nor the public itself can claim an interest in enforcing an unconstitutional governmental action."); *ACLU v. Reno,* 929 F. Supp. 824, 866 (E. D. Pa. 1996). *See Amos v. Higgins,* 996 F. Supp. 2d 810, 814 (W.D. Mo. 2014) ("[I]t is always in the public interest to protect constitutional rights.") (citation omitted).

45. Further, although the public may have an interest in protecting the free-ranging cervid population in Missouri from the further spread of CWD, Defendants have not shown that continuing to allow importation of cervids into Missouri subject to the Missouri Department of Agriculture's regulations will cause harm to that population. Despite a higher percentage of privately owned cervids being tested, there has not been a CWD positive captive cervid for five years; captive cervids pose less of a risk of spreading CWD outside the facilities where they are kept; and the State has a greater ability to respond to a CWD positive found at a captive facility because the cervids are enclosed.

46. For the foregoing reasons, the Court finds in Plaintiffs' favor on their request for a permanent injunction regarding Count I.

II. Even if the proposed regulations were potentially authorized by the Missouri Constitution, Plaintiffs' Count II is granted on the merits, on grounds that the regulations burden a fundamental right and are not narrowly tailored.

A. Plaintiffs are engaged in "farming and ranching" practices protected by the Missouri Constitution.

47. Despite Defendants' assertion to the contrary, the proposed regulations implicate Article I, Section 35 of the Missouri Constitution, which provides that "the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state," subject to duly authorized powers conferred by article VI of the Missouri Constitution, which are not at issue here.

48. Unless otherwise defined in the text, "words used in the constitution are given their plain and ordinary meaning," so as to effect the intent of the relevant provision. *E.g., Heidbrink v. Swope,* 170 S.W.3d 13, 15 (Mo. App. E.D. 2005) (citing *City of Jefferson v. Mo. Dep't of Nat. Resources,* 863 S.W.2d 844, 850 (Mo. banc 1993)).

49. The types of activities in which Plaintiffs are engaged, including acquiring, keeping, feeding and caring for herds of cervids, including white-tailed deer, on their property; breeding these animals for desired traits through artificial insemination or controlled breeding; and building and maintaining appropriate fences and other facilities to contain their animals, fall within the plain and ordinary meaning of "farming and ranching" practices.

50. Plaintiffs participate in the USDA's "herd" certification programs and are regulated by the Missouri Department of Agriculture, whose authority over Plaintiffs' operations derives from its entitlement to regulate "animals," a term defined in statute as "an animal of the equine, bovine, porcine, ovine, caprine, or species *domesticated or semidomesticated.*" Section 267.565(2) RSMo (emphasis added). The term "semi-domesticated" is defined by Webster's as an animal living in semi-domestication, to include "a captive state (*as on a fur or game farm* or

in a zoo) of a wild animal in which its living conditions and often its breeding are controlled and its products or services used by man." (Plaintiff's Exhibit 66) (emphasis added).

51. Defendants emphasize that Plaintiffs' animals are not sold for food; yet if the use of animals for food were determinative of whether they come from a "farm" or "ranch," there could be no such thing as a horse "farm" or "ranch," or a "farm" used to raise animals for fur or for game. Whether animals are sold for food is not determinative as to whether their breeding and keeping implicates "farming and ranching" practices. *See, e.g., State ex inf. Ashcroft, ex rel. Curators of Univ. of Missouri v. Town of Weldon Springs Heights,* 582 S.W.2d 661, 662 (Mo. banc 1979) (concluding that a property used in part "to pasture horses and cattle" was being used for "farming purposes" within the meaning of annexation statute).

52. Defendants similarly emphasize a handful of cases conservatively interpreting the term "farm labor" under the state's workers' compensation scheme, overlooking a number of authorities concluding that activities similar to Plaintiffs' *were* held to constitute farm labor. *E.g., Dost v. Pevely Dairy Co.,* 273 S.W.2d 242, 243 (Mo. 1954) (holding that the care and breeding of cows on a farm, including care of calves in barns and fields and mixing of feed was properly held to be "farm labor"); *Ullum v. George Carden Circus Int'l, Inc.,* 223 S.W.3d 192, 195 (Mo. App. S.D. 2007) (holding that ranch hand for circus company, whose duties consisted of cutting wood, building fences, grading roads, planting/mowing grass, cutting hay bales, taking care of cows, and feeding a buffalo, was a "farm laborer").

53. The Missouri Supreme Court has further recognized that the plain and ordinary meaning of the term "farm" includes "A tract of land devoted to agriculture, pasturage, stock raising, or some allied industry." *Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam County,* 946 S.W.2d 234, 239 (Mo. banc 1997) (*citing* BLACK'S LAW DICTIONARY).

