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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

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AGRICULTURE DECISIONS

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THE PRODUCE PLACE v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 95-1154.
Decided July 23, 1996.

(Cite as: 91 F.3d 173)

Alteration of inspection certificates - Interstate commerce - Administrative sanctions versus criminal sanctions - Fraudulent intent.

The United States Court of Appeals for the District of Columbia Circuit found that Petitioner's challenges to the Department of Agriculture's order lacked merit and, therefore, denied its petition for review. The Secretary suspended Petitioner for 90 days for fraudulently altering inspection certificates. The Court rejected Petitioner's argument that the Secretary has the burden of "proving that a particular shipment of produce was intended for interstate commerce in addition to showing the the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for sale to or by a produce dealer that does a substantial portion of its business in interstate commerce." The Court held that a criminal conviction is not required before administrative penalties may be imposed. Finally, the Court found that fraudulent intent was proven where it was shown that Petitoiner "knowingly misrepresented the temperature recorded by the inspector and intended that others would rely upon his misrepresentation."

Before: GINSBURG, ROGERS and TATEL, Circuit Judges.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

GINSBURG, Circuit Judge.

The Produce Place, a wholesale dealer in fruits and vegetables, petitions for review of a Department of Agriculture order suspending for 90 days its license to do business. Having determined that the Petitioner's challenges to the legal and factual bases of this order lack merit, we deny the petition.

I. BACKGROUND

The Perishable Agricultural Commodities Act, codified as amended at 7 U.S.C. §§ 499a *et seq.*, provides that no person may carry on the business of a

commission merchant, dealer, or broker (as defined in the Act) without a license issued by the United States Department of Agriculture. 7 U.S.C. § 499c. The PACA also proscribes certain "unfair conduct," and specifically makes it unlawful for a licensee

> to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer . . .

7 U.S.C. § 499b(4). Violation of this provision may result in a 90-day license suspension. 7 U.S.C. §§ 499h(a).

The Produce Place is a wholesale produce dealer located in Los Angeles. A substantial portion of its business involves the interstate purchase and sale of fruits and vegetables. In October and November 1992 the Produce Place purchased six loads of berries from two California growers through the growers' sales agent, Sandy Jurach. These so-called "late-season berries" were weaker than berries harvested earlier in the season and thus were not suitable for shipment over a long distance.

Shortly after each load arrived, a USDA-authorized inspector noted the general condition of the fruit and measured and recorded its temperature on a certificate issued to the Produce Place. Knowing the temperature helps a buyer or seller determine whether produce has been handled properly since it left the seller's hands, an important fact because the seller usually warrants that the produce was in suitable condition when shipped. If the produce arrives in poor condition despite proper handling--including maintenance of the proper temperature--then the seller may be liable to the purchaser under the warranty.

After the berries arrived Ted Kaplan, an employee and one-third owner of the Produce Place, reported to Sandy Jurach that there were problems with their condition and asked for a price reduction. Jurach does not grant such price reductions without a federal inspection certificate documenting the condition in which the shipment was received. Kaplan altered the temperature recorded on the six USDA inspection certificates and faxed her copies of them. He claims that he did this because federal inspectors require that each shipment be removed from coolers for inspection, resulting in a temperature increase and a recorded temperature that does not accurately reflect the temperature at which the shipment was transported and stored. The inspection certificates indicated that

each shipment had sustained bruising and decay, and Jurach did reduce the prices for the various shipments by as much as 75%, for a total reduction of $9,111.00. She authorized the price reductions based not upon the (altered) temperatures reported, but upon her knowledge the berries were weak and upon the information on the certificates concerning the general condition of the shipments.

During an investigation inspired by an anonymous tip regarding irregularities in the records maintained by the Produce Place, a USDA investigator discovered the altered inspection certificates. The Fruit and Vegetable Division of the Agricultural Marketing Service (USDA) charged the Produce Place with "willful, flagrant and repeated violations" of 7 U.S.C. § 499b(4). After a two-day hearing, an Administrative Law Judge found that the Produce Place had committed the alleged PACA infractions, and the departmental Judicial Officer eventually imposed a 90-day license suspension.

II. ANALYSIS

The Produce Place raises three issues in its petition for review: (1) whether the transactions at issue occurred within "interstate commerce" as that term is used in the PACA, and thus whether the Secretary of Agriculture had jurisdiction over this case; (2) whether 7 U.S.C. § 499h(a)(2) provides the sole authority for administrative sanctions in this case, and thus whether the Secretary was empowered to act against the Produce Place even though it had not been convicted of the misdemeanor set out at 7 U.S.C. § 499n(b); and (3) whether substantial evidence in the record supports the ALJ's finding that Kaplan altered the inspection certificates with fraudulent intent. We find no merit to the Petitioner's argument on any of these issues.

A. "Interstate Commerce"

The Produce Place argues first that the six transactions at the source of this case did not occur in "interstate commerce" as that phrase is used in the Act. (The Petitioner does not argue that the transactions are beyond the constitutional reach of the Congress under the Commerce Clause of the United States Constitution, Art. I §7.) The PACA provides both its own definition of "interstate commerce," 7 U.S.C. § 499a(3), and in § 499a(8) a guide to its interpretation:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign

> commerce if such commodity is part of *that current of commerce usual in the trade* in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another. . . .

The Produce Place argues that the raspberries and strawberries at issue here were deliberately reserved for intrastate commerce because their weak condition made them unsuitable for interstate shipping and that, therefore, they never entered "the current of [interstate] commerce." According to the ALJ, however, the six shipments of strawberries and raspberries with which we are concerned did enter the current of interstate commerce because (1) strawberries and raspberries regularly move in interstate commerce, (2) the Produce Place regularly engages in interstate purchases and sales of produce, and (3) the Produce Place sold some of these strawberries and raspberries to a national hotel chain. In these circumstances, the ALJ explained, the exclusion of the six shipments from the Secretary's jurisdiction would "greatly burden the administration of the Act."

We must reject the Petitioner's notion that the Congress intended to impose upon the Secretary the burden of proving that a particular shipment of produce was intended for interstate commerce in addition to showing that the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce. The Produce Place does not dispute that this would significantly burden the administration of the Act and concedes that the Secretary's understanding of "current of commerce" is due deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984). Indeed, we have repeatedly held that an agency "can legitimately take into account its administrative burdens when defining an ambiguous term," *National Fuel Gas Supply Corp. v. FERC*, 900 F.2d 340, 345 (D.C. Cir. 1990) (citing cases), and the term "current of commerce" is nothing if not ambiguous.

As a textual matter, the Secretary has offered a reasonable interpretation. In the spirit of the riverine metaphor used by the Congress, we read the Secretary implicitly to suggest that the current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of

strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown. Or consider the perhaps more contemporary case of a truck that regularly uses an interstate highway to carry shipments of a commodity, one of which shipments is to an intrastate destination.

Contrary to the Petitioner's argument, nothing in *Stafford v. Wallace*, 258 U.S. 495, 42 S. Ct. 397, 66 L.Ed. 735 (1922), precludes the Secretary's interpretation. That case involved the constitutionality of the "current of commerce" provision in the Packers and Stockyards Act of 1921, 7 U.S.C. § 183. Relying upon *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905), an antitrust decision from which the Congress had in fact lifted the "current of commerce" metaphor, the Supreme Court held that even a transaction occurring wholly within an individual stockyard is in the current of interstate commerce: "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another." 258 U.S. at 516, 42 S.Ct. at 402. The Court did not, however, address the status of a particular stockyard transaction that facilitates only intrastate sales, the case that would be analogous to this one.

Nor can the Petitioner cite any prior disciplinary case in which the Secretary has adopted an interpretation of 7 U.S.C. § 499a(8) that is inconsistent with the interpretation he advances in this case. The Petitioner does cite *C.B. Foods, Inc.*, 43 Agric. Dec. 489 (1981), but it is not on point because the perishable commodities at issue there had traveled interstate before the intrastate sale that gave rise to that case.

We do not understand the Secretary to take the position that the Produce Place could not possibly have demonstrated--perhaps based upon the maintenance of rigid separation between its interstate and intrastate business--that some shipments of strawberries pass through its hands without entering the current of interstate commerce. His main concern appears to be whether the separation between the current of interstate commerce and a separate and distinct stream of intrastate commerce is sufficiently clear that recognizing the distinction would not unduly burden the administration of the Act. As noted, in this case the Produce Place has not even disputed the Secretary's conclusion that he would face a formidable administrative burden if the Petitioner were to prevail here.

B. Administrative vs. Criminal Sanctions

In addition to authorizing the Secretary to suspend the license of a dealer

who "make[s], for a fraudulent purpose, any false or misleading statement in connection with any transaction," 7 U.S.C. § 499h(a)(1) and 499b(4), the PACA authorizes the Secretary to suspend the license of a dealer convicted of a misdemeanor under 7 U.S.C. § 499n(b) ("Whoever shall falsely make, issue, alter, forge, or counterfeit . . . any certificate of inspection ... shall be guilty of a misdemeanor"). 7 U.S.C. § 499h(a)(2). The Produce Place has not been convicted under § 499n(b), and the Secretary accordingly proceeded against the company under §§ 499h(a)(1) and 499b(4).

The Produce Place argues that because § 499n(b) sanctions the specific offense of "forg[ing] . . . a certificate of inspection," by the principle that *expressio unius est exclusio alterius*, forgery cannot be thought also to come within the more general condemnation of "false [ ] statements" in § 499b(4). The Produce Place argues also that because § 499b(6) makes it unlawful to "alter . . . any . . . notice placed upon any container" the same principle precludes reading "false [ ] statement" in § 499b(4) to encompass the purposeful transmission of a fraudulently altered inspection certificate. The first line of reasoning leads to the peculiar conclusion that the Secretary, who has general authority to suspend a licensee for making a false statement must, in the case of a particularly egregious type of false statement, to wit, a forged inspection certificate, await a criminal conviction before he can suspend the miscreant. The second line of reasoning leads to the equally peculiar conclusion that prior to its enactment of the criminal sanction in § 499n(b), the Congress had provided the Secretary with no authority to suspend a licensee who had fraudulently altered an inspection certificate and used it to facilitate a transaction.

In any event, the PACA authorized the Secretary to sanction a dealer for making a false statement long before the Congress added a criminal penalty for forging an inspection certificate. That the Congress found the threat of imprisonment necessary in order to deter that particular type of false statement in no way suggests that the Congress had not already empowered the Secretary to take administrative action against a forger under § 499b(4). Nor does anything in the legislative history provided by the Produce Place suggest that by adding a criminal provision the Congress intended to limit the Secretary's pre-existing administrative authority. Section 499h(a)(2), which authorizes the Secretary to suspend or revoke the license of any dealer convicted under the criminal provision (§ 499n(b)) is therefore better understood as a means merely of relieving the Secretary, when the inculpative facts have already been found beyond a reasonable doubt in another forum, of the procedural burden entailed in making a factual determination under § 499b(4), and not as creating the exclusive means of suspending the license of a forger.

Moreover, as the Secretary points out, the terms "remove, alter, or tamper with" in § 499b(6) do not reach the full extent of Kaplan's conduct in this case; he not only altered the inspection certificate, he submitted them to Jurach. While one might conclude from the specific terms of § 499b(6) that the Secretary cannot proceed under § 499b(4) against a licensee who has merely altered an inspection certificate without somehow using it in connection with any transaction--indeed, it is not clear that altering a certificate and then putting it in a file counts as a "mak[ing a] statement"--we have no occasion to reach that issue today. For now it is enough to conclude that neither of the Petitioner's *expressio unius* arguments is at all persuasive.

C. Evidence of Fraudulent Intent

Finally, the Produce Place argues that the record does not contain substantial evidence indicating that Ted Kaplan altered the inspection certificates "for a fraudulent purpose." Kaplan admitted at the hearing, and the ALJ found, that Kaplan altered the certificates in case one of the Petitioner's customers, Ralph's Supermarkets, questioned whether the berries had been properly chilled. The ALJ also found that Kaplan had altered the certificates in order to support his request for a price adjustment from his supplier, Sandy Jurach.

The Produce Place does not dispute either finding but argues that they do not establish a fraudulent purpose. According to the Petitioner, Kaplan was merely trying to correct the information on the certificate in order to compensate for "what he perceived to be a flaw in the inspection process"--namely, that it required removing the berries from the cooler so far in advance of the actual inspection that their temperature would rise between three and seven degrees--rather than to mislead either Jurach or Ralph's as to the actual temperature at which the berries had been transported or stored.

Even if all this is true, it is wholly beside the point, which is that Kaplan knowingly misrepresented the temperature recorded by the inspector and intended that others would rely upon his misrepresentation. Kaplan's honest belief that the certificates did not reliably indicate the condition of the berries is not a license for him to change them. Those with whom the Produce Place deals may understand quite well the imperfections in the inspection process--Jurach testified that she did--and may adjust for those imperfections when considering the temperature recorded on an inspection certificate; then the unaltered information, even if uncertain, would be valuable within the trade. Indeed, that Kaplan altered the certificates in order to facilitate transactions with Ralph's and Jurach is ample evidence of his belief that the temperatures recorded on those

certificates would matter to them. Whether they did in fact matter (and Jurach testified that they did not matter to her in this case) is not relevant to the validity of the ALJ's conclusion that Kaplan's purpose was fraudulent.

III. CONCLUSION

For the foregoing reasons, the petition for review is *denied.*

POTATO SALES COMPANY, INC. v. DEPARTMENT OF AGRICULTURE.
No. 95-70845.
Decided August 5, 1996.

(Cite as: 92 F.3d 800)

Misrepresenting the place of origin of apples - Willful and flagrant violations - License revocation.

The United States Court of Appeals for the Ninth Circuit denied the petition for review of the Secretary's decision revoking Petitioner's license for misrepresenting the place of origin on 7,554 cartons of New Zealand Apples. Petitioner did not dispute that it violated the PACA, therefore, the Court's determination was limited to whether the violations wer flagrant, repeated and willful, and whether license revocation was appropriate. The Court found that the Judicial Officer correctly determined Petitioner's conduct to be flagrant based on the fact that it was intentional, knowing, and deliberate. The Judicial Officer's finding that Petitioner's conduct was flagrant was not arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law. It was therefore, not necessary for the Court to decide whether Petitioner's conduct was also repeated. Petitioner's conduct was willful, as it was done either intentionally or with careless disregard of the regulations. License revocation is consistent with Department of Agriculture policy, and the Judicial Officer considered the appropriate factors when determining the sanction.

Before BRUNETTI and RYMER, Circuit Judges, and Tanner, District Judge.*

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*Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RYMER, Circuit Judge

Potato Sales Company, Inc. petitions for review of the decision of the Secretary of the United States Department of Agriculture (USDA),[1] adopting the decision of the administrative law judge that revoked Potato Sales's license under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a *et seq.* for misrepresenting the place of origin on 7,554 cartons of New Zealand apples.

We have jurisdiction, 28 U.S.C. § 2342 and deny the petition for review.

I.

Potato Sales holds a license under the PACA. Sometime in March or April 1992, Lynn Chou of TSL Trading, Inc., d/b/a SL International, approached Don Beck, Potato Sales's vice president in charge of fruit sales and son-in-law of Jack Berlin, its president and sole shareholder. Chou wanted to buy New Zealand apples from Beck, but indicated that her customer, Ever Justice Corporation, required them to be repacked so that the lids would not identify the products as New Zealand apples. Beck told Chou that this practice was "not customary trade" and was "not something that Potato Sales ordinarily would do." Nevertheless, Beck agreed to the relidding to "satisfy somebody to do the business and get the order." Potato Sales charged $33 per carton plus an additional $5 per carton for the relidding. Beck ordered box lids from a supplier in Washington. Chou and a representative from Ever Justice inspected a sample pallet before paying for the apples.

At some point, SL International asked Potato Sales to peel the stickers from the apples for the last 6 pallets loaded at the tail of each container, but Beck didn't do this. In any event, four Potato Sales employees worked for nine days each to relid the apple cartons ordered by SL International.

During April and May Potato Sales filled three orders and shipped a total of nine trailers with 7,554 relidded cartons of New Zealand gala apples to SL International, which in turn sold them to Ever Justice for shipment to Taiwan

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[1]Donald A. Campbell, the Judicial Officer (JO) of the USDA, entered the decision and order. The JO's order is deemed to be the final order of the Secretary of the USDA pursuant to 7 U.S.C. § 499j and 7 C.F.R. § 1.142(c).

under an invoice listing the commodity as "U.S. Fresh Apples." Taiwanese officials inspected the second shipment and found that the apples were misbranded. The third shipment was then diverted to a buyer in Hong Kong.

The USDA instituted proceedings against all three entities, alleging "flagrant," repeated," and "wilful" violations of PACA, 7 U.S.C. § 499b(5), and seeking revocation of each entity's PACA, license.[2] Ever Justice settled before the administrative hearing, agreeing to a 90-day suspension of its PACA license and a $50,000 penalty.

By the time of the hearing, Potato Sales was out of business. It had filed for bankruptcy, had no employees, and both Beck and Berlin were employed elsewhere.

The Chief ALJ, Victor W. Palmer, concluded that Potato Sales and SL International violated PACA by misbranding the cartons; that the violations were "flagrant," "repeated," and "wilful"; and that Potato Sales's PACA license should be revoked. The ALJ's conclusions were adopted on appeal by the Judicial Officer, Donald A. Campbell. Potato Sales timely filed this petition for review.

II.

The scope of our review of administrative decisions is narrow: administrative agency decisions will be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . ." *Farley and Calfee, Inc. v. U.S. Dept. of Agriculture,* 941 F.2d 964, 966 (9th Cir. 1991) (citation and internal quotation omitted). We are to uphold an agency's findings of fact if they are supported by substantial evidence. *Hawaii Helicopter Operators Ass'n v. FAA,* 51 F.3d 212, 215 (9th Cir. 1995). An agency's conclusions of law are subject to de novo review, with deference to the agency's "reasonable construction" of the statute and regulations. *Mester Mfg. Co. v. INS,* 879 F.2d 561 (9th Cir. 1989).

We may not overturn the Secretary's choice of sanction unless it is "unwarranted in law . . . or without justification in fact." *Farley,* 941 F.2d at 966 (citation and internal quotation omitted). "The fashioning of an appropriate remedy is for the Secretary of Agriculture and not for the court." *Magic Valley*

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[2]Section 499b(5) makes it unlawful for a licensee to misrepresent the State or region of origin of any perishable agricultural commodity. PACA in turn provides that no entity may carry on the business of a commission merchant, dealer, or broker in perishable agricultural commodities without a valid and effective PACA license. 7 U.S.C. § 499c(a).

Potato Shippers, Inc. v. Secretary of Agriculture, 702 F.2d 840, 842 (9th Cir. 1983) (citation and internal quotation omitted). Thus, "[t]he court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in (his) choice of the remedy.'" *Id.* (citation omitted).

III.

PACA, 7 U.S.C. §§ 499a *et seq.*, makes it unlawful for any licensee to misrepresent the origin of a perishable agricultural commodity, 7 U.S.C. § 499b(5), and provides for license revocation for "flagrant" or "repeated" violations, 7 U.S.C. § 499h(a). Where the violation is "willful," license revocation proceedings may be initiated without a prior written warning and opportunity to demonstrate or achieve compliance. 7 C.F.R. § 46.45(e)(5); *see also* 5 U.S.C. § 558(c). Here, the parties do not dispute that Beck's conduct is imputed to Potato Sales, 7 U.S.C. § 499p, and that Potato Sales violated PACA by relidding 7,554 cartons of New Zealand apples. Nor do they dispute that Potato Sales did not receive a written warning or an opportunity to cure prior to the institution of this disciplinary action. Accordingly, we need determine only whether the Secretary properly concluded that Potato Sales's violations were "flagrant" or "repeated" and "wilful" and, if so, whether the Secretary acted within his authority by revoking Potato Sales's license.

IV.

Potato Sales argues that the Secretary erred in concluding that its violations were "flagrant" because 7 C.F.R. § 46.45 defines its conduct as either a "serious" or "very serious" violation; the Secretary improperly relied primarily on the number of lots involved; and the Secretary erroneously distinguished other misbranding cases. We disagree.

Examples given in PACA regulations suggest that a "flagrant" violation involves knowing conduct, whereas a "serious" or a "very serious" violation typically involves only accidental or negligent conduct. *Compare* 7 C.F.R. §§ 46.45(a)(3)(i)-(iii) (flagrant violations), with 7 C.F.R. § 46.45(a)(2)(ii) (very serious violations), and 7 C.F.R. §§ 46.45(a)(1)(i)-(iv) (serious violations). Other indicia of "flagrant" rather than "serious" or "very serious" violations are a large number of transactions, committed over a period of time. *See, e.g., In re Stemlit Growers, Inc.*, 49 Agric. Dec. 520 1990 WL 230367 (1990) ("flagrant" violations where grower sold and shipped containers of cherries labeled grade "Washington No. 1" after official inspected and informed grower that cherries failed to make

that grade); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557 (1981) ("flagrant" violation where shipper shipped nine lots of potatoes labeled grade "U.S. No. 1" after official inspected and informed shipper that potatoes failed to make that grade), *aff'd*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers*, 34 Agric. Dec. 773 (1975) ("flagrant" violation where, over the course of four years, grower sold and shipped fourteen lots of potatoes labeled "U.S. No. 1, 50 lbs Net" after officials repeatedly inspected and notified grower after each violation that shipments did not make grade), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *E. J. Harrison & Son, Inc.*, 27 Agric. Dec. 1339 (1968) ("flagrant" violation where shipper shipped six lots of potatoes marked "U.S. No. 1" when they failed at the time of shipment to make the grade). *Accord* 10 Harl, *Agricultural Law* § 72.09[3], p. 72-35 (1995) ("'Flagrant' violations have been stated to be those which are committed with knowledge of their occurrence, involve a large number of transactions, are committed over a period of time, and involve a substantial sum of money.")

Here, the JO found that Beck's conduct was intentional, deliberate, and knowing, that a large volume of produce was involved, and that the shipments spanned a period of a month and a half. These findings are supported by substantial evidence.

Potato Sales faults the JO's conclusion that its conduct was "flagrant" on the footing that his primary rationale was because the "serious" and "very serious" definitions under the regulations use the singular language "[a]ny lot of perishable agricultural commodity." We don't read the JO's decision as turning on the fact that more than a single lot was misbranded, although the quantity of cartons and number of shipments involved were factors that he took into account. Rather, the ruling was based on the JO's finding that Potato Sales's conduct was intentional, knowing, and deliberate.

Potato Sales also contends that the decision was arbitrary because it incorrectly distinguished the Secretary's three most recent misbranding decisions as far less serious than this one. We do not agree. In *In re Magic Valley,* 40 Agric. Dec. 1557, there was a dispute over the grade of the potatoes; the shipper genuinely misapprehended the distinction between shipping point and receiving point inspections; and it was a one-time occurrence involving a small portion of a single day's shipment. Likewise, in *In re Stemilt,* 49 Agric. Dec. 520, the shipper relied upon a 25-year old prior practice by inspection authorities that allowed domestic shipment even after foreign shipment was prohibited due to misbranding. In *In re Maine Potato Growers,* 34 Agric. Dec. at 795, although the grower had received several warnings of past violations over the past four years, the proceeding involved a failure to take steps to assure that no violations

would occur; it did not involve current shipment of misbranded commodities despite knowledge of the current misbranding.

Accordingly, the Secretary's conclusion that Potato Sales's violations were "flagrant" was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. We need not, therefore, decide whether Potato Sales's violations were also "repeated."

V.

Potato Sales further argues that the Secretary erred in concluding that its conduct was "wilful" because "wilfulness" requires a showing of "gross neglect of a known duty"; Potato Sales was unaware of Taiwan's import restrictions; Beck did not believe that he was misleading anyone because the customer knew what was inside the cartons; Potato Sales was at most lax or careless; and Beck was the only person in a position of authority who knew about the relidding. Therefore, Potato Sales claims, the Secretary simply "surmised without a factual basis" that Beck was deliberately deceptive. We cannot agree.

Potato Sales relies on the definition of willfulness in *Capitol Packing v. United States,* 350 F.2d 67, 78-79 (10th Cir. 1965)--that it amounts to "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof"--but we are bound by our own definition. In this circuit, a violation is "wilful" if the violator "(1) intentionally does an act which is prohibited,- irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements . . . ." *Lawrence v. Commodity Futures Trading Comm'n,* 759 F.2d 767, 773 (9th Cir. 1985) (citation and internal quotation omitted). *See also* Agricultural Law at 72-36.

There is substantial evidence to support the Secretary's finding that the violations were "wilful." Beck charged almost a 20% premium for the relidding, gave a demonstration of the effectiveness of the relidding before payment, was asked to remove stickers only from the last several pallets in each container, expressed doubts about the propriety of his conduct, and loaded nine containers in three separate shipments with more than 7,000 cartons of New Zealand apples relidded to look like Washington apples. As the JO suggested, it is hard to imagine how this doesn't add up at least to acting in "careless disregard" of PACA's misbranding regulations.

Potato Sales points out that it was not an exporter, that Beck knew nothing about Taiwanese import restrictions, and that he could not have acted wilfully because he didn't believe that anyone would be deceived since his customer and its customer had asked for the relidding. Potato Sales also argues that the JO

improperly inferred that its conduct was willful, contrary to *Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985). In *Farrow*, the JO simply "inferred" or "assumed" intent without factual support; here, however, there is substantial evidence supporting the JO's finding that Beck's actions were deliberate and not merely negligent. Even though relidding did not deceive SL International or Ever Justice, it *was* deceptive. Unlike *Capital Produce Co., Inc. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991), where the evidence showed only a single substitution of products and negligent supervision instead of deliberate action, Beck went to considerable lengths to relid, buying cartons from Washington, devoting substantial work-hours to the project, and charging extra for it. In addition, while Beck did not peel off the New Zealand stickers on apples in cartons packed in the rear of the containers, he did continue to relid despite the clear signal of an effort to hide something from inspection. The JO's findings thus have substantial factual support and were not legally erroneous.

Accordingly, the JO did not arbitrarily conclude that Potato Sales's violations were "wilful." Therefore, neither prior notification nor an opportunity to demonstrate compliance was required. 7 C.F.R. § 46.45(e)(5); 5 U.S.C. § 558(c).

VI.

Potato Sales argues that the order permanently revoking its license is contrary to the USDA's own express policy, articulated in *In re Stemilt Growers Inc.*, 49 Agric. Dec. 520, 1990 WL 320367 not to remove a firm that engages in misbranding from the produce industry. While *Stemilt* did say that "it is not the policy of the Department to remove from the industry a firm that engages in misbranding," *id.* at *7, the JO there was not relying on an official policy statement from the USDA but on two prior cases involving license suspensions, *In re Magic Valley*, 40 Agric. Dec. 1557, and *In re Maine Potato Growers,* 34 Agric. Dec. 773. As none of these decisions considered conduct that put the license itself in jeopardy, the Secretary is not constrained by their statements about policy in a case such as this, where flagrant and willful conduct has been found.

The plain language of § 499h(a) itself allows the Secretary to revoke a license for "flagrant" or "repeated" misbranding violations. It provides that when the Secretary determines that a violation of § 499b has occurred he may "suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." In any event, license revocation is consistent with the

USDA's sanctions policy as it has been construed. In *In re S.S. Farms Linn Country, Inc.*, 50 Agric. Dec. 476 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table), the JO spelled out the USDA's sanctions policy as follows:

> each sanction will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

50 Agric. Dec. at 497. Revocation of Potato Sales's license was consistent with this policy.

Potato Sales further maintains that removing it from the industry does not serve either USDA's policy for misbranding violations or the interests of deterrence since Potato Sales had no knowledge of, did not benefit from, and has already been penalized (by going out of business) for the violations. Potato Sales also complains that Ever Justice entered a more favorable settlement with a less severe sanction. It also contends that the Secretary failed to take mitigating factors into account.

We agree that mitigating factors must be considered in determining the appropriate sanction. *Norinsberg Corp. v. U.S. Dept. of Agr.*, 47 F.3d 1224, 1227 (D.C. Cir.) (citing *In re S.S. Farms*, 50 Agric. Dec. at 497), *cert. denied*, --- U.S. ---, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995). However, the Secretary did consider all relevant circumstances in this case. *Id.* The choice of sanction was based on the key role that Potato Sales played in the misrepresentations; the blatant and deliberate nature of the conduct; the number of transactions involved; the span of time during which the relidding and shipping occurred; and on evidence showing harm to trade with Taiwan, an important customer for United States apples, and to the credibility of the Washington State apple label as well as the trust relationship that is necessary in the produce industry. The JO also considered the need to deter this type of violation in the future. The fact that Potato Sales was already out of business and that the only individuals likely to be affected by the revocation were its shareholders were also noted, as was the fact that this was Potato Sales first brush with the law.

While Potato Sales complains about Ever Justice's disparate treatment, a sanction resulting from negotiation rather than adjudication is not something we can consider. *Agricultural Law* at 72-45 (citing *In re Sol Salins*, 37 Agric. Dec. 1699, 1737 (1978)).

Other mitigating factors that Potato Sales suggests should have influenced the result, but did not, are either not supported by the record or are immaterial. For example, the record does not support Potato Sales's claim that it was an "unwitting repacker," as there was ample evidence that Beck played an integral role, with full knowledge of the deceptive relidding. Nor does the record support Potato Sales's assertion that Beck had a good faith belief that there was no violation, for there is ample evidence that he knew what he was doing. Likewise, the evidence does not support Potato Sales's argument that its actions were attributable to "lax management practices" and the "carelessness" of one employee rather than to the deliberate, wilful, and knowing conduct of a corporate officer.

That Beck and the four employees were the only one involved in the relidding is also not dispositive, as PACA provides that Beck's conduct is imputed to Potato Sales. *See* 7 U.S.C. § 499p. By the same token, the fact that Potato Sales did not realize a profit because SL International ultimately did not pay for the apples does not compel a different result; as Beck conceded, he agreed to relid to get the business.

Revoking Potato Sales's license was within the Secretary's authority, and substantial evidence supports his decision to do so.

PETITION DENIED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: GARY B. HOPKINS and LAWRENCE F. KRZEWINSKI, d/b/a EAT MORE CITRUS CO., AND GARY B. HOPKINS, ANTHONY L. NGUYEN and MARK TATGENHORST, d/b/a EAT MORE CITRUS CO.
PACA Docket No. D-95-0525.
Decision and Order filed June 25, 1996.

Failure to make full payment promptly for produce - Failure to obtain license does not alter or negate PACA compliance requirements - Publication.

Judge Hunt published the finding that Respondents Anthony L. Nguyen and Mark Tatgenhorst committed flagrant and repeated violations of the PACA by failing to make full payment promptly for 37 lots of perishable agricultural commodities, totalling $413,163.33. The failure of Respondent partnership to seek a license does not alter the fact that it was subject to the PACA.

Eric Paul, for Complainant.
Respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, Pro se.
Michael N. Alexander, Rancho Cucamonga, CA, for Respondent Lawrence F. Krzewinski.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) ("PACA"), the regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45; hereinafter the "Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice").

The proceeding was instituted by a complaint filed on May 23, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged failure to make full payment promptly for 37 lots of perishable agricultural commodities totalling $413,163.33, which had been received and accepted in interstate and foreign commerce from four sellers. The complaint alleged in paragraph IV that four purchase transactions in September 1992 occurred during the period when respondents Gary B. Hopkins and Lawrence F. Krzewinski were doing business as partners as respondent Eat More Citrus Company; and that thirty-two purchase transactions in May, June, and July 1993 occurred while respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst were doing business as partners as respondent Eat More Citrus Company. Copies of the complaint were

served on respondents Gary B. Hopkins, Lawrence F. Krzewinski, and Mark Tatgenhorst. Four attempts were made to serve respondent Anthony Nguyen. The last attempt was returned by the United States Postal Service on July 14, 1995, with the statement "Box Closed-Unable to Forward-Return to Sender."

Separate answers were filed admitting some of the jurisdictional allegations and denying the failure to pay allegations by respondents Gary B. Hopkins and Lawrence F. Krzewinski. Respondent Mark Tatgenhorst filed an answer disputing his responsibility for the violations alleged. On March 7, 1996, an order to show cause was issued directing the parties to show cause why a hearing should not be conducted in this proceeding by telephone. No objections were filed to a hearing by telephone. A hearing was accordingly conducted by telephone on April 22, 1996. Complainant was represented in Washington, D.C. by Eric Paul, Office of the General Counsel. Respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst appeared *pro se* by telephone from different locations in the greater Los Angeles area. Respondent Lawrence F. Krzewinski, represented by attorney Michael N. Alexander, entered into a stipulation with complainant before the hearing concerning his poor health and his lack of participation in the day-to-day operations of the Eat More Citrus Company partnership in September 1992.

The complaint was amended at the hearing on complainant's unopposed motion to delete the four failure to pay transactions in September 1992 alleged in paragraph IV of the complaint. This amendment effectively removed Lawrence F. Krzewinski as a respondent and limited the violations alleged with respect to respondent Gary B. Hopkins to those which occurred during the existence of his Eat More Citrus Company partnership with respondents Anthony L. Nguyen and Mark Tatgenhorst.

Complainant presented testimony from two witnesses, Marketing Specialist Don Wilson, who testified from Tucson, Arizona, and Marketing Specialist Clare Jervis, who testified from Washington, D.C. Testimony was given by respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst. George Viota, a witness called by respondent Gary B. Hopkins, testified from a fourth California location. Respondents introduced no exhibits.

Findings of Fact

1. On August 1, 1987, respondent Gary B. Hopkins, an individual doing business as Eat More Citrus Company, under PACA license number 86145, formed a partnership of the same name with Lawrence F. Krzewinski. (CX-1, pgs. 21-24.)

2. PACA license number 881788 was issued to this partnership, composed of respondents Gary B. Hopkins and Lawrence F. Krzewinski, on August 17, 1988. This license terminated on August 17, 1993, pursuant to section 7(d) of the PACA (7 U.S.C. § 499d(a)) when the partnership failed to pay the required annual renewal fee. (Tr. 70-72.)

3. Eat More Citrus Company ("Eat More"), at all times material herein was a California general partnership. It's mailing and business address at the Los Angeles Produce Market was 778 Market Court, Los Angeles, California.

4. Respondents Anthony L. Nguyen and Mark Tatgenhorst were employed by Eat More as salesmen beginning about 1990.

5. On or about January 1, 1993, Gary B. Hopkins approached Mark Tatgenhorst and Anthony L. Nguyen and asked them to invest and become partners with him in Eat More.

6. Gary Hopkins testified that he, Tatgenhorst, and Nguyen entered into an agreement to become general partners and to use the name Eat More Citrus Company. Mark Tatgenhorst invested $20,000 in Eat More and received a ten-percent interest in the business. Anthony L. Nguyen invested $10,000 in Eat More and received a share of the business. (Tr. 81-82.)

7. On or about January 1, 1993, Eat More began operating as a partnership composed of Gary B. Hopkins, Mark Tatgenhorst, and Anthony L. Nguyen. This partnership was reported to the California Department of Food and Agriculture. The partnership did not seek a new PACA license, although it operated subject to the PACA. (Tr. 62, 86.)

8. Tatgenhorst stated in his answer to the complaint filed on June 5, 1995, that "in late 1992 the company was on the verge of bankruptcy. The payables were always 200,000 - 300,000 above the receivables. Everyone was always calling for money. . . ." He explained at the hearing that "I knew very well going into this venture that the company was way upside down but we were hoping that during the January and February months which is Chinese New Year's Eve in there that it would be a good time and we would make a lot of money and somehow get the same quotes where we could keep the operation going." (Tr. 91.)

9. Tatgenhorst testified that the venture did not turn out as he had expected. He said that Eat More immediately got "hit with enormous amounts of bankruptcies" by six or seven of its customers which depleted the money that he and Nguyen had invested. However, the partnership tried to continue because "I saw how that company could be upside down and could go on forever. I mean I almost -- because shippers were willing to ship you products and take a chance on you -- you know -- and we -- you know -- we all knew that we

couldn't pay the people in thirty days -- you know. We tried our best to be a thirty-day company. It wasn't going to happen. It just -- so we would select certain shippers to pay that were important to us at that point in the season and then try our best to make money on the stuff they shipped us in hopes that we could continue to pay down our debt which it didn't happen." (Tr. 101-02.)

10. Between June 18 and July 11, 1993, the partnership, operating as respondent Eat More, purchased and accepted mangoes and limes, perishable agricultural commodities, in eight transactions with Paulmex International, Inc., McAllen, Texas. The total amount past due and unpaid in these transactions was $94,088.25. (CX-8, 8b.)

11. Between May 17 and July 17, 1993, Eat More purchased and accepted mangoes, grapes, and limes, perishable agricultural commodities, in 25 transactions with Chiquita Frupac, Philadelphia, Pennsylvania. The total amount past due and unpaid in these transactions was $214,608.58. (CX-8, 8c.)

12. On June 18 and 26, 1993, Eat More purchased and accepted mangoes, a perishable agricultural commodity, in two transactions with London Fruit, Inc., Pharr, Texas. The total amount past due and unpaid in these transactions was $41,856.00. (CX-8, 8d.)

13. Mark Tatgenhorst ceased being a partner in Eat More on or about July 9, 1993. (CX-2; Tr. 93.)

14. Respondents Gary B. Hopkins and Anthony L. Nguyen filed individual Chapter 7 petitions in the United States Bankruptcy Court, Central District of California, on November 19, 1993. They stated in bankruptcy documents that the Eat More partnership had ceased operations. (CX-3, p. 4; 4, p. 3.)

15. A computer generated Eat More balance sheet as of October 29, 1993, obtained from the bankruptcy trustee, revealed cash, accounts receivable, and inventory totalling $73,126.56 and accounts payable of $739,251.44. (CX-5.)

16. During an investigation that he conducted in Los Angeles on August 26 and 27, 1994, Marketing Specialist Don W. Wilson was advised by respondent Gary B. Hopkins that the business records of Eat More had been stolen a short time after it had stopped operations in July 1993. (Tr. 14-17.) Mr. Wilson contacted sellers that had filed trust notices against Eat More with the Secretary, and who were also listed as unpaid creditors with addresses outside the State of California in the bankruptcy schedules (schedule F) that had been filed by respondents Gary B. Hopkins and Anthony L. Nguyen. (CX-3, 4; Tr. 17.) He verified that the amounts set forth on the invoices that he obtained from Paulmex International, Inc., Chiquita Frupac, and London Fruit, Inc., remained unpaid and prepared a schedule of these unpaid purchases of perishable agricultural commodities in interstate commerce. (CX-8, 8b, 8c, 8d; Tr. 57-60.)

17. Prior to the hearing on April 22, 1996, Mr. Wilson contacted each of these three unpaid sellers by telephone and confirmed that the transactions still remained unpaid. (Tr. 60-62.) Although Paulmex International, Inc. and London Fruit, Inc. were able to confirm that the full amount scheduled by Mr. Wilson remained unpaid, Chiquita Frupac was only able to confirm that at least $182,738.00 remained unpaid. Information as to some of the earlier transactions was no longer included in the data accessible by computer. (Tr. 61.) The total amount confirmed unpaid as of the date of the hearing in this proceeding was, therefore, approximately $318,682.25.

Law

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; . . .

Section 8(a)1 of the PACA (7 U.S.C. § 499h(a)) provides:

> Whenever (1) the Secretary determines, as provided in section 499f of this title that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Discussion

All persons engaged in the interstate produce business as a "commission merchant," "dealer," or "broker" are required to have a PACA license. The term "person" includes partnerships. (7 U.S.C. § 499a(b)(1)).

The Eat More partnership composed of Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst did not seek a PACA license even though it made purchases as a produce dealer in interstate commerce. The failure to seek a license, however, does not alter the fact that a partnership, as alleged in the complaint, was formed on or about January 1, 1993, and that it was subject to the PACA. Hopkins admitted this allegation in his answer and in his testimony, and Tatgenhorst admitted as much by stating that he received a ten-percent interest in the business. There is no evidence to the contrary. I therefore find that Hopkins, Nguyen, and Tatgenhorst formed a partnership doing business as Eat More Citrus Company on or about January 1, 1993, that Tatgenhorst withdrew from the partnership on July 9, 1993, and that Hopkins and Nguyen discontinued the partnership when they filed for bankruptcy on November 19, 1993. The record shows that during the period of Eat More's operation as a Hopkins-Nguyen-Tatgenhorst partnership (January 1 - July 9, 1993), Eat More had 21 unpaid purchases of produce totalling $185,986.93, and during the period of the Hopkins-Nguyen partnership (July 10 - November 19, 1993), Eat More had an additional 14 purchases of unpaid produce totalling $164,565.90.

It is USDA's policy that when there is more than one failure to make prompt payment for the purchase of produce and the amount involved is more than *de minimis*, there is a violation of the PACA. The violation is considered repeated and flagrant, regardless of the reason for the non-payment. *The Caito Produce Co.*, 48 Agric. Dec. 611, 629 (1989). The amount of unpaid produce purchases in this proceeding by respondents Hopkins, Nguyen, and Tatgenhorst doing business as partners in respondent Eat More were far in excess of a *de minimis* amount and the purchases were repeated. Accordingly, I find that Gary B. Hopkins, Anthony L. Nguyen and Mark Tatgenhorst, doing business as Eat More Citrus Company, committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusion of Law

Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, doing business as Eat More Citrus Company, by failing to make full payment for purchases of perishable agricultural commodities as alleged in paragraph IV of

the complaint, have flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, doing business as Eat More Citrus Company, have committed flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth above shall be published.

This order shall become final and effective 35 days after service of this Decision and Order on respondents unless appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final as to Respondent Lawrence F. Krzewinski on April 22, 1996, as to Respondent Anthony Nguyen on August 2, 1996, as to Respondent Mark Tatgenhorst on August 5, 1996, and as to Respondent Gary B. Hopkins on August 27, 1996.--Editor]

In re: QUALITY TOMATOE, INC., TOMATO, INCORPORATED and CARL FIORENTINO.
PACA Docket No. D-96-0520.
Decision and Order filed July 2, 1996.

Failure to make full payment promptly - Engaging in unfair and deceptive practices - Providing false and misleading information on license application - Alter ego - Excuses for payment violations never sufficiently mitigating - Willful, flagrant, and repeated violations - Publication.

Judge Baker published the finding that Respondents Quality Tomatoe, Inc., and Carl Fiorentino, the alter ego of Respondent Quality Tomatoe, Inc., have committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly of the agreed purchase prices of nineteen lots of perishable agricultural commodities, totaling $101,624.30. Respondent Tomato, Incorporated, a successor to Quality Tomatoe, Inc., is unfit to be licensed under the PACA because Respondent Fiorentino engaged in practices prohibited by PACA and because its license application contained false and misleading information. Even though a respondent has good excuses for payment violations, such excuses are never sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful.

Eric Paul, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a Combined Show Cause and disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*, hereinafter sometimes referred to as the "PACA"), the Regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45, hereinafter sometimes referred to as the "Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151, hereinafter referred to as the "Rules of Practice").

This proceeding was instituted by a Notice to Show Cause and Complaint filed on March 15, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United State Department of Agriculture. The Notice to Show Cause and Complaint allege that Respondents Quality Tomatoe, Inc. and Carl Fiorentino willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period April 1993 through February 1995, by failing to make full payment promptly of the agreed purchase prices of nineteen lots of perishable agricultural commodities purchased, received and accepted in interstate commerce from four sellers on which the total amount unpaid and past due was $101,624.30. The Notice of Show Cause and Complaint alleges that the PACA license issued to Respondent Quality Tomatoe, Inc. on March 31, 1993, was suspended on November 23, 1994, because of failure to pay a reparation award and terminated on March 31, 1995. Complainant seeks publication of a finding of repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) for the payment violations alleged.

The Notice to Show Cause and Complaint further alleges that a PACA license was issued on January 6, 1995, under the name Tomato Co., Inc. which has also terminated for failure to pay the annual renewal fee, and that a new PACA license application sought by Respondent Tomato, Incorporated, under the name Tomato Co., Inc. by application received February 14, 1996, should be denied because of false and misleading statements made in the license application and because Respondent Carl Fiorentino had engaged in practices of a character prohibited by the PACA while directing the operations of Respondent Quality Tomatoe, Inc.

The oral hearing was held in Richmond, Virginia, on April 11, 1996 in accordance with section 4(d) of the PACA (7 U.S.C. § 499d(d)) which requires a hearing on a contested license application within sixty days of the date the application was filed. Respondent Carl Fiorentino filed an Answer denying that he was the alter ego and de facto owner of Respondents Quality Tomatoe, Inc.

and Tomato, Incorporated, denying that he had engaged in practices of a character prohibited by the PACA, and denying that any false and misleading statements were made at his direction in the license application. No Answer was filed on behalf of Respondent Quality Tomatoe, Inc. and Tomato, Incorporated. However, Respondent Carl Fiorentino acknowledged at the start of the oral hearing held before Administrative Law Judge Dorothea A. Baker on April 11, 1996, that he was also representing Respondent Tomato, Incorporated.[1] Complainant was represented by Eric Paul, Esquire, Office of the General Counsel, Washington, D.C. Complainant presented six witnesses and twenty-two exhibits. Respondent Fiorentino appeared pro-se, cross-examined witnesses and testified. He presented no exhibits. Reference to Complainant's exhibits and specific pages of the transcript will be by the prefixes "CX" and "Tr."

The parties were given the opportunity to file briefs. The Complainant did so; the Respondents did not. The case was referred to the Administrative Law Judge for decision on May 30, 1996.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section

[1]Trans. p. 7 - "Mr. Fiorentino: I'm representing Tomato Company, Incorporated."

499e(c) of this title.[2] However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides in pertinent part:

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse

[2]Section 5(c) of the PACA.

to issue a license to the applicant.

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

(a) Whenever (1) the Secretary determines, as provided in section 499f of this title[3] that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title,[4] or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court or having violated section 499n(b) of this title,[5] the Secretary may publish the facts and circumstances of such violation and/or, by order, suspended the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Section 8(e) of the PACA (7 U.S.C. § 499h(e)) provides:

(e) In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title,[6] that a commission merchant, dealer, or broker has violated section 499b of this title[7] or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employee, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

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[3]Section 6 of the PACA.

[4]Section 2 of the PACA.

[5]Section 14(b) of the PACA.

[6]Section 6 of the PACA.

[7]Section 2 of the PACA.

Findings of Fact

1. Respondent Quality Tomatoe, Inc., doing business as Quality Tomato Company, Inc. (CX 22), is a corporation which was organized and existing under the laws of the Commonwealth of Virginia between February 5, 1993 and September 1, 1995, when the corporation's existence was terminated by operation of law. (CX 2). The business and mailing address of Respondent Quality Tomatoe, Inc., at all times material herein was 2041-A Midway Avenue, Petersburg, Virginia 23803. (Answer, p. 1).

2. At all times material herein, Respondent Quality Tomatoe, Inc., was licensed under the provisions of the PACA. License number 930938 was issued to Respondent Quality Tomatoe, Inc., on March 31, 1993. This license was suspended on November 23, 1994, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) and terminated on March 31, 1995, pursuant to the provisions of the Act, when the firm failed to pay the required annual renewal fee.

3. Vernon L. Hatton is the nominal president, director and 100 percent shareholder of Respondent Quality Tomatoe, Inc.. At all times material herein Vernon L. Hatton was a full time employee of the Virginia State Health Department; and he did not perform any corporate duties, receive any compensation from, or have any investment in, Respondent Quality Tomatoe, Inc.. (Answer, pp. 1-2; Tr. 57-63).

4. Respondent Carl Fiorentino has acknowledged that he managed the day-to-day operations of Respondent Quality Tomatoe, Inc. in terms of operating, purchasing, selling, and soliciting customers. (Answer, p. 2). He was not given any instruction with respect to the employment of employees, the duties of employees, and the operations of the firm by its nominal president and sole stockholder, Mr. Vernon L. Hatton. (Tr. 59-60). Respondent Carl Fiorentino did not keep Mr. Hatton advised as to the operations of Respondent Quality Tomatoe, Inc. including the identity of produce sellers, when payments were made for produce, and whether anyone was not paid. (Tr. 60-61; (Hatton)).

5. During the period April 6, 1993, through February 12, 1995, Respondent Quality Tomatoe, Inc. failed to make full payment promptly to D.E. Scott & Son, Onancock, Virginia, for fourteen interstate shipments of potatoes originating in Massachusetts. (CXs 3-4; Tr. 24-26, 53, 54). The amount past due and unpaid for these fourteen transactions, $57,382.00, remains unpaid. *Id.* Mr. David E. Scott, Jr., the owner of D.E. Scott & Son, testified that Respondent Carl Fiorentino was contacted with respect to these sales and that he had no knowledge of Mr. Vernon Hatton or, with respect to the last transaction, that the

license issued to Quality Tomatoe, Inc. had been suspended and that a new entity had been licensed as Tomato Co., Inc.. (Tr. 53-55).

6. Respondent Quality Tomatoe, Inc. purchased, received and accepted three shipments of tomatoes from Six L's Packing Co., Inc., Immokalee, Florida, between September 19, 1993 and October 22, 1993 and failed to make full payment promptly for agreed purchase prices, or balances thereof, totaling $22,761.30. (CX 5; Tr. 26).

7. On October 18, 1994, a reparation order was issued awarding $18,597.30 to Six L's Packing Co., Inc. in connection with the last two of these three shipments of tomatoes. (CX 9). Respondent Quality Tomatoe, Inc. failed to pay this reparation award and, accordingly, its PACA license was automatically suspended. (CX 1, p. 2).

8. Respondent Quality Tomatoe, Inc. purchased a truckload of tomatoes from Woody's Tomato Corp. on or about May 15, 1994, and has failed to pay the agreed purchase price of $8,337.50. (CX 6; Tr. 26-27).

9. Respondent Quality Tomatoe, Inc. purchased a truckload of tomatoes from Taylor & Fulton, Inc., Palmetto, Florida, on or about June 6, 1994, and has failed to pay the agreed purchase price of $13,143.50. (CX 7; Tr. 27). An unpaid reparation default order awarding Taylor & Fulton, Inc. $13,143.50 plus interest against Respondent Quality Tomatoe, Inc. was issued March 1, 1995. (CX 8; Tr. 27).

10. A total of $101,624.30 remains unpaid to these four produce sellers for the nineteen transactions alleged in paragraph IV of the Complaint.

11. Respondent Tomato, Incorporated, was incorporated under the laws of the Commonwealth of Virginia on December 6, 1994, and was issued PACA license number 950487 under the name Tomato Co., Inc. on January 6, 1995. This license terminated on January 6, 1996, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), when the firm failed to pay the required annual renewal fee. (CXs 11, 12; Tr. 20-21).

12. On February 12, 1996, Mr. Duane Williams, a Marketing Specialist assigned to the Southeast Regional Office, PACA Branch, Fruit & Vegetable Division, Agricultural Marketing Service, conducted an investigation to determine whether Respondent Quality Tomatoe, Inc., and its principals were complying with the sanctions imposed when its PACA license was suspended for failing to pay the reparation award issued to Six L's Packing Co., Inc.. (CX 9; Tr. 17-18).

13. Marketing Specialist Williams visited the office located at 2041-A Midway Avenue, Petersburg, Virginia 23803, which was the last known business address of Respondent Quality Tomatoe, Inc. and discovered a wholesale produce business being operated at this same address, using the same telephone and FAX

numbers, and the business name Tomato Company Inc.. (CX 21; Tr. 18-19, 33-34). This was made clear when Respondent Carl Fiorentino produced a business card identifying himself as the manager of Quality Tomato Company, Inc., on which there was lined out the word "Quality" and expressly represented that the information then set forth remained accurate for the new business.

14. Respondent Carl Fiorentino also produced a notice letter dated February 15, 1996, giving Tomato[e] Co., Inc. notice that PACA license number 950487 had terminated on its January 6, 1996 anniversary date, and that it could be reinstated within thirty days following this anniversary date by the paying of a $550.00 annual fee plus a $50.00 reinstatement fee. (CX 10, p. 2; Tr. 20). Mr. Williams determined that this reinstatement period had expired and provided Respondent Carl Fiorentino with an application form for a new license and advised him that the license application should be returned immediately after it was completed because operating without a license made the firm subject to penalties. (Tr. 22).

15. On February 14, 1996, the completed application for license that is the subject of the Notice to Show Cause part of this proceeding was handed to Marketing Specialist Williams. (CX 12; Tr. 41).

16. This application, which was submitted using the business name Tomato Co., Inc. instead of the name Tomato[e] Co., Inc., used on the prior license, contained the signature "Debbie H. Taylor" and identified this person as being the president, director and 100% stockholder of the applicant corporation. It also named "Louis J. Wells" as the Secretary-Treasurer of the applicant and stated the home address of both officers as 21517 Warren Avenue, Petersburg, Virginia 23803. Similar information, with the name of the Secretary-Treasurer stated to be "Louise J. Wells", appeared on the application that had been submitted for the license that had terminated on January 6, 1996. (CXs 10, 12). The corporate records obtained from the Commonwealth of Virginia, however, identified the corporate entity as "Tomato, Incorporated" and the officers as "Debbie H. Taylor" and "Louis J. Wells". (CX 11).

17. Both license applications filed for Tomato, Incorporated contain "no" answers checked off for the following questions:

> 10. Has any person currently employed by applicant been the individual owner, partner, officer, director, or holder of more than 10 percent of the outstanding voting stock of a firm, association, or corporation?
>
> c. Against whom there was unpaid reparation award?

11. Do the business operations of applicant succeed those of another firm?

18. At the time, the name "Debbie H. Taylor" was signed to the application handed to Marketing Specialist Williams, the legal name of this individual had become Debbie H. Perkinson by reason of her marriage on April 7, 1995. (Tr. 63-64). She testified that the signature was signed by her father (Vernon Hatton) who had been given permission by her to sign her name if he had a need to and couldn't get in touch with her. (Tr. 67).

19. Neither Debbie H. Perkinson nor Louise J. Wells, her mother, made any investment in Tomato, Incorporated, or exercised any management of this Respondent, or received any compensation from this Respondent. (Tr. 64-67; (Perkinson)). The incorporation of Respondent Tomato, Incorporated, and the completion of the first license application for this corporation under the name Tomatoe Co., Inc. was done by Debbie H. Perkinson in response to requests from her father and Respondent Carl Fiorentino. (Tr. 64).

20. Both Mrs. Perkinson and Mrs. Wells were asked by Complainant's counsel whether they had any desire to have a PACA license issued to Tomato, Incorporated. Louise J. Wells answered "No, sir, I do not." (Tr. 70), and Debbie H. Perkinson answered "To be honest with you, I don't want no part of it. No, sir." (Tr. 67).

21. Respondent Carl Fiorentino gave Marketing Specialist Duane Williams a sworn statement on February 14, 1996, stating:

> "I Carl Fiorentino run daily operations Tomato Co., Inc. & also ran daily operation of Quality Tomato Co. Inc. until Nov. 94, 2041 A Midway Avenue, Petersburg as manager." (CX 15).

22. Mr. Vernon Hatton gave Marketing Specialist Duane Williams a sworn statement on February 14, 1996 stating:

> I Vernon Hatton was not running the day to day operations of Quality Tomato Co. Inc., Petersburg, VA. I worked for the State Department of Health since November 1985. Mr. Carl Fiorentino was in charge of the day to day operations of Quality Tomato Co. Inc., and served as manager until it ceased operation in November 1994. (CX 14).

23. Respondent Carl Fiorentino was the customer in whose name electric service was provided to the business address at 2041-A Midway Avenue since

October 30, 1992. (CX 18). He was licensed as an individual under the PACA doing business as Mohawk Tomato[8] at this location. (CXs 13, 19, p. 1; Tr. 22). He was personally sued by a produce firm, Thomas E. Moore, Inc. and had an unsatisfied judgment entered against him for the principal sum of $12,045.29, in connection with a 1992 sale of potatoes to Mohawk Tomato Co. at a former address in Petersburg, Virginia. (CX 16). He has acknowledged that as of the date of the hearing he still owed for produce purchased using the name Mohawk Tomato, has lost his home and $90,000.00 in the bank, due to debt, and that he is primarily living on social security payments of $651.00 a month at age eighty-four. (Tr. 86-87).

24. Respondent Carl Fiorentino routinely signed for produce received by Respondent Quality Tomatoe, Inc. (CX 19) and signed checks issued in payment for produce by this Respondent that also contain the stamped signature of Vernon L. Hatton. (CX 30).

25. Respondent Carl Fiorentino was the president of a PACA licensee, Big Chief Tomato and Produce, Petersburg, Virginia, in 1994, when reparation orders were issued against this firm. He became subject to employment sanctions as a result of the nonpayment of these reparation orders which had expired when he obtained a license as an individual doing business as Mohawk Tomato on May 21, 1987. (CXs 13, 22).

Conclusions

Respondent Quality Tomatoe, Inc., doing business as Quality Tomato Co., Inc., under the direction, management and control of Respondent Carl Fiorentino, and Respondent Carl Fiorentino as the alter ego of Respondent Quality Tomatoe, Inc., and as a person subject to the license requirement of the PACA, by failing to make full payment for produce purchases as alleged in paragraph IV of the Complaint, have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA by failing to make full payment for these produce purchases and by failing to satisfy the two reparation orders issued against Respondent Quality Tomatoe, Inc., requiring payments to Six L's Packing Co., Inc., Immokalee, Florida and Taylor & Fulton, Inc., Palmetto, Florida.

Respondent Tomato, Incorporated, is unfit to be licensed under the PACA

[8]Exhibit 19 uses the name Mohawk Tomatoe.

because Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA; and because its license application contained false and misleading representations as to who were the actual officers and owner of the applicant and failed to reveal that the applicant was a successor to Quality Tomatoe, Inc., against whom there are two unpaid reparation orders.

The PACA was enacted to regulate and control the handling of fresh fruit and vegetables. 71 Cong. Rec. 2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. Accordingly, certain conduct by commission merchants, dealers or brokers was declared to be unlawful. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 858 (9th Cir. 1976). Enforcement is effectuated through a system of licensing with penalties for violations. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). *See also, George Steinberg and Son, Inc. v. Butz,* 491 F.2d 988 (2d Cir.), *cert. denied,* 419 U.S. 830 (1974). It has also been held that Congress intended by enactment of the Perishable Agricultural Commodities Act to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act. *Zwick v. Freeman,* 373 F.2d 110 (2nd Cir.), *cert. denied,* 389 U.S. 835 (1967).

The Secretary is provided with the authority to refuse to issue a license to an applicant who has committed acts prohibited by the PACA. The making of any false or misleading statements in a license application is made unlawful by section 8(c) of the PACA (7 U.S.C. § 499h(c)).

Section 2(4) of the PACA makes it unlawful for any commission merchant, dealer or broker to fail to "make full payment promptly" of this obligation with respect to transactions involving perishable agricultural commodities made in interstate commerce. (7 U.S.C. § 499b). Insofar as it's pertinent here, "full payment promptly" is defined by the Regulations as requiring payment of the agreed purchase prices for produce within ten days after the day on which the produce is accepted. The provisions of the Act do not allow partial payment of a settlement to constitute full payment promptly. Quality Tomatoe, Inc., doing business as Quality Tomato Co., Inc., under the direction, management and control of Respondent Carl Fiorentino, and Respondent Carl Fiorentino, as the alter ego of Respondent Quality Tomatoe, Inc. and as the person subject to the license requirements of the PACA by failing to make full payment for produce purchases as alleged in paragraph IV of the Complaint, have willfully, flagrantly

and repeatedly violated section 2(4) of the PACA (7 U.S.C. 499b(4)). Even though a Respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. *Atlantic Produce Co., et al.,* 54 Agric. Dec. 701 (1995).

Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA by failing to make full payment for those produce purchases and by failing to satisfy the two reparation orders issued against Respondent Quality Tomatoe, Inc. requiring payments to Six L's Packing Co., Inc., Immokalee, Florida, and Taylor & Fulton, Inc., Palmetto, Florida.

The alter ego theory applies, as Complainant argues, in those situations where the act of the corporate wrongdoer are committed under the direction, management and control of a corporate stockholder or corporate official or other responsible person who has a high degree of dominion and control over the corporation. Whether an alter ego situation exists in a specific instance, is a question of fact. "In general the corporate form may be ignored whenever an individual so dominates its company as in reality to negate its separate personality." *In re: Ronald Green*, 51 Agric. Dec. 363, 369 (1992). It is clear from the evidence herein that Respondent Carl Fiorentino dominated the corporate entities with which he was associated.

Respondent Tomato, Incorporated, is unfit to be licensed under the PACA because Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA; and, because its license application contained false and misleading representations as to who were the actual officers and owner of the applicant, as well as failing to reveal that the applicant was a successor to Quality Tomatoe, Inc. against whom there are two unpaid reparation orders. The more serious of these offenses was the failure to reveal that Respondent Tomato, Incorporated, was a successor to Quality Tomatoe, Inc.. The application form did contain names of persons who were nominal officers and as such did reflect the actual names of the persons who were chosen to occupy the titles and positions set forth. However, the failure to reveal the fact that it was a successor to Quality Tomatoe, Inc. was an act of deception and was a basis of furnishing false information. The making of any false or misleading statements in a license application is made unlawful by section 8(c) of the PACA (7 U.S.C. § 499h(c)) and a license to the applicant should be denied.

The cases arising under section 8(c) of the PACA indicate the Department's policy of holding to a strict interpretation of the Act's requirements. Intent is not a part of the offense. The Department's Judicial Officer has stated in *In re: Perfect Potato Packers Inc.,* 45 Agric. Dec. 338 (1986), as follows: "Respondent

argues that there was no intent to defraud, but intent to defraud is not an issue here. Respondent's license may be revoked if the license was obtained through a false or misleading statement in the application therefor." (7 U.S.C. § 499h(c)). This principle was reiterated by the Judicial Officer in *In re: Midland Banana & Tomato Co., Inc., et al.,* PACA Docket No. D-93-548, 54 Agric. Dec. 1239, appeal pending No. 95-3552 (8th Cir.).

Respondent Fiorentino, by his own admission, indicated that he engaged in the buying and selling of produce, that he gave instructions to the office clerk with respect to the payment of amounts and other matters involved in the management of both Quality Tomatoe, Inc. and Tomato, Incorporated.

The relevant definition of dealer under the PACA reads:

> "(6) the term 'dealer' means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." (7 U.S.C. § 499a(6)).

Because the facts establish that Respondent Carl Fiorentino is a dealer, it is appropriate that a finding of repeated and flagrant violations should be issued with respect to this Respondent.

In commenting upon the testimony with respect to the activities of Respondent Carl Fiorentino, Mr. Bruce Summers, Senior Marketing Specialist, categorized Respondent Fiorentino as a dealer.

With respect to the fitness of Carl Fiorentino to engage in business as a dealer under the PACA, the Complainant notes that it is evident that both Carl Fiorentino and Tomato, Incorporated are inadequately capitalized to be considered financially responsible persons under the PACA.

Although Respondent Carl Fiorentino's efforts to pay small amounts on the overdue accounts are admirable, and at his age of eighty-four years, it is commendable that he seeks to do this, nevertheless, he did acknowledge in his own testimony that he is nearly destitute and should the sanctions of the Complainant take effect, he likely would seek discharge under the bankruptcy laws. Respondent, Quality Tomatoe, Inc. went out of business about November of 1994 with unpaid reparation orders and other produce debt and was not in the position to transfer working capital to its successor Respondent Tomato, Incorporated. It is undisputed that no new capital was put into the new wholesale produce firm by Debbie H. Taylor, whether before or after she became married or by her mother, Louise J. Wells. The existing working capital was so

limited that Respondent Carl Fiorentino tried to get Marketing Specialist Duane Williams to agree to an extension of time to collect receivables before paying the application fee for a new license. It appears from the evidence of record herein that both Quality Tomatoe, Inc. and Tomato, Incorporated, were both under capitalized shells. Moreover, it also appears that in order to obtain potatoes from D.E. Scott & Son for Respondent Quality Tomatoe, Inc., it was first necessary to advance a payment on older transactions. It appears that corporate entities may have been disregarded in the payment for prior obligations incurred by Carl Fiorentino while he was doing business as Mohawk Tomato. In other words, the payments that Respondent Carl Fiorentino made with respect to recent purchases were not with respect thereto but rather all the payments that were made were applied to the prior ones. (Tr. 55, 56).

The evidence shows that the operational decisions concerning the activities of Respondent Quality Tomatoe, Inc., and Tomato, Incorporated, were made by Respondent Carl Fiorentino. He was merely continuing his operation as a dealer behind a series of corporate fronts. He was the alter ego of each entity to the extent that they can be considered the real entity and not mere fictions. Although a finding of willfulness is not necessary in this case because the license issued to Respondent Quality Tomatoe, Inc. has terminated and a finding of willfulness is not necessary to support a revocation of license, nevertheless, it is abundantly clear from the decisions of the Department of Agriculture that the payment violations were willful according to the standards expressed in *Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir. 1961), wherein the Court stated among other things: "We think it is clear that if a person (1) intentionally does an act which is prohibited irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements the violation is willful. *See, Diane Mattes et al. v. United States,* 721 F.2d 1125 (7th Cir. 1983) and *In re: Samuel Esposito,* 38 Agric. Dec. 613 (1979). It is undisputed in this proceeding that the numerous-payment violations alleged in the Complaint were repeated and flagrant.

No Answer was filed by Respondent Quality Tomatoe, Inc. and both Respondent Carl Fiorentino and Mr. Vernon Hatton, the nominal president and sole stockholder of this defunct entity, declined to appear on its behalf when given the opportunity at the start of the hearing. Respondent Carl Fiorentino appeared *pro se* for himself and for his alter ego, Respondent Tomato, Incorporated, whose nominal officers and sole stockholders have disclosed in their testimony as not having any interest in the license application contested in this proceeding.

All contentions of the parties have been carefully considered and to the

extent not adopted herein have been found to be irrelevant, immaterial or not factually or legally sustainable.

Premised upon the entire record evidence it is appropriate that the following Order be issued.

Order

Respondent Quality Tomatoe, Inc. and Carl Fiorentino have committed repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

The fact and circumstances set forth above shall be published.

The application for a license made pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) by Respondent Tomato, Incorporated, is denied.

This Order shall become final and effective thirty-five (35) days after service hereof upon Respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. §§ 1.130, *et seq.*, 1.145).

Copies thereof shall be served upon the parties.

[This Decision and Order became final August 14, 1996.-Editor]

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Decision and Order filed September 12, 1996.

Failure to make full payment promptly — Repeated, flagrant, and willful violations — License revocation — Denial of license application.

The Judicial Officer affirmed in part and reversed in part Judge Hunt's (ALJ) Decision and Order (1) revoking Respondent Fruitland's PACA license (because Respondent Fruitland committed flagrant and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce); and (2) denying Respondent AAA Recovery's application for a PACA license (because James A. Andershock, doing business as AAA Recovery, engaged in practices of a character prohibited by the PACA while an officer of Respondent Fruitland). The Judicial Officer reversed both the ALJ's stay of the ALJ's order of revocation, and the ALJ's provision for an automatic rescission of the ALJ's order of revocation, because the stay and automatic rescission do not carry out the remedial purposes of the PACA. Moreover, the factors cited by the ALJ for his decision to stay the revocation of Respondent Fruitland's PACA license are not relevant circumstances under the Department's sanction policy for flagrant or repeated failures to make full payment promptly. Excuses for payment violations and collateral effects of revocation of a PACA license are neither relevant to proceedings to determine whether the Respondent has failed to make full payment promptly, nor relevant to the sanction to be imposed on a Respondent who flagrantly or repeatedly fails to make full payment promptly for produce. The sanction policy in *In re S.S. Farms Linn County, Inc.*, does not alter the doctrine in *In re The Caito Produce Co.* that, because of the peculiar nature of the produce industry, and the congressional purpose that only financially responsible persons should be engaged in the produce industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time. The record does not justify reversing the ALJ's finding, based upon credibility determinations, that Respondent Fruitland paid one of its produce creditors prior to the hearing. The Judicial Officer found that in addition to being flagrant and repeated Respondent Fruitland's violations of 7 U.S.C. § 499b(4) were willful.

Barbara S. Good, for Complainant.
Joseph P. McCafferty, Cleveland, OH, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Notice To Show Cause and Complaint

(hereinafter Complaint) filed on July 14, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) during the period May 1994 through May 1995, Andershock Fruitland, Inc. (hereinafter Respondent Fruitland), committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 11 sellers of the agreed purchase prices of 113 lots of perishable agricultural commodities in the total amount of $245,873.41, which Respondent Fruitland had purchased, received, and accepted in interstate and foreign commerce, (Complaint ¶ IV, pp. 4-9); and (2) during the period May 1994 through May 1995, James A. Andershock, as owner of 100 per centum of the outstanding shares of Respondent Fruitland and president of Respondent Fruitland, engaged in practices of a character prohibited by the PACA, (Complaint ¶ V, p. 9). The Complaint requests an order revoking Respondent Fruitland's PACA license and a finding that James A. Andershock, doing business as AAA Recovery (hereinafter Respondent AAA Recovery), is unfit to be licensed under the PACA because James A. Andershock, the sole proprietor of Respondent AAA Recovery, has engaged in practices of a character prohibited by the PACA while an officer of Respondent Fruitland, (Complaint, p. 10).

Respondents filed Respondents' Answer on August 10, 1995, and Respondents' Amended Answer (hereinafter Amended Answer) on September 14, 1995. Respondents: (1) admit that, during the period May 1994 through May 1995, Respondent Fruitland failed to make prompt payment to 11 sellers for 113 lots of perishable agricultural commodities in the total amount of $245,873.41, which Respondent Fruitland had purchased, received, and accepted in interstate and foreign commerce, but deny that the failure to pay constitutes willful and flagrant violations of the PACA, (Amended Answer ¶ 4, p. 1); (2) deny that, during the period May 1994 through May 1995, James A. Andershock engaged in practices of a character prohibited by the PACA, (Amended Answer ¶¶ 5, 7, pp. 1-2); and (3) raise three affirmative defenses, (Amended Answer ¶¶ 8-10, p. 2).

Administrative Law Judge James W. Hunt (hereinafter ALJ) presided over a hearing on September 21, 1995, in Chicago, Illinois. Complainant was represented by Barbara S. Good, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were represented by Joseph P. McCafferty, Esq., Martyn and Associates, Cleveland, Ohio. The ALJ filed an Initial Decision and Order on December 15, 1995, in which he found that Respondent Fruitland had committed flagrant and repeated violations of section 2 of the PACA, (7 U.S.C. § 499b). (Initial Decision and Order, p. 8.) The ALJ

revoked Respondent Fruitland's PACA license, but stayed the revocation for 1 year from the date of the Initial Decision and Order. Further, the ALJ provided for the automatic rescission of the revocation if Respondent Fruitland "owes no money for due and unpaid purchases of produce" at that time. (Initial Decision and Order, pp. 8-9.) The ALJ also denied Respondent AAA Recovery's application for a PACA license. (Initial Decision and Order, p. 9.)

On January 16, 1996, Complainant appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).* On March 4, 1996, Respondents responded to Complainant's appeal, and on March 5, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, except that I do not delay for 1 year the revocation of Respondent Fruitland's PACA license, and I do not provide for the potential rescission of the revocation order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions from the Initial Decision and Order are shown by dots, and minor editorial changes to the Initial Decision and Order are not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Facts

Respondent . . . Fruitland is wholly-owned and operated by James A. Andershock. [Respondent Fruitland] buys and sells a full line of fruits and vegetables at its principal place of business in Chesterton, Indiana.

James A. Andershock started [in] the [produce] business when he was 13 by selling fruit from the front yard of his parents' house. A year or two later he moved his operation to a highway fruit stand. About 1975, [Mr. Andershock]

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

began operating a fruit stand in Florida in the winter months, returning to his Indiana operation in the summer. Over time, he expanded into wholesaling and received a PACA dealer's license in 1985. Respondent [Fruitland's] sales have grown to between 4 and 6 million dollars a year and it employs 38 people. In 1995, [Mr.] Andershock said he attempted to get his 12-year-old son involved in the business as a licensed produce repacker called AAA Recovery. The application [for a PACA license] was [denied] because James Andershock's name was on the check for the license fee. [Mr.] Andershock then applied for a [PACA] license for AAA Recovery in his name. The record does not indicate any failures by [Respondent] Fruitland or [Respondent AAA Recovery] to comply with the PACA prior to this proceeding.

In the last year or two, Respondent Fruitland began experiencing difficulties when several customers went out of business owing Respondent [Fruitland] money. [United States Department of Agriculture (hereinafter] USDA) officials, in turn, began receiving complaints about Respondent [Fruitland's] failing to make payments to its suppliers. Candace Criss, a USDA marketing specialist, conducted an audit of Respondent [Fruitland's] operations in May 1995. Respondent [Fruitland's] accountant, Veronica Jackson, cooperated with Criss and provided her with copies of Respondent [Fruitland's] invoices. Criss determined that there were 113 transactions involving due and unpaid produce purchases totalling over $245,000. The largest of these was $171,268 owed to Thomas Produce Company in Boca Raton, Florida.

Criss conducted a second audit in August 1995. She found that the amount of the "old" unpaid purchases had been reduced to $191,000, but that, since May [1995,] Respondent Fruitland had "new" due and unpaid purchases of $46,709.70.

At the hearing on September [21, 1995], Veronica Jackson testified that the following accounts remained unpaid:

Ron's Melon Market	$ 3,525.20
Durante & Termini	5,428.00
Paul Sinclair Sales	13,527.50
Berrybrook Farms, Inc.	1,125.50
DeGroot's Vegetable Farm	2,030.00
Strube Celery & Vegetable Co.	4,413.55
J. Caruso	1,370.00
Five Star	147.00
Total	$31,566.75

Jackson also said that [Respondent] Fruitland has an unpaid balance of $42,662.96 arising from a transaction with a farmer in Michigan. She further testified that [Respondent] Fruitland carries receivables of $284,179.19 on its books, but of that amount about $88,000 has been extended as credit and another $96,000 is in bankruptcy courts, leaving $99,115.49 as collectible.

John Thomas, president of Thomas Produce Company, which was owed $171,268 by Respondent Fruitland for produce purchases, testified that the debt to Thomas Produce [Company] was satisfied prior to the hearing through a transaction whereby one of [John] Thomas' companies, called Thomas Investments, Inc., paid Thomas Produce [Company] the amount [Respondent] Fruitland owed. The payment constitutes a loan from Thomas Investments[, Inc.,] to [Respondent] Fruitland, which [Thomas Investments, Inc.,] secured by a mortgage on [Respondent] Fruitland's property.[1] James Andershock testified that at the time of the hearing Respondent Fruitland had an inventory of fruits and vegetables of approximately $145,150.

Complainant contends that, because [Respondent] Fruitland continued to owe money for its produce purchases as of the time of the hearing, [Respondent Fruitland] was not in compliance with the PACA and that its [PACA] license should be revoked. [Complainant] also contends that, because James Andershock was the owner and operator of Respondent Fruitland, his application for a [PACA] license for [Respondent] AAA Recovery should be denied.

Law

1. Section 2(4) of the PACA . . . provides:

[§ 499b. Unfair conduct]

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a

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[1]Complainant contends that Respondent [Fruitland] failed to produce any records of this loan. However, John Thomas offered to produce the loan check. Complainant did not ask to see it. (Tr. 119-20.)

fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.

7 U.S.C. § 499b(4).]

2. Section 8(a) [of the PACA] . . . provides:

[§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary]

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

[7 U.S.C. § 499h(a).]

3. Section 4(d) [of the PACA] . . . provides . . .:

[§ 499d. Issuance of license

. . . .

(d) Withholding license pending investigation]

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by . . . [the PACA] or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the . . . [PACA] by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by . . . [the PACA] or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the . . . [PACA] by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

[7 U.S.C. § 499d(d).]

Regulations

Section 46.2(aa)[(5) of the regulations issued pursuant to the PACA provides:

§ 46.2 Definitions.]

. . . .

(aa) *Full payment promptly* is the term used in the [PACA] in specifying

the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for the purpose of determining violations of the [PACA], means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.

7 C.F.R. § 46.2(aa)(5).]

Discussion

The primary purpose of the PACA is to protect growers and producers from the "sharp practices of financially irresponsible and unscrupulous brokers" in the produce industry. *In re Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 745 (1992). It is the firmly established policy of USDA that when there is more than one failure to make prompt payment for the purchase of produce and the amount involved is more than *de minimis*, there is a violation of the PACA and the violation is considered repeated and flagrant, regardless of the reason for the non-payment. When a non-complying Respondent fails to make full payment by the time of the hearing, USDA's sanction for the violation is revocation of the Respondent's [PACA] license. *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (1989). In the circumstances here, Respondent Fruitland failed to make prompt payment for more than one purchase of produce, and, notwithstanding its efforts to pay its creditors, there remained a substantial amount (approximately $74,229) that was due and unpaid at the time of the hearing.[2] Accordingly, as required by USDA policy, Respondent Fruitland's PACA license shall be ordered revoked and Respondent AAA Recovery's application for a license shall be ordered denied because [James A.] Andershock, [the sole proprietor of AAA Recovery,] as owner and operator of Respondent

[2]Although Respondent[s admit] in [their Amended] Answer that [Respondent Fruitland] owed money for its purchases, as found by . . . Candace Criss, [Agricultural Marketing Specialist for the Agricultural Marketing Service, Fruit and Vegetable Division, Perishable Agricultural Commodities Act Branch,] Respondent[s] suggest[] that Criss' investigation was improper because she allegedly failed to tell Respondent[s] the purpose of her investigation. Criss testified that she did tell Respondent[s] the purpose of her investigation. Whether Criss did or not, I find, after reviewing the record, that in either case she did not engage in any conduct that was prejudicial to Respondent[s].

Fruitland, engaged in conduct of a character prohibited by the PACA.

. . . .

Findings of Fact

1. Respondent Fruitland is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address is 921 East U.S. Highway 20, Chesterton, Indiana 46304-1376. (Complaint [¶ II.(a), p. 3; Amended] Answer [¶ 2, p. 1.])

2. Pursuant to the licensing provisions of the PACA, license number 860516 was issued to Respondent Fruitland on January 14, 1986. . . . (Complaint [¶ II.(b), p. 3; Amended] Answer [¶ 2, p. 1.])

3. James A. Andershock is the president and owner of [100 per centum of the outstanding shares of] Respondent Fruitland. [(Complaint ¶ II.(c), p. 3; Amended Answer ¶ 2, p. 1.)]

4. The business and mailing address of . . . James A. Andershock, doing business as AAA Recovery, is 921 East U.S. Highway 20, Porter, Indiana 46304. (Complaint [¶ III.(a), p. 3; Amended] Answer [¶ 3, p. 1.])

5. [Respondent] AAA [Recovery] has never been licensed under the PACA. [(Complaint ¶ III.(b), p. 4; Amended Answer ¶ 3, p. 1.)]

6. During the period May 1994 through May 1995, Respondent Fruitland purchased, received, and accepted 113 lots of perishable agricultural commodities from 11 sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $245,873.41. [(Complaint ¶ IV, pp. 4-8; Amended Answer ¶ 4, p. 1.)]

7. Respondent [AAA Recovery] filed an application for a PACA license on June 22, 1995. [The application of Respondent AAA Recovery lists James A. Andershock as the sole proprietor. (Complaint ¶ VI.(a), (b), p. 9; Amended Answer ¶ 6, p. 2.)]

8. As of the date of the hearing, Respondent Fruitland had paid to its produce creditors a portion of the amounts [alleged] in the Complaint [and admitted by Respondents in their Amended Answer] as having not been promptly paid. However, as of the date of the hearing, Respondent Fruitland had a past-due and unpaid produce debt of approximately $74,229.

Conclusions of Law

Respondent . . . Fruitland . . . committed flagrant[, willful,] and repeated

violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]). Respondent . . . AAA Recovery is not entitled to a license.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises two issues in Complainant's Appeal Petition and Supporting Brief (hereinafter CAP).

First, Complainant contends that:

> [T]he ALJ improperly applied the Department's sanction policy in delaying the effective date of the revocation for one year and providing for automatic rescission of the order of revocation upon condition that [R]espondent has no "due and unpaid" purchases of produce one year from the date of the Initial Decision.

CAP, p. 2.

I agree with Complainant. Failure to pay for perishable agricultural commodities is a very serious violation of the PACA, (7 U.S.C. § 499b(4)).[3] The PACA provides for the revocation of a license if the Secretary finds flagrant or repeated violations of the PACA, regardless of whether the firm is unable to pay due to circumstances beyond its control. (7 U.S.C. § 499h(a).) It is the policy of this Department to impose severe sanctions for violations of the PACA that are repeated or are regarded by administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to Respondents, but also to potential violators. Both the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry have referred

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[3] *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 298 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), reprinted in 46 Agric. Dec. 1105 (1987); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2025 (1985); *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 147 (1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1513 (1983); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1154 (1983); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

to the PACA as an intentionally "tough" law, as follows:

> The Perishable Agricultural Commodities Act is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be many thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.
>
> The law has fostered an admirable degree of dependability and fairness in the industry chiefly through the method of requiring the registration of all those who carry on an interstate business in perishable agricultural commodities and denying this registration to those whose business tactics disqualify them. It also provides the procedures and the authority with which complaints within the industry can be settled without resort to courts of law. In spite of the strictness of some of the provisions of the law, the [PACA] and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support.

H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2 (1955).[4]

The Judicial Officer explained the justification for the stringency of the law, as follows:

> If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the

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[4]S. Rep. No. 2507, 84th Cong., 2d. Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (quoting H.R. Rep. No. 1196, 84th Cong., 1st Sess. (1955)).

consequences if the violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or by other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to risk resulting from respondent's under-capitalization or bad debt experience.

In re John H. Norman & Sons Distributing, Co., 37 Agric. Dec. 705, 719–20 (1978).

In section 525(a) of the Bankruptcy Code, Congress again recognized the importance of having only financially responsible firms in the perishable agricultural commodities business. In that section, Congress carved out an explicit exception to the anti-discrimination provision of the Bankruptcy Code for the PACA.[5] Congressman Foley, Chairman of the House Agriculture Committee, explained the need for this exception, as follows:

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

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[5]Section 525(a) of the Bankruptcy Code states:

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930[, (7 U.S.C. §§ 499a-499s)], . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

> The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act.

123 Cong. Rec. 35,641, 35,672 (1977).

The Department's policy is to revoke the PACA license of any Respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce, and fails to make such payments by the time of the hearing.[6] This policy is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also is designed to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[7] This admittedly harsh sanction policy has consistently been upheld

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[6]*See, e.g., In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 788 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1623 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1441 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 765 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The Caito Produce Co., supra*, 48 Agric. Dec. at 629-42; *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1467 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988); *In re Clarence Miller Co.*, 43 Agric. Dec. 529, 532 (1984); *In re Gilardi Truck & Transportation, Inc., supra*, 43 Agric. Dec. at 123, 149-50.

[7]*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Boss Fruit & Vegetable, Inc., supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc., supra*, 51 Agric. Dec. at 1440; *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co., supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable*

(continued...)

by the courts.[8]

Respondent Fruitland, relying on *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971), contends that there is precedent to support a stay or abeyance of a sanction order. (Response of Respondent Andershock's Fruitland, Inc., to Complainant's Appeal Petition (hereinafter Respondent Fruitland's Response), pp. 7-8.) Respondent Fruitland's reliance on *In re American Fruit Purveyors, Inc., supra*, is misplaced. First, the *American Fruit Purveyors* case was decided prior to the adoption of current Department policy, and second, the facts upon which the Judicial Officer based his abeyance of the sanction order in the *American Fruit Purveyors* case are not present in the instant proceeding.

In the *American Fruit Purveyors* case, the Judicial Officer suspended American Fruit Purveyors, Inc.'s, PACA license for 14 days for flagrantly and repeatedly failing to make full payment of the agreed purchase prices of perishable agricultural commodities purchased in interstate commerce. The Judicial Officer held the suspension of American Fruit Purveyors, Inc.'s, PACA license in abeyance for 4 years upon the condition that American Fruit Purveyors, Inc., pay for perishable agricultural commodities in accordance with the regulations issued under the PACA or in accordance with written agreements between American Fruit Purveyors, Inc., and sellers of perishable agricultural commodities. The Judicial Officer specifically based this sanction on the facts of the case, as follows:

> In the most recent litigated case under the [PACA] involving a firm's

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[7](...continued)
Co., supra, 40 Agric. Dec. at 402; *In re Columbus Fruit Co., supra*, 40 Agric. Dec. at 112; *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). See also *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

[8]*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co., supra*; *In re Finer Foods Sales Co., supra*; *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro, supra*; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

failure to pay promptly for 48 lots of produce (the delay in payment ranging from 21 to 175 days), the firm's [PACA] license was suspended for 15 days. *In re William D. Bethea*, 22 [Agric. Dec.] 824, 826-827 [(1963)]. However, in the *Bethea* case, there were no mitigating circumstances. As far as the record in that case shows, the respondent intentionally failed to pay promptly. In the present case, on the other hand, as far as the record shows, the respondent not only thought that it had implied agreements which justified delays in payment, but the respondent also notified the complainant of its views on a number of occasions, and there is no evidence in the record that the complainant ever corrected the respondent's misunderstanding.

In these circumstances, rather than impose an active suspension, as was done in the *Bethea* case, I believe that it is more appropriate to suspend the respondent's license for two weeks, but hold the suspension in abeyance for a period of four years, conditioned upon the respondent paying promptly during such period.

In re American Fruit Purveyors, Inc., supra, 30 Agric. Dec. at 1597. (Footnotes omitted.)

Ruling on a petition for reconsideration in the *American Fruit Purveyors* case, the Judicial Officer further explained the basis for the lenient sanction, as follows:

The complainant argues that the sanction imposed in this case is too lenient (Petition, pp. 26-28). The complainant states (Petition p. 28):

We submit that if this "sanction" remains, it will only serve to encourage others to violate the [PACA]. This is especially true in this instance since this sanction is the first one imposed by this particular Judicial Officer and the industry will probably interpret his action as a pattern for the type of sanctions they can expect from him in the future when they engage in serious and willful violations of the [PACA] as found by the Judicial Officer to have been perpetrated by this respondent.

If this decision raises expectations in the industry of lenient sanctions for serious or flagrant violations, their expectations will be short-lived. For example, I have just filed a Tentative Decision in a case under another regulatory statute in which I agreed with the Hearing Examiner's findings

as to the violations but increased the recommended suspension of 45 days to three years.

> The lenient sanction was issued in this case solely because the complainant failed to prove a convincing case. As explained in the decision, the respondent advised the complainant in writing of its construction of the [PACA] and regulations on a number of occasions and—as far as the record shows—the complainant made no effort to inform the respondent that it disagreed with its construction.

In re American Fruit Purveyors, Inc., 31 Agric. Dec. 122, 127-28 (1972) (Ruling on Complainant's Petition for Reconsideration).

In the instant proceeding, Respondent Fruitland's failures to pay promptly were not based upon a misunderstanding, which Respondent Fruitland brought to Complainant's attention on several occasions, but rather, were flagrant, willful, and repeated failures to make full payment promptly of $245,873.41 to 11 sellers for 113 lots of perishable agricultural commodities over the course of 1 year.

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36–3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Fruitland by it own admission failed to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of $245,873.41 for 113 lots of perishable agricultural commodities during the period May 1994 through May 1995. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even consumers of perishable agricultural commodities who ultimately bear increased industry costs

resulting from failures to pay.[9] These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[10]

Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or repeatedly fail to make full payment promptly.

The administrative officials charged with responsibility for administering the PACA have long recommended revocation of PACA licenses where there have been many failures to pay promptly involving lengthy delays in making full payment.[11]

In the instant proceeding, Ms. Joan Colson, an auditor with the United States Department of Agriculture, Agricultural Marketing Service, Perishable Agricultural Commodities Act Branch, (Tr. 71), testified regarding the administrative officials' policy as to payment violations and the sanction to be imposed upon Respondents, as follows:

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[9]Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec. at 33. See also *In re B.G. Sales Co., supra*, 44 Agric. Dec. at 2026; *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2426; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1169; *In re The Connecticut Celery Co., supra*, 40 Agric. Dec. at 1134; *In re Columbus Fruit Co., supra*, 40 Agric. Dec. at 114.

[10]See footnote 7.

[11]*See, e.g., In re Lloyd Myers Co., supra*, 51 Agric. Dec. at 764; *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons, supra*, 34 Agric. Dec. at 133.

BY MS. GOOD:

Q. Ms. Colson, what, if any, violations of the PACA were uncovered by the investigative materials you reviewed in this case and the testimony that you have heard here today?

[BY MS. COLSON:]

A. That Andershock Fruitland Inc. committed repeated and flagrant violations of Section 2-4 of the PACA and that when the second investigation was conducted the rollover debt existed.

Q. Now, have you yourself conducted any investigation in this case?

A. Yes.

Q. Is there anything unique about the produce industry that makes failures to pay promptly particularly harmful?

A. The industry is very unique because of the items involved are highly perishable. The items have to go from growing areas to other areas of the country in order to reach the consumer at the height of its edible appeal. Because of the short expand time, industry members don't always have time to perform extensive credit checks that may be commonplace in other industries. Therefore, the members have to rely a great deal on trust.

For example, a typical transaction involves a shipper and a receiver. The shipper, usually on the basis of a few phone calls, ships produce, many times worth thousands of dollars, to the receivers on the basis or the promise that they will pay for that produce and pay for it promptly.

The receiver on the other hand, trusts that the shipper will ship the kind, grade and quality that they contracted to.

Q. What is the sanction that the Complainant recommends as a result of Respondent's failures to make full payment promptly in this case?

A. We recommend that a finding be made that Andershock Fruitland Inc. committed repeated and flagrant violations of Section 2-4 of the act and that

the license be revoked.

With regard to James Andershock d.b.a. AAA Recovery, we recommend that their license application be denied.

Q. What were the major factors considered in arriving at the sanction recommendation, with respect to Andershock Fruitland Inc.?

A. There were basically four factors. The number of violations, the number of sellers involved, the amount of money involved and the time period involved. In this particular circumstance, it was 113 transactions that Andershock Fruitland Inc. failed to pay to 11 sellers in the amount of $246,000 approximately.

The time period was about a year from May of '94 through May of '95. The last one would be the effect that these violations have on the industry.

Q. And what effect do these violations have on the industry?

A. Basically it's a ripple effect. If there's a Firm A and Firm B and Firm C, and they each sell to each other, Firm A sold to Firm B, Firm B sold to Firm C, and Firm C failed to pay Firm B for the produce, then that puts financial harm on that firm and puts them in more distress in order to pay Firm A. So their ripple effect is throughout the industry for any particular transaction.

Q. What effect would the recommended sanction of revocation of the license have on the produce industry?

A. Basically a deterrent effect to the industry.

Q. Is this a strong deterrent effect?

A. Yeah, the Secretary, when he issues a license, he's making the statement to the industry. If a person or a firm has been found to act in the character prohibited by the act or commit violations of the act, then the Secretary is saying that these violations are very serious and that, you know, action will be taken against them or a license won't be issued if they've committed them.

Tr. 75-78.

The ALJ's Initial Decision and Order revoking Respondent Fruitland's PACA license for flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), which would not have taken effect for 1 year from the date of the Initial Decision and Order and which would have been automatically rescinded if, 1 year from the date of the Initial Decision and Order, Respondent Fruitland "owes no money for due and unpaid purchases of produce," (Initial Decision and Order, pp. 8-9), is not in accord with Department policy, and does not carry out the remedial purposes of the PACA. Rather, the ALJ's Initial Decision and Order would allow, and even encourage, Respondent Fruitland to continue to violate the PACA and the regulations issued pursuant to the PACA.

Section 46.2(aa)(5) of the regulations issued pursuant to the PACA defines *full payment promptly* as payment for produce purchased by a buyer within 10 days after the day on which the produce is accepted. (7 C.F.R. § 46.2(aa)(5).) The ALJ's Initial Decision and Order constructively amends this definition of *full payment promptly* by providing Respondent Fruitland with 1 year from the date of the Initial Decision and Order in which to make payment for produce, rather than the 10-day period provided in 7 C.F.R. § 46.2(aa)(5). Further, the ALJ's Initial Decision and Order allows this financially-unstable PACA licensee to remain in business and, for an additional year, to expose to financial risks the very persons the PACA was designed to protect: producers, sellers, consumers, and other PACA licensees.

If the relaxed sanction imposed by the ALJ in the Initial Decision and Order were to be imposed routinely on PACA licensees who fail to make full payment promptly in accordance with the PACA, financially-troubled PACA licensees would be encouraged to forego prompt payment, because the Department's sanction would be an order allowing the PACA licensee to further violate the PACA by taking up to an additional year to pay for produce.

The ALJ explained the basis for his Initial Decision and Order allowing Respondent Fruitland an additional year in which to pay for perishable agricultural commodities, as follows:

> [I]n view of the history of [R]espondent Fruitland's longtime compliance with the PACA, the failure of [R]espondent [Fruitland's] customers to pay it the money it was due that precipitated [R]espondent [Fruitland's] non-compliance, [R]espondent [Fruitland's] apparent good faith efforts to pay its suppliers, the loss these suppliers may incur if [R]espondent [Fruitland's PACA] license is revoked outright, and the loss of employment to thirty-eight persons employed by [R]espondent

> [Fruitland], I find that the purpose of the PACA to protect growers and producers, and others in the industry, such as workers, will be better served by affording [R]espondent [Fruitland], who is not shown to be an "unscrupulous" person engaging in "sharp practices," an opportunity to continue to pay the money it owes its suppliers before the order of revocation takes effect.

Initial Decision and Order, p. 7.

Respondent Fruitland contends that the Department's new sanction policy articulated in *In re S.S. Farms Linn County, Inc., supra*, requires that the ALJ weigh mitigating circumstances against Respondent Fruitland's statutory violation, and that the ALJ properly did so. (Respondent Fruitland's Response, p. 6.) I disagree with Respondent Fruitland. The sanction policy in *In re S.S. Farms Linn County, Inc., supra*, does not alter the doctrine in *In re The Caito Produce Co., supra*.[12] The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the articulated congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.

The Department's sanction policy requires an examination of the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Fruitland's violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondent Fruitland's violations directly contravene one of the primary remedial purposes of the PACA--the financial protection of sellers of perishable agricultural commodities. The administrative officials charged with administering the PACA recommend the revocation of Respondent Fruitland's PACA license.

Ms. Joan Colson testified that the relevant circumstances taken into consideration in making the recommendation that Respondent Fruitland's PACA

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[12] *In re Hogan Distributing, Inc.*, 55 Agric. Dec. ___, slip op. at 16 (Apr. 22, 1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1329 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995).

license be revoked were the number of Respondent Fruitland's violations (113); the number of sellers to whom Respondent Fruitland failed to make full payment promptly (11); the amount of money not paid ($245,873.41); the time period during which Respondent Fruitland violated the PACA (approximately 1 year); and the effect that the violations have on the perishable agricultural commodities industry. (Tr. 77.)

The ALJ cited several mitigating factors for staying Respondent Fruitland's license revocation: previous compliance with the PACA, good faith efforts to pay suppliers, excuses for failure to pay, and collateral effects of revocation. However, these are not *relevant circumstances* under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.[13] Respondent Fruitland's compliance with the PACA prior to the Complaint's alleged violations and Respondent Fruitland's good faith efforts to pay suppliers are not relevant to the imposed sanction. Rather, the relevant factors are whether the violations found in the instant proceeding are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondent Fruitland had paid all sellers by the opening of the hearing, and whether Respondent Fruitland is in compliance with the PACA and the regulations under the PACA. Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a Respondent who has flagrantly or repeatedly failed to make full payment promptly.[14] Furthermore, collateral effects of a Respondent's license revocation

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[13]Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), which provides "alternative civil penalties" for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. The factors that must be considered under section 8(e) of the PACA, (7 U.S.C. § 499h(e)), are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license.

[14]*In re Moreno Bros., supra*, 54 Agric. Dec. at 1443 (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995), *appeal docketed*, No. 95-70906 (9th Cir. Dec. 18, 1995) (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an

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[14](...continued)
extended period of time); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990) (failure to pay for produce results in the revocation of Respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with Respondent); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished) (failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a Respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with Respondent); *In re The Caito Produce Co., supra*, 48 Agric. Dec. at 615 (although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (revocation of Respondent's PACA license is appropriate even though Respondent failed to pay because Respondent's customers ceased doing business with Respondent when the city announced it was taking Respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (excuses such as nonpayment because of bankruptcy resulting after Respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co., supra*, 44 Agric. Dec. at 2028-30 (all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that Respondent failed to pay because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of Respondent's funds in the bank's possession; as in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations and sanctions under the PACA); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that Respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by $200,000 in losses in 2-year period from theft of produce from Respondent's warehouse are irrelevant); *In re Gilardi Truck & Transportation, Inc., supra*, 43 Agric. Dec. at 129 (fire at Respondent's business for which Respondent was under-insured rejected in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc., supra*, 42 Agric. Dec. at 1513-26 (bankruptcy caused by failure of large purchaser from Respondent to comply with its contractual agreement is not a mitigating circumstance in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc., supra*, 42 Agric. Dec. at 1158-70 (nonpayment because another firm failed to pay Respondent $248,805.66 is not a mitigating circumstance); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay Respondent, and increased operating costs rejected in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2428, 2442-44 (revocation of Respondent's PACA license is appropriate where nonpayment is caused by Respondent's bankruptcy); *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1171 (nonpayment because of bankruptcy rejected in determining whether payment violations occurred or whether violations were willful); *In re Carlton*
(continued...)

are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or

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[14](...continued)
F. Stowe, Inc., supra, 41 Agric. Dec. at 1129 (nonpayment because of bankruptcy of another firm owing Respondent $776,459.23 rejected in determining whether payment violations occurred or whether violations were willful); *In re V.P.C., Inc., supra*, 41 Agric. Dec. at 746-47 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co., supra*, 40 Agric. Dec. at 1138-40 (Respondent's sudden and unexpected loss of a major sales account is not a mitigating circumstance in a failure to pay case); *In re C.B. Foods, Inc., supra*, 40 Agric. Dec. at 969-70 (Respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA); *In re United Fruit & Vegetable Co., supra*, 40 Agric. Dec. at 404 (nonpayment because of financial difficulties is not a mitigating circumstance); *In re Columbus Fruit Co., supra*, 40 Agric. Dec. at 113 (nonpayment because Respondent lost a major sales account and a large supplier changed its course of dealing with Respondent, demanding cash on delivery, rejected in determining whether payment violations occurred or whether violations were willful); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (a strike and the failure of others to pay Respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distributing Co., supra*, 37 Agric. Dec. at 709-14 (nonpayment because of failure of others to pay Respondent and Respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (bankruptcy of another firm owing Respondent over $130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec. at 31 (a railroad strike causing Respondent's failure to pay is not a defense under section 2 of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (financial difficulty is not an excuse for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc., supra*, 32 Agric. Dec. at 266-68 (Respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (the fact that Respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (financial difficulties do not condone Respondent's repeated failures to pay and revocation of Respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties authorizes revocation of Respondent's PACA license and had Respondent's license not already terminated, it would have been revoked).

repeatedly failing to make full payment promptly.[15]

Respondent Fruitland could inflict considerable damage on the perishable agricultural commodities industry during the year the license revocation would have been stayed under the Initial Decision and Order. Such a result is contrary to two of the primary purposes of the PACA; *viz.*, the financial protection of the perishable agricultural commodities industry and consumers; and the removal of financially irresponsible persons from the industry.

It should be emphasized that the revocation order in this case is not being issued for any *punitive* reasons. Respondent Fruitland has done nothing worthy of *punishment*. Respondent Fruitland has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*--not *mala in se*. There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that takes up to a year to pay produce sellers in violation of the PACA.

Second, Complainant contends that:

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[15] *In re Hogan Distributing Co., supra*, slip op. at 22 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed wilful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co., supra*, 49 Agric. Dec. at 576 (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co., supra*, 48 Agric. Dec. at 571 (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc., supra*, 46 Agric. Dec. at 177 (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co., supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co., supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

THE ALJ ERRED IN FINDING THAT, AS OF THE DATE OF THE HEARING, RESPONDENT [FRUITLAND] HAD PAST DUE AND UNPAID PRODUCE DEBT OF $74,229.00 WHEN, IN FACT, RESPONDENT [FRUITLAND'S] PAST DUE AND UNPAID PRODUCE DEBT TOTALLED APPROXIMATELY $241,847.01

CAP, 12.

The ALJ states that:

> John Thomas, president of Thomas Produce Company, which was owed $171,268 by [R]espondent Fruitland for produce purchases, testified that the debt to Thomas Produce was satisfied prior to the hearing through a transaction whereby one of Thomas' companies, called Thomas Investments, Inc., paid Thomas Produce the amount [Respondent] Fruitland owed. The payment constitutes a loan from Thomas Investments[, Inc.,] to [Respondent] Fruitland which [Thomas Investments, Inc.,] secured by a mortgage on [Respondent] Fruitland's property.

Initial Decision and Order, pp. 3-4. (Footnote omitted.)

Based upon Thomas' testimony, the ALJ found that, as of the date of the hearing, Respondent Fruitland had paid to its produce creditors a portion of the amounts alleged as not having been paid promptly and had a past-due and unpaid produce debt of approximately $74,229. (Initial Decision and Order, Findings of Fact No. 8, p. 8.) Complainant contends that this is not worthy of belief because the ALJ accepted, without question or documentary proof, both the testimony of John Thomas and Respondent Fruitland's proof that the Thomas Produce Company account balance of approximately $167,518 had been discharged prior to the hearing. (CAP, p. 13.)

Although the ALJ made no specific credibility determinations as to John Thomas, I find that the ALJ's discussion of the evidence, together with the ALJ's findings, indicate that the ALJ found credible John Thomas' testimony that Respondent Fruitland paid prior to the hearing. It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.[16] However, in some

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[16] *E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *compare In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426-28 (Remand Order), *final decision*, 38 Agric. Dec. (continued...)

circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *In re William Joseph Vergis*, 55 Agric. Dec. ___, slip op. at 16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co., supra*, 54 Agric. Dec. at 1271-72; *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

While I find the evidence concerning Respondent Fruitland's payment to Thomas Produce Company is not as strong as would normally be expected in these cases, the evidence is not so weak as to justify my making a separate determination of John Thomas' credibility or my reversing the ALJ's finding,

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[16](...continued)
1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

based upon his determination of the credibility of John Thomas, that Respondent Fruitland paid Thomas Produce Company approximately $167,000 of the $241,847.01 balance, prior to the date of the hearing. In any event, the remainder that would still be owing (approximately $74,229) is most assuredly not *de minimis*; therefore, Respondent Fruitland is still liable under the PACA for "no pay" of that amount, which requires revocation.

The distinction between "slow pay," which requires suspension, and "no pay," which requires revocation, is analyzed in *Caito*, as follows:

> Prior to the decision in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), it had been the policy of the Judicial Officer to issue lengthy suspension orders in the case of serious "slow payment" cases, usually from 70 to 90 days.
>
> The administrative officials charged with the responsibility for administering the Perishable Agricultural Commodities Act have long recommended revocation of a license where there have been many failures to pay promptly, involving lengthy delays in making full payment. See, e.g., *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). There are strong administrative reasons supporting their revocation recommendation. Just as in the case of the savings and loan industry, if a produce licensee is in financial difficulty (i.e., not able to pay its creditors promptly), the loss to the industry as a whole is frequently much less if the firm is closed down promptly. Furthermore, we are dealing here with an industry that asked for, pays for, and desires a tough regulatory program to insure that only financially responsible licensees are permitted to remain in the industry.
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> . . . .
>
> In *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149-54 (1984), the Judicial Officer moved a step closer to the views of the administrative officials, holding that in order for a suspension order to be issued on the basis of a "slow pay" case, rather than a revocation order which would be issued in a "no pay" case, full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent must be in full compliance

with the payment requirements by the time of the hearing.

. . . .

> The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 500-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW), by requiring that respondent's present compliance not involve credit agreements for more than 30 days. *Carpenito* also emphasizes that under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing--i.e., being almost in compliance is not enough!

In re The Caito Produce Co., *supra*, 48 Agric. Dec. at 632-33, 638. (Footnotes and citations omitted.)

The record is clear that Respondent Fruitland was not in compliance when the hearing started. Thus, under the *Caito* doctrine, Respondent Fruitland's license will be revoked.

I agree with the ALJ that Respondent Fruitland committed flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). (Initial Decision and Order, Conclusions of Law, p. 8.)[17] Moreover, I find that Respondent Fruitland willfully violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)). An action is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Moreno Brothers, supra*, 54 Agric. Dec. at 1432; *In re*

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[17]Complainant and Respondent Fruitland also agree with the ALJ's conclusion that Respondent Fruitland committed repeated and flagrant violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). (CAP, p. 2; Respondent Fruitland's Response, p. 11.)

Samuel S. Napolitano Produce, Inc., supra, 52 Agric. Dec. at 1612.[18] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Fruitland's PACA license is revoked, effective 30 days after service of this Order on Respondent Fruitland.
2. Respondent AAA Recovery's application for a license is denied, effective upon service of this Order on Respondent AAA Recovery.
3. The facts and circumstances set forth in this decision shall be published.

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[18]The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent Fruitland's violations would still be found willful in view of its blatant disregard of an express provision in the PACA requiring Respondent Fruitland to make full payment promptly, (7 U.S.C. § 499b(4)), and a regulation expressly defining *full payment promptly*, (7 C.F.R. § 46.2(aa)(5)).

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Order Denying Petition for Reconsideration filed October 29, 1996.

Timothy A. Morris, for Complainant.
Mark A. Amendola, Cleveland, OH, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

Respondents' Petition for Reconsideration of the Decision and Order issued in this proceeding is denied for the reasons previously set forth in the Decision and Order filed on September 12, 1996, and for the reason that Respondents' Petition for Reconsideration neither states specifically the matters claimed to have been erroneously decided nor states briefly the alleged errors, as required by section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.146(a)(3)).

Section 1.146(b) of the Rules of Practice, (7 C.F.R. § 1.146(b)), provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration. Respondents' Petition for Reconsideration was timely filed and automatically stayed my Decision and Order filed on September 12, 1996. Therefore, since Respondents' Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Decision and Order filed September 12, 1996, is reinstated, with allowance for time passed, as follows:

1. Respondent Fruitland's PACA license is revoked, effective 30 days after service of this Order on Respondent Fruitland.
2. Respondent AAA Recovery's application for a license is denied, effective upon service of this Order on Respondent AAA Recovery.
3. The facts and circumstances set forth in this decision shall be published.

In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Decision and Order filed November 15, 1996.

Failure to make full payment promptly — Repeated, flagrant, and willful violations — License revocation.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Havana's and Respondent Havpo's PACA licenses because Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make prompt payment for produce. Complainant proved Respondents' violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no-pay" case to a "slow-pay" case by paying all outstanding debts alleged in the Complaint, if Respondents are not in full compliance with the payment provisions of the PACA at the time of the hearing. Produce supplier invoices obtained from Respondents' files and tables of past-due debts prepared by USDA investigators based upon examinations of Respondents' files are highly reliable, probative, and substantial evidence of Respondents' violations of the PACA and Respondents' past-due debt. Respondents' purchases of produce from out-of-state suppliers were in interstate and foreign commerce and Respondent Havana's purchases of produce from in-state produce suppliers involving produce that had been moved in interstate or foreign commerce were in interstate or foreign commerce. The sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co.* Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

Julie Cook Schuster, for Complainant.
Tab K. Rosenfeld, New York, NY, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (hereinafter PACA), (7 U.S.C. §§ 499a-499s), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.130-.151).

The proceeding was instituted by a Complaint filed on August 1, 1994, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that, during the period February 1993 through January 1994, Respondent Havana Potatoes of New York Corp. (hereinafter Havana) violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of $1,960,958.74, which Havana purchased, received, and accepted in interstate and foreign commerce and that, during the period August 1993 through December 1993, Respondent Havpo, Inc. (hereinafter Havpo), violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of $101,577.50, which Havpo purchased, received, and accepted in interstate

commerce. (Complaint ¶ 3.) Respondents filed Answers on August 17, 1994, in which they denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 2-3, 1995, in New York, New York. Complainant was represented by Julie Cook, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were represented by Tab K. Rosenfeld, Esq., of New York, New York. The ALJ issued an Initial Decision and Order on October 19, 1995, in which he found that Respondent Havana and Respondent Havpo committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), (Initial Decision and Order at 5), and revoked Respondent Havana's PACA license and Respondent Havpo's PACA license, (Initial Decision and Order at 17).

On February 20, 1996, Respondents appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).[1] On March 18, 1996, Complainant responded to Respondents' appeal, and on March 19, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's Discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Findings of Fact

1. Respondent Havana Potatoes of New York Corp. is a corporation organized and existing under the laws of the State of New York. Its business mailing address is Hunts Point Terminal Market, Row D, Units 449-461, Bronx,

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

New York 10474. (Complaint ¶ 2[; Answer; CX 1; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 1.])

2. At all times material herein, Havana was licensed under the provisions of the PACA. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 2.)] License number 870432 was issued to Havana on December 22, 1986. This license has been renewed annually . . . . (CX 1.)

3. Respondent Havpo, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Its business mailing address is 25 Christopher Place, Saddle River, New Jersey 07458. (Complaint ¶ 2[; Answer; CX 2; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 3.])

4. At all times material herein, Havpo was licensed under the provisions of the PACA. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 4.)] License number 930801 was issued to Havpo on March 8, 1993. This license has been renewed annually . . . . (CX 2.)

5. During the period of February 1993 through January 1994, Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of $1,960,958.74, which Havana had purchased, received, and accepted in interstate and foreign commerce. (CX 4, 4a-4ppp.) Since the time that the Complaint was filed, this amount has been paid in full. (Tr. 27[, 29-30; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5.])

6. During the period of August 1993 through [January 1994], Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of $101,577.50, which Havpo had purchased, received, and accepted in interstate commerce. (CX 5, 5a-5f.) Since the time that the Complaint was filed, this amount has been paid in full. (Tr. 27[, 29-30; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5.])

7. In January 1994, [the United States Department of Agriculture (hereinafter] USDA) initiated an investigation to determine whether Havana was complying with the prompt payment provisions of the Perishable Agricultural Commodities Act. [Mr. Donald P.] Dutton[, a marketing specialist employed by the USDA, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch,] was assigned to conduct the USDA investigation after over 400 trust notices in excess of $6 million were filed with USDA against Havana. (Tr. [37-]38).

8. On January 25, 1994, Mr. Dutton travelled to New York and visited Havana's place of business. Mr. Dutton met with [Mr.] Pedro Perez, Havana's president, and explained to [Mr. Perez] that he was conducting an investigation to determine whether Havana was complying with the prompt payment

provisions of the [PACA]. Mr. Dutton requested access to the firm's business records, including the firm's accounts receivable records, accounts payable records, cash disbursement records, and corporate records. Mr. Perez immediately provided Mr. Dutton with access to these records. (Tr. 40-41.)

9. Upon examination of Havana's records, Mr. Dutton uncovered records relating to Havpo, another company owned and operated by Mr. Perez. ([CX 2;] Tr. 43[-44.])

10. On April 5-7, 1995, . . . [Mr.] John A. Koller, [the Assistant Regional Director for the Northeast Regional Office, USDA, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch,] visited Havana's place of business to conduct a compliance investigation of Havana and Havpo. Mr. Koller requested access to the books and records of both firms and was granted access to these records. (Tr. 95-98.) Upon inspection of Havana's books and records, Mr. Koller discovered that, during the period March 1994 through April 3, 1995, Havana failed to make full payment promptly to 2[5] sellers of the agreed purchase prices for 137 lots of perishable agricultural commodities in the total amount of $1,197,616.35, which Havana had purchased, received, and accepted in interstate and foreign commerce[, and which amount was past-due and unpaid at the start of the hearing]. (CX 6, 6a-6z; Tr. 104.) The compliance investigation also revealed that approximately $1[68],000 in checks, issued by Havana in purported payment for its produce purchases, were returned unpaid by the bank upon which they were drawn, because Havana did not have and maintain sufficient funds on deposit and available in the account upon which such checks are drawn to pay the checks when presented. (CX 8, 8a-8c.)

11. During his April 5-7, 1995, visit to Havana's place of business, Mr. Koller also inspected Havpo's books and records. That inspection revealed that, during the period August 1994 through November 1994, Havpo failed to make full payment promptly to 1 seller of the agreed purchase prices for 14 lots of perishable agricultural commodities in the total amount of $58,181, which Havpo had purchased, received, and accepted in interstate commerce[, and which amount was past-due and unpaid at the start of the hearing]. (CX 7, 7a.)

Conclusions

1. The acts of Havana in failing to make full payment promptly of the agreed purchase prices for the 345 lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically alleged in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]).

2. The acts of Havpo in failing to make full payment promptly of the agreed purchase prices for the 23 lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically alleged in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]).

Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. [No.] 1041, 71st Cong., 2d Sess. [1] (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *O'Day* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. [No.] 1041, 71st Cong., 2d Sess. [3] (1930). *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the PACA, (7 U.S.C. § 499b(4)), makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate [or foreign] commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department, (7 C.F.R. § 46.2(aa)(5)), as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

The $1,960,958.74 indebtedness of Respondent Havana, which is the subject of the Complaint, was . . . paid in its entirety [before the date of the hearing in this proceeding], and the $101,577.50 indebtedness of Respondent Havpo, which is the subject of the Complaint, was . . . paid in its entirety [before the date of the hearing in this proceeding]. However, [Respondents' payment of past-due debts does] not . . . alter the fact of the violations. . . . At the time of the hearing, Havana and Havpo had additional outstanding indebtedness of approximately $1,197,616.35 and $58,181, respectively, for perishable agricultural commodities purchased in interstate [and foreign] commerce. (CX 6,

6a-6z, 7, 7a.) Furthermore, approximately $1[68],000 in checks that Havana had issued in purported payment for its produce purchases were returned unpaid by the bank upon which they were drawn because Havana did not maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented. (CX 8, 8a-8c.)

USDA initiated an investigation into Havana's payment practices in January 1994, after over 400 trust notices in excess of $6 million were filed against Havana with the Department. (Tr. 38.) [Mr.] Dutton, USDA's investigator, testified without contradiction that, when he arrived at Respondent Havana's place of business in January 1994, he requested access to that firm's books and records. (Tr. 40-41.) More specifically, he requested access to those invoices that were past-due and unpaid. Mr. Dutton testified that both Havana's president, [Mr.] Pedro Perez, and the firm's controller[, Mr. Rafael Stipion,] directed him to a filing cabinet that contained the past-due and unpaid invoices. (Tr. 4[1]-45.) During the course of Mr. Dutton's review of Havana's records, he discovered the records of Havpo, Mr. Perez' other company. (Tr. 43[-44.]) These documents from Havana's own records and Havpo's own records were the documents that Mr. Dutton analyzed and utilized to make his determination that both Havana and Havpo were not paying for perishable agricultural commodities in accordance with the [PACA.] (CX 4, 4a-4ppp, 5, 5a-5f.)

During his review of the books and records of Havana and Havpo, Mr. Dutton uncovered no written agreements that would extend the payment time for produce purchases. (Tr. 45.) Further, Mr. Dutton discussed his findings with Mr. Perez at the conclusion of his investigation. At that time, Mr. Perez never disputed the fact that Havana owed almost $2 million for produce purchases and that Havpo owed over $100,000 for produce purchases. [(Tr. 46.)] The documents provided by Respondents to USDA reveal both Havana['s] and Havpo's violations of the PACA. At the hearing, Respondents presented no . . . evidence whatsoever to refute the evidence presented by Complainant.

In April 1995, immediately prior to the oral hearing, Complainant initiated a compliance investigation to determine whether Havana and Havpo were, at the time of the hearing, in compliance with the [PACA]. [Mr.] John A. Koller visited Havana's place of business on April 5-7, 1995, to conduct USDA's compliance investigation of Havana and Havpo. Mr. Koller also requested all of the books and records of both Havana and Havpo. [(Tr. 96-97.)] Mr. Koller was directed by both Mr. Perez and Havana's new controller, [Mr.] Hector Paredes, to the invoices that were past-due and unpaid. (Tr. [97-]98.) Upon inspection of Havana's books and records provided to USDA by Respondents, Mr. Koller discovered that, during the period of March 1994 through April 3,

1995, Havana failed to make full payment promptly to 2[5] sellers of the agreed purchase prices for 137 lots of perishable agricultural commodities in the total amount of $1,197,616.35, which Havana had purchased, received, and accepted in interstate and foreign commerce. (CX 6, 6a-6z; Tr. 104.) The compliance investigation also revealed that approximately $1[68],000 in checks issued by Havana in purported payment for its produce purchases were returned unpaid by the bank upon which they were drawn because Havana did not have and maintain sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented. (CX 8, 8a-8c.) Mr. Koller's investigation revealed that Havana was not in compliance with the PACA.

The compliance investigation also revealed that, . . . [d]uring the period August 1994 through November 1994, Havpo failed to make full payment promptly to 1 seller of the agreed purchase prices for 14 lots of perishable agricultural commodities in the total amount of $58,181, which Havpo had purchased, received, and accepted in interstate commerce. (CX 7, 7a.)

. . . Respondents [contend] that their counsel was not given enough time to prepare—prior to the hearing and during the hearing. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 9.) The ALJ] previously ruled upon . . . [Respondents' requests for additional time] and [the ALJ's] rulings are contained in the record of this proceeding. [The ALJ] . . . balance[d] the needs of Respondents' counsel to prepare for the case with the need not to unduly delay the proceedings. . . . [T]he time accorded to Respondents' counsel was appropriate. . . .

As a large part of Complainant's evidence[, Complainant] introduced copies of unpaid invoices to show produce sold to Havana and Havpo, (CX 4[a]-4ppp, 5[a]-5f, 6a-6z, . . . 7a, 8[a]- 8c), and rid[ing] sheets, (CX 9). Complainant obtained these exhibits from Respondents' files. In Respondents' Proposed Findings [of Fact and Conclusions of Law], Respondents argue that the witnesses for Complainant, Donald P. Dutton and John A. Koller, who obtained the documents from Respondents, as well as Complainant's witness, [Ms.] Clare Jervis, could not rely upon these documents. For example, Respondents argue that Mr. Dutton did not know whether the goods were delivered, took no independent steps to confirm the accuracy of the information, did not know the meaning of dates on the shippers' invoices, did not know if the goods arrived, did not know whether the payment amounts were disputed, did not speak to any of the 66 shippers, based his conclusion regarding price upon the invoices, did not know if there were alterations in payment arrangements, did not know if the amounts were disputed, and did not know if the goods were unloaded or sent back to the shippers. Respondents raised similar questions with regard to Mr.

Koller and Ms. Jervis. Essentially, Respondents argue that what appears on the face of the documents may not be the case.

However, the evidence indicates that both Mr. Dutton and Mr. Koller were directed to these documents in Respondents' files by Mr. Perez, Respondents' president, and by Respondent [Havana's controllers]. (Tr. 40-41, 97.) In exit conferences with both Mr. Dutton and Mr. Koller, Mr. Perez confirmed that both Havana and Havpo had unpaid invoices for produce purchases in the approximate amounts uncovered by Mr. Dutton and Mr. Koller. (Tr. 46-47, 106-07.) . . . Mr. Dutton [did not discover] any written agreements extending payment terms for produce transactions[, and Mr. Koller discovered one such agreement which is not relevant to this proceeding]. When asked if there were any [other] such agreements, Mr. Perez said there were [no others]. (Tr. 45, 105[-06.]) . . . [T]he documents prove a prima facie case that the sales alleged were made, that the goods in the alleged amounts were delivered, that payment for these amounts as alleged was not made in a timely fashion, and that no written agreements existed to excuse the failure to make timely payments.

In the face of this evidence, Respondents have chosen to present no contradictory evidence. They have merely adopted an obstructionist stance, trying to pick holes in the evidence which Complainant obtained from Respondents' own files. If this evidence were not correct, Respondents could have introduced evidence to contradict it. Respondents' failure to contradict this evidence leads me to conclude that the evidence is sufficient to prove Complainant's allegations of sales, deliveries, and failure to pay in a timely fashion. I find that Complainant has met its burden of proof. The documentary evidence presented at the hearing was obtained directly from the books of Respondents. Respondents have failed to rebut this evidence. Therefore, I find the evidence proves the allegations in the Complaint.

Although Complainant submitted voluminous exhibits, Respondents submitted no exhibits. The only evidence presented at the hearing by Respondents was testimony of [Mr.] Hector Paredes, a controller of Havana Potatoes, and [Mr.] Robert Reich, an employee of one of Havana's [produce] suppliers.

Respondents' attorney argues . . . that Mr. Koller's testimony is devoid of credibility and no probative weight should be given to this testimony because "Complainant can not dispute Mr. Paredes' testimony that he does not speak English." [(Respondents' Reply Memorandum at 7.)] However, [the ALJ] found Mr. Koller to be a very credible witness, something [the ALJ did not find] with respect to Mr. Paredes. [(Initial Decision and Order at 10.)]

Mr. Paredes testified through an English-Spanish interpreter. He first stated

that he does not speak English but knows words that he needs such as "accounts payable" and "accounts receivable." He has a degree in public accounting and a degree in business administration from Venezuelan universities. (Tr. 285, 287.) [Mr. Paredes] testified that, when Mr. Koller visited Respondents' office in April 1995, at Mr. Perez' request, Mr. Paredes directed Mr. Koller to Respondents' financial files, including [their] accounts payable records. (Tr. 290, 294.) When [the ALJ] questioned Mr. Paredes, he stated that he had been living in the United States for 3 years and 2 months, (Tr. 296), and that he studied English for 3 years in secondary school, (Tr. 297-98). As a result of Mr. Paredes' study of English for 3 years in Venezuela, his residence in the U.S. for over 3 years, and his dealing on a daily basis with records that were in English, [the ALJ found] that [Mr. Paredes] understood more than enough English to direct Mr. Koller to the appropriate financial records. [(Initial Decision and Order at 11.)]

Respondents' only other witness was Robert Reich, sales manager for Red Hawk Farms, one of Havana's [produce suppliers]. Mr. Reich testified regarding his belief as to what payment practices in the produce industry as a whole are. (Tr. 442[-43.]) Mr. Reich also testified regarding ratings of produce firms in a private publication known as "The Blue Book." (Tr. 444-51.) This testimony is not relevant because the law regarding payment for perishable agricultural commodities is set out in the PACA and the regulations promulgated pursuant to the PACA. This matter is not bound by "The Blue Book," but by the law itself. The regulations promulgated pursuant to the PACA define prompt payment. *See* 7 C.F.R. § 46.2(aa). Under the [PACA] and regulations, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment.

Mr. Reich also testified that Havana had extended payment terms with his firm and that he was sure that Havana had paid Red Hawk Farms in a timely manner. However, Mr. Reich could not identify what the specific payment terms were or when his company was paid. (Tr. 463, 465-67.) Respondents have not submitted any written credit agreements with Red Hawk into evidence. Additionally, Mr. Reich was unable to explain why, if his firm was satisfied with Havana's payment practices, it had filed reparation complaints against Havana and notified USDA of the insufficient funds checks that it had received from Havana in purported payment for produce purchases. (Tr. 464.)

The evidence presented at the hearing demonstrates that Respondents violated the [PACA] as alleged in the Complaint. Respondents' failures to make timely payment, as alleged in the Complaint, are in violation of the prohibitions in section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]). . . . Moreover, Havana's

failure to pay promptly and in full for 345 transactions occurring over a period of 11 months, totalling $1,960,958.74, and Havpo's failure to pay promptly and in full for 23 transactions occurring over a period of 5 months, totalling $101,577.50, constitute repeated and flagrant violations of section 2 of the PACA. . . .

. . . .

Both the 345 violations [by Respondent Havana] and the 23 violations [by Respondent Havpo] are "repeated" because repeated means more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time periods during which the violations occurred. *See . . . Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984), holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA; *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972), finding 26 violations involving $19,059.08 occurring over 2½ months [to be] repeated and flagrant; and *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967), concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000.

Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102 (8th Cir.), *cert. denied*, [502 U.S. 860] (1991); *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-69 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974). Respondents knew or should have known that they could not make prompt payment for the large amount of perishable commodities that they ordered, yet Respondents continued to make purchases. Respondents were aware or should have been aware of the PACA's requirements, yet Respondents continued to buy knowing that each purchase would result in another violation. Respondents should have made sure that they had sufficient capitalization with which to operate. They did not [have sufficient capitalization], and, consequently, could not pay their [produce] suppliers. They deliberately shifted the risk of nonpayment to [produce] sellers. The sellers were required to involuntarily and, in some cases, unknowingly extend credit to Respondents. [Respondents' shifting of the risk of nonpayment to produce

sellers] is especially evident in this case where the compliance investigation reveals that Respondents incurred additional roll-over debts in meeting their obligations for the transactions that are the subject of the Complaint. Under these circumstances, Respondents have both intentionally violated the [PACA] and operated in careless disregard of the payment requirements of the PACA. Respondent Havana's and Respondent Havpo's violations were, therefore, willful. *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Complainant seeks revocation of the licenses of both Havana and Havpo. Departmental policy is that where a Respondent is not in compliance [with the payment provisions of the PACA] at the time of the hearing, the appropriate sanction is revocation of Respondent's license. *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983). Congress designed the PACA to be an intentionally tough law, and, as a result, support for the Department's sanction policy is well grounded in both precedent and law. *See In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

Congress again recognized the importance of having only financially responsible firms in the perishable agricultural commodities business in section 525 of the Bankruptcy Code. In that section, Congress carved out an explicit exception to the anti-discrimination provision of the Bankruptcy Code for the PACA. Congressman Foley, Chairman of the House Agriculture Committee, explained the need for this exception, as follows:

> Under the Perishable Agricultural Commodities Act, commission merchants, dealers and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and a flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.
>
> The Committee on Agriculture has no quarrel with the "fresh-start"

> philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act. . . .

123 Cong. Rec. 35,672 (1977).

In exempting proceedings brought under the PACA from the anti-discrimination provision of the Bankruptcy Code, Congress was well aware of the Department's well-established policy to revoke one's license for failure to pay in full for produce purchases.

Furthermore, this admittedly harsh sanction policy has consistently been upheld by the federal circuit courts. *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co., supra*; *In re Finer Foods Sales Co., supra*; *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro, supra*; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc., supra.*

In the case at hand, Havana failed to make full payment promptly for 345 lots of perishable agricultural commodities over a period of 11 months, for a total of $1,960,958.74, and Havpo failed to make full payment promptly for 23 lots of perishable agricultural commodities over a period of 5 months, for a total of $101,577.50. Furthermore, since the filing of the Complaint, Havana has incurred new indebtedness, and[, at the time of the hearing, owed] $1,197,616.35, and Havpo has incurred new indebtedness, and[, at the time of the hearing, owed] $58,181. Where a Respondent is not currently in compliance, but has . . . roll-over debts, revocation is the appropriate sanction. *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989); *In re Gilardi Truck & Transp., Inc., supra.* Moreover, the Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where a Respondent has failed to pay for produce. *See In re Atlantic Produce Co.*, 54 Agric. Dec. 701, 715 (1995). Taking all these factors into consideration, the sanction sought by Complainant is appropriate. *In re J.H. Norman & Sons Distributing Co.*, 37

Agric. Dec. 705 (1978); *In re George Steinberg & Son, supra.*

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise three issues in Respondents' Appeal to the Judicial Officer.

First, Respondents contend that:

> [W]hen properly analyzed, the proof that Respondents violated PACA's prompt payment rules was utterly insufficient and unconvincing. Respondents were charged in the Complaint with having failed to make full payment promptly with regard to certain lots of perishable agricultural commodities. The only proof submitted by the Complainant concerning those allegations was Dutton's testimony, the invoices which he copied (CX-4a-4ppp, CX-5a-5f), and the table which he created (CX-4). Yet Dutton himself admitted that the results of his investigation were solely based on information derived from his examination of Respondent's [sic] records (Tr. 86). Hence, . . . the Complainant's case stands entirely on unreliable hearsay and double hearsay. For that reason, the A.L.J.'s finding that the Respondents committed the violations charged in the Complaint is clearly erroneous, and must be vacated.

Respondents' Appeal to the Judicial Officer at 21-22. (Footnote omitted.)

I disagree with Respondents, and I agree with the ALJ's conclusion that Respondents violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), as alleged in paragraph III of the Complaint. Complainant proved by a preponderance of the evidence, which is all that is necessary in these proceedings,[2] that: (1)

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[2]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, (continued...)

during the period February 1993 through January 1994, Respondent Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of $1,960,958.74, which Havana had purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); (2) during the period August 1993 through January 1994, Respondent Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of $101,577.50, which Havpo had purchased, received, and accepted in interstate commerce, in violation of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); (3) at the time of the hearing in the instant proceeding, Respondent Havana had additional outstanding indebtedness of approximately $1,197,616.35 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce; and (4) at the time of the hearing in the instant proceeding, Respondent Havpo had additional outstanding indebtedness of approximately $58,181 for perishable agricultural commodities purchased, received, and accepted in interstate commerce.

Each of Respondent Havana's 345 violations of the PACA and Respondent Havpo's 23 violations of the PACA is clearly established by produce supplier invoices obtained from Respondents' files, (CX 4a-4ppp, 5a-5f), the tables of amounts past-due and unpaid by Respondents, prepared by Mr. Donald P. Dutton, a USDA investigator, based upon Mr. Dutton's examination of Respondents' files, (CX 4, 5; Tr. 41, 48-49), and the testimony at the hearing.

Mr. Dutton testified that he obtained the produce supplier invoices from

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[2](...continued)
No. 94–4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94–70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Respondents' files after informing Respondents' president, Mr. Pedro Perez, that he was conducting an investigation regarding Respondent Havana's failure to pay for perishable agricultural commodities, (Tr. 38-40), and after Mr. Perez and Mr. Rafael Stipion, Respondent Havana's controller and officer manager, directed Mr. Dutton to the files containing unpaid produce supplier invoices. (Tr. 40-50.) Further, Mr. Dutton testified that, at the conclusion of his investigation, he discussed his finding that Respondents violated the PACA with Mr. Perez, who did not disagree with Mr. Dutton's findings, as follows:

[BY MS. COOK:]

Q. What, if anything, did you determine about Havana Potatoes payment practices during your review of their records?

[BY MR. DUTTON:]

A. That at the time of my visit there was a considerable amount of produce invoices which were past due and unpaid.

Q. And do you recall what that total amount of those past due and unpaid invoices were?

A. Approximately $2 million.

Q. During the course of your review of the records of Havana Potatoes and I guess now the records of Havpo Inc., did you discover anything regarding the payment practices of Havpo Inc.?

A. Yes, ma'am.

Q. And what was that?

A. That they also had past due invoices for produce.

Q. And do you recall the total amount involved in those past due and unpaid invoices?

A. Approximately $100,000.

Q. During the course of your review of Respondent Havana Potatoes of New York Corp.'s records and Respondent Havpo Inc.'s records Mr. Dutton, did you come across any written credit agreements extending the terms of payment?

A. No.

Q. For produce transactions.

A. No, ma'am I did not.

Q. Did you ask Mr. Perez if any such agreements existed?

A. Yes, I did.

Q. Do you recall what he told you in response?

A. Yes, ma'am. I believe he stated to me that while he had oral agreements with certain of his shippers to extend his payments that they were not committed to writing and he did not have any formal written agreements with his suppliers for extended payment terms.

Q. And when did you complete your investigation of the business records of the Respondent?

A. On or about the 2nd of February, 1994.

Q. Okay. And at the conclusion of your review of the records, did you discuss your findings with Mr. Perez or anybody else at Havana?

A. Yes, ma'am I did.

Q. Who did you discuss your findings with?

A. Mr. Perez.

Q. Do you recall what you told Mr. Perez at that time?

A. I reviewed with Mr. Perez the general findings of my audit, the dollar

amounts that my review showed that the company was past due and unpaid. I discussed with him the possible ramifications of this that it was a violation of the prompt pay provisions of the Act and that it could lead to a disciplinary proceeding being filed against the company's license.

Q. Okay. And do you recall what Mr. Perez told you in response to your findings?

A. Yes, ma'am. He agreed with me that the total dollar amounts that I was reporting to him seemed reasonable in terms of what the company's debt was and then we discussed some steps that he could undertake at that point in time to attempt to resolve these problems that he was having.

Q. Okay. And do you recall what those steps were?

A. Yes, ma'am. He told me that at that time the company between 1991 when the Department had visited him previously and when I was there that the company had paid off a great deal of its notes payables in fact all of its notes payables that it had for its purchases of what it had on the market and that he was at the time diverting as much money as he possibly could into the payment of these past due invoices that he was not taking any money out of the business at that time and that he hoped that in a period of 12 to 18 months that he could return his business to a status of being able to pay on a timely basis.

Q. Okay, thank you. Mr. Dutton, did that conclude your investigation?

A. Yes, ma'am it did.

Tr. 44-47.

Moreover, Respondent Havana's past-due debt that was not paid at the time of the hearing and Respondent Havpo's past-due debt that was not paid at the time of the hearing are clearly established by the produce supplier invoices obtained from Respondents' files, (CX 6a-6z, 7a), the tables of amounts past-due and unpaid by Respondents, (CX 6, 7; Tr. 111-13, 213-14, 274), and the testimony at the hearing. Mr. Koller testified that he obtained the produce supplier invoices from Respondents' files after informing Mr. Perez that he was conducting an investigation of Respondents' compliance with PACA and after Mr. Perez and Respondent Havana's controller, Mr. Hector Paredes, directed Mr.

Koller to Respondents' accounts payable files, as follows:

[BY MS. COOK:]

Q. . . . During April of 1995 Mr. Koller, did you have cause to become aware of the Respondents herein Havana Potatoes of New York Corp. and Havpo Inc.?

[BY MR. KOLLER:]

A. Yes.

Q. Under what circumstances did you become aware of the Respondents?

A. The Regional Director for the Northeast Regional Office Michiko Shaw asked me to or assigned me to conduct a compliance investigation regarding Havana Potatoes of New York and Havpo Inc.

Q. What is a compliance investigation Mr. Koller?

A. A compliance investigation is in which I was asked to go in regarding the table presented by Mr. Dutton when full payment was made on those transactions that were found on there as past due and unpaid as well as look into the present situation of past due and unpaid invoices by Havana and Havpo Inc. in terms of its compliance with the PACA prompt pay provisions immediately prior to the hearing.

Q. Okay. And what was the purpose of the compliance investigation?

A. The purpose of the compliance investigation was to essentially establish Respondents payment of produce and prompt payment of it.

Q. How did you begin your investigation Mr. Koller?

A. I reviewed the license records concerning Havana Potatoes of New York and Havpo Inc. as well as the materials pertaining to Mr. Dutton's investigation?

Q. Okay. And would those be records that are maintained in the ordinary

course of business of your office?

A. Yes.

Q. In the Department of Agriculture.

A. Yes.

Q. Okay. And did you eventually travel to the Respondents place of business Mr. Koller?

A. Yes, I did.

Q. And when was that?

A. April 5, 1995.

Q. And was anyone with you?

A. No.

Q. And when you arrived at Respondents place of business on the 5th of April, 1995, who did you see?

A. Pedro Perez.

Q. Okay. And what did you tell Mr. Perez at that time?

A. I informed Mr. Perez that I had come to visit Havana Potatoes of New York to initiate the investigation the compliance investigation of Havana Potatoes and Havpo Inc.

Q. Okay. And what happened next?

A. Mr. Perez advised me that he was unaware of me coming to do this investigation.

Q. Okay. And did he then grant you access to the premises?

A. No. He asked that he contact his lawyer.

Q. And what did you do next?

A. I provided him that opportunity at which time I notified the Washington, D.C. headquarters office of the circumstances that I had experienced.

Q. Okay. And did there come a time that Washington, D.C. contacted you and informed you that you could return to Havana's place of business?

A. Yes.

Q. Okay. And did you then at some point on April 5th return?

A. Yes.

Q. Approximately what time was that?

A. It was about 11:00 a.m.

Q. Okay. And who did you meet with when you returned at 11:00 a.m.?

A. Pedro Perez.

Q. Okay. And what did you tell Mr. Perez at that time?

A. That again that I was initiating a compliance investigation into the records and business operations of Havana Potatoes of New York and Havpo Inc.

Q. Okay. And did you request access to certain records from Mr. Perez at that time?

A. Yes.

Q. And what records were those?

A. I requested access to the accounts payables. I requested an accounts payable report, accounts receivables, bank records and generally that would

be about it.

Q. Were you granted access to those records Mr. Koller?

A. Yes.

Q. And when were you granted access?

A. At 1:30 p.m. that afternoon.

Q. Okay. And after you were granted access to the records, did you discuss these records with anyone other than Mr. Perez?

A. Yes.

Q. And who would that individual have been?

A. Hector Paredes.

Q. And who is Hector Paredes?

A. He is the controller for Havana Potatoes of New York.

Q. Okay. And was it he who granted you access to the records or Mr. Perez. Who showed you around?

A. Mr. Perez directed me to Hector Paredes who then guided me to where the files and the payables were located and also provided me with the accounts payable report.

Q. Okay. And can you describe how Havana's and Havpo's records were stored?

A. Yes. The unpaid invoices that were directed to me were maintained in a four drawer file cabinet in which the sellers of produce to Havana were ordered alphabetically in the files from A to Z and then behind that were the payable files regarding Havpo Inc. and also adjacent to that were file cabinets that maintained paid produce transactions and also in other parts of the office where the extra paid invoices were stored as well.

. . . .

BY MS. COOK:

Q. When Mr. Paredes gave you access to the records, did you have any discussion with him regarding Havana's payables records or Havpo Inc.'s payable records?

A. Yes.

Q. What did you tell Mr. Paredes?

A. I instructed him that I needed to be provided the access to all of the unpaid invoices that Havana Potatoes maintained and also access to the transactions that were found on Mr. Dutton's table to look at them to determine when full payment was made.

Tr. 94-98, 100-01.

Further, Mr. Koller testified that at the conclusion of his investigation, he discussed his findings of Respondents' new past-due debt and the payment of the past-due debt found by Mr. Dutton with Mr. Perez who did not disagree with Mr. Koller's findings, as follows:

Q. After reviewing the records of both Havana Potatoes and Havpo Inc. Mr. Koller, did you discuss your findings with Mr. Perez?

A. Yes, I did.

Q. And do you recall when that conversation was?

A. On April 7, 1995.

Q. What did you tell Mr. Perez regarding your findings?

A. That I confirmed that the transactions from Mr. Dutton's table were paid and that I had also found additional unpaid past due transactions that were not in compliance with the PACA prompt pay provision.

Q. What did Mr. Perez tell you with regard to your findings?

A. He acknowledged that the transactions were past due and unpaid.

Tr. 106-07.

Respondents contend that the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, and 7a), and the tables based upon examinations of Respondents' files, (CX 4, 5, 6, and 7), do not constitute substantial evidence of Respondents' violations of the PACA or the new past-due debt incurred by Respondents because they are not reliable. I disagree with Respondents.

In proceedings conducted under the Administrative Procedure Act, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*." (5 U.S.C. § 556(d) (emphasis added).) "Substantial evidence" denotes quantity, *Steadman v. SEC*, *supra*, 450 U.S. at 98, and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

I find that the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and the tables of the amounts past-due and unpaid by Respondents, (CX 4, 5, 6, 7), are highly reliable, probative, and substantial evidence of Respondents' violations of the PACA, as alleged in paragraph III of the Complaint, and Respondents' debt that was past-due at the time of the hearing. USDA investigators obtained the produce supplier invoices from Respondents' files after asking Respondents' president for the accounts payable files and after being directed by Respondents' president and Respondent Havana's controllers to the files. When confronted with the results of the USDA investigators' findings, based upon their examinations of Respondents' files, Respondents' president confirmed that the produce supplier invoices had not been paid timely.

Respondents contend that it is possible that the produce supplier invoices may not mean what they appear to mean, or may have no meaning at all. (Respondents' Appeal to the Judicial Officer at 5-12, 28-30.) Specifically, Respondents contend that produce supplier invoices kept by purchasers of perishable agricultural commodities can contain inaccuracies, can contain iterations and stamps whose meaning is not fathomable to any given reviewer, can be generated by persons other than those whose names appear on the invoices as produce suppliers, and can even refer to produce that has never been received. However, I find nothing in the record to indicate that the produce supplier invoices, which were located in Respondents' files, described by

Respondents' president and Respondent Havana's controllers as the accounts payable files, are anything other than they appear to be; *viz.*, itemized statements of perishable agricultural commodities sold to Respondents by those identified on the invoices.

Not only is there no evidence that any of Respondents' litany of possibilities apply to Respondents' produce supplier invoices, but Respondents' own actions belie their contention that their produce supplier invoices are inaccurate or meaningless. Respondents' president confirmed to both Mr. Dutton and Mr. Koller that the produce supplier invoices represent amounts owed suppliers of perishable agricultural commodities, and that, generally, the amounts found by Mr. Dutton and Mr. Koller to be past-due are correct. (Tr. 46, 106-07.) Further, Mr. Perez discussed with Mr. Dutton the "steps that he[, Mr. Perez,] could take . . . to resolve these problems he was having" and the steps he had taken to "return his business to a status of being able to pay on a timely basis." (Tr. 46-47.) Further still, Respondents stipulated that, by the time of the hearing, they had paid all of the amounts alleged in paragraph III of the Complaint to be past-due and identified in produce supplier invoices obtained from Respondents' files by Mr. Dutton, (Tr. 27; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5). I find it improbable that Respondent Havana would have paid $1,960,958.74 and Respondent Havpo would have paid $101,577.50 based on what Respondents contend are inaccurate, unintelligible produce supplier invoices, which invoices could have been sent to Respondents by persons that are not identified on the invoices, for perishable agricultural commodities that had never been delivered to Respondents. Moreover, Respondents' president, in response to Mr. Dutton's findings, "agreed . . . that the total dollar amounts . . . seemed reasonable in terms of what the company's debt was," and, in response to Mr. Koller's finding new past-due debt, "acknowledged that the transactions were past-due and unpaid" and that none of the transactions were in dispute. (Tr. 46, 106-07.)

While it is possible that any given produce supplier invoice may be inaccurate, Respondents have not introduced any evidence to show that any of Respondents' produce supplier invoices in question are inaccurate. I find nothing in the record to indicate that the produce supplier invoices are anything other than they appear to be--reliable, probative, and substantial evidence of past-due debts for perishable agricultural commodities Respondents purchased, received, and accepted in interstate and foreign commerce.

Respondents also contend that Mr. Dutton's testimony and the tables prepared by Mr. Dutton, (CX 4, 5), are unreliable because some of Respondents' documents, which Mr. Dutton reviewed, and the notes, which Mr. Dutton made

based on his review of Respondents' documents, were not introduced into evidence. (Respondents' Appeal to the Judicial Officer at 4-5, 27.) Complainant has no obligation to introduce all of Respondents' documents which Mr. Dutton reviewed or Mr. Dutton's notes of those documents and neither the reliability of Mr. Dutton's testimony nor the reliability of the tables prepared by Mr. Dutton, (CX 4, 5), is affected by the failure to introduce all documents reviewed by Mr. Dutton or Mr. Dutton's notes. While Respondents were not in possession of Mr. Dutton's notes, it was within Respondents' power to introduce any or all of the documents reviewed by Mr. Dutton, but Respondents chose not to do so. Further, Mr. Dutton testified at the hearing in this proceeding and was available for and subject to cross-examination by Respondents' counsel.

Respondents also contend that the tables prepared by Mr. Dutton, (CX 4, 5), are particularly unreliable because they were prepared in anticipation of litigation. (Respondents' Appeal to the Judicial Officer at 27.) Respondents cite *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), as authority for the proposition that documents prepared in anticipation of litigation are unreliable.

The court in *Young* states:

> The [Veterinary Medical Officer's] testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. *See Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [477], 87 L.Ed. [645] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

In *Young*, the court found that a Summary of Alleged Violations form and the affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found; and therefore, they were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act

which provided:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading," (318 U.S. at 114). Specifically, the Court held:

> The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for

which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

. . . .

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations form, and, in the instant proceeding, there is no question about the admissibility of the tables of amounts past-due and unpaid, (CX 4, 5, 6, 7), under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).[3] The documents were properly admitted. The only issue in *Young* was whether the affidavits prepared by USDA veterinarians and the Summary of Alleged Violations form were inherently unreliable and lacking in probative value, and the issue raised by Respondents in the instant proceeding is whether the tables prepared by Mr. Dutton and Ms. Jervis, (CX 4, 5, 6, 7), are inherently unreliable.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the USDA's Agricultural Marketing Service under the PACA is investigating suspected violations of the PACA and litigating PACA cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of USDA inspectors to detect violations of the PACA and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is "the inherent nature of the business in question," (318 U.S. at 115), and the preparation of tables of past-due and unpaid debts for perishable agricultural commodities in violation of the PACA is the most important of the "methods systematically employed for the conduct of the business as a business." (*Id.*)

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[3]The Administrative Procedure Act provides:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

> Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

None of the parties in the instant proceeding dispute the admissibility of the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and the tables of amounts past-due, (CX 4, 5, 6, 7). (Respondents' Appeal to the Judicial Officer at 26-27; Complainant's Response to Respondents' Appeal at 10.)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials throughout the Federal Government who, like the USDA inspectors, "prepare summary reports . . . only when administrative proceedings are anticipated." (53 F.3d at 730.) Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

Stone, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*, just discussed. The issue in *Stone* was "whether the government violated the hearsay rule and the defendant's right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession." (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth "the activities of the office or agency." (604 F.2d at 925.) The court held, however, that the affidavit "violates the hearsay rule and the defendant's confrontation right" (604 F.2d at 924), as follows:

> This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. *See, e.g., Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5 Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

604 F.2d at 925-26.

As stated above, under the discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman* was railroading, not litigating. That was not true in *Young* and is not true in the instant PACA proceeding. Furthermore, we are not concerned with the admission of Mr. Dutton's and Ms. Jervis' tables, (CX 4, 5, 6, 7), since they

were properly admitted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even under the Federal Rules of Evidence, it appears that the documents at issue in *Young* would have been admissible and the tables, (CX 4, 5, 6, 7), at issue in the instant proceeding would be admissible, under Rules 803(6) and 803(8)(C), which provide:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) Records of regularly conducted activity

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(6), 803(8)(C).

Tables indicating PACA violations, such as those at issue in the instant proceeding, would be admissible under Rule 803(6) and 803(8)(C) exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that, under appropriate circumstances, a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is the case here. Mr. Dutton and Ms. Jervis have no vested interest in the outcome of this proceeding. They merely prepared a summary in the form of a table of information obtained from Respondents' records in the performance of their duties to enforce the PACA. There was no basis for the court's view in *Young* for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations forms lacked trustworthiness merely because they were prepared in anticipation of litigation, and there is no basis in the instant proceeding for finding that the tables of past-due and unpaid debts to sellers of perishable agricultural commodities lacked trustworthiness merely because they were prepared in anticipation of litigation.

Second, Respondents contend that:

> As a threshold matter, the Complainant failed to prove that the perishables at issue actually moved in interstate commerce. At most, the invoices show that some of Havana Potatoes' suppliers had offices or warehouses outside of the State of New York. While Dutton claimed to have reviewed other records to determine interstate transportation of the goods, those records were not introduced, so the Complainant's proof on that crucial issue was second-level hearsay presented by a witness with a cloudy memory who had not seen the documents on which he relied in over a year.
>
> With regard to Havpo, the lack of a connection to interstate commerce is even clearer. All of the transactions involving Havpo involved suppliers who, according to the Complainant's own evidence (CX-5, CX-5a-5f) are located in New York State. While Havpo is a New Jersey corporation, it was created, according to Dutton's own testimony concerning information provided by Mr. Perez, to create interstate transactions purely on paper so that Havana Potatoes could avoid posting a New York State required bond of approximately $200,000.00 in connection with goods shipped intrastate to Hunts Point Market (Tr. 43-44). Indeed, most of the invoices relating to Havpo indicate shipment to Havpo, or to Havana Potatoes, or to Havpo care of Havana Potatoes, at the Hunts Point Market, Bronx, New York

(CX-5a, 5b, 5d, 5e and 5f). Accordingly, for this reason alone, the case against Havpo should have been dismissed.

Respondents' Appeal to the Judicial Officer at 31-32.

Section 1(b)(3) of the PACA defines the term "interstate or foreign commerce," as follows:

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof, or within the District of Columbia.

7 U.S.C. § 499a(b)(3).

Section 1(b)(8) of the PACA provides:

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

7 U.S.C. § 499a(b)(8).

The produce supplier invoices and table of past-due and unpaid debts introduced by Complainant clearly establish that all of Respondent Havana's transactions alleged in paragraph III of the Complaint were in interstate or foreign commerce. (CX 4, 4a-4ppp.) Fifty-nine of the 66 produce sellers who were not paid promptly by Respondent Havana, a New York corporation whose business address is Hunts Point Terminal Market, Row D, Units 449-461, Bronx, New York 10474, were located outside the State of New York. Further, Complainant proved by a preponderance of the evidence that the seven produce sellers, which were located in New York, shipped produce in interstate or foreign commerce to Respondent Havana. (CX 4, 4a-4ppp.) Mr. Dutton testified that he examined Respondents' records specifically to determine whether produce transactions represented by produce supplier invoices were in interstate commerce, as follows:

[BY MS. COOK:]

Q. And can you just briefly describe for the Court what procedure you followed in order to establish that produce purchased by the Respondent actually moved in interstate commerce?

[BY MR. DUTTON:]

A. When I was reviewing the writing sheets I would look at the origin of the shipment. For instance if the shipper was located in Florida, transactions for that shipper would be considered as interstate commerce because of the physical location of the two companies. If I was looking at vendors who were located within the state of New York, I would examine freight bills, brokers confirmations, invoices which might show an origin other than the state of New York for those transactions and if that was found, then I would consider that invoice to also have traveled in interstate commerce.

Tr. 47-48.

It is well settled that a transaction involves interstate or foreign commerce if it involves a commodity that has previously moved in interstate or foreign commerce. *See In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 617; *In re C.B. Foods, Inc., supra*, 40 Agric. Dec. at 967. *Accord In re Fresh Approach, Inc.*, 51 B.R. 412, 424-28 (Bankr. N.D. Tex. 1985), reprinted in 44 Agric. Dec. 1546 (1985). *See also In re Van Buren County Fruit Exchange, Inc.*, 51 Agric.

Dec. 733, 740 (1992) (the mere fact that the buyer and seller are within the same state does not preclude interstate or foreign commerce as defined by section 1(b)(3) of the PACA, (7 U.S.C. § 499a(b)(3)). Such a transaction unquestionably fits the statutory definition of "interstate or foreign commerce," which encompasses "that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another. . . ." (7 U.S.C. § 499a(b)(8).)

The produce supplier invoices and tables of past-due and unpaid debts introduced by Complainant clearly establish that all of Respondent Havpo's transactions alleged in paragraph III of the Complaint were with produce sellers located in New York. (CX 5, 5a-5f.) As Respondents admit, Respondent Havpo is a New Jersey corporation whose business address is 25 Christopher Place, Saddle River, New Jersey 07458. (Respondents' Appeal to the Judicial Officer at 2, 32.) A transaction between a party located in one state and a party located in another state constitutes interstate commerce, and a transaction between a party located in the United States and a party located outside the United States constitutes foreign commerce. Even if, as Respondents contend, the produce that was the subject of the transactions between Respondent Havpo and its produce sellers was bought and sold in New York and never left New York, the transactions alleged in paragraph III of the Complaint between Respondent Havpo, a New Jersey Corporation, and the six sellers located in New York, would be transactions in interstate commerce.

I, therefore, find that all of the transactions alleged in paragraph III of the Complaint between Respondents and sellers of perishable agricultural commodities were in interstate or foreign commerce, that the Secretary has jurisdiction over those transactions under the PACA, and that there is no basis for dismissing the Complaint against either Respondent Havana or Respondent Havpo.

Third, Respondents contend that:

> The A.L.J. applied U.S.D.A.'s long-standing "harsh sanctions" policy in imposing the sanction of revocation on Respondents (Decision and Order, pp. 14-16). In doing, so, the A.L.J. plainly erred since that policy no longer exists, having been recently abandon[]ed in favor of a policy of determining the sanction in each case by balancing the nature of the violations proved in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, with the recommendation of the administrative officials involved in the case.

Respondents' Appeal to the Judicial Officer at 34.

I disagree with Respondents' contention that the ALJ applied the wrong sanction policy in the instant proceeding. The ALJ applied the Department's current sanction policy and, in accordance with that sanction policy, imposed the appropriate sanction under the circumstances—revocation of Respondent Havana's and Respondent Havpo's PACA licenses. The circumstances of this proceeding, *sub judice*, are that Respondents paid the past-due amounts alleged in the Complaint before the start of the hearing. However, at the start of the hearing, Respondents owed other past-due amounts, which are identified and established in the record, but which are not alleged in the Complaint.

Thus, our concern herein is the situation where Respondents have paid all past-due amounts alleged in the Complaint, but are not in compliance with PACA, because there are on this record other past-due amounts still owing to produce sellers at the time of the hearing. The decision in *Gilardi, supra*, answers this question of USDA policy on the above-described situation by specifically requiring full compliance with PACA before a "no pay" case can be converted to a "slow pay" case. The Judicial Officer's *Gilardi* policy is very simply that, to receive a PACA license suspension ("slow pay") rather than a license revocation ("no pay"), Respondents must not only make full payment of all the money past-due, as alleged in the Complaint by the start of the hearing, but there must be present compliance with the payment provisions of the PACA and regulations. There can be no "robbing Peter to pay Paul," and no "rolling over" of past-due accounts involved in the case, while continuing to violate the payment requirements, as follows:

> Respondent argues that after the hearing in this case, it reduced its debt to about $30,000, which should be paid within the next 30 days (Appeal Brief at 10). It is established that if a case begins as a "no pay" case, but full payment is made by the time of the hearing, the case becomes a "slow pay" case, which warrants a suspension order rather than a revocation order. *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. [1930 (1983)].
>
> As far as I know, there has been only one case under the Perishable Agricultural Commodities Act treated as a "slow pay" case in which full payment was made after the hearing. *In re L.R. Morris Produce Exchange, Inc.*, 37 Agric. Dec. 1112, 1119-22 (1978). In that case, full payment was made before the initial decision was issued by the Administrative Law Judge. A 90-day suspension order, rather than a revocation order, was imposed, with the following caveat (37 Agric. Dec. at 1121-22):

In view of respondent's flagrant violations extending over a period of several years, and involving delays of up to 23 months in payments for over $1 million worth of produce, if respondent knowingly violates the payment provisions of the Act or regulations on one more occasion within the next five years as to a contract entered into on or after the effective date of this Order (which does not involve a bona fide dispute as to the contract), respondent's license will be revoked. If further violations occur which are not knowingly committed, a lengthy suspension order will be imposed.