B. By proposing to eliminate an interstate market for captive cervids and causing Plaintiffs to potentially incur hundreds of thousands of dollars to comply with new fencing standards, the proposed regulations substantially burden Plaintiffs' right to engage in farming and ranching practices.

54. Defendants assert that the new regulations cause no more than a *de minimis* impact on Plaintiffs' exercise of their right to engage in farming and ranching practices, both because an importation ban does not totally prevent one from raising deer in Missouri, and because the detailed fencing regulations merely provide clarification regarding the existing "sufficient to prevent escape" fencing standards, as it is possible to obtain a variance from the standards.

55. The Court disagrees with Defendants' assertions that the regulations do not burden Plaintiffs in a manner sufficient to invoke strict scrutiny, as Plaintiffs have demonstrated that the regulations significantly impact the exercise of their rights, financially and otherwise. *See, e.g., Weinschenk v. State,* 203 S.W.3d 210, 214-15 (Mo. banc 2006) (holding that substantial burden includes being subject to a "cumbersome procedure" or "onerous procedural requirement" that requires payment of money and significant advance planning, effectively limiting ability to exercise right); *Labor's Educ. & Pol. Club- Indep. v. Danforth,* 561 S.W.2d 339, 348 (Mo. banc 1977) (impact must be "real and appreciable"); *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Svcs.,* No. 2:12-CV-92-DDN, 2012 WL 6738489 at *5 (E.D. Mo. Dec. 31, 2012) (holding that forcing parties to suffer "substantial economic consequences" significantly burdened protected right); *cf. Barr v. City of Sinton,* 295 S.W.3d 287, 305 (Tex. 2009) ("A restriction need not be completely prohibitive to be substantial").

56. Hill, for example, testified at the June 2016 hearing on the merits that he would go bankrupt if not allowed to import deer from other states. As recognized in the Court's prior findings of fact and conclusions of law, Plaintiffs face the prospects of cancellation of scheduled

hunts and an inability to meet customer demand both for breeding operations and private hunting events should they be unable to continue importing deer from out-of-state.

57. Further, it would cost Winter Quarters an estimated $450,000 to install new tensile-wire fencing meeting the 6-inch vertical spacing standards set out in the new fencing rules. Winter Quarters has held off on re-branding and re-marketing the lodge for the past two years because of uncertainty as to whether this expenditure would be required. Winter Quarters' director of operations, Mr. deMoss, testified that the possibility of obtaining a variance from the regulations "means nothing" to him and does not allow him to operate as a businessman, given the uncertainty as to whether MDC's director would continue to allow any variance from year to year.

58. Based on these facts and those discussed above regarding the potential irreparable harm that would be suffered by Plaintiffs, the Court finds that by banning importation to Missouri and by setting forth detailed new fencing standards that would cost hundreds of thousands of dollars to meet, the proposed regulations significantly impact Plaintifs' ability to engage in farming and ranching practices, in a manner sufficient to invoke strict scrutiny.

C. The regulations are not narrowly tailored and therefore must fail a strict-scrutiny analysis.

59. Plaintiffs assert that the proposed regulations are not narrowly tailored to achieve a compelling governmental interest. The Court agrees, for the reasons set out below.

60. A narrowly tailored regulation "is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement[.]" *Republican Party of Minnesota v. White,* 416 F.3d 738, 751 (8th Cir. 2005) (analyzing free-speech

protections under strict-scrutiny standard); *see also Mitchell v. Steffen,* 487 N.W.2d 896 (Ct. App. Minn. 1992) (holding that state statute providing reduced benefits to persons who had lived in state less than six months was not shown to be necessary to achieve compelling governmental purpose or to be least burdensome means of accomplishing governmental purpose).

61. "More than mere perception" that a problem exists is required when fundamental rights are at stake. *See Weinschenk,* 203 S.W.3d at 218. Where existing regulations "have been sufficient" to prevent the problem that the proposed regulation seeks to correct, narrow tailoring does not exist. *Id.*

62. Further, when a government action is "arbirtrary and unreasonable," it is not narrowly tailored. *Danforth,* 561 S.W.2d at 348.

63. As to the fencing regulations, MDC defeats its own argument as to narrow tailoring by suggesting in its pretrial brief that because MDC may grant variances in case of hardship, the fencing regulations are mere guidelines, advisory in nature, which "place no greater burden on Plaintiffs than did the previous regulations" and which are "largely just an explanation about how to make a fence escape proof, *which is already required*" Defendant's Trial Brief, June 7, 2016, at p. 10 (emphasis added). A regulation cannot be strictly necessary to achieve a compelling governmental interest when even the agency promulgating the regulation claims that following the regulation is not necessary because existing rules already address the issue.