In a pending case under the Perishable Agricultural Commodities Act, *In re Clarence Miller Co.*, PACA Docket No. 2-6394, it is alleged on appeal that full payment was made after the initial decision was issued by the Administrative Law Judge. Since the same issue may arise in the present case, perhaps within a few days after this decision is filed, it is appropriate to set forth the policy that will govern in such situations.

There are substantial reasons for making the final determination as to whether a case is "slow pay" or "no pay" as of the date on which the administrative hearing begins. Any determination made after that time would require a new investigation by complainant which might unduly delay the proceeding. Each day that the payment violations continue results in increased risk and damage to the industry. The increased damage to existing creditors is obvious--they are forced to wait longer for their money. The increased risk to others arises from the fact that a firm in financial difficulty frequently increases its volume significantly, perhaps taking imprudent chances, thereby exposing many other unsuspecting persons to the risk of nonpayment, if the debtor's efforts to regain financial stability are unsuccessful. Since there is a considerable time lag between the violation and the hearing, there is no real justification for not making full payment by the opening of the hearing.

Accordingly, the policy in future cases will be that if full payment is not made by the opening of the hearing, *together with present compliance with the payment provisions of the [PACA] and regulations* (or if no hearing is to be held, by the time the answer is due), the case will be treated as a "no pay" case. There is, of course, no basis for considering as mitigating payments that are made by "robbing Peter to pay Paul," *i.e.*, by "rolling over" the past-due accounts involved in the case, while continuing to vio-

late the payment requirements. (I cannot now conceive of extraordinary circumstances that would warrant further extending the time for making full payment and achieving compliance, but if any exist, they can be considered in a concrete factual setting.)

. . . .

> The imposition of a suspension order, rather than a revocation order, in flagrant and repeated "slow pay" cases is not mandated by the [PACA] but, rather, is a self-imposed limitation, which is admittedly experimental. *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-73 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133-34 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). Where a respondent has committed repeated and flagrant violations of the magnitude involved here, this self-imposed limitation would not be followed if a determination as to whether full payment was finally made (long after the hearing) would require the lengthy delay incident to a reopened hearing, a new Administrative Law Judge's decision, and a further appeal to the Judicial Officer.

In re Gilardi Truck & Transp., Inc., *supra*, 43 Agric. Dec. at 149-50, 152 (footnote omitted, emphasis added).

Moreover, subsequent cases have tightened *Gilardi* considerably, most notably, *Carpenito Bros.* and *Caito*, as explained in the *Lloyd Myers* case, as follows:

> Of particular relevance to this proceeding are two earlier cases which established the doctrine that a Respondent must be in compliance (full payment) with the payment rules by the time of the hearing, to avoid revocation. The distinction between "slow pay," which requires suspension, and "no pay," which requires revocation, is analyzed in *Caito*, as follows (*id.* at 632–33, 638; slip op. at 43–45, 51) (footnotes and citations omitted):
>
> > Prior to the decision in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), it had been the policy of the Judicial Officer to issue lengthy suspension orders in the case of serious "slow payment" cases, usually from 70 to 90 days.

The administrative officials charged with the responsibility for administering the Perishable Agricultural Commodities Act have long recommended revocation of a license where there have been many failures to pay promptly, involving lengthy delays in making full payment. See, e.g., *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). There are strong administrative reasons supporting their revocation recommendation. Just as in the case of the savings and loan industry, if a produce licensee is in financial difficulty (i.e., not able to pay its creditors promptly), the loss to the industry as a whole is frequently much less if the firm is closed down promptly. Furthermore, we are dealing here with an industry that asked for, pays for, and desires a tough regulatory program to insure that only financially responsible licensees are permitted to remain in the industry.

. . . .

In *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149-54 (1984), the Judicial Officer moved a step closer to the views of the administrative officials, holding that in order for a suspension order to be issued on the basis of a "slow pay" case, rather than a revocation order which would be issued in a "no pay" case, full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent must be in full compliance with the payment requirements by the time of the hearing.

. . . .

The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 500-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW), by requiring that respondent's present compliance not involve credit agreements for more than 30 days. *Carpenito* also emphasizes that under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing--i.e., being almost in compliance is not enough!

In re Lloyd Myers, *supra*, 51 Agric. Dec. at 764-65.

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36–3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The sanction policy in *S.S. Farms Linn County, Inc.*, does not alter the doctrine in *In re The Caito Produce Co., supra.*[4] The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the articulated congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.

The Department's sanction policy requires an examination of the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices in the total amount of $1,960,958.74 for 345 lots of perishable agricultural commodities, during the period February 1993 through January 1994, and Respondent Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices in the total amount of $101,577.50 for 23 lots of perishable agricultural commodities, during the period August 1993 through January 1994. Respondents' violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondents' violations directly contravene one of the primary remedial purposes of the PACA, the financial

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[4]*In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 26 (Sept. 12, 1996); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co., supra*, 54 Agric. Dec. at 1329.

protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even consumers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay.[5] These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[6]

Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently,

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[5]Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec. at 33. See also *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2026 (1985); *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2426; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1169; *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

[6]*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin, supra*, 443 F.2d at 588-89; *Zwick v. Freeman, supra*, 373 F.2d at 117; *In re Andershock Fruitland, Inc., supra*, slip op. at 16-17; *In re Boss Fruit & Vegetable, Inc., supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 621; *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co., supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co., supra*, 40 Agric. Dec. at 112; *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec. at 33. *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or repeatedly fail to make full payment promptly.

The administrative officials charged with responsibility for administering the PACA have long recommended revocation of PACA licenses where there have been many failures to pay promptly involving lengthy delays in making full payment.[7]

In the instant proceeding, the administrative officials charged with administering the PACA recommend the revocation of Respondent Havana's and Respondent Havpo's PACA license. Ms. Clare Jervis, a marketing specialist employed by USDA, Agricultural Marketing Service, Perishable Agricultural Commodities Act Branch, (Tr. 205), testified regarding the administrative officials' policy as to payment violations and the sanction to be imposed upon Respondents, as follows:

BY MS. COOK:

Q. Ms. Jervis, you previously testified that you are employed by the P.A.C.A. Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, is that correct?

[BY MS. JERVIS:]

A. Yes.

Q. Do you represent the Complainant at this proceeding?

A. Yes.

Q. Are you aware of whether the Complainant has a recommendation that it wishes to make to the administrative law judge on the sanction

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[7]*See, e.g., in re Andershock Fruitland, Inc., supra*, slip op. at 22-24; *In re Lloyd Myers Co., supra*, 51 Agric. Dec. at 764; *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons, supra*, 34 Agric. Dec. at 133.

he should issue, if he should find that the Respondents herein violated the P.A.C.A., as alleged in the complaint?

A. Yes.

Q. Would you tell Judge Bernstein what that recommendation is?

A. We're seeking revocation of Respondent's licenses.

Q. And can you tell Judge Bernstein what factors were considered by the Complainant in making the recommendation that you have just described?

A. Yes. The factors we consider are the seriousness of the violation, the number of violations, the period of time that the violations cover, the dollar amount, the warning notice that the Respondent was provided with, and the effect of failures to make full and prompt payment in compliance with the Act have upon the industry.

In this particular instance here today, we have two Respondents that, based upon Mr. Dutton's investigation, and as alleged in the complaint, had failed to make full payment for -- specifically Havana Potatoes failed to make full payment for approximately $2 million during the period of March 1993 to January of 1994, to 66 suppliers. Havpo failed to make full payment promptly of approximately $100,000 to 26 suppliers during the period of March of 1993 to January of 1994.

Although it has been stated here today that those transactions have, in fact, been paid for by Respondents, they were not paid for promptly in accordance with P.A.C.A. prompt pay provisions.

The compliance investigation conducted by Mr. Koller several weeks ago showed that Respondents were not in compliance with the Act at this time either. It documented that Havana Potatoes had failed to pay approximately a little over $1 million for transactions that covered the time period of March of 1994 to April of 1995. Hav[p]o failed to pay for approximately $58,000 to one seller during the period of time of March of 1994 to November of 1994.

The -- we also look at the warning letter Respondent received. He was given ample notice of prompt payment provisions. He was given time to come into compliance with the provisions.

And finally the effect of these violations have on the industry are a very serious effect.

JUDGE BERNSTEIN: What warning letter?

THE WITNESS: There is a warning letter that's Exhibit No. 3 dated -- it's in November of 1991, that was sent to Havana Potatoes.

BY MS. COOK:

Q. You've mentioned the effect that these types of violations have on the industry, Ms. Jervis. Could you explain those effects more fully, please?

A. The failures to make full payment promptly have a serious impact upon the industry. The produce -- the perishable agriculture commodities have a short shelf life. They move from the growing region through middlemen to the wholesaler to reach the consumers very rapidly in order to reach the consumers at the height of their edible appeal.

Because of the quickness with which the produce must be moved to reach the consumers, the industry doesn't have the opportunity to perform extensive credit checks that are so common in other industries.

Businesses enter into contracts on a daily basis, just on -- at face value, having just talked to the buyer a few times over the phone. They trust that each party will live up to the contractual obligations. In other words, the shipper, when he ships the product to the buyer, he trusts that the buyer will in fact receive that produce, handle it promptly and make full payment promptly.

The buyer, on the other hand, is trusting that the shipper will ship the quantity and the quality of the commodity as ordered, so that he may meet its customers' demands.

When you have failures to make full payment promptly, it breaks down this trust relationship, the marketing chain breaks down, and it also can create a financial hardship. It's what we refer to as a domino effect. If A fails to pay B, then B fails to pay C and so on. And this is a hardship on the industry.

Q. Ms. Jervis, what is your understanding of the secretary's role in enforcement of the Perishable Agricultural Commodities Act?

A. The Secretary of Agriculture is charged with enforcing the P.A.C.A., thereby insuring that this trust relationship that the industry operates upon is -- continues to exist in the industry.

This is done in several different ways. One, the Secretary of Agriculture, when he issues a P.A.C.A. license, he's making a statement to the entire produce industry that that firm is -- will operate in compliance with the Act, in that that firm is in a financial position to conduct business.

If, in the course of business, the firm is found to have committed violations of the Act, the Secretary, through evenhanded enforcement, through sanction policy, sends a very, very strong message to the industry that violations will not be tolerated. The firms that have committed the violations will be charged and that -- and through this even-handed enforcement policy that the Secretary issues sanctions through, he's providing a level playing field for the entire industry to operate on.

Now, the other aspect of the Secretary's role is that the effect of the sanctions that are imposed is that it serves as a deterrent effect on the industry. One, it removes a firm that has committed violations of the Act, and it prevents additional violations from being committed.

It also serves as a deterrent to the entire produce industry in that it will deter them from committing similar violations.

MS. COOK: Thank you, Ms. Jervis. I have no further questions.

Tr. 472-77.

Respondents contend that the Department's new sanction policy articulated in *S.S. Farms Linn County, Inc.*, requires that the ALJ weigh mitigating

circumstances, and that, in light of these circumstances, the ALJ should have considered and imposed "a lesser sanction, such as a 30-day suspension" of Respondent Havana's PACA license and Respondent Havpo's PACA license. (Respondents' Appeal to the Judicial Officer at 34-38.) I disagree with Respondents.

Ms. Clare Jervis testified that the relevant circumstances taken into consideration in making the recommendation that Respondents' PACA licenses be revoked include the number of Respondents' violations (Respondent Havana 345; Respondent Havpo 23); the number of sellers to whom Respondents failed to make full payment promptly (Respondent Havana 66; Respondent Havpo 6); the amount of money not paid (Respondent Havana $1,960,958.74; Respondent Havpo $101,577.50); the time period during which Respondents violated the PACA (Respondent Havana 11 months; Respondent Havpo 5 months); and the effect that the violations of the PACA have on the perishable agricultural commodities industry. (Tr. 473-74.)

Respondents cite several "mitigating factors" that Respondents contend the ALJ should have considered when determining the sanction to be imposed on Respondents: an industry-wide crisis that has resulted in few purchasers paying for perishable agricultural commodities within 10 days; the weakness of the evidence of Respondents' roll-over debt; Respondents' excellent payment history relative to others in the perishable agricultural commodities industry; Respondents' good faith efforts to address their payment problems; and the effects of revocation on perishable agricultural commodity suppliers. Even if I found each of Respondents' "mitigating factors" to be supported by the record, which I do not so find, I would not agree with Respondents' contention that those factors should be considered when determining the sanction to be imposed for Respondents' repeated, flagrant, and willful violations of the PACA. The factors cited by Respondents as "mitigating factors" are not *relevant circumstances* under the Department's sanction policy regarding flagrant or repeated failures to make full payment promptly under the PACA.[8] Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay

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[8]Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), which provides "alternative civil penalties" for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. *See In re Andershock Fruitland, Inc., supra*, slip op. at 27 n.13 (the factors that must be considered under section 8(e) of the PACA, (7 U.S.C. § 499h(e)), are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license).

more than a *de minimis* amount, whether Respondents had paid all sellers by the opening of the hearing, and whether Respondents are in compliance with the PACA and the regulations under the PACA. Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a Respondent who has flagrantly or repeatedly failed to make full payment promptly.[9]

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[9]*In re Andershock Fruitland, Inc.*, *supra*, slip op. at 28 (excuses are not relevant to the sanction to be imposed); *In re Moreno Bros.*, *supra*, 54 Agric. Dec. at 1443 (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995), *appeal dismissed*, No. 95-70906 (9th Cir. 1996) (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990) (failure to pay for produce results in the revocation of Respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with Respondent); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished) (failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a Respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with Respondent); *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 615 (although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (revocation of Respondent's PACA license is appropriate even though Respondent failed to pay because Respondent's customers ceased doing business with Respondent when the city announced it was taking Respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (excuses such as nonpayment because of bankruptcy resulting after Respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co.*, *supra*, 44 Agric. Dec. at 2028-30 (all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that Respondent failed to pay because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of Respondent's funds in the bank's possession; as in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations and sanctions under the PACA); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that Respondent was in business for 35 years with no complaints or financial difficulties, and that

(continued...)

[9](...continued)
nonpayment was caused by $200,000 in losses in 2-year period from theft of produce from Respondent's warehouse are irrelevant); *In re Gilardi Truck & Transportation, Inc.*, *supra*, 43 Agric. Dec. at 129 (fire at Respondent's business for which Respondent was under-insured rejected in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc.*, *supra*, 42 Agric. Dec. at 1513-26 (bankruptcy caused by failure of large purchaser from Respondent to comply with its contractual agreement is not a mitigating circumstance in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158-70 (1983) (nonpayment because another firm failed to pay Respondent $248,805.66 is not a mitigating circumstance); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay Respondent, and increased operating costs rejected in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2428, 2442-44 (revocation of Respondent's PACA license is appropriate where nonpayment is caused by Respondent's bankruptcy); *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1171 (nonpayment because of bankruptcy rejected in determining whether payment violations occurred or whether violations were willful); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982), (nonpayment because of bankruptcy of another firm owing Respondent $776,459.23 rejected in determining whether payment violations occurred or whether violations were willful), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, *supra*, 41 Agric. Dec. at 746-47 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1138-40 (Respondent's sudden and unexpected loss of a major sales account is not a mitigating circumstance in a failure to pay case); *In re C.B. Foods, Inc.*, *supra*, 40 Agric. Dec. at 969-70 (Respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA); *In re United Fruit & Vegetable Co.*, *supra*, 40 Agric. Dec. at 404 (nonpayment because of financial difficulties is not a mitigating circumstance); *In re Columbus Fruit Co.*, *supra*, 40 Agric. Dec. at 113 (nonpayment because Respondent lost a major sales account and a large supplier changed its course of dealing with Respondent, demanding cash on delivery, rejected in determining whether payment violations occurred or whether violations were willful); *In re Rudolph John Kafcsak*, *supra*, 39 Agric. Dec. at 685-86 (a strike and the failure of others to pay Respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce); *In re John H. Norman & Sons Distributing Co.*, *supra*, 37 Agric. Dec. at 709-14 (nonpayment because of failure of others to pay Respondent and Respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1632-33 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (bankruptcy of another firm owing Respondent over $130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro*, *supra*, 35 Agric. Dec. at 31 (a railroad strike causing Respondent's failure to pay is not a defense under section 2 of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (financial difficulty is not an excuse
(continued...)

Respondents' payment of all past-due amounts alleged in the Complaint is commendable; but, the operational device of "robbing Peter to pay Paul" still leaves Respondents in non-compliance with the PACA, as follows:

D. Mitigational Aspects

> The record should note that respondent's financial difficulties basically arose out of the failure of respondent's customers to pay respondent. Respondent continued to operate selling to Paul in order to pay Peter and had some measure of success. At the time of trial, respondent had paid about $63,000.00 of the complaint transactions, cutting the complaint obligations to about $100,000.00
>
> A respondent witness testified that their operations at the time of trial were on a "current basis" (Transcript page 77), e.g., purchases were then being made on a cash basis or were being promptly paid within the terms of their agreement or the regulations.
>
> Respondent's efforts to satisfy the older unpaid obligations are commendable. But, under the strict interpretation of the PACA, and binding precedents cited, there is no discretion allowed here.

In Farm Market Service, Inc., 44 Agric. Dec. 316, 322 (1985) (footnote omitted).

Furthermore, collateral effects of a Respondent's license revocation are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or

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[9](...continued)
for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc., supra*, 32 Agric. Dec. at 266-68 (Respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (the fact that Respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (financial difficulties do not condone Respondent's repeated failures to pay and revocation of Respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties authorizes revocation of Respondent's PACA license and had Respondent's license not already terminated, it would have been revoked).

repeatedly failing to make full payment promptly.[10]

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Havana Potatoes of New York Corp.'s PACA license is revoked, effective 11 days after service of this Order on Respondent Havana Potatoes of New York Corp.
2. Respondent Havpo, Inc.'s, PACA license is revoked, effective 11 days after service of this Order on Respondent Havpo, Inc.
3. The facts and circumstances set forth in this decision shall be published.

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[10] *In re Andershock Fruitland, Inc., supra*, slip op. at 28-30 (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co., supra*, 55 Agric. Dec. at 639 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed wilful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co., supra*, 49 Agric. Dec. at 576 (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co., supra*, 48 Agric. Dec. at 571 (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc., supra*, 46 Agric. Dec. at 177 (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co., supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co., supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

PRODUCE SERVICES & PROCUREMENT, INC. v. MARK J. VESTAL, d/b/a WESTERN PACIFIC PRODUCE.
PACA Docket No. R-94-0052.
Decision and Order filed January 22, 1996.

Agency - Broker authorized to invoice, collect and remit for undisclosed principal did not possess sufficient interest in cause of action to allow it to bring reparation action against purchaser where principal was later disclosed.

Where complainant was a broker relative to a transaction in perishables and was authorized by its principal, the seller, to invoice the buyer, collect and remit to the principal, the agency contract did not contemplate that such broker would be enabled to bring a legal action to collect the debt. The fact that the principal was undisclosed at the time of contracting did not alter this rule, where the existence of the principal was later disclosed. Complainant was under no obligation to pay its principal if complainant was not paid, and was not the real party in interest for the purpose of bringing a reparation action against the buyer.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $4,823.05 in connection with a transaction in interstate commerce involving a truckload of celery.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither

party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Produce Services and Procurement, Inc., is a corporation whose address is P. O. Box 690923, San Antonio, Texas.
2. Respondent, Mark J. Vestal, is an individual doing business as Western Pacific Produce, whose address is (b) [redacted]. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On or about January 5, 1993, complainant, acting as broker for Plantation Produce Co., sold to respondent one truck load of celery for a price of $9,701.00, f.o.b. The truck load of celery was shipped by Plantation Produce Co. to respondent on January 8, 1993.
4. Complainant at all times relevant to the subject transaction acted as an invoice, collect and remit broker for Plantation Produce Co. At the time of the sale of the truck load of celery Plantation Produce Co. was not disclosed to respondent as the seller. Following shipment of the celery complainant invoiced respondent for the load, and such invoice disclosed Plantation Produce Co. as the seller.
5. An informal complaint was filed on March 17, 1993, which was within nine months after the cause of action alleged herein accrued.

Conclusions

It is clear from the record herein that complainant was not the owner of the subject truck of celery, and acted as an invoice, collect and remit broker between Plantation Produce Co. and respondent. In a recent case we held that an invoice, collect and remit broker is not the real party in interest, and has no standing to bring a reparation complaint without an assignment of interest from the seller. In that case we stated:

> We note first that being an invoice, collect and remit broker does not establish any primary liability running from complainant to its principal, R. L. Wheatley & Son. As a collecting agent for R. L. Wheatley & Son, complainant is liable to that firm only for what it collects from respondent. [*Forney Fruit & Produce Co., Inc. v. Dixie Brokerage Co.*, 29 Agric. Dec. 1433 (1970).] The Regulations affirm that:

> In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. [7 C.F.R. § 46.28(c).]

It is obvious, therefore, that complainant does not own the chose in action here, but only has an agency duty to remit any funds collected from respondent to its principal.

Since complainant has no obligation to remit funds which it does not collect, it follows that the existence of an "invoice, collect and remit" contract should not be taken to imply that any extraordinary means of collection will be undertaken. The agency obligation is to "invoice" and collect, not sue and collect. The normal conduct of commerce does not contemplate law suits to collect money due, but rather payment in due course.[1]

In this case complainant's principal was undisclosed to respondent at the time the contract was made. In our opinion this fact does not affect the rule enunciated above because the existence of the principal is now disclosed. Warren A. Seavey states:

> If the agent discloses or the other party discovers the existence or identity of the principal, the agent is in the position of an agent for a disclosed or partially disclosed principal and can affect relations with the other party only to the extent that his known position gives him power to affect the principal.[2]

Seavey goes on to say that if an agent for an undisclosed principal should obtain a judgment against the other party after the identity of the principal has become known, the rights of the principal, who took no part in the litigation, would not

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[1] *PurePac Brokers, Inc. v. Procacci Bros. Sales Corporation*, PACA Docket R-93-250 decided June 15, 1995, 54 Agric. Dec. ____ (1995).

[2] W. Seavey, *Handbook of the Law of Agency*, §115B, p.203 (1964).

be barred or diminished.[3] As we said in *Harrisburg Daily Market, Inc. v. S. Boova & Co.*:

> The real party in interest is the person who can discharge the claim upon which the suit is brought and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim against subsequent suits covering the same subject matter by other persons. . . . A person who acts merely as a broker or agent in a purchase and sale cannot maintain an action against the buyer for the purchase price in the absence of an assignment from his principal or other legal basis.[4]

We conclude that complainant does not possess a claim against respondent upon which this action may be based. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

FIRMAN PINKERTON CO., INC. v. BOBINELL J. CASEY d/b/a INTERNATIONAL PRODUCE EXCHANGE, INC. v. FIRMAN PINKERTON CO., INC.
PACA Docket No. R-94-0134.
PACA Docket No. R-94-0169.
Decision and Order filed January 22, 1996.

Shipper's obligations regarding adequacy of transportation vehicle.

In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation service and providing shipping instructions to the carrier. The shipper, in accordance with its duty of reasonable care in this instance, had an affirmative obligation to notify respondent that its use of an unrefrigerated truck to transport the produce was

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[3] *Id*, at § 116.

[4] *Harrisburg Daily Market, Inc. v. S. Boova & Co.*, 19 Agric. Dec. 689 (1960).

inadequate, and its failure to do so was a breach of duty on its part. Complainant will not be later heard to complain about the receiver's choice of transport vehicle as a means of proving abnormal transportation.

Kimberly D. Hart, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). This decision will reflect a decision by the Department to consolidate two separate but integrally related cases which are *Firman Pinkerton Co., Inc. v. Bobinell J. Casey d/b/a International Produce Exchange,* PACA Docket No. R-94-134 [hereinafter referred to as the **"Firman case"**] and *Bobinell J. Casey d/b/a International Produce Exchange v. Firman Pinkerton Co., Inc.,* PACA Docket No. R-94-169 [hereinafter referred to as the **"International Produce case"**]. All parties have been properly notified by certified mail of the Department's consolidation of the two cases.

In the "Firman case", complainant filed a timely formal complaint seeking a reparation award against International Produce Exchange in the amount of $3,465.00 in connection with a transaction involving yellow onions, a perishable agricultural commodity, in interstate commerce. In the "International Produce case", International Produce filed a timely formal complaint seeking a reparation award against Firman Pinkerton in the amount of $3,899.40 in connection with a transaction involving yellow onions, a perishable agricultural commodity, in interstate commerce. The same load of yellow onions is the subject of both cases.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaints were served upon the respondents, which filed answers thereto, denying the allegations of the complaints. Since the amount claimed as damages does not exceed $15,000.00, the procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. §47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence in this case, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. In the "Firman case", neither party elected to file additional evidence. Neither party elected to file a brief.

In the "International Produce case", neither party elected to file additional evidence. Neither party elected to file a brief.

Findings of Fact

1. Complainant, Firman-Pinkerton Co., Inc., is a corporation whose mailing address is P.O. Box 2216, Wenatchee, Washington 98807.

2. Respondent, Bobinell J. Casey, is an individual doing business as International Produce Exchange whose mailing address is (b) (6) (b) (6) At the time of the transaction alleged herein, respondent was licensed under the Act.

3. Complainant, on or about July 2, 1993, sold to respondent, by written contract and in the course of interstate commerce, 900 U.S. Commercial medium yellow onions, at the agreed upon f.o.b. contract price of $3,465.00. The produce was shipped on July 2, 1993, from Othello, Washington to respondent's customer in Hudsonville, Michigan. The produce arrived at respondent's customer on July 7, 1993, but it was not unloaded upon arrival. On July 8, 1993, a federal inspection was obtained with the following results:

Applicant:	Bosgraf Sales Hudsonville, Michigan
Shipper:	Olympic Produce Othello, Washington
Insp. date:	July 8, 1993 at 8:45 a.m.
Carrier type:	Open trailer, tarp covered
Temperatures:	72 to 74 degrees
Product:	Onions, yellow northern
Brand/markings:	"Derby" 50 lbs.
# of containers:	900 sacks

Average defects:	10% average including 8% serious damage by black mold beneath outer scales (12 to 20%)
	10% average including 6% serious damage by numerous sunken areas (4 to 16%)
	40% average including 40% serious damage by decay (10 to 66%)(mostly in early, many in advanced stages affecting 1-3 outer scales, to entire onion)
	66% checksum including 54% serious damage
Notes:	Restricted to all sacks on rear 2 pallets and to upper 3 layers of remainder of load

4. Based on the inspection results, respondent's customer rejected the load and notified respondent of such rejection. Respondent in turn notified complainant of its rejection based on the condition of the produce. Both parties abandoned the load to the trucker who transported the produce to be dumped due to the fact that it had no commercial value.

5. Respondent has failed to pay complainant the full contract price of $3,465.00. In addition, respondent International Produce has filed a complaint against complainant Firman alleging that complainant is liable to it for damages resulting from the breach of contract. Respondent is seeking to recover the amount of invoice to its customer, $5,850.00, plus inspection charges of $74.40 minus freight charges of $2,025.00 or $3,899.40 as its damages. Complainant Firman has failed to pay respondent International Produce this alleged amount of damages.

6. In the **Firman case**, the formal complaint was filed on December 1, 1993, which is within nine months from when the cause of action accrued. In the **International Produce case**, the formal complaint was filed on January 12, 1994, which is within nine months from when the cause of action accrued.

Conclusions

Complainant alleges that respondent ordered, received and accepted the produce in conformity with the terms of the f.o.b. contract and thus owes it the full contract price. Respondent denies that it accepted produce in conformity

with the terms of the contract and alleges a breach of contract on complainant's part as proven by the inspection taken. Respondent contends that it is entitled to damages directly resulting from complainant's breach of contract due to its inability to fulfill its contract with its customer. As the moving party, complainant bears the burden of proving its case. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The party with the burden of proof must meet the preponderance of evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969).

The evidence shows that the produce was shipped on July 3, 1993, on a tarped flatbed truck with sides secured by respondent. The produce arrived at respondent's customer's place of business on July 7, 1993, where a visual inspection was taken of the produce. The produce was not unloaded upon arrival and remained on the original transport vehicle. Respondent's customer noticed some potential problems with the load and called for a federal inspection which took place early morning on July 8, 1993. Respondent was notified of its customer's intent to secure a federal inspection. On July 8, 1993, a federal inspection was taken on the load. The inspector noted that the load was intact and still loaded on the original transport vehicle. The inspection report reads in pertinent part:

Applicant:	Bosgraf Sales Hudsonville, Michigan
Shipper:	Olympic Produce Othello, Washington
Insp. date:	July 8, 1993 at 8:45 a.m.
Carrier type:	Open trailer, tarp covered
Temperatures:	72 to 74 degrees
Product:	Onions, yellow northern
Brand/markings:	"Derby" 50 lbs.
# of containers:	900 sacks

Average defects:	10% average including 8% serious damage by black mold beneath outer scales (12 to 20%)
	10% average including 6% serious damage by numerous sunken areas (4 to 16%)
	40% average Including 40% serious damage by decay (10 to 66%)(mostly in early, many In advanced stages affecting 1-3 outer scales, to entire onion)
	66% checksum including 54% serious damage
Notes:	Restricted to all sacks on rear 2 pallets and to upper 3 layers of remainder of load

Upon receiving the inspection results, respondent's customer notified respondent of its rejection of the produce. Respondent, in turn, notified complainant of the inspection results and ensuing rejection and complainant requested that respondent file a claim with the trucking company for mishandling. Respondent released the load to the trucker due to the fact that it had no commercial value. The trucker dumped the produce once it was abandoned by complainant and respondent due to its condition.

It is our opinion that respondent did not accept the produce in this transaction. The produce was never unloaded and the inspection was performed with the load remaining on the transport vehicle. Respondent nor its customer exercised any dominion or control over the produce. Therefore, we conclude that complainant has not carried its burden of proving acceptance on respondent's part.

There is also some discrepancy as to whether the sale was on an f.o.b. basis or a delivered basis. We have reviewed the evidence which indicates that the sale from complainant to respondent was on an f.o.b. basis and the resale from respondent to its customer was on a delivered basis. Since we are only concerned with the contract between complainant and respondent, the produce in question is found to have been sold on an f.o.b. basis.

Respondent alleges a rejection of the produce via its customer and contends that such rejection was promptly communicated to complainant. For a rejection to be effective, it must be made in clear, unmistakable terms. *Farm Market*

Service, Inc. v. Albertson's, Inc., 42 Agric. Dec. 429 (1983). A rejection is not effective unless the buyer seasonably notifies the seller and the burden of proving seasonable notice rests with the buyer. *San Tan Tillage Co., Inc. v. Kap's Foods, Inc.*, 38 Agric. Dec. 867 (1979); *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979). We have reviewed the evidence and we are persuaded that respondent communicated a clear, timely rejection of the produce to complainant on July 8, 1993. Therefore, we find that respondent has carried its burden of proving a procedurally effective rejection.

After rejecting produce, a receiver has a duty to dispose of the goods in commercial channels upon request of the shipper or in lieu of instructions from the shipper. *Yokoyama Brothers v. Cal-Veg Sales, Inc.*, 41 Agric. Dec. 535 (1982). The evidence indicates that once respondent rejected the produce, the complainant failed to give it instructions as to the disposition of the produce nor did complainant make any efforts to arrange to have the produce returned or transported elsewhere. Therefore, respondent released the produce to the shipper who dumped it due to its lack of commercial value.

The receiver has the burden to show that produce has no commercial value. *Homestead Pole Bean Co-op Inc. v. Jones Produce Co.*, 43 Agric. Dec. 1216 (1984); *Growers Produce v. Star Produce*, 33 Agric. Dec. 693 (1974). We find that the respondent acted properly in allowing the trucker to dump the produce since the inspection results clearly indicate that the produce had little to no commercial value. We are persuaded that respondent has shown that the produce had no commercial value and that dumping was justified.

The next issue is whether complainant breached its contract by providing non-conforming goods as alleged by respondent. When effectively rejected produce is sold f.o.b., the shipper has the burden to show transportation service and conditions were abnormal. *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844 (1979); *Sunset Strawberry Growers v. Luna Co., Inc.*, 46 Agric. Dec. 1701 (1987). When produce has been rejected by a receiver as not meeting contract specifications the shipper has the burden to show that it was in suitable shipping condition when it was loaded at shipping point. *Heggeblade-Marguleas-Tenneco, Inc. v. Fisher Foods, Inc.*, 33 Agric. Dec. 1443 (1974).

There is a warranty of suitable shipping condition in an f.o.b. sale such as the one involved herein (7 C.F.R. § 46.43(i)). Under the warranty, the commodity is warranted to be in a condition "which if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties" (7 C.F.R. § 46.43(j)). The rationale for this rule is the following: "Whether the commodity, at the time of billing, was in good enough condition

to travel to destination without abnormal deterioration can be determined, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at the time of billing." *Anonymous,* 12 Agric. Dec. 694 (1953).

Complainant alleges that abnormal transportation accounted for the condition of the produce upon arrival. In particular, complainant contends that the respondent's use of a tarped flatbed truck caused the abnormal deterioration due to the fact that transporting onions in an unrefrigerated trailer makes the product vulnerable to decay and other defects if the weather turns damp or there is a prolonged period of time during which proper air flow is not maintained. Complainant further contends that the weather conditions, including rain and high humidity, during transit contributed to the abnormal deterioration. Complainant also alleges that the trucker's failure to maintain a transit temperature of 50 degrees fahrenheit contributed to the abnormal deterioration. Finally, complainant contends that only abnormal deterioration can account for such a drastic change in the condition of the produce from shipment to destination since a shipping point inspection showed only 1% decay.

Respondent, on the other hand, alleges that transportation was normal. Respondent contends that there were no weather conditions occurring during transit which contributed to the problems, citing the inspector's notes which state that the dampness was derived from the decay and not rain or water. Respondent also alleges that the use of the tarped flatbed truck was appropriate and there is no proof that the produce was not properly ventilated. Respondent disputes complainant's allegation that the shipping point inspection sufficiently identifies the produce as being the same produce shipped to its customer. Finally, respondent disputes that the trucker failed to maintain proper transit temperatures since it contends that it would have been impossible to maintain a temperature of 50 degrees due to the fact that the transport vehicle was not refrigerated and the transportation took place in July when temperatures are warmer.

We have thoroughly reviewed the evidence regarding these issues and reach the following conclusions. The shipping point inspection report submitted by complainant does not sufficiently identify the produce inspected as being the same produce as was shipped to respondent's customer on July 3, 1993. Therefore, we cannot say that this inspection report provides proof that the produce was in suitable shipping condition at the time of shipment. We find that the transit time of approximately 4 days is acceptable.

In addition, if complainant were of the opinion at the time of shipment that the use of a tarped flatbed truck to transport the produce was unacceptable, it had

an affirmative duty to inform the buyer and/or to refuse to allow the produce to be shipped in that manner. In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation service and providing shipping instructions to the carrier. *Progressive Groves v. Bittle,* 31 Agric. Dec. 436 (1972); *A.J. Levy & J. Zentner Co. v. Leaf Brandt Co.,* 21 Agric. Dec. 179 (1962). In the present situation, complainant, in accordance with its duty of reasonable care, should have notified respondent that the unrefrigerated truck was inadequate, and its failure to do so was a breach of duty on its part, not respondent's. See *Teddy Bertucca Company v. The Kunkel Co., Inc.,* 38 Agric. Dec. 580 (1979).

There has been no evidence submitted by complainant to show that transporting onions in this manner is unacceptable in the industry or that it voiced any concerns to respondent about utilizing a tarped flatbed truck to transport the produce. Complainant cannot be heard to complain about respondent's choice of transport vehicle in an attempt to prove abnormal transportation.

As to complainant's contention that weather conditions contributed to the abnormal deterioration, we accord no credibility to this contention as complainant has submitted no proof to show the actual weather conditions during the transit period or that the weather conditions actually contributed to the condition problems. In fact, we have as evidence the inspector's notes which state that the dampness observed was found to be due to the decay and not water. We are not persuaded that weather conditions contributed to the condition of the produce upon arrival.

In addition, complainant cannot hold respondent the trucker responsible for not maintaining the transit temperatures at 50 degrees since it was well aware that the transport vehicle was unrefrigerated thereby making it impossible to control the transit temperatures. As stated earlier, if complainant had concerns about the produce not being maintained at 50 degrees during transit, it had a duty to notify the respondent of its concerns or decline to ship the produce in an unrefrigerated truck. Complainant did neither so its allegation has no merit.

Based on the foregoing, we find that complainant has not carried its burden of proving abnormal transportation thereby voiding the suitable shipping condition warranty. In addition, complainant has failed to carry its burden of proving that the produce was in suitable shipping condition at the time of shipment. The inspection report clearly establishes a breach of contract on complainant's part and we are not persuaded by the evidence that the extensive damage found on inspection resulted from abnormal transportation. The inspection report establishes that the produce had no commercial value and was

appropriately dumped. We find that complainant breached its contract by providing non-conforming produce as shown by the inspection report results.

Respondent is entitled to damages occurring as a result of complainant's breach of contract. Section 2-713 states that the measure of damages for non-delivery by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article, but less expenses saved in consequence of the seller's breach. We would normally determine the market price by resorting to Market News Service reports to obtain an average price for similar produce. However, we have consulted the Market News reports for Detroit, Michigan and Chicago, Illinois area and find that there are no comparable quotes for Washington yellow onions which can be utilized to obtain an average price.

The second best method for determining the market price is to use the delivered price of the commodity (f.o.b. price plus freight). We have reviewed the invoices and freight bills submitted as evidence and determine the delivered price to be $5,490.00 for the produce involved which is obtained by adding the f.o.b. contract price of $3,465.00 to the freight costs of $2,025.00. We must then deduct the contract price of $3,465.00 from the market price of $5,490.00 for a value of $2,025.00. Since respondent was not required to pay freight costs, these were expenses saved as a result of the complainant's breach. Therefore, the freight costs of $2,025.00 must be deducted with the result that respondent's damages equal 0. Respondent does not recover any sum of money as its damages pursuant to section 2-713 of the U.C.C. Respondent has also requested recovery for incidental damages involving the inspection costs of $74.40. Respondent will be allowed to recover the inspection costs as reasonable incidental damages. *See Strano Farms v. Shapiro and Cohen*, 49 Agric. Dec. 1227 (1990).

The reparation case filed by respondent International Produce Exchange under PACA docket no. R-94-169 involves respondent's attempts to recover consequential damages incurred in connection with complainant's breach. Respondent alleges that it suffered loss in the form of consequential damages due to the fact that it had already resold the produce at the time of shipment and would have realized a profit on the sale to its customer. Section 2-715(2) states:

> Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and

> needs of which the seller at the time of contracting had reason to know and which could have not reasonably be prevented by cover or otherwise . . . .

The evidence presented persuades us that complainant had reason to know at the time of contracting that respondent intended to resell the produce to its customer. In addition, we have consulted the market news reports and found that there are no comparable quotes found for the Michigan area during that time frame which leads us to the conclusion that respondent's loss could not have been reasonably prevented by cover. There are no market quotes available for Washington yellow onions. Respondent has carried the burden of proving that the complainant had reason to know of its intent to resell the produce to a customer and that its loss could not have been prevented by cover.

Respondent has submitted evidence showing that it resold the produce to its customer for $5,850.00 which included freight costs of $2,025.00. Respondent is entitled to recover the difference between the invoice price to its customer, $5,850.00, and the contract price negotiated with complainant, $3,465.00, or $2,385.00. However, since the invoice price included the freight charges, those must be deducted in order to obtain respondent's losses. The freight costs must be deducted since respondent nor its customer incurred this cost so nothing has been lost to respondent on freight charges. Deducting $2,025.00 from $2,385.00 leaves us with a remaining balance of $360.00. Respondent is entitled to recover consequential damages totalling $360.00 under the International Produce case (R-94-169).

We have previously concluded that respondent is entitled to recover inspection costs of $74.40 as incidental damages pursuant to the Firman case (R-94-134) along with consequential damages of $360.00 pursuant to the International case (R-94-169) which totals $434.40. In total, complainant is liable to respondent in the amount of $434.40 in damages as a result of its breach of contract.

Complainant's failure to pay this sum is a violation of section 2 of the Act for which reparation should be awarded. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. See *Perl Grange Fruit*

Exchange, Inc. v. Mark Bernstein Co., 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963).

Order

Within 30 days from the date of this order, complainant shall pay to respondent, as reparation, $434.40, with interest thereon at the rate of 10 percent per annum, from September 1, 1993, until paid.

Copies of this order are to be served upon the parties.

GREEN ACRES TURF FARMS, INC. v. KELLY DISTRIBUTING, INC., and SALES KING INTERNATIONAL, INC.
PACA Docket No. R-93-0313.
Decision and Order filed July 15, 1996.

Arbitration - reparation forum must respect agreement for binding arbitration. Arbitration - matters falling outside an arbitration agreement may be decided by the reparation forum.

Grower and grower's agent entered into a written "Distribution Agreement" defining terms under which the agent would market grower's garlic, and such Agreement included a paragraph requiring submission of disputes under the Agreement to binding arbitration. The agent, after marketing some of the garlic, refused to market the garlic any further due to alleged quality problems. Thereafter, according to the allegation of the grower, the agent agreed to purchase a quantity of the garlic, and grower brought a reparation complaint for failure to pay according to the terms of the alleged purchase agreement. It was held that under the Federal Arbitration Act the reparation forum was bound to respect the arbitration agreement. It was also stated that the question of whether the Agreement allowed a sale of garlic outside the Agreement to take place between the parties would be a question that could be decided only by an arbitration forum under the Agreement. However, it was stated that if such question were answered in the affirmative, the question of whether there was in fact a sale could not be answered by the arbitration forum since the sale would fall outside the scope of the Agreement between the parties. Therefore, in order to promote efficiency in the administration of justice, the limited factual question of whether a sale of the garlic took place between the grower and agent was considered and decided in the negative by the reparation forum.

George S. Whitten, Presiding Officer.
R. Jason Read, Newport Beach, CA, for Complainant.
Respondent Kelly Distributing, Inc., Pro se.
Respondent Sales King International, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $201,896.00 in connection with transactions in interstate commerce involving twelve loads of garlic.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondents which filed a joint answer thereto denying liability to complainant. The amount claimed in the formal complaint exceeds $15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant, filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Green Acres Turf Farms, Inc., is a corporation whose address is Route 3, Box 7171, Wilcox, Arizona.

2. Respondent, Kelly Distributing, Inc. (hereafter Kelly), is a corporation whose address is P. O. Box 1582, Nogales, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.

3. Respondent, Sales King International (hereafter Sales), is a corporation whose address is P. O. Box 1582, Nogales, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.

4. On July 27, 1992, complainant and respondent Sales entered into a written agreement whereby Sales undertook to become complainant's exclusive distribution agent for garlic grown on a specified 60 acre plot farmed by complainant in Kansas Settlement, Arizona. The agreement provided in part as follows:

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[1]Effective November 15, 1995, the threshold for hearings in reparations was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

Exclusive Distribution Agreement

THIS EXCLUSIVE DISTRIBUTION AGREEMENT entered into between Sales King International, Inc. a/an Florida corporation, hereinafter called "DISTRIBUTOR" and Green Acres of Arizona Turf Farm, Inc. hereinafter, (sic) called "GROWER." (DISTRIBUTOR and GROWER sometimes hereinafter referred to as "PARTIES").

. . .

WHEREAS, GROWER will grow the following crops/produce at the CROP LOCATIONS in the manner set forth below:

Type of Crop/Produce	Season	Acres To Be Planted
GARLIC	1992	60-00-00
TOTAL		60-00-00

(the foregoing hereinafter sometimes referred to as the "produce"), which produce distributor will handle for grower as grower's sole and exclusive distribution agent upon the terms and conditions herein set forth. . . .

NOW, THEREFORE, for good and valuable consideration, . . .

. . .

2. This agreement shall commence on the date hereinafter set forth and shall continue in effect until all obligations of both PARTIES are fulfilled or one (1) year from commencement, which (sic) is the latter (sic)."

3. DISTRIBUTOR as GROWER'S sole and exclusive sales agent, agrees to exercise reasonably diligent efforts in handling DISTRIBUTOR exclusively all its products. (sic) During the term of this agreement, GROWER will not pack any other produce in GROWER'S shed without written permission of DISTRIBUTOR. GROWER will pack his produce at the shed or packing facility designate (sic) by DISTRIBUTOR. GROWER will not pack under any labels other than the labels designated by DISTRIBUTOR."

4. As GROWER'S agent, DISTRIBUTOR is authorized by GROWER to use its sole discretion as to how, when, where, and to whom the produce is to be sold or distributed. Further, DISTRIBUTOR is authorized to sell through brokers, consign to commission merchants, use auction facilities, make joint account sales, . . .

. . .

9. DISTRIBUTOR shall receive for its service a commission of TEN (10%) percent of the F.O.B. price, . . .

. . .

11. DISTRIBUTOR shall pay on behalf of GROWER the following harvest related costs and expenditures;

ADVANCES (U.S. $)	TYPE OF PRODUCE
OR .15 CENTS PER LB	#1 PACKED OUT GARLIC

per shipping package received by DISTRIBUTOR (herein sometimes referred to as "PICKING and PACKING"). Said expenses shall be incurred on GROWER'S behalf, (sic) each week and will reduce the GROWER'S LIQUIDATION by a similar amount . . . . Advances under this paragraph shall be conditioned upon the produce meeting quality standards set by DISTRIBUTOR. . . . When in DISTRIBUTOR'S judgment market conditions are such that the weekly picking and packing costs, commissions, freight, duties, DISTRIBUTOR'S costs, overhead and commissions exceed the F.O.B. sales price of the produce, DISTRIBUTOR, upon notification to GROWER, shall reserve the right to reduce or suspend all picking and packing activities. Once DISTRIBUTOR determines to its satisfaction that the market has advanced to an acceptable position, DISTRIBUTOR may resume normal picking and packing activities.

. . .

16. In the event that the PARTIES have any dispute with regard to final accounting and reckoning between the PARTIES and the respective

funds due to GROWER and/or DISTRIBUTOR in LIQUIDATION as provided for herein, or have a dispute with regard to any provisions of this Agreement, and said dispute remains unresolved for a period in excess of ten (10) days after the PARTIES have in good faith attempted to resolve the same, then and in that event the PARTIES agree that said dispute or controversy shall be resolved and settled by final and binding arbitration in accordance with the Commercial Arbitration rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having competent jurisdiction thereof. Arbitration shall be commenced by either party by sending notice to the person at the address as provided for herein. Within ten (10) days of mailing notice of said dispute each of the PARTIES to the dispute shall select an arbitrator . . . . The venue of any actions between the PARTIES to this Agreement shall be Santa Cruz County, Nogales, Arizona. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

. . .

22. This Agreement shall be binding upon the PARTIES hereto, their heirs, executors, administrators, successors and assigns. This instrument contains all the agreements and conditions made between the PARTIES and may not be altered or modified unless agreed to in writing and signed by all of the PARTIES to this Agreement. . . .

23. The PARTIES acknowledge and agree that the legal doctrine stating that a writing will be construed against the party who prepared it shall not apply to any interpretation of this Agreement, judicial or otherwise, inasmuch as this Agreement has been freely negotiated by the PARTIES hereto.

. . .

5. Between October 10, and December 23, 1992, complainant shipped twelve loads of garlic with a total weight of 504,740 pounds. Complainant issued straight (nonnegotiable) bills of lading as to each of the twelve loads which stated: "SOLD TO: Kelly Produce & Sales King International." In addition the bills of lading stated under the "SHIP TO:" heading as follows: six of the bills of lading — "Gilbert, Az."; two of the bills of lading — "Nogales, Az."; one bill

of lading — "Chandler, Az."; one bill of lading — "Joe Sandino"; as to one bill of lading the entry was illegible, and as to one there was no entry. Under the heading "DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXEMPTIONS" the bills of lading stated "Field Run Garlic As Is Over the scales." Some added "40¢ lb." after the word scales, and the remainder placed the same notation under the column headed "ORDERED."

6. The formal complaint was filed on February 8, 1993, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant seeks to recover the contract price relating to the alleged sale of twelve loads of garlic to respondents. Complainant alleges, through its president, T. Aigaki, that respondent Sales initially handled several loads of garlic pursuant to the July 27, 1992 contract. However, Aigaki asserts that Mr. Joe Sandino, employee of respondent Sales, contacted complainant in July of 1992 by phone and stated that Sales had decided to "stop the garlic deal" altogether because a load had been received which could not be processed for the fresh market due to staining by rain, and in Sales' opinion processing the garlic for the fresh market would cost too much. Complainant's Aigaki states that Sandino told him to try to locate another firm to sell the garlic, and suggested that complainant look into alternative markets such as juice, dehydration and/or seed. Aigaki asserts that in early October of 1992 Sandino contacted him again and offered to purchase garlic for seed at $.40 per pound, and that the twelve loads were sold to respondents pursuant to this offer.

Respondents submitted an affidavit by Sandino asserting that:

> The statement that I agreed to purchase this garlic crop is a positive and outright lie. I have never had the authority to purchase this crop. I have never recommended or discussed with the Defendant's management the purchase of this crop. I would never have considered buying, or recommended (sic) that this crop be purchased having experienced a great deal (sic) trouble and resistance in attempting to sell the garlic that we had agreed to sell.

Sandino further stated that the $.40 per pound price was the initial purchase price negotiated by respondent Sales with Mexican buyers on behalf of complainant, and that the price "fell thru due to quality." Respondents' president, Kelly T. Larey, made the following assertions relative to the bills of lading, and a

subsequent invoice from complainant:

> On all loads going to Freeman Farms (approximately 406,470 gross pounds), the bills of lading were never seen by Co-Respondents. On loads destined for Nogales the notation of .40 cents did not alarm Co-Respondent as Co-Respondent assumed that this was merely a notation made by Complainant to help his memory later on. Since Co-Respondent was then and has always been the sales agent of Complainant, Co-Respondent was not alarmed. However when Complainant sent Co-respondent an invoice which was received mid-December 1992 (Exh. 6A & 6B) Co-Respondent promptly called Complainant and rejected the same. Additionally, shortly thereafter, at a face to face meeting with Complainant, Co-Respondent returned Complainant's invoice as not representing any such transaction between the parties.

A bill of lading is a contract with the carrier, and not the proper or usual place for a memorandum of a contract with the purchaser of the goods being transported. Respondent Kelly was not a party to the grower's agent agreement, and denies any connection with the twelve garlic shipments. We find that complainant has failed to prove by a preponderance of the evidence that respondent Kelly contracted to purchase the twelve loads of garlic which are the subject of the complaint.[2] The complaint as against respondent Kelly should be dismissed.

The disposition of the complaint as to respondent Sales involves the significance which should be accorded to the "Exclusive Distribution Agreement" (hereafter Agreement), and the scope which should be conferred on the binding arbitration clause thereof. Respondent Sales has argued repeatedly that this matter should be submitted to binding arbitration pursuant to the terms of the Agreement. It could, however, be cogently argued that complainant has alleged a sale of the twelve loads of garlic to respondent Sales, that such a sale falls outside the scope of the "Exclusive Distribution Agreement," and that this forum should first determine as a factual matter whether there was in fact a sale. If it were determined that there was a sale, then presumably reparation could be awarded to complainant, and the arbitration agreement could be bypassed.

On the other hand cogent reasons can be advanced as to why this is not the proper course to follow. First, the arbitration clause provides for arbitration when

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[2]*Carlton Jones v. Samuel S. Barrage*, 16 Agric. Dec. 1142 (1957).

the parties "have a dispute with regard to any provisions of this Agreement . . ." Second, interpretation of the Agreement is required in order to determine whether a sale of the produce outside the terms of the Agreement was legally possible. The Agreement is so strictly drawn as to make this a real question. Respondents point out that the agreement provides in paragraph 2 thereof that the agreement "shall continue in effect until all obligations of both PARTIES are fulfilled or one (1) year from commencement, which (sic) is the latter (sic)." The agreement further provides that: "This instrument contains all the agreements and conditions made between the PARTIES and may not be altered or modified unless agreed to in writing and signed by all of the PARTIES to this Agreement. . . ." On the basis of these provisions it might be argued that a sale of the garlic by complainant to respondent Sales was legally impossible, and respondent Sales has, in effect, made this argument.

Legal questions cannot always be neatly and precisely decided. Our task here is to give as full effect as possible to the contract between the parties, and at the same time promote efficiency in the administration of justice. The Federal Arbitration Act[3] provides in part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

The Federal Arbitration Act establishes a liberal federal policy favoring arbitration agreements, and questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.[5] Section 3 of the Act, however, further provides:

> If any suit or proceeding be brought in any of the courts of the United

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[3]9 U.S.C. § 1 *et seq.*

[4]9 U.S.C. § 2.

[5]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

> States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[6] (emphasis supplied)

We are not satisfied that the issue of whether there was in fact an agreement between the parties for the sale of the garlic could be determined by an arbitration panel. We will not refer to the issue of whether a sale could be legally made, for this involves the determination of whether the Agreement would allow such a sale, and such determination is clearly within the province of an arbitration panel under the Agreement. If the Agreement were interpreted by the arbitration panel to not prohibit a sale of garlic between the parties, the panel would, nevertheless, have no authority under the terms of the arbitration clause to decide the issue of whether there was, in fact, an agreement for a sale, since such a sale would likely be determined to fall entirely outside the scope of the Agreement. Accordingly we will determine this factual issue.

Sandino, who is admitted by Aigaki to have been the person involved directly in all dealings between the parties concerning the subject twelve loads, has stated in the most clear terms, under oath, that he did not agree to a purchase of the garlic by Sales. The bills of lading are contracts with the carrier[7], are not the usual and proper document for a memorandum of any contractual agreement between the parties, and were not the place to which respondent Sales should be expected to look for such. That only two or three of the bills of lading should have come to the attention of any responsible party at Sales, and that the notations on those should have been dismissed as references to the expected

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[6]9 U.S.C. § 3. This forum is not a "court of the United States." However, the decisions of this forum are appealable, by an adversely affected party, to the district court of the United States for the district in which the hearing was held or, in shortened procedure cases such as this, the district in which the party complained against is located. The parties are there entitled to a trial de novo, and the pleadings in this forum shall constitute the pleadings upon which the trial de novo shall proceed. (7 U.S.C. §499g(c).) It is appropriate, therefore, that we apply the Federal Arbitration Act in the manner in which we anticipate that the district court would apply it.

[7]*See* Uniform Commercial Code § 1-201(6).

return from sales negotiated on complainant's behalf with purchasers other than Sales is understandable and credible. We find that complainant has failed to prove by a preponderance of the evidence that it agreed with Sales that Sales would purchase the twelve loads of garlic.

Although complainant in its brief alleges that "Respondent wrongfully breached the terms of the Distribution Agreement and, therefore, is liable to Complainant for the fair market value of all garlic subject to that agreement," and requests, in the alternative that we do not find that the garlic was sold to respondents, that we award the fair market value of the garlic to complainant (stated to be $411,600.00), the complaint is based squarely, and only, upon the allegation of a sale to respondents. In an affidavit made a part of the supplemental report of investigation T. Aigaki stated that:

> . . . this complaint is not based upon the exclusive distribution agreement . . . . This complaint is based upon the fact that after being advised by Joe Sandino of Sales King International that the garlic crop could not be sold, a new agreement was entered into with the undersigned whereby in October 1992 the garlic crop was purchased by Sales King International and/or Kelly Distributing, Inc. for seed . . . . (emphasis in original)

If the complaint had sought relief on the alternative grounds of breach of the Agreement, or of failure to account under the Agreement, we would be required by the Federal Arbitration Act to stay this proceeding pending the results of arbitration. In our opinion nothing remains of this matter to stay. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

GOLDEN GEM GROWERS, INC. v. ORYAL TRADING COMPANY.
PACA Docket No. R-96-0099.
Decision and Order filed July 16, 1996.

Accord and Satisfaction - Florida law, in conformity with recent changes in the Uniform Commercial Code, provides that restrictive endorsements will not defeat an otherwise valid

accord and satisfaction.
Accord and Satisfaction - necessary elements of an accord and satisfaction, including existence of a bona fide dispute and payment in full, were evident from the record.

Respondent claimed that grapefruit shipped by complainant and received by respondent's customers had condition problems. After several meetings were held with complainant to discuss these problems, respondent wrote a check to complainant for $116,096.84 with the notation "Clear Account" on the front. Complainant's endorsement and cashing of the check, after crossing out the notation "Clear Account" and writing on the back "accepted as partial payment only," found to be an accord and satisfaction. Florida law, in conformity with recent changes in the Uniform Commercial Code, provides that restrictive endorsements will not defeat an otherwise valid accord and satisfaction. Necessary elements of an accord and satisfaction, including the existence of a bona fide dispute and payment in full, were evident from affidavits provided by complainant. Complainant's $228,480.41 claim was thus dismissed.

Andrew Y. Stanton, Presiding Officer.
Mike Bess, Orlando, FL, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Order of Dismissal

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $228,480.41 in connection with several shipments of grapefruit sold and shipped in the course of foreign commerce. Respondent filed an answer to the complaint, denying liability.

Respondent filed a motion to dismiss, claiming that complainant, by cashing respondent's May 9, 1995, check for $116,096.84 containing the notation "Clear Account" on the front, entered into an accord and satisfaction. A copy of respondent's motion was served upon complainant, which filed a response thereto, denying the occurrence of an accord and satisfaction.

An accord and satisfaction requires the existence of a bona fide dispute and a tender of payment which is clearly made as payment in full. *Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979). We have recently addressed the question of the requirement for a bona fide dispute in *A. Sam & Sons Produce Company, Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, at 1053 n. 13 (1991), as follows:

> [T]he requirement of good faith, as well as the overriding purposes of the Act, require the presence of a *bona fide* dispute for the effectuation of an

accord and satisfaction. This is true for several reasons. First, a dispute puts the creditor on notice so that the payment may not be accidentally processed in a routine manner. Second, and more importantly, a good faith dispute furnishes a reason for compromising, or failing to pay according to the original agreement, an indebtedness otherwise valid on its face. This latter reason coincides with the very important requirement of 'full payment promptly' imposed by the Act and this Department's regulations. See 7 U.S.C. § 499b(4) and 7 C.F.R. § 46.2(aa).

Respondent claims that all requirements for an accord and satisfaction have been met. Respondent contends that its $116,096.84 check was issued pursuant to a settlement agreed to at a May 8, 1995, meeting between representatives of the parties concerning respondent's claims regarding the condition of the grapefruit received by its customers. Respondent states that it received a letter from the Department's PACA Branch, dated June 9, 1995, asking whether respondent would agree to release the check as the undisputed amount. Respondent asserts that, in a letter sent to the PACA Branch and received by them on July 7, 1995, respondent expressed its refusal to release the check as the undisputed amount and fully explained its version of the dispute between the parties, the alleged settlement agreement, and its issuance of the check to complainant. Respondent also noted that it had been contacted by complainant's representative, Mike Bess, who asked it to remove the "Clear Account" language, but that respondent refused to do so. Respondent claims that complainant cashed the $116,096.84 check in early June 1995, after crossing out the words "Clear Account" and writing on the back of the check "accepted as partial payment only."

Respondent argues that, under Florida law, 39 Florida Statutes Annotated, sections 671.207 and 673.3111, which incorporated recent amendments to the Uniform Commercial Code, complainant's attempt to accept respondent's check as partial payment by making a restrictive endorsement was ineffective, and an accord and satisfaction occurred when complainant cashed the check. Sections 671.207 and 673.3111 state as follows, in relevant part:

671.207. **Performance or acceptance under reservation of rights**

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are

sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

673.3111. **Accord and satisfaction by use of instrument**

(1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies [inapplicable herein], the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

Complainant acknowledges that it cashed respondent's $116,096.84 check on either June 9 or June 12, 1995, after crossing out the notation "Clear Account" and writing on the back "accepted as partial payment only." Under section 671.207(2), as set forth above, complainant's attempt to restrictively endorse respondent's check did not prevent an accord and satisfaction from otherwise occurring. However, complainant contends that the necessary elements of an accord and satisfaction are not present, as it denies that the check was tendered in good faith, that there was a bona fide dispute, and that the check contained a clear notation showing that it was tendered as payment in full.

Complainant has submitted affidavits from its sales agent, Mary Houston, and vice-president, Hosea Walls, who were involved in the transactions with respondent, as well as the affidavit of Mr. Bess, and argues that such affidavits show that there was no dispute between the parties at the May 8, 1995, meeting. However, Ms. Houston acknowledges in her affidavit that she met with respondent's representatives in March and April 1995 to discuss respondent's claims that the grapefruit arrived in a decayed condition. Mr. Walls states in his affidavit that he attended the March meeting, and that he and the other representatives of complainant "expressed our surprise as well as disappointment to additional claims after many months had passed." Mr. Walls also states that, at the May 8, 1995, meeting, "I expressed my disappointment as well as being shocked to hear Tim [respondent] wanted a credit of $276,290.16 in addition to

the adjustment of $26,460.00 granted for the shipment on the Lilly Everett and $11,512.00 on the Goose Bay shipments."

It is evident that, for months prior to and during their May 8, 1995, meeting, the parties were engaged in a serious dispute concerning the condition of the grapefruit and its effect on the liability of either party. We thus find that there was a bona fide dispute in existence at the time respondent tendered its May 9, 1995, check.

Complainant denies that the May 9, 1995, check contained a clear indication that it was tendered as payment in full. However, the actions of complainant's representative, Mr. Bess, show that complainant was aware that the notation "Clear Account" meant that the check was intended to be full payment. In his affidavit, Mr. Bess states that in a May 11, 1995, telephone conversation with respondent's principal, Tim Martin, "I then told Tim that on his last payment to complainant, the check was marked "clear account". I then asked if he would release this check as the undisputed amount, and advised that I would fax the statement over to him to be filled out." Mr. Bess further states that "several days later" he again asked Mr. Martin about a release form for the check, and then spoke to a P.A.C.A. Branch official about the notation "Clear Account" written on the check. The great concern expressed by Mr. Bess to respondent and the P.A.C.A. Branch regarding the notation on respondent's check, and his efforts to convince respondent to release the check as the undisputed amount, are very strong evidence that complainant knew the check was being offered as payment in full and not just as partial payment.

We conclude that, by cashing respondent's May 9, 1995, check for $116,096.84, complainant entered into an accord and satisfaction, thereby discharging any further claim. Therefore, the complaint must be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BIG SKY v. S & H, INC.
PACA Docket No. R-94-0225.
Decision and Order filed August 19, 1996.

Growers' agents — failure to enter into written agreement, or furnish written statement to grower.
Growers' agents — unauthorized allowances.

Where a grower's agent failed to enter into a written agreement with the grower, or furnish a written statement of the terms under which it would handle grower's potatoes, allowances granted by the grower's agent were disallowed. However, the fact that the agent was not authorized to make allowances, and nevertheless made allowances, was said to not render the agent liable for the allowances made if, and to the extent that, the allowances were found to coincide with deductions from invoice cost which were supported by damages resulting from breaches of the contract of sale on the part of complainant.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $147,794.04 in connection with transactions in interstate commerce involving potatoes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint exceeds $15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Don and Carol McFarland, Lori and Kelly Human, Suzanne Vance, Maurisa McFarland, Kristi Lucas, and McFarland Agricultural Co., doing business as Big Sky, whose address is P. O. Box 268, Eden, Idaho.

2. Respondent, S & H, Inc., is a corporation doing business as Ida-Pride Potato Co., whose address is P. O. Box 68, Hazelton, Idaho. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 14, through September 11, 1992, respondent, acting as a grower's agent relative to complainant's potatoes, sold such potatoes under 70 invoices for prices totaling $577,628.53. The invoices were numbered consecutively, 1 through 69, with the last being numbered 106.

4. Eight of the invoices, 14, 24, 34, 40, 47, 55, 62, and 68, represented sales of potatoes for prices totaling $10,785.25, concerned transactions which were wholly intrastate, and were classed as "culls and eliminators."

5. Respondent charged complainant a $6.00 per cwt. handling fee, or a total of $215,157.00, freight in the amount of $14,311.40, and an advertising tax in the amount of $2,565.84. Respondent granted adjustments to buyers against 64 of the original 70 invoices. These adjustments totaled $169,769.90 and included adjustments as to each of the eight intrastate invoices referred to in finding 4 above. These latter adjustments totaled $407.90.

6. Respondent paid complainant $196,963.52. Complainant applied $10,785.25 of this amount to the 8 intrastate transactions.

7. On or about August 14, 1992, under invoice number 5, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
40	80 CC	20	$27.00	$ 540.00
120	90 CC	60	24.00	1,440.00
120	100 CC	60	20.00	1,200.00
120	110 CC	60	19.00	1,140.00
120	50LB Box Bakers	60	19.00	1,140.00

320	10/5 Poly	160	14.00	2,240.00
				$7,700.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., by truck, on August 14, 1992.

8. On August 20, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading, with results as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45°F	Mostly (illegible)some long Russet Potatoes	"Ida-Pride" "80,""90," "100,""110"	ID		400 Ctns	N
B		Long Russet Potatoes	"Ida-Pride" "10/5 lbs"	ID		320 Ctns	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality (bruises,cuts)	
	04	% 00	%	% internal black spot	
	04	% 00	%	% internal brown discoloration	
	04	% 00	%	% sunken discolored areas with underlying flesh being discolored	
	02	% 00	%	% sunken discolored areas	
	- ½	% -½	%	% soft rot	
	17	% 00	%	% checksum	
B	01	% 00	%	% QUALITY (bruises,cuts)	
	07	% 00	%	% internal black spot (4 to 10%)	
	04	% 00	%	% internal brown discoloration	
	03	% 00	%	% sunken discolored areas	
	02	% 00	%	% sunken discolored areas with underlying flesh discolored	
	01	% 01	%	% soft rot	
	18	% 01	%	% checksum	

GRADE: Each lot: Fails to grade US No 1, 80,90,100,110 Size and 2 inch or 5 (illegible minimum, respectively, account of condition.

9. On or about August 19, 1992, under invoice 18, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
200	70 CC	100	$27.00	$2,700.00
280	80 CC	140	27.00	3,780.00

680	90 CC	340	24.00	8,160.00
800	100 CC	400	20.00	8,000.00
400	110 CC	200	18.00	3,600.00
40	50LB Box Bakers	20	19.00	380.00
				$26,620.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 454886, on August 19, 1992.

10. On August 26, 1992, one lot of potatoes was federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 454886. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	42 to 44°F	Potato	"Ida-Pride 50 lbs 70.80. 90,100,110	ID	MIXED VARIETY	2400 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality defect;misshapen.	
	01	% 00	%	% sunken areas underlying flesh being chalky.	
	03	% 03	%	% Soft Rot. (0 to 8%) early stages.	
	05	% 03	%	% checksum	

Grade: Fails to grade US No 1 account condition.

11. On or about August 20, 1992, under invoice number 20, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
1,400	10/5 POLY	700	$14.00	$ 9,800.00
280	70 CC	140	26.00	3,640.00
240	80 CC	120	26.00	3,120.00
240	90 CC	120	23.00	2,760.00
240	100 CC	120	20.00	2,400.00
				$21,720.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in

railcar UPFE 455536, on August 20, 1992.

12. On September 1, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 455536. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 66 °F	Russett Potatoes	"Ida-Pride" U.S. No.1, Mixed Variety	ID	size 100, 80, 90,70	800 cartons	
B	51 to 61 °F	Russett Potatoes	"Ida-Pride" U.S. No.1, Mixed Variety	ID	10-5 LB. Bags	1400 cartons	

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality (misshapened, old cuts and bruises)	size: meets size as marked
	01	% 00	%	% Sunken Discolored Areas	
	01	% 00	%	% enlarged lenticles	
	01	% 00	%	% external brown discoloration	
	03	% 00	%	% internal discoloration	
	- 1/2	% -1/2	%	% soft rot	
	07	% 00	%	% checksum	
B	01	% 00	%	% QUALITY (old cuts and bruises)	size ranges: 2 inch or 4 oz minimum to 12 oz maximum
	01	% 00	%	% Sunken Discolored Areas	
	02	% 00	%	% Internal Discoloration	
	03	% 03	%	% Soft rot (0% to 9%)	
	07	% 03	%	% checksum	soft rot: some in early stages, mostly in moderate to advanced stages

GRADE: Lot A: US No 1, size 100, size 90, size 80 and size 70, respectively
Lot B: Fails to Grade U.S. No. 1 on account of condition, 2 inch or 4 oz. minimum.

13. On or about August 21, 1992, under invoice number 28, respondent sold 800 50LB sacks of 10/5 poly bags of potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., for $14.00 per cwt. or a total of $5,600.00. Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., by Godfrey truck, license number GU511901, on August 20, 1992.

14. On August 26, 1992, one lot of potatoes was federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., after unloading. The inspector was told by the applicant that the potatoes had been unloaded from a Godfrey truck,

license number GU511901. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	60 to 62 °F	Potatoes (illegible) Russet	"Ida-Pride" 10-5lb bags	ID		800 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality(Bruises)	
	04	% 00	%	% Brown External Discoloration	
	01	% 00	%	% Sunken Discolored Areas	
	02	% 02	%	% Soft Rot (0 to 5%)	
	08	% 02	%	% checksum	

GRADE: Fails US No 1 2 inch or 4 ounce minimum account of condition.

15. On or about August 24, 1992, under invoice number 29, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
1,200	10/5 POLY	600	$14.00	$ 8,400.00
280	70 CC	140	24.00	3,360.00
80	80 CC	40	24.00	960.00
520	90 CC	260	22.00	5,720.00
320	100 CC	160	20.00	3,200.00
				$21,640.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 461809, on August 24, 1992.

16. On September 4, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., after partial unloading from railcar UPFE 461809, with results as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45 °F	Potato Russet	"Ida-Pride" 70, 80, 90, 100 Size	ID	50lbs net wt	800 cartons	N
B	45 to 46 °F	Potato Russet	"Ida-Pride" 10-5lb Bags, US#1	ID	50lbs net wt	1200 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (cuts, Bruises)	meets size as marked.
	08	% 00	%	% Brown External Discoloration (5 to 11%)	
	02	% 00	%	% Sunken Discolored Areas	
	- 1/2	% -1/2	%	% Soft Rot	
	14	% 00	%	% checksum	
B	02	% 00	%	% Quality (cuts, Bruises)	Lot B = Some to many cartons crushed 1 to 4 inches from top to bottom, few cartons wet
	02	% 00	%	% Brown External Discoloration	
	06	% 06	%	% Soft Rot (0 to 40%)	
	10	% 06	%	% checksum	

GRADE: Lot A = Fails US No 1, size 70, size 80, size 90, size 100, account of condition
Lot B = Fails US No. 1 2 inch or 4 oz. minimum account of condition
REMARKS: Lot B = Restricted to 500 cartons Being unloaded During time of Inspection.

17. On or about August 25, 1992, under invoice number 39, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
800	10/5 POLY	400	$13.00	$ 5,200.00
200	70 CC	100	24.00	2,400.00
280	80 CC	140	24.00	3,360.00
600	90 CC	300	22.00	6,600.00
520	100 CC	260	19.00	4,940.00
				$22,500.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 462821, on August 26, 1992.

18. On September 9, 1992, two lots of potatoes were federally inspected, following unloading, at the place of Morris Okun, Inc., in Bronx, N.Y. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 462821. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT

A	63 to 64°F	Long Russet Potatoes	"Ida-Pride" 50 LBS SIZE 70,80,90,100 MIXED VARIETY	ID	1644 cartons	N
B	56 to 56°F	Long Russet Potatoes	"Ida-Pride" 10-5 LB Bags	ID	756 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 00	%	% Quality (sunburn, old cuts)	Lot A Size: meets size as marked.
	02	% 00	%	% Sunken Areas	
	00	% 00	%	% Soft Rot	
	04	% 00	%	% checksum	
B	01	% 00	%	% Quality (sunburn)	Lot B Size: minimum 2 inch or 4 ounce maximum 8 ounce no offsize
	01	% 00	%	% Sunken Areas	
	00	% 00	%	% Soft Rot	
	02	% 00	%	% checksum	

GRADE: Lot A US No 1, size 70, 80, 90, 100, respectively
REMARKS: Lot A most Cartons Have Some Contents Showing Sprouts Not affecting grade.
Lot B many Cartons Are Slightly Crushed From Approximately 1 to 3 inches

19. On September 10, 1992, one lot of potatoes was federally inspected at the place of business of Morris Okun Co., Inc., Bronx, N.Y., following unloading, with the following results:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	50 to 62 °F	Russet Potatoes	"Ida-Pride" US No. 1 Net Wt. 5 LBS	ID		600 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality (old cuts & Bruises, misshapen, sunburn)	
	02	% 02	%	% Soft Rot (0 to 6%)	
	05	% 02	%	% checksum	

GRADE: Fails US No 1 2 inch or 4 ounce minimum only account condition.

20. On or about August 27, 1992, under invoice number 42, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
720	10/5 POLY	360	$13.00	$ 4,680.00

160	80 CC	80	24.00	1,920.00
720	90 CC	360	22.00	7,920.00
480	100 CC	240	19.00	4,560.00
80	110 CC	40	17.00	680.00
240	50LB BOX BAKERS	120	17.00	2,040.00
				$21,800.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 455293, on August 27, 1992.

21. On September 1, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 455293. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 46°F	russet potatoes	"Ida-Pride" 80, 90, 100 (illegible)	ID		1608 cartons	N
B	44 to 45°F	russet potatoes	"Ida-Pride" 10-5 lbs bags	ID		720 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality Defects, old cuts and bruises misshapen	
	04	% 00	%	% Brown Skin discoloration	
	04	% 00	%	% Sunken pitted discolored areas	
	02	% 00	%	% Dry type fusarium tuber Rot	
	01	% 01	%	% Soft Rot	
	15	% 01	%	% checksum	each lot: shows some potatoes, sprouts barely visible not affecting the Grade
B	04	% 00	%	% Quality Defects. old cuts and bruises misshapen	
	05	% 00	%	% Brown Skin discoloration	
	03	% 00	%	% Sunken pitted discolored areas	
	01	% 00	%	% Dry type fusarium tuber Rot	
	02	% 02	%	% Soft Rot. (0 to 5%)	
	15	% 02	%	% checksum	

GRADE: Lot A: Fails to Grade US No 1, 80, 90, 100, 10 ounce minimum account condition
Lot B: Fails to Grade US No 1 2 inch or 4 ounce minimum account of condition.

22. On or about September 1, 1992, under invoice number 65, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
800	10/5 POLY	400	$12.00	$ 4,800.00
120	70 CC	60	22.00	1,320.00
200	80 CC	100	22.00	2,200.00
120	50LB BOX BAKERS	60	16.00	960.00
600	90 CC	300	20.00	6,000.00
560	100 CC	280	18.00	5,040.00
				$20,320.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 462824, on September 1, 1992.

23. On September 14, 1992, two lots of potatoes were federally inspected, following unloading, at the place of Morris Okun, Inc., in Bronx, N.Y. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 462824. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	46 to 48°F	Russet Potato	"Ida-Pride" US No 1, 10-5	ID	Mixed Variety	800 cartons	N
B	46 to 50°F	Russet Potato	"Ida-Pride" US No 1, 70 80 90 100	ID	Mixed Variety	1450 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality	Each lot Quality: Cuts and Bruises Size: 2 inches or 4 to 8 ounces
	04	% 04	%	% Soft Rot (0 to 10%)	
	07	% 04	%	% checksum	
B	04	% 00	%	% Quality	Size: Meets size as marked
	02	% 02	%	% Soft Rot (0 to 5%)	
	06	% 02	%	% checksum	

GRADE: Each lot: fails to grade US No 1 2 inch or 4 ounce minimum or US No 1 70, 80, 90, or 100 size respectively only Account of Condition.

24. An informal complaint was filed on February 24, 1993, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant brings this action to recover balances alleged due from respondent in connection with multiple shipments of potatoes between August 14, and September 11, 1992. It is evident that respondent acted in regard to the shipments as a grower's agent. Respondent issued 70 invoices showing sales of complainant's potatoes to respondent's customers in amounts totaling $577,628.53. Such amount included eight invoices totaling $10,785.25 which were intrastate transactions over which we have no jurisdiction.[2]

Respondent contends that complainant authorized it to make adjustments to the original sale prices reflected by its invoices. The record makes it apparent that respondent did make adjustments, in favor of its customers, which totaled $169,769.90 as to the 70 invoices.

The Regulations provide in regard to growers' agents that:

> The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot . . . .[3]

Respondent submitted a copy of an alleged written agreement, or contract, as an

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[2]*See Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Chester Ruter v. C. H. Robinson Company and Sol Sieff Produce Company*, 44 Agric. Dec. 2135 (1985); *Mendelson-Zeller Co. v. Pyramid Produce*, 36 Agric. Dec. 941 (1977); *Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423 (1975); *P. C. Kellam v. Virginia Tomato Corporation*, 29 Agric. Dec. 835 (1970); *S. Water Mkt. Credit v. Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1168 (1969); *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967); *Conway, Inc. v. Ben F. Line*, 16 Agric. Dec. 387 (1957); and *E. S. Harper Co. v. B. Osborne*, 8 Agric. Dec. 1027 (1949).

[3]7 C.F.R. § 46.32(a).

exhibit to its answer. The spaces for the amount of acreage, or potatoes, were not filled in, and the spaces for the signatures of the grower and for Ida-Pride Potato Co. were also blank. In addition the document was not dated. Complainant denied being furnished with a copy of this document, and we conclude that respondent did not comply with the regulations quoted above. Moreover, the document does not contain a provision authorizing respondent to make adjustments. Respondent has the burden of showing that it was authorized to grant adjustments.[4] We conclude that respondent has not met this burden, and the adjustments claimed by respondent will, therefore, not be allowed.[5]

While the adjustments claimed by respondent will be disallowed, as to some of the transactions respondent submitted evidence in the form of federal inspections in an apparent effort to show a breach of contract by complainant. Since respondent acted as an agent, and not as purchaser, respondent would be liable to complainant only for the amounts for which the ultimate purchaser would be liable absent the unauthorized allowances. However, the fact that respondent was not authorized to make allowances, and nevertheless made allowances, should not render respondent liable for the allowances made if, and to the extent that, the allowances coincide with deductions from invoice cost which are supported by damages resulting from breaches of the contract of sale on the part of complainant. It is appropriate, therefore, that the relevant evidence submitted by respondent as to these transactions should be examined to determine if damages should be allowed as to such transactions so as to diminish the amount for which respondent is liable as a result of its unauthorized allowances. Respondent also claimed other justifications for many of the deductions, such as falling market price, and that the potatoes were too round. Falling market price is not a justification for an adjustment unless the grower has explicitly agreed to adjustments for this reason. We find no evidence of any such agreement in this case. There is also insufficient evidence of any agreement between the parties that the potatoes would be any particular shape.

Invoice 5; findings 7 and 8.

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[4]*See Newmiller Farms v. Nicolls*, 36 Agric. Dec. 1230 (1979); and *Walker & Hagan Packing House v. Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968).

[5]As will later appear, respondent will gain the benefit from the claimed adjustments as to the eight invoices covering intrastate transactions. However, this results from our lack of jurisdiction over such transactions, and not from our allowance of the claimed adjustments.

Although the potatoes covered by invoice 5 were federally inspected at shipping point and graded U.S. No. 1, there is no indication on any of the documentation relative to the sale of these potatoes (or as to the potatoes covered by any of the other invoices) that they were sold as U.S. No. 1 potatoes. The invoice indicates that these potatoes were sold on an f.o.b. shipping point basis. The Regulations,[6] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[7] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations[8] which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"[9] are based upon case law predating the adoption of the Regulations.[10] Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b.

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[6]7 C.F.R. § 46.43(i).

[7]7 C.F.R. § 46.43(j).

[8]7 C.F.R. § 46.43(j).

[9]7 C.F.R. § 46.44.

[10]*See* Williston, *Sales* § 245 (rev. ed. 1948).

under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.[11] This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.[12] If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.[13]

The inspection at destination in Bronx, N.Y. was made on August 20, 1992, following shipment by truck from Idaho on August 14, 1992. This is a distance of approximately 2,500 miles, and the transport should have taken three to four days. Assuming the inspection should have been made within one day after arrival, the inspection was one to two days late. This is not too late for us to make use of the inspection to determine the condition of the goods on arrival.[14] The lot designated A on the inspection certificate contained 14.5 percent condition defects, or 2.5 percentage points higher than what we would normally allow on a coast to coast shipment. However, the lot contained only 400 of an original 520 cartons of potatoes. Accordingly, the uninspected part of the load

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[11]*See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[12]As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 11, *supra*.

[13]*See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[14]*See Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975); and *D.L. Piazza Co. v. Stacy Distr. Co.*, 18 Agric. Dec. 307 (1959).

should be assumed to have no condition defects and be averaged with the portion that does contain such defects.[15] If we assume that the absent 120 cartons had no condition defects, the lot as a whole had 11.15 percent condition defects. The United States Standards for Grades of Potatoes provide a tolerance of eight percent for condition defects, including not more than one percent for decay.[16] On a coast to coast shipment we would increase this to a 12 percent tolerance, including not more than two percent for decay, in order to make good delivery under the suitable shipping condition warranty.[17] Thus, this lot of potatoes would have made good delivery. However, we must look at the load as a whole.

The second lot of potatoes had a total of 17 percent condition defects, or five percentage points in excess of what would be allowed for good delivery. When this lot is averaged with the other lot, we arrive at an average of 13.38 percent for the load, or more than our expanded tolerance for good delivery would allow. We conclude, therefore, that complainant breached the warranty of suitable shipping condition as to this load.

The record did not contain an accounting of the resale of these potatoes from respondent's customer, Morris Okun, Inc. Absent an accounting, the value of accepted goods may be shown by use of the percentage of condition defects disclosed by a prompt inspection.[18] The average of 13.38 percent condition defects should be allowed as a deduction against the value the potatoes would have had if they had been as warranted. Destination market reports covering the type potatoes sold by complainant were not available. The best available indication of the value the potatoes would have had if they had been as

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[15]*See Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1471 (1992); *Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce*, 50 Agric. Dec. 1001 (1991); *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982); *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); and *Mario Saikhon v. Russell Ward Co., Inc.*, 34 Agric. Dec. 1940 (1975). See also 7 C.F.R. § 46.43(ii).

[16]7 C.F.R. § 51.1546(a)(2).

[17]See *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co.,and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990).

[18]*South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

warranted is, therefore, the f.o.b. cost plus freight.[19] The record contained no indication as to the freight cost associated with this load. However, records kept by the Agricultural Marketing Service of this Department, of which we take official notice, indicate that throughout the period in question the lowest truck cost between Idaho and New York was $2,580.00.[20] Using this figure, the value of this load, if it had been as warranted, was $10,280.00. Therefore, allowable damages applicable to this load amount to 13.38 percent of such amount, or $1,375.46.

Invoice 18; findings 9 and 10.

The potatoes covered by invoice 18 were shipped by rail on August 19, 1992, and were inspected at destination in New York on August 26, 1992. Rail shipments between Idaho and New York should take six to eight days. Therefore, this was a timely inspection for a rail shipment. The inspection at destination shows that soft rot was present in the potatoes in an average amount of three percent. This exceeds the two percent allowable under the suitable shipping condition warranty, and we find therefore that complainant breached the contract of sale as to this load. An accounting from Morris Okun, Inc., which purported to cover this load, was submitted by respondent. However, the number of cartons sold of each size does not in each case match the number shown on the invoice, the loading manifest, and the bill of lading. The amounts shown on the accounting versus the amounts shown on the shipping documents is as follows:

SIZE	SHP. DOC	ACCOUNTING
70 count	200	241
80 count	280	220
90 count	680	679
100 count	800	762
110 count	400	423

[19] *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

[20] We use the lowest cost because respondent, as the party which had the burden of furnishing evidence of its damages, but which failed to do so, should bear the adverse consequences resulting from any uncertainty as to the proper cost.

50 lb. Bakers	40	45
Total	2,400	2,370

There was no explanation for the discrepancies in the accounting. Furthermore the accounting furnished no dates for the resales that were made. On the whole we do not think it would be appropriate to rely on an accounting such as this. Accordingly we will use the percentage of condition defects, four percent as shown on the applicable inspection, as a method of allowing some damages as to this load.

In the absence of market price quotes for the potatoes we will again use the f.o.b. price plus freight. No records are kept by the Department of costs of transport by rail. However, although, for the reasons stated in the preceding paragraph, we are refusing to use the accounting from Morris Okun, Inc. as accurately representing the resales of the potatoes, we will use the freight cost shown by the accounting for the following reasons. For each of the six rail shipments set forth in detail in the findings, Morris Okun, Inc. issued an accounting showing that the freight cost for the 1,200 cwt. of potatoes transported was $5,750.00. This represents a cost of $4.79 per cwt., or substantially less than the $6.14 per cwt. which we found to be the lowest cost of transport by truck in regard to the shipment covered by findings 7 and 8. The cost of transit by rail is typically less than the cost of transit by truck, and we find that the use of the cost shown by Okun's accountings is reasonable. The value of the potatoes covered by invoice 18, if they had been as warranted, was therefore $32,370.00. Okun's allowable damages as to this load would, therefore, have been four percent of this amount, or $1,294.80. Respondent should be allowed this amount as a deduction from the original invoice cost of this load.

Invoice 20; findings 11 and 12.

The potatoes covered by invoice 20 were inspected at destination on the twelfth day after shipment. Transport by rail between Idaho and New York should have taken no longer than six to eight days. Although the lot of poly-bags had three percent decay, or slightly more than we would allow for good delivery, the remaining potatoes had only one-half of one percent decay. Thus the load as a whole contained only 1.54 percent decay, and even had the inspection been timely we would find no breach of contract as to this load.[21]

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[21] *See* 7 C.F.R. § 46.43(ii).

Invoice 28; findings 13 and 14.

The potatoes covered by invoice 28 contained only seven percent condition defects, including two percent decay. This does not exceed what we would allow for good delivery, and we find no breach of contract as to this load.

Invoice 29; findings 15 and 16.

The potatoes covered by invoice 29 were shipped on August 24, by rail, and were inspected at destination on September 4. The inspection was, therefore, made three to five days after what would be considered timely arrival, and was, thus, two to four days late. The destination inspection shows six percent decay in the 1,200 poly-bag cartons, and one-half of one percent decay in the remaining 800 cartons of potatoes, or an average for the load of 3.16 percent decay. While this exceeds the amount we would allow for good delivery under the suitable shipping condition warranty, we are unable to say that the load as a whole would have had excessive decay at the time of arrival. We are unable to find a breach of contract as to this load.

Invoice 39; findings 17, 18, and 19.

The inspections as to the potatoes covered by invoice 39 were made 14 and 15 days after shipment, and were therefore much too late to show the condition at the time of arrival. Moreover, such inspections do not show a breach even if they had been timely.

Invoice 42; findings 20 and 21.

The inspection as to this load of potatoes was timely. If the sale of the potatoes had been on a U.S. No. 1 basis the amount of quality defects would be sufficient, together with the condition defects, to show a breach of contract by complainant. However, as we have already stated, the documentation does not show that the parties sold the potatoes with any grade designation. We find that there was no breach of contract as to these potatoes.

Invoice 65; findings 22 and 23.

The potatoes covered by invoice 65 were shown by the destination inspection to contain 2.54 percent decay for the load as a whole. However, the inspection

was made on the thirteenth day following shipment, which is much too late to show a breach of contract as to this load.

The net usable weight of potatoes that respondent sold to its customers was 42,265 cwt. The sales were made at the following original prices as shown by respondent's invoices to its customers:

$ 10,785.25	6,163 cwt. of culls /eliminators sold within Idaho
$566,843.28	36,102 cwt. that moved in interstate commerce
	42,265 cwt.

From the $566,843.28 the following deductions were proper according to the agreement between the parties:

$ -216,612.00	$6.00 per cwt. handling fee
- 2,565.84	advertising tax
- 14,311.40	freight for transport of potatoes to respondent
$ 333,354.04	

The parties agree that respondent made payments to complainant which totaled $196,345.25. Complainant applied $10,785.25 of this amount to the culls which were sold intrastate, and over which we have no jurisdiction. Complainant had a legal right to apply the payments made by respondent to any of the invoices, as long as respondent had not directed how they should be applied. Since we do not have jurisdiction over the eight intrastate invoices we cannot adjudicate disputes relating to these invoices, *i.e.* whether the small adjustments made to each of these invoices were proper. However, the notations of adjustments on these invoices show that respondent exercised its prior right to direct how payment as to these invoices would be directed, *i.e.* that no payment could be applied to the adjustment portion of such invoices. These adjustments totaled $407.90. This amount must be credited to respondent. This means that only $10,377.35 was legally applied by complainant to the intrastate transactions and not $10,785.25. Accordingly, instead of $185,560.00 in payments being available to apply against the interstate transactions, $185,967.90 is available.

$ 333,354.04
-185,967.90
$ 147,386.14

From this amount we must deduct the damages to which respondent's customers were entitled as a result of breaches of contract by complainant, or $2,670.26. This leaves $144,715.88 still due from respondent to complainant. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[22] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[23] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $144,715.88 with interest thereon at the rate of 10% per annum from October 1, 1992, until paid.

Copies of this order shall be served upon the parties.

MARTORI BROS. DISTRIBUTORS v. HOUSTON FRUITLAND, INC.
PACA Docket No. R-94-0295.
Decision and Order issued October 31, 1996.

Breach of Contract - Meaning of term "material breach."
Warranty of Merchantability - Standard for showing breach by inspection made after shipment.

Parties concluded an f.o.b. contract that called for shipment of a load of cantaloupes to Houston, Texas as the contract destination, but trucker disclosed to seller prior to loading that load was destined for Los Angeles. Seller then informed buyer through the broker that diversion to any other destination than Houston would result in contract terms being changed to "Acceptance Final, No

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[22] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[23] *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Recourse." Buyer agreed, but shipped the load to Los Angeles where a federal inspection showed substantial condition defects. Buyer's defense that load was en route to Houston through Los Angeles was found to lack credibility. It was stated that the acceptance final terms of the contract abrogated the warranty of suitable shipping condition, but left the seller liable for any material breach of the contract. A material breach, as the term is used in the Regulations, refers to all substantial breaches of contract other than a breach of the warranty of suitable shipping condition. The inspection in Los Angeles could be used to show a breach of the warranty of merchantability, applicable at shipping point, but would have to show condition defects so severe as to render it self-evident and certain that the commodity was nonconforming at shipping point. The certainty required was, however, stated to be reasonable certainty, not certainty that excludes all fanciful doubt. It was found that although the results of the inspection rendered it improbable that the cantaloupes were conforming at shipping point, it was not reasonably certain that they were nonconforming.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Edward L. Noah, Houston, TX, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $5,406.50 in connection with a transaction in interstate commerce involving cantaloupes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim in the amount of $4,206.00 arising out of the same transaction. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds $15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement,

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Anthony F. Martori, Arthur J. Martori, Edward J. Martori, and Stephen A. Martori, doing business as Martori Bros. Distributors, whose address is 15029 North 74th Street, Scottsdale, Arizona. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Houston Fruitland, Inc., is a corporation whose address is 7010 Pryon Way, Houston, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 14, 1993, respondent, through Eric Ho its President, asked Michael Ohanesian of Penny Produce Distributing of Nogales, Arizona, to book a load of 1,050 cartons, #15 cantaloupes, being offered by complainant, Martori Bros. of Scottsdale, Arizona. The load was booked at $3.80 per carton, plus $1.35 per carton for cooling, $.20 per carton brokerage, and $15.00 for air bags, f.o.b., with a contract destination of Houston, Texas, and respondent requested an additional 5 loads for later in the week.

4. The truck hired by respondent Houston arrived at complainant's cooler in Scottsdale on July 14, 1993, to pick up the melons, and the truck driver informed cooler personnel that the load was going to Los Angeles. The cooler personnel informed Martori's salesman, Harry Ram, and Harry called Penny Produce and talked with Elaine Ohanesian, Michael Ohanesian being out of town at the time.

5. Harry Ram informed Elaine that he had "exclusives" with other wholesalers in Los Angeles and did not want to compete with his own label in the area. Harry informed Elaine that if Houston Fruitland still wanted the melons the destination had to be Houston, Texas, and that if the melons were diverted to any other city the terms of sale would be changed to "Acceptance Final, No Recourse."

6. Elaine Ohanesian then called Eric Ho, who asked her to call Kent Huckabay. Elaine called Kent, thinking at the time that Kent was an associate of Ho. Kent was in fact with Cal Sierra of Visalia, California, the firm to which Ho had sold the melons on behalf of respondent. Elaine was assured by Kent that the load would be going to Houston Fruitland, Houston, Texas. After receiving this assurance Elaine again called Ho and informed him of what Kent had said. Ho then agreed that the load would be going to Houston, Texas. Elaine informed Ho that in the event the load would be diverted to any other city such as Los

Angeles, Martori Bros. would be seeking payment in full. Elaine then called Harry and informed him that the load would be going to Houston, Texas. The load was then shipped, on July 14, 1993, at 6:17 p.m., under a bill of lading stating that the destination was Houston, Texas.

7. The load was diverted to Los Angeles, California. At 11:35 a.m. on July 15, 1993, following unloading at the place of business of Davalon Sales, 1320 E. 6th Street, Los Angeles, California, a load of cantaloupes was federally inspected with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 52 °F	Cantaloupes	"Bimbo"	AZ	15 Count	1050 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	08	% 00	%	% Quality (Not well Netted)(0 to 13%)	Mostly firm to ripe and firm. some hard.
	11	% 00	%	% Black Mold (0 to 27%)	Mostly Turning To Yellow, some light green.
	10	% 04	%	% Numerous sunken areas (0 to 20%)	
	01	% 01	%	% Soft	
	01	% 01	%	% Bruising	
	09	% 09	%	% Decay (0 to 20%)	Decay in early stages.
	40	% 15	%	% CHECKSUM	Good Internal Quality.

GRADE: Fails to grade U.S. No 1 only account Condition.

The load was sold in Los Angeles for substantially less than the market price for good quality cantaloupes.

8. An informal complaint was filed on September 20, 1993, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant has shown by a preponderance of the evidence that prior to shipment of the cantaloupes it was made clear to respondent that diversion of the load to any other destination than Houston, Texas would result in liability for the full purchase price of the melons. Respondent's defense centers upon a claim that the destination of the load was never altered from Houston, Texas. Respondent asserts that the load was "routed" through Los Angeles on its way to Houston, Texas. Respondent would thus have us believe that the load was sent approximately 375 miles in the opposite direction from Houston, or 750 miles round-trip, in order that the customer of Houston Fruitland, Cal Sierra Produce

Inc., of Visalia, California, could have the melons inspected in Los Angeles before sending them on their way to its customers in Houston, Texas. Under other circumstances we might be prone to swallow our credulity on the basis that bizarre things do happen. However, if the purpose of shipping the melons to Los Angeles was for inspection en route to Houston, then why were the melons unloaded prior to inspection? Indeed, why were the melons not subjected to a shipping point inspection in Arizona? Prior to the shipment of these melons it was specifically called to the attention of respondent that the melons must not go to Los Angeles. Respondent had the opportunity to state to complainant at that time that the melons would be "routed" through Los Angeles on their way to Houston, for whatever reason, and if that was respondent's intent at the time it obviously should have made that clear to complainant. Instead it agreed that the goods would be shipped to Houston, and the parties also agreed to the consequences of their not being shipped to Houston. Accordingly, as the trier of the facts, we do not believe that the melons were "routed" through Los Angeles on their way to Houston, but were diverted to Los Angeles contrary to the agreement between the parties.

When respondent diverted the goods to Los Angeles the acceptance final terms of the altered contract came into effect. The Regulations provide, in relevant part, that:

> "F.o.b. acceptance final" or "Shipping point acceptance final" means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

The words "material breach" in the Regulations do not imply that a breach of the warranty of suitable shipping condition, applicable in f.o.b. sales, is not "material" in the usual sense of that term. Rather the term "material breach," in the context of the Regulations, is used to describe all substantial breaches of

contract other than a breach of the warranty of suitable shipping condition.[2]

The suitable shipping condition provisions of the Regulations,[3] applicable in f.o.b. sales, which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"[4] are based upon case law predating the adoption of the Regulations.[5] Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that

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[2]*See Yales King International v. Danny & Sons, Inc.*, 52 Agric. Dec. 715 (1993). See also *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810 (1994); *Raymond "Mickey" Cohen & Son, Inc. v. Great Lakes Fruit & Produce, Inc.*, 52 Agric. Dec. 1686 (1993); *Horticulture Producers Federated Assn., Inc. M/T/N Federation Produce Sales v. A Sams & Sons Produce Co., Inc.*, 51 Agric. Dec. 1460 (1992); *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Derrick Ranches, Inc., v. Purity Supreme, Inc.*, 46 Agric. Dec. 1245 (1987); *Colendich Farms, Inc. and Vukasovich Farms, Inc., d/b/a C. & V. Vegetable Farms v. Finest Fruits, Inc.*, 46 Agric. Dec. 986 (1987); *L-Shang's, Inc. v. Gwin, White & Prince, Inc., and/or Cascoa Growers*, 44 Agric. Dec. 1322 (1985); *National Farmers Organization, Inc. v. Western Iowa Farms Co.*, 44 Agric. Dec. 844 (1985); *Genbroker Corporation a/t/a General Brokerage Company v. Havana Potatoes Corp.*, 43 Agric. Dec. 587 (1984); *Rushton & Co. Inc. v. Evergood Enterprises*, 43 Agric. Dec. 255 (1984) and 42 Agric. Dec. 629 (1983); *Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc a/t/a J & J Produce*, 42 Agric. Dec. 281 (1983); *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); *Genbroker Corporation d/b/a General Brokerage Company v. Stevco, Inc.*, 40 Agric. Dec. 1360 (1981); *Tri-Boro Fruit Co., Inc., v. Dino Distributors, Inc.*, 40 Agric. Dec. 155 (1981); and *L. Gillarde Company v. Joseph Martinelli & Company, Inc.*, 168 F.2d 276 (1st Cir. 1948) and 169 F.2d 61 (1st Cir. 1948). *Cf. L. Gillarde Sons Company v. I. Meltzer & Sons, Inc.*, 23 Agric. Dec. 481 (1964) and *Jerome Kantro Company v. McDonnel & Blankfard*, 20 Agric. Dec. 984 (1961).

[3]7 C.F.R. § 46.43(j).

[4]7 C.F.R. § 46.44.

[5]*See* Williston, *Sales* § 245 (rev. ed. 1948).

we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.[6] This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.[7]

> It must be remembered that the warranty of suitable shipping condition is an extension of the common law warranty of merchantability. The warranty of merchantability is applicable only at shipping point. The suitable shipping condition warranty allows us to look at the condition of *perishables* at contract destination and to conclude on the basis of their condition at destination whether there was a breach [when they were loaded at shipping point]. The question is always: were the perishables, at shipping point, in suitable condition for shipment to a specific destination? If no destination was specified in the contract the warranty does not apply because the seller is deemed to be giving a warranty only that the perishable goods will last so as to arrive at the agreed destination without *abnormal* deterioration. It is a given that perishables deteriorate. Under the warranty we must consider whether the deterioration was normal in degree or abnormal.[8]

Historically, under the warranty of merchantability one could only look at the condition of the goods at the time of shipment to determine if there was a breach

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[6]*See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[7]*See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[8]*Lookout Mountain Tomato & Banana Co., Inc. v. Consumer Produce Co., Inc. of Pittsburgh*, 50 Agric. Dec. 960 (1991).

of warranty. The suitable shipping condition warranty does not merely enable us to look back, from the point of destination, at the *manifest* condition at time of shipment. Under the suitable shipping condition warranty the burden is on the seller to select goods that will arrive at contract destination without abnormal deterioration. It is understood that arrival at destination with abnormal deterioration does not necessarily entail that the goods were not in *apparent* good condition when shipped.

> . . . suitable shipping condition requires delivery without abnormal deterioration *at the contract destination.* Therefore, the inspection at destination rather than the inspection at shipping point is of much greater importance in determining whether a commodity was in suitable shipping condition.[9]

As we stated earlier, it is possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point.

The abrogation of the warranty of suitable shipping condition by the f.o.b. acceptance final terms of the contract still leaves in place the warranty of merchantability. Accordingly, if there is some way of showing that the goods, in an f.o.b.a.f. contract, were unmerchantable when shipped, a material breach may be proven, and damages for that breach may be awarded. In a similar situation we have stated that:

> Respondent contends that even if we find that the contract was f.o.b. acceptance final, the condition of the strawberries as revealed by the federal inspection report at destination shows that the strawberries were not merchantable at time of shipment. Respondent thus seeks to show that there was a material breach of the contract, even though the suitable shipping condition rule does not apply. See 7 CFR 46.43(m). However, the use of condition at destination to show condition at time of shipment is exactly the function of the suitable shipping condition warranty. See Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 AD 703 (1980). In this case, where the suitable shipping condition warranty is specifically negated by

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[9] *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, at 707 (1980).

> the terms of the contract, we would not be justified in finding a breach of the warranty of merchantability unless condition at destination, in the light of transportation history, were such as to make it self-evident and certain that the commodity was nonconforming at shipping point.[10]

The certainty required is not certainty in some absolute sense, but reasonable certainty.[11] To understand what this means we may analogize to the reasonable doubt standard used in criminal trials. There it is commonly said that the doubt necessary for an acquittal is not a fanciful doubt, but a reasonable doubt. So here, we are seeking a certainty that is in accord with reason, not a certainty that excludes all fanciful doubt.

In the present case there was no grade designation involved in the contract between the parties. In fact, even if the cantaloupes had been sold as U.S. No.1, the federal inspection at Los Angeles shows that the melons would have met the quality requirements, as distinguished from condition requirements, of the grade.[12] The inspection in Los Angeles discloses a total of 32 percent condition defects. The temperatures were higher than normal, but the transit time was less than 24 hours. We have no hesitation in stating that we believe that it is probable that the cantaloupes were unmerchantable at time of shipment. But probability is not the test. The test is can we say with reasonable certainty that there was a breach of the warranty of merchantability when the melons were shipped. For a coast to coast shipment we would allow a total of 15 percent condition defects at destination, and still find no breach of the warranty of suitable shipping condition. Fifteen percent condition defects in a load of cantaloupes would therefore not indicate a breach of the warranty of merchantability. The inspection

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[10] *Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc. a/t/a J & J Produce,* 42 Agric. Dec. 281 (1983).

[11] *North American Produce Distributors, Inc. v. Eddie Arakelian,* 41 Agric. Dec. 759 (1982)

[12] "'Quality' and 'condition' are terms of art as used in inspection certificates, U. S. Grade Standards, and within the produce industry. Generally 'condition' defects are those which are subject to change due to a worsening of the defect. All decays are condition defects. 'Quality' or 'permanent grade' defects are generally not subject to change. The U.S. Grade Standards for a commodity will generally have tolerances specified for both quality and condition defects. 'Grade' is often, but not always, used as a synonym for 'quality.'" *Yales King International, v. Danny & Sons, Inc.,* 52 Agric. Dec. 715 (1993), at note 3. See also 10 N. Harl, Agricultural Law § 72.10[4][b] at note 82.

report does not disclose the specific pathologies which caused the black mold, the numerous sunken areas, or the decay. The Department's publication on market diseases of cantaloupes lists 12 different types of rot or decay.[13] Several of these are possible candidates for the cause of the major problems listed on the inspection certificate. Some of these develop with great rapidity. The "decay" in the cantaloupes was stated to be in "early stages." On the whole we do not think that it is unreasonable to suppose that the subject cantaloupes may have been in merchantable condition at shipping point in Arizona, although such is deemed improbable. Since respondent accepted the melons it was entitled to attempt to show a material breach of the contract. We conclude that it has not shown a material breach.

Since respondent accepted the cantaloupes, and has not shown a breach of contract by complainant, it is liable for the full purchase price thereof, or $5,632.50. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. The counterclaim should be dismissed.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[14] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[15] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $5,632.50, with interest thereon at the rate of 10% per annum from August 1, 1994, until paid.

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[13] *Market Diseases of Cabbage, Cauliflower, Turnips, Cucumbers, Melons, and Related Crops,* Agriculture Handbook No. 184, Agricultural Research Service, United States Department of Agriculture, pp.26-35 (1961).

[14] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[15] *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

SHARYLAND L.P. d/b/a PLANTATION PRODUCE v. C.H. ROBINSON COMPANY.
PACA Docket No. R-94-0235.
Decision and Order filed November 4, 1996.

Open Sales - Losses sustained by the buyer.

In an open sale, title passes from seller to buyer. Since the contract is one of a "sale," the buyer assumes responsibility for earning either a profit or taking a loss. As the seller can not expect to share in the distribution of any profit the buyer may earn through its efforts, neither can the buyer expect the seller to absorb any losses it may incur. Therefore, any losses the buyer may sustain through this type of transaction are for its own account.

Patrice H. Harps, Presiding Officer.
Complainant, Pro se.
Thomas G. Rock, Esquire, Minneapolis, MN, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed with the Department on September 10, 1993 and a formal complaint was filed on March 4, 1994, in which complainant seeks a reparation award against the respondent in the amount of $1,650.00 in connection with two trucklots of onions shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying the allegations of the complainant.

Since the amount claimed in the formal complaint does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the

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[1]Effective November 15, 1995, the threshold for oral hearings was raised to $30,000 by Public Law 104-48.

case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant filed a verified opening statement. Respondent filed a verified answering statement. Complainant filed a verified statement in reply. Complainant and respondent both filed briefs.

Findings of Fact

1. Complainant, Sharyland L.P., d/b/a Plantation Produce Company, hereinafter referred to as Plantation, is a limited partnership whose post office address is P.O. Box 1043, Mission, Texas, 78573-1043. At the time of the transaction involved herein, Plantation was licensed under the Act.

2. Respondent, C.H. Robinson Company, hereinafter referred to as Robinson, is a corporation whose post office address is 8100 Mitchell Rd., Suite 200, Eden Prairie, Minnesota. At the time of the transactions involved in this proceeding, Robinson was licensed under the Act.

3. On or about June 30, 1993, complainant sold and shipped to respondent, on invoice number D01486, 200 sacks of fifty lb. jumbo white onions. The onions were inspected on July 6, 1993, and as a result of the inspection the term of sale was amended to open.

4. On or about June 30, 1993, complainant sold and shipped to respondent, on invoice number N00453, 210 sacks of fifty lb. jumbo white onions. The onions were inspected on July 6, 1993, and as a result of the inspection the term of sale was amended to open.

5. The formal complaint was filed on March 4, 1994, which was within nine months after the causes of action alleged therein accrued.

Discussion

This proceeding involves a dispute as to respondent's liability to the complainant for the two trucklots of onions it received and accepted through the actions of its customers.

Plantation alleges in its formal complaint, that the value of the onions Robinson purchased is $3.00 per sack on the 200 sacks of onions it shipped on invoice number D01486-I, and $5.00 per sack on the 210 sacks of onions shipped on invoice number N00453. As proof of the onions' value, Plantation refers to its exhibits numbered 1 and 2 of the formal complaint. The aforementioned exhibits are invoices Plantation generated to Robinson, which substantiate the terms of sale to be "open" for these two transactions. Plantation

does not include any calculations or Market News Service prices in its exhibits to support how it arrived at the $3.00 and $5.00 figures assigned to the onions it sold on an open basis.

Robinson, on the other hand, includes within its documentation an invoice, numbered 881505 and 881509, which accounts for $641.00 it claims it lost in handling the onions it purchased from the complainant. Both parties go into detailed analysis of temperature conditions at the time of shipment, type of truck, when the product was inspected and when notification of a problem with the product was given in their opening statements and briefs, which is totally irrelevant to the problem of establishing financial liability for the final disposition of the onions.

Plantation sold and shipped, and Robinson purchased the two partial trucklots of onions involved in this dispute. The record establishes these onions were the subject of U.S.D.A. inspections. Upon completion of the inspections, the original contracts were renegotiated from purchase and sale at a fixed price, to a sale on an open basis. "Open Price" assumes parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods should be imputed. PACA Docket No.4456, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979). In this instance the parties were unable to negotiate a price for the onions. The complainant feels an equitable price should be derived by looking at Market News Service prices; however, compainant has not included any market quotes in its documentation. Respondent, on the other hand, is basing the amount it feels is reasonable on the accounts of sale received from its customer. These accountings show respondent to have incurred a deficit through the purchase and resale of both trucklots.

Since the two parties were unable to determine an amicable settlement price for the onions, we must determine a reasonable value for the onions. Complainant has failed to submit adequate market news reports to substantiate its computations for the value assigned to the onions, as alleged in its formal complaint. The record shows that we are left with respondent's resales as the best evidence of the reasonable value of the subject onions, especially as the onions were received in poor condition. *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990).

Since the respondent accepted the loads, it is liable to complainant for the agreed contract price, which in this case is a reasonable price. For the reasons previously discussed, market quotes cannot be consulted in determining the reasonable value. We will look to the accountings of sale respondent submitted as evidence to the reasonable value.

Included within the report of investigation are copies of accountings of sale respondent received from its customer. Respondent's customer reported sales totaling $810.00 for the lot of 200 onions it received which corresponds to the shipper's invoice number D01486. This lot of onions was inspected at respondent's customer's place of business on July 7, 1993, showing 26 per cent decay. The accounting is broken down by individual sales which all occurred on July 7, 1993, which is deemed timely. When Robinson accounted back to Plantation with gross figures, Robinson reported average sales for this lot to be $3.15 for a total of $630.00. Robinson is claiming $3.15 per sack freight charges and a $52.00 inspection fee for a total of $682.00, or a total deficit of $52.00 for this particular lot.

Robinson also submits an account sale for the lot corresponding to the shipper's invoice number N00453. This lot was also inspected at respondent's customer's place of business on July 7, 1993 where it was found to have a total of 56 per cent condition defects of which 54 per cent was decay. The accounting it received from its customer for this lot shows a total of $329.50 in sales for the 210 cartons it received. Robinson accounted back to Plantation showing $.90 per sack for the 210 sacks it purchased, or a total of $189.00. Out-of-pocket freight charges total $661.50. Adding freight to market charges of $52.50 and inspection charges of $64.00, for a total of $778.00 in costs, or a total loss of $589.00 for this transaction. The difference between the gross proceeds reported by respondent's customer and the proceeds as reported by respondent is noted. However, taking into consideration an allowance for profit by both parties, the difference is allowed.

In this particular case, respondent is attempting to pass back to the complainant the deficit it incurred from the resale of the onions. Ultimately, respondent, after agreeing to renegotiate the contracts to open price, lost the right to pass back to the shipper any losses it incurred, whereas had the contracts been changed to consignment, or had the loads been rejected outright, the shipper could have been held liable for any damages incurred by the receiver.

Based upon the preceding discussion, we find Plantation has failed to carry the burden of proof with regard to its complaint. Plantation's complaint is dismissed. Robinson's countercomplaint is also dismissed.

Order

The complaint is dismissed.
The countercomplaint is dismissed.
Copies of this order shall be served on the parties.

PHOENIX VEGETABLE DISTRIBUTORS v. RANDY WILSON, CO.
PACA Docket No. R-95-0167.
Decision and Order filed November 4, 1996.

Acceptance - Precludes subsequent rejection by intermediate parties to their seller. Rejection - Does not preclude subsequent acceptance by intermediate parties.

Where A sold to B, B sold to C, and C sold to D, a rejection by D to C was effective even though it occurred following C's acceptance of the lot of produce, because lot was accepted by unloading at C's warehouse, and D was on hand to reject when the lot was unloaded. However, following C's acceptance C could not reject to B, nor could B reject to A. It was found that in fact no such rejection had been attempted, but that C and B had merely communicated the fact that D had rejected to C. A's subsequent repossession of three-fourths of the lot of produce was wrongful, and precluded A from entitlement to the contract price as to more than the one-fourth of a lot left in C's possession, even though the entire lot had been accepted.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $3,504.75 in connection with a transaction in interstate and foreign commerce involving rappini.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Phoenix Vegetable Distributors, is a corporation whose address is P. O. Box 7, Tolleson, Arizona.

2. Respondent, Randy Wilson Co., is a corporation whose address is 2348 West Whitendale, Suite G, Visalia, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 3, 1994, complainant sold to respondent one truck lot of rappini, consisting of 336 cartons, at $10.00 per carton, plus $32.00 for top ice, or a total of $3,392.00, f.o.b. On or about the same date respondent sold the rappini to Sure-Way International, in Toronto, Ontario, Canada, who had previously sold the rappini to a chain store outside Toronto.

4. On or about March 4, 1994, complainant shipped the rappini from Arizona to respondent in Toronto. The rappini arrived at Sure-Way's warehouse in Toronto on March 8, 1994, and was unloaded from the truck into cold storage. Sure-Way's customer was on hand at time of arrival, looked at the rappini, and gave notice to Sure-Way that the rappini was rejected. Sure-Way promptly gave notice to respondent that the rappini had a quality problem the chain store had rejected it, and that Sure-Way had called for a Canadian inspection. Respondent then promptly gave notice to complainant, by telephone, that the rappini had a quality problem, that the chain store had rejected it, and that a Canadian inspection had been requested. On the same day, March 8, 1994, respondent sent complainant a faxed "Trouble Report" covering the rappini. The trouble report was on a pre-printed form and stated that the rappini had trouble due to quality, and that an inspection had been requested. The trouble report had a blank beside the words "REJECTED TO:", but the blank was not filled in. Sure-Way then proceeded to sell two pallets (84 cartons) of the rappini.

5. On the morning of March 9, 1994, after receiving the notice of trouble and of the rejection by the chain store, complainant was told by a broker in Toronto that two pallets of its rappini were for sale by "So-Oh Fresh," a produce firm in Toronto. Complainant also, at about the same time, contacted the broker to have the remaining rappini removed to another produce firm in Toronto, Rite Pak. This was accomplished during the morning of March 9, 1994.

6. Respondent, following the removal of the rappini, sent complainant the following faxed message:

To:	Phoenix Veg Distor	From:	Ivan Schaefer
	Attn	Time:	
	Don McGaffee	Date:	3/9/94

Number of pages including this cover sheet: 1
Remarks:

Tried to Reach you after I finished my telephone call with Sure-way but you had left for lunch.

Sure-way is prepared to accept Responsibility for the outcome of the Agriculture Canada Inspection provided the Product is brought back in their custody (i.e.) T.B.I. Cold Storage.

Moreover, the Agriculture Inspection is slated for T.B.I. Cold Storage as the site of the Inspection. If Rite Pak only now Requests the Inspection, another 48 - 72 hours will elapse.

Also, Sure-way is questioning - if the pallets are removed to another site, how can they be responsible?

Don, since I wish to resolve this matter as effectively as possible, and Sure-way is prepared to abide by the Inspection provided the product is under their control, perhaps it is a viable option to have 1) Rite Pak bring back the pallets of Rappini back (sic) to the Cold Storage 2) have Sure-way complete the Inspection by no later than to-morrow.
Please advise.

7. Complainant's Don McGaffee replied immediately to the above faxed message with a faxed letter, quoted below in relevant part:

This is to acknowledge receipt of your faxed message dated 3/9/94 concerning the above referenced shipment of rappini.

Please be advised that your fax is not correct. The contract between Phoenix Vegetable Distributors and Randy Wilson has not been changed. The terms of sale were FOB no grade contract. It is my understanding that two of the pallets have been accepted by one or your customers in Toronto, Ontario, Canada. As you are aware, partial acceptance constitutes acceptance in full of the entire trucklot shipment. Also please be advised that a timely Agriculture Canada inspection has not yet been secured on any of the rappini in question.

Therefore, at this time, Phoenix Vegetable Distributors is expecting payment in full as invoiced. Your relationship with your customers in

Toronto has no bearing on the contract between Phoenix Vegetable Distributors and your firm, Randy Wilson Company. Therefore, inasmuch as the rappini has been accepted, the original terms of this contract are still in force.

8. An informal complaint was filed on September 2, 1994, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant seeks to recover the full purchase price of the rappini sold to respondent on the basis that the rappini was accepted on arrival in Toronto. Respondent does not deny acceptance of the rappini, but seems to focus its defense on complainant's repossession of the six flats of rappini which remained after the sale of two of the flats by respondent's customer. Complainant justifies this repossession as an effort to "mitigate any further potential losses due to the mishandling by respondent and/or its customer(s)." Complainant also states that "[w]hen the rappini finally arrived in Toronto [complainant] was notified by respondent that the chain store rejected the rappini because of discoloration" and that "[b]ased on this rejection [complainant] advised respondent that the rappini would be picked up . . . ." However, prior to picking up the rappini, complainant was aware that two of the flats had been removed, and complained at the time, and throughout this proceeding, that this amounted to an acceptance of the entire lot of eight flats. It is apparent from the record herein that the rappini was never rejected by Sure-Way to respondent, or by respondent to complainant. It is certainly true that respondent and complainant were informed that the rappini had arrived showing trouble, and were also informed that the chain store had rejected the rappini to Sure-Way. However, rejections must be made by each buyer to their own seller, and must be clearly communicated as such.[2] Furthermore, it is even more abundantly clear that Sure-Way did not have the right to reject the rappini to respondent, nor did respondent have the right to reject to complainant, following the rejection by the chain store to Sure-Way. This is obviously the case because Sure-Way had already accepted the rappini

[2]*See Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983); *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (1979); *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979); and *Beamon Brothers v. California Sweet Potato Growers*, 38 Agric. Dec. 71 (1979).

vis-à-vis respondent and complainant when it unloaded the rappini into the warehouse. Sure-Way's customer, the chain store, was able to reject to Sure-Way because such customer never exercised any dominion and control over the rappini prior to rejecting it. The customer was on hand when the rappini arrived, and the unloading of the rappini was the act of Sure-Way, not the act of the chain store. The rejection was therefore effective against Sure-Way, but could not have been effective had Sure-Way attempted to pass on the rejection to respondent, or had respondent sought to pass it on to complainant. The effective rejection by the chain store had, in effect, been intercepted by the acceptance of the produce by Sure-Way. An acceptance is operative all the way up the line to the ultimate seller,[3] and does not even have to be communicated to be effective.[4] This is true because any act contrary to the seller's ownership, or a failure to make a timely rejection, operates as an acceptance, and if Sure-Way's act of acceptance was contrary to respondent's ownership, it was of necessity also contrary to complainant's ownership. There was nothing that respondent could do that would neutralize the acts of Sure-Way that were contrary to its own or complainant's ownership. Sure-Way was, in effect, respondent's agent as to such acts of acceptance, and the acts of the agent are imputed to the principal. Thus Sure-Way's acceptance not only precluded any subsequent rejection by Sure-Way, but also precluded any rejection by respondent.[5] This overriding operation of an acceptance precludes the intervention of a rejection anywhere in the chain of purchase, but since a rejection does not have this overriding effect, where there has been a rejection an acceptance may subsequently intervene anywhere in the chain, and will intervene if any party in

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[3]This discussion applies, of course, only as to a shipment of goods, i.e., between shipment and arrival, or between possession by the seller and possession (or rejection) by the purchaser who receives (or is the intended receiver of) the goods from the hands of the carrier.

[4]There is one minor, and likely insignificant, exception to this statement. UCC § 606(1)(a) provides that "[a]cceptance of goods occurs when the buyer (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity. . ." For such notice of acceptance to be effective as against each seller up the chain of purchase it must be communicated up the chain of purchase. However, if it is not communicated the same result is shortly obtained by the failure to communicate a rejection (see UCC § 606(1)(b)). Also the failure to communicate the acceptance may be made irrelevant by the performance of an act inconsistent with the seller's ownership (see UCC § 606(1)(c)). Such an act does not have to be communicated for the acceptance to be effective.

[5]*See Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991).

the chain fails to reject to its seller. Obviously, to inform the seller of a rejection of another buyer somewhere down the chain is not the same thing as rejecting to the seller. Communication of trouble, or of a down-chain buyer's rejection, should be taken as merely notice of breach, unless such notice is accompanied by a clear notice that a rejection is also intended. If a seller has any doubt as to the significance of a communication of a down-chain buyer's rejection, inquiries should be made by the seller to clearly establish the exact intent of any notice conveyed by the seller's immediate purchaser.

In this case, complainant did not have any notice that respondent was rejecting. None of the descriptions of what occurred given by the parties indicates that there was any such notice, and if any doubt were entertained on the point, the trouble report faxed by respondent to complainant on the day of arrival should remove that doubt. Instead, complainant was clearly aware that the rappini had been accepted. It was accepted by being unloaded,[6] and doubly accepted by the subsequent resale of two flats of the rappini.[7] Complainant is certainly correct when it points out that the sale of those two flats amounted to an acceptance of the whole lot.[8] Therefore, complainant's subsequent acquisition of the rappini was an acquisition of produce which did not belong to complainant, and was wrongful as against respondent.

Respondent complains that complainant's acquisition of the balance of the lot precluded respondent's customer getting an inspection of the rappini by the Canadian Department of Agriculture. Respondent offered evidence that under the normal procedures of such Department the remaining seventy-five percent of the lot would have been considered representative of the lot as a whole, and that, as an inspection had been requested on the day of arrival, the rappini would have been inspected had it been left in place. We offer no comment as to whether we would give credence to an inspection of seventy-five percent of a lot, but it is certainly true that complainant precluded inspection of the lot in question. It is also true that complainant did not have the remainder of the lot inspected after it wrongfully regained control of it.

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[6]*Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980); *Crown Orchard Co. v. Mid - Valley Prod. Corp.*, 34 Agric. Dec. 1381 at 1385 (1975); *Conn & Scalise Co., Inc. v. Frank J. Crivella & Co., Inc.*, 20 Agric. Dec. 415 (1961).

[7]*Dave Walsh Co. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 2085 (1983).

[8]*Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991).

Respondent accepted the entire lot of produce, and normally would be held liable for the full purchase price thereof, less damages flowing from any breach of contract. However, complainant's repossession of 252 cartons of the rappini makes it inequitable to hold respondent liable for the purchase price of more than the 84 cartons which were left in its possession. Therefore, as to such cartons, respondent is liable to complainant for $10.00 per carton, plus the portion of the $32.00 top ice charge applicable to such cartons, or $8.00, or a total of $848.00. In addition, respondent paid the freight and duty charges applicable to the entire lot of 336 cartons, or $684.75. Respondent should be chargeable only with the portion of this freight that is applicable to the 84 cartons of rappini which it resold, or $171.19. The remainder of the freight paid by respondent, or $513.56, should be deducted from the $848.00, leaving $334.44 as the amount owing from respondent to complainant. Respondent has already paid complainant $187.25, which leaves $147.19 still owing from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[9] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[10] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $147.19, with interest thereon at the rate of 10% per annum from April 1, 1994, until paid.

Copies of this order shall be served upon the parties.

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[9] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[10] *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer W. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crokett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

C.J. PRETTYMAN, JR., INC. v. AMERICAN GROWERS, INC.
PACA Docket No. R-94-0164.
Decision and Order filed November 14, 1996.

Damages - Percentage of defects.
Open Price - Computation of reasonable value.

Where contracts called for the sale of U.S. No. 1 product, shipper breached the warranty of suitable shipping condition, and neither market reports nor a proper accounting were available, damages and reasonable value were computed on the basis of the percentage of the total of condition and quality defects shown by a timely federal inspection.

George S. Whitten, Presiding Officer.
William J. Fair, Springfield, PA, for Complainant.
Thomas W. Johnston, Pompano Beach, FL, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $40,797.23 in connection with transactions in interstate commerce involving eight shipments of mixed perishable produce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent also filed a counterclaim in the amount of $9,120.42 arising out of expenses allegedly incurred by respondent in connection with the eight shipments which were the subject of the complaint. Complainant filed a reply to the counterclaim denying any liability to respondent.

Respondent attached to its answer a motion to dismiss the complaint, and renewed the motion following submission of its brief. The sole basis for the motion to dismiss is that the contracts concerning the eight transactions were negotiated by respondent's president Glenn C. Thomason with the individual C. J. Prettyman, Jr. (as a representative of the corporation) but that the complaint was signed by C. J. Prettyman, III. Respondent states that "the execution of the Complaint having been by someone other than C. J. Prettyman (C. J. Prettyman III, whoever that is) and not by someone, as required by the law and the Act, to have personal knowledge of the facts alleged in the Complaint causes the action to fail for lack of jurisdiction." Respondent is misinformed. There is no

requirement of the Act, Regulations, Rules of Practice, or of the law that requires a pleading to be signed by someone with personal knowledge of the facts. It is true that the formal complaint was signed by C. J. Prettyman, III, vice president of complainant corporation, and that there was no showing that such person had any personal involvement in the negotiation of the eight transactions. Indeed, the statement in reply, signed by C. J. Prettyman, Jr., president of complainant corporation, agrees with respondent's president Glenn C. Thomason that the contracts were negotiated between C. J. Prettyman, Jr. and Glenn C. Thomason. It is obvious, therefore, that the formal complaint, though in evidence under the shortened procedure because verified, should be accorded no evidentiary weight in regard to matters alleged therein not within the scope of the knowledge of C. J. Prettyman, III. However, the evidentiary value of the formal complaint has nothing to do with whether the formal complaint qualifies as a pleading herein. Indeed, formal complaints signed only by an attorney with no knowledge of the facts, and not verified, still constitute valid pleadings under the Rules of Practice, and serve to join the issues between the parties.[1] Respondent's motion is denied.

The amount claimed in the formal complaint exceeds $15,000.00, however, the parties waived oral hearing and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, C. J. Prettyman, Jr., Inc., is a corporation whose address is P. O. Box 665, Exmore, Virginia. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, American Growers, Inc., is a corporation whose address is Hooker Highway, SR 3019 SR 15, Belle Glade, Florida. At the time of the

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[1] *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991); *Chapman Fruit Co., Inc. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366 (1985). *See also Perell, Inc. v. Anthony Abbate Fruit Distributors*, 32 Agric. Dec. 1900 (1973) and *H. & M. Fujishige v. Mike Phillips Enterprises, Inc.*, 30 Agric. Dec.1095 (1971).

transactions involved herein, respondent was licensed under the Act.

3. On or about December 12, 1992, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
196	Squash, Butternut	$12.00	$2,352.00
72	Cucumbers	9.25	666.00
1,280	Cucumbers, Ctn 24's	3.25	4,160.00
	Ryan recorder		23.50
			7,201.50

4. On December 14, 1992, complainant issued invoice number 4509 as to the load of produce covered by finding 3. Complainant granted an adjustment on the butternut squash in the amount of $3,129.60. Respondent has paid $3,175.80 on this load.

5. On or about February 5, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
98	Bell Peppers, Ex. Lg.	$12.50	$1,225.00
324	Cucumbers	5.25	1,701.00
336	Eggplant, 18's	5.50	1,848.00
120	Squash, Zucchini Medium	9.50	1,140.00
196	Squash, Acorn	5.50	1,078.00
144	Squash, Spaghetti	5.50	792.00
			$7,748.00

6. On February 6, 1993, complainant issued invoice number 4611 as to the load of produce covered by finding 5. Following arrival of the load respondent noted problems and called for a federal inspection. The inspection, made on February 9, 1993, showed 8 percent quality defects and 4 percent bruising in the 336 cartons of eggplants. Respondent's Glenn C. Thomason reported this to complainant's C. J. Prettyman, Jr. and secured his permission to handle the load on a consignment basis. Respondent issued an accounting of the resale of the eggplant showing as follows:

50 @ 12.50	625.00
80 @ 9.50	760.00
19 @ .6750	12.83
187 lost to repack	0.00
Repack 336 @ 1.00	336.00
Cooler 336 @ .35	117.60
Freight 336 @ 1.70	571.20
USDA 174.00	174.00
	199.03

7. On or about February 22, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
140	Bell Peppers, Red, XLG.	$14.25	$ 1,995.00
196	Bell Peppers, Red, XLG	20.25	3,969.00
165	Bell Peppers, Red, XLG	12.25	2,021.25
107	Bell Peppers, Red, LG	12.25	1,310.75
98	Bell Peppers, Red, MED	18.25	1,788.50
322	Cucumbers, Plain	00.00	00.00
81	Cucumbers, Select	00.00	00.00
19	Cucumbers, Small	00.00	00.00
1	Temp. Recorder	23.50	23.50
			$11,108.00

8. On February 23, 1993, complainant issued invoice number 4629 as to the load of produce covered by finding 7. Following arrival of the load on February 25, respondent noted problems and called for a federal inspection. The inspection was made on February 26, 1993, at 1:00 p.m., at the place of business of respondent in Belle Glade, Florida, while the produce was still loaded on the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 47 °F	Sweet Peppers	"Tricar" 1 1/9 Bu	MX	Exlarge/ Large	271 Cartons	N
B	45 to 46 °F	Cucumbers	"MMC Brand," 1 1/9 Bu	MX	-	422 Cartons	N
C	47 to 48 °F	Sweet Peppers	"Signature Brand,"15 lbs. Exlarge	MX	-	140 Cartons	N
D	48 to 50 °F	Sweet Peppers	"Signature Brand,"Net Wt 25 lbs.	MX	Exlarge/ Medium	295 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (Scars & misshapen)	A: Size: No OFFSIZE. Decay mostly early, some moderate stages including 27% affecting walls & clayxes (sic), remaining stems.
	04	% 04	%	% Crushed & Broken Pods	
	11	% 00	%	% Shriveled (6 to 15%)	
	28	% 28	%	% Decay (16 to 35%)	
	47	% 32	%	% CHECKSUM	
B	10	% 00	%	% Quality (8 to 14%) (Scars & Misshappen)	B: Size: No offsize.
	10	% 01	%	% Shriveled ends (2 to 18%)	
	-1	% -1	%	% Decay	
	21	% 02	%	% CHECKSUM	
C	25	% 00	%	% Quality (17 to 36%) (Scars & Misshappen)	C & D: No offsize C: Decay early stages affecting walls & calyxes.
	04	% 04	%	% Decay (3 to 6%)	
	29	% 04	%	% Checksum	
D	11	% 00	%	% Quality (8 to 15%)(Scars)	D: Decay early stages affecting walls & calyxes 10% Remainder & Stems.
	12	% 12	%	% Decay	
	23	% 12	%	% CHECKSUM	

GRADE: LOT A: Fails to Grade U.S. NO1 only account condition. B: Fails to grade U.S. NO1 only account condition: Lots C & D Fail to Grade U.S. NO1 account Quality defects.

Condition of Containers: 4 pallets nearest Rear Doors of Trailer Shifted left to Right Approximately 1 inch Bottom layer to 6 inches top layer. Few cartons bottom layer crushed downward approximately 1 to 3 inches..

9. On or about February 26, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, one load containing 840 cartons of cucumbers on an open basis.

10. On February 26, 1993, complainant issued invoice number 4631 as to the load of produce covered by finding 9. Following arrival of the load on March 2, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 2, 1993, at 8:10 a.m., at the place of business of

respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 43 °F	Cucumbers	"The Boss Brand", 1 1/9 Bushel	MX		840 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	10	% 05	%	% Quality (Scars & Misshapen)	Size: None under 6 inches (6 to 16%) in length, Average 2% over 2 3/8 inch Diameter
	04	% 03	%	% Shriveled ends	
	03	% 03	%	% Decay (0 to 4%)	Decay Early Stages
	17	% 11	%	% Checksum	

GRADE: Fails to Grade U.S. No 1 only Account Condition.

11. Respondent rendered an accounting showing that 112 cartons were lost in repacking and the remainder resold as follows:

127 Plain	@ $ .1751	= $	22.24
110 Selects	@ 1.5702	=	172.72
15 "	@ .1751	=	2.63
160 "	@ 5.75	=	920.00
60 "	@ 6.25	=	375.00
150 "	@ 5.75	=	862.50
21 Super Selects	@ 16.00	=	336.00
85 " "	@ 12.50	=	1,062.50
			$3,753.59
less freight			2,200.00
less Repack 840 @ 1.00			840.00
less Cooler 840 @ .35			294.00
less USDA			71.00
less USDA Reinspection			71.00
Net Return		$	277.59

12. On or about February 27, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
168	Squash, Spaghetti	$ 7.50	$ 1,260.00
168	Squash, Acorn	10.50	1,764.00
78	Squash, Butternut	21.00	1,638.00
126	Cucumbers, Super Select	9.50	1,197.00
480	Squash, Zucchini Medium	5.25	2,520.00
216	Squash, Zucchini Fancy	6.25	1,350.00
1	Temp. Recorder	23.50	23.50
			$ 9,752.50

13. On February 28, 1993, complainant issued invoice number 4632 as to the load of produce covered by finding 12. Following arrival of the load on or about March 2, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 3, 1993, at 3:25 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce was unloaded from the truck. Due to the number of lots contained in the load the inspection was recorded on two certificates which disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 46 °F	Acorn Squash (w)	"Big Chuy Brand", 18 count	MX	65126	168 Cartons	N
B	48 to 49 °F	Green Squash (s)	"Nu Brand", 4/7 Bushel	MX	Zucchini	126 Cartons	N
C	47 to 50 °F	Butternut Squash (w)	"Big Chuy Brand", M	MX	63426	42 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (Scars)	A: Size: Fairly uniform
	00	% 00	%	% Soft Rot	
	04	% 00	%	% Checksum	
B	02	% 00	%	% Quality (cuts)	B: Size: Fairly uniform. Decay Early stages.
	39	% 39	%	% Decay (34 to 42%)	
	41	% 39	%	% Checksum	
C	07	% 00	%	% Quality (4 to *%) (Scars)	C: Size: uniform.
	00	% 00	%	% Soft Rot	
	07	% 00	%	% Checksum	

GRADE: Lots A & C U.S. No. 1. Lot B fails to Grade U.S. No 1 only Account Condition.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45 °F	Cucumbers	"The Boss Brand", 1 1/9 Bushel	MX	Super Select	126 Cartons	N
B	46 to 47 °F	Green Squash (s)	"The Great 44", Size XXX	MX	Zucchini	480 Cartons	N
C	46 to 48 °F	Spaghetti Squash (W)	"Big Chuy Brand," M	MX	65327	168 Cartons	N
D	47 to 49 °F	Butternut Squash (W)	"Palo Alto"	MX	Medium	36 Crates	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 00	%	% Over 2 3/8 Diameter	A: Size: 6 to 9 inches in length 1 3/4 to 2 3/8 inches in Diameter. Decay early stages.
	12	% 07	%	% Quality (8 to 14%) (Scars & Misshapen.)	
	08	% 04	%	% Shriveled ends (7 to 10%)	
	03	% 03	%	% Decay (2 to 4%)	
	25	% 14	%	% CHECKSUM	
B	04	% 00	%	% Quality (Scars & Cuts)	B: Size: fairly uniform
	00	% 00	%	% Decay	
	04	% 00	%	% CHECKSUM	
C	17	% 00	%	% Quality (Scars)	C: Size: fairly uniform
	00	% 00	%	% Soft Rot	
	17	% 00	%	% Checksum	
D	03	% 00	%	% Quality (Scars)	D: Size: uniform.
	00	% 00	%	% Soft Rot	
	03	% 00	%	% CHECKSUM	

GRADE: LOTS A & C Fail to Grade U.S. NO1 Account Quality Defects. LOTS B & D: U.S. No.1

14. On or about March 13, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
711	Bell Pepper, large	$ 7.25	$5,154.75
420	Bell Pepper, large	7.25	3,045.00
84	Cucumbers, Select	12.25	1,029.00
			$9,228.75

15. On March 14, 1993, complainant issued invoice number 4649 as to the load of produce covered by finding 14. Following arrival of the load on or about

March 17, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 17, 1993, at 10:50 a.m., at the place of business of respondent in Belle Glade, Florida, while the produce was being unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 50 °F	Sweet Pepper	"The Boss Brand" 1 1/9 Bushel	MX	Large	711 Cartons	N
B	49 to 50 °F	Cucumbers	"The Boss Brand" 1 1/9 Bushel	MX	See Remarks	84 Cartons	Y
C	51 to 53 °F	Sweet Pepper	"King Louiz Brand," 1 1/9 Bushel	MX	XXX—	420 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	07	% 01	%	% Quality (Misshapen & Scars) (6 to 10%)	A:SizeRanges: 2 1/2 to 4 inch length. No offsize. Decay early stages affecting walls.
	02	% 00	%	% Discoloration	
	02	% 00	%	% Bruising	
	08	% 03	%	% Shriveled (6 to 12%)	
	03	% 03	%	% Decay (0 to 6%)	
	22	% 07	%	% Checksum	
B	03	% 00	%	% Under 6 in length	Size B 5 1/2 to 9 inch length, 1 1/2 to 2 3/8 inch Diameter. Decay moderate stages.
	12	% 00	%	% Quality (8 to 20%)(Scars)	
	02	% 00	%	% Shriveled	
	03	% 03	%	% Decay	
	20	% 03	%	% Checksum	
C	08	% 00	%	% Quality (Scars & Misshapen)(6 to 10%)	C Size Ranges 2 1/2 inch to 3 1/2 inch Diameter. 2 1/2 to 4 1/4 inch length. Decay early stages affecting walls.
	05	% 00	%	% Shriveled	
	06	% 00	%	% Bruising (4 to 6%)	
	02	% 02	%	% Decay (0 to 4%)	
	21	% 02	%	% Checksum	

GRADE: LOT's A & C Fails to Grade U.S. NO1 only account condition. LOT B Fails to grade U.S. NO1 account Quality Defects.
REMARKS: Inspected during unloading. Lot B Remarks 1 pallet marked large other pallet few cartons marked large, remaining cartons no mark.

16. On or about March 17, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
840	Squash, Zucchini Medium	$ 9.25	$ 7,770.00
84	Cucumbers, Super Sel.	20.25	1,701.00
108	Cucumbers, Select	18.25	1,971.00
126	Cucumbers, Small	16.25	2,047.50
72	Cucumbers, Large	14.25	1,026.00
			$14,515.00

17. On March 18, 1993, complainant issued invoice number 4656 as to the load of produce covered by finding 16. Following arrival of the load on or about March 22, 1993, respondent noted problems in the large cucumbers and called for a federal inspection. The inspection was made on March 22, 1993, at 3:50 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	52 to 55 °F	Cucumbers	"MMC Brand", 1 1/9 Bushel	MX	Large	41 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	12	% 00	%	% under 2 1/4 inch Diameter (10 t0 13%)	Size Ranges 1 7/8 to 2 1/2 inch Diameter. 6 to 9 inch length.
	13	% 08	%	% Quality (Scars & Misshapen) (8 to 16%)	
	05	% 00	%	% Shriveled ends	
	00	% 00	%	% Decay	
	30	% 08	%	% Checksum	

GRADE: Fails to Grade U.S. No 1 Large Account Quality Defects & Min. Diameter.

18. On or about March 17, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
180	Squash, Zucchini Med.	$ 9.25	$1,665.00
288	Squash, Zucchini	9.25	2,664.00

360	Cucumbers, Plain	14.50	5,130.00 $9,459.00

19. On March 18, 1993, complainant issued invoice number 4631 as to the load of produce covered by finding 18. Following arrival of the load on March 22, 1993, respondent noted problems and called for a federal inspection of the cucumbers. The inspection was made on March 22, 1993, at 5:00 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 48 °F	Cucumbers	"MMC Brand", 1 1/9 Bushel	MX		360 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	03	%	%	% under 5 inch length.	Size: Ranges 4 3/4 to 8 1/7 inches in length. 1 1/2 to 2 3/8 inch Diameter
	07	%	%	% Quality (Scars & cuts) (4 to 10%)	
	05	%	%	% Soft & Shriveled ends	
	01	%	%	% Decay	
	16	%	%	% Checksum	

GRADE: Fails to Grade U.S. No 2 only Account Condition.
REMARKS: Based on U.S. No 2 at Applicants Request.

20. The informal complaint was filed on May 24, 1993, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant brings this action to recover the balance of the purchase price of eight shipments of mixed perishable produce sold to respondent between December 14, 1992, and March 18, 1993. The total of the invoice prices of the eight shipments was $69,021.15, and respondent is alleged to have paid complainant $28,223.72, leaving balances due totaling $40,797.43. Respondent denies owing the amounts claimed (although respondent does admit that some amounts are still due as to some of the transactions), and in addition alleges set-offs totaling $9,120.42. There are several matters which should be discussed before we discuss each load individually.

First, the parties are in disagreement as to the basic nature of the contractual agreement that applied to the eight transactions. This dispute is complicated by the paucity of testimonial evidence submitted on behalf of complainant from the party directly involved in the transactions, and by affidavits submitted on behalf of respondent which are often unintelligible.

Respondent contends that the contracts between the parties called for the produce to be U. S. No. 1 grade on arrival. During the informal stages of this proceeding respondent submitted copies of ten handwritten messages (included as exhibits 5-C, 5-G, 5-H, 5-K, 5-O, 5-S, 5-Y, 5-AA, 5-FF, and 5-II to the report of investigation) which Glen Thomason asserts were faxed to complainant at various times between December 18, 1992, and March 23, 1993. Complainant's C. J. Prettyman, Jr. asserted during the informal stages of the proceeding, in a letter to Prettyman's lawyer which is included as exhibit 8-A to the report of investigation, that he had no record of receiving these faxes, and enclosed two other faxes from Thomason which he admitted receiving (exhibits 8-B and 8-C to the report of investigation). Thomason later asserted in sworn statements that the faxes had been sent, and these assertions were never rebutted in any sworn statement by Prettyman. Since the only denial of receipt is contained in the unverified letter from Prettyman to his attorney we conclude that the messages were sent by respondent and received by complainant. Many of the faxed messages contain objections to the failure of the produce, especially the cucumbers, to grade U.S. No. 1. Thomason urged in an early letter to this Department that these communications indicate that the contract between the parties called for the produce to be U. S. No. 1.:

> . . . If continued fax transmission and phone conversation do not establish a firm contract, and if our explicit faxes of December 29, 1992 and January 29, 1993 do not set forth the guidelines and criteria for all future purchases, then we need to know the alternate way of doing it correctly. . . .

The faxes of December 29, and January 29, read as follows:

> 12 - 29
>
> Uncle C.J.
>
> As per our phone conversation 2-day — lets take a vacation on anymore product from the Mexican side, until we are sure that the grade and quality are what we need!! We don't need to get into another "Mexican Standoff"

like last year!! Remember, grade and condition standards are not the same thing — And, especially on cukes, when you ship us "off-grade" product (like select or plain cukes), that refers to size and shape and appearance, not condition or grade quality. They still must make US# 1 grade standards for grade & condition!!! As soon as we have this clear, and your "Mex" boys can deliver what we need give us a call, and we'll try again —

Glen

1 - 29

Uncle C.J. —

Pat says that she just talked to you when you called and I was "out to lunch"! She says that you miss us, and have "a new roll of paper" in your fax, and are ready to start-up shipping again!! I say that's good, but I want you to be sure that your grower/shippers are really ready to give us what we need quality wise — especially on Cukes — Those guys are notorious for "topping-off" those wonderful strapped pallets, and putting less than #1 grade merchandise down on the inside layers of the pallets. That made it impossible for us to work the product so that you and I can make some money!

With the market and weather conditions being what they are here — we could start bringing mixed loads in from you right away! But, you've gotta make sure that these guys (Mex shippers & growers) understand that we have absolutely got to have product that meets US# 1 grade standards on quality & condition when it gets here, regardless of what size or "grade" you ship— especially on cukes — Whether you ship supers, selects, plains or whatever, they must make a US#1 on grade and condition — Their idea that a select or plain can arrive with any and all grade and/or quality defects and still be ok is not accurate or acceptable!! Our customers need #1 product, and I don't want to go through the expense of repacking, etc. With that in mind, call me, and we'll get started again!

Thanx Glen

C. J. Prettyman, Jr. submitted his only affidavit in this proceeding as complainant's statement in reply. In this affidavit Prettyman asserts that:

All of the shipments were sold FOB Nogales, Arizona, no grade specified.

All of the invoices which were mailed to the respondent made no reference to being US # 1.

However, complainant's invoices were stripped of everything other than quantity, item and price. There is no reference in any of the invoices as to the contract terms, which complainant contends were f.o.b. If this important information was left off the invoices, we should not be surprised that other important information, i.e. that the goods were to be U.S. No. 1, was also left off the invoices. Also, in his affidavit, Prettyman made no reference to the faxes, from which we quoted above, wherein Thomason pleads with Prettyman before the second load was shipped to send only U.S. No. 1 product. In view of this omission, we are unable to accord any credibility to Prettyman's denial of receipt of the faxes in the double hearsay letter which was made a part of the Department's report of investigation.

A question still remains as to whether the parties contemplated that the product would be U.S. No 1 at time of shipment, or at time of arrival. There is one sentence in one of the eleven faxes sent by respondent to complainant that speaks specifically of an expectation that the product would make U.S. No. 1 grade on arrival. This is the statement contained in one of the faxes quoted above that "we have absolutely got to have product that meets US# 1 grade standards on quality & condition when it gets here . . . ." The remainder of the references to grade expectation in the faxes are consistent with either view. Complainant's C. J. Prettyman, Jr. stated in his sworn statement that the contracts called for f.o.b. sales, which would be inconsistent with a requirement that the product meet U.S. No. 1 grade requirements on arrival. Respondent's Thomason stated in the initial response that ". . . C. J. Prettyman quoted all of this merchandise on a delivered basis, (F. O. B. plus freight) . . . ." Moreover, Thomason repeatedly referred to the contracts between the parties as "f.o.b. delivered." This is not a term that is defined in the Regulations, and is also not a term current in the trade. Respondent nowhere attempts to define this term, but the term in the Regulations which approximates "f.o.b. delivered" most closely is "f.o.b. sale at delivered price." Certainly, respondent contended throughout this proceeding that the cost of freight was to be borne by complainant, and protests the fact that the loads often arrived freight collect. This contention is consistent with the "delivered" part of the alleged "f.o.b. delivered" term. The only way we can ascribe any meaning to the "f.o.b." portion of the term is to infer that the U.S. No. 1 grade requirement applied at shipping point, and that Thomason's reference in one of the faxes to an expectation that the product should grade U.S. No. 1 on arrival was meant to

refer to the need that the product make good delivery for product sold as U.S. No. 1. We conclude that the contract terms intended by the parties were the equivalent of "f.o.b. sale at delivered price," or, where the price was "open," were intended to mean that the contract was f.o.b., but that complainant would bear the cost of freight. We also conclude that the contract called for the sale of U.S. No. 1 product.

Under this term product is expected to be f.o.b. as to grade, quality, and condition, and delivered as to price. The Regulations, in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined, in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations, which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery," are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale as to grade,

quality and condition rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.

Load 1

We now turn to a consideration of each transaction individually. As to load 1, covered by invoice 4509 (Findings of Fact 3 and 4), complainant claims that a balance is due of $896.10. Respondent in its answer asserts that the only item in dispute as to this load is the 72 cartons of cucumbers which were invoiced at $666.00. In its answering statement respondent asserts:

> During the transmission that I sent him, both via the call on December 17, 1992, and the fax on December 18, 1992, Mr. Prettyman was in acknowledgement of the fact that the product was not up to our standards, did not grade #1, had problems and that we would, indeed, be working them on open account because of the breach of contract caused by either him or his grower/shipper in not meeting the grade standards upon arrival.

Thus respondent seems to be claiming that there was an agreement between the parties that the produce could be handled on an open basis. However, the fax of December 18, 1992, says nothing about the produce being handled on an open basis, and we conclude that there was no new contract as to the cucumbers. There was, however, at least an allowance as to the butternut squash. Complainant states that it agreed to a deduction of $3,129.80. Apparently, respondent took more than this amount, and this accounts for the difference between the $896.10 claimed due by complainant and the $666.00 price for the 72 cartons of cukes. Respondent has not given any reason for withholding the additional $230.10, and since no such reason is apparent from the record, we conclude that this amount is due from respondent to complainant.

Respondent asserts that the $666.00 is not due because the Federal inspection made on December 18, 1992, showed the cucumbers to have shriveled ends, bruising and yellowing, and 20 percent average condition problems. The inspection certificate in question shows that four lots of cucumbers were inspected: one 137 carton lot of "Santa Anita" brand large size from Mexico; one 180 carton lot of "Santa Anita" brand "select's" from Mexico; one 49 carton lot of "Diamond" brand large size from Arizona; and one 147 carton lot of "Diamond" brand medium size from Arizona. In an internal document attached as an unnumbered exhibit to respondent's answer, respondent clearly refers to the

lot of 72 cucumbers as "selects." However, the only lot of "selects" shown on the inspection was a lot of 180. Even assuming that the lot of 180 cucumbers contained the lot of 72 which is in issue (an assumption for which there is no evidence), the mixing in of 108 cartons of cucumbers from some unknown source with complainant's cucumbers obviously makes the inspection worthless. Moreover, complainant asserted several times that the lot of 72 cucumbers shipped were "Carmelina" brand, and submitted a bill of lading in support of this assertion. Respondent, however, made no reply to this assertion. We conclude that respondent has failed to meet its burden of proving by a preponderance of the evidence that there was a breach of contract as to this load by complainant. The entire balance of $896.10 is due from respondent to complainant as to invoice 4509.

Load 2

As to load 2, covered by invoice 4611 (Findings of Fact 5 and 6), complainant claims that a balance is due of $1,648.97. Respondent agrees that this is the amount in dispute, and asserts that such amount was correctly deducted from complainant's invoice because the 336 cartons of eggplants arrived in poor condition, and complainant agreed "that it was okay to work it on an open consignment basis." Since the term "open" refers to a sale as to which no price is agreed, and a "consignment" is not a sale, but rather an agreement by the consignee to become the consignor's agent to sell goods that remain the shipper's property until sold by the consignee, there can be no such thing as an "open consignment." In view of the way in which respondent dealt with the eggplant we conclude that respondent meant a simple consignment. Complainant did not address this assertion by respondent, and we therefore conclude that the parties agreed to the eggplant being handled by respondent for complainant on a consignment basis. Complainant did, however, complain about the way in which the eggplant was handled. The United States Standards for Eggplant[2] allow a tolerance of 10 percent for eggplant that does not meet the standards of the grade, including 1 percent for decay. Under the suitable shipping condition rule we would allow an expansion of this tolerance, on a coast to coast shipment, to approximately 15 percent including approximately 3 percent for decay. Accordingly, the federal inspection indicates that the eggplant made good delivery for eggplant sold as U.S. No. 1. Although we allow wide latitude to

[2]7 C.F.R. § 51.2190 *et. seq.*

consignees acting in their agency capacity,[3] there can be no justification for the dumping of over half of a lot which makes good delivery. We will assign a value to this lot based on the average value of the cartons which were sold, or $9.38, or total constructed gross proceeds of $3,151.68. From this should be deducted the cost of freight, or $1.70, cooler expense, or $.35 per carton, and profit and handling in the amount of 20 percent, or $1.88 per carton. In view of the conversion of this lot to a consignment the cost of the federal inspection, $174.00, or $.52 per carton, should also be allowed. After the deduction of these amounts the value of the eggplants was $4.93 per carton, or $1,656.48. Complainant's recovery will be limited to the balance requested in the complaint, or $1,648.97.

Load 3

The 3rd load, covered by invoice 4629 (Findings of Fact 7 & 8), was shipped on February 22, 1993, and subjected to prompt federal inspection while still on the truck, on February 26, 1993. The results of that inspection clearly show a breach of the warranty of suitable shipping condition as to each lot of produce. Respondent rendered an accounting relative to this load, but the accounting cannot be given our full credence for the following reasons. Respondent's answering statement, contains the sworn affidavit of Glenn C. Thomason, respondent's president. On page 14 of the 42 page affidavit Thomason makes the following statement in reference to the accounting for the third load:

> . . . I will refer to our master jacket concerning this load, the front of which states that C.J. Prettyman apparently tried to change the freight to collect while the truck was in route and I again told him not to do this and you will see my instructions to Karin Churchill, who was American Grower's bookkeeper at the time, that we were using the Jack Bunting repack crew so that we could get through these as soon as possible due to the poor quality on the cukes and the heavy, soft and decay on the red pepper. I advised her to see Jack's worksheets as soon as available for the

[3] *See Tex-Sun Produce v. International Produce Distributors, Inc.*, 48 Agric. Dec. 1111 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); and *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956).

> pack outs for actual costs. But, I told Karin Churchill in this note that I would give her a separate sheet pay from (sic) as Uncle C.J. Prettyman asked for us to figure the returns to show that the Tri Car label had the highest return because apparently the son of the gentleman at the Tri Car label packing house was working for C.J. Prettyman at the time.

The actual handwritten note on the face of the "jacket" reads in relevant part as follows:

> Karen — We are using Jack Bunting Repack Crew (mexicals[?] only) so we can get through these Asap Due to poor quality on cukes & Heavy Soft and decay on Red [illegible] Please see Jack's Work sheets as soon as Available for Packouts for Actual costs — But, I will give you separate sheets to pay from, as uncle C. J. asked for us to figure Returns to show "tricar" label with Highest Return. I think the guy's son works for C.J. . . .

At the top of a typed accounting dated 3/10/93, apparently received from one of respondent's customers (exhibit 3-40 to the answering statement), is the following hand written note:

> Karin — Charge Back Pepper as shown in schedule belowe (sic) — You'll notice the lions share on the Red Goes to Uncle C.J. — We'll try to make him look good! also charge 1.35 freight to Franks 1 1/9 return on all 249 Cases sent to Finer — as uncle C.J. wants the Tricar Return to look Better!

The record shows clearly that "Franks" refers to what is designated on the inspection as the "Signature Brand" peppers, and it is evident that such peppers originated from one grower, and the "Tricar" brand from another. All of this appears to us to be a clear admission of a willingness to render a fraudulent accounting, and on this basis we will not give full credence to any of respondent's accountings herein, but will utilize sales figures from such accountings to the minimal extent necessary to avoid detriment to complainant when appropriate market reports are not available.

Other problems with respondent's accountings should be noted. Often respondent mingled produce with identically described produce from other shippers. It is therefore often impossible to see how, or on what basis, respondent allocated returns in its accountings. Moreover, much of the product was shipped to distant markets and incurred significant additional freight charges.