64. Similarly, Defendants can articulate no need for the detailed new standards given that MDC agents previously approved all of Plaintiffs' fences, and deemed them sufficient to prevent escape. If, as Defendants assert, the detailed new fencing standards are merely guidelines that may be nullified with a variance, then the regulations do not add anything—beyond the constant threat of strict enforcement and the need to obtain a variance at the MDC

director's discretion—to the "sufficient to prevent escape" standard currently used by MDC. Before issuing the proposed regulations, moreover, MDC never undertook any internal efforts to educate its agents as to how to better enforce the existing "sufficient to prevent escape" standard.

65. The new fencing standards cannot be narrowly tailored, as they are not based on documentation of any existing problems that would be ameliorated should the regulations take effect. The supposed documentation of deer escapes in Missouri, on which MDC relies as a justification for the standards, consists only of anecdotal, second-hand reports from field agents claiming that a total of 150 deer have escaped from captivity in Missouri in the past 3 years. Defendants adduced no information regarding how many of these escapes were caused by someone leaving an enclosure open, as opposed to being caused by a fencing defect, and did not base the proposed regulations on any information about the details or means of these claimed escapes. For example, Defendants have no idea how many of the reported 150 escapes, if any, were caused by 10-inch spacing of vertical wires as opposed to 6-inch spacing, or by posts not being set in concrete as required by the new regulations. Defendants similarly adduced no information or estimates regarding how many escapes could be prevented by the new guidelines.

66. The importation ban is similarly not narrowly tailored and is patently both over-inclusive (prohibiting importation of healthy animals under the close scrutiny of the USDA program) and under-inclusive. It is underinclusive in that MDC claims that eliminating interstate movement of cervids is essential to managing CWD, yet MDC itself in recent years has brought in cervids from out of state by importing elk which have the ability to cross Missouri's state borders without restriction. While asserting that the U.S. Department of Agriculture's herd-certification program for CWD is not a sufficient assurance against importation of CWD-positive animals, MDC nonetheless relies on a similar certification program to justify its own

importation of elk from the State of Kentucky, which are now freely roaming the Missouri landscape, creating potential for CWD transmission across state lines.

67. Defendants' own experts acknowledged that the USDA program is based on good science, and that those who administer it in Missouri are good scientists, yet fail to explain why Plaintiffs' participation in this program is not sufficient to monitor for Chronic Wasting Disease. All three of Defendants' own experts claimed to know of at most only a single instance of a deer from a CWD-certified herd shipped interstate and later found to have had CWD, constituting an extraordinarily small percentage of all deer shipped from USDA certified herds. Dr. Gillin also conceded that the USDA program has the valuable ability to "trace back" any potential CWD-positive animals, which is the only method to trace back an epidemiological event. He acknowledged that, unlike in cases of CWD detections in the wild, the USDA program creates a situation where following a CWD-positive test, there can be 100 percent testing performed inside the fence in connection with depopulation of the affected herd.

68. For all of the foregoing reasons, the Court finds in Plaintiffs' favor on their request for both a preliminary and permanent injunction, as to Counts I and II.

NOW, THEREFORE, THE COURT HEREBY ORDERS AND ADJUDGES AS FOLLOWS:

1. The Court hereby declares the following regulations challenged in this matter to be invalid pursuant to RSMo 536.050.1: 3 CSR § 10-4.110(1), 3 CSR § 10-9-220(2), 3 CSR § 10-9.220(3), 3 CSR § 10-9.353, 3 CSR § 10-9.359, and CSR § 10-9-565(1)(B). Defendants are prohibited from directly or indirectly relying on or enforcing these regulations.

2. Plaintiffs and others affected by the regulations are allowed to the import white-tailed deer, white-tailed deer-hybrids, mule deer and mule-deer hybrids into the State of

Missouri, subject to the existing regulations issued by the Missouri Department of Agriculture or any other relevant federal or state regulations not challenged herein; and

3. Plaintiffs and others affected by the regulations may hold live cervids imported into the State of Missouri on a licensed big game hunting preserve, subject to the existing regulations issued by the Missouri Department of Agriculture or any other relevant federal or state regulations not challenged herein.

4. As prevailing nonstate parties, Plaintiffs are entitled to reasonable fees and expenses incurred in this action pursuant to RSMo 536.050.3 and 536.050.4, and the Court will hear evidence as to the reasonable amount of such fees and expenses upon Plaintiffs' motion, which shall be filed within 30 days of this Order.

IT IS SO ORDERED ON THIS 15th day of September, 2016.

Judge Robert D. Schollmeyer