Much of the product thus shipped was distressed merchandise that respondent had caused to be reworked. As an example of the many perplexing aspects of respondent's accountings, in respondent's answering statement, respondent states as to load 3 that ". . . Complainant changed the freight arrangement from none to a collect basis while the truck was in route." Respondent then refers to:

> . . . a check for the freight number 011979 in the amount of $1,778.00 (note that the freight checks are all handwritten and not machine written because they had to be done dock side, as the Respondent was not anticipating being charged C.O.D. when the truck arrived).

This check, made out to West Florida Truck Brokers, and dated 2/27/93, is attached as an exhibit to the answering statement. However, on its accounting, respondent charges complainant with freight totaling $2,657.00. This total does not include freight incurred in shipping the produce to distant customers. Such additional freight was also charged to complainant as follows:

To Finer in Philadelphia:		
101 Sel Cukes	$2.45 per ctn.	$247.45
131 Sel (plane) Cukes	2.45 " "	294.75
40 Lg Red Pep (Tricar)	1.45 " "	58.00
87 " " " "	1.45 " "	126.15
60 Med Red Pep (Franks)	1.45 " "	87.00
62 Xlg Red Pep (Tricar)	1.45 " "	89.90
To Central in Jacksonville:		
100 Sel Cukes	$ .75 per ctn.	$ 75.00
		$978.25

We were unable to determine the reason for the charge back to complainant of $2,657.00 in freight, when the freight paid by respondent was apparently only $1,778.00.

In situations such as this, where there is no useable accounting, we have often used the percentage of condition defects shown by a timely neutral inspection as

a basis for computing damages.[4] In employing this method we are seeking to approximate the damages encountered by a party who has failed to prove damages in the normal manner due to a failure by such party to account properly. Therefore, we exercise caution so as to not risk harm to the party who was entitled to the absent or inadequate accounting.[5] In the past we have used only condition defects as a basis for computing damages because in most instances we were dealing with product which was sold without reference as to grade,[6] or were dealing with a situation in which the inspection was only for condition. In this case we have inspections that disclose both quality and condition defects, and we have determined that the contracts were for U.S. No. 1 product. If a receiver of goods, required by contract to be a U.S. grade, were to recondition the goods because of a breach, such receiver would discard not only product with condition defects but also product with any quality defects severe enough to affect the grade. In addition the receiver, if a proper accounting were rendered, would be allowed the expense incurred due to the reconditioning process. In our opinion, where the product has been sold with a U.S. grade description, we can in most cases allow both condition and quality defects to enter into the computation of damages without any risk of awarding excessive damages. If in any future case we should have reason to fear that damages may be too high as a result of following this policy we will adjust the policy accordingly. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.[7] The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by Market News Service Reports. The

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[4]*See South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

[5]*See Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

[6]Product sold without reference to grade can have any amount of quality defects so long as such defects are not so extensive as to cause the goods to be unmerchantable.

[7]*See* UCC § 2-714(2).

second method of ascertaining the value the goods would have had if they had been as warranted is to use the delivered price of the commodity, that is the f.o.b. price plus freight.[8] For the 140 cartons of 15 pound carton extra large red peppers [lot "C" on the federal inspection certificate] there are no appropriate market reports, and we will therefore use the delivered price contained on complainant's invoice, or $1,995.00, as the value these peppers would have had if they had been as warranted. In the absence of a useable accounting we can arrive at a value for the goods accepted by multiplying the combined quality and condition defects shown on the inspection report by the value of the peppers if they had been as warranted, and deducting the product from the $1,995.00 figure. The combined defects amounted to 29 percent, and this multiplied by $1,995.00 equals $578.55. This amount deducted from $1,995.00 yields $1,416.45, which we determine to be the value of the goods accepted. The value of the goods accepted deducted from the value of the goods had they been as warranted yields respondent's damages, which amount to $578.55.[9] Since respondent accepted the peppers it became liable for the full purchase price thereof, or $1,995.00. Respondent's damages of $578.55 deducted from this amount yields a balance of $1,416.45. Using a 25 pound figure for the 566 cartons of 1 and 1/9 bushel peppers, 15 pounds for the 140 15 pound peppers, and 55 pounds for the 422 cartons of cucumbers, the total weight of the load was 39,460 pounds. At a total freight cost of $1,778.00 the load cost $.045058286 per pound to transport to respondent's place of business in Florida. The freight applicable to the 140 cartons of peppers was therefore $94.62. This amount deducted from the balance of $1,416.45 leaves $1,321.83 as the amount still owing from respondent to complainant on this lot of peppers.

There are no applicable market quotations for the 196 cartons [a part, along with the 98 cartons of medium red bell peppers, of lot "D" on the federal inspection certificate] of extra large red bell peppers. Accordingly we will use the delivered price of $3,969.00 as the value of these peppers if they had met contract requirements, and allow respondent as damages the combined quality and condition defects shown on the inspection report. Such defects amount to 23 percent, and accordingly respondent's damages as to this lot amount to

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[8] *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

[9] This figure is, of course, the same as that derived from multiplying the percentage of defects by the value the goods would have had if they had been as warranted, and when the percentage of defects method of computing damages is used such will always be the case. We have set forth all the steps so as to clarify the methodology, but will refrain from doing so in subsequent computations.

$912.87. Since respondent accepted the load it is liable for the purchase price of $3,969.00, less its damages of $912.87, and freight in the amount of $220.79, or $2,835.34.

As to the 98 cartons of medium red bell peppers which were also a part of federal inspection lot "D" the Federal-State Market News Fruit and Vegetable Reports for Miami on March 3 through 5, 1993, show medium size red bell peppers from Mexico selling for $20.00 to $22.00 per 1 and 1/9 bushel carton. Applying the average of these prices the 98 cartons of peppers had a value, if they had been as warranted, of $2,058.00. Using the 23 percent defects applicable to this lot respondent's damages amount to $473.34. The freight which should be allocated to this lot is $110.39. These amounts deducted from the purchase price of $1,788.50, leaves $1,204.77 as the amount still owing from respondent to complainant on these peppers.

The 165 cartons of extra large red bell peppers were a part, along with the 107 cartons of large red bell peppers, of federal inspection lot "A." There are no applicable market reports for the 165 cartons. Accordingly we will use the delivered price of $2,021.00 as the value of these peppers if they had met contract requirements, and allow respondent as damages the combined quality and condition defects shown on the inspection report. Such defects amount to 47 percent, and accordingly respondent's damages as to this lot amount to $949.99. Since respondent accepted the load it is liable for the purchase price of these peppers, or $2,021.25, less its damages of $949.99, and freight in the amount of $185.87, or $885.39.

As to the 107 cartons of large red bell peppers which were also a part of federal inspection lot "A" the Federal-State Market News Fruit and Vegetable Reports for Miami on March 4 and 5, 1993, show large size red bell peppers from Mexico selling for prices of $26.00 to $28.00 per 1 and 1/9 bushel carton. Applying the average of these prices the 107 cartons of peppers had a value, if they had been as warranted, of $2,889.00. Using the 47 percent defects applicable to this lot respondent's damages amount to $1,357.83. Respondent is also entitled to be credited for freight on this lot in the amount of $120.53. Since respondent accepted the load, it became liable for the $1,310.75 purchase price. Respondent's damages exceed the purchase price for this lot by $167.61.

The cucumbers were shipped open, and in the absence of market prices for similar cucumbers, we are forced to use respondent's highest reported resale price for a portion of the cucumbers, or $6.25 per carton, as the value of the goods if they had been as warranted. At this price the 422 cartons of cucumbers would have had a value, if they had been as warranted, of $2,637.50. Against this amount we will allow the 21 percent defects, or $553.88. In addition

respondent is entitled to $1,045.80 in freight. Under "open" sales we also allow for profit and handling of 20 percent, which in this case would amount to $527.50. The total amount due on the cucumbers is therefore $510.32. A deduction for the load of the $134.00 inspection fee should also be allowed. The total of the amounts which we have found to be still due as to load 3 is $6,456.04.

Load 4

The 4th load is covered by Findings of Fact 9, 10, and 11. Complainant issued three different bills or invoices as to this load. They each bear the same date, so it is impossible to tell which was issued first. One, which appears to be a bill of lading, has no price for the 840 cartons of cucumbers. A similar document contains the additional statement that the cucumbers are sold on the basis: "Joint Shipment, Price After Sale," and the invoice (submitted as an exhibit to the complaint) states a price of "$6.50" and adds: "F.O.B. No grade." Complainant gave no explanation for the differences in these documents, and we therefore except respondent's statement that the original price was "open," that this was later changed to "Joint Shipment, Price After Sale," and that this change was ratified by respondent.

The federal inspection shows that the cucumbers did not make good delivery for cucumbers sold as U.S. No. 1, but the defects exceeded what we would allow for good delivery by only 2 percentage points. Under the price after sale terms of the joint account agreement the parties should have conferred and agreed on a price following completion of respondent's sales. This was not done, and accordingly we must assign a reasonable price to the cucumbers.[10] There are no applicable market reports, and for the reasons stated earlier we will not make unqualified use of respondent's accounting. Respondent claims to have reworked the cucumbers and resold them for prices ranging from 17.5 cents per carton to

[10]*See Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865, at 877 (1991) where we said: "The term 'price after sale' usually contemplates the parties agreeing to a price following the prompt resale of the produce. *See also Bonanza Farms, Inc. v. Tom Lange Co., Inc.*, 51 Agric. Dec. 839, at 846 (1991); and *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990). In *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980) we said "[t]he term is a subcategory of "Open Price." "Open Price" assumes the parties will negotiate a price after the goods are sold. If they do not the reasonable value of the goods should be imputed. PACA Docket No. 4456, 5 Agric. Dec. 494 (1946). *See also J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

$16.00 per carton. We will discount the extremes of these prices and use the figure of $5.83 which is an average of the middle range of prices. Using this amount the value the cucumbers would have had if they had been as warranted was $4,896.98. Against this amount we will allow an offset of freight in the amount of $2,024.00, and the cost of one of the federal inspections, or $71.00, leaving a net amount of $2,801.98.[11] Under the joint account terms complainant is entitled to $1,400.99 on this load, less the amount of $277.50 already paid, or $1,123.49.

Load 5

The 5th load is covered by Findings of Fact 12 and 13. Complainant's invoice for this load totals $9,752.50. Respondent, by complainant's admission, has paid $6,578.02 of this amount, which leaves a balance in dispute of $3,174.80. Respondent asserts that as a consequence of the problems on this load complainant agreed to the entire load being handled on an open basis. Respondent claims that complainant has admitted this, and cites as evidence exhibit 17 attached to the complaint. However, there is no exhibit 17 to the complaint. There is an exhibit 17 to complainant's reply to respondent's counterclaim, but it is an invoice sent by respondent to its customer Al Finer in Philadelphia covering a shipment made March 28, 1993, of 220 cucumbers, 94 select peppers and 61 red gourmet peppers. The invoice shows that the sale to Finer was open, but has no apparent connection to the subject load. We conclude that there was no agreement for load five to be handled on an open basis.

Respondent paid in full for the items shipped in load five except for the 126 cartons of super select cucumbers, and the 216 cartons of fancy zucchini squash. As to these two items respondent's accounting records deficits of $442.64 as to the cucumbers and $184.84 as to the zucchini. Complainant claims that respondent failed to account accurately as to these items. For the reasons stated earlier we will not give full credence to respondent's accounting. The highest sale price shown for the super select cucumbers on respondent's accounting was $12.50 per carton. We will take this as reflecting the value of these cucumbers if they had

[11]The freight in the amount of $2,024.00 is the amount of the check for freight attached by respondent as an exhibit to the answer. No explanation is given as to why respondent charged $2,200.00 for freight on its accounting. Only the cost of the first inspection is allowed since the second inspection applied to only half of the load, and was therefore worthless as an indication of whether there was a breach.

been as warranted. The 126 cartons thus had a value, if they had been as warranted, of $1,575.00. The federal inspection showed a total of 25 percent defects present in these cucumbers, and we conclude that respondent's damages as to the cucumbers amount to $393.75. In addition respondent should be allowed freight. Assuming the spaghetti, acorn, and butternut squash weighed 50 pounds per carton, the cucumbers 55 pounds per carton, and the zucchini 21 pounds per carton, the total weight of the load was 42,246 pounds. The freight cost was $2,024, or $.047909861 per pound. The 126 cartons of cucumbers weighed 6,930 pounds, and the freight allocable to such cucumbers amounts therefore to $322.02. Respondent's damages and freight deducted from the invoice cost of $1,197.00 leaves $481.23 as the correct amount due on the cucumbers.

The inspection of the fancy zucchini shows 126 cartons inspected, with the count not having been made by the inspector. It appears likely that this number was an inversion of the actual number in the lot — 216 cartons. Accordingly we will use the total of 41 percent defects shown on the inspection as applicable to this load. There are no applicable market reports, and respondent's accounting shows that the lot was not reworked but was sold "as is" for $1.4941 per carton. We will therefore use the delivered price of $6.25 per carton, or $1,350.00, as the value this lot of produce would have had if it had been as warranted. Respondent's damages are therefore $553.50. In addition respondent should be allowed freight. The 216 cartons of zucchini weighed 4,536 pounds, which at $.047909861 per pound, yields freight costs of $217.32. These amounts deducted from the invoice cost of $1,350.00, leaves $579.18. The amounts due on the cucumbers and zucchini total 1,060.41. Respondent should be allowed the cost of the federal inspection, or $199.00, as a deduction from this amount. The total remaining due from respondent to complainant on load 5 is therefore $861.41.

Load 6

Load 6 was covered by Findings of Fact 14 and 15. Respondent contended that this load was shipped open, on an "f.o.b. delivered" basis, and attached as an exhibit to its answer a copy of a handwritten bill dated March 13, 1993, that shows the product listed without a price. However, this bill appears to us to be a bill of lading. At the bottom of the bill are the words:

THE ABOVE MERCHANDISE RECEIVED IN GOOD ORDER AND THE OWNER OF THE TRUCK GUARANTEES TO DELIVER LOAD FREE

FROM DAMAGE BY HEAT FROST OR RAIN.

Beneath the above quoted words is a place for the name of the "TRUCK OWNER," "BROKER," "LICENSE NO.," "AMOUNT TO COLLECT," and a place designated "DRIVER SIGN." Respondent admits receiving the invoice showing the prices listed in the findings of fact, but there is no indication that a prompt written objection was made to such invoice. We conclude that the produce on load 6 was sold at the prices listed on complainant's invoice as reflected by Finding of Fact 14.

The federal inspection shows that neither of the lots of peppers nor the lot of cucumbers made good delivery. There are no applicable market reports for the peppers or cucumbers. Respondent's accounting shows that the highest price received for the sweet peppers was $12.00, and the highest price received for the cucumbers was $13.00. We will take these amounts as reflecting the value these items would have had if they had been as warranted. Accordingly, the 711 cartons of large sweet peppers would have had a value of $8,532.00. Considering the 22 percent defects respondent's damages for this lot amount to $1,877.04. The 420 cartons of large sweet peppers would have had a value if they had been as warranted of $5,040.00. Respondent's damages, considering the 21 percent defects applicable to this lot, amount to $1,058.40. The 84 cartons of cucumbers would have had a value if they had been as warranted of $1,092.00. The 20 percent defects applicable to this lot results in damages of $218.40. In addition to its damages respondent should be allowed the freight on this load, or $2,000.00. Respondent's damages and freight should be deducted from the $9,228.75 invoice price. There remains due from respondent to complainant on load 6 the sum of $4,074.91.

Load 7

Load 7 was covered by Findings of Fact 16 and 17. Respondent contends that this load was shipped open, on an "f.o.b. delivered" basis, and attached as an exhibit to its answer a copy of a handwritten bill dated March 17, 1993, that shows the product listed without a price. However, the bill is like that referred to in our discussion above relative to load 6. Moreover, respondent's answer states that:

> The amount invoiced on this load was $12,835.50 and the amount paid by the Respondent was $11,640.25, and the amount in controversy is $1,195.25.

Respondent's Glen C. Thomason, after stating in his affidavit that the load was open, states that a $2.00 per box allowance was granted by complainant on the zucchini. We conclude that this load was sold at the prices listed in finding 16.

Respondent has paid complainant a total of $11,640.25 on this load, and asserts that the $1,195.25 balance sought by complainant is attributable only to the large cucumbers. Complainant made no reply to this assertion and we conclude that such is the case.

The inspection covers only 41 cartons out of the 72 shipped, and cannot be taken as representative of the entire 72 carton lot.[12] The uninspected part of the load will be assumed to have no defects and will be averaged with the inspected portion. The 72 cartons will therefore be assumed to have contained a total of 17 percent defects. This exceeds what can be allowed under the terms of the contract.[13] Respondent states that the 72 cartons were repacked into 25 cartons of 24's, 41 cartons of selects, and that 19 cartons were dumped. There are no applicable market reports. The average sale price reported for the 41 select cucumbers was 8.02.[14] The 25 carton lot of 24's were reported sold at $7.75. If we assign the $8.02 price to the 19 cartons reported dumped, we arrive at $674.95 as the value the large cucumbers would have had if they had been as warranted. Applying the 17 percent defects figure to this amount yields $114.74 as respondent's damages. Respondent's freight cost on this load was $2,024.00. Assuming the zucchini weighed 21 pounds per carton and the cucumbers weighed 55 pounds per carton, the load weighed 39,090. The freight cost per pound was thus $.051777948. The freight applicable to the 72 cartons of cucumbers was therefore $205.04. Respondent's damages and freight deducted from the $1,026.00 invoice price for the large cucumbers, results in a net amount still due to complainant of $706.22.

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[12]*See Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce,* 50 Agric. Dec. 1001 (1991); *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.,* 49 Agric. Dec. 620 (1990); *Tom Bengard Ranch v. Tomatoes, Inc.,* 41 Agric. Dec. 1637 (1982); *Mutual Vegetable Sales v. Select Distributors, Inc.,* 38 Agric. Dec. 1359 (1979); and *Mario Saikhon v. Russell Ward Co., Inc.,* 34 Agric. Dec. 1940 (1975).

[13]The lot, after averaging the uninspected portion with the inspected portion, does not exceed contract requirements as to either quality or condition, but only as to size. *See* 7 C.F.R. § 51.2227(a)(2).

[14]The average sale price is used because the 41 cartons were sold as a part of a 220 carton lot of selects, and the highest and lowest reported prices applied to only a few cartons.

Load 8

Load 8 was covered by Findings of Fact 18 and 19. Since respondent accepted the produce on load 8 it had the burden of proving by a preponderance of the evidence that complainant breached the contract of sale. Respondent had only the cucumbers from this load inspected, and these were inspected, not against the U.S. No. 1 grade, but against the U.S. No. 2 grade standards. Respondent makes much of the fact that the cucumbers did not "even make U.S. No. 2." Apparently, respondent's thinking was that it would thus be shown how very bad the cucumbers were. This is unfortunate, because if the cucumbers had been inspected against the U.S. No. 1 standards we might have been able to find a breach of contract. However, we have no way of knowing on the basis of the inspection against U.S. No. 2 standards whether there was in fact a breach. It is clear that the inspection of the cucumbers submitted by respondent, which was on the basis of the U.S. No. 2 grade standards, does not show a breach of the contract between the parties. This is true for the following reasons. The United States Standards for Cucumbers[15] allow a tolerance for defects of "10 percent for cucumbers in any lot which fail to meet the requirements of the grade, including therein not more than 1 percent for decay,"[16] and in a separate paragraph[17] an additional 10 percent tolerance is allowed for off-size cucumbers. Although the 3 percent under 5 inch length was listed on the federal inspection certificate as a defect, this was for information purposes only, and off-size cucumbers are not scored as a defect against the grade, but rather against the separate size requirement of the grade. This means that in the expansion of quality and condition tolerances which we allow under the suitable shipping condition rule off-size product is not considered. If there were sufficient off-size cucumbers to exceed the tolerance for the grade the cucumbers would obviously not have graded at shipping point and there would be a material breach of contract, just as there would be a material breach for quality defects in excess of the published grade tolerance, regardless of the expansion of defects allowed

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[15] 7 C.F.R. § 51.2220 *et seq.*

[16] 7 C.F.R. § 51.2227(a)(1).

[17] 7 C.F.R. § 51.2227(a)(2).

under the suitable shipping condition rule.[18] In the case of the cucumbers the federal inspection showed 7 percent total quality defects, which does not exceed the tolerance allowed for U.S. No. 1, and a total of 6 percent condition defects (including 1 percent decay), which, coupled with the quality defects, does exceed the tolerance for U.S. No. 1. However, under the suitable shipping condition rule we would allow an expansion to a total of 15 percent defects, including 3 percent for decay. We conclude that respondent has failed to meet its burden of proving by a preponderance of the evidence that complainant breached the contract as to load 8. Since respondent accepted the produce on load 8 it became liable to complainant for the full purchase price thereof, less a price allowance of $1.50 per carton because of market conditions allowed by complainant on the 468 cartons of squash, or a net amount of $8,757.00.

The total of the amounts we have found due from respondent to complainant on the eight loads is $24,524.14. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[19] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[20] We have determined that a reasonable rate is 10 percent per annum.

Respondent's counterclaim was based upon amounts claimed due as to the eight transactions which were the subject of the complaint, and the claims have been disposed of in our treatment of such transactions herein. The counterclaim should be dismissed.

Order

Within 30 days from the date of this order respondent shall pay to

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[18]See discussion of the suitable shipping condition rule at pages 20-21 *supra*.

[19]*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[20]*See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

complainant, as reparation, $24,524.14, with interest thereon at the rate of 10% per annum from March 1, 1993, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

CONTINENTAL GROWERS v. FISHER PROCUREMENT, INC., and ALBERT FISHER SALES/NOGALES, INC.
PACA Docket No. R-94-0195.
Decision and Order filed November 20, 1996.

Interstate or Foreign Commerce - Contract concerning the movement of commodity in bond.

Where commodities, which were the subject of a contract between parties in the same or separate states of the United States, never entered the commerce of the United States because the commodities moved through the United States from one foreign country to another foreign country, in bond, it was held that there was no interstate or foreign commerce within the meaning of the Act.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent Fisher Procurement, Inc., Pro se.
Respondent Albert Fisher Sales Nogales, Inc., Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $26,300.83 in connection with three container loads of mangoes shipped from one foreign country to another, in bond, through the United States.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondents which filed answers thereto denying liability to complainant.

The amount claimed in the formal complaint exceeds $15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn

statements. Complainant filed an opening statement, and respondent Albert Fisher Sales/Nogales, Inc., filed an answering statement. Complainant filed a statement in reply. None of the parties filed a brief.

Findings of Fact

1. Complainant, Continental Growers, is a corporation whose address is 766 Market Ct., Los Angeles, California.

2. Respondent, Fisher Procurement, Inc. (hereafter "Procurement"), is a corporation whose address is 201 Monterey-Salinas Hwy., Suite G., Salinas, California. At the time of the transactions involved herein, this respondent was licensed under the Act.

3. Respondent, Albert Fisher Sales/Nogales, Inc. (hereafter "Albert"), is a corporation whose address is P. O. Box 4206, Rio Rico, Arizona. At the time of the transactions involved herein, this respondent was licensed under the Act.

4. On or about June 18, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,328 cartons, mixed sizes, at $3.50 per carton f.o.b. The load of mangoes travelled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto a Sealand container, was transported in bond through the port of Houston, Texas, to a destination in the Netherlands.

5. On or about June 18, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,328 cartons, mixed sizes, at $3.35 per carton f.o.b. The load of mangoes travelled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto a Sealand container, was transported in bond through the port of Houston, Texas, to a destination in the United Kingdom.

6. On or about June 21, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,456 cartons, mixed sizes, at $2.65 per carton f.o.b. The load of mangoes traveled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto an H & R Transport truck, was transported in bond through the port of Sweet Grass, Montana, to a destination in Canada.

7. The formal complaint was filed on January 28, 1994, which was within nine months after the causes of action alleged herein accrued.

Conclusions

In this case we are confronted with three shipments of perishable agricultural commodities. Two of these shipments moved from Mexico to Europe, and one

moved from Mexico to Canada. Although in each case the commodities moved by truck through the United States, in each case the commodities moved through the United States in bond. In regard to transportation of goods through a country in bond an early United States Attorney General's Opinion found that the entering of merchandise for immediate exportation without any intent that it enter into commerce is not an importation.[1] Accordingly, we must conclude that the mangoes which were the subject of the three transactions did not enter the commerce of the United States.

This conclusion, however, does not necessarily dispose of the question whether we have jurisdiction over the subject transactions. The jurisdiction of the Secretary is tied by statute to interstate or foreign commerce. Section 2 of the Act provides in relevant part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail without reasonable cause, to perform any specification or duty express or implied, arising out of any undertaking in connection with any such transaction . . .[2] (underlining supplied)

The Act contains a very specific definition of when a "transaction" is to be considered "in interstate or foreign commerce."

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of

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[1] 27 Op. Att'y Gen. 440 (1909).

[2] 7 U.S.C. § 499b(4).

> that current of commerce usual in the trade in that commodity whereby such commodity and or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description all cases where sale is either for shipment to another State of for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.[3] (underlining supplied)

Thus an interstate or foreign commerce "transaction" is not viewed as existing apart from a commodity that is a part of the current of commerce, or expected to be part of such current. "Interstate or foreign commerce" is defined as meaning:

> . . . commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.[4]

The definition of "interstate or foreign commerce," quoted above from section 1(b)(3) of the Act, encompasses basically "commerce between any State . . . and any place outside thereof; or between points within the same State . . . but through any points outside thereof; . . ." It is clear that no foreign commerce is involved in this case in the sense of the term as used in the Act. The commodities moved from Mexico to Canada, and to Europe. Legally the commodities at no time entered the commerce of the United States. Therefore, there was no "commerce between any State . . . and any place outside thereof" in the sense of a foreign place outside of any State. The question remains, however, whether there was interstate commerce.

In this case the contract was made between American nationals, who at the time of contracting were within the United States. According to complainant the initial business meeting was between representatives of complainant, respondent

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[3] 7 U.S.C. §499a(b)(8).

[4] 7 U.S.C. § 499a(3).

Albert, and "Buy Fresh Inc." at an office in Nogales, Arizona. Apparently the shipments were later scheduled by phone between California and Arizona. Complainant states that it was told by representatives of respondent Albert to invoice respondent Procurement. Complainant now wants us to decide whether the contract was between complainant, a company located in California, and respondent Procurement, also located in California, or between complainant and respondent Albert, located in Arizona.

There is no question that under the current concept of the constitutional meaning of interstate commerce Congress would have power to regulate the parties' contracting, whether viewed as between the two parties in California, or as between complainant in California and respondent Albert in Arizona. The question is whether Congress has sought to reach the contracting undertaken by these parties, divorced as it was from any movement, or contemplated movement, in interstate or foreign commerce, of a perishable agricultural commodity.[5] We think that in view of the evident close tie that exists in the Act between the concept of commerce, and the movement, or contemplated movement, of commodities in, or to, or from one of the several states, the answer must be in the negative. The situation is legally no different from the hypothetical sale by a firm in California to a buyer in New York, of perishables, which remain at all times in a warehouse in Germany, or which transfer, due to the sale, from a warehouse in Germany to one in France. In this hypothetical there is an interstate sale and a foreign sale, but there is no interstate or foreign commerce as defined by the Act, because there is no movement, or contemplated movement, of a perishable commodity, into, or out of, one of the United States, and there is no current of commerce in such commodity into, or out of, one of the United States. We conclude that we lack jurisdiction over the subject matter of the complaint. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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[5]In *Tulelake Potato Distributors, Inc. v. John M. Giustino*, 52 Agric. Dec. 752 (1993), the commodity moved entirely intrastate, but was found to be a part of the current of interstate commerce. This interstate current may contain transactions in which the perishable commodities physically move only within one state, but are, on that account alone, no less a part of the general interstate movement usual in the commodities. See *The Produce Place v. United States Department of Agriculture*, 90 F.3d ____ (D.C. Cir. 1996).

JOHN F. AREKLET v. STOKELY USA, INC.
PACA Docket No. R-95-0177.
Decision and Order filed November 26, 1996.

Jurisdiction - Definition of dealer.
Jurisdiction - Definition of transaction.

Complainant, a farmer with acreage in Michigan, contracted with respondent, a canner of vegetables in Michigan, to produce green beans on 37 acres of land. The contract provided that title to the seed, and the beans produced from the seed, would at all times remain in respondent. Respondent harvested the beans as required by the contract, and then rejected them at the cannery due to the alleged presence of worms, but did not notify complainant of the rejection until after the beans were dumped. Complainant alleged that the rejection was improper, and sought to recover the value set by the contract for the beans. It was held that the transfer of the beans from complainant to respondent under the contract could fit within the meaning of the term "transaction" used in section 2 of the Act, that respondent was a dealer under section 1(b)(6) of the Act, because it purchased beans on the open market from time to time, and because the canner exception of section 1(b)(6)(C) was inapplicable due to respondent having elected to secure a license under the Act. However, respondent did not fall within the definition of dealer in section 1 vis-à-vis complainant, nor did respondent participate in a transaction covered by section 2(4), because no sale of the beans took place between complainant and respondent.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $12,474.00, in connection with an alleged transaction in interstate commerce involving green beans.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and therefore the shortened method of procedure provided in the Rules of

Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief. However, respondent's answer was accompanied by a cover letter containing extensive legal argument.

Findings of Fact

1. Complainant, John F. Areklet, is an individual whose address is [redacted].

2. Respondent, Stokely USA, Inc., is a corporation whose address P. O. Box 248, Oconomowoc, Wisconsin. At the time of the matters involved herein respondent was licensed under the Act.

3. On April 5, 1994, complainant and respondent entered into a contract whereby complainant undertook to grow green beans which would be used in respondent's canning facility located in Michigan, the same state where the beans would be grown. The contract was a pre-printed form contract under the stylized letterhead of respondent, and provided in relevant part as follows:

1994 SNAP BEAN CONTRACT

GROWING AREA: Scottsville, Michigan Date: April 5, 1994

The undersigned Producer (herein called "Producer") and Stokely, USA, Inc. (herein called "Company") agree as follows:

During the 1994 season, Producer will plant 37 acres of snap beans from seed furnished by Company as directed and on land approved by Company.

Producer will prepare the soil, plant, fertilize and cultivate this crop in a husbandlike manner. Land is located in Section 34 Town

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

of Riverton, County of Mason
COMPENSATION: Company will pay Producer for the production of suitable snap beans according to the Schedule of Compensation and Deductions based upon the pay weight of the beans. Pay weight will be determined by deducting 8% minimum tare from the weight of the beans delivered to Company. Payment will be to Producer, as Producer hereafter designates, and will be mailed on November 3, 1994, unless Producer elects the Deferred Compensation Option.

SCHEDULE OF COMPENSATION AND DEDUCTIONS

COMPENSATION (Per Ton of Pay Weight)		Deductions
Bean Size	Price	Tare.....8% Minimum
2-4	$140.00	Harvesting.....No Charge
5	$ 75.00	Hauling.....No Charge
		Seed Charge.....$1.40 per pound
		Unharvested Acreage....See Below

IRRIGATION BONUS: . . .

EARLY PLANTING BONUS: . . .

DEFERRED COMPENSATION: . . .

HARVESTING AND HAULING: Company will furnish, without charge, labor and equipment to mechanically harvest the beans and haul them to the factory, . . .

TITLE TO SEED AND CROP: Producer's interest in the seed and crop is that of a bailee of the Company. Producer has no right, title or interest in or to the seed provided by Company nor in the crop grown therefrom. All suitable acreage produced pursuant to this contract shall be delivered to Company for harvesting.

INDEPENDENT CONTRACTOR: Producer undertakes the production hereunder as an independent contractor and not as an employee of Company. Likewise, all persons employed by Producer for the purpose of this contract are employees of Producer and not of Company.

SUCCESSORS: . . .

DESIGNATION OF PAYMENT: . . .

The terms and conditions on the front and back of this contract are the entire agreement of the parties. No oral statements shall bind either of the parties. No waiver of any term or condition is effective unless expressed in writing and delivered to the other party.

In addition, the contract contained extensive provisions on the back governing, among other things, the circumstances under which respondent could abandon acreage and reject beans that had been harvested.

4. On September 18, 1994, respondent harvested approximately 22 acres of the 37 under contract, and transported them to its canning facility. On September 19, 1994, respondent rejected the green beans due to the alleged presence of Corn Borer worms in the beans, but did not give complainant any notice of the rejection until after the green beans had been dumped on the property of another grower where they were disked into the ground before complainant could examine them.

5. An informal complaint was filed on September 30, 1994, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Respondent contends that the Secretary is without jurisdiction in this case, and also offers a defense on the merits, namely, that it acted correctly in rejecting complainant's beans because they contained an impermissible Corn Borer worm count. Respondent's first defense is that it is not a "dealer" because it's operation falls within the canner exception to the definition of "dealer" in section 1(b)(6) of the Act.[2] This section provides as follows:

> The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such

[2] 7 U.S.C. § 499a(b)(6).

commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer".

Respondent's reliance on the canner exception is obviously misplaced because respondent has elected to secure a license, and the last sentence of the paragraph quoted above obviates the canner exception for those who elect to secure a license. However, respondent does not need to rely upon the canner exception vis-à-vis complainant. The definition of "dealer," from which respondent seeks exclusion by means of the canner exception, already excludes respondent's relationship with complainant. "The term 'dealer' means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, ..." Complainant did not sell the beans to respondent because the contract provided that title to the seed from which the beans were grown, and well as the beans themselves, always resided in respondent.

While it is undoubtedly true that the lack of applicability of the canner exception makes respondent a "dealer" in some of its relationships, such as occasional purchases of beans on the open market,[3] the fact that respondent is thus be classed as a dealer does not help complainant. Section 2(4) of the Act[4] provides:

It shall be unlawful in or in connection with any transaction in interstate

[3]Respondent's plant manager alleged, during the informal stage of this proceeding (exhibit 3 to the Department's report of investigation), that, as a result of the rejection of complainant's beans, respondent "had to go to an outside broker for additional beans to meet our budget at a higher cost for both raw product and trucking."

[4]7 U.S.C. § 499b(4).

or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (underlining supplied)

The underlined words of the section are very broad. In addition, the term "transaction," standing alone, would be broad enough to cover the contracted bean transfer between complainant and respondent. Also, the record certainly suggests that respondent failed to live up to both express and implied duties arising out of the "undertaking" contained in the contract. However, such failures must arise out of an undertaking in connection with what is termed "any such transaction." The "transaction" referred to is one "involving any perishable agricultural commodity which is . . . bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer . . ." The bean transfer here, even though it qualifies as a transaction, and even though respondent is considered a dealer, was not one involving a perishable commodity which was bought or sold. We conclude that the Secretary does not have jurisdiction over the contract between complainant and respondent. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: EAST COAST PRODUCE, INC.
PACA Docket No. D-96-0516.
Order Dismissing Notice to Show Cause and Complaint filed July 18, 1996.

Julie C. Schuster, for Complainant.
Luis A. Espino, Miami, FL, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to complainant's motion to withdraw its notice to show cause and complaint, it is ordered that they be dismissed.

In re: QUALITY FIRST MARKETING, INC.
PACA Docket No. D-95-0519.
Dismissal filed July 19, 1996.

Kimberly Hart, for Complainant.
Melinda Vaughn, Fresno, CA, for Respondent.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon the motion of Complainant and for good cause shown, the complaint in the above-captioned proceedings is hereby dismissed.

In re: MARK TATGENHORST.
PACA APP Docket No. 96-0004.
Order Dismissing Appeal filed August 23, 1996.

Eric Paul, for Complainant.
Respondent, Pro se.
Order issued by James Hunt, Administrative Law Judge.

On April 23, 1996, petitioner Mark Tatgenhorst filed a petition seeking review of a determination that he was responsibly connected with Eat More Citrus Company under section 1(9) of the Perishable Agricultural Commodities

Act.

Pursuant to a telephone conference on June 25, 1996, with petitioner and respondent's attorney, Eric Paul, it was agreed that a telephone hearing would be conducted on August 6, 1996, beginning at 1 p.m. Eastern Time and 10 a.m. Pacific Time. A formal notice of the hearing was sent to petitioner on July 15, 1996.

Petitioner did not appear at the time scheduled for the hearing. An order was sent to petitioner directing him to show cause by August 19, 1996, why his petition should not be dismissed because of his failure to appear for the hearing. Petitioner did not respond.

Accordingly, it is ordered that the petition be dismissed with prejudice.

In re: J. MIRANDO PRODUCE CORPORATION.
PACA Docket No. D-96-0529.
Order of Dismissal-Cancellation of Hearing filed August 26, 1996.

Eric Paul, for Complainant.
Mark C.H. Mandell, Annandale, NJ, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

On August 20, 1996, Respondent filed a notice of withdrawal of its license application and requested that Complainant's Notice to Show Cause be dismissed. With the concurrence of Complainant's counsel, Respondent's motion is granted. As stated in Complainant's response, filed August 26, 1996, Respondent's license application fee will be refunded.

Respondent's license application is withdrawn and it is ordered that the Notice to Show Cause, filed herein on July 26, 1996, be dismissed.

The hearing scheduled for November 26, 1996, in New York City is canceled.

In re: JOHN J. CONFORTI, d/b/a C & C Produce.
PACA Docket No. D-94-0524.
Order Lifting Stay filed October 29, 1996.

Andrew Y. Stanton, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On February 28, 1995, the Judicial Officer issued a Decision and Order herein which, *inter alia*, suspended Respondent's Perishable Agricultural Commodities Act (hereinafter PACA) license. Respondent filed an appeal with the United States Court of Appeals for the Eighth Circuit, and, on March 28, 1995, Respondent requested a stay pending the outcome of proceedings for judicial review, which the Judicial Officer granted on April 3, 1995. The Eighth Circuit affirmed in part and reversed in part the Judicial Officer's Decision and Order. *Conforti v. United States*, 74 F.3d 838 (8th Cir.), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3256 (1996). Respondent filed a petition for a writ of certiorari with the United States Supreme Court, which the Court denied on October 7, 1996.

On October 22, 1996, Complainant filed a Motion to Lift Stay Order stating that Respondent's counsel has indicated that Respondent will not seek further judicial review and has requested that Complainant move to lift the April 3, 1995, Stay Order. Accordingly, the Stay Order issued April 3, 1995, is lifted. In accordance with *Conforti v. United States, supra*, 74 F.3d at 843, the Judicial Officer's Decision and Order issued February 28, 1995, is effective, except that the sanction imposed by the Judicial Officer is vacated and the sanction imposed by Administrative Law Judge James W. Hunt in the Initial Decision and Order filed in this proceeding, PACA Docket No. D-94-524 (July 28, 1994), is reinstated. Therefore, Respondent's PACA license is suspended for 30 days effective on the 30th day after service on Respondent of this Order Lifting Stay.

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.
PACA Docket No. D-95-0502.
Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal filed November 7, 1996.

Kimberly D. Hart, for Complainant.
Michael J. Keaton, Naples, FL, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely Under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of this Motion (hereinafter Respondent's Motion to Dismiss Appeal), and on September 10, 1996, Complainant filed Complainant's Response to Respondent's Motion to Dismiss Complainant's

Appeal as Untimely Filed (hereinafter Complainant's First Response). On September 18, 1996, I issued a Ruling on Respondent's Motion to Dismiss Appeal in which: I found that Complainant was served with the Initial Decision and Order in this proceeding on June 25, 1996; I found that Complainant's Notice of Petition of Appeal and Appeal Brief (hereinafter Complainant's Appeal Petition), filed July 24, 1996, was filed timely; I denied Respondent's Motion to Dismiss Appeal; and I extended the time for filing Respondent's response to Complainant's Appeal Petition to October 9, 1996.

On September 27, 1996, Respondent filed Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely (hereinafter Respondent's Motion for Reconsideration), and on October 22, 1996, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration of the Order Denying Motion to Dismiss Complainant's Appeal Petition as Untimely (hereinafter Complainant's Second Response).

Respondent raises four issues in Respondent's Motion for Reconsideration. First, Respondent contends that I erroneously found in the Ruling on Respondent's Motion to Dismiss Appeal that Complainant was served with the Initial Decision and Order in this proceeding in accordance with section 1.147(c)(3)(i) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.147(c)(3)(i)). (Respondent's Motion for Reconsideration at 2-3.)

Respondent's premise is that Complainant is either the Secretary or an agent of the Secretary. Consequently, Complainant could not have been served with the Initial Decision and Order in accordance with section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)), because 7 C.F.R. § 1.147(c) provides methods of service on any party to a proceeding, other than the Secretary or an agent of the Secretary. However, Respondent posits no alternative provision in the Rules of Practice by which Complainant was served with the Initial Decision and Order. (Respondent's Motion for Reconsideration at 3.)

As an initial matter, I find that Complainant must be served with the Initial Decision and Order in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147), in order to begin the period within which Complainant's appeal of the Initial Decision and Order may be filed. Section 1.145(a) of the Rules of Practice establishes service of the Initial Decision and Order as the commencement of the period within which an appeal may be filed, as follows:

§ 1.145 Appeal to the Judicial Officer.

(a) *Filing of petition* Within 30 days after receiving service of the

Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Section 1.142(c)(3) of the Rules of Practice provides that the parties, which term includes the Complainant herein,[1] must be served with any written Initial Decision and Order in accordance with section 1.147 of the Rules of Practice, as follows:

§ 1.142 Post-hearing procedure.

. . . .

(c) *Judge's decision. . . .*

. . . .

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in § 1.147.

7 C.F.R. § 1.142(c)(3).

The Initial Decision and Order filed in this proceeding is in writing. (See Chief Administrative Law Judge Victor W. Palmer's Decision and Order, PACA Docket No. D-95-502 (June 18, 1996).) Therefore, the Initial Decision and Order must be served on Complainant in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147), and the period in which Complainant may appeal the Initial Decision and Order begins when Complainant receives service of the Initial Decision and Order, in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147).

Complainant contended in Complainant's First Response that Complainant had been served with the Initial Decision and Order issued in this proceeding in accordance with section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. §

[1]Section 1.132 of the Rules of Practice, (7 C.F.R. § 1.132), defines the word *Complainant* as the party instituting the proceeding.

1.147(c)(1)), as modified by a practice established by the Office of the Hearing Clerk, (Complainant's First Response at 2-4). Complainant has abandoned this position and now contends that Complainant, as an agent of the Secretary, was served in accordance with section 1.147(d)(2) of the Rules of Practice, (7 C.F.R. § 1.147(d)(2)). (Complainant's Second Response at 5-8.)

Section 1.147(d)(2) of the Rules of Practice provides, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(d) *Service on another.* Any subpoena, written questions for a deposition under § 1.148(d)(2), or other document or paper, served on any person other than a party to a proceeding, the Secretary or agent thereof, shall be deemed to be received by such person on the date of:

. . . .

(2) Delivery other than by mail to any responsible individual at . . . any such location[.]

7 C.F.R. § 1.147(d)(2).

Even if I were to find that Complainant is the Secretary or the Secretary's agent for the purposes of service under the Rules of Practice (which I do not so find), section 1.147(d) of the Rules of Practice would not apply to service on Complainant, because Complainant is a party to the proceeding,[2] and section 1.147(d) specifically applies to any person *other than a party to a proceeding.* Further, I find that the language in the introductory provision of section 1.147(d) of the Rules of Practice, (7 C.F.R. § 1.147(d)), specifically excludes from the scope of section 1.147(d), not only parties to the proceeding, but also the Secretary and the Secretary's agents.[3]

Moreover, the supplementary information in the rulemaking document adding section 1.147(d) to the Rules of Practice specifically states that the rulemaking

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[2]See note 1.

[3]I read the words *other than* in the introductory provision of section 1.147(d) to refer to: (1) a party to the proceeding; (2) the Secretary; and (3) agents of the Secretary.

document is not designed to change the method by which the Secretary or the Secretary's agents are served, and that the Secretary and the Secretary's agents are served when documents are received by the Hearing Clerk, as follows:

SUPPLEMENTARY INFORMATION:

. . . .

. . . No change is made in the method of filing, or service on the Secretary or agent thereof, and service of such documents will be considered made when the documents are received by the Hearing Clerk.

55 Fed. Reg. 30,673 (1990).

Therefore, I find that Complainant was not served with the Initial Decision and Order in accordance with section 1.147(d) of the Rules of Practice, (7 C.F.R. § 1.147(d)). Since section 1.142(c)(3) of the Rules of Practice requires service of the Initial Decision and Order in accordance with section 1.147, and the only method by which service can be made under section 1.147 of the Rules of Practice, other than that provided in section 1.147(d), is in section 1.147(c), I find that, for the purposes of the service provisions in section 1.147 of the Rules of Practice, Complainant is not the Secretary or the agent of the Secretary and that Complainant was served with the Initial Decision and Order in accordance with section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)). More specifically, and for the reasons in the Ruling on Respondent's Motion to Dismiss Appeal filed September 18, 1996, I find that Complainant was served in accordance with 7 C.F.R. § 1.147(c)(3)(i).

Second, Respondent contends that Complainant admitted in Complainant's First Response that Complainant was served with the Initial Decision and Order on June 21, 1996, as follows:

> [T]he JO's Ruling effectively ignored the fact the Complainant expressly admitted the Initial Order was received in the principal place of business of its counsel of record on Friday, June 21, 1996. *See* Complainant's Response, p. 4. Under the plain language of § 1.147(c)(3)(i), the service provision under which the JO determined service here was made, requires three things for "any document" to be "deemed received by such party", these are:
>
> 1) "[d]elivery to any responsible individual...";

2) "at,... the last known principal place of business of";
3) "the party,... (or) the attorney or representative of record of such party."

Respondent's Motion for Reconsideration at 3-4. (Footnote omitted.)

Complainant's statement, which Respondent characterizes as Complainant's express admission, reads, as follows:

> While complainant's attorney readily admits that its copy of the decision and order arrived in the main office on Friday, June 21, 1996 as indicated by the date stamped on the cover letter, the fact remains that no one signed for the decision and complainant's attorney was not aware of the arrival of the decision and order until Tuesday, June 25, 1996 which is the date on which complainant's attorney verified receiving said decision and order by signing and dating the cover sheet and returning same to the Hearing Clerk's Office. Despite respondent's implication that complainant's attorney purposely chose to leave the decision and order in the "in box" until Tuesday, June 25, 1996 when she had the time to "pull it out", the facts clearly show that respondent's scenario has no basis in reality. Complainant's attorney was on approved sick leave on Friday, June 21, 1996 and out of the office the entire day of Monday, June 24, 1996 which made it impossible for her to have any notice of the arrival of the decision and order in the main office until her return on Tuesday, June 25, 1996 as indicated by the records.

Complainant's First Response at 4.

Section 1.147(c)(3)(i) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary. . . .*

. . . .

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at . . . the . . . last known principal place of business of the attorney or representative of record of such party. . . .

7 C.F.R. § 1.147(c)(3)(i).

I do not find that Complainant's statement that the Initial Decision and Order *arrived in the main office* on June 21, 1996, constitutes an admission that the Initial Decision and Order was delivered to a *responsible individual at the last known principal place of business of the attorney or representative of record*, on June 21, 1996. Rather, the statement referenced by Respondent as Complainant's admission that Complainant was served with the Initial Decision and Order on June 21, 1996, appears to be a denial of that fact and an assertion that the Initial Decision and Order was first delivered to a *responsible individual at the last known principal place of business of the attorney of record* on June 25, 1996.

Further, the proof of service in the record establishes that Complainant was served with the Initial Decision and Order on June 25, 1996. Section 1.147(e) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket file by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided* that such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record of such party, or an official or employee of the United States or of a State or political subdivision thereof.

7 C.F.R. § 1.147(e).

A copy of the service letter, which accompanied the Initial Decision and Order to Respondent, was signed and dated by Complainant's counsel and placed in the record of this proceeding. (See Appendix.) While it is apparent from the face of the service letter signed and dated by Complainant's counsel that it constitutes proof of service of the Initial Decision and Order on Complainant on June 25, 1996, as provided in section 1.147(e) of the Rules of Practice, reference to section 14 of the Hearing Clerk's Office Procedures Manual makes transparent the import of Complainant's counsel's signature and date of Complainant's counsel's signature, as follows:

ALJ's DECISION AND ORDER (INITIAL DECISION)

Instructions

1. Serve Decision giving the parties 30 days to file an appeal and advising them how many copies of the appeal will be needed. Parties should submit an original and two copies. If there are more than two parties, an additional copy should be submitted for each additional party. (See **SAMPLE LETTER**)

- The Decision should be served on the Respondent's Attorney by **certified mail**. If Respondent does not have an attorney, serve on Respondent by **certified mail**.

- Make an extra copy of the service letter and put this stamp on it.

COPY OF THIS LETTER AND/OR ATTACHMENT
RECEIVED THIS DATE _____
Month Day Year

SIGNATURE OF/FOR GOVERNMENT ATTORNEY

When internal distribution is made to the OGC attorney, the extra copy should be dated, signed and returned to this office for computation of the due date for complainant's appeal.

Hearing Clerk's Office Procedures Manual § 14 (Aug. 1995). (Emphasis in the original.)

Third, Respondent contends that:

> The JO's reference [in the Ruling on Respondent's Motion to Dismiss Appeal] to the internal publication identified as the Hearing Clerk's Office Procedures Manual is improper as such information is not generally known to litigants appearing before the USDA and such pronouncements are not subjected to the type of public notice and comment as are the regulations promulgated under the Act. See Exportal LTDA v. United States, et al., 902 F.2d 45, 50 (D.C. Cir. 1990).

Respondent's Motion for Reconsideration at 4 n.4.

The Hearing Clerk's Office Procedures Manual is an employee handbook that provides guidance to employees of the Office of the Hearing Clerk, not members of the public. Therefore, the Hearing Clerk's Office Procedures Manual is not required to be published in the *Federal Register*, in accordance with notice-and-comment procedures in 5 U.S.C. § 553. *See Lake Mohave Boat Owners Ass'n v. National Park Service*, 78 F.3d 1360, 1368 (9th Cir. 1996) (National Park Service agency staff manual containing rate-setting guidelines, not required to be published in the *Federal Register*); *Capuano v. National Transp. Safety Bd.*, 843 F.2d 56 (1st Cir. 1988) (Federal Aviation Administration enforcement staff manual regarding sanction policies, not required to be published in the *Federal Register*); *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1983) (Occupational Safety and Health Administration inspection program, an internal procedure for selecting establishments to be inspected, not required to be published in the *Federal Register*); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 760 (D.C. Cir. 1978) (United States Attorney's staff manuals relating to the exercise of prosecutorial discretion by the United States Attorney for the District of Columbia, not required to be published in the *Federal Register*); *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1306 (8th Cir. 1978) (Drug Enforcement Administration staff manual, not required to be published in the *Federal Register*).

Section 14 of the Hearing Clerk's Office Procedures Manual, which was quoted in the Ruling on Respondent's Motion to Dismiss Appeal, does not amend the Rules of Practice and specifically does not change the method, date, or proof of service provisions in the Rules of Practice. Respondent is not affected by section 14 of the Hearing Clerk's Office Procedures Manual, and I do not find that the reference to section 14 of the Hearing Clerk's Office Procedures Manual in the Ruling on Respondent's Motion to Dismiss Appeal was improper.

Fourth, Respondent contends that the Ruling on Respondent's Motion to

Dismiss Appeal is contrary to the "plain language of § 1.145" to the extent that I held therein that I would not have granted Respondent's Motion to Dismiss Appeal even if I had found that Complainant had been served with the Initial Decision and Order on June 21, 1996. (Respondent's Motion for Reconsideration at 5-8.)

Section 1.145(a) of the Rules of Practice provides:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

As I stated in the Ruling on Respondent's Motion to Dismiss Appeal, even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, I would not have granted Respondent's Motion to Dismiss Appeal because Complainant's Appeal Petition, although filed more than 30 days after June 21, 1996, was filed before the Initial Decision and Order became effective.

Section 1.142(c)(4) of the Rules of Practice provides:

§ 1.142 Post-hearing procedure.

. . . .

(c) *Judge's decision.* . . .

. . . .

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145. . . .

7 C.F.R. § 1.142(c)(4).

The written Initial Decision and Order was served on Respondent on June 25, 1996, and, in accordance with section 1.142(c)(4) of the Rules of Practice, (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order was to become effective 35 days later, July 30, 1996.[4] Complainant filed Complainant's Appeal Petition on July 24, 1996.

The former Judicial Officer, Donald A. Campbell, who assisted with drafting the Rules of Practice, explained the reason for providing that an initial decision does not become final and effective until after the time for appeal, as follows:

> Since I reviewed various drafts of the . . . Rules of Practice issued in 1977, and discussed them with attorneys drafting the rules, I am familiar with the reason for providing that the initial decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. That was done so that if an appeal was inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for filing a late appeal.

In re William T. Powell, 44 Agric. Dec. 1220, 1222 (1985). *See also In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished).

Therefore, consistent with the Rules of Practice and Department precedent,[5]

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[4]Moreover, the Initial Decision and Order specifically provides:

> This decision and order shall become final and effective thirty-five days after Respondent receives service of it, subject to the right of either party to appeal it to the Judicial Officer as provided in 7 C.F.R. § 1.145.

Initial Decision and Order at 17.

[5]*In re Sandra L. Reid*, 55 Agric. Dec. ___, slip op. at 5 (July 17, 1996) (2-day extension of time granted to Respondent for filing an appeal 32 days after service of the Default Decision on Respondent but prior to the effective date of the Default Decision); *In re William T. Powell, supra*, 44 Agric. Dec. at 1222 (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Rinella's Wholesale, Inc., supra* (if the appeal is filed before the Initial Decision and Order becomes effective,

even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, (rather than June 25, 1996, which was the date the Initial Decision and Order was served on Complainant), and Complainant had filed Complainant's Appeal Petition 33 days after receiving service of the Judge's decision, I would have granted a 3-day extension of time to Complainant to file Complainant's Appeal Petition, because Complainant's Appeal Petition was filed 5 days before the day the Initial Decision and Order was to become final and effective.

Respondent further states that the Judicial Officer's proffered reason for acceptance of late-filed appeals, filed prior to the effective date of Initial Decisions and Orders, is the potential for delay in the mail. Respondent contends that, since Complainant did not use the mail to file Complainant's Appeal Petition, there is no potential for a delay in the mail; and therefore there is no basis for acceptance of Complainant's late-filed appeal. (Respondent's Motion for Reconsideration at 7 n.6.)

Neither the Rules of Practice nor Department precedent restricts the Judicial Officer as to the circumstances that may be considered in determining whether to accept a late-filed appeal. The Judicial Officer has consistently held that a late-filed appeal may be accepted if the appeal is inadvertently filed late, as long as the late-filed appeal is filed prior to the effective date of the Initial Decision and Order.[6] The references to a delay in the mail in the Judicial Officer's previous decisions regarding this issue were by way of example only and do not constitute a self-imposed limitation on the Judicial Officer's jurisdiction to accept a late-filed appeal that is filed prior to the effective date of an Initial Decision and Order.

Further still, Respondent, relying on *In re Mary Fran Hamilton*, 45 Agric.

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the Judicial Officer may grant an extension of time for filing a late appeal); *In re Palmer G. Hulings, supra* (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Toscony Provision Co., supra* (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Miguel A. Machado* (Decision as to Respondent Cozzi), 42 Agric. Dec. 1454, 1455 n.3 (1983) (in accordance with the practice of this Department, Complainant's appeal of an Initial Decision and Order, 32 days after service of the Initial Decision and Order on Complainant, accepted late since it was filed before the Initial Decision and Order became final), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[6]See note 5.

Dec. 2395 (1986) and *In re Yankee Brokerage Inc.*, 42 Agric Dec. 427 (1983), contends that the Judicial Officer has never allowed a party to escape dismissal of its appeal due to a delay in the mail. (Respondent's Motion for Reconsideration at 7 n.6.) I do not find Respondent's argument relevant to this proceeding, because, as Respondent contends, the record does not indicate that Complainant filed Complainant's Appeal Petition by mailing it to the Hearing Clerk. Moreover, Respondent's contention that the Judicial Officer has not accepted a late-filed appeal based upon delay in the mail is incorrect and Respondent's reliance on *Hamilton* and *Yankee Brokerage* is misplaced. In *Hamilton* and *Yankee Brokerage*, each Respondent therein filed an appeal on the day the applicable Initial Decision and Order became final and effective. It has continuously been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed on the day the Initial Decision and Order becomes final and effective or on any day after the Initial Decision and Order becomes final and effective.[7] Unlike *Hamilton* and *Yankee Brokerage*,

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[7]*In re Field Market Produce, Inc.*, 55 Agric. Dec. ___, slip op. at 10 (July 10, 1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re Ow Duk Kwon*, 55 Agric. Dec. 78, 83 (1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton, supra* (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell, supra* (it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Yankee Brokerage, Inc., supra* (Judicial Officer has no jurisdiction to hear Respondent's appeal received by the Hearing Clerk on the day the Initial Decision and Order became final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider

Complainant filed Complainant's Appeal Petition 5 days before the date on which the Initial Decision and Order was to become final and effective. The Judicial Officer has jurisdiction to grant extensions of time to allow parties to file appeals before the Judge's Initial Decision and Order becomes effective, including in those instances in which an appeal is filed late due to delay in the mail.[8]

Finally, Respondent contends that, assuming that the Judicial Officer has jurisdiction to accept a late-filed appeal, not only must the appeal be filed before the Initial Decision becomes final and effective, but also the Judicial Officer must accept the appeal before the Initial Decision and Order becomes final and effective. (Respondent's Motion for Reconsideration at 7 n.5.) Neither the Rules of Practice nor Department precedent provides any basis for Respondent's contention. Generally, the Judicial Officer will not know of a late-filed appeal, filed before the Initial Decision and Order becomes final, until after the date the Initial Decision and Order was to become final and effective. In my tenure as Judicial Officer, one case has been appealed to me in which a late-filed appeal was filed before the Initial Decision and Order became final and effective. *See In re Sandra L. Reid, supra.* In *Reid*, Respondent was served with a Default Decision on May 3, 1996, and on June 4, 1996, 32 days after Respondent was served with the Default Decision, Respondent filed an appeal with the Hearing Clerk. The *Reid case* was referred to me and I first learned of the case on July 3, 1996, well after the Default Decision would have become final and effective, but for my acceptance of Respondent's late-filed appeal. Nonetheless, I granted Respondent a 2-day extension of time for filing her appeal and deemed her appeal petition to have been timely filed. *In re Sandra L. Reid, supra*, slip op. at 5.

For the reasons set forth in my Ruling on Respondent's Motion to Dismiss

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Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (since Respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

[8]See note 5.

Appeal filed September 18, 1996, and the foregoing reasons, Respondent's Motion for Reconsideration is denied, and, in accordance with my Informal Order of August 22, 1996, the time for filing Respondent's response to Complainant's Appeal Petition is extended to November 29, 1996.

APPENDIX

APPENDIX

United States Department of Agriculture
Office of the Hearing Clerk
Room 1081 South Building
Washington, D.C. 20250-9200
Telephone: 202/720-4443
Fax No.: 202/720-9776

RECEIVED 6/21/96

CERTIFIED RECEIPT REQUESTED

June 20, 1996

RECEIVED JUN 25 1996 The Hearing Clerk OALJ USDA

Mr. Michael J. Keaton
Meuers & Associates, P.A.
Attorneys at Law
2590 Golden Gate Parkway
Suite 109
Naples, Florida 33942

Dear Mr. Keaton:

Subject: In re: Scamcorp, Inc., dba Goodness Greeness, Respondent - PACA Docket No. D-95-502

Enclosed is a copy of the Decision and Order issued in this proceeding by Chief Administrative Law Judge Victor W. Palmer on June 18, 1996.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,

Joyce A. Dawson

6/25/96

JOYCE A. DAWSON
Hearing Clerk

Enclosure

cc: Kimberly Hart, Trade Practices Div., OGC
Jane Servais, F&V, AMS
PMWright: 6/20/96

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: MICHAEL A. GABOLDI d/b/a NEVADA FRESH.
PACA Docket No. D-96-0509.
Decision and Order filed May 17, 1996.

Failure to file an answer - Operating without a license - Failure to make full payment promptly for produce - Making false and misleading statements to induce potential sellers to sell on a credit basis - Willful, flagrant and repeated violations - Publication.

Andrew L. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (PACA), instituted by a complaint filed on December 8, 1995, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 27 sellers of the agreed purchase prices totaling $459,672.11 in connection with 78 transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period October 11, 1995, through November 28, 1995.

The complaint also alleged that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) in connection with transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce, by making false and misleading statements for the fraudulent purpose of inducing potential sellers to sell to respondent numerous lots of perishable agricultural commodities on a credit basis.

The complaint requested that the Administrative Law Judge issue a finding that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) and order such finding published.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of complainant for the issuance of a decision without hearing by reason

of default, the following decision and order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

(1) Michael A. Gaboldi is an individual doing business as Nevada Fresh (hereinafter, "respondent"), whose mailing address is [redacted], and whose business address is 3149-A Rancho Drive, Las Vegas, Nevada 89106.

(2) At all times herein, respondent was not licensed under the PACA but was operating subject to license under the PACA.

(3) As more fully set forth in paragraph III of the complaint, respondent failed to make full payment promptly to 27 sellers of the agreed purchase prices totaling $459,672.11 in connection with 78 transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period October 11, 1995, through November 28, 1995.

(4) As more fully set forth in paragraphs IV and V of the complaint, respondent, in connection with transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce, made false and misleading statements for the fraudulent purpose of inducing potential sellers to sell to respondent numerous lots of perishable agricultural commodities on a credit basis.

Conclusions

Respondent's actions, as set forth in Findings of Fact 3 and 4 above, were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent, Michael A. Gaboldi d/b/a Nevada Fresh, is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

This Order shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this

Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 11, 1996.-Editor]

In re: NATIONWIDE PRODUCE CO., d/b/a NATURAL CHOICE.
PACA Docket No. D-96-0511.
Decision and Order filed May 31, 1996.

Admission of material allegations - Failure to make full payment promptly for produce - Willful, repeated and flagrant violations - License revocation.

Kimberly Hart, for Complainant.
John A. Lapinski, Los Angeles, CA, for Respondent.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on January 22, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of October 1994 through July 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 39 sellers, 207 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $805,269.39. Complainant contended that respondent's failures to make full payment promptly constituted willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and requested that respondent's license be revoked.

In respondent's answer, it admitted that it failed to make prompt payment for perishable agricultural commodities which it received and accepted in interstate and foreign commerce. Specifically, respondent admits that it currently owes 28 of the 39 sellers for the transactions described above in the amount of $567,062.49. Although respondent denies liability for some of the transactions

and alleges partial payment for other transactions, respondent has admitted that at least 71% of the produce debt, or $567,062.49 is still owed to its produce creditors. Respondent generally denies that it willfully violated Section 2(4) of the PACA based on its assertion that it executed a General Assignment for the Benefit of Creditors to Credit Managers Association of California on September 18, 1995. Respondents admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) *(In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989)). Further, respondents admission that at least $567,062.49 of the $805,269.39 in produce debt alleged in the complaint is still owed warrants the immediate imposition of a license revocation, as excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time *(In re Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. ____ (March 23, 1995)).

In view of respondent's admission of liability, the issuance of a Decision Without Hearing by Reason of Admissions is appropriate pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent, Nationwide Produce Co., doing business as Natural Choice, is a corporation organized and existing under the laws of the State of Minnesota. Its business mailing address is 1995 E. 20th Street, Los Angeles, California 90058.

2. Respondent was issued PACA license number 931511 on July 20, 1993. This license has been renewed annually and is next subject to renewal on or before July 20, 1996.

3. As more fully set forth in paragraph 3 of the complaint, during the period of October 20, 1994 through July 16, 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 39 sellers, 207 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $805,269.39. Respondent admits that it currently owes $567,062.49 to 28 of the produce sellers contained in the complaint.

Conclusions

Respondent's failure to make full payment promptly with respect to the

transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent's license is hereby revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 11, 1996.-Editor]

In re: SHARP FARMS, INC.
PACA Docket No. D-96-0513.
Decision and Order filed June 13, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to make full payment promptly for produce - Willful, repeated, and flagrant violations - Publication.

Mary Hobbie, for Complainant.
Sheila Tamez, Dallas, TX, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on January 30, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of November 1994 through March 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 16 sellers, 234 lots of perishable agricultural commodities, but failed to

make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $390,704.30.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Sharp Farms, Inc., is a corporation organized and existing under the laws of the State of Texas. Its business mailing address is 815 South Good Latimer, Dallas, Texas 75226.

2. Respondent was issued PACA license number 721364 on February 22, 1972. This license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), on February 22, 1996, when it failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1994 through March 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 16 sellers, 234 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $390,704.30.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 23, 1996.-Editor]

In re: FIELD MARKET PRODUCE, INC. d/b/a THE PRODUCE PLACE.
PACA Docket No. D-95-0516.
Decision and Order filed February 12, 1996.

Admission of material allegations - Failure to pay annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andrew Stanton, for Complainant.
Cari Drew, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

In this disciplinary proceeding under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) (PACA), a Complaint was filed on February 21, 1995, alleging that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers for purchases of 62 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $304,814.40 during the period June 1993 through September 1993. Complainant requested that a finding be made that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published.

Respondent's Answer consisted of a general denial and assertions that the Complaint was defective due to lack of subject matter jurisdiction, estoppel and the statute of limitations. No explanation was offered in support of these assertions.

In a September 21, 1995, conference call involving Complainant's counsel, Andrew Stanton, Esq., Respondent's counsel, Leighton Clark, Esq., and the undersigned Administrative Law Judge, Mr. Clark stated that Respondent

disputed the amount alleged to be owed by the Complaint, although he did not deny that Respondent owed money for produce purchases. Mr. Clark did not explain Respondent's allegations of a lack of subject matter jurisdiction, estoppel and the statute of limitations. Mr. Clark made no claim that Respondent had paid the amounts alleged in the complaint. I ordered Mr. Stanton to send Mr. Clark copies of Complainant's proposed evidence and witness list by November 1, 1995. Mr. Clark was ordered to reciprocate on or before November 15, 1995. Courtesy copies of the witness lists were ordered to be filed with the undersigned.

In compliance with the Order, Mr. Stanton sent Mr. Clark Complainant's proposed evidence and witness list on October 27, 1995, and filed a copy of its witness list with the undersigned. However, Mr. Clark did not provide Respondent's evidence and witness list by November 1, 1995, as ordered, and has never provided such documents.

At about 12 noon on February 8, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions together with a Proposed Decision and Order. Copies of the motion and the proposed order were immediately telefaxed to Respondent's counsel and were received by that office. The telefax transmittal sheet stated that, because the hearing was scheduled to commence within a week, Respondent's counsel was directed to transmit a written response by telefax by the close of business on February 9, 1996. It is now 3 P.M. Eastern Time on February 12, 1996. Respondent has failed to file any opposition to the motion. Therefore, the motion is granted and the proposed findings of fact, proposed conclusions of law and proposed order submitted by Complainant are adopted.

Findings of Fact

1. Respondent, Field Market Produce, Inc., doing business as The Produce Place, is a corporation organized and existing under the laws of the State of Arizona. Its business mailing address is 863 Avenue B., Yuma, Arizona 85364.

2. PACA license number 921261 was issued to Respondent on June 2, 1992. This license terminated on June 2, 1994, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period June 1993 through September 1993, Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers for purchases of 62 lots of perishable agricultural commodities in the course of

interstate or foreign commerce in the amount of $304,814.40.

Conclusions

Respondent's failures to make full payment promptly, as more fully set forth in paragraph III of the Complaint, constitute willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and such finding is ordered published.

This Order shall take effect 14 days after this Decision becomes final. This Decision will become final and effective without further proceedings 35 days after service upon Respondent, unless appealed to the Judicial Officer within 30 days after service, as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 2, 1996.-Editor]

In re: FIELD MARKET PRODUCE, INC., d/b/a THE PRODUCE PLACE.
PACA Docket No. D-95-0516.
Order Denying Late Appeal filed July 10, 1996.

Late appeal — Attorney-client — Double jeopardy — Petition to reopen — Petition for reconsideration.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Decision Without Hearing by Reason of Admissions became final. Respondent is bound by the acts and omissions of its attorney. The double jeopardy clause cannot be interposed to bar this administrative disciplinary proceeding. Respondent's petition to reopen the hearing filed pursuant to 7 C.F.R. § 1.146(a)(2) is denied because no hearing preceded Respondent's petition to reopen hearing. Respondent's petition to reconsider filed pursuant to 7 C.F.R. § 1.146(a)(3) before the Judicial Officer issued a decision is denied as prematurely filed.

Andrew Stanton, for Complainant.
Leighton P. Clark, Phoenix, AZ, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA), instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By The Secretary Under Various Statutes, (7 C.F.R. §§ 1.130-.151) (hereinafterthe Rules of Practice), by a Complaint filed on February 21, 1995, by the Acting Director of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that Field Market Produce, Inc., d/b/a The Produce Place (hereinafter Respondent), willfully, flagrantly, and repeatedly violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of $304,814.60 for 62 lots of fruits and vegetables that Respondent purchased, received, and accepted in interstate and foreign commerce during the period June 1993 through September 1993. (Complaint, pp. 2-6.) On April 3, 1995, Respondent, represented by counsel, Mr. Leighton P. Clark, filed an Answer denying each and every allegation in the Complaint that Respondent willfully violated the PACA, asserting three affirmative defenses (lack of subject matter jurisdiction, estoppel, and statute of limitations), and requesting a hearing. (Answer.)

On April 18, 1995, Complainant filed a Motion To Set Oral Hearing stating, in relevant part, that:

> [T]he [C]omplaint and [A]nswer in this action having been filed and the issues having been joined, [C]omplainant requests that a prehearing conference be held and that this case be assigned a date certain for oral hearing.

Motion To Set Oral Hearing, p. 1.

On May 10, 1995, Respondent filed a Reply To Motion To Set Oral Hearing stating, as follows:

> Respondent hereby submits that this matter is not ready to proceed to oral hearing on the grounds that certain discovery matters are necessary in order to adequately prepare for the hearing and to ensure that all issues have been joined.

Reply To Motion To Set Oral Hearing.

The proceeding was then assigned to Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) who, in a Prehearing Order issued May 16, 1995, among other things, states, as follows:

> Also, in Respondent's May 10 Reply To Motion to Set Oral Hearing, counsel stated: ". . . this matter is not ready to proceed to oral hearing on the grounds that certain discovery matters are necessary in order to adequately prepare for the hearing and to ensure that all issues have been joined." The Rules of Practice governing this proceeding, 7 C.F.R. §§ 1.130-.151, do not provide for discovery. . . .
>
> However, [section] 1.140(a)[(1)](iii) and (iv) of the Rules of Practice[, (7 C.F.R. § 1.140(a)(1)(iii), (iv)),] provide[s] that at the [J]udge's discretion, in connection with prehearing conferences, parties may be directed to exchange lists of anticipated witnesses and copies of documents that they intend to introduce at the hearing. Therefore, Respondent's request for discovery is denied, but in a prehearing telephone conference to be held at a later date, a schedule will be established for the parties' exchange of proposed hearing exhibits and witness lists.

Prehearing Order, p. 2.

On September 15, 1995, and September 21, 1995, the ALJ conducted telephone conferences with counsel for Complainant and Respondent. After the September 21, 1995, telephone conference, the ALJ filed a written Summary of Telephone Conference which provides, in part, as follows:

> It was agreed and decided that the hearing would commence on February 2, 1996, at 9 a.m., in a Phoenix, Arizona location to be designated by subsequent notice. . . .
>
> On or before November 1, 1995, Mr. Stanton[, counsel for Complainant,] will send Mr. Clark[, counsel for Respondent,] copies of Complainant's proposed hearing exhibits and witness list, including brief summaries of the testimony the witnesses will present. On or before November 15, 1995, Mr. Clark will send Mr. Stanton similar documents with respect to Respondent's proposed hearing exhibits and witnesses. Courtesy copies of the parties' witness lists, but not their exhibits, should be sent to the undersigned when copies are sent to opposing counsel.

Summary of Telephone Conference, pp. 1-2. (Emphasis in original.)

On October 27, 1995, based upon agreement of counsel for Complainant and Respondent, the ALJ rescheduled the hearing to commence at 9 a.m., February 15, 1996, (Order Rescheduling Hearing), and on December 12, 1995, the ALJ filed a notice stating the location of the hearing to commence at 9 a.m., February 15, 1996. (Notice of Hearing.)

On October 31, 1995, in accordance with the ALJ's Order of September 21, 1995, (Summary of Telephone Conference), Complainant filed Complainant's Notice of Witnesses, which contains a list of witnesses that Complainant intended to call at the hearing and summaries of the testimony Complainant expected the witnesses to present.

On February 5, 1996, Complainant filed a Motion For Prehearing Telephone Conference, stating, as follows:

> Complainant hereby moves for a prehearing telephone conference so that it can be determined (1) whether [R]espondent still desires to contest the [C]omplaint in this matter, and (2) whether [R]espondent or its counsel, Leighton P. Clark, Esq., will be appearing at the February 15, 1996, hearing in Phoenix, Arizona.
>
> . . . .
>
> In a September 21, 1995, telephone conference call with [C]omplainant's counsel and Judge Bernstein, Mr. Clark stated that he would be presenting evidence at the hearing disputing [C]omplainant's allegations. Judge Bernstein ordered [C]omplainant to send Mr. Clark copies of [C]omplainant's proposed hearing exhibits and a witness list by November 1, 1995, and ordered [R]espondent to reciprocate by November 15, 1995. Complainant complied with Judge Bernstein's order. However, [C]omplainant has not received any response whatsoever from [R]espondent or Mr. Clark.
>
> Complainant's counsel has called Mr. Clark twice during the month of January 1996, and left a message on the answering machine, but has not received a return call.
>
> Based on the above record, there is good reason to doubt (1) that [R]espondent continues to contest the allegations of the [C]omplaint, and (2) that [R]espondent, or Mr. Clark, will be appearing at the February 15,

1996, hearing. Therefore, [C]omplainant moves that a prehearing telephone conference call be held, as soon as possible, to examine these issues.

Motion For Prehearing Telephone Conference, pp. 1-2.

On February 8, 1996, Complainant filed a Motion for Decision Without Hearing By Reason of Admissions and Supporting Memorandum (hereinafter Motion for Decision Without Hearing) and a Decision Without Hearing by Reason of Admissions (hereinafter Proposed Decision). The Motion for Decision Without Hearing, in part, states:

In a September 21, 1995, conference call involving [C]omplainant's counsel, [R]espondent's counsel, Leighton Clark Esq., and Administrative Law Judge Edwin S. Bernstein, Mr. Clark stated that [R]espondent disputed the amount alleged to be owed by the [C]omplaint, although he did not deny that [R]espondent owed money for produce purchases. Mr. Clark did not explain [R]espondent's allegations of a lack of subject matter jurisdiction, estoppel and statute of limitations. Mr. Clark made no claim that [R]espondent had paid the amounts alleged in the [C]omplaint. Judge Bernstein ordered [C]omplainant's counsel to send Mr. Clark copies of [C]omplainant's proposed evidence and witness list by November 1, 1995. Mr. Clark was ordered to reciprocate on or before November 15, 1995. Courtesy copies of the witness lists were ordered to be filed with Judge Bernstein.

In compliance with Judge Bernstein's order, [C]omplainant's counsel sent Mr. Clark [C]omplainant's proposed evidence and witness list on October 27, 1995, and filed a copy of its witness list with Judge Bernstein. However, Mr. Clark did not provide [R]espondent's evidence and witness list by November 1[5], 1995, as ordered, and has never provided such documents. This failure to submit evidence and a witness list is an indication that [R]espondent does not seriously dispute the facts of this case as alleged by [C]omplainant.

There can be no legitimate dispute with respect to subject matter jurisdiction, as this is a typical disciplinary [C]omplaint alleging failure to make full payment promptly in violation of the PACA, involving perishable agricultural commodities shipped across state lines. Further, as [R]espondent has offered no explanation regarding its bare assertions of estoppel and the statute of limitations, it is clear that these assertions are

lacking in merit.

> So long as there is no real dispute that [R]espondent has failed to make full payment promptly for produce purchases, [R]espondent must be found to have committed willful, flagrant and repeated violations of the PACA, for which the appropriate sanction is a license revocation or its equivalent, a finding of the commission of such violations and publication thereof.

Motion for Decision Without Hearing, pp. 2-3.

On February 8, 1996, the ALJ sent Complainant's Motion for Decision Without Hearing and Proposed Decision and a cover page to Respondent's counsel by facsimile transmission. The cover page states:

> Date: February 8, 1996
>
> To: Leighton Clark
>
> Office:
>
> Fax Number: (602) 274-0001
>
> Total Number of Pages Including Cover: 9
>
> Comments:
>
> At approximately 12 noon today these items were delivered to my office by Complainant's counsel, Andrew Stanton (a Motion for Decision w/o Hearing by Reason of Admissions and Supporting Memorandum and a [P]roposed Decision Without Hearing by Reason of Admissions). Copies are being transmitted herewith. In view of the fact that the hearing is scheduled to commence within a week[,] please transmit your written response by telefax by close of business on February 9, 1996.
>
> From: Judge Edwin S. Bernstein

Facsimile transmission cover page dated February 8, 1996.

Respondent did not respond to the ALJ's February 8, 1996, facsimile transmission and on February 12, 1996, the ALJ issued an Order canceling the hearing scheduled for February 15, 1996, (Order Canceling Hearing), and a

Decision Without Hearing by Reason of Admissions (hereinafter Decision and Order) in which the ALJ found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and ordered that this finding be published. The Office of the Hearing Clerk sent the Decision and Order and a cover letter from the Hearing Clerk dated February 13, 1996, to Respondent's counsel by certified mail,[1] but it was returned marked by the postal service as "ATTEMPTED NOT KNOWN." On March 13, 1996, the Office of the Hearing Clerk served the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk by ordinary mail on Respondent[2] in accordance with the Rules of Practice. (7 C.F.R. § 1.147(c)(1).)[3] The Decision and Order, provides, in pertinent part, that:

> This Order shall take effect 14 days after this Decision becomes final. This Decision will become final and effective without further proceedings 35 days after service upon Respondent, unless appealed to the Judicial Officer within 30 days after service, as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Decision and Order, p. 4.

A letter from the Office of the Hearing Clerk accompanying the Decision and Order informed Respondent that:

> Subject: **In re: Field Market Produce, Inc., dba The Produce**

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[1]The envelope containing the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk was addressed to Mr. Leighton P. Clark, Attorney at Law, Suite 1000, 3550 N. Central, Phoenix, AZ 85012.

[2]The envelope containing the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk was addressed to Mr. Leighton P. Clark, Attorney at Law, Suite 1000, 3550 N. Central, Phoenix, AZ 85012.

[3]Section 1.147 (c)(1) of the Rules of Practice provides, in relevant part, that an initial decision "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last know[n] residence of such party if an individual, *Provided that,* if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address. (7 C.F.R. § 1.147(c)(1).)

Place, Respondent - PACA Docket No. D-95-516

Enclosed is a copy of the Decision and Order issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on February 12, 1996.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Letter from Joyce A. Dawson, Hearing Clerk, to Mr. Leighton P. Clark, dated February 13, 1996.

The Rules of Practice provide that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

On April 25, 1996, Ms. Cari Drew, on behalf of Respondent, appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has

been delegated. (7 C.F.R. § 2.35.)[4]

Respondent's Appeal to the Judicial Officer states:

> Respondent, Field Market Produce, Inc. d/b/a The Produce Place, Appeals to the Judicial Officer to Reopen this action for a Hearing or in the alternative the action be reconsidered for the following reasons[:]
>
> 1. Leighton Clark is no longer the attorney representing Field Market Produce, Inc. because of the following.
>
> a. Mr. Clark failed to inform us of the status of this case.
> b. Mr. Clark made decisions for us without our consent or knowledge.
> c. Mr. Clark failed to make timely answers to the USDA/PACA.
>
> 2. Respondent, Field Market Produce, Inc., ha[s] not had a chance to present [its] case because of [its] attorney's failure to comply with the Administrative Law Judge's Orders. Respondent has no other remedy to present [its] case unless it is reopened.
>
> 3. Respondent, Field Market Produce, currently i[s] under restrictions due to the fact that our old attorney, Leighton Clark, failed to answer -2- reparation complaints filed as RD-94-631 and LP-94-221 copies of the reparation awards are attached here. The sanctions began September 8, 1994. These cases are part of the current Disciplinary proceeding. With both sanctions the total time under restrictions would be 3 years and 6 months. This seems to be double jeopardy.
>
> Wherefore, Respondents, [sic] Field Market Produce, Inc., respectfully request[s] that this case be reopened for the purpose of an oral hearing; or in the alternative the Judicial Officer find the effective date of sanctions would start September 8, 1994, for the purpose of this disciplinary action.
>
> Respectfully submitted this 25 day of April, 1996.

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[4]The position of the Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Respondent's Appeal to the Judicial Officer, pp. 1-2.

On May 15, 1996, Complainant filed Complainant's Opposition To Respondent's Petition To Reopen The Hearing Or Reconsider The Decision and Order, and on May 16, 1996, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, Respondent's Appeal to the Judicial Officer must be rejected as untimely. However, even if I had jurisdiction to consider Respondent's Appeal to the Judicial Officer, which I do not, Respondent has not stated a basis in its Appeal to the Judicial Officer upon which relief could be granted.

Respondent's Appeal to the Judicial Officer, filed April 25, 1996, was not filed within 35 days after service of the ALJ's Decision and Order on Respondent which occurred on March 13, 1996. In accordance with 7 C.F.R. § 1.139, the ALJ's Decision and Order became final 35 days after service on Respondent, *viz.*, on April 17, 1996, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's appeal. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final. *In re Ow Duk Kwon*, 55 Agric. Dec. ___, slip op. at 6-7 (June 6, 1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (it has consistently been held that, under the Rules of Practice, the

Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (since Respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.—**
>
> (1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Fed. R. App. P. 4(a)(1).

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory

> and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .

Accord Bundinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after the Initial Decision and Order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal. (Rule 4(a)(5).) The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after the Initial Decision has

become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after the Initial Decision becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.

Accord Jem Broadcasting Co. v. FCC, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Thus, even though the instant proceeding contains procedural irregularities,[5]

---

[5]Section 1.139 of the Rules of Practice, in relevant part, provides that: "[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . ." (7 C.F.R. § 1.139.) Although Respondent later admitted the allegations in the Complaint, Respondent filed an answer denying "each and every allegation contained in the [C]omplaint which alleges that Respondent willfully violated the P.A.C.A." (Answer.) Moreover, Respondent was not provided with 20 days after service of Complainant's Motion for Decision Without Hearing and Proposed Decision in which to file objections.

Respondent's appeal must be denied, since it is too late for the matter to be further considered.

Moreover, even if Respondent had filed a timely appeal, none of the issues raised in Respondent's Appeal to the Judicial Officer serves as a basis to reverse the ALJ's finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and the ALJ's order that this finding be published.

First, Respondent contends that its former attorney,[6] Mr. Leighton P. Clark, failed to inform Respondent of the status of the case, made decisions without Respondent's consent or knowledge, failed to file "timely answers to the USDA/PACA," and deprived Respondent of "a chance to present [its] case because of [his] failure to comply with the Administrative Law Judge's Orders." (Respondent's Appeal to the Judicial Officer, p. 1.)

As a general rule, a client is bound by the acts and omissions of its attorney. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Link v. Wabash R.R.*, 370 U.S. 626 (1962); *United States v. 7108 West Grand Ave., Chicago, Ill.*, 15 F.3d 632 (7th Cir.), *cert. denied sub nom. Flores v. United States*, 114 S.Ct. 2691 (1994); *Cotto v. United States*, 993 F.2d 274 (1st Cir. 1993).

As stated by the Supreme Court in response to the argument that a party should not be required to suffer harm for an attorney's derelictions:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." [Footnote omitted. Citation omitted.]

Link v. Wabash R.R., supra, 370 U.S. at 633-34.

Even if Mr. Clark's conduct is deemed to be grossly negligent, Respondent

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[6]Respondent's Appeal to the Judicial Officer is the first time Respondent indicates that Mr. Leighton P. Clark no longer represents Respondent in this proceeding. (Respondent's Appeal to the Judicial Officer, p. 1.)

cannot avoid the consequences of its attorney's acts and omissions. As stated by the United States Court of Appeals for the Seventh Circuit:

> Yet why should the label "gross" make a difference to the underlying principle: that the errors and misconduct of an agent redound to the detriment of the principal (and ultimately, through malpractice litigation, of the agent himself) rather than of the adversary in litigation? We know how to treat both ends of the continuum: negligence and wilful misconduct alike are attributed to the litigant. When the polar cases are treated identically, intermediate cases do not call for differentiation. Holding that negligence and wilful misconduct, but not gross negligence, may be the basis of a default judgment would make hay for standup comics. . . .

United States v. 7108 West Grand Ave., Chicago, Ill., supra, 15 F.3d at 634.

Respondent's attorney may have failed to keep Respondent informed of the status of the instant proceeding, made decisions for Respondent without Respondent's consent or knowledge, failed to make "timely answers to the USDA/PACA," and failed to comply with the ALJ's orders, as Respondent contends, and Respondent may have a cause of action against its attorney for these acts and omissions. Nonetheless, Respondent cannot avoid the consequences of the acts or omissions of its attorney and the Decision and Order cannot be overturned based upon the quality of the representation Respondent's attorney provided to Respondent in this proceeding.

Second, Respondent contends that:

> Respondent, Field Market Produce, currently i[s] under restrictions due to the fact that our old attorney, Leighton Clark, failed to answer -2- reparation complaints filed as RD-94-631 and LP-94-221 copies of the reparation awards are attached here. The sanctions began September 8, 1994. These cases are part of the current Disciplinary proceeding. With both sanctions the total time under restrictions would be 3 years and 6 months. This seems to be double jeopardy.

Respondent's Appeal to the Judicial Officer, p. 1.

I disagree with Respondent's contention that the imposition of a sanction in the instant proceeding would violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution (hereinafter the Double Jeopardy Clause) because Respondent has previously been sanctioned in two reparation proceedings.

The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." (U.S. Const. amend. V.) The Double Jeopardy Clause protects a defendant in a criminal proceeding against multiple or repeated prosecutions for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

The reparation actions referred to by Respondent in its Appeal to the Judicial Officer are not criminal proceedings. Respondent, in its Appeal to the Judicial Officer, refers to reparation proceedings which it identifies as RD-94-631 and LP-94-221 and states that copies of the reparation awards are attached to its Appeal to the Judicial Officer. (Appeal to the Judicial Officer, p. 1.) The documents attached by Respondent to its Appeal to the Judicial Officer relate to two reparation proceedings identified as *Seacoast Distributing Inc. v. Field Market Produce Inc.*, PACA Docket RD-94-631 and *Jack Cancellieri & Fernando Vargas d/b/a Francisco Distributing Co. v. Field Market Produce Inc.*, PACA Docket RD-94-605,[7] and clearly establish that both of these proceedings are civil actions between private litigants regarding alleged damages arising from transactions involving perishable agricultural commodities. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties, *United States v. Halper*, 490 U.S. 435, 452 (1989); *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989), and such proceedings are not the type to which jeopardy attaches.

Moreover, this administrative disciplinary proceeding is not a criminal proceeding. *See generally United States v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990) (administrative proceedings in which defendants were debarred from Department of Housing and Urban Development (hereinafter HUD) programs, and one defendant agreed to make payment to HUD, were not prosecutions within the meaning of the Double Jeopardy Clause); *In re Terry Horton*, 50 Agric. Dec. 430, 440 (1991) (double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); *In re Leonard McDaniel*, 45 Agric. Dec. 2255, 2264 (1986) (administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy Clause). Therefore, jeopardy attaches neither to the reparation proceedings

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[7]There is no indication in Respondent's Appeal to the Judicial Officer of the nature of the reparation proceeding referenced by Respondent as "LP-94-221," and I infer, based on the Respondent's attachments to its Appeal to the Judicial Officer, that Respondent's reference to a reparation proceeding identified in Respondent's Appeal to the Judicial Officer as "LP-94-221" is in error.

referenced by Respondent, nor to the instant administrative proceeding. Thus, the Double Jeopardy Clause cannot be interposed to bar the instant proceeding.

Respondent's Appeal to the Judicial Officer includes a request "to Reopen this action for a Hearing." (Respondent's Appeal to the Judicial Officer, p. 1.) Section 1.146(a)(2) of the Rules of Practice governing this proceeding provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite* - . . . .
>
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

The Rules of Practice define the word "hearing" as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart, [7 C.F.R., pt. 1, subpart H, (7 C.F.R. §§ 1.130-.151)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Hearing* means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

7 C.F.R. § 1.132.

A petition to reopen a hearing and take further evidence may only be granted if a hearing in the proceeding in question has preceded the petition to reopen the hearing. There has been no hearing in the instant proceeding and no evidence

was previously submitted before the Judge for the record in this proceeding. Rather, the Decision and Order in this proceeding was issued by reason of admissions without hearing. Therefore, Respondent's petition to reopen the hearing must be denied. *See In re Ow Duk Kwon, supra,* slip op. at 6 n. 2 (Respondent's petition to reopen the hearing to take further evidence denied because no hearing had previously been conducted in the proceeding). Moreover, even if a hearing had been conducted in this proceeding, Respondent's petition to reopen the hearing would be denied because Respondent has not stated the nature and purpose of the evidence to be adduced at the reopened hearing, as required by section 1.146(a)(2) of the Rules of Practice. (7 C.F.R. § 1.146(a)(2).)

Respondent's Appeal to the Judicial Officer also contains a request that "the action be reconsidered." (Respondent's Appeal to the Judicial Officer, p. 1.)

Section 1.146(a)(3) of the Rules of Practice governing this proceeding provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite* - . . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Petitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision. Since the Judicial Officer had not, at the time Respondent filed its petition for reconsideration, issued a decision in the instant proceeding, Respondent's petition to reconsider is denied as prematurely filed.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's petition to reopen hearing, Respondent's petition to reconsider, and Respondent's Appeal to the Judicial Officer, filed April 25, 1996, are denied. The Decision Without Hearing by Reason of Admissions issued and filed by the ALJ on February 12, 1996, is the final Decision and Order in this case. This Order shall take effect upon service of this Order on Respondent. The Decision and Order issued and filed by the ALJ on February 12, 1996, shall take effect 14 days after service of this Order on Respondent.

In re: CALLIS PRODUCE, INC.
PACA Docket No. D-96-0522.
Decision and Order filed July 8, 1996.

Failure to file an answer - Failure to pay reparation award - Failure to make full payment promptly - Willful, repeated and flagrant violations - License revocation.

Kimberly Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on March 21, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of March 1994 through June 1995, respondent purchased, received and accepted, in interstate commerce from 14 sellers, 208 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $652,848.67.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Callis Produce, Inc., is a corporation organized and existing under the laws of the State of Maryland. Its business address is Maryland Wholesale Produce Terminal Market, Conowingo Drive, Building B, Jessup, Maryland 20794 and its mailing address is P. O. Box 844, Mathews, Virginia 23109.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 891708 was issued to respondent on August 17, 1989. This license has been renewed annually and is next subject to renewal on or before August 17, 1996. However, on March 26, 1996, this license was suspended for failure to pay a reparation award in accordance with section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of March 1994 through June 1995, Respondent purchased, received and accepted, in interstate commerce from 14 sellers, 208 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $652,848.67.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the license of respondent is hereby revoked.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.
[This Decision and Order became final August 20, 1996.-Editor]

In re: BILLY NEWSOM PRODUCE CO., INC.
PACA Docket No. D-96-0508.
Decision and Order filed July 22, 1996.

Admission of material allegations - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Andrew Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the "PACA"), instituted by a Complaint filed on November 7, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the Complaint that Respondent had committed wilful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to 12 sellers for purchases of 80 lots of perishable agricultural commodities in the course of interstate and foreign commerce in the amount of $279,850.14 during the period August 9, 1993, through August 9, 1994. The Complaint also alleged that on October 18, 1994, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*), designated Case No. 94-30627B. Complainant requested that, as a result of Respondent's violations of the PACA, an order should be issued finding that Respondent has committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and ordering publication of such finding.

Respondent submitted an Answer in which it neither admitted nor denied filing for bankruptcy. Respondent also claimed that it had made full payment to two of the sellers set forth in the Complaint, Johnston Brokerage Company and Val Verde Vegetable Co., Inc., and claimed that it had extended payment terms with the other 10 sellers listed in the Complaint.

On June 18, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions. On July 15, 1996, Respondent filed written objections

to the motion. Complainant's motion is granted.

Findings of Fact

1. Respondent Billy Newsom Produce Co. Inc., is a corporation organized and existing under the laws of the State of Tennessee. Its business mailing address is P.O. Box 1189, Dyersburg, Tennessee 38024.

2. Pursuant to the licensing provisions of the PACA, license number 841816 was issued to Respondent on August 6, 1984. This license automatically terminated on August 6, 1994, due to Respondent's failure to pay the required annual license fee.

3. On or about October 18, 1994, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*), designated Case No. 94-30627B.

4. Respondent failed to make full payment promptly of at least $222,668.10 of the $279,850.14 set forth in the Complaint to 10 of the 12 sellers in the Complaint for purchases of numerous lots of perishable agricultural commodities in the course of interstate and foreign commerce during the period from August 1993 through August 1994.

Conclusion

Respondent has failed to make payment for purchases of produce, as alleged in the Complaint, and currently owes at least $222,668.10. Respondent's failures to make payment constitute wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

Complainant attached to its motion as Exhibit 1, a photocopy of what appears to be a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code filed on or about October 18, 1994, as Case No. 94-30627-B. The petition appears on its face to be authentic and Respondent has failed to deny its authenticity and accuracy. Therefore, I take official notice of the petition and accept its statements as admissions by Respondent.

Respondent, in Schedule F of its Chapter 7 bankruptcy petition, admits that it owes 10 of the sellers set forth in the Complaint at least $222,668.10 of the

$279,850.14 which the Complaint alleges Respondent has failed to fully and promptly pay, as shown in the following table:

CREDITOR	COMPLAINT	SCHEDULE F	COMPLAINT AMOUNT REFLECTED IN SCHEDULE F
L&M Companies, Inc.	$42,256.60	$42,617.00	$42,256.60
Baker Produce, Inc.	3,041.80	3,041.00	3,041.00
Bushwick Comm. Co., Inc.	3,523.25	3,300.00	3,300.00
Grand Prairie Fruit & Vegetable Brokers, Inc.	108,700.21	92,610.00	92,610.00
Sound Commodities, Inc.	7,587.50	7,588.00	7,587.50
VG Kyle & Associates, Inc.	3,991.50	3,691.00	3,691.00
Ryan Potato Company	3,062.50	3,063.00	3,062.50
United Fruit & Produce Co.	60,347.88	56,092.00	56,092.00
Banacol Marketing Corp.	6,240.00	17,472.00	6,240.00
Harvest Valley Produce	4,787.50	4,788.00	4,787.50
TOTAL	$243,538.74	$234,262.00	$222,668.10

The listing of these 10 sellers in Respondent's bankruptcy schedule is an admission that Respondent has failed to pay these sellers the amounts alleged in the Complaint, to the extent the amounts in the Complaint do not exceed those in the bankruptcy schedule, for a total of $222,668.10. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 606-607 (D.C. Cir. 1987); *United Fruit & Veg. Co. v. Director of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *Potato Sales Co., Inc.*, 54 Agric. Dec. (1995); *National Produce Co., Inc.*, 53 Agric. Dec. 1622 (1994).

Respondent's admitted failure to pay $222,668.10 of the $243,538.74 alleged in the Complaint to 10 of the 12 sellers set forth in the Complaint for purchases of numerous loads of perishable agricultural commodities in interstate and foreign commerce during the period August 1993 through August 1994, constitutes wilful, flagrant and repeated violations of the PACA.

Respondent's violations were wilful, as "[u]nder PACA, an action is wilful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 646 (1989); *In re B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021

(1985). That Respondent's failure to pay was intentional is clearly demonstrated by the long period of time over which the violations occurred. Respondent knew or should have known that it could not make payment for the large number of perishables it ordered, yet continued to make purchases. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and consequently could not pay its suppliers. Therefore, Respondent committed wilful violations of the PACA. *In re B.G. Sales Co., Inc., supra*, at 2028-2042. Respondent's violations were flagrant and repeated because of the large amount of money, $222,668.10, which Respondent admittedly failed to pay in numerous transactions during the period August 1993 through August 1994. *In re The Caito Produce Co., supra*, at 611.

Respondent asserts a defense that it had extended payment terms with 10 of the sellers specified in the Complaint. However, payment terms agreed to after the produce transactions take place do not conform to the requirement of the Department's regulations that agreements for a payment period different from those established in section 46.2(aa) of the regulations (7 C.F.R. § 46.2(aa)) must be in writing and agreed to prior to the time of the transactions (7 C.F.R. § 46.2(aa)(11)). Another reason why payment agreements after the transaction are not considered a defense is that the bargaining power of the parties is unequal once the buyer has the produce. *In re The Caito Produce Co., supra*, at 609.

The essence of Respondent's opposition to Complainant's motion is a concern that as a result of this decision James D. Newsom will be found to have been responsibly connected with Respondent Billy Newsom Produce Co., Inc. Respondent refers to a "companion case" of *In re James D. Newsom*, PACA D-1784. However, that case is not before me for decision at this time, and although I stated in a telephone conference in this matter on June 7, 1996, that "it appears that Mr. James D. Newsom was responsibly connected with Respondent during the time of most of the violations" since that issue was not litigated before me in this matter, I do not decide that issue.

The proper sanction for Respondent's failure to make full payment promptly for produce purchases is a license revocation or, when a respondent's license has terminated, as it the case here, a finding of the commission of wilful, flagrant or repeated violations of section 2(4) of the PACA and publication of such finding.

Order

Respondent has committed wilful, flagrant or repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

These findings are ordered published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after its service upon Respondent, unless it is appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final September 3, 1996.-Editor]

In re: SUPERIOR POTATO CHIP CO.
PACA Docket No. D-96-0501.
Decision and Order filed March 27, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to pay reparation award - Failure to make full payment promptly for produce - Willful, repeated and flagrant violations - Publication.

Julie Cook Schuster, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on October 2, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of November 1994 through April 1995, Respondent purchased, received and accepted, in interstate commerce, from 4 sellers, 66 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $244,573.38. Three of the four sellers participated in a distribution of trust assets which reduced respondent's produce debt to $186,962.56.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Superior Potato Chip Co., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of Michigan. Its business address is 352 Fail Road, Laporte, Indiana 46350, and its mailing address is 12620 Newburgh, Livonia, Michigan 48150.

2. Pursuant to the licensing provisions of the PACA, license number 930091 was issued to respondent on October 16, 1992. This license terminated on October 16, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499b(a)), when respondent failed to pay the required annual renewal fee. Furthermore, respondent's license previously had been suspended as of July 27, 1995, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499d(a)) when it failed to satisfy a reparation award.

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1994 through April 1995, Respondent purchased, received and accepted, in interstate commerce, from 4 sellers, 66 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $244,573.38. Three of the four sellers protected their trust rights under Section 5c(3) of the PACA (7 U.S.C. § 499e(c)) by filing timely trust notices. As a result, they participated in a distribution of trust assets which reduced respondent's produce debt to $186,962.56.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this

Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 16, 1996-Editor]

In re: HEE FARM, INC.
PACA Docket No. D-96-0526.
Decision and Order filed August 9, 1996.

Failure to file an answer - Failure to make full payment promptly - Failure to pay reparation award - Willful, flagrant, and repeated violations - License revocation.

Timothy Morris, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on April 22, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of May through November 1995, respondent purchased, received, and accepted, in interstate commerce from 12 sellers, 63 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $347,784.51.

A copy of the Complaint was served upon respondent, which has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Hee Farm, Inc., is a corporation organized and existing under the laws of the District of Columbia. Its business and mailing address is 1270-1274 5th Street, N.E., Washington, DC 20002.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 950093 was issued to respondent on October 18, 1994. This license has been renewed annually and is next subject to renewal on or before October 18, 1996. However, on March 29, 1996, this license was suspended for failure to pay a reparation award in accordance with section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph III of the complaint, during the period of May through November 1995, respondent purchased, received, and accepted, in interstate commerce from 12 sellers, 63 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $347,781.51.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated, and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, repeated, and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the license of respondent is hereby revoked.

This order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceedings within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 19, 1996.-Editor]

In re: ALISON FRUIT CO., INC.
PACA Docket No. D-96-0514.
Decision and Order filed August 8, 1996.

Failure to file an answer - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 1, 1996, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1994 through April 1995, respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 103 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,577,782.07.

A copy of the complaint was served upon respondent Alison on or about February 1, 1996, which has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Alison Fruit Co., Inc., is a corporation, whose address is 5-1/2 Mile S. 23rd, Hidalgo, Texas 78557.

2. Pursuant to the licensing provisions of the Act, license number 921899 was issued to respondent on September 30, 1992. This license was renewed annually, but terminated on September 30, 1995, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph IV of the complaint, during the period September 1994 through April 1995, respondent purchased, received, and

accepted in interstate and foreign commerce, from 22 sellers, 103 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,577,781.07.

Conclusions

Respondent's failure to make full payment promptly with respect to the 103 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final September 26, 1996.-Editor]

In re: TAVILLA FOODSERVICE, INC.
PACA Docket No. D-96-0523.
Decision and Order filed November 5, 1996.

Failure to file an answer - Failure to pay required annual renewal fee - Failure to made full payment promptly - Willful, flagrant and repeated violations - Publication.

JoAnn Waterfield, for Complainant.
Spencer Fox, Coral Gables, FL, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.)*, the "PACA,"

instituted by a complaint filed on April 5, 1996 by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that the respondent corporation failed to make full and prompt payment for 246 lots of produce purchased during June through December, 1994 from 48 sellers for which it owed $646,089.09. The complaint further alleged that the respondent corporation's license terminated on June 1, 1995, when it failed to pay the required annual renewal fee. The complaint seeks an order publishing the facts of the alleged violations and the entry of findings that respondent's violations were willful, flagrant and repeated. Upon entry and publication of such findings, all persons responsibly connected with the respondent corporation are barred from employment by any PACA licensee for one year and a bond acceptable to the Secretary must be posted for them to be employed the following year. (7 U.S.C. § 499h(b)).

An attempt was made to serve the complaint on the respondent at 1930 N.W. 23rd Street, Miami, Florida 33142. The letter and complaint was received at that address on April 15, 1996 by a person who signed the Post Office certified receipt as respondent's agent. However, the law firm of Mishan, Sloto & Greenberg, by letter of April 19, 1996, advised the Hearing Clerk that it represented an assignee of the corporation pursuant to Florida State law, and the service of the complaint should be accomplished by sending it to Paul Tavilla's home address or his attorney, Candis Trusty. The complaint was then sent by certified mail to both locations. Ms. Trusty signed a receipt on June 24, 1996; the letter and complaint sent to Mr. Tavilla at (b) (6) (b) (6) was returned unclaimed. However, the address of (b) (6) was listed on a yellow card sent back to the Hearing Clerk and the certified letter was sent on to Mr. Tavilla at that address where it too was subsequently returned to the Hearing Clerk. The complaint was then posted by regular mail on July 29, 1996, to Paul Tavilla at (b) (6)

Under the controlling Rules of Practice, 7 C.F.R. § 1.136, an answer must be filed within 20 days after the service of the complaint. Failure to file an answer is deemed to be an admission of the allegations in the complaint and a waiver of hearing which permits the complainant to file a proposed decision and a motion for its adoption under 7 C.F.R. § 1.139. The respondent has 20 days after service of the motion to file objections to it, and an administrative law judge is required to enter a decision without further procedure or hearing unless meritorious objections are filed.

In this proceeding, no answer was ever filed. A proposed decision and

motion for decision were duly filed on September 24, 1996 and were served on respondent at [redacted] on September 30, 1996. An objection to the proposed decision was filed on respondent's behalf by Spencer Fox, attorney, on October 23, 1996, one day past the October 22, 1996 due date.

Inasmuch as the objections were only one day late they have been considered as if timely received. On October 31, 1996 complainant filed a response to respondent's objection which has also been considered.

The objection states that pursuant to an Assignment of Assets for the Benefit of Creditors filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (Case No. 94-21649 CA 29), $550,000.00 of the $646,089.09 debt specified in the complaint has been paid on PACA trust claims.

Complainant's response to respondent's objection correctly points out that the objection cannot substitute for the answer which respondent failed to timely file. Complainant, however, concedes that respondent has correctly reported that monies were paid on trust claims under the PACA in reduction of the $646,089.09 indebtedness. Complainant contends though that its review of the trust distribution shows $311,889.65 is still outstanding.

Even if respondent's assertion is correct and the $646,089.09 debt had been reduced by $550,000.00, over $90,000.00 would still be owed which would constitute a flagrant violation of the PACA. This fact together with the undenied obligations of the complainant showing the violations of the PACA to have been repeated, requires that the following findings and order be entered.

Findings of Fact

1. Respondent Tavilla Foodservice, Inc., is a corporation, which was officed at 1930 N.W. 23rd Street, Miami, Florida 33142.

2. Pursuant to the licensing provisions of the PACA, license number 931245 was issued to respondent on June 1, 1993. The license was renewed annually until it terminated for failure to pay the required renewal fee on June 1, 1995.

3. During the period June through December, 1994, respondent purchased, received and accepted in interstate and foreign commerce, from 48 sellers, 246 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total of $646,089.09. As of the date of this Decision's issuance, at least $96,000.00 remains unpaid.

Order

A finding is hereby made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh (11th) day after the Decision becomes final.

Pursuant to the governing Rules of Practice (7 C.F.R. § 1.142(c)(4), this Decision will become final without further proceedings thirty-five (35) days after the date of service upon the respondent unless appealed to the Judicial Officer within thirty (30) days after service as provided in 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 17, 1996.-Editor]

In re: SUPREME PRODUCE, INC.
PACA Docket No. D-96-0515.
Decision and Order filed October 30, 1996.

Failure to file an answer - Failure to make full payment promptly - Failure to pay required annual renewal fee - Failure to pay a reparation order - Willful, repeated and flagrant violations - Publication.

Julie C. Schuster, for Complainant.
Respondent, Pro se.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on February 7, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of July through November 1994, respondent purchased, received and accepted, in interstate commerce from 14 sellers, 33 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of

$148,063.10.

A copy of the Complaint was served upon Respondent, which has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Supreme Produce, Inc., is a corporation organized and existing under the laws of the State of Florida. Its business and mailing address was 1285 W. Atlantic Boulevard, Pompano Beach, Florida 33069.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 940303 was issued to respondent on November 23, 1993. This license terminated on November 23, 1995, pursuant to Section 4(a)of the PACA (7 U.S.C. §499d(a)), when the firm failed to submit the required annual renewal fee. In addition, this license was suspended on March 9, 1995, for failure to pay a reparation order pursuant to Section 7(d) of the PACA (7 U.S.C. §499g(d)). This order, and the three subsequent orders issued, remain unpaid.

3. As more fully set forth in paragraph 3 of the complaint, during the period of July through November 1994, respondent received and accepted, in interstate commerce from 14 sellers, 33 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $148,063.10. During May through July 1996, five of the sellers received payment in an amount totaling $11,081.75, the full amounts set forth as owed to those five sellers in the complaint. There still remains past due and unpaid to the 9 remaining sellers, $136,981.35.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and

flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)). Such finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 23, 1996.-Editor]

In re: TRI-COUNTY PRODUCE CO., INC. and LEE D. EFFENSON.
PACA Docket No. D-96-0528.
Decision and Order as to Tri-County Produce Co., Inc. filed October 28, 1996.

Failure to file an answer - Failure to submit required annual renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Julie C. Schuster, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on May 26, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of February through September 1994, Tri-County Produce Co., Inc., under the direction, management, and control of Lee D. Effenson, purchased, received and accepted, in interstate and foreign commerce from 10 sellers, 61 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $106,020.05.

A copy of the Complaint was served upon Respondents, which has not been

answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tri-County Produce Co., Inc., (hereinafter "Tri-County"), is a corporation organized and existing under the laws of the State of Florida. Its business and mailing address was 1285 W. Atlantic Boulevard, Pompano Beach, Florida 33069.

2. At all times material herein, Tri-County was licensed under the provisions of PACA. License number 940718 was issued to Tri-County on February 25, 1994. This license terminated on February 25, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when the firm failed to submit the required annual renewal fee.

3. Respondent, Lee D. Effenson, (hereinafter "Effenson"), is an individual whose address is (b) (6) [redacted].

4. At all times material herein, Effenson was the manager of Tri-County and responsible for the direction, management and control of the firm.

5. At all times material herein, Kathleen A. Effenson, the wife of Effenson, was reported as the sole principal of Tri-County. Kathleen A. Effenson was not responsible for the direction, management and control of Tri-County.

6. As more fully set forth in paragraph 3 of the complaint, during the period of February through September 1994, Tri-County, under the direction, management and control of Effenson, purchased, received and accepted, in interstate and foreign commerce from 10 sellers, 61 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $106,020.05.

Conclusions

Respondents' failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 6, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondents have committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). Such finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 23, 1996.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Boyd Acquisition Company, Inc. d/b/a Boyd Potato Chips and State Line Snacks Corp. PACA Docket Nos. D-96-0525 & D-96-0524. 7/26/96.

U.S. Produce Co., Inc. PACA Docket No. D-94-0547. 8/2/96.

BT Network, Inc. and Mushroom Growers Association Sales Co., Inc. PACA D-96-0517. 8/30/96.

Michigan Re-Packing and Produce Company. PACA Docket No. D-95-0529. 9/24/96.

Crown Tomato Sales, Inc. PACA Docket No. D-96-0534. 11/1/96.

Pick Pack Produce Co., Inc. PACA Docket No. D-96-0533. 12/4/96.

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1996

PACKERS AND STOCKYARDS ACT

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DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDER

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PACKERS AND STOCKYARDS ACT

COURT DECISION

SAMUEL J. DALESSIO, JR., DOUGLAS S. DALESSIO, d/b/a INDIANA FARMERS LIVESTOCK MARKET, INC. v. SECRETARY OF AGRICULTURE.
No. 95-3266.
Filed February 6, 1996.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

The United States Court of Appeals for the Third Circuit affirmed the Secretary's decision.

The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Third Circuit provides by rule for the reporting of opinions having "precedential or institutional value. An opinion which appears to have value only to the trial court or the parties is ordinarily not published." The Federal Reporter tables are prepared from lists of cases terminated by judgment orders, unpublished per curiam opinions and unpublished signed opinions, indicating the disposition of each case, transmitted by the Court. Third Circuit Rules, App. 1, Internal Operating Procedures, Ch. 5, sec. 5.1, 28 U.S.C.A.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: SMITHFIELD LIVESTOCK AUCTION, INC., LEROY DEL HOLMGREN, WAYNE NORMAN and KAREN JACKSON.
P&S Docket No. D-95-43.
Decision and Order filed November 29, 1995.

Stipulated facts - Failure to maintain and use properly a custodial account - Alter ego - Existence of line of credit no defense to custodial account violation - Sufficient funds necessary without regard to collection of receivables - Cease and desist order - Civil penalty.

Judge Bernstein issued a cease and desist order and imposed a $7,000 civil penalty. Complainant and Respondents stipulated that the corporate Respondent, under the direction, management and control of individual Respondents, failed to maintain and use properly its custodial account and that individual Respondents were the alter ego of corporate Respondent. Respondents' delays in securing funds from a bond and from receivables and a bank's failure to honor a line of credit to cover Respondents' overdrafts are no defenses to Respondents' custodial account violations.

Andrew Y. Stanton, for Complainant.
N. George Daines, Logan, UT, for Respondents.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), (the "Act"), and the regulations promulgated pursuant to the Act (9 C.F.R. § 201.1 *et seq.*). A Complaint was filed on June 7, 1995, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the corporate Respondent, under the direction, management and control of the individual Respondents, wilfully violated the Act and the regulations by failing to maintain and use properly its Custodial Account for Shippers' Proceeds, thereby endangering the faithful and prompt accounting and payments of the portions due the owners or consignors of livestock.

Respondents did not file timely Answers and on August 9, 1995, Complainant filed a motion for a decision without hearing by reason of default. On August 9, 1995, Respondents filed a proposed Answer in which they admitted that they technically violated the Act and regulations. On August 14, 1995, Complainant filed an objection to Respondents' proposed Answer. In a September 14, 1995, telephone conference, I stated that I would

reserve ruling on Complainant's motion for a decision and if the parties could file stipulations of fact and proposed findings of fact, conclusions and orders, I would decide the sole issue of sanction based upon such submissions. The parties filed their agreed upon stipulations of fact and they filed proposed findings of fact, proposed conclusions of law, and briefs on November 15 and 16, 1995. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. In addition, Respondents filed a document of alleged mitigating facts.

As agreed by the parties, the sole issue is one of sanction which will be determined upon consideration of the findings of fact and the applicable law.

Pertinent Statutory and Regulatory Provisions

Section 312 of the Act (7 U.S.C. § 213):

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.
(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty

by an action in the appropriate district court of the United States.

Section 201.42 of the regulations (9 C.F.R. § 201.42):

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.
(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.
(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.
(d) *Withdrawals from custodial accounts.* The custodial account for shipper's proceeds shall be drawn on only for payment of (1) net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.
(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of

funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Findings of Fact

The parties stipulated and I find:

1. Respondent, Smithfield Livestock Auction, Inc. (the "corporate Respondent"), is a Utah corporation whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

2. The corporate Respondent was at all times material:

a. Engaged in the business of operating the Smithfield Livestock Auction, Inc., a posted stockyard subject to the provisions of the Act,

b. Engaged in the business of a market agency selling livestock on a commission basis; and

c. Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and furnish stockyard services.

3. Respondent, LeRoy Del Holmgren, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

4. Respondent Holmgren was at all times material:

a. President and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

5. Respondent, Wayne Norman, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

6. Respondent Norman was at all times material:

a. Vice-president and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

7. Respondent, Karen Jackson, is an individual whose business mailing address is 711 South 100 West, Smithfield, Utah 84335.

8. Respondent Jackson was at all times material:

a. Secretary/treasurer and owner of 25 percent of the stock of the corporate Respondent; and

b. Responsible for the direction, management and control of the corporate Respondent.

9. The corporate Respondent, under the direction, management and control of the individual Respondents, during the period April 30, 1994, through June 15, 1994, failed to maintain and use properly its Custodial Account for Shippers' Proceeds (the "custodial account"), in that:

a. As of April 30, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of $307,764.61, and had, to offset those checks, a balance in the account in the amount of $94,408.89, no deposits in transit and current proceeds receivable in the amount of $121,125.70, resulting in a deficiency of $92,230.02 in funds available to pay shippers' proceeds.

b. As of May 31, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of $157,068.71 and a negative balance in the account in the amount of $38,073.35, and had, to offset such amounts, deposits in transit in the amount of $89,854.86, and current proceeds receivable in the amount of $37,480.13, resulting in a deficiency of $67,807.07 in funds available to pay shippers' proceeds.

c. As of June 13, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of $144,845.40, and had, to offset those checks, a balance in the account in the amount of $12,575.62, no deposits in transit and current proceeds receivable in the amount of

$65,196.85, resulting in a deficiency of $67,062.93 in funds available to pay shippers' proceeds.

d. As of June 15, 1994, the corporate Respondent had outstanding checks drawn on the custodial account in the amount of $144,845.40, and had, to offset those checks, a balance in the account in the amount of $93,411.02, no deposits in transit and current proceeds receivable in the amount of $11,183.50, resulting in a deficiency of $40,250.88 in funds available to pay shippers' proceeds.

e. Such deficiencies were caused, in part, by the failure of the corporate Respondent, under the direction, management and control of the individual Respondents, to deposit in the custodial account, within the time prescribed in section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock.

f. Further, the corporate Respondent, under the direction, management and control of the individual Respondents, failed to properly designate the custodial account and failed to reimburse the custodial account in amounts equal to the proceeds receivable from the sale of livestock due from the corporate Respondent, Respondent Holmgren and buyers to whom the corporate Respondent had extended credit.

10. The actions of Respondents were in violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)), and section 201.42 of the regulations issued pursuant to the Act (9 C.F.R. § 201.42).

11. In a certified letter dated March 5, 1991, and received by Respondent Holmgren and the corporate Respondent, Complainant advised that a review of the corporate Respondent's custodial account revealed that the account was short $4,909.68 due to the failure of the corporate Respondent to fully reimburse the custodial account for accounts receivable. The shortage was also due to withdrawals from the custodial account which exceeded the amount of funds due to the corporate Respondent for services. Respondent Holmgren and the corporate Respondent were also advised that full and complete records of funds due the corporate Respondent as compensation for its services and accounts receivable due the corporate Respondent were not being maintained.

12. The corporate Respondent has submitted an annual report to Complainant, dated May 15, 1995, covering the year ending December 31, 1994. The May 15, 1995, annual report shall be considered part of the evidence (Exhibit 1).

Respondents have alleged additional mitigating facts. Complainant disputes these assertions on the basis that Complainant has no knowledge

about those facts. Since it was agreed that my findings would be based upon only stipulated facts, I am unable to accept Respondents' alleged mitigating facts as a basis for findings of fact.

Conclusions

1. **The corporate Respondent, under the direction, management and control of the individual Respondents, during the period April 30, 1994, through June 15, 1994, failed to maintain and use properly its custodial account, in violation of the Act and Regulations.**

Respondents have failed to maintain and use properly the custodial account of the corporate Respondent. Respondents admit that their actions violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) (Finding 10).

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a custodial account (9 C.F.R. § 201.42(b)). The custodial account is a fiduciary account which is designed to hold trust proceeds that a market agency collects from the sale of livestock consigned to it for sale on a commission basis. Section 201.42(c) prescribes the manner in which a market agency is to make deposits into the custodial account and otherwise maintain the custodial account.

Respondents failed to properly maintain the corporate Respondent's custodial account on four different occasions, April 30, 1994, May 31, 1994, June 13, 1994, and June 15, 1994. The custodial account was out of balance, reflecting deficiencies of $92,230.02, $67,807.07, $67,062.93, and $40,250.88, respectively, in funds available to pay shippers' proceeds (Findings 9a, b, c and d). These deficiencies were caused, in part, by the failure of Respondents to deposit in the custodial account, within the time prescribed in section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock (Finding 9e).

Further, Respondents misused the custodial account, as they failed to properly designate the custodial account and failed to reimburse the custodial account in amounts equal to the proceeds receivable from the sale of livestock due from the corporate Respondent, Respondent Holmgren and buyers to whom the corporate Respondent had extended credit (Finding 9f).

It has been consistently held by the Department, and upheld by the Courts, that the improper handling and use of the custodial account, in contravention of the requirements of section 201.42 of the regulations, is a

violation of section 312(a) of the Act (7 U.S.C. § 213(a)). It has also been held that shortages found to exist in the custodial account and the failure to properly use and maintain the custodial account are unfair and deceptive practices in violation of Section 312(a) of the Act. *In re Farmers and Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Thumb Auction Markets, Inc.*, 37 Agric. Dec. 164 (1977); *In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546 (1977); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re James J. Miller*, 33 Agric. Dec. 53, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Bowman*, 23 Agric. Dec. 1074 (1964), *aff'd, Bowman v. United States Dep't of Agric.*, 363 F.2d 81 (5th Cir. 1966).

A significant aggravating factor in this case is that Respondents were aware of the importance of the proper use and maintenance of the custodial account. In a certified letter dated March 5, 1991, and received by Respondent Holmgren and the corporate Respondent, Complainant advised that a review of the corporate Respondent's custodial account revealed that the account was short $4,909.68 due to the failure of the corporate Respondent to fully reimburse the custodial account for accounts receivable. The shortage was also due to withdrawals from the custodial account which exceeded the amount of funds due to the corporate Respondent for services. Respondent Holmgren and the corporate Respondent were also advised that full and complete records of funds due the corporate Respondent as compensation for its services and accounts receivable due the corporate Respondent were not being maintained (Finding 11).

Despite receiving prior notice of problems with the corporate Respondent's custodial account, Respondents have again failed to maintain and use properly the corporate Respondent's custodial account, in violation of the Act and regulations.

2. The individual Respondents were the alter egos of the corporate Respondent.

The parties have stipulated that, at all times material herein, Respondent Holmgren was the president and 25 percent owner of the corporate Respondent (Finding 4a), Respondent Norman was vice-president and 25 percent owner of the corporate Respondent (Finding 6a), and Respondent Jackson was secretary/treasurer and 25 percent owner of the corporate Respondent (Finding 8a). The parties have also stipulated that, at all times

material, the individual Respondents were responsible for the direction, management and control of the corporate Respondent (Findings 4b, 6b and 8b). Therefore, the individual Respondents were the alter egos of the corporate Respondent.

The law is clear that in cases under the Packers and Stockyards Act, "[t]he corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute." *Bruhn's Freezer Meats v. United States Dep't of Agric.*, 438 F.2d 1332, 1343 (3d Cir. 1971). *See also Van Wyck v. Bergland*, 570 F.2d 701, 705 (1978); *In re Fowler Livestock Auction, Inc.*, 52 Agric. Dec. 558, 571 (1993); *In re Sebastopol Meat Company, Inc.*, 28 Agric. Dec. 435, 441 (1969). In this case, the individual Respondents admittedly directed, managed and controlled the corporate Respondent and are thus responsible for the violations.

3. The proper sanction in this case is a cease and desist order and a $7,000.00 civil penalty.

Complainant argues that the appropriate sanction in this case is a cease and desist order and a $7,000.00 civil penalty. Complainant's sanction recommendation is based on the nature of the violations committed by Respondents, the remedial purposes of the Act and relevant circumstances, including the aggravating factor that Respondents were previously notified of problems with the maintenance and use of the corporate Respondent's custodial account in a certified letter dated March 5, 1991. Respondents, therefore, knew the importance of properly maintaining and using the corporate Respondent's custodial account but chose not to do so. Further, there is no stipulated finding or even allegation that Respondents are not able to pay a $7,000 civil penalty, pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)).

The sanction sought by Complainant complies with the Judicial Officer's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991):

> The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondents' failure to maintain and use properly its custodial account exposes its consignors to great risk. As stated in *In re Danny Cobb and Crockett Livestock Sales Co., Inc.*, 48 Agric. Dec. 234, 256 (1989), "the custodial account is a trust account which is a conduit for funds received from the sale of consignors' livestock. When properly designated, as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation." The consignors were not adequately protected in this case due to Respondents' violations.

Respondents' alleged mitigating facts fall into six basic categories: (1) the corporate Respondent and its bank, the First Bank of Commerce, North Logan, Utah, had an informal agreement that the bank would pay overdrafts, and there is now a formal agreement to this effect; (2) when the corporate Respondent received a bad check from Todd Davis, Complainant requested that the corporate Respondent proceed against the bond, but there was a five and one-half month delay in obtaining the bond money which Respondents allege was caused by Complainant; (3) the deficiencies in the custodial account occurred because receivables owed to the corporate Respondent were delayed beyond seven days; (4) that the corporate Respondent has never had a check returned to any seller for insufficient funds; (5) the violations were corrected during the examination and (6) no one was harmed by the violations. Since these were not stipulated to, I am unable to base my decision upon these allegations. However, even if I found these to be the case, my decision would not be changed.

Assuming, *arguendo*, that the corporate Respondent did have an informal agreement to pay overdrafts with the First Bank of Commerce and currently has a formal line of credit, this is not a legally adequate defense to Respondents' violations. It has been held in many decisions under the Act that the existence of a line of credit, informal or formal, is no defense to payment or custodial account violations because it provides no security to the unpaid livestock sellers. If the bank, lawfully or unlawfully, terminates the line of credit or fails, the sellers will have no recourse. *In re Jeff Palmer d/b/a Palmer Cattle Company*, 50 Agric. Dec. 1762 (1991); *In re Ozark County Cattle Company, Inc.*, 49 Agric. Dec. 336 (1990); *In re Richard N. Garver*, 45 Agric. Dec. 1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988). As stated in *Garver, id.* at 1094-1095 (1986):

> Respondent . . . argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he

did not wilfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's over-draft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements . . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is of no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc., supra; In re Hugh B. Powell*, 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.*, 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy*, 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

The lack of protection afforded livestock sellers by the existence of a line of credit was discussed in *In re Harry C. Hardy*, 33 Agric. Dec. 1383, 1401 (1974):

The existence of a line of credit under which the bank agrees to honor a check notwithstanding the absence of funds in the account is not as much protection to consignors as cash in the account. The line of credit could be immediately withdrawn in the event of a sudden business failure by the respondents. In these times, sudden and unexpected business failures have occurred, not only in the livestock industry, but in many other industries. In addition, a line

> of credit would be of no value if the bank extending the line of credit failed.

Similarly, in the case at hand, Respondents' consignors should not have been placed in a position where they were compelled to rely on Respondents' informal credit line with the First Bank of Commerce, which the bank apparently elected not to honor. This is not a mitigating circumstance to Respondents' custodial account violations.

Respondents' argument that Complainant is responsible for a five and one-half month delay in recovering funds from the bond of Todd Davis, a customer of the corporate Respondent, is based on a misunderstanding of the Act and regulations. Section 201.29 of the regulations (9 C.F.R. § 201.29) requires that an appropriate bond be maintained by every market agency, packer and dealer, except packers whose annual purchases do not exceed $500,000.00 and packer buyers registered as dealers to purchase livestock for slaughter only. Section 201.33 of the regulations (9 C.F.R. § 201.33) requires that the bonds contain provisions regarding claims for recovery made on such bonds. However, neither the Act nor the regulations state anywhere that it is the responsibility of Complainant, Packers and Stockyards Programs, to make the claim for recovery on behalf of the aggrieved party. Respondents' contention that Complainant is somehow responsible for the alleged delay in recovery on the bond is, therefore, baseless.

Respondents' claim that the deficiencies in the custodial account occurred because receivables owed to the corporate Respondent were delayed beyond seven days is not a mitigating circumstance. Section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)) states that the market agency shall

> deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

Therefore, it was Respondents' duty to ensure that, within seven days from the sale of the livestock, the custodial account contained sufficient funds to pay the consignor, whether or not Respondent had collected all proceeds receivable by that time. By conducting business as a market agency subject to the Act, Respondents elected to comply with the requirement set forth in section 201.42(c) to provide sufficient funds in the custodial account, without

regard to the collection of receivables. The alleged untimely collection of receivables is no excuse for Respondents' violations.

Further, Respondents' claim that it could not maintain its custodial account because of the failure to collect its receivables in a timely fashion demonstrates the domino effect created by the failure to comply with the Act's custodial obligations. Respondents should not have been buying on commission if they could not conform to the custodial account requirements of the Act.

Finally, although I am unable to find, as Respondents allege, that the corporate Respondent has never had a check returned for insufficient funds, Respondents have admitted that, prior to these custodial violations, the corporate Respondent and Respondent Holmgren were notified by Complainant in a certified letter dated March 5, 1991, that they were not properly maintaining the custodial account (Finding 11). This is an aggravating factor.

Upon consideration of the foregoing, I conclude that the issuance of a cease and desist order and a $7,000.00 civil penalty constitute an appropriate sanction.

Order

Respondent Smithfield Livestock Auction, Inc., its officers, directors, agents, employees, successors and assigns, Respondent LeRoy Del Holmgren, Respondent Wayne Norman and Respondent Karen Jackson, individually or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Failing to deposit in the corporate Respondent's "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock; and

2. Failing to maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42).

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondents are jointly and severally assessed a civil penalty of $7,000.00.

This Decision and Order will become final and effective without further proceedings 35 days after service upon Respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final January 10, 1996.-Editor].

In re: JEREMY BYRD, d/b/a T BYRD CATTLE CO.
P&S Docket No. D-95-55.
Decision and Order filed February 21, 1996.

Cease and desist order — Registration order — NSF checks — Failing to pay — Failing to pay when due — Engaging in business without being registered or bonded — Failure to file timely answer — P&S sanctions permitted notwithstanding bankruptcy — Sanction.

The Judicial Officer affirmed the decision by Chief Judge Palmer (Chief ALJ) ordering Respondent to cease and desist from engaging in business in any capacity without the required registration and bonding under the Act; failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order prohibits Respondent from engaging in business subject to the Act without being registered, and provides that Respondent shall not be registered to engage in business for 5 years and thereafter until properly registered and bonded; provided, however, that upon application, a supplemental order may be issued allowing Respondent registration and bonding after 150 days upon demonstration that all unpaid livestock sellers have been paid in full, and provided further, that the Order may be modified to permit Respondent's salaried employment by another registrant or packer after 150 days. Respondent failed to file a timely Answer, and, therefore, a default order was properly issued. The Bankruptcy Code permits disciplinary proceedings and the imposition of sanctions under the Packers and Stockyards Act notwithstanding bankruptcy. The sanction imposed is appropriate, based upon similar sanctions in similar disciplinary proceedings under the Packers and Stockyards Act, considering the serious nature of the violations.

Kimberly D. Hart, for Complainant.
Hal B. Cameron, Jr., Tyler, Texas, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq.*) (Act). An Initial Decision Without Hearing By Reason of Default was filed on December 4, 1995, by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) ordering that Respondent cease and desist from: (1) Engaging in any business for which registration and bonding are required under the Act and regulations issued under the Act, (9 C.F.R. § 201.1 *et seq.*), without so registering and filing adequate bond or its equivalent; (2) Failing to pay for livestock; (3) Failing to pay, when due, for livestock; and (4) Issuing NSF checks in payment for livestock; and that Respondent not be registered to engage in business subject to the Act for 5 years and thereafter until Respondent is properly registered and bonded. The Chief ALJ's Order provides, however, that, upon application, a supplemental order may be issued allowing Respondent to register and obtain a bond or its equivalent after 150

days if Respondent has paid all livestock sellers in full, and provides further, that, upon application, Respondent may be permitted salaried employment by another registrant or packer after the initial 150 days.

On December 18, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] The Respondent filed a First Amended Notice of Appeal and a Second Amended Notice of Appeal on December 18, 1995, and December 28, 1995, respectively. On January 25, 1996, Complainant filed a Response to Respondent's Appeal, and on January 26, 1996, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit, (7 C.F.R. § 1.145(d)), is refused because the issues are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions.

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the Respondent willfully violated the Act and the regulations promulgated under the Act.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Copies of the Complaint and the Rules of Practice, (7 C.F.R. § 1.130 *et seq.*), governing proceedings under the Act were [sent to] Respondent by certified mail[, but the letter containing these documents was returned marked by the United States Postal Service as "Unclaimed." The Complaint was then remailed to the Respondent by ordinary mail on October 2, 1995, and under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), was deemed received by the Respondent on the date of remailing.] Respondent was informed in [the Complaint] that an Answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent failed to file an Answer within the time prescribed in the Rules of Practice which ended on October 2[3], 1995. [On November 2, 1995, in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.139), Complainant filed a motion for adoption of a proposed decision and a proposed decision based upon Respondent's failure to file an Answer within the time prescribed by the applicable Rules of Practice. (7 C.F.R. § 1.136(a).)] Instead [of filing an Answer or responding to Complainant's motion for adoption of a proposed decision, Respondent filed] a Suggestion of Bankruptcy on November 6, 1995, followed by a Corrected Suggestion of Bankruptcy filed on November 14, 1995. On November 2[2], 1995, an Answer was finally filed by Respondent. Although the late-filed Answer does generally deny the allegations of the Complaint, it . . . asserts bankruptcy as a bar to the Complaint. On November 30, 1995, Complainant filed a response to Respondent's Notice of Bankruptcy Filing. [In that response, Complainant identified] the statutory authorities and the case law which preclude bankruptcy being a bar to this proceeding . . . [and] requested that the Answer tendered by Respondent should not be accepted as timely filed. 7 C.F.R. § 1.136(c) states that failure to file an Answer within the time provided shall be considered a default and deemed an admission of the allegations in the Complaint. Extension of time for filing may be ordered by a Judge if there is good reason for it and after a notice of the request for the extension has been given to the other party. (7 C.F.R. § 1.147([f]).) Respondent has not given any reason why the time for the filing of the Answer should have been extended, and, therefore, the tendered Answer will not be treated as timely filed. Therefore, the material facts alleged in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139.)

Findings of Fact

1. (a) Jeremy Byrd, hereinafter referred to as Respondent . . ., is an individual doing business as T Byrd Cattle Co., whose mailing address is P[redacted]. [redacted] (b) (6) [redacted]d, [redacted].

(b) The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account.

(c) The Respondent, at all times material herein, was not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent . . . was placed on notice by certified mail dated June 7, 1994, and July 6, 1994, that he was operating as a dealer subject to the Act and that, if he continued such operations, he would need to register and obtain adequate bond coverage. Notwithstanding such notice, Respondent has continued to engage in the business of a dealer subject to the Act without registering with the Secretary of Agriculture and obtaining an adequate bond or its equivalent.

3. (a) The Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III(a) of the Complaint, purchased livestock and in purported payment issued checks which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions listed in paragraph III(a) of the Complaint, and in the transaction set forth in paragraph III(b) of the Complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of August 1, 1995, there remained unpaid a total of $141,444.69 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the Respondent has willfully violated sections 201.29 and 201.30 of the regulations. (9 C.F.R. §§ 201.29-.30.)

By reason of the facts found in Finding of Fact 3 herein, the Respondent has willfully violated sections 312(a) and 409 of the Act. (7 U.S.C. §§ 213(a), 228b.)

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues on appeal. First, Respondent denies that he was told that an Answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all material facts contained in the Complaint. (Respondent's Second Amended Notice of Appeal, p. 1, ¶ I; hereafter RA.) Second, Respondent contends that "he was out of the state working and although the Notice was received by someone at his residence, he did not learn of the contents of this letter until he returned to Grapeland, Texas on November 1, 1995." (RA, p. 1, ¶ II.) These facts, which are set forth for the first time on appeal, come too late. Complainant's proposed decision and motion for adoption of a proposed decision was filed on November 2, 1995, and served on Respondent on November 6, 1995. In accordance with the applicable Rules of Practice, (7 C.F.R. § 1.139), Respondent had 20 days after service of Complainant's motion for a proposed decision in which to file objections to the motion. The letter transmitting Complainant's motion to Respondent informed Respondent of this 20-day time limit. Respondent had an opportunity to raise the facts set forth in RA, p. 1, ¶ I and ¶ II, in response to Complainant's motion for adoption of a proposed decision, but Respondent chose not to file a response to Complainant's motion. Instead, Respondent filed a Suggestion of Bankruptcy on November 6, 1995, a Corrected Suggestion of Bankruptcy on November 14, 1995, and an untimely Answer on November 22, 1995, none of which assert the facts set forth in RA, p. 1, ¶ I and ¶ II. On appeal, Respondent, for the first time, asserts the facts in RA, p. 1, ¶ I and ¶ II.[2] It is well settled that

[2]The facts asserted in RA, p. 1, ¶ I, are also asserted in Respondent's Notice of Appeal and First Amended Notice of Appeal. The facts asserted in RA, p. 1, ¶ II, are also asserted in Respondent's First Amended Notice of Appeal.

Respondent cannot raise new issues on appeal or present new facts for the first time on appeal to the Judicial Officer.[3]

Nonetheless, I will address the newly raised issues in RA, p. 1, ¶ I and ¶ II, and show that those arguments would not have changed the outcome of this case. Copies of the Complaint and applicable Rules of Practice, (7 C.F.R. § 1.130 *et seq.*), were sent to Respondent by certified mail, but the letter containing these documents was returned marked by the United States Postal Service as "Unclaimed." The Complaint was then remailed to the Respondent by ordinary mail on October 2, 1995, and under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), was deemed received by the Respondent on the date of remailing, October 2, 1995. Respondent admits that the "Notice was received by someone at his residence," but states that it was not until November 1, 1995, that he learned of its contents. (RA, p. 1, ¶ II.)

Under the Department's Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, a Respondent's failure to file a timely Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. The Rules of Practice provide:

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[3]*In re Bama Tomato Co.*, 54 Agric. Dec. ___ (Aug. 17, 1995), *appeal docketed*, No. 95-6778 (11th Cir. Sept. 26, 1995); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138. (7 C.F.R. § 1.136(a)-(c).)

. . . .

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed

> decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . . (7 C.F.R. § 1.139.)
>
> . . . .
>
> **§ 1.141 Procedure for Hearing.**
>
> (a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. (7 C.F.R. § 1.141(a).)
>
> The Complaint served on Respondent on October 2, 1995, states:
> The respondent shall have twenty (20) days after receipt of this complaint in which to file with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, an answer in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. Section 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint. (Complaint, pp. 3-4.)

The Complaint clearly informs Respondent of the consequences of a failure to answer and clearly identifies the Rules of Practice applicable to the administrative proceeding instituted by the Complaint.

Respondent's Answer was due October 23, 1995, and a failure to file a timely Answer constitutes an admission of the material allegations in the Complaint. (7 C.F.R. § 1.136(a), (c).) Respondent did not file a timely

Answer.[4] Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[5] Respondent has shown no basis for setting aside the default decision here.[6]

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[4]Respondent filed an Answer November 22, 1995: 51 days after service of the Complaint under the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)); between 51 and 21 days after the Complaint arrived at Respondent's residence, (RA, p. 1, ¶ II); and 21 days after Respondent contends he had actual knowledge of the contents of the Complaint, (RA, p. 1, ¶ II).

[5]*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[6]*See In re Moreno Bros.*, 54 Agric. Dec. ___ (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. ___ (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely

(continued...)

The requirement in the Department's Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

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[6](...continued)
Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (default order proper where timely Answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[7] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

Third, Respondent contends that he filed a Suggestion of Bankruptcy on November 1, 1995, which, through a clerical error, was assigned a number of another case, which Respondent's attorney handled in 1992. This error was brought to the attention of Respondent, and, on November 8, 1995, Respondent filed a Corrected Suggestion of Bankruptcy. (RA, pp. 1-2, ¶ III.)

The facts asserted by Respondent in paragraph III of his Second Amended Notice of Appeal do not change the outcome of this case. First, neither Respondent's Suggestion of Bankruptcy nor Respondent's Corrected Suggestion of Bankruptcy deny or respond to any of the allegations in the Complaint; and, under the applicable Rules of Practice, Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Further, even if Respondent's Suggestion of Bankruptcy or Corrected Suggestion of Bankruptcy were determined to be an Answer to the Complaint, they were untimely filed,[8] and, under the applicable Rules of Practice, Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. (7 C.F.R. § 1.136(a), (c).)

Although not stated in the Suggestion of Bankruptcy, the Corrected Suggestion of Bankruptcy, Respondent's Notice of Appeal, Respondent's First Amended Notice of Appeal, or Respondent's Second Amended Notice of Appeal, Respondent's late Answer reveals that Respondent takes the position

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[7]*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

[8]The record shows that Respondent's Suggestion of Bankruptcy was filed November 6, 1995, 35 days after service of the Complaint on Respondent; and the Corrected Suggestion of Bankruptcy was filed November 14, 1995, 43 days after service of the Complaint on Respondent.

that "any efforts to subject Respondent or his assets to this proceeding while he was in bankruptcy are void." (Answer, ¶ III.)

Respondent is incorrect. Section 362(a) of the Bankruptcy Code provides, in relevant part, that:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . . (11 U.S.C. § 362(a).)

Section 362(b) of the Bankruptcy Code provides, in relevant part, that:

> (b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—
>
> > (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . . (11 U.S.C. § 362(b)(4).)

Further, section 525 of the Bankruptcy Code provides, in relevant part, that:

> (a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for

> other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. (11 U.S.C. § 525(a).)

The Secretary of Agriculture is seeking to enforce regulatory power under the Packers and Stockyards Act in this disciplinary proceeding. This proceeding clearly falls within the class of actions or proceedings described in section 362(b)(4) of the Bankruptcy Code, (11 U.S.C. § 362(b)(4)), and, therefore, is exempt from the stay provisions in section 362(a) of the Bankruptcy Code, (11 U.S.C. § 362(a)). Further, section 525(a) of the Bankruptcy Code, (11 U.S.C. § 525(a)), does not limit the Secretary of Agriculture's authority to issue a cease and desist order or refuse to register the Respondent under the Packers and Stockyards Act. *See Farmers & Ranchers Livestock Auction, Inc. v. United States (In re Farmers & Ranchers Livestock Auction, Inc.)*, 46 B.R. 781 (Bankr. E.D. Ark. 1984).

Fourth, Respondent contends that " [a]fter Respondent's Suggestion of Bankruptcy was mailed to this Court on November 1, 1995, and before Respondent learned that his Bankruptcy Petition had been dismissed on November 2, 1995, Respondent filed his Original Answer and generally denied the allegations contained in the Complaint filed by the Administrator, Texas Stockyard Administration and requested a hearing on Complainant's allegations." (RA, p. 2, ¶ IV.)

I assume that the Respondent's reference to his general denial of the allegations contained in the Complaint filed by the "Administrator, Texas Stockyard Administration," is in error and that he meant to refer to his

general denial in response to the Complaint filed in the instant case by the Deputy Administrator, Packers and Stockyards Programs, on September 1, 1995. (Complaint.)

Respondent's Answer was due October 23, 1995. Under the applicable Rules of Practice, (7 C.F.R. § 1.136(a), (c)), a failure to file a timely Answer (in the instant case within 20 days after service of the Complaint on Respondent) constitutes an admission of the allegations of the Complaint. Respondent's Answer was filed on November 22, 1995, 51 days after proper service of the Complaint in accordance with the applicable Rules of Practice, (7 C.F.R. § 1.147(c)(1)), and Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint. Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[9] the facts set forth in paragraph IV of Respondent's Second Amended Notice of Appeal, (RA, p. 2, ¶ IV), do not constitute a basis for setting aside this default decision.[10]

An examination of other cases instituted by Packers and Stockyards Programs for similar violations reveals that similar sanctions have been imposed. *See, e.g., In re Samuel J. Dalessio, Jr.*, 54 Agric. Dec. 590, 611 (1995), *aff'd*, No. 95-3266 (3d Cir. Feb. 6, 1996) (unpublished); *In re Bruce Thomas*, 53 Agric. Dec. 1569, 1576 (1994); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1530 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jimmy Ray Hendren*, 51 Agric. Dec. 672, 675-76 (1992); *In re David H. Harris*, 51 Agric. Dec. 649, 651-52 (1992); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1773, 1790-96 (1991); *In Sam Odom*, 48 Agric. Dec. 519, 536-45 (1989); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1097-1104 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988). The sanction imposed in this case is entirely appropriate, considering the serious nature of Respondent's violations.

For the foregoing reasons, the following Order should be issued.

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[9]See note 5.

[10]See note 6.

Order

Paragraph I.

Respondent Jeremy Byrd, his agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Act, shall cease and desist from:

1. Engaging in business in any capacity for which registration and bonding is required under the Act and the regulations, without registering with the Secretary of Agriculture and filing an adequate bond or its equivalent, as required by the Act and the regulations;
2. Failing to pay the full purchase price of livestock;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Paragraph II.

Respondent Jeremy Byrd shall not be registered to engage in business subject to the Act for a period of 5 years and thereafter until the Respondent is properly registered and bonded; *Provided, however*, That upon application to the Packers and Stockyards Programs a supplemental order may be issued allowing Respondent to register with the Secretary of Agriculture and obtain an adequate bond or its equivalent at any time after 150 days from the effective date of paragraph II of this Order upon demonstration by the Respondent that all unpaid livestock sellers have been paid in full; *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer at any time after 150 days from the effective date of paragraph II this Order.

Paragraph III.

Pursuant to section 303 of the Act, (7 U.S.C. § 203), Respondent is prohibited from engaging in business subject to the Act without being registered with the Secretary of Agriculture.

Paragraph IV.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondent. Paragraphs II and III of this Order shall become effective on the 30th day after service of this Order on Respondent.

In re: GREENCASTLE LIVESTOCK MARKET, INC. and JEFFREY S. CRAIG.
P&S Docket No. D-94-58.
Decision and Order filed March 22, 1996.

Civil penalty - Cease and desist order - Failure to maintain and use properly custodial account - Line of credit not acceptable alternative to custodial account or defense to account violation.

Judge Hunt issued a cease and desist order and jointly and severally assessed respondents a civil penalty of $4,000.00. Corporate respondent Greencastle Livestock, under the direction, management, and control of respondent Jeffrey S. Craig, failed to maintain or use properly its custodial account for shippers' proceeds. Respondents did not timely deposit in custodial account an amount equal to the proceeds receivable for the sale of consigned livestock. The failure of a market agency to maintain its custodial account is an unfair and deceptive practice. A line of credit is not an acceptable alternative to a certificate of deposit and/or a savings account and is not a defense to a custodial account violation.

Julie Cook Schuster, for Complainant.
James H. Thomas, Lancaster, PA, for Respondents.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding was instituted by a complaint filed on September 28, 1994, by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, ("Department"). The complaint was brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented, ("Act"), 7 U.S.C. § 181 *et seq.*, and the Department's Rules of Practice, 7 C.F.R. § 1.130 *et seq.*

The complaint alleges that the corporate respondent, Greencastle Livestock Market, Inc., under the direction, management and control of respondent Jeffrey S. Craig, wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) by failing to maintain and use properly its Custodial Account for Shippers' Proceeds ("custodial account"). Respondents' answer denied that they violated the Act or regulations.

A hearing was held on November 15, 1995, in Lancaster, Pennsylvania. Complainant was represented by Julie Cook Schuster, Esq. Respondents were represented by James H. Thomas, Esq.

Facts

Respondent Greencastle Livestock Market, Inc., ("Greencastle"), a Pennsylvania corporation, operates a stockyard in Greencastle, Pennsylvania, as a registered market agency under the Act selling livestock in commerce on a commission basis. Respondent Jeffrey S. Craig, ("Craig"), is president and manager of Greencastle and its 100% stockholder.

On December 4, 1990, Greencastle and Craig entered into a consent decision with complainant (P&S Docket No. D-90-69), whereby Greencastle and Craig were, among other things, ordered to cease and desist from failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed, an amount equal to the outstanding proceeds receivable due from the sale of consigned livestock and from otherwise failing to maintain their Custodial Account for Shippers' Proceeds in conformity with section 201.42 of the regulations. (CX-3.)

During the week of June 6, 1994, two of complainant's auditors, Branard England and Lyle Nordstrand, conducted an audit of Greencastle's custodial account. England testified that it was a routine audit. Nordstrand, who is no longer employed by complainant, testified that it was his "feeling" that the audit resulted from his supervisor, Durwood Helms, wanting to take "formal action" against Greencastle. However, when asked the basis for this "feeling," he responded only with "I don't know why. Ask him [Helms]." (Tr. 114.) Helms said the audit was conducted routinely according to his work plan and that there was no intention to take formal action against Greencastle. (Tr. 20, 142.) Routine audits of market agencies are conducted every three or four years and the 1994 audit of Greencastle was apparently the first since 1990. (Tr. 114-116.)

The auditors' analysis of Greencastle's custodial account revealed that on May 2, 1994, Greencastle had outstanding custodial checks in the amount of $520,934.69 and that it had offset the checks against a balance in the custodial account of $67,579.97, with money market savings accounts designated as custodial funds of $3,069.12, proceeds on hand of $227,600.12, and proceeds receivable of $133,615.66. This left a deficiency of $89,069.82 in Greencastle's custodial account on May 2, 1994. The auditors' analysis further indicated that Greencastle had not deposited in its custodial account an

amount equal to the proceeds received from the sale of consigned livestock within the time required by the regulations. (CX-4.) The auditors' report, however, also showed that by the time they prepared the report in June, 1994, $90,002.95 in accounts receivable had been paid to Greencastle. (RX-2; Tr. 65.) Nordstrand testified that the receivables had been paid by May 5 to cover the shortage on May 2. (Tr. 113.) Helms, England and Nordstrand all testified that, despite the shortage on May 2, Greencastle was not insolvent. (Tr. 43, 67, 109.) There is no evidence that any livestock seller was not paid.

Craig, who acquired Greencastle in 1985, testified that he has always paid livestock sellers, and has never issued an insufficient funds check. He said that in 1994 he had a formal line of credit for $100,000 from the bank where Greencastle's custodial account is maintained to insure Greencastle's ability to meet its obligations, that the line of credit was in effect on May 2, 1994, and that since that time he has increased it to $200,000. The line of credit, secured by a mortgage on Greencastle's property and Craig's personal guarantee, provides that "[d]raws on the line of credit will be available for use in conjunction with the Greencastle Livestock Market custodial account for shippers' proceeds." (Tr. 124-127.) However, it also states that the line of credit is "contingent upon the right of the bank to review the loan from time to time and adjust terms and conditions or to discontinue the line of credit upon written notice by the Bank should it appear necessary to do so." (RX-1.) Craig said he believed that the line of credit was "as good as cash" and complied with the requirements for custodial accounts, but admitted that he had not asked anyone from the Packers and Stockyards Administration at the time he obtained the line of credit whether it was a permissible means of securing the custodial account. (Tr. 124-129.) Craig, however, did tell England about the line of credit at the time of the audit. England said he did not know at the time whether a line of credit met the requirements for custodial accounts, but that others at the agency later told him that a line of credit could not be included in a custodial account analysis. He relayed this information to Craig in a phone call. (Tr. 77-78, 126.)

Craig testified that he has at times drawn on the line of credit to cover shortfalls in the custodial account, but that he did not make any draws on May 2, 1994, because he believed he had sufficient money in the account and he had not checked the account at that time to determine whether there was a shortage. (Tr. 129.)

Law and Regulations

1. Statute

Section 312 of the Act (7 U.S.C. § 213) provides:

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.
(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

2. Regulations

9 C.F.R. § 201.42

§ 201.42. Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (ii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

. . . .

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to consignors. The savings account must be properly designated as a party of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The

certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Discussion

The failure of a market agency to maintain its custodial account in accordance with the regulatory requirements is an unfair and deceptive practice in violation of the Act, irrespective of whether livestock sellers were paid or not. *Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 398 (1989). The Act is intended to prevent potential as well as actual injuries to livestock sellers from occurring. *Thumb Auction Market*, 37 Agric. Dec. 164, 167 (1977).

Respondents contend that they did not violate the statute or regulations because their line of credit, which was intended to cover any shortages in the custodial account, should be considered compliance with the regulations.[1] They argue that a line of credit is an alternative to, and as safe as, a certificate of deposit and/or savings account which are permissible under the regulations (9 C.F.R. § 201.42(g)) to reconcile custodial accounts. The Department, however, has held that a line of credit is not an acceptable alternative and is not a defense to a custodial account violation. "A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. . . Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements." *Jeff Palmer*, 50 Agric. Dec. 1762, 1775 (1991). In the instant case, for instance, the bank issuing the line of credit specifically reserved to itself the unilateral right to discontinue the line of credit it had extended to Greencastle. Accordingly, I find that respondents' May 2, 1994, shortage in Greencastle's custodial account and their failure to make timely deposits to the custodial account from the sale of consignor livestock was a violation of section 312(a) of the Act and that respondents' line of credit was not a defense to their failure to maintain the custodial account as required by the regulations.

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[1]Respondents do not argue in their brief that complainant conducted its audit for purposes of instituting formal action against respondents, as Nordstrand testified. Whether this is an issue or not, I find the evidence insufficient in any event to support Nordstrand's contention.

In determining the sanction, the seriousness of the offense is one of the factors to consider. Complainant's sanction witness, Daniel Van Ackeren, Director of the Department's Livestock Marketing Division, testified: "We consider it a pretty serious violation if the shortage in the custodial account puts the livestock sellers at risk of not getting paid." (Tr. 157.)

The circumstances of this case, however, do not show that respondents' violation put the sellers at great risk. The line of credit, while not providing the degree of security required by the regulations for custodial accounts, did nevertheless provide some protection for livestock sellers. It was a resource that was available to respondents to pay these creditors. As it turned out, the brief shortfall in the custodial account did not result in any creditor being unpaid and it was corrected within three days. Respondents were also not insolvent.

Craig testified that his reliance on a line of credit was based on his mistaken belief that it was a permissible means of complying with the requirements for custodial accounts. While ignorance of the law's requirements is not a defense, it is noteworthy for purposes of determining whether the violation was wilful that even one of complainant's officials, Branard England, was unsure whether a line of credit was an asset that could be included in a custodial account analysis. I find that respondents' violation was not wilful.

Nevertheless, despite these circumstances, a line of credit, while providing some protection to livestock sellers, is not, contrary to Craig's belief, "as good as cash." It can in fact be a risky means of securing funds. Craig's bank, as noted, reserved the right to unilaterally revoke the line of credit, a power that banks have, indeed, exercised with the result that, on some occasions, market agencies who have relied on a line of credit to pay livestock sellers have been unable to do so. *See, e.g., Richard N. Garver*, 45 Agric. Dec. 1090, 1094-95 (1986).

Greencastle's custodial account was a trust fund for its livestock sellers. Craig and Greencastle, as the fund's fiduciaries, were under a duty to maintain the account according to strict statutory and regulatory requirements. They had, moreover, expressly agreed to an order to that effect. Considering all the circumstances, including the extent to which livestock sellers were actually at risk, I find that $4,000 is an appropriate sanction for respondents' failure to comply with these requirements.

Findings of Fact

1. Respondent Greencastle Livestock Market, Inc., is a corporation organized and existing in the State of Pennsylvania.

2. Greencastle is, and at all times material herein, was:

a. Engaged in the business of conducting and operating tne Greencastle Livestock Market, Inc.;

b. Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

c. Registered with the Secretary of Agriculture as a market agency.

3. Respondent Jeffrey S. Craig, an individual, is and at all times material herein, was:

a. President and manager of Greencastle;

b. Owner of 100% of the stock of Greencastle; and

c. Responsible for the direction, management and control of Greencastle.

4. On May 2, 1994, Greencastle had a shortage in its Custodial Account for Shippers' Proceeds in the amount of $89,069.82. Greencastle issued custodial checks in the amount of $520,934.69, which remained outstanding as of May 2, 1994. Greencastle offset such checks against a balance in the custodial account of $67,579.97, with money market savings accounts designated as custodial funds of $3,069.12, proceeds on hand of $227,600.12, and proceeds receivable of $133,615.66.

5. Greencastle did not deposit in its custodial account an amount equal to the proceeds receivable from the sale of consigned livestock within the time set forth in the regulations.

6. On May 5, 1994, Greencastle was paid $90,002.95 in accounts receivable.

7. Greencastle was not insolvent at any time relevant to this proceeding.

8. Greencastle paid all sums due to livestock consignors at all times relevant to this proceeding.

9. On December 4, 1990, Greencastle and Craig entered into a consent decision with complainant which ordered Greencastle and Craig from, among other things, failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed in Section 201.42 of the regulations, amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock and from failing to otherwise maintain their Custodial

Account for Shippers' Proceeds in conformity with section 201.42 of the regulations.

Conclusion of Law

Greencastle Livestock Market, Inc., under the direction management and control of Jeffrey Craig, violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) by failing to properly maintain its Custodial Account for Shippers' Proceeds.

Order

Respondent Greencastle Livestock Market, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Jeffrey S. Craig, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in Section 201.42 of the regulations (9 C.F.R. § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock; and

2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. § 201.42). In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Greencastle Livestock Market, Inc., and Jeffrey S. Craig are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

[This Decision and Order became final May 2, 1996.--Editor]

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDER

In re: RIVERBEND CATTLE COMPANY and JOHN WHEELER.
P&S Docket No. D-95-10.
Order on Motion Requesting Imposition of Sanction Against Respondents for Failure to Comply with Terms of Consent Decision filed June 17, 1996.

Kimberly D. Hart, for Complainant.
Dwight D. Sutherland, Jr., Kansas City, MO, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

On May 6, 1996, Complainant filed a Motion Requesting Imposition of Sanction Against Respondents for Failure to Comply with Terms of Consent Decision. Respondents filed a Response on June 4, 1996, seeking an extension until July 1, 1996, within which to comply. On June 14, 1996, Complainant filed a document indicating it would not agree to the requested extension. Therefore, the following Order is issued:

Order

Respondents John Wheeler and Riverbend Cattle Company are suspended as registrants under the Act for a period of five years. Provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, Packers and Stockyards Programs, a Supplemental Order may be issued terminating the suspension of the Respondents at any time after ninety (90) days upon demonstration by the Respondents that all livestock sellers identified by the Complaint in this proceeding have been paid in full, and provided, further, that this order may be modified upon application to the Packers and Stockyards Programs, GIPSA, to permit the salaried employment of Respondent John Wheeler by another registrant or packer after the expiration of the initial ninety (90) days of this suspension terms and upon circumstances warranting modification of the Order.

Copies hereof shall be served upon all parties.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BENSON W. THOMPSON.
P&S Docket No. D-95-25.
Decision and Order filed October 27, 1995.

Failure to file an answer - Engaging in the buying and selling of livestock in commerce without adequate bond - Cease and desist order - Suspension of registration - Civil penalty.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Benson W. Thompson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 159, Pitkin, Louisiana 70656.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

3. As more fully set forth in paragraph II of the complaint, respondent was notified by certified mail dated November 18, 1994, that the $10,000.00 bond he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase his bond to $40,000.00 before continuing his livestock operations subject to the Act. Notwithstanding such notice, respondent has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in paragraph II of the complaint, respondent has wilfully violated sections 312(a) of the Act (7 U.S.C. §§ 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent, Benson W. Thompson, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Five Hundred Dollars ($1,500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.
[The Decision and Order became final January 11, 1996.-Editor]

In re: LANCE A. TARVER.
P&S Docket No. D-95-48.
Decision and Order filed December 1, 1995.

Failure to file an answer - Engaging in the business of buying and selling livestock while not registered as a dealer and without adequate bond - Issuance of checks returned unpaid for insufficient funds - Failure to pay, when due, full purchase price of livestock - Cease and desist order - Prohibition from registration.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Lance A. Tarver, hereinafter referred to as respondent Tarver, is an individual whose mailing address is [redacted].

(b) Respondent Tarver, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock for his own account;

(2) Operating as a dealer within the meaning and subject to the provisions of the Act; and

(3) Not registered with the Secretary of Agriculture as a dealer.

2. (a) Respondent Tarver, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(b) of the complaint, operated without a bond.

(b) Respondent Tarver, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(b) of the complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent Tarver did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(c) Respondent Tarver, on or about the dates and in the transactions set forth in paragraph II(b) and paragraph II(c) of the complaint and on numerous other occasions, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(d) As of April 26, 1995, $49,504.00 remained unpaid for livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) & 228(b)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent Tarver, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock;
3. Failing to pay the full purchase price of livestock; and
4. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Tarver is prohibited from registering as a dealer subject to the Packers and Stockyards Act for a period of five years, and pursuant to section 303 of the Act (7 U.S.C. § 203) is prohibited from engaging in business subject to the Act without being registered and bonded, provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition at any time after the expiration of 120 days upon demonstration by the respondent that all unpaid livestock sellers have been paid in full and that the respondent is registered and bonded, and provided further that this order may be modified upon application to the Grain Inspection, Packers and Stockyards Administration to permit respondent Tarver's employment by a registrant or packer after the expiration of the 120 day period of prohibition upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 28, 1996.-Editor]

In re: ROBERT M. CROUCH.
P&S Docket No. D-95-54.
Decision Without Hearing By Reason of Default filed December 20, 1995.

Failure to file an answer - Issuance of checks in payment for livestock without having sufficient funds on deposit - Failure to make full payment when due for livestock - Cease and desist order - Suspension of registration.

Kimberly Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Robert Crouch, hereinafter referred to as respondent Crouch, is an individual whose mailing address is (b) (6) [redacted]

(b) Respondent Crouch is and at all times material herein was:

(1) Engaged in the business of buying and selling livestock as a dealer in commerce for its own account and the account of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce on a commission basis.

2. (a) The respondent, in connection with his operations subject to the Act, on or about the date and in the transaction set forth in paragraph II(a) of the complaint, purchased livestock and in purported payment issued a check which was returned unpaid by the bank upon which it was drawn because respondent did not have sufficient funds on deposit and available in the account upon which such check was drawn to pay such check when presented.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transaction listed in paragraph 2(a) and paragraph II(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of August 1, 1995, there remained unpaid a total of $16,028.95 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b)).

Order

Respondent Robert Crouch, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent Robert Crouch is suspended as a registrant under the Act for a period of 5 years. Provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the respondent at any time after 120 days upon demonstration by respondent that all livestock sellers identified by the complaint in this proceeding have been paid in full and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit

respondent's salaried employment by another registrant or a packer after the expiration of the 120 day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: JAMES L. "PAT" HANNA, d/b/a HANNA CATTLE.
P&S Docket No. D-95-45.
Decision Without Hearing By Reason of Admissions filed January 16, 1996.

Admissions of material allegations - Issuance of checks in payment for livestock purchases without sufficient funds available - Failure to pay, when due, the full purchase price of livestock - Cease and desist order - Suspension of registration.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed on June 13, 1995 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. It is alleged in the complaint that the respondent issued checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock totalling $41,086.25 as of May 3, 1995.

A copy of the complaint was served upon respondent and the complaint was answered on July 31, 1995. In the answer respondent admitted that he issued checks in payment for livestock purchases without having and

maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock, but denied that his acts constituted wilful violations of the Act. The respondent's answer constitutes an admission of all the material allegations of fact contained in the complaint pursuant to Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Complainant moved for the issuance of a Decision, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. James L. "Pat" Hanna, doing business as Hanna Cattle, hereinafter referred to as respondent Hanna, is an individual whose business mailing address is P.O. Box 349, Kemp, Texas 75143.

2. Respondent Hanna is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis;

(b) Engaged in the business of buying and selling livestock for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock on his own account.

3. As more fully set forth in paragraph II of the complaint, respondent issued checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented; failed to pay, when due, the full purchase price of livestock; and failed to pay the full purchase price of livestock totalling $41,086.25 as of May 3, 1995.

Conclusions

By reason of the facts found in Findings of Fact No. 3 above, respondent has wilfully violated Sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) for which the Order below is issued.

Order

Respondent Hanna, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent Hanna is suspended as a registrant under the Act for a period of five (5) years provided, however, that upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by the respondent that all unpaid livestock sellers have been paid in full. It is provided further that this order may be modified upon application to the Grain Inspection, Packers and Stockyards Administration to permit respondent Hanna's employment by a registrant or packer after the expiration of the 120 day period of suspension upon demonstration of circumstances warranting modification of the order.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 5, 1996.-Editor]

In re: JAMES L. "PAT" HANNA d/b/a HANNA CATTLE.
P&S Docket No. 95-45.
Modified Order filed April 30, 1996.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On January 16, 1996, a Decision Without Hearing by Reason of Admissions was issued in the above-captioned matter, which, *inter alia*,

suspended respondent as a registrant under the Act for a period of five (5) years and included a proviso permitting respondent Hanna's employment by a registrant or packer after the expiration of a 120 day period of suspension upon demonstration of circumstances warranting modification of the order.

Subsequent to that order, the respondent submitted a plan of restitution for the amounts still owing for livestock. As a result, the complainant submitted a request for a modification of the order issued on January 16, 1996, to permit respondent Hanna's employment by a registrant or packer so long as he continues making payments according to the plan of restitution, with the order remaining in effect in all other respects. Accordingly,

IT IS HEREBY ORDERED that respondent Hanna is permitted to be employed by a registrant or packer so long as he continues making payments according to the plan of restitution. If respondent is in default on this payment plan for more than sixty days he shall be prohibited from salaried employment by a registrant or packer for the remainder of the 120 day period. Proof of payments shall be forwarded to the Fort Worth GIPSA Regional Office. Affidavits from each livestock seller will be required to prove payment in full. Upon demonstration that full restitution has been made, a supplemental order terminating the suspension will be issued after such suspension has been in effect for at least 120 days. The order shall remain in full force and effect in all other respects.

In re: JACKSON LIVESTOCK MARKET, INC., THOMAS G. OLIN and RODNEY L. KOLANDER.
P&S Docket No. D-94-20.
Decision and Order As To Jackson Livestock Market, Inc., filed January 18, 1996.

Failure to file an answer - Failure to deposit in custodial account amounts equal to outstanding proceeds receivable due from the sale of consigned livestock - Failure to maintain custodial account - Reimbursement of custodial account with checks drawn on other accounts without maintaining sufficient funds on deposit in such accounts to cover the checks when presented - Using funds received from sale of livestock for purpose other than payment of marketing charges or payment to consignors - Issuance of checks in payment for livestock without having sufficient funds on deposit - Kiting checks for the purpose of changing the true amounts of funds available - Failure to remit when due the net proceeds received from the sale of consigned livestock - Failure to pay when due the full purchase price of livestock - Consigning livestock under false names - Cease and desist order - Suspension of registration.

Eric Paul, for Complainant.
Respondent Jackson Livestock Market, Inc., Pro se.
Donald H. Molstad, Sioux City, IA, for Respondent Thomas G. Olin.
Steven L. Handevidt, Jackson, MN, for Respondent Rodney L. Kolander.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Administrator, Packers and Stockyards Administration, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201. *et seq.*). The original allegations were realleged and additional new and subsequent allegations were added by an amended complaint filed on May 23, 1995, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration.

Copies of the complaint and the amended complaint were served upon respondent Jackson Livestock Market, Inc., by certified mail delivery to its officers, respondents Thomas G. Olin and Rodney L. Kolander. Separate answers were duly filed by respondents Thomas G. Olin and Rodney L. Kolander in their individual capacities. Respondent Jackson Livestock Market, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the amended complaint, which are admitted by the failure of respondent Jackson Livestock Market, Inc., to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. Jackson Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the state of Minnesota. The corporate respondent's business mailing address was P.O. Box 362, Jackson, Minnesota 56143.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of conducting and operating the Jackson Livestock Market, a posted stockyard under the Packers and Stockyards Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and for the account of others; and

(d) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce.

3. The corporate respondent failed to maintain and use property its "Jackson Livestock Market Custodial Account for Shippers' Proceeds" (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due owners and consignors of livestock, in that:

(a) As of February 26, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of $266,483.67 and expense items chargeable to its custodial account in the amount of $1,796.70, and had to offset these checks and expense items, a balance in its custodial account of $152,690.78 and proceeds receivable in the amount of $35,875.48, resulting in a deficiency of $79,714.11 in funds available to pay shippers their proceeds.

(b) As of March 24, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of $145,151.50 and expense items chargeable to its custodial account in the amount of $2549,36, and had to offset these checks and expense items, a balance in its custodial account of $34,894.59 and proceeds receivable in the amount of $80,548.02, resulting in a deficiency of $31,258.25 in funds available to pay shippers their proceeds.

(c) As of December 31, 1993, the corporate respondent had outstanding checks drawn on its custodial account in the amount of $163,545.92, and had to offset these check, a balance in its custodial account of $1,495.89, resulting in a deficiency of $162,050.05 in funds available to pay shippers their proceeds.

4. The corporate respondent was misusing its custodial account in that the corporate respondent was not reimbursing the account by the close of the next business day following the sale of livestock for purchases made by the corporate respondent, its owners, officers, employees.

5. The corporate respondent was further mishandling its custodial account in that the corporate respondent was not reimbursing the account by the close of the seventh day following the sale of livestock for all uncollected receivables.

6. The corporate respondent misused, mishandled and failed to maintain properly its custodial account on and about the dates set forth above

despite having been placed on notice by certified mail letter dated September 17, 1992, that practices of the nature set forth above were prohibited by section 201.42 of the regulations.

7. The corporate respondent, in connection with its operations as a market agency selling livestock on a commission basis, on or about the dates and in the transactions set forth in paragraph III of the amended complaint, issued checks in purported payment of the net proceeds resulting from the sale of livestock consigned for sale on a commission basis, which checks were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

8. The corporate respondent on or about the dates and in the transactions set forth in paragraph IV of the amended complaint sold livestock consigned to the corporate respondent for sale on a commission basis and failed to remit to the consignors the net proceeds resulting from the sale of their livestock.

9. As of March 15, 1995, there remained unpaid approximately $34,625.88 for livestock sold on a commission basis.

10. The shortage in the custodial account for shippers proceeds that precluded full payment being made for the consigned livestock sold in commission in the above transactions was attributable to:

(a) The corporate respondent's failure to pay for purchase of consigned livestock made by corporate respondent and by respondent Tom Olin; and

(b) The corporate respondent's purported reimbursement of the custodial account with checks drawn on other bank accounts maintained by the corporate respondent and respondent Olin which were subsequently dishonored. Payments received from purchasers of consigned livestock were either expended by the corporate respondent for other purposes, or lost when the banks containing the general or dealer bank accounts in which such funds were deposited stopped providing credit for uncollected funds and applied the funds on deposit to reduce overdrafts in the bank accounts.

11. The corporate respondent, on or about the dates and in the transactions set forth in paragraph V of the amended complaint, purchased livestock from Joseph E. Furr Livestock, a livestock dealer located in Staunton, Virginia, and failed to pay, when due, the full purchase price of such livestock.

12. The corporate respondent, in connection with its operations and a dealer buying and selling livestock in commerce for its own account or the account of others, on or about the dates and in the transactions set forth in paragraph V of the amended complaint, issued checks in purported payment of the purchase price of livestock, which checks were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

13. The corporate respondent, on or about the dates and in the transactions set forth in paragraph VII of the amended complaint consigned livestock under false names and prepared accounts and records using the false names.

14. The corporate respondent sold livestock after August 1993 without keeping and maintaining a purchase and sales journal.

15. The corporate respondent engaged in an extensive exchange or "kiting" of checks between Jacksonville Livestock Market, Inc., Account No. (b) (4) in Bank [redacted] (the general or "Hay" account) and Tom Olin Livestock Account No. (b) (4) in [redacted] Bank, [redacted] Checks were exchanged as set forth in paragraph VII of the amended complaint.

16. The corporate exchanged or "kited" these 483 checks totalling $33,945,249.33 during the three month period set forth in paragraph VII of the amended complaint in order to create a false float and inflated bank balances that relied upon credit extended for uncollected funds. The checks issued vastly exceeded the actual purchase and sales volume of the corporate respondent's livestock operations.

17. The corporate respondent knew, or should have known, when it deposited checks drawn on the above bank accounts in the custodial Account For Shippers Proceeds in purported payment for purchases of consigned livestock, or in purported reimbursement of proceeds due for consigned livestock sold to others, that if Bank Midwest of Farmers Saving Bank became aware of this check kiting and stopped providing immediate credit for uncollected funds that custodial account deposits would be reversed and that a substantial deficit condition would result. This occurred beginning on or about December 17, 1993.

Conclusions

By reason of the fact found in Findings of Fact 3 through 6 and herein, the corporate respondent has wilfully violated section 312 (a) of the Act (7 U.S.C. § 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Findings of Fact 7 through 9 and 11 through 12 herein, the corporate respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b) and section 201.43 of the regulations (9 C.F.R. § 201.43).

By reason of the facts found in Findings of Fact 13 and 14 herein, the corporate respondent has violated sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221).

Order

Respondent Jackson Livestock Market, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds within the time prescribed in Section 201.42 of the regulations (9 C.F.R. § 201.42) amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

3. Reimbursing the custodial account for shippers' proceeds with checks drawn on any account without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

6. Issuing checks in payment of the net proceeds from the sale of consigned livestock without having sufficient funds on deposit and available in

the custodial account upon which such checks are drawn to pay such checks when presented;

7. Exchanging or "kiting" checks with any person or between any accounts for the purpose or with the effect of concealing the true amount of funds available in any account;

8. Failing to remit, when due, the net proceeds received from the sale of consigned livestock;

9. Failing of remit the net proceeds received from thee sale of consigned livestock;

10. Failing to pay, when due, the full purchase price of livestock, and

11. Consigning livestock under false names and preparing accounts and records using false names.

The corporate respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business subject to the Packers and Stockyards Act including the following:

1. Check-in-slips, scale tickets, clerk sheets, accounts of sale showing the true and correct names of livestock consignors; and

2. A purchase and sales journal identifying all livestock purchased and sold.

Respondent Jackson Livestock Market, Inc., is suspended as a registrant under the Act for a period of five (5) years and thereafter until such times as it demonstrates that the shortage in its Custodial Account For Shippers' Proceeds has been eliminated. Provided however, that upon application to Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued terminated the corporate respondent's suspension at any time after 150 days of this suspension term upon demonstration by the corporate respondent that all unpaid consignors have been paid the full net proceeds due for the sale of consigned livestock and that the shortage in its Custodial Account For Shippers' Proceeds has been eliminated.

The decision shall become final and effective without further proceeds 35 days after the date of service upon respondent Jackson Livestock Market, Inc., unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: AUSTIN FARMS, INC. and WESLEY W. AUSTIN.
P&S Docket No. D-95-33.
Decision and Order Upon Admission By Facts By Reason of Default filed March 7, 1996.

Failure to file an answer - Alter ego - Failure to pay, when due, full purchase price for livestock - Issuing checks - Non payment for livestock without sufficient funds on deposit - Cease and desist order - Civil penalty.

Eric Paul, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint and notice of hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and notice of hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

Findings of Fact

1. Respondent Austin Farms, Inc., hereinafter referred to as the corporate respondent, is a South Dakota corporation whose business mailing address until it ceased operating in 1993 was P.O. Box 1018, Elk Point, South Dakota 57025.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for purposes of slaughter, and of manufacturing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

3. Respondent Wesley W. Austin, hereinafter referred to as the individual respondent, is an individual whose business mailing address is [redacted] (b) (6)

4. The individual respondent is, and at all times material herein was:

(a) President and one of the two directors of the corporate respondent;

(b) Owner, in combination with his wife Marva C. Austin, of 100 percent of the corporate respondent's stock;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) The *alter ego* of the corporate respondent; and

(e) A packer within the meaning of that term as defined in the Act.

Conclusions

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

Order

Respondent Austin Farms, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Wesley W. Austin, his agents and employees, directly or through any corporate or other device, in connection with their operations as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to pay the full purchase price of livestock; and
3. Issuing checks in payment for livestock purchases without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Wesley W. Austin is assessed a civil penalty in the amount of Ten Thousand Dollars ($10,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

[The Decision and Order became final on May 2, 1996.-Editor]

In re: POPLARVILLE STOCKYARDS, INC., M&J CATTLE COMPANY, INC., and JOE MACK SMITH.
P&S Docket No. D-95-14.
Decision Without Hearing By Reason of Default With Respect to Respondent Poplarville Stockyards, Inc., filed April 2, 1996.

Failure to file an answer - Engaging in the business of a dealer or market agency while insolvent - Current liabilities in excess of current assets - Usage or disposal of funds endangering or impairing the faithful and prompt accounting therefor and payment due to owners or consignors of livestock - Using funds received from the sale of consigned livestock for purposes other than payment to consignors or payment of sums due the respondent as compensation for services rendered - Failure to maintain custodial account - Issuance of checks in payment for livestock without having sufficient funds on deposit - Failure to remit to consignors when due net proceeds from sales of consigned livestock - Cease and desist order - Suspension of registration.

Julie Cook Schuster, for Complainant.
Respondent Poplarville Stockyards, Inc., Pro se.
James K. Dukes, Hattiesburg, MS, for Respondent M&J Cattle Company, Inc.
Respondent Joe Mack Smith, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that respondent Poplarville Stockyards, Inc., wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were directed to respondent Poplarville Stockyards, Inc., by certified mail on August 24, 1995, but were returned on September 1, 1995. Thereafter, on September 12, 1995, copies of the complaint and the Rules of Practice were sent to respondent Poplarville Stockyards, Inc., by regular mail to its last known address. Respondent Poplarville Stockyards, Inc., was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Poplarville Stockyards, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint relative to respondent Poplarville Stockyards, Inc., which are admitted by respondent Poplarville Stockyards, Inc.'s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation whose mailing address is P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville, at all times material herein, was:

(1) Engaged in the business of conducting and operating the Poplarville Stockyards, Inc., a posted stockyard subject to the provisions of the Act, hereinafter referred to as "the stockyard;"

(2) Engaged in the business of a market agency selling livestock in commerce on a commission basis at the stockyard;

(3) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(4) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

2. (a) As of December 31, 1993, respondent Poplarville's current liabilities exceeded its current assets. As of that date, respondent Poplarville had current liabilities totalling $242,917.34 and current assets totalling $121,244.85, resulting in an excess of current liabilities over current assets of $121,672.49.

(b) Respondent Poplarville's current liabilities presently exceed its current assets.

3. During the period December 31, 1993, through December 31, 1994, respondent Poplarville operated subject to the Act while its current liabilities exceeded its current assets.

4. Respondent Poplarville, during the period November 16, 1993, through December 31, 1994, failed to maintain and use properly its Custodial Account for Shippers' Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due the owners and consignors of livestock, in that:

(a) As of November 16, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $306,494.38, and had to offset such checks a balance in the custodial account of $64,487.35, deposits in transit of $12,157.70, and current proceeds receivable of $67,385.40, resulting in a shortage of $162,463.93.

(b) As of November 30, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $279,249.92, and had to offset such checks a balance in the custodial account of $93,777.47 and current proceeds receivable of $60,185.12, resulting in a shortage of $125,287.33.

(c) As of December 7, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $310,003.10, and had to offset such checks a balance in the custodial account of $60,369.01, deposits in transit of $23,386.26, and current proceeds receivable of $110,909.32, resulting in a shortage of $115,338.51.

(d) As of December 14, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $354,598.11, and had to offset such checks a balance in the custodial account of $104,268.04, deposits in transit of $18,831.95, and current proceeds receivable of $161,575.88, resulting in a shortage of $69,922.24.

(e) As of December 22, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $178,143.48, and had to offset such checks a balance in the custodial account of $34,677.42, resulting in a shortage of $143,466.06.

(f) As of December 31, 1993, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $121,140.94, and had to offset such checks a balance in the custodial account of $36,040.17, resulting in a shortage of $85,100.77.

(g) As of December 31, 1994, respondent Poplarville had outstanding checks drawn on the custodial account in the amount of $299,716.19, and had a deficit balance in the custodial account of $701.04, resulting in a shortage of $300,418.03.

5. Respondent Poplarville engaged in unfair and deceptive practices in that respondent Poplarville failed to deposit checks received from purchasers of consigned cattle into the custodial account and used funds received from the sale of consigned livestock for purposes other than remittance of net proceeds to the owners and consignors of livestock. Specifically, respondent Poplarville misused custodial funds by issuing checks on the Poplarville custodial account in payment for loans, commissions, and cattle purchased on

a dealer basis. During the period November 16, 1993, to January 3, 1994, $364,973.44 in custodial funds were misused in this manner.

6. Respondent Poplarville engaged in unfair and deceptive practices in that respondent Poplarville failed to deposit checks in the amount of $23,302.19 received from the sale of consigned livestock into its custodial account for shippers' proceeds, but instead converted said checks to cash and transferred the cash to individuals to whom respondent Poplarville previously had given insufficient funds checks as payment for consigned livestock.

7. (a) Respondent Poplarville, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in Exhibit A to the complaint, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented.

(b) In connection with the transactions set forth in Exhibit A to the complaint, respondent Poplarville failed to remit to consignors, when due, the net proceeds due from the sale of consigned livestock.

(c) In connection with the transactions set forth in Exhibit A to the complaint, respondent Poplarville failed to remit to consignors $141,417.19 in net proceeds due from the sale of consigned livestock.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the financial condition of respondent Poplarville does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, respondent Poplarville wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts found in Finding of Fact 4 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 5 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 6 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts found in Finding of Fact 7 herein, respondent Poplarville wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 C.F.R. § 201.43(a)).

Order

Respondent Poplarville Stockyards, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

(1) Engaging in business as a dealer or market agency while insolvent, that is, while current liabilities exceed current assets;

(2) Making such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

(3) Using funds received as proceeds from the sale of consigned livestock for purposes of its own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondent as compensation for services rendered or for other lawful marketing charges;

(4) Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

(5) Issuing checks to consignors in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

(6) Failing to remit to consignors the net proceeds resulting from the sale of consigned livestock; and

(7) Failing to remit to consignors, when due, the net proceeds resulting from the sale of consigned livestock.

Respondent Poplarville is suspended as a registrant under the Act for a period of five years, and thereafter until respondent Poplarville demonstrates that its current liabilities no longer exceed its current assets and that any shortages in its Custodial Account for Shippers' Proceeds have been eliminated; *Provided that*, if respondent Poplarville demonstrates that its

current liabilities no longer exceed its current assets and that all shortages in its Custodial Account for Shippers' Proceeds have been eliminated, and that all unpaid consignors have been paid in full, a supplemental order may be issued terminating this suspension after the expiration 180 days of the term of the suspension.

This decision shall become final and effective without further proceedings 35 days after the date of service upon respondent Poplarville, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 22, 1996.-Editor]

In re: KARLER PACKING COMPANY, INC., JESSE KARLER and HENRY KARLER.
P&S Docket No. D-95-52.
Decision By Reason of Admissions filed April 22, 1996.

Admission of material allegations - Current liabilities in excess of current assets - Alter ego - Purchasing livestock for slaughter without filing or maintaining a bond or its equivalent - Failing to pay when due for livestock or meat purchases - Issuance of checks in payment for livestock or meat purchases without having sufficient funds on deposit - Impeding prompt disbursement of trust proceeds to unpaid cash sellers of livestock who have preserved their trust interests with timely filed written notices - Violation of Consent Decision - Cease and desist order - Civil penalty.

Barbara S. Good, for Complainant.
Peter H. Johnstone, Albuquerque, NM, for Respondents.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the financial condition of the corporate respondent herein does not meet the requirements of the Act and that respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*). This decision is entered pursuant to the provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Karler Packing Company, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated and doing business in the State of New Mexico and whose mailing address is P.O. Box 1005, Albuquerque, New Mexico 87103.

(b) The corporate respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and manufacturing or preparing meat or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

2. (a) Jesse Karler is an individual whose mailing address is [redacted] (b) (6)

(b) Jesse Karler is, and at all times material herein, was:

(1) President of the corporate respondent;

(2) Owner of 68 per cent of the stock of the corporate respondent; and

(c) In combination with respondent Henry Karler, responsible for the direction, management and control of the corporate respondent.

3. (a) Henry Karler is an individual whose address is [redacted] (b) (6)

(b) Henry Karler is, and at all times material herein was:

(1) Vice-President of the corporate respondent;

(2) Owner of 32 per cent of the stock of the corporate respondent; and

(c) In combination with respondent Jesse Karler, responsible for the direction, management and control of the corporate respondent.

4. Each of the respondents Jesse Karler and Henry Karler, hereinafter collectively referred to as the individual respondents, is, and at all times material herein was, the *alter ego* of the corporate respondent, and a packer within the meaning of and subject to the provisions of the Act.

5. Respondents Karler Packing Company, Inc., Jesse Karler, and Henry Karler entered into a consent decision in P&S Docket No. D-92-28, issued on January 14, 1993, a copy of which is attached to the complaint and notice of hearing as Exhibit A. The decision, *inter alia*, ordered respondents to cease and desist from failing to pay, when due, the full purchase price of livestock and from issuing checks in payment for livestock without having and

maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

6. Respondents were notified by certified mail, received May 15, 1995, that the surety bond they maintained to secure the performance of the livestock operations of the corporate respondent under the Act would terminate on June 9, 1995. Notwithstanding such notice, the corporate respondent, under the direction, management, and control of the individual respondents, continued to purchase livestock for purposes of slaughter without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

7. As of October 29, 1994, the corporate respondent's current liabilities exceeded its current assets. As of that date, respondent Karler had current liabilities totalling [redacted] and current assets totalling [redacted] resulting in an excess of current liabilities over current assets of [redacted]

8. The corporate respondent's current liabilities presently exceed its current assets.

9. The corporate respondent, under the direction, management and control of the individual respondents, on or about the dates and in the transactions set forth in Exhibit B to the complaint and notice of hearing, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock.

10. As of July 12, 1995, $551,351.64 of the amounts referred to in ¶ 9 remained unpaid.

11. The corporate respondent, under the direction, management and control of the individual respondents, on or about the dates and in the transactions set forth in Exhibit C to the complaint, purchased livestock for slaughter, and in purported payment for such livestock issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

12. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its business as a packer, on March 30, 1995, purchased meat from Booker Packing Company, and failed to pay when due the full purchase price of such meat, which was $31,385.62.

13. As of July 12, 1995, the entire amount of $31,385.62 referred to in Paragraph 12 remained unpaid.

14. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its business as a packer, on March 1, 1995, purchased meat from Ruebush Packing Company and in purported payment therefor issued its check no. 3037 to Ruebush Packing Company dated March 27, 1995 in the amount of $6,048.00, which was returned unpaid by the bank on which it was drawn because the corporate respondent did not have sufficient funds on deposit and available in the account on which such check was drawn to pay the check when presented.

15. The corporate respondent, under the direction, management and control of the individual respondents, purchased livestock for slaughter in cash sales and failed properly to carry out its fiduciary obligations as a statutory trustee by not collecting, liquidating and distributing trust assets on a pro rata basis within a reasonable time after receiving timely written trust notices from unpaid cash sellers of livestock, and the trust analysis prepared by the Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration (GIPSA).

16. The trust proceeds collected and not properly distributed as of the date of issuance of the complaint and notice of hearing herein total at least $34,081.91.

17. The corporate respondent, under the direction, management, and control of the individual respondents, failed to carry out properly its fiduciary obligations as statutory trustee despite the actual knowledge of the individual respondents of such fiduciary obligations based upon their participation in prior trusts involving the corporate respondent.

Conclusions

1. Respondents have admitted all the material allegations of fact contained in the complaint, and have therefore, pursuant to 7 C.F.R. § 1.139, waived hearing in this matter.

2. By reason of the facts alleged in paragraph I(a) through I(f) and I(h) of the complaint, which are admitted in the response, each of the individual respondents, Jesse Karler and Henry Karler, is the *alter ego* of the corporate respondent, Karler Packing Company, Inc. *See* Findings of Fact 1 through 4.[1]

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[1]We note that in the response, each of the individual respondents denied that he was the *alter ego* of the corporate respondent, insofar as corporate formalities were adhered to in the business. However, the issue for our purposes is whether the individuals were responsible for

(continued...)

3. By continuing to purchase livestock for purposes of slaughter without maintaining an adequate bond or its equivalent as required by the Act and the regulations, which facts are alleged in paragraph II of the complaint and which facts respondents have admitted in their response, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30). *See* Findings of Fact No. 6 herein.

4. Respondents admit, as alleged in paragraph III of the complaint, that as of October 29, 1994, the corporate respondent had current liabilities totalling $2,084,940.94 and current assets totalling $1,229,727.75 as of October 29, 1994, resulting in an excess of current liabilities over current assets of $855,213.19. *See* Findings of Facts Nos. 7 and 8 herein. Therefore, the corporate respondent's financial condition does not meet the requirements of 7 U.S.C. § 204.

5. Respondents admit, as alleged in paragraphs IV and V of the complaint, that the corporate respondent, under the direction, management, and control of the individual respondents, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock; that as of July 12, 1995, $551,351.64 of the amounts alleged remained unpaid; that the corporate respondent, under the direction, management, and control of the individual respondents, purchased livestock for slaughter, and in purported payment for such livestock issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented. *See* Findings of Fact Nos. 9 and 10 herein. By reason of such facts, the respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a) and 228b), and the Secretary's Order in P&S Docket No. D-92-28.

6. Respondents admit, as alleged in paragraphs VI and VII of the complaint herein, that in connection with its business as a packer, the

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[1](...continued)
the direction, management, and control of the corporation. The respondents admitted that they were responsible for the direction, management, and control of the corporate respondent. Complaint, ¶¶ I(d)(3) and I(f)(3); Response, ¶ 1. Furthermore, respondents admitted the numerous substantive allegations of the complaint which alleged their direction, management, and control of the corporate respondent. As they admittedly owned and controlled the corporation, they are responsible as individuals for the violations admitted. *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893 (1980); *In re Britton Bros., Inc.*, 49 Agric. Dec. 423 (1990).

corporate respondent, under the direction, management, and control of the individual respondents, on March 30, 1995, purchased meat from Booker Packing Company, and failed to pay when due the full purchase price of such meat. *See* Findings of Fact No. 12 herein. Respondents further admitted that as of July 12, 1995, the entire purchase price of $31,385 remained unpaid. *See* Findings of Fact No. 13 herein. Respondents also admitted that the corporate respondent, under the direction, management, and control of the individual respondents, in connection with its business as a packer, on March 1, 1995, purchased meat from Ruebush Packing Company and in purported payment therefor issued its check no. 3037 to Ruebush Packing Company dated March 27, 1995, in the amount of $6,048.00, which was returned unpaid by the bank on which it was drawn because the corporate respondent did not have sufficient funds on deposit and available in the account on which such check was drawn to pay the check when presented. *See* Findings of Fact No. 14 herein. By reason of these facts, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. §§ 192(a)).

7. Respondents have admitted, as alleged in paragraph VIII herein, that the corporate respondent, under the direction, management and control of the individual respondents, purchased livestock for slaughter in cash sales and failed properly to carry out its fiduciary obligations as a statutory trustee by not collecting, liquidating and distributing trust assets on a pro rata basis within a reasonable time after receiving timely written trust notices from unpaid cash sellers of livestock, and a trust analysis prepared by the Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration. The trust proceeds collected and not properly distributed as of the date of issuance of the complaint total at least $34,081.91. *See* Findings of Fact Nos. 15 and 16 herein. I find that the corporate respondent, under the direction, management, and control of the individual respondents, failed to carry out properly its fiduciary obligations as statutory trustee despite the actual knowledge of the individual respondents of their fiduciary obligations. By reason of these facts, respondents have wilfully violated sections 202(a) and 206(b) of the Act (7 U.S.C. §§ 192(a) and 196(b)).

Order

Respondent Karler Packing Company, Inc., its officers, directors, agents, employees, successors, and assigns, and respondents Jesse Karler and Henry Karler, individually or as officers, directors, agents or employees of respondent Karler Packing Company, Inc., or of any other packer, directly or through any

corporate or other device, in connection with their operations as a packer, shall CEASE AND DESIST from:

1. Purchasing livestock for slaughter without filing and maintaining a bond or its equivalent in the amount determined by the Packers and Stockyards Programs, GIPSA, in accordance with the Act and the regulations.

2. Failing to pay, when due, for livestock or meat purchases;

3. Failing to pay for livestock or meat purchases;

4. Issuing checks in payment for livestock or meat without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to permit the payment of such checks upon presentation;

5. Acting in such a manner as to impede or delay the prompt disbursement of trust proceeds to unpaid cash sellers of livestock who have preserved their trust interests with timely filed written notices;

6. Violating the Order of the Secretary in P&S Docket No. D-92-28; and

IT IS HEREBY ORDERED that all purchases of livestock for slaughter by respondents shall be paid for at the time of purchase by cashier's check, wire transfer of funds, or United States currency PROVIDED that a supplemental order may be issued releasing respondents from the obligation to follow such payment procedures after the defendants demonstrate that the current assets of Karler Packing Company, Inc., are no longer exceeded by its current liabilities.

IT IS FURTHER ORDERED that until such time as respondents demonstrate, by properly audited financial statements, that the corporate respondent is solvent; *i.e.*, that the current assets of the Karler Packing Company, Inc., exceed its current liabilities; and a stipulation to such effect is filed in this proceeding, respondents shall prepare weekly statements showing all livestock purchases, and all payments made for such purchases by cashier's check, wire transfer of funds or United States currency; and monthly balance sheets of Karler Packing Company, Inc. The weekly statements shall identify the names of the livestock sellers, the number of head and purchase amount, the purchase and payment date; and the method of payment; *i.e.*, whether the payment is by cashier's check, wire transfer of funds, or United States currency. Copies of these weekly statements and monthly balance sheets shall be mailed to the Regional Supervisor of the GIPSA Regional Office in Denver, Colorado, at the close of each week and month, respectively. Monthly balance sheets may be prepared by compilation by a certified public accountant.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Karler Packing Company, Inc., Jesse Karler, and Henry Karler are jointly and severally assessed a civil penalty of $46,000.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Jurisdiction is retained for the purpose of insuring full compliance with the provisions of this Order.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 1, 1996.-Editor]

In re: S. LEVON OWENS.
P&S Docket No. D-95-13.
Decision and Order filed May 3, 1996.

Failure to deny material allegations - Suspension of registration - Cease and desist order - Failure to pay full purchase price when due - Prior course of dealing not sufficient - Willful violation.

Barbara S. Good, for Complainant.
Michael S. MacInnis, Jackson, MS, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the provisions of the Rules of Practice setting forth the procedure upon failure to file an answer or admissions of facts (7 C.F.R. § 1.139).

The complaint in this matter was filed on December 22, 1994, and served upon the respondent on January 25, 1995. The complaint set forth the details of a number of livestock purchase transactions covering the period January 4, 1993 through September 22, 1993, and alleged that respondent, in these transactions, had failed to pay when due for livestock in the amount of $63,602.43, and that further, of that amount, $32,104.01 remained unpaid as of the date of the complaint. The complaint further alleged that respondent's failures to pay when due for livestock and failures to pay for livestock as

alleged constitute violations of §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondent filed his answer to the complaint on March 24, 1995. In the answer, respondent admitted the jurisdictional allegations in paragraph I of the complaint, admitted that he purchased livestock on or about the dates set forth in the complaint, admitted that there remains unpaid the $32,104.01 specified in the complaint; but denied that he failed to pay when due for the livestock purchases and denied that the $32,104.01 admitted as unpaid is due because there were no terms of "repayment other than those established by prior course of dealing." AN, ¶ II(b).

Findings of Fact

1. S. Levon Owens, hereinafter referred to as "the respondent," is an individual whose business mailing address is (b) (6) [redacted]

2. Respondent is, and at all times material herein, was:

(A) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account or the accounts of others; and

(B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. Respondent purchased livestock as set out in Paragraph II of the complaint and failed to pay, when due, the amount of $32,104.01.

4. Respondent purchased livestock as set out in Paragraph II of the complaint and failed to pay therefor the amount of $32,104.01.

Conclusions

The respondent admits making the purchases of livestock set forth in the complaint, and further admits that $32,014.01 remains unpaid for such purchases. As a defense, he states that the amount is not presently due based upon a prior course of dealing with the livestock seller. As a matter of law, respondent has willfully violated §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). Section 409 of the Act provides, in part, as follows:

> (a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full

amount of the purchase price: . . . *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirements for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

Respondent here admits the transactions, admits the amount unpaid, but relies on a theory that he had a prior course of dealing with the livestock seller for the argument that the unpaid amount is not due. Section 409, however, requires either payment or a written credit agreement. Under no set of circumstances can "prior course of dealing" suffice as compliance with the Act. If parties to a transaction wish to extend payment terms beyond those specified in the Act, the plain language of section 409 requires a written credit agreement to be in existence before the transaction in question. Thus, the admissions that the transactions took place as alleged and that $32,104.01 remains unpaid establishes that a violation of the statute occurred.

The undisputed facts show that the respondent has violated the Act by failing to pay when due and failing to pay for livestock. Section 409 of the Act requires *delivery of the full amount of the purchase price before the close of the next business day following the purchase.* 7 U.S.C. § 228b(a). Subsection (c) provides, further, that *"[a]ny delay or attempt to delay by a market agency [or] dealer . . . purchasing livestock, the collection of funds as herein provided . . . resulting in extending the normal period of payment shall be considered an unfair practice"* in violation of § 213(a) of the Act. (Emphasis supplied).

Such a violation is willful where the respondent has " . . . 1) intentionally do[ne] an act that is prohibited--irrespective of evil motive or reliance on erroneous advice, or 2) act[ed] with careless disregard of statutory requirements. . . . *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961), *citing Eastern Produce v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997. The Ninth Circuit Court of Appeals has ruled that if a person "'acts with careless disregard of statutory requirements, the violation is willful.'" * * * [quotations omitted]. "To establish willfulness, the . . . [agency] . . . only needed to show that . . . [petitioner's] . . . ongoing failure to act was intentional as opposed to accidental. Proof of an evil motive is unnecessary." *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 773 (9th Cir. 1985). In such cases the notice described in 5 U.S.C. § 558(c) is not required prior to suspension of respondents' registration.

Order

Respondent, S. Levon Owens, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Failing to pay the full purchase price of livestock; and

Respondent, S. Levon Owens, is suspended as a registrant under the Act for a period of 5 years; **provided**, *however*, that at any time after the expiration of 90 days after the effective date of this decision, if respondent demonstrates that restitution has been made to all unpaid sellers of livestock, then a supplemental order may be issued terminating this suspension; and **provided further** that this order may be modified upon application to Packers and Stockyards Programs, Grain Inspection, Packers & Stockyards Administration to permit the salaried employment of the respondent, S. Levon Owens, by a

registrant or packer after the initial 90 days of the term of this order and upon demonstration of circumstances warranting modification of the order.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service upon Respondent unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final June 14, 1996.-Editor]

PACKERS AND STOCKYARDS ACT

CONSENT DECISIONS

(Not published herein.-Editor)

Jimmy Hughes. P&S Docket No. D-95-35. 1/17/96.

Gregory W. Shipman. P&S Docket No. D-95-57. 1/23/96.

Riverbend Cattle Company and John Wheeler. P&S Docket No. D-95-10. 2/1/96.

Taylor Packing Co., Inc., Harold A. Roney. P&S Docket No. D-95-21. 2/12/96.

Empire Kosher Poultry, Inc., Lenard Tessler and Matthew Soccio. P&S Docket No. D-96-06. 2/29/96.

Aiken Livestock, Sam Aiken, Jerry Aiken, Jack Aiken and Jeff Aiken. P&S Docket No. D-96-07. 3/8/96.

C.R. (Rick) Nejmanowski. P&S Docket No. D-95-39. 3/20/96.

Milan Brumit. P&S Docket No. D-96-09. 3/28/96.

Barry Kort. P&S Docket No. D-95-19. 4/2/96.

Thomas G. Olin. P&S Docket No. D-94-20. 4/24/96.

Harold L. Marshall. P&S Docket No. D-96-08. 4/29/96.

J.B. Richards. P&S Docket No. D-96-16. 4/30/96.

Joe A. Fritz d/b/a Mid West Cattle Co. P&S Docket No. D-95-05. 5/2/96.

Gaines Hughes. P&S Docket No. D-96-14. 5/9/96.

Fresh Meat Export Co., Inc. and Herve Solandt. P&S Docket No. D-96-01. 5/14/96.

Jack-Rich, Inc. P&S Docket No. D-95-39. 5/31/96.

LIST OF DECISIONS REPORTED

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

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ANIMAL QUARANTINE AND RELATED LAWS

ANIMAL WELFARE ACT

FEDERAL CROP INSURANCE ACT

PLANT QUARANTINE ACT

HORSE PROTECTION ACT

ERRATA

In re: GARY R. EDWARDS, LARRY E. EDWARDS, CARL EDWARDS & SONS STABLES, WILLIAM V. BARKLEY, JR., AND KAY BARKLEY.
HPA Docket No. 91-113
Errata.

The Second Remand Order issued by Judicial Officer, Donald A. Campbell is published at both 54 Agric. Dec. 348, and 55 Agric. Dec. 309. The correct citation is 54 Agric. Dec. 309.

In re: JACKIE McCONNELL and FLOYD SHERMAN.
HPA Docket No. 91-162.
Errata.

The Order Lifting Stay Order issued by Judicial Officer, Donald A. Campbell is published at both 54 Agric. Dec. 448 and 55 Agric. Dec. 307. The correct citation is 54 Agric. Dec. 448.

In re: MARVIN PASTOR.
HPA Docket No. 94-2.
Errata.

The Dismissal of Complaint issued by Administrative Law Judge, Dorothea A. Baker is published at both 54 Agric. Dec. 450 and 55 Agric. Dec. 332. The correct citation is 54 Agric. Dec. 450.

AGRICULTURE DECISIONS

Volume 55

July - December 1996
Part One (General)
Pages 727 - 1120

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

DAN GLICKMAN, SECRETARY OF AGRICULTURE v. WILEMAN BROTHERS & ELLIOTT, INC., ET AL.
No. 95-1184.
Filed September 20, 1996.

(Cite as: 117 S. Ct. 34)

SUPREME COURT OF THE UNITED STATES

Former decision, 116 S.Ct. 1875.

Case below, *Wileman Brothers & Elliott, Inc. v. Espy*, 9th Cir., 58 F.3d 1367.

Motion of National Association of State Departments of Agriculture, et al. for leave to file a brief as amici curiae granted. Motion of Washington Apple Commission, et al. for leave to file a brief as amici curiae granted. Motion to American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae granted.

CAL-ALMOND, INC., ET AL. v. DEPARTMENT OF AGRICULTURE.
No. 95-1978.
Filed October 7, 1996.

(Cite as: 117 S. Ct. 72)

SUPREME COURT OF THE UNITED STATES

Cite Case below, 14 F.3d 429; 67 F.3d 874.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

GORE, INC., d/b/a PURE MILK CO., V. ESPY, AS SECRETARY OF UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 94-50631.
Filed July 16, 1996.

(Cite as: 87 F.3d 767)

Milk marketing order - Standing - Separate facility - Arbitrary and Capricious.

The United States Court of Appeals for the Fifth Circuit reversed the Secretary's finding that Gore's delivery of packaged milk products to a customer's distibution center constituted a shipment to a milk plant under 7 C.F.R. § 1126.4,where the distribution center and processing plant were separate operations but were housed under the same roof. The Court held that the Secretary's interpretation of the meaning of "separate facilities" was arbitrary and capricious, and plainly inconsistent with the text of the regulation. Gore paid $366,772.38 into the producer-settlement fund on behalf of its customer HEB. The Court held that Gore had standing to challenge the assessments, finding 1) that it suffered injury by losing HEB as a market for its milk, and 2) that it is in the zone of interests protected because it is in the class of persons regulated.

Before: POLITZ, Chief Judge, JONES and PARKER, Circuit Judges.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

POLITZ, Chief Judge:

Gore, Inc. doing business as Pure Milk Co., appeals an adverse summary judgment sustaining a ruling by the Secretary of Agriculture that Gore's delivery of packaged milk products to a customer's distribution center constituted a shipment to a milk plant under 7 C.F.R. § 1126.4. Concluding that the Secretary's interpretation is arbitrary, capricious, and plainly inconsistent with the text of the regulation, we reverse.

BACKGROUND

The Agriculture Marketing Agreement Act of 1937[1] governs the distribution, sale, and marketing of all milk products.[2] The AMAA is implemented regionally by the Secretary who has adopted milk marketing regulations.[3] These regulations, often referred to as "order," establish a labyrinthine price support scheme.[4] Under the Texas Order,[5] producers[6] receive a "blend price" from the handlers[7] who purchase and distribute their milk.[8] The blend price is the uniform price paid to producers for all milk sold to handlers regardless of the milk's eventual use.[9] The AMAA recognizes the unlikelihood that each handler will use milk purchases in a

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[1]7 U.S.C. § 601 *et seq.* (1992 & Supp.1995).

[2]In *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

[3]*Suntex Dairy v. Block*, 666 F.2d 158 (5th Cir.), *cert. denied*, 459 U.S. 826, (1982). *See, e.g.*, 7 C.F.R. pt. 1126 (1995) (Texas marketing order).

[4]*Suntex Dairy; see also* 7 U.S.C. § 608c (1992 & Supp. 1995); 7 C.F.R. pt. 1126 (1995).

[5]7 C.F.R. § 1126.2(1995) (establishing the boundaries for the Texas milk marketing area).

[6]7 C.F.R. § 1126.12(1995). Dairy farms are producers under this definition.

[7]7 C.F.R. § 1126.9(1995).

[8]7 C.F.R. § 1126.61(1995).

[9]7 C.F.R. § 1126.61(1995). The AMAA's price support system is premised on the fact that the price handlers are willing to pay for milk depends upon its use. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994), *cert. denied*, _U.S._6 , 116 S.Ct. 50, 133 L.Ed.2d 15 (1995). Under the Texas order, milk distributed in fluid form is classified as Class I. 7 C.F.R., § 1126.50(a) (1995). Class I commands the highest minimum price. 7 C.F.R. § 1126.50(a) (1995). Class II uses, which include yogurt and cream, command an intermediary minimum price. 7 C.F.R. § 1126.50(b) (1995). Class III and IIIA uses command the lowest minimum prices. 7 C.F.R. § 1126.50(c),(d) (1995).

manner exactly reflecting the average utilization in the market as a whole.[10] The Texas Order establishes a producer-settlement fund into which handlers directing a greater than average proportion of their milk into the more valuable fluid uses must make payments.[11] Handlers directing a lesser than average proportion of their total milk into such fluid uses receive payments from that fund.[12]

An operator of both a dairy farm and a processing plant is designated as a producer-handler.[13] Producers-handlers are entitled to certain benefits, including the ability to sell their products without regard to the pricing scheme.[14] Milk received from a producer-handler at the plant of a regulated handler is designated as a lower Class III receipt, regardless of the price actually paid to the producer-handler or the actual use of the milk by the handler.[15] Thereafter, if the handler applies the milk to a higher value use it must pay the difference into the producer-settlement fund.

Gore is a vertically integrated milk producer, owning a dairy, a processing plant, and a packaging facility. As such, it is designated as a producer-handler under the Texas Order. H.E. Butt Company (HEB), a grocery company operating in Texas, purchases packaged fluid milk from Gore for sale in its retail stores. In addition to purchasing packaged fluid milk from Gore, HEB also owns and operates a milk plant.

HEB operates a large complex in San Antonio, Texas, housing its milk production plant, an ice cream plant, a bakery and a Perishable Distribution Center (PDC). The PDC is housed under the same roof and shares a common wall with the milk production plant but is entirely separate

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[10]*See Lehigh Valley Farmers v. Block,* 829 F.2d 409 (3d Cir. 1987).

[11]7 C.F.R. § 1126.71(1995).

[12]7 C.F.R. § 1126.71(1995).

[13]7 C.F.R. § 1126.10(1995).

[14]*See* 7 C.F.R. § 1126.7(f)(1)(1995).

[15]7 C.F.R. § 1126.14and 1126.44(1995). Although Gore could sell its milk at any price due to its status as a producer-handler, the record reflects that Gore sold its milk at a premium over the Class I minimum price.

therefrom.[16] The record reflects that the PDC is exclusively a distribution center.[17]

Perishable goods sold by HEB, including the milk purchased from Gore,[18] milk produced in the HEB milk processing plant, and various other items such as cut flowers, eggs, and meat are delivered to the PDC.[19] Once delivered to the PDC, the goods are loaded onto trucks for distribution to the HEB retail stores. There is no connection between the milk processing plant and the PDC that does not also exist between the origin of the non-milk perishable goods and the PDC.[20]

The market administrator[21] for the Texas Order determined that HEB's receipt of Gore's milk constituted a receipt of milk from a producer-handler at the processing plant of a regulated handler. As such, the receipt was classified as Class III.[22] From this premise HEB's subsequent sale of the milk purchased from Gore as Class I fluid milk called for a deposit into the producer-settlement fund. Gore paid $366,772.38 into the producer-settlement fund on behalf of HEB to avoid loss of HEB as a customer.[23]

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[16]The PDC has its own receiving and loading docks and is managed separately.

[17]The record establishes that the PDC turns over its entire inventory 200 to 250 times each year.

[18]Gore previously delivered all of the milk directly to the individual HEB retail stores but began delivering a portion to the PDC to increase efficiency.

[19]The milk processed in the HEB plant passes through the wall between the plant and the PDC on a conveyor belt.

[20]No raw milk to be processed by the HEB processing plant is delivered to the PDC and no processed milk ever passes from the PDC into the processing plant.

[21]The Secretary acts through the market administrator. 7 C.F.R. § 1000.3 (1995).

[22]7 C.F.R. § 1126.14 and 1126.44 (1995).

[23]Gore concedes that if the Secretary's interpretation is correct $366,772.38 is the amount HEB properly owed to the producer-settlement fund.

Gore sought administrative review,[24] maintaining that the PDC is a separate distribution facility which is specifically excepted from the definition of a plant.[25] The Administrative Law Judge deferred to the Secretary's interpretation [26] and the Secretary's chief judicial officer affirmed.

The instant action followed. The parties submitted cross-motions for summary judgment. The district court referred this matter to a magistrate judge who recommended granting Gore's motion for summary judgment. After a *de novo* review, the district court determined to grant the Secretary's motion for summary judgment. Gore timely appeals.

Analysis

A. Standing

At the threshold we must determine whether Gore possesses standing. The Supreme Court teaches that "term standing subsumes a blend of constitutional requirements and prudential considerations."[27] To satisfy the requirements of Article III a plaintiff must have suffered an injury in fact, caused by the challenged government conduct, which is likely to be redressed by the relief sought.[28] In addition to the constitutional requirement, the Supreme Court has also taught that we should consider certain prudential principles in determining whether the plaintiff has standing. Specifically, we must resolve whether the plaintiff's conduct falls within the zone of interest protected or regulated by the statute.[29] Only those belonging to the class

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[24]*See* 7 U.S.C. § 608c(15)(A)(1992).

[25]7 C.F.R. § 1126.4(1995) ("[S]eperate facilities used only as a distribution point for storing packaged milk in transit for route distribution shall not be a plant under this definition.").

[26]The ALJ deferred but noted the persuasive force of Gore's position.

[27]*Apache Bend Apartments, Ltd. v. United States through the Internal Revenue Service*, 987 F.2d 1174, 1176 (5th Cir. 1993) (en banc) (internal quotations omitted).

[28]*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[29]*Apache Bend* (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)). *See also Lujan*, 497 U.S. at 883 (emphasis in

that the law was designed to protect may sue.[30] We must also inquire whether the plaintiff is asserting personal legal rights and interests.

Gore possesses constitutional standing; it was injured in fact by the Secretary's interpretation of 7 C.F.R. § 1126.4 which essentially foreclosed at least one very valuable market to Gore, *i.e.*, the HEB account, and we may relieve that injury by rejecting that interpretation.[31] Further, Gore belongs to the class of persons regulated by the AMAA[32] and, as such, is within the zone of interests protected or regulated by the statute.[33] Finally, other prudential considerations do not weigh against a finding of standing.

B. The Secretary's Interpretation of 7 C.F.R.§ 1126.4.

Gore contends that the Secretary grossly erred in interpreting the definition of "plant" found in 7 C.F.R. § 1126.4. Gore maintains that the PDC is specifically excluded under the definition of "plant."

Our review is governed by the Administrative Procedure Act which requires that we determine whether the Secretary's interpretation of the regulation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[34] In such a review we routinely defer to an agency's

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original)("[T]he plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interest' sought to be protected by the statutory provisions whose violation forms the legal basis for his complaint.").

[30]*Sabine River Authority v. United States Dep't of Interior*, 951 F.2d 669 (5th Cir.), *cert. denied*, 506 U.S. 823 (1992).

[31]*See Craig v. Boren*, 479 U.S. 190 (1976) (foreclosure of a market constitutes an injury in fact).

[32]*See* 7 U.S.C. § 601 *et seq.* (1992); 7 C.F.R. pt. 1126 (1995).

[33]*See Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *cf. Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

[34]5 U.S.C. § 706(2)(A) (1989); *Pacific Gas Transmission Co. v. F.E.R.C.*, 998 F.2d 1303 (5th Cir. 1993); *Acadian Gas Pipeline System v. F.E.R.C.* 878 F.2d 865 (5th Cir. 1989).

construction of its own regulations,[35] but our examination should not be categorized as a summary endorsement of the agency's actions. A reviewing court does not serve the function of a mere rubber stamp of agency decisions."[36] Rather, we must undertake a careful and searching examination, ensuring that the agency's interpretation is rational and not plainly inconsistent with the text of the regulation.[37]

The text of the regulation defines a "plant" as

> the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products (including filled milk) are received, processed, or packaged....[S]eperate facilities used only as a distribution point for storing packaged milk in transit for route disposition shall not be a plant under this definition.[38]

Gore contends the PDC is a "separate facility used only as a distribution point" even though the complex, as a whole, includes a plant within the meaning of section 1126.4. The Secretary maintains that to constitute a separate facility, the PDC must be physically removed from the milk plant. Based on this interpretation, the Secretary concluded that the PDC is not a separate facility because it is housed under the same roof with the milk plant. We find the Secretary's interpretation of section 1126.4 strained, plainly inconsistent with the text of the regulation, arbitrary, capricious, and otherwise not in accordance with law.

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[35]*See, e.g.,Acadian Gas; Pacific Gas.*

[36]*Acadian Gas,* 878 F.2d at 868. The review of an agency's interpretation of its regulations is different than the review of an agency's interpretation of the statute it is charged to interpret under *Chevron U.S.A.,Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). *See Pacific Gas; Marlowe v. Bottarelli,* 938 F.2d 807 (7th Cir. 1991).

[37]*Acadian Gas; Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945) (An agency's interpretation of its own regulations must comport with "the plain words of the regulation.").

[38]7 C.F.R. § 1126.4(1995).

The regulations do not define "separate facility";we must first determine whether the Secretary applied the ordinary meaning of that term.[39] A facility typically is defined in terms of its function;[40] hence, the ordinary import of the phrase "separate facility" is that the subject unit functions distinctly from something else and that it possesses a different purpose.[41]
The Secretary's contention that the modifier "separate" requires that the facility be physically removed modifies the regulation, for adopting that interpretation effectively inserts the phrase "and removed" before the term "facility." Section 1126.4on its face recognizes a distinction between facilities and buildings. This suggests that if a physically separate building were required, the ordinary term for such would have been used. We perforce conclude that the Secretary's myopic interpretation is arbitrary, capricious, and otherwise not in accordance with law.

Alternatively, the Secretary contends that even if the facilities need not be physically separate, the PDC was not functionally separate. Under section 706(2)(E) of the APA, the factual findings of the hearing officer must be upheld if supported by substantial evidence.[42] "The 'substantial evidence' standard requires a determination that agency findings are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support

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[39]*Elizabeth Blackwell Health Center for Women v. Knoll,* 61 F.3d 170 (3d Cir. 1995); *see also, F.D.I.C. v. Meyer,* 510 U.S. 471 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning.").

[40]*See* Webster's Third International Dictionary 812-13 (3d ed. 1976) (defining facility as "something that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"); Black's Law Dictionary 531 (5th ed. 1979) (defining facility as "[s]omething that is built or installed to perform some particular function.").

[41]Webster's Third International Dictionary 2069 (3d ed. 1976) (defining separate as distinct, different, dissimilar in nature, or set apart); Black's Law Dictionary 1124 (5th ed. 1979) (defining separate as something that is distinct individual, particular, or disconnected). The ordinary usage of the term "separate" does not require physical separation.

[42]5 U.S.C. § 706(2)(E) (1989); *Parchman v. United States Department of Agriculture,* 852 F.2d 858 (6th Cir. 1988). The substantial evidence test only applies when a formal trial-type hearing is required under 5 U.S.C. §§ 556 and 557. *Consumers Union of the United States, Inc. v. Federal Trade Commission,* 801 F.2d 417 (D.C. Cir. 1986).

a conclusion.'"[43] A finding that the PDC is not functionally separate is not supported by substantial evidence; rather, the evidence overwhelmingly supports the contrary conclusion.

The Secretary maintains that because milk passed from the HEB milk plant into the PDC, the PDC was part of the production process. We are not persuaded. As the marketing administrator recognized, the PDC is strictly an assembly point for distribution.[44] First, no raw milk ever entered the PDC; the milk processed in the HEB plant was completely processed, packaged, and cooled before passing through the PDC.[45] Second, various other perishable goods passed through the PDC en route to HEB retail stores and as these perishables arrived at the PDC they quickly were loaded onto trucks for distribution.[46] Finally, the PDC was completely separate from the HEB milk plant; each had its own management and loading docks. No product ever entered the PDC and was then taken into any other area of the facility. The only physical connection between the milk plant and the PDC is the conveyor belt operating through the common wall. This sole tenuous connection is insufficient to transform a large distribution center into a component part of a milk plant. It is manifest that the Secretary's determination that the PDC constituted a plant under section 1126.4 is not supported by substantial evidence.

Gore seeks not only invalidation of the Secretary's interpretation that the delivery of its processed milk to the PDC constituted a delivery to a plant, but it also seeks reimbursement for the $366,772.38 paid into the producer-settlement fund on behalf of HEB. Gore paid this money because of the Secretary's now-rejected interpretation of section 1126.4 (or, alternatively, the Secretary's unsupported conclusion that the PDC was not functionally

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[43] *Suntex Dairy*, 666 F.2d at 162 (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

[44] Not only was the PDC a distribution point for the milk products, but it was also the distribution point for numerous other perishables.

[45] No milk processed by HEB ever passed from the PDC into the milk plant.

[46] The inventory of the PDC was turned over every second day.

separate) and, therefore, is entitled to a refund of the amount from the producer-settlement fund.[47]

The judgment appealed is REVERSED, judgment consistent herewith in favor of Gore is RENDERED, and the matter is REMANDED for appropriate disposition.

SANI-DAIRY, A DIVISION OF PENN TRAFFIC CO., INC. v. YEUTTER SECRETARY OF AGRICULTURE, UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.*
No. 95-3304.
Decided July 31, 1996 as amended August 29, 1996.

(Cite as: 91 F.3d 15)

Milk marketing order - Prohibited economic trade barrier.

The United States Court of Appeals for the Third Circuit affirmed and adopted the District Court's decision which held that the Secretary's regulations, as applied to the plaintiffs, constitute a prohibited economic trade barrier.

Before: NYGAARD, SAROKIN and ALDISERT, Circuit Judges.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

OPINION OF THE COURT

Per Curiam.

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[47] *See Abbotts Dairies Division of Fairmont Foods v. Butz*, 584 F.2d 12 (3d Cir. 1978); *see also* 7 U.S.C. § 608c(15)(B) (1992) (granting jurisdiction in equity).

*Pursuant to Rule 12(a), F.R.A.P.

Several Pennsylvania dairy farmers and a dairy cooperative[1] challenge the validity of the Secretary of Agriculture's regulations governing the marketing of fluid milk in the New York-New Jersey milk marketing area.[2]

Plaintiffs allege that the Secretary's regulations, promulgated under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, violate 7 U.S.C. § 608c(5)(G), which states:

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The district court found that the Secretary's regulations governing the marketing of fluid milk in the New York-New Jersey milk marketing area, as applied to plaintiffs, constituted a prohibited economic trade barrier to milk producers and sellers outside the New York-New Jersey milk marketing area. *See Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U.S. 76, 91-98 (1962). The district court awarded plaintiffs restitution and interest. We will now affirm, and in so doing adopt the reasoning of the district court expressed in *Sani-Dairy v. Yeutter,* 935 F.Supp. 608 (W.D. Pa. 1995) and *Sani-Dairy v. Espy,* F. Supp. NO. CIV. A. 90-222J, CIV. A. 90-236J, 1993 WL 832147 (W.D. Pa. Dec. 30, 1993).

KENNEY v. GLICKMAN, SECRETARY OF AGRICULTURE.
No. 95-2371.
Decided September 30, 1996.

(Cite as: 96 F.3d 1118)

Not the type of enforcement decision that is presumptively unreviewable under APA - Sufficient law for judicial review - Reversed and remanded.

Poultry and meat producers brought an action challenging USDA regulations governing meat and poultry processing. The United States District Court for the Southern District of Iowa

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[1]The dairy cooperative is no longer part of this suit because it failed to exhaust its administrative remedies before seeking judicial review.

[2]The marketing area is defined in 7 C.F.R. § 1002.3.

dismissed the action for failure to state a claim. The United States Court of Appeals for the Eight Circuit reversed and remanded the case finding that the regulations were not presumptively unreviewable enforcement decisions under the Administrative Procedure Act, and that there was sufficient law available for judicial review of the agency's decisions. The Secretary's decisions regarding zero tolerance water washing are general policies and standards, not decisions on whether a violation has occurred or should be acted against, and are therefore not enforcement actions. There is a strong presumption that Congress intends the judicial review of administrative action, and law to apply can be found in underlying statutes or regulations. The PPIA and the FMIA regulations provide sufficient law to apply in reviewing the Secretary's decisions regarding zero tolerance, water washing, and permissible water retention. The case was remanded for a determination of whether the Secretary abused his discretion.

Before MCMILLIAN and BEAM, Circuit Judges, and PERRY,* *District Judge.*

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

PERRY, District Judge.

Delores Kenney and fellow poultry consumers appeal from the district court's order dismissing this action for failure to state a claim. Because we find that the challenged actions and inactions of the Secretary of Agriculture are reviewable, we reserve and remand to the district court for a determination of whether the Secretary abused his discretion.

I.

The original plaintiffs, poultry consumers and red meat producers, brought an action against appellee Daniel Glickman, Secretary of Agriculture,[1] challenging certain aspects of the Department of Agriculture's regulatory scheme governing meat and poultry processing. The district court held that the poultry consumers had standing to challenge the Secretary's actions, but

*The HONORABLE CATHERINE D. PERRY, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1]Defendant below was Mike Espy, who was Secretary of Agriculture at the time appellants brought this action. Daniel Glickman, current Secretary of Agriculture, has replaced Espy as party to this action.

the red meat producers did not have standing. The red meat producers did not appeal that part of the district court's order. With respect to the poultry consumers, the district court granted the Secretary's motion to dismiss for failure to state a claim, holding that the actions and decisions of the Secretary of Agriculture challenged by appellants are not subject to judicial review. The poultry consumers have appealed that determination.

Appellants challenge certain actions and inactions by the Secretary of Agriculture regarding the processing of poultry. The Secretary is responsible for implementing both the Poultry Products Inspection Act ("PPIA"), 21 U.S.C.451 *et seq.*, and the Federal Meat Inspection Act ("FMIA"),21 U.S.C. 601 *et seq.* The stated objectives and bases of the two Acts are identical: protect the health and welfare of consumers and to eliminate the burdens on interstate commerce that result from the distribution of unwholesome, adulterated or mislabeled products. With respect to the health of consumers, both parties provided statistics regarding the large number of contaminated meat and poultry carcasses processed each year and the negative consequences resulting from human consumption of the contaminated carcasses. In light of the identical goals of the two Acts, appellants allege that the Secretary has issued contradictory requirements for the inspection and cleaning of meat and poultry, and that the Secretary has improperly allowed water absorbed during processing to remain in poultry.

The processing of meat and poultry begins with the removal of certain parts of the carcasses. The carcasses and parts are then either sold or processed further. Because both meat and poultry are sold by weight, any moisture added during processing increases the value of the carcass. Similarly, any trimming of the carcass during processing to remove contaminants reduces the value of the carcass. To further the goals of the PPIA and FMIA, the regulations require ante-and post-mortem inspections of the livestock and poultry processed for human food. In technical terms, the purpose of the inspections is to ensure that the carcasses are not "adulterated" or "misbranded." The definitions of those two terms are nearly identical under the two Acts.

Individual meat and poultry carcasses are inspected during processing, and carriers of E. coli and other pathogens are removed. The well-known contaminants that carry pathogens are feces, ingesta and milk. If contaminants are found on an individual meat or poultry carcass, the regulations require processors to remove the contaminants. The regulations refer to this as "zero tolerance" with respect to individual carcasses. After the individual carcasses have been inspected and reprocessed as necessary, the

inspector reinspects sample carcasses selected from the entire lot to determine whether there was a "process defect" that may have caused contaminants to exist on carcasses in that particular lot. Before March 1993, the regulations established a tolerance slightly above zero with respect to process defects in both poultry and meat. In other words, if the number of defects discovered on the sample carcasses was less than the tolerance level, the entire lot could proceed. If the defects exceeded the tolerance level, the entire lot failed and corrective action was required.

In March 1993, the Secretary issued directives to operators and inspectors of beef slaughter plants.[2] The directives--which affected meat but not poultry--lowered the tolerance level for process defects to zero. The directives did not affect the tolerance level for individual carcasses, *i.e.*, the tolerance for contaminants on individual carcasses remains zero for both meat and poultry. The tolerance level for process defects in poultry remains slightly above zero. In other words, a certain level of contaminants discovered in poultry during the process inspection is acceptable and the lot will not be returned for reprocessing.

In addition to the different standards of tolerance for process defects, the methods of contaminant removal approved by the Secretary also differ between meat and poultry. The regulations governing inspections require meat processors to trim or otherwise actually remove the contaminated tissue, while the regulations allow poultry processors to "water wash" the contaminated portion of the carcass.

Appellants challenge the Secretary's decisions with respect to (1) the "zero tolerance" for process defects in meat but not poultry and (2) the regulations allowing poultry processors to water wash rather than trim contaminants. Appellants contend that the Secretary should either issue the same regulations for poultry and meat or provide a legally sufficient reason for treating meat and poultry differently.

Finally, appellants challenge certain water-retention regulations governing poultry. The regulations governing water absorbed during processing differ between meat and poultry. The meat regulations prohibit processors from adding water and other substances to a meat carcass during processing. Poultry carcasses, on the other hand, may absorb and retain an average of eight percent increase over the weight of the carcass before final washing.

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[2] In December 1993, interim guidelines replaced the March 1993 directives with no relevant substantive changes.

Appellants challenge this regulation on two grounds. First, irrespective of the meat regulations, appellants allege that the Secretary has violated the Poultry Act's prohibitions against "adulterated" and "misbranded" carcasses by allowing water retention in poultry. Second, appellants allege that the Secretary has acted arbitrarily and capriciously by allowing retention of water in poultry but not in meat.

II.

The district court held that none of the Secretary's challenged actions or inactions are reviewable. With respect to the zero tolerance and contaminant removal standards, the court looked to the introductory language of the PPIA and held that "that statute has been drawn so broadly that there is no standard available for judging how and when the agency should exercise its discretion." Likewise, the court held that decisions regarding retention of water during poultry processing are "left completely to the discretion of the Secretary." We review the district court's decision *de novo*. *Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784, 787 (8th Cir.), *cert. denied,* 444 U.S. 899, 100 S. Ct. 208, 62 L. Ed. 2d 135 (1979).

The Administrative Procedure Act (APA) is the starting point for discussion of reviewability of an agency action. The APA provides that any person "adversely affected or aggrieved" by a "final agency action for which there is no other adequate remedy" is generally entitled to judicial review. 5 U.S.C. § 702, 704.[3] There are two exceptions to the general rule of reviewability:
(1) where the statute explicitly precludes judicial review, and (2) where "agency action is committed to agency discretion by law." *Id.* 701(a). In *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971), the Supreme Court noted that the second exception was "very narrow" and that "it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410, 91 S. Ct., at 821 (footnote omitted) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). The Court again discussed the second exception to reviewability in *Heckler v. Chaney,* 470 U.S. 821, 105 S. Ct. 1649, 84 L.Ed.2d 714 (1985). In *Chaney,* the Court created a rebuttable presumption that "an

[3]The APA judicial review provisions apply equally to agency action and agency inaction. 5 U.S.C. §§ 551(13), 706(1); *see also Iowa ex rel. Miller v. Block,* 771 F.2d 347, 352 (8th Cir. 1985), *cert. denied,* 478 U.S. 1012, 106 S. Ct. 3312, 92 L. Ed.2d 725 (1986).

agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" under § 701(a) (2) of the APA. *Chaney,* 470 U.S. at 831, 105 S. Ct. at 1655.

In this case, neither party contends that any of the three challenged actions are explicitly precluded from judicial review by statute, and therefore the first exception to reviewability does not apply. Appellee contends that its regulations regarding zero tolerance and contaminant removal are enforcement decisions that are presumptively unreviewable under *Chaney.* Appellants contest the characterization of these regulations (or lack thereof) as enforcement decisions, and claim that they are reviewable. With respect to the Secretary's decision to allow water absorption into poultry, appellee apparently does not dispute that the action is reviewable, and instead argues that the Secretary's actions were not arbitrary and capricious.

III.

Appellee contends that the Secretary's decisions to reject a zero tolerance standard for poultry process defects and to allow water washing of poultry contaminants are the type of enforcement decisions that the Supreme Court declared presumptively unreviewable in *Heckler v. Chaney,* 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985). In support of his argument, appellee states that the meat and poultry inspection processes are the same, and that the Secretary has merely made a decision to use agency resources to enforce the meat inspection processing regulations more vigorously as part of a "high priority" to prevent pathogens in the nations's meat supply.

We reject appellee's characterization of the zero tolerance and water washing policies as enforcement decisions; we find that *Chaney* does not establish a presumption of unreviewability in this case. In *Heckler v. Chaney,* the Court held that the Food and Drug Administration's decision not to take enforcement actions to prevent the use of lethal injections was not subject to review. *Id.* According to the Court, a decision not to enforce "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831, 105 S. Ct. at 1655. The Court stated the following reasons for the general unsuitability of judicial review of enforcement actions:

> [T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another,

> whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32, 105 S. Ct. at 1656.

The Secretary's decisions regarding zero tolerance and water washing are not *Chaney*-type enforcement actions. The Secretary has not decided "whether a violation has occurred," has not decided whether he will "succeed" if he acts, and has not determined which "technical violations" to act against. Rather, the Secretary has adopted general policies stating that the tolerance level of process defects in poultry is slightly above zero while the tolerance level of process defects in meat is zero, and that poultry contaminants can be water washed rather than trimmed while meat contaminants must be trimmed. Those policies are the standards that the Secretary deems acceptable to implement the goals of the PPIA and FMIA.

Likewise, this is not a case where the Secretary has refused to institute proceedings. In support of the presumption of unreviewabilty, the Court in Chaney stated:

> Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict--a decision which has long been regarded as the special province of the Executive Branch . . . .

Id. at 832, 105 S. Ct. at 1656. This language suggests that *Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards. An example highlights the distinction: A prosecutor refuses to institute proceedings when he or she decides no to prosecute an individual possessing one ounce of marijuana; Congress would not be characterized as "refusing to institute proceedings" under *Chaney* if it amended the drug laws to exclude simple possession of one ounce or less of marijuana as a crime.

In sum, we do not believe the Court in *Chaney* intended its definition of "enforcement action" to include an interpretation by an agency that the

statute's goals could be met by adopting a certain permanent standard.[4] *See, e.g., Arent v. Shalala,* 70 F.3d 610, 614 (D.C. Cir. 1995) ("*Chaney* is of no assistance to the [agency] in this case because the [agency's] promulgation of a standard for 'substantial compliance' under the [Act] does not represent an enforcement action."); *Edison Elec. Institute v. U.S. EPA,* 996 F.2d 326, 333 (D.C. Cir. 1993) ("Petitioners are not challenging the manner in which the [agency] has chosen to exercise its enforcement discretion . . . . Instead, petitioners are challenging the [agency's] interpretation of [the Act] and its implementing regulations . . . Clearly, this interpretation has to do with the substantive requirements of the law; it is not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review."); *National Treasury Employees Union v. Horner,* 854 F.2d 490, 496 (D.C. Cir. 1988) ("[The agency's] decision to develop some but not other competitive examinations . . . is a major policy decision, quite different from day-to-day agency nonenforcement decisions . . ."). The poultry policies allowing greater than zero tolerance of process defects and water washing of contaminants are policy decisions based on the Secretary's interpretation of the PPIA in light of the goal to protect consumers from health risks.

IV.

Having determined that the Secretary's zero tolerance and water washing policies for poultry do not quality as enforcement actions, we continue to review the Secretary's challenged inactions under the relevant provisions of the APA. The Secretary's decisions with respect to poultry are presumed reviewable unless there is no law to apply. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402; 91 S. Ct. 814; 28 L. Ed. 2d 136 (1971). In general, there is a strong presumption that Congress intends judicial review of

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[4]The Court in *Chaney* recognized that it was not addressing the situation "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," and therefore expressed no opinion as to whether such decisions would be unreviewable under § 701(a). *Chaney,* 470 U.S., at 833, n. 4; 105 S. Ct. at 1656 n. 4. In this case, the Secretary' zero tolerance and contaminant removal standards are conscious and express general policies. Although appellants have not argued that this case involves an extreme policy that is an "abdication" of the Secretary's responsibilities, we find that the Court's distinction in footnote four of *Chaney* between general policies and enforcement actions supports our conclusion.

administrative action. *Abbott Lab v. Gardner,* 387 U.S. 136, 140; 87 S. Ct. 1507, 1511; 18 L. Ed.2d 681 (1967). "Judicial review of a final agency action will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.*

Courts have found that "law to apply" may exist in the underlying statute or in regulations by the agency interpreting the underlying statute. *See, e.g., Safe Energy Coalition of Michigan v. U.S. Nuclear Regulatory Comm'n,* 866 F.2d 1473, 1478 (D.C. Cir. 1989); *Center for Auto Safety v. Dole,* 846 F.2d 1532, 1534 (D.C. Cir. 1988) (per curiam). Both the PPIA and the Secretary's regulations under the FMIA provide law to apply in reviewing the Secretary's inaction with respect to zero tolerance and water washing. The district court relied on the introductory language to the PPIA and found that it was so broad that there was no law to apply. However, appellants rely on more than the introductory language to the PPIA regarding protection of consumers' health; appellants also rely on the language in the PPIA mandating that the Secretary prevent adulterated poultry products from entering commerce. *See* 21 U.S.C. §§ 453 (g), 455. We find that the prohibition of "adulterated" products found in the PPIA provides a sufficient standard by which the district court can examine the Secretary's zero tolerance and water wash policies that govern poultry processing. The district court must examine the Secretary's reasons for adopting the policies in light of the goals of the PPIA and the definition of "adulterated" to determine whether the Secretary's action or inaction was arbitrary and capricious or an abuse of discretion.

In addition, the Secretary's regulations and policies regarding meat that were implemented pursuant to the FMIA provide law to apply. The PPIA and FMIA are identical in several respects, and parallel in most other respects. The legislative history of the two Acts and subsequent amendments indicate a congressional intent to construe the PPIA and the FMIA consistently. *American Public Health Ass'n v. Butz,* 511 F.2d. 331, 335 (D.C. Cir. 1974); *see also* H.R. Rep. No. 1333, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N 3426. Courts have also held that, in general, similar or parallel statutes should be interpreted consistently whenever possible. *See, e.g.,Greenwood Trust Co. v. Massachusetts,* 971 F. 2d 818, 827 (1st Cir. 1992), *cert. denied,* 506 U.S. 1052, 13 S. Ct. 974, 122 L. Ed.2d 129 (1993); *FAIC Securities, Inc. v. United States,* 768 F.2d 352, 363 (D.C. Cir. 1985). Although there is no requirement that the regulations interpreting the PPIA and FMIA be identical, we believe that the Secretary's interpretation of the FMIA--which resulted in a zero tolerance of process defects in meat and a requirement that meat processors trim contaminants--provides law to apply in evaluating the

regulations interpreting the nearly identical PPIA. The Secretary may have legitimate, rational reasons for differing between meat and poultry. However, in light of the strikingly similar goals and language of the two statutes, we hold that there is law to apply to determine whether the Secretary acted arbitrarily and capriciously in distinguishing between poultry and meat in implementing regulations governing contaminants during processing. Because the district court found the actions unreviewable, it did not proceed to review them. Accordingly, Count I will be remanded to the district court for review of the Secretary's actions.

V.

Appellants have also challenged the Secretary's regulations allowing up to 8% water to be absorbed during poultry processing. It is undisputed that these regulations are not "enforcement actions" under *Heckler v. Chaney,* but rather are agency interpretations of the PPIA and FMIA. In addition, appellee does not appear to argue that there is no law to apply or that the decision to allow poultry to absorb some water is "committed to agency discretion." Rather, appellee appears to have conceded that the actions are reviewable, and essentially argued to this Court that the regulations are a reasonable interpretation by the Secretary of the PPIA.

Appellants are correct that this action is reviewable because there is law to apply--both the PPIA itself and the Secretary's interpretation of the nearly identical FMIA. Appellants challenged the poultry water retention regulation under the PPIA provision prohibiting adulterated and misbranded poultry products. The relevant definitions of "adulterated" and "misbranded" are identical under the PPIA and FMIA. *Compare* 21 U.S.C. § 453(g), (h) with 21 U.S.C. § 601(m), (n). However, the regulations permit up to 8% water to be retained during the processing of poultry, *see* 9 C.F.R. § 381.66 (1995), whereas the meat regulations do not allow the retention of water or any other substance during processing, *see* 9 C.F.R. § 301.2(c)(8) (1995).

Under the PPIA, a poultry product is "adulterated" if "any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appeal better or of greater value than it is." 21 U.S.C. § 453(g)(8). This definition provides law to apply. The district court can review whether the Secretary has properly excluded water absorbed during processing from the class of substances prohibited by the PPIA from being added to poultry. In addition, the court can compare the Secretary's poultry and meat regulations to determine whether the

Secretary has acted arbitrarily and capriciously or abused his discretion by treating meat and poultry differently.

Likewise, the definition of "misbranded" provides law to apply, as evidenced by the numerous court decisions reviewing agency action and inaction challenged as violations of the prohibition against misbranded poultry products. *See, e.g.,American Meat Institute v. USDA,* 646 F.2d 125 (4th Cir. 1981); *National Pork Producers Council v. Bergland,* 631 F.2d 1353 (8th Cir. 1980), *cert. denied,* 450 U.S. 912, 101 S. Ct. 1350, 67 L. Ed.2d 335 (1981); *American Public Health Ass'n v. Butz,* 511 F.2d 331 (D.C. Cir. 1974). Appellants contend that the current poultry regulations regarding water retention violate two of the provisions in the definition of "misbranded" poultry under the PPIA. First, a poultry product is misbranded "if its labeling is false or misleading in any particular." 21 U.S.C. § 453 (h)(1). Second, a poultry product is misbranded

> [U]nless it bears a label showing . . . (B) an accurate statement of the quantity of the product in terms of weight, measure, or numerical count: Provided, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages or articles not in packages or other containers may be established by regulations prescribed by the Secretary.

21 U.S.C. § 453(h)(8). The district court relied on the "reasonable variation" and "exemptions . . . may be established" language contained in 453 (h)(5) to conclude that all interpretations of the term "misbranded" were committed by Congress to agency discretion. This conclusion affords too much weight to provisions that are merely a part of the definition of "misbranded" and that appear to apply only in very narrow situations. *See generallyRath Packing Co. v. Becker,* 530 F.2d 1295, 1298-1301, 1308-12 (9th Cir. 1975), *aff'd,* 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed.2d 604 (1977); *see also* 9 C.F.R. §§ 317.2, 317.19 (1995) (defining scope of "reasonable variations"). There is nothing in the definition of "misbranded" that indicates Congress intended to afford complete discretion to the agency regarding decisions such as the water absorption provisions challenged in this case. Because appellee has not overcome the presumption of reviewability with respect to the poultry regulations that allow some water to be absorbed, Count II will be remanded to the district court for review of the Secretary's actions.

VI.

In conclusion, we reverse and remand this action to the district court on both Counts I and II for a review of the Secretary's actions.

MCMILLIAN, Circuit Judge, *dissenting in part.*

I respectfully dissent in part. I would affirm the district court's dismissal of appellants' claim in Count I of the complaint. In my opinion, the Secretary's decisions not to enforce a zero tolerance standard for poultry process defects and to allow water washing of poultry contaminants are nonreviewable enforcement decisions under *Heckler v. Chaney,* 470 U.S. 821, 831-32, 105 S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985). However, for the reasons stated in Part V of the majority opinion, I agree that the district court's dismissal of appellants' claim in Count II of the complaint (concerning the water absorption regulations) should be reversed, and that claim remanded for review.

KREIDER DAIRY FARMS, INC. v. GLICKMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. CIV. A. 95-6648.
Filed August 15, 1996.

Milk marketing order - Definition of producer-handler - Promulgation history-Remand.

The United States District Court for the Eastern District of Pennsylvania remanded the case for further factfinding, in order to determine whether granting Kreider producer-handler status would give it an unfair economic advantage. The market administrator (MA) of Order 2 denied Kreider producer-handler status because its sales to Ahava are considered to be distributions to a "subdealer." Because Ahava plays a role in distributing the milk to its ultimate end users, the MA determined that Kreider is not completely self-contained, and is therefore, not entitled to be exempt from contributions to the producer-settlement fund. The Court found that the MA's interpretation of Order 2 is not clearly supported by the plain language of the order, the promulgation history, or agency precedent. It also determined that further fact finding is necessary to decide whether the economic justification for the market administrator 's interpretation is valid. It further held that if the petitioner prevails, it is entitled to a full refund of assessments with interest.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM

CAHN, District Judge:

Plaintiff, Kreider Dairy Farms, Inc. ("Kreider"), seeks review of a Decision and Order issued by the Judicial Officer of the United States Department of Agriculture ("USDA").[1] Kreider initiated this case by filing a complaint pursuant to section 608c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. (the "AMAA"). The case arises from the administration of a federal milk marketing order, enacted under the authority of the AMAA, which regulates the sale of milk and fluid milk products in the New York-New Jersey milk marketing area. *See* 7 C.F.R. § 1002 *et seq.* (1995).

Kreider challenges the ruling of the Judicial Officer ("JO") who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2")[2] to regulate Kreider as a handler

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[1]The Judicial Officer acts on behalf of the Secretary of Agriculture in all adjudicative matters which are appealed to the USDA. *See* 7 C.F.R. § 2.35 (1995).

[2]The following provides a helpful background on the purpose of a milk marketing order:

> Milk marketing orders issued under the [AMAA] provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and for the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. The procedure is generally as follows: The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means

(continued...)

under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk. Pursuant to 7 U.S.C. § 608c(15)(B) of the AMAA, Kreider sought review of the JO's decision by filing a complaint in this court against Defendant Dan Glickman, the Secretary of the USDA ("Defendant" or "the Secretary"). Currently before this court are Kreider's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. After consideration of the memoranda and the on-record hearing on this matter, this court finds that Defendant's action is not warranted by the record before this court. Therefore, this case is remanded to the Secretary for further factual findings.

PROCEDURAL HISTORY

Kreider initiated these proceedings on December 23, 1993, by filing a Petition with the USDA pursuant to section 608c(15)(A) of the AMAA. An Answer to the Petition was filed by the Administrator of the Agricultural Marketing Service, USDA, on February 25, 1994. On December 14, 1994, a hearing was held before an administrative law judge ("ALJ").

In a Decision and Order dated March 20, 1995, the ALJ held that Kreider qualified as a producer-handler under Order 2 and stated that Kreider was therefore entitled to a full refund of all sums which had it been required to pay into producer-settlement and administrative funds established under the Order. As of November, 1994, these sums totalled $543,864.68. The ALJ denied Kreider's request for interest on the amount paid.

The Agricultural Marketing Service filed its Appeal to the ALJ's Decision on May 5, 1995. Also on May 5, 1995, Kreider filed a Cross-Appeal concerning its right to interest on the refund. On September 28, 1995, the JO issued a Decision and Order reversing the ALJ and upholding the MA's decision to regulate Kreider as a handler under Order 2. *See In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2 (USDA Sept. 28, 1995).

On October 18, 1995, following the issuance of the JO's Decision and Order, Kreider filed its Complaint with the United States District Court for

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[2](...continued)
of the equalization or producer-settlement fund.

In re Yasgur Farms, Inc. 33 Agric. Dec. 389, 391-92 (1974) (quoting *Grant v. Benson*, 229 F.2d 765, 767 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)).

the Eastern District of Pennsylvania. On December 29, 1995, Defendant filed its Answer to the Complaint.

FACTUAL BACKGROUND

Kreider is a dairy farm corporation with its principal office in Manheim, Pennsylvania. Manheim is located within what the USDA considers to be the Middle Atlantic area, a region in which sales of milk are regulated by Federal Milk Marketing Order 4. *See* 7 C.F.R. § 1004 *et seq.* (1995). Although Kreider is physically located within the boundaries of Order 4, it sells fluid milk in the marketing area covered by Order 2.

Since 1990, Kreider has been selling packaged kosher fluid milk to two subdealer/handlers, the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. (the "FPPTLC") and Ahava Dairy Products, Inc. ("Ahava"). The FPPTLC is a distributor of fluid milk and milk products and is located in Baltimore, Maryland. It sells fluid milk to customers in Lakewood, New Jersey. Ahava, which is also a distributor of fluid milk and milk products, is located in Brooklyn, New York. Ahava distributes its dairy products in Brooklyn, Manhattan, and Queens, New York. Its customer base encompasses between 800 and 1,100 customers consisting of grocery stores, restaurants, and schools.

In December, 1990, the MA responsible for administering Order 2 learned that Kreider was selling fluid milk to Ahava for distribution into the milk marketing area covered by the New York-New Jersey Milk Marketing Order. Subsequently, the MA determined that Kreider also sold fluid milk to the FPPTLC, which distributed it into the Order 2 marketing area.

By letter dated December 19, 1990, the MA informed Kreider that it might be subject to regulation under Order 2 and instructed it to file reports with the MA's office. In January 1991, Kreider filed an application for a producer-handler designation with the MA for Order 2. The MA denied the application based on its determination that Kreider did not meet the requirements of a producer-handler as defined in § 1002.12 of Order 2. *See* 7 C.F.R. § 1002.12 (1995). Instead, in July 1992, following audits of Kreider, the MA concluded that Kreider should be billed as a regulated handler operating a partial pool plant under Order 2. On August 7, 1992, the MA sent a billing statement to Kreider, billing it as a regulated handler under Order 2 for the period November 1991 to June 1992. Subsequently, the MA continued to bill Kreider on a monthly basis as a handler operating a partial

pool plant. As of December 14, 1994, the time of the hearing before the ALJ, the total amount which Krieder has paid to the MA was $543,864.68.

STANDARD OF REVIEW

A district court's review of an MA's decision is limited to whether the decision was warranted by the record and has a rational basis in the law. *Marigold Foods, Inc. v. Butz,* 493 F.2d 60, 62 (8th Cir. 1974). The court cannot engage in a de novo fact finding process. *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 315 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Assn v. State Farm Mutual,* 463 U.S. 29, 43 (1983). However, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Because the MA's decision appears arbitrary on the basis of the record before this court, this case is remanded for further factual findings.

DISCUSSION

In the instant motion Kreider raises four claims: first, that Defendant's application of the Order 2 producer-handler regulations to Kreider is not in accordance with the law; second, that the MA should be estopped from changing Kreider's status as a producer-handler because the MA initially approved this status for Kreider; third, that Defendant's application of Order 2 to Kreider's distribution of kosher milk products impermissibly interferes with the First Amendment rights of Ahava and its customers; and fourth, that Kreider is entitled to declaratory and injunctive relief and a refund of all payments made pursuant to the unlawful application of the order, with appropriate interest upon the refund. Because Kreider failed to raise the First Amendment and estoppel claims before the Judicial Officer, this court will not consider these claims. *United States v. Daylight Dairy Products,* Inc., 822 F.2d 1, 2 (1st Cir. 1987) (stating that "a district court, when enforcing a marketing order, cannot consider legal challenges to the order until after the handler has

pursued his administrative remedy") (citations omitted).[3] Therefore, this court confines its discussion to Kreider's first and fourth claims.

I. Whether Kreider Qualifies for Producer-Handler Status

Kreider offers two arguments supporting its designation as a producer-handler. Kreider asserts first that the promulgation history of the Order 2 producer-handler regulations establishes that distribution to subdealers is not prohibited. Second, Kreider contends that the plain language of the Order 2 producer-handler regulation establishes that Kreider meets all of the requirements. Because Kreider's second assertion is more logically the starting point for a determination of Kreider's status under Order 2, this court will examine these claims in reverse order. Additionally, the court will examine the JO's findings that departmental precedent does not support the ALJ's decision that producer-handlers are not prohibited from distributing to subdealers and that Kreider's interpretation of the exemption is antithetical to the federal milk marketing scheme and would defeat the purpose of Order 2.

A. The Plain Language of the Order 2 Producer-Handler Regulation

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[3]Even if this court were to consider the First Amendment and estoppel claims, it would concur with the ALJ's decision. The ALJ found that Plaintiff had no standing to assert the claim under the First Amendment. This finding is supported by *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (finding that respondents, who objected to the government's donation of property to a religious organization on First Amendment grounds, had no standing because "[t]hey fail[ed] to identify any personal injury suffered . . . as a consequence of the alleged constitutional error"). The ALJ found no undue delay on the part of the MA in reaching his decision with respect to Plaintiff's producer-handler status. This court also finds that the record does not support Kreider's assertion that the Market Administrator misled Kreider as to whether Kreider would qualify for producer-handler status. The record shows nothing more than a misunderstanding between Kreider and the MA, and is therefore insufficient to support an estoppel claim. "When estoppel is alleged against the United States, the [party asserting this] must also prove 'affirmative misconduct' on the part of the government." *United States v. St. John's General Hospital*, 875 F.2d 1064, 1069 (3d Cir. 1989). Further, even if the MA had given Kreider erroneous information about its potential for attaining producer-handler status, this does not mean that the Secretary should be bound by that act. *See In re Yasgur Farms, Inc*, 33 Agric. Dec. at 412 ("[I]t is settled that a handler relies on erroneous advice by the Market Administrator's office at his peril.") (citations omitted).

There are three subpoints to Kreider's plain-language argument. Kreider asserts that "the syntax of the Order 2 producer-handler regulations establishes that there is no requirement that producer-handlers have any specific role in the distribution of their fluid milk products after the products leave their plant." (Pls.' Br. Supp. Mot. Summ. J. at 19.) Kreider also contends that its interpretation is supported by the cancellation provisions of the order. *Id.* at 22-23. Finally, Kreider asserts that the order's treatment of the delivery of producer-handler milk products to regulated pool plants supports its interpretation. *Id.* at 23.

1. The Syntax of Order 2

The relevant language of the Order reads as follows:

> (b) Requirements. (1) The handler has and exercises (in his capacity as a handler) complete and exclusive control over the operation and management of a plant at which he handles milk received from production facilities and resources (milking herd, buildings housing such herd, and the land on which such buildings are located) [,] the operation and management of which also are under the complete and exclusive control of the handler (in his capacity as a dairy farmer), all of which facilities and resources for the production, processing, and distribution of milk and milk products constitute an integrated operation over which the handler (in his capacity as a producer-handler) has and exercises complete and exclusive control.

7 C.F.R.§ 1002.12(b)(1). Kreider asserts that it is significant that the exempt entity is called a "producer-handler" as opposed to a "producer-handler-distributor" or "producer-distributor." (Pls.' Br. Supp. Mot. Sum. J. at 20.) Kreider contends that when the language of this section of Order 2 is parsed, "it demonstrates a precise concern with the facilities and resources for the production and processing of milk, but no concern whatsoever with respect to facilities of, or means of, distribution." *Id.* Kreider further asserts that

> [I]f the regulation . . . was intended to require that producer-handlers have distribution facilities to deliver the milk products directly to the consumer or to the store which sells to the consumer, the regulation, to be logical and consistent, would have specified the types or categories

of distribution facilities that were contemplated, just as it did with respect to the farm and plant facilities.

Id. at 22.

In assessing this argument, the JO found that Kreider is "attempting to meet the 'plain language' [of the producer-handler regulation] by putting a meaning on the word 'distribution' which the word cannot bear . . ." *In re: Kreider,* 1995 WL 598331, at *21. The JO stated "the Order declares that the 'production, processing, and distribution of milk and milk products' must constitute an 'integrated operation' over which the producer-handler has and exercises 'complete and exclusive control.'" *Id.*

This court finds that the order is ambiguous. The order clearly states that a producer-handler must have complete and exclusive control over distribution facilities and resources, not simply distribution in general. However, while production facilities and resources are defined as "milking herd, buildings housing such herd, and the land on which such buildings are located," there is no definition of distribution facilities. Thus, it does not appear to this court to be clear from the plain language of the order what the distribution facilities are that must be under the complete and exclusive control of the producer-handler.

2. Order 2's Cancellation Provisions

Krieder also contends that the cancellation provisions of the regulation supports its interpretation of "producer-handler." Kreider notes that the cancellation provision, 7 C.F.R. § 1002.12(c), mentions nothing about cancellation for delivery to subdealers but addresses all of the other substantive requirements for producer-handler status. (Pls.' Br. Supp. Mot. Summ. J. at 22.) Kreider points to the three specific instances of cancellation covered in this section of the regulations:

(1) Transfer of cows or production resources to the name of another person who then sells the milk into the pool as producer milk; (2) purchase/transfer into the producer-handler operation of cows or facilities previously used to supply pool milk (except after notice and only during the 'flush' months of the year; and (3) handling fluid milk products from other handlers in amounts exceeding the exempt limits.

Id. at 23 (citing 7 C.F.R. § 1002.12(c)). In response, Defendant cites the JO's finding that "the catch-all provision contained in § 1002.12(c) which states that producer-handler status may be canceled if any of the requirements contained in § 1002.12(b) of the regulation are not met, served to effectively provide that sales to subdealer handlers would be grounds for cancellation." (Def.'s Resp. Pls'. Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 23 (citing *In re: Kreider,* 1995 WL 598331, at *22).)

Because this court finds the requirements set forth in section 1002.12(b) ambiguous for the reasons previously stated, Defendant's argument is not a satisfactory explanation of why the cancellation order does not include dealing to subdealers when it does speak to other activity clearly prohibited by the requirements section.

3. Order 2's Treatment of the Delivery of Producer-Handler Milk Products to Regulated Pool Plants

Kreider's final argument concerning the plain language of Order 2 is that the Order "specifically contemplates the delivery of producer-handler milk products to regulated pool plants and establishes the consequences of those transactions (in terms of allocating and pricing the milk)." (Pl.'s Br. Supp. Mot. Summ. J. at 23 (citing 7 C.F.R. § 1002.45(a)(8)(iii).) Kreider asserts that although such sales are discouraged by treating such deliveries as non-pool deliveries and thereby possibly subject to compensatory payments, such sales are allowed and do not affect a producer-handler's status. *Id.* In considering this argument of Kreider, the JO found:

> [T]he Order must dictate how all milk and milk products are allocated and priced from every conceivable source. Otherwise, there would be a gap in the regulatory scheme. But it is neither logical nor necessary to include the consequences to a producer-handler of delivering milk to a subdealer in the "allocation" provisions of the Order. That section is concerned only with the consequences to the pool plant of receiving milk from particular sources.

In re: Kreider, 1995 WL 598331, at *22 (citation omitted).

This court agrees with the JO that there is no reason to assume that a section on allocation should deal with consequences to a producer-handler for delivering to a pool-handler. However, as noted above, this court finds the order to be ambiguous. If there is ambiguity, it is appropriate to turn to the

legislative history. *See, e.g.,In re Wileman Bros. & Elliott, Inc.*, 49 Agric. Dec. 705,798 (1990) (stating that "[i]t is appropriate to consider all of the legislative history in the rulemaking records before the Secretary," and that "where the Secretary's intent is revealed, the regulations should be construed, insofar as possible, in accordance with the Secretary's intent").

B. The Promulgation History of Order 2 Producer-Handler Regulations

Kreider contends that a "[r]eview of [the] record demonstrates that the [USDA] specifically refused to adopt a prohibition of producer-handler sales to subdealers." (Pl's Br. Supp. Mot. Summ. J. at 13-14.) The parties agree on the relevant facts of the promulgation history.

The producer-handler exemption currently contained in the New York-New Jersey Milk Marketing Order was first promulgated in 1958 through amendments to what was then Milk Marketing Order No. 27. Prior to 1958, milk from a handler's own dairy farm was exempt from the pooling requirements of the New York-New Jersey Order on the following basis:

> (2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.
> (3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such point.

7 C.F.R. § 927.65(h).

The 1958 hearings were called (insofar as the producer-handler issue was concerned) to consider proposed amendments to the producer-handler exemption cited above. The hearings resulted from concern in the milk industry that the terms of the exemption needed to be better defined and more stringently enforced.

Subsequent to the rulemaking hearings, several handler organizations submitted proposals as to how the Secretary should address the producer-handler issue. The largest handler group in the area, the Milk Dealers' Association of Metropolitan New York, Inc., advocated either elimination of the producer-handler status or limitation on the amount of a producer-handler's milk which could be exempt from regulation. If the producer-

handler exemption were to remain in effect, this group advocated a complete prohibition on milk sales to subdealers by producer-handlers.

On June 11, 1958, the Secretary issued his Recommended Decision concerning amendments to the New York-New Jersey Milk Marketing Order. The Secretary did not specifically prohibit sales to subdealer handlers. Instead, the Recommended Decision set forth the following requirements for producer-handler status:

> (b) Requirements: (1) the handler owns the plant which he operates in his capacity as a handler and also owns, in his capacity as a dairy farmer, the milking herd, the buildings housing the milking herd, and the land on which such buildings are located, all of which constitute the milk production, processing, and distributing facilities and resources of the handler's operation as a producer-handler. . . .

7 C.F.R. § 927.15.

After the publication of the Recommended Decision in the Federal Register, various handler organizations filed exceptions with the Secretary, advocating inclusion of specific language to prohibit producer-handlers from selling milk to subdealers.

When the Final Decision was issued, it did not include specific language barring sales to subdealers. As can be determined from a comparison of the recommended and current orders, the altered language of what is now the current order adds, among other things, the requirement that the producer-handler have complete and exclusive control over the facilities and resources for the production, processing and distribution of milk and milk products and that such constitute an integrated operation.

Although both Kreider and Defendant agree on the events of the promulgation history, they of course interpret them in different ways. Kreider asserts that this history shows that the Secretary specifically chose not to include a prohibition on distribution to subdealers in the requirements for producer-handlers. Defendant's argument appears to fall back on its plain language argument: "the Judicial Officer . . . turned to the language of the Final Decision itself and noted that 'the new language in the Final Decision, as opposed to the [language of the] Recommended Decision ha[d] the effect of barring sales to subdealers." (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & 598331, at *25).) As previously stated, the plain language of the Order does not clearly have this effect. Further, the promulgation history lends

some support to Kreider's interpretation of Order 2's producer-handler requirements.

C. Departmental Precedent

The JO and Defendant rely primarily on *In re Smoot Jersey Farms,* 30 Agric. Dec. 713 (1971) as support for their contention that producer-handlers under Order 2 cannot engage in subdealing. In *Smoot* the relevant milk order, Order No. 136, contained the following requirement for producer-handlers: "The operation of the milk production, processing, and distributing facilities are under the complete and exclusive control of such person and at his sole risk." *Smoot,* 30 Agric. Dec. at 719 (citing 7 C.F.R. § 1136.8(c).) The petitioner in Smoot was an individual doing business as Smoot Jersey Farms for many years prior to the formation by his sons and his daughters-in-law of Smoot Dairy Sales, which was formed for the purpose of distributing milk products produced and processed by the petitioner. *Id.* at 715. The operations of Smoot Jersey Farms and Smoot Dairy Sales were conducted on the same premises as follows:

> Among other things, the premises housed a milking barn and processing facilities under the control of petitioner, and a cooler or storage area with a loading dock which was leased by and controlled by Smoot Dairy Sales. Milk was produced, packaged, and bottled in the area controlled by petitioner. It was then placed in the cooler which was controlled by Smoot Dairy Sales, and distributed from the dock on retail and wholesale routes by [Smoot Dairy Sales].

Id. at 715-16. The JO in *Smoot* ruled that the petitioner did not qualify as a "producer-handler" because "the distribution of the milk produced and processed by petitioner is not under the exclusive control or at the risk of petitioner, but is, rather, at the risk and control of Smoot Dairy Sales." *Id.* at 721. In *Smoot,* the JO defined "distribution" as follows:

> Petitioners would have us define as a distribution the transfers of processed milk into the cooler and depot. This we cannot do in the context of a milk order issued pursuant to the act. Order No. 136 and milk orders issued pursuant to the act generally are constructed on the basis of distribution from regulated plants and not mere intra-plant transfers of milk. The distribution of fluid milk products takes place

when such products are taken from the plant and a mere transfer from the processing section therein to storage facilities on the plant premises does not constitute a distribution.

Id. at 719-20 (citations omitted).

This case does not appear to squarely support the JO's and Defendant's interpretation of Order 2 as applied to Kreider. In *Smoot*, the Judicial Officer's assertion that "[t]he distribution of fluid milk products takes place when such products are taken from the plant" does not clearly prohibit a producer-handler from distributing to subdealers so long as the producer-handler itself takes the product from its plant. In the instant case, it is undisputed that Kreider uses its own trucks to distribute to Ahava and the FPPTLC. Therefore, under *Smoot's* definition the distribution of Kreider's fluid milk products is under Kreider's complete and exclusive control.

D. The JO's Finding that Kreider's Interpretation of the Exemption is Antithetical to the Federal Milk Marketing Scheme

The JO and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind Order 2's producer-handler exemption. The JO explains the economic purpose as follows:

> [M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated. . . .

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool-riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

> [Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n. 2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.[4]

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of Order 2 is ambiguous and the MA's action is not clearly supported by the promulgation history of Order 2 or departmental interpretation. "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in

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[4]For example, Ahava has determined that "Farmland Dairies, a major fluid milk processor in the Northern New Jersey-New York area, although entirely owned by a family of the Jewish faith . . . was unacceptable as a source of kosher milk" to New York's ultra-orthodox Jewish community, which makes up Ahava's customer base. (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 5.)

accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." 7 U.S.C.§ 608c(15)(B), *see also Minnesota Milk Producers Ass'n v. Yeutter,* 851 F. Supp. 1389, 1398 (D. Minn. 1994) (finding that the Secretary's final decision did not provide sufficient explanation so that it could be determined that it meets the requirements of the AMAA and remanding to the Secretary for additional findings of fact and explanation); *Oak Tree Farm Dairy, Inc. v. Butz,* 390 F. Supp. 852, 857 (E.D.N.Y. 1975) (remanding the case for "further administrative exploration of the contentions raised here"); *In re: County Line Cheese Co., Inc.*, 44 Agric. Dec. 63, at *1 (1985) ("If the Secretary had failed to engage in reasoned agency decisionmaking, it would have been appropriate to remand the proceeding to the Secretary for the purpose of issuing revised findings."). Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

II. APPROPRIATE RELIEF

Kreider asserts that it is entitled to a judgment declaring that the application of the Order 2 producer-handler regulation to "its sales in Order 2 is not in accordance with law; that further enforcement of the regulations in this manner should be permanently enjoined; ... that the Market Administrator should refund to Kreider the payments made pursuant to the invalid application of the regulations; and that reasonable interest should be added to the refunds." (Pl.'s Br. Supp. Mot. Summ. J. at 28-29.) For the reasons stated below, this court finds that Kreider is entitled to a refund and interest should it be found that Kreider qualifies for the status of a producer-handler.

In his Decision and Order, the JO ruled that Kreider would not be entitled to a return of the principal amount paid into Order 2 even if it were to prevail in this case:

> In fact, if I were to conclude that Petitioner meets the criteria in 7 C.F.R.sec. 1002.12(b)(1) of a producer-handler, I would hold that there would be no retroactive relief even as to the principal. That is because under the definition of producer-handler, a producer-handler is not a person who meets the requirements of paragraph (b), but, rather, is a person who "has been so designated by the market administrator upon

determination that the requirements of paragraph (b) of this section have been met.

In re: Kreider, 1995 WL 598331 at *35 (citations omitted). It is undisputed that Kreider never received producer-handler designation under Order 2. However, at issue in the instant case is whether the MA erroneously denied Kreider's application for such a designation. In *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389 (1974), the JO discussed the propriety of lump sum refund payments for money previously paid into the producer-settlement fund by those later claiming producer-handler status, and stated that "[s]uch a lump sum payment must be made, at times, where it is determined that the Market Administrator erroneously imposed an obligation upon a handler during a prior period." Id. at 407 n. 5. Therefore, if it is determined that the MA's failure to designate Kreider as a producer-handler is erroneous, a refund is in order.

This court also finds that interest should accompany this refund. *See Sani-Dairy v. Yeutter,* Civ. A. No. 90-222J, 1995 WL 848950, at *2 (W.D. Pa. Mar. 27, 1995) (finding it appropriate that interest be allowed on a refund from the producer-settlement fund), *aff'd,* No. 95-3304, 1996 WL 427870 (3d Cir. July 31, 1996); *see also Kinnett Dairies, Inc. v. Madigan,* 796 F. Supp. 515, 516 (M.D. Ga. 1992) (ordering refunds from producer-settlement funds and interest on the refunds); *Cumberland Farms, Inc.*, CIV. No. 88-2406(CSF) 1989 WL 85062, at *2 (D.N.J. July 18, 1989) (stating that "[i]t is well settled that a reviewing court may award monetary damages under the AMAA . . . and that a reviewing court may award interest on these amounts") (citations omitted).[5]

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[5]This court finds Defendant's argument against awarding interest unpersuasive. First, Defendant cites *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59-60 (1985), *aff'd,* No. 85-7179 (N.D. Ohio, Dec. 12, 1986), *aff'd* 857 F.2d 1065 (6th Cir. 1988), and *In re M.H. Renken Dairy Co.*, 14 Agric. Dec. 794, 807 (1955), for the proposition that "section 8c(15)(A) of the [AMAA] does not contain any language authorizing an award of interest to a handler who prevails in a 8c(15)(A) proceeding." (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 49.) These cases are clearly contradicted by the more recent cases cited in this memorandum. Second, Defendant's citation of *In re Lawson Milk Co.*, 22 Agric. Dec. 126, 22 Agric. Dec. 455 (1963), *aff'd,* 358 F.2d 647 (6th Cir. 1966), is inapposite. The *Lawson* court determined not that interest on an overpayment was inappropriate generally, but that by the terms of that particular milk marketing order the refund was not yet overdue and therefore interest had not yet accrued on it. *Lawson,* 358 F.2d at 650. Third, Defendant cites to several Supreme Court cases. However, these cases are distinguishable from the instant cases in that

(continued...)

Therefore, should it be determined that a refund is due to Kreider, such a refund should be awarded with interest based on the average monthly prime lending rate prevailing from the date Kreider first paid into the producer-settlement fund until the date Kreider is refunded in full. *See Sani-Dairy*, 1995 WL 848950 at *3 (ordering interest based on the average monthly prime lending rate prevailing from the date payment was first made into the producer-settlement fund "until the date that payment of damages to plaintiffs is made in full"). The Secretary of Agriculture is directed to calculate and award the interest due.

Therefore, if Kreider is eligible for producer-handler status, this court finds that the appropriate remedy is to direct the Secretary to apply the producer-handler status to Kreider and to provide Kreider with a refund plus interest on the sum of $543,864.68, which Kreider has paid into producer-settlement and/or administrative funds.

CONCLUSION

This court finds that neither the plain language of Order 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is "riding the pool" in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court. Therefore, this action is remanded to the Secretary for further factual findings and a decision in accordance with this memorandum.

ORDER

AND NOW, this day of August, 1996, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, the responses thereto and the on-record hearing, it is hereby ORDERED that these motions are DENIED. The case is remanded to the Secretary of Agriculture for further factual findings and a decision consistent

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[5](...continued)
they pertain to the awarding of interest in contract or tort actions against the United States as opposed to the award of interest in connection with the refund of an overpayment. Finally, Defendant cites *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993) which this court finds unpersuasive, particularly in light of the fact that *Sani-Dairy* was recently affirmed by the Third Circuit.

with this memorandum. The clerk is directed to close the within case for statistical purposes.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

In re: HUGH TIPTON (TIP) HENNESSEY AND BERNARD JAMES VANDE BERG.
A.Q. Docket No. 95-7.
Decision and Order as to Hugh Tipton Hennessey filed October 10, 1996

Movement of cattle interstate without official health certificates - Sanction policy - Civil penalty.

Administrative Law Judge, Dorothea A. Baker, found that the Respondent moved test-eligible cattle from Oregon, a Class A State, to Idaho, a Class Free State, without testing the animals for brucellis thirty days prior to the movement and without accompanying the cattle with the required health certificates. She determined that Respondent 's acts facilitated the spread of brucellosis and imposed Complainant 's recommended sanction of $500 for each count set forth in the Complaint, for a total of $2,500.

Darlene M. Bolinger, for Complainant.
Respondent, Hugh Tipton (Tip) Hennessey, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative proceeding for the assessment of civil penalties under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120 and 122), for violations of the Act and the regulations promulgated thereunder (9 C.F.R. § 78.8) governing the interstate movement of cattle.

This disciplinary proceeding was instituted by a Complaint filed on November 3, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), seeking the assessment of a civil penalty of Three Thousand Dollars ($3,000.00) because Respondent moved cattle interstate from Oregon, a Class A State, to Idaho, a Class Free State, without an official health certificate accompanying the cattle during the interstate movement. Respondent filed an Answer on December 6, 1994, denying all material allegations of fact.

Pursuant to Complainant's Motion therefor, on April 2, 1996, Respondent Bernard James Vande Berg was dismissed from this administrative proceeding. The administrative proceeding continued with only Hugh Tipton (Tip) Hennessey as a Respondent.

A hearing was held by means of Audio-Visual Transmission on June 6, 1996, with visual transmissions in Portland, Oregon; Boise, Idaho; and Washington, D.C. before Administrative Law Judge Dorothea A. Baker. Darlene M. Bolinger, Esquire, of the Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the Complainant. Hugh Tipton (Tip) Hennessey appeared pro se.

Respondent, although filing an Answer denying the material allegations of the Complaint, did not file a list of anticipated witnesses or a prospective witness list; did not adduce any documentary or testimonial evidence at the Audio-Visual Transmission hearing; did not testify in his own behalf; did not give testimony under oath and subject to cross-examination; and, did not file any post-hearing briefs.

On brief, the Complainant requested that Count VIII of the Complaint, pertaining to allegations that Respondent on December 18, 1991, moved interstate at least three test-eligible cattle from Portland, Oregon, to Notus, Idaho, be dropped from the Complaint. That request is granted and Paragraph VIII of the Complaint is no longer under consideration. The Complainant also requested a revision in a civil penalty to reflect the removal of that Count. Thus, the requested civil penalty herein is $2,500.00.

Pertinent Regulations

9 C.F.R. § 78.9 Cattle from herds not known to be affected.

> Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restriction. Female cattle which are not test eligible and are from herds not known to be affected may be moved interstate only in accordance with § 78.10. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:
>
> . . . .
>
> (b) *Class A States/areas.* Test-eligible cattle which originate in Class A States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be

moved interstate from Class A States or areas only as specified below:

. . . .

(3) *Movement other than in accordance with paragraphs (b)(1) [Movement to recognized slaughtering establishments.] and (b)(2) [Movement to quarantined feedlots.] of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

. . . .

(ii) Such cattle are negative to an official test within 30 days prior to such interstate movement and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, the test dates and results of the official tests;

9 C.F.R.§ 78.41 State/area classification:

(a) Class Free - . . . , Idaho, . . .

(b) Class A - . . . , Oregon, . . .

Discussion

Respondent is an individual with a mailing address of [redacted], and who does business as [redacted] Company. On or about October 29, 1991, December 4 [14], 6, 7 and 9, 1991, Respondent moved approximately nineteen head of test-eligible cattle from Oregon, a Class A State, to Idaho, a Class Free State, without the animals being tested prior to the movement and without the animals being accompanied by the required health certificate.

In determining the origin of a test-eligible cow, a method used by USDA/APHIS Veterinary Services is the backtag identification number ("backtag"). Backtag identification numbers consist of a prefix two digit numerical code signifying a particular State, followed by two letters signifying

a particular State livestock market, which, based on the sale volume for that livestock market is followed by the individual identifying three or four digit number. Three digit tags are generally used by markets which handle less than one thousand head of cattle per sale day, whereas four digit tags are used by markets which handle in excess of one thousand head of cattle per sale day. Backtags are generally laminated, oval-shaped paper applied to the hide of an animal. The backtag numbers are used on invoices, State brand inspection certificates and other documents to create a record of cattle sold and purchased at livestock markets.

Kirk Miller, Senior Investigator, APHIS, was informed that cattle were being moved interstate from Oregon livestock markets to the Marshbanks feedlot in Idaho without being qualified prior to entering Idaho. "Qualified" means the test-eligible cattle are destined for slaughter, a quarantined feedlot or have been tested thirty-days prior to moving interstate and are accompanied during the move by a health certificate, which states the test-results. (CX 2, 3; Tr. 11, 24, 40). The Marshbanks feedlot is neither a recognized slaughtering establishment, a quarantined feedlot, nor an approved intermediate handling facility. (Tr. 31, 32). Thus, cattle moving to the Idaho feedlot from the Oregon livestock markets had to be accompanied interstate by a health certificate. (Tr. 40). On December 13, 1991, Senior Investigator Miller, accompanied by Idaho's State Inspector Bill McKinster, visited the Marshbanks feedlot to determine the origin and health status of cattle located in the feedlot. (CX 1; Tr. 39, 45). They observed the backtags on the cattle and surmised that based on the prefix two digit numerical State code (92) the cattle originated in Oregon. To eliminate the risk of disease spreading from these nonqualified cattle, while investigating the health status, and the legality of the interstate movement from Oregon, Idaho Hold Order Notice No. 7785 was issued by State Inspector McKinster. (Exh. 13; Tr. 39, 40)

The health status of the cattle was determined by having them brucellosis tested by Gordon Cooper, D.V.M., an accredited veterinarian. (CX 2, 8, 9, 12; Tr. 42) The cattle that were healthy and met Idaho's requirements were released from the quarantine and the remaining cattle continued under quarantine pursuant to Idaho Hold Order Notice No. 5859. (Exh. 2, 8, 9, 11, 12; Tr. 42). These remaining animals were also tested by Dr. Cooper. (Exh. 8, 9; Tr. 42). Although no field strain reactives were found among the cattle and thus their health status was not a problem, the legality of their interstate movement was questionable.

In determining whether these animals were legally moved into Idaho, Senior Investigator Miller used the backtag identifications to trace the cattle back to their herd of origin and to search the records of the Idaho Bureau of

Animal Industry for health certificates that might have been issued to Respondent with respect to these cattle. No such documents were on file.

The testimony of record reflects the manner in which identification and tracing was done and how the cattle were traced to the Respondent. (Tr. 61, 62, 70, 71, 75).

Findings of Fact

1. On October 29, 1991, Respondent moved at least one head of cattle interstate from Woodburn, Oregon, to Notus, Idaho, without the cattle being accompanied by a certificate during the interstate movement in violation of 9 C.F.R. § 78.9(b)(3)(ii).

2. On December 7, 1991, Respondent moved at least three head of cattle interstate from Eugene, Oregon, to Notus, Idaho, without the cattle being accompanied by a certificate during the interstate movement in violation of 9 C.F.R. § 78.9(b)(3)(ii).

3. The Respondent on or about December 4 [14], 1991, moved interstate at least four test-eligible cattle from McMinnville, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate, as required.

4. The Respondent on or about December 6, 1991, moved at least eleven head of cattle from Corvallis, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate as required.

5. On December 9, 1991, Respondent moved interstate at least three test-eligible cattle from Portland, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate, as required.

Discussion

Brucellosis is a contagious bacterial disease that can affect livestock and human beings. In cattle it can cause abortions, infertility, as well as reduced milk production. In human beings, the disease is known as undulant fever and can cause flu-like symptoms which can be severe.

As part of the Brucellosis Eradication Program, the United States Department of Agriculture has promulgated regulations, in Part 78, Title 9, Code of Federal Regulations, that delineate certain requirements for the interstate movement of cattle. Cattle movement interstate from a Class A

State, other than to a quarantined feedlot or slaughtering establishment, must be tested for brucellosis thirty days prior to the movement and they must be accompanied interstate by a health certificate. A health certificate is used to document that the cattle moving interstate, from a Class A State to a place other than to a slaughter establishment or a quarantined feedlot, were tested for brucellosis thirty days prior to the movement. (Tr. 81, 83). The risk of cattle moving interstate without the health certificate involves the possibility of an infected animal going undetected, the inability to trace an infected animal back to its herd of origin, and the possible downgrading of a State's classification as Class Free, Class A, or otherwise. (Tr. 83, 84). Thus, such actions undermine the whole purpose of the program, namely, the eradication of the disease brucellosis.

Respondent's acts of noncompliance facilitate the spread of brucellosis. The Complainant recommends that the Respondent be assessed a civil penalty of $500.00 per count, or $2,500.00. (Tr. 85).

The Department's sanction policy is reviewed by the Judicial Officer in the case of *In re: John Casey, et al.*, 54 Agric. Dec. 91 (1995) which follows the rationale set forth in *In re: S.S. Farms Linn County, Inc., et al.*, 50 Agric Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) wherein it is stated, among other things, that, in determining sanction, each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In the present proceeding Dr. Eric Ebol, an employee of the United States Department of Agriculture, APHIS, Veterinary Services testified. He indicated, among other things, in his testimony the reasons why he was recommending a $500.00 per count sanction with respect to the Respondent:

> A Well, a Class A State has some level of infection. They have not achieved their class free status, therefore there is some risk of animals moving from a Class A state and having brucellosis. For the class free state that would receive such a movement, the potential for real problems is significant, simply because a class free state has gone to great lengths to achieve this status and the discovery of detection of infection in that state would automatically force them to go back to a Class A State. From the standpoint of a Class A state that cut [got] these cattle, lacking the proper certification and paperwork may make

the job of locating where that infection originated very difficult, and potentially would involve many other producers, innocent producers and require tests. (Tr. 84).

In response to the question as to what would be an appropriate sanction in this case, Dr. Ebol testified that according to the Veterinary Services memorandum, a fine of $500.00per cow would be an appropriate penalty and that was the penalty which he was recommending. (Tr. 85). It is noted that the Complainant on brief has not based a penalty on the number of cows, but rather upon the number of counts set forth in the Complaint.

The recommendation of Dr. Ebol is in accord with other cases and is warranted and appropriate herein. *In re: Terry Horton et al.*, 50 Agric. Dec. 430, 463-64 (1991); *In re: Grady,* 45 Agric. Dec., 66, 109, (1986) and *In re: Petty,* 43 Agric. Dec. 1406, 1409-10 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

For the foregoing reasons the following Order is issued.

Order

The Respondent, Hugh Tipton (Tip) Hennessey, is hereby assessed a civil penalty in the amount of Two Thousand Five Hundred Dollars ($2,500.00). The civil penalty shall be payable to the Treasurer of the United States, by a certified check or money order and shall be forwarded to:

The United States Department of Agriculture
Animal & Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor,
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate on the check or money order that payment is made in reference to A.Q. Docket No. 95-7.

All contentions, and motions of the parties have been carefully considered and, to the extent not ruled upon or not granted herein, they are denied.

This Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon Respondent, unless appealed to the Judicial

Officer pursuant to section 1.145 of the Rules of Practice and Procedures applicable to the proceeding (7 C.F.R. §§ 1.130 *et seq.*, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 12, 1996.-Editor]

ANIMAL WELFARE ACT

COURT DECISION

JULIAN TONEY and ANITA TONEY v. DAN GLICKMAN.
No. 96-1317.
Decided December 3, 1996.

(Cite as: 101 F.3d 1236)

Petition for review - Remand for redetermination of sanctions - Denial of request to reopen.

The United States Court of Appeals for the Eighth Circuit affirmed most of Secretary's findings but found that the evidence did not support two of the allegations and, therefore, remanded the case for a redetermination of the sanction. It also affirmed the Judicial Officer's refusal the reopen the hearing. The Court found that the Toneys: falsely identified the sources of dogs; kept the dog; in unsafe and unsanitary conditions; forged health certificates; failed to keep animals for the required holding period; and altered records. However, it also found that the evidence did not support the findings that the Toneys falsely received dogs from two of the sources alleged. The case was remanded for the ALJ to determine a sanction based only on the substantiated violations. In addition the Court denied the Toneys' Request for Leave to Consider Additional Evidence. The Toneys sought to introduce inspection reports which stated that their records were in compliance with the regulation, as well additional evidence they acquired through the Freedom of Information Act. The request was denied because they failed to show good cause as to why the evidence was not introduced at the hearing. The evidence can be admitted on remand to the extent that it is relevant to sanctions.

Before ARNOLD, Chief Judge and GIBSON and ROSS, Circuit Judges.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

ARNOLD, Chief Judge.

Julian and Anita Toney were in the business of selling animals to research facilities. The Administrative Law Judge (ALJ) found that they had committed hundreds of violations of the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* She then imposed what was, to that point, the harshest sanction in the history of the Act. The Judicial Officer affirmed the ALJ's findings and denied the Toneys' request to reopen the hearing for consideration of new evidence. While we affirm most of these findings, we hold that the evidence does not support all of them. Accordingly, we remand this matter to the Department for redetermination of the sanction. We also affirm the Judicial

Officer's refusal to reopen the hearing and deny the Toneys' Request for Leave to Adduce Additional Evidence.[1] The Toneys are free, however, to seek leave to offer this additional evidence on remand to the extent it is relevant to the sanction.

I. Background

Animal dealing is a strictly regulated business. In 1966, Congress passed the Animal Welfare Act to deter animal stealing and to ensure the humane treatment of animals involved in the animal research trade. Among other things, the Act prohibits dealers from obtaining animals from certain sources, requires that they keep detailed records of animal they obtain, and mandated that they hold such animals for a certain period of time prior to selling them. The Act also requires dealers to provide safe and sanitary shelter for animals in their care.

Julian Toney was a licensed animal dealer. Together with his wife Anita and his employee Cliff Waterburg, Mr. Toney obtained dogs from various sources and then sold them to animal research facilities. They had been in business since the mid-1980's without a formal complaint being lodged against them. In November of 1990, investigators from the Department of Agriculture (USDA) came to the Toneys' home and asked to look at their records. The Toneys kept their records in spiral notebooks, a practice which was not in itself violative of the Act. They also used USDA forms on an intermittent basis, but these forms were incomplete at the time of the first inspection. The Toneys' records were difficult to read and examine, and the Toneys later transposed the records onto USDA forms, and, at some point prior to the initiation of the first Complaint, supplied these records as well as the original notebook records to the USDA. As a result of its investigation, the Department issued the first of two complaints in September of 1992. A second investigation in early 1994 led to the filing of a second complaint, which was consolidated with the first.

The Administrative Law Judge found that: (1) the Toneys kept records that falsely identified the source of many of the dogs they obtained and contained incorrect information about the sources; (2) they used forged certificates when selling at least 44 dogs to research facilities; (3) they failed to hold at least 190 animals for the five days required by the Act and then

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[1]We have considered both the letter the Toneys sent to us after oral argument as well as the Government's response to it.

altered their records in some instances to conceal their violations; (4) they willfully failed to identify properly 60 dogs on the premises; (5) they failed to record other necessary information on 13 of those 60 dogs; (6) they willfully kept records that contained false information on an "undeterminable" number of the 60; and (7) they provided unsafe and unsanitary housing and contaminated food to the dogs. ALJ Dec. & Order 10-40. The ALJ fined the Toneys $200,000, the amount requested by the Government, permanently revoked their license, and ordered them to cease and desist from the prohibited practices. *Id.* at 44-46.

The Toneys' then appealed the Initial Decision and Order to the USDA's Judicial Officer, who, with minor modifications, affirmed the decision, incorporating the ALJ's findings and adding his own conclusions and discussion. J.O. Dec. 2. The Judicial Officer found that the Toneys had committed more than enough violations to justify the sanctions. *Id.* at 100. Finally, he denied the Toneys' Request to Reopen the Record to Allow Additional Exhibits. *Id.* at 104. The Toneys then filed this petition for review.

II. The Violations

Animal dealers must maintain truthful and accurate records that identify the source of the animals they acquire and the date of acquisition. The records must also include the source's address and, if the source is not licensed or registered under the Act, the source's driver's license and vehicle identification numbers. 9 C.F.R. § 2.75(a)(1).

The Judicial Officer found that the Toneys' records falsely stated that they acquired dogs from various pounds when in fact they had actually acquired them from individuals. J.O. Dec. 16. We uphold the Judicial Officer's findings that the Toneys' records falsely claimed to have acquired dogs from the Marceline, Keytesvelle, Macon, Cameron, Brookfield, and Moberly pounds.

The evidence establishes that the town of Keytesville did not have a pound and the Marceline's pound was closed on the dates that the Toneys claim to have acquired the dogs. The Toneys concede in their brief that their agent actually acquired the Keytesville dogs from individuals who claimed they got the dogs from pounds. Petitioners' Br. 12. By admitting to this conduct, the Toneys are conceding a violation of the Act. The Act required the Toneys to identify correctly the immediate source of their animals. It is not enough that the animals may have been in a pound at some point. Indeed, as of 1990,

even if the Toney had kept proper records, it would have been illegal for them to obtain dogs from any individual who had not raised the dog on his or her own property. 9 C.F.R. § 2.132.

As to the Marceline pound, the Toneys claim that the dogs came from a veterinary facility which held them while the town pound was closed. Again, this concession makes their records false, for the present no evidence that the veterinary facility operated as the legal equivalent of a pound. Similarly, the Toneys argue that the dogs they claimed to have obtained from the Macon pound came from an individual who received these dogs from the town animal control officer, who got the dogs from the pound. All of these contentions may be true, but they are also irrelevant to the question of whether the Toneys correctly identified the source of these animals.

The Toneys make essentially the same argument with respect to the dogs they claimed to have received from the Cameron pound, and for the same reasons we reject the argument. Moreover, at least some of the dogs that the Toneys claimed to have obtained from the Brookfield pound in fact came from a Mr. Grimsley, who the Toneys claim got the dogs from the Brookfield facility. Though the Toneys' lawyer referred to Mr. Grimsley as the Toneys' agent at oral argument, the Toneys have pointed to no evidence in the record to support that characterization. Thus, the evidence supports the Judicial Officer's finding that the Toneys falsely claimed to have obtained some number of dogs from the Brookfield facility.

The record also establishes that the Toneys falsely claimed to have acquired dogs from the Moberly pound. They argue that while the pound has no record of a sale on the date claimed, the Toneys might have obtained the dogs from pound employees who neglected to record the transaction. The pound representative admitted that this was a possibility, but neither the Toneys nor their agent can point to positive evidence that they actually received the animals from such individuals. Accordingly, it was reasonable for the ALJ to infer that the Toneys did not acquire the animals from the pound.

The evidence does not support the ALJ's finding that the Toneys falsely claimed to have obtained dogs from the Trenton pound. Indeed, the record includes testimony from a Dr. Alambaugh that his veterinary facility had operated as the pound for the city, and that Cliff Waterbury would often pick up dogs from the facility. Tr. 391. Both the Government and the Judicial Officer agree that Mr. Waterbury (unlike Mr. Grimsley) was the Toneys' employee. As the ALJ wrote, "the [Government] has not contended . . . that the records were false because the [Toneys] did not personally acquire the dogs from the pounds as opposed to acquiring them through their employee. The [Toneys'] records are false because they did not acquire the dogs from

the pounds." ALJ Dec. & Order 29. In this instance, there is no evidence to support the finding that the Toneys did not acquire the dogs from the Trenton pound.

The ALJ and Judicial Officer also found a number of inaccuracies in the Toneys' identification of individuals from whom they obtained dogs. The Toneys' do not dispute that the record supports these findings with one notable exception. They Toneys' records disclosed a purchase of 48 dogs from Kenneth Hughes. The Judicial Officer found that the records contained an inaccurate address and driver's license number for Hughes for all 48 dogs. This part of the finding is undisputed, and by itself justifies a finding of 48 violations of the Act's record keeping requirements. The Officer also seemed to find, though it is not entirely clear from his Decision, that Toneys' did not obtain certain dogs from Mr. Hughes at all. If so, this finding would not be supported by substantial evidence. Mr. Hughes was unsure how many dogs he sold to the Toneys' agent, but testified that it could have been more than thirty. Though he thought he never sold the Toneys' agent more than six dogs at a time, and though the Toneys' records revealed much larger purchases, there is no evidence that directly contradicts their records as to the number of dogs they purchased from him. Thus, any finding that the Toneys falsely claimed to have obtained certain dogs from Mr. Hughes at all should play no role in the calculation of the sanction on remand.

The Judicial Officer also found that the Toneys kept dogs in unsafe and unsanitary conditions in violation of USDA regulations. Among other things, the Toneys did not provide shelter that adequately protected the dogs from the elements, and they did not remove animal and food waste so as to minimize the risk of contamination and disease. For example, an inspector found a deteriorating cow carcass and other cow parts on the Toneys' premises and witnessed loose dogs eating the carcass. He also found two puppies "underneath one of the dog enclosues . . . in advance[d] stages of decomposition." Tr. 155-56. The Toneys do not contest these findings, and we find that they are supported by the evidence. They argue only that there is no evidence that any dogs suffered from these conditions. Neither the Judicial Officer nor the ALJ based the size of the sanction upon a finding that the Toneys had injured animals. This argument is thus irrelevant.

The remainder of the Toneys' arguments do not address the Judicial Officer's conclusion that certain violations occurred, but rather dispute that those violations were willful. Federal law directs the Secretary to give due consideration to, among other things, "the gravity of the violation" and the person's good faith" in determining how much of a fine to impose. 7 U.S.C.

§ 2149(b). The Judicial Officer considered the Toneys' willfulness in upholding the monetary penalty imposed by the ALJ. J.O. Dec. 97.

"Willfulness . . . includes not only intent to do a prohibited act but also careless disregard of statutory requirements." *Cox v. United States Dept. of Agriculture,* 925 F.2d 1102, 1105 (8th Cir.), *cert. denied,* 502 U.S. 860, 112 S. Ct. 178, 116 L. Ed. 2d. 141 (1991). The Toneys challenge the Judicial Officer's willfulness findings as to: (1) basic recordkeeping requirements; (2) the submission of forged certifications to animal research facilities; (3) violations of the holding-period requirements; and (4) violation of requirements for the identification of dogs on the premises.

The Judicial Officer found that the Toneys "falsified their records to claim that dogs had been acquired from pounds" and "willfullyfalsified these records to conceal their unlawful acquisitions of random source dogs from individuals." J.O. Dec. 96. He also found that they falsified their records to conceal their failure to obtain required information, and that they at the very their least acted with careless disregard for the regulations by not verifying what turned out to be inaccurate names and addresses. *Id.* Finally, he found that they exaggerated the number of dogs that they purchased from "at least one individual." *Id.* We uphold these findings, only some of which the Toneys contest in their brief.

The Toneys' response to these allegations is to point to the testimony and reports of the USDA inspector who apparently found no irregularities in the Toneys' records when she inspected them three times in 1990. Petitioners' Br. 20-21. They argue that their practice was simply to comply with what their local inspector told them to do. *Id* at 21. The Toneys, however, never say, nor could they, that they did not know that keeping false or inaccurate records was a violation of the Act. Moreover, it is certainly not clear that a USDA inspector making a routine records inspection would be likely to detect that the records were false, since such a discovery would entail an investigation that went beyond merely examining the records.[2]

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[2]The Toneys point out that the inspector stated in her report that the identification of animals was "being conducted in compliance with Section 2.50 of the regulations." This is irrelevant, because the government did not base its allegations that the Toney violated Section 2.50on its 1990 inspection of their facilities, but rather on its inspection four years later. They do not claim that their 1990 practice was the same as their 1994 practice, but instead that the latter was "an unusual or atypical situation." Petitioners' Br. 28. The inspector could hardly ratify the state of the Toneys' dog identification four years in advance.

Next, the Judicial Officer agreed with the ALJ that the Toneys forged certificates used to authenticate the source of dogs and used them "to unlawfully sell dogs to research facilities." J.O. Dec. 97. When dealers sell dogs that they acquired from pounds, they must provide the buyer of the dog with a certificated from the pound describing the dogs and stating that the pound met federal holding-period requirements. 9 C.F.R. 2.133.

The Judicial Officer also found that the Toneys obtained copies of a blank certificate form signed by the Animal Control Officer at the Vinton, Iowa, pound, filled in the rest of the form themselves, and submitted the forms when selling 40 dogs to research facilities. The Animal Control Officer was unaware that his signature had been used in this way. Tr. 28-30. The Toneys deny filling in the forms themselves, but the evidence, including Mrs. Toney's handwriting on the forms (a point that the Toneys do not address in their brief), bears out the finding. They also argue that the "real question" is whether or not the dogs in these actually came from the Vinton pound and whether the certifications facilitated a dog theft.[3] Once again, the only issue is whether the Toney complied with recordkeeping regulations. The Judicial Officer found that the Toneys willfully failed to do so, and we agree.

The Judicial Officer also found that in at least 190 instances, the Toneys failed to hold animals that they obtained for the five-day period that federal law mandates prior to selling them. J.O. Dec. 83. The purpose of the holding-period requirement is to give the owner of lost or stolen animals time to find them before they are sold to a research facility. *See ibid.*, citing S. Rep. No. 1281, 89th Cong., 2d Sess., *reprinted in* 1996 U.S.C.C.A.N.2635, 2640. Moreover, he found many instances where the Toneys "falsified their records to conceal violations of the holding period requirements." J.O. Dec 96.

The Toneys do not appear to challenge the Judicial Officer's finding as to the number of holding-period violations. They protest instead that the

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[3]They point out that there is no evidence that the 40 dogs came from anywhere other than the Vinton pound. This is true, although there also seems to be no evidence that they all did come from the pound. Either way, the certifications were false. The Toneys also argue that they have been singled out by the USDA since the dealer who gave the Toneys the blank certificates has not been prosecuted. There is no evidence, however, that Mr. Scherbring has committed all of the other violations that the Toneys have. The USDA may simply have decided that those violations alone were insufficient to warrant prosecution. Give the overwhelming deference that we must accord to an agency's exercise of its prosecutorial discretion, we reject the Toneys' selective prosecution argument.

Government never delineated the specific violations in its complaint, and that they were thus unable to show which of the violations fell within applicable exceptions to the requirement. The Toneys do not suggest that they ever asked the Government to be more specific. Given that they do not actually deny the violations in their brief, we uphold this finding.

The Judicial Officer concluded, mainly from the Toneys' original notebook records, that they had altered records, principally by changing acquisition dates in their notebooks and then entering those dates on the USDA forms after the 1990 inspection. The Toneys argue that this conclusion "doesn't make any sense" because they would not have provided the notebook records to the USDA if they contained damaging information. Instead, they would have provided only the records onto which they had transposed the notebook information. There are many reasons, however, why they might have still chosen to provide the records, including a desire to create the impression of full disclosure, or a feeling that the USDA would eventually have asked for those records anyway. This kind of argument is insufficient to upset the evidence of alteration in the notebook that the Judicial Officer sets forth in his scrupulous opinion, and it was fully within his discretion to reject it.

Finally, the Judicial Officer found that petitioners ran afoul of federal regulations governing dealer identification of animals on the premises 9 C.F.R. §§ 2.50,2.53. The Toneys concede the violations but argue that because these violations were unusual and because past inspections had not uncovered similar violations, the violations were not willful. The mere fact that the Toneys had not violated these regulations in the past does not mean the violations at issue here were not willful.

We thus uphold the Judicial Officer's Decision except as to the findings that the Toneys falsely received dogs from the Trenton pound and that they falsely claimed to have received dogs from Mr. Hughes. Accordingly, we remand so that the Judicial Officer can recalculate the sanction without considering these violations.

III. The Size of the Sanction

The ALJ ordered and the Judicial Officer affirmed the imposition of a $200,000 fine and permanent revocation of the Toneys' license. Because their decisions may have been based on violations that we have found to be unsubstantiated, we remand for a recalculation of the sanction. We remand so that the ALJ can determine the sanction based exclusively upon substantiated violations.

IV. The Request for Leave to Adduce Additional Evidence

The Toneys argue that the Judicial Officer erred in not reopening the hearing to allow the introduction of three 1990 inspection reports which state that their records were in compliance with applicable regulations. They fail to state a good reason why they could not have introduced this evidence at the original hearing, as a federal regulation requires. 7 C.F.R. § 1.146(a)(2). The fact that counsel was unaware of the reports is insufficient to justify reopening the hearing if the Toneys themselves knew about them, and there is nothing in the record or briefs to suggest that they did not. Moreover, we have no reason to dispute the Judicial Officer's conclusion that if received, "[the reports'] weight would be infinitesimal." J.O. Dec 107.

The Toneys also seek leave to adduce additional evidence to add information they received through a Freedom of Information Act request. Again, though they received the information after the hearing, they fail to explain why they could not have requested the information in time to present it at the hearing. We deny their request.

V. Conclusion

The Toneys repeatedly point out that there is no evidence that they have dealt in stolen dogs, and no one has argued to the contrary. The Animal Welfare Act does not penalize only those who steal dogs or who purchase stolen dogs. It also penalizes those who violate the regulations that are designated to make dog stealing more difficult. It may seem unfair to the Toneys that they are being punished when they have not helped to steal any dogs, but that does not change the fact that they repeatedly, and, in some cases, flagrantly violated the law. The law may or may not be overly harsh, but it is our job uphold it. Thus, with the exceptions noted above, we uphold the Judicial Officer's decision and remand for recalculation of the sanction. We also deny the Toneys' Request for Leave to Adduce Additional Evidence.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: RONALD G. WACKERLA.
AWA Docket No. 95-0026.
Decision and Order filed July 19, 1996.

Operating as a dealer without a license - "Dealer" defined - Finding of wilfulness not required - Complainant's requested penalty too high - Cease and desist order - Civil penalty.

Judge Bernstein imposed a cease and desist order and assessed a civil penalty of $7,000 upon Respondent for operating as a dealer without being licensed. In selling approximately 120 dogs and cats for resale as pets, Respondent operated as a dealer. There is no requirement that the Secretary prove that the violations were wilful to either assess a civil penalty or issue a cease and desist order. Judge Bernstein determined after reviewing recent decisions and the criteria set forth in the statute that Complainant's requested penalty of $13,000 was too high.

Sharlene A. Deskins, for Complainant.
Bruce L. Hart, Cozad, NE, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("the Act") instituted by a Complaint filed on April 11, 1995, by the Acting Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Respondent willfully violated the Act and its regulations by operating as a dealer without being licensed. Respondent denied the Complaint's material allegations in a timely Answer. A hearing was held on May 15, 1996, in Lincoln, Nebraska. Complainant was represented by Sharlene A. Deskins, Esq., Office of the General Counsel, USDA. Respondent was represented by Bruce L. Hart, Esq., Cozad, Nebraska.

Complainant filed proposed findings of fact, conclusions of law and a brief on June 28, 1996. Respondent filed a two-page written argument on June 28, 1996. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

Findings of Fact

1. Respondent Ronald G. Wackerla is an individual who has done business as RGW Kennels and RGW Cattery and whose address is [redacted] (b) (6) [redacted] (Answer, ¶ 1).

2. Respondent has never held a license under the Animal Welfare Act (Tr. 53).

3. Until June 1992, Respondent sold dogs and cats in commerce (Answer, ¶ 3). Between February 6, 1991 and March 28, 1992, Respondent sold dogs through an arrangement with Roland and Terry Anderson. Respondent and the Andersons shipped dogs to Valley Pet in Phoenix, Arizona. Valley Pet also used the name Great Western Pet Supply. Valley Pet or Great Western Pet Supply sent payments to Roland and Terry Anderson or their firm, Countryside Kennel. In turn, Countryside Kennel sent checks paying for these dogs to Respondent (Tr. 43-50; CX-3, 4). Between March 9, 1991 and June 18, 1992, Respondent also sold dogs to American Kennels in New York City and to Bay Pet Center in Friendswood, Texas, and Respondent sold cats to Fabulous Felines in New York City (CX-4-10).

4. In 1991, before Respondent sold the dogs and cats, Respondent inquired as to what he needed to do to become licensed (Tr. 50). In February 1992, Respondent requested information as to how he could obtain a license.

5. Respondent rents the farm that he works from his mother (Tr. 58). He owns 35 head of cattle. He also works as a part-time bartender. His total annual income is [redacted] a year (Tr. 63).

Conclusion of Law

Respondent operated as a dealer as defined in the Act and regulations without being licensed from February 6, 1991 until June 18, 1992, in violation of section 4 of the Act (7 U.S.C. § 2132) and section 2.1 of the regulations (9 C.F.R. § 2.1) and Respondent sold or offered for sale in commerce approximately 120 dogs and cats for resale use as pets.

Discussion

In selling approximately 120 dogs and cats for resale as pets between February 6, 1991 and June 18, 1992, Respondent operated as a dealer as that term is defined. Section 2(f) of the Act defines dealer as follows:

> The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. . .

Section 4 of the Act (7 U.S.C. § 2134) states:

> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animal unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Section 2.1 of the regulations (9 C.F.R. § 2.1) has a similar requirement. It states:

> (a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements of the paragraph (a)(3) of this section, must have a valid license.

The evidence is clear that Respondent was never licensed under the Act. Thus, in acting as a dealer without having a valid license, Respondent violated section 4 of the Act and section 2.1 of the regulations.

There is evidence that Respondent knew that he needed to be licensed. Terry Anderson testified that before the sales Respondent was attempting to determine what he needed to do to obtain a license (Tr. 50). In addition, Respondent admitted that in February 1992, after most of these sales had been completed, that he requested information as to how he could obtain a license (Tr. 55), and Respondent obtained a prelicensing packet from APHIS on March 10, 1992 (CX-11).

Respondent's attorney argues in his post-hearing written argument that Complainant has failed to prove wilfulness and, therefore, this proceeding should be dismissed. However, as the Judicial Officer has recently reiterated, "there is no requirement that the Secretary prove that the violations were wilful in order to assess either a civil penalty or issue a cease and desist order

under the Act." *Big Bear Farm, Inc., et al.*, AWA Docket No. 93-32 (March 15, 1996) at p. 42. *See also Delta Airlines, Inc.*, 53 Agric. Dec. 1076, 1080 (1994).

Complainant requests that Respondent be assessed a civil penalty of $13,000. Respondent urges that, if he is found to have committed the alleged violation, he be assessed a civil penalty of only $500.

Section 19(b) of the Act states:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and history of previous violations. *See* 7 U.S.C. § 2149(b) (1988).

Respondent's size was moderate. Although he sold approximately 120 dogs during the period of approximately 16 months covered by the allegations in the Complaint, he appears not to own much property. He rents the farm he works from his mother. He owns only 35 cows whose value is, at most, $10,000. He works as a part-time bartender. His total annual earnings appear to be [redacted] a year.

There is testimony that Respondent knew that he needed to be licensed in 1991 before the sales in question. It certainly is clear that he knew about this requirement by February 1992. There is no history of prior violations.

A review of other recent decisions in which respondents failed to obtain licenses, reveals that the requested penalty of $13,000 is too high. In *Jerome A. Johnson*, 51 Agric. Dec. 209 (1992), a $10,000 penalty was assessed. In *Terry Lee Harrison*, 51 Agric. Dec. 234 (1992), a $2,000 penalty was assessed. In *Lloyd Wenger*, 51 Agric. Dec. 247 (1992), a $4,000 penalty was assessed. In *Lee Roach*, 51 Agric. Dec. 252 (1992), a $5,000 penalty was assessed. In *David L. Twomey*, 50 Agric. Dec. 1575 (1991), a case that I decided which involved other violations, a $4,000 penalty was assessed. In *Mary Bradshaw*, 50 Agric. Dec. 499 (1991), a $10,000 penalty was assessed. In *Ronnie Faircloth*, 52 Agric. Dec. 171 (1993), a $4,000 penalty was assessed in a case which involved other violations as well.

The purpose of sanctions is to deter this Respondent as well as other would be violators from committing the same violation. Taking into consideration this objective, the evidence, the criteria set forth in the statute, and the other referenced decisions, I conclude that a civil penalty of $7,000 will be sufficient to deter this Respondent and others from committing this type of violation. I, therefore, issue the following Order.

Order

1. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed.

2. Respondent is assessed a civil penalty of $7,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States and shall be sent to Sharlene A. Deskins, Office of the General Counsel, Marketing Division, Room 2014, South Building, United States Department of Agriculture, Washington, DC 20250-1400. Respondent is disqualified from applying for a license under the Act until the civil penalty is paid.

This Decision and Order shall become final without further proceedings 35 days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 28, 1996.--Editor]

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JERRY GOETZ d/b/a JERRY GOETZ AND SONS v. DAN GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 94-1299-FGT.
Filed September 24, 1996.

Petition for injunction to stay administrative proceedings denied - Failure to show likelihood of success on appeal - No irreparable injury.

The United States District Court for the District of Kansas denied plaintiff's petition for an injunction to stay the administrative proceeding pending its appeal in Federal Court. The court found that the plaintiff failed to make the necessary showing of likelihood of success on appeal, and that the plaintiff will not suffer irreparable injury.

UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS
MEMORANDUM AND ORDER

THEIS, District Judge.

The plaintiff brought this action challenging the constitutionality of Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* The plaintiff sought to represent a class of all persons subject to the requirements of the Act, including all persons who have been required to pay the assessment of one dollar per head of cattle sold, as required by the Act. In a memorandum and order dated February 28, 1996, this court granted the motions to dismiss filed by the defendant and intervenors and denied the plaintiff's motion for summary judgment. On February 29, 1996, judgment was entered. Thereafter, the plaintiff filed a notice of appeal. Oral argument before the Tenth Circuit Court of Appeals is scheduled for November 21, 1996.

Presently pending before the court is the plaintiff's motion for injunction staying administrative case during the pendency of the appeal (Doc. 168, filed September 17, 1996). The plaintiffs seeks to stay the administrative hearing before the Department of Agriculture which is scheduled for September 25 and 26, 1996 in Wichita, Kansas. The court conducted a hearing by conference call on September 23, 1996. Following the conclusion of the

hearing, the court informed counsel that it was denying the plaintiff's motion and that a memorandum and order would follow.

On March 8, 1996, the Department of Agriculture resumed the administrative proceedings which had been pending against the plaintiff. This court had stayed those administrative proceedings during the pendency of this action. On March 8, 1996, the Department of Agriculture's Administrative Law Judge set the administrative hearing for July 31, 1996. In June 1996, a motion for continuance was granted and the administrative hearing was rescheduled for September 25, 1996.

The parties are in agreement that the following factors are relevant to the court's determination of whether to issue an injunction pending appeal: (1) whether the plaintiff has made a strong showing of the likelihood of success on appeal; (2) whether the plaintiff will be irreparably injured; (3) whether an injunction would injure other parties; and (4) where the public interest lies.

The court does not believe that plaintiff has made the necessary showing on the likelihood of success on appeal. This court followed the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), in upholding the constitutionality of the Beef Promotion Act. This court continues to believe that the Third Circuit's decision is correct. There is no case law from any other circuit to the contrary.

The plaintiff will not be irreparably injured by having to appear at a two day administrative hearing in Wichita. There has been no determination of liability under the Act, and no determination of what amounts, if any, may be due for unpaid assessments, late penalties, and civil penalties. At this time, there is nothing comparable to a money judgment which could be stayed upon the filing of a supersedeas bond. Following the hearing before the Administrative Law Judge, there would be an appeal to a judicial officer within the Department of Agriculture. If, at the conclusion of the administrative process, Goetz is ordered to pay monies and refuses to do so, the agency could initiate a collection proceeding. At that time, a stay of proceedings might be in order upon the filing of a bond in the nature of a supersedeas. If the plaintiff were to prevail on his constitutional challenge, he would be unable to obtain a refund of any monies paid because of the government's sovereign immunity. The plaintiff has suffered no harm to date, however. The inconvenience of attending a brief hearing does not constitute irreparable harm.

The plaintiff's refusal to pay assessments under the Act constitutes harm to the beef promotion program established by the Act. Income that was to have been used to conduct promotion and research has not been paid. The

government has a preliminary estimate that plaintiff owes nearly $25,000 (through the first half of 1994), not including interest or penalties.

It is not in the public interest to allow the plaintiff to continue to refuse to participate in the beef promotion program established by the Act. The Act's provisions are mandatory. The plaintiff's views about the program do not justify his noncompliance. The plaintiff has delayed these administrative proceedings for approximately three years.[1] A determination of liability, if any, under the Act needs to be made. The public interest lies on the side of requiring compliance with the Act.

The court is troubled by the plaintiff's delay in filing the motion for injunction.[2] In this court's memorandum and order of February 28, 1996, the court lifted the injunction previously in effect. The plaintiff was aware no later than March 8, 1996 that the agency was going forward with the administrative proceedings. The plaintiff had notice for several months of the hearing date, yet plaintiff waited until the last moment to file his motion for injunction. Plaintiff's failure to act promptly weighs against his claim of irreparable harm.

IS BY THE COURT THEREFORE ORDERED that plaintiff's motion for injunction staying administrative case during the pendency of the appeal (Doc. 168) is hereby denied.

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[1]The Department of Agriculture initiated the administrative proceedings against the plaintiff in October 1993.

[2]Plaintiff appears to have a proclivity to wait until that last minute. Plaintiff filed this action on August 2, 1994 and immediately sought to obtain a stay of the administrative hearing which was scheduled for August 8, 1994.

FARM SERVICE AGENCY

DEPARTMENTAL DECISIONS

In re: JOANNE FRANTA.
FS Docket No. 96-0001
Decision and Order filed August 21, 1996.

Salary offset - 15% deduction of disposable pay.

Chief Judge Victor Palmer approved a 15% salary offset imposed by the FSA on the respondent, a federal employee, to collect an overdue loan owed to the United States government

Nancy L. New, Marc A. Smith and Craig Iverson, for Complainant.
Jack Crickenberger and Penny Walker, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to 7 C.F.R.§ 1951.111,the Farm Service Agency (FSA), formerly Farmers Home Administration, on May 2, 1996, sent its employee, Joanne Franta, "Salary Offset" letters. The letters advised Ms. Franta that FSA had reviewed its records and determined that she owed the U.S. Government $17,765.94on an overdue loan, which it intended to collect by offsetting 15% of her net salary until the debt and all accumulated interest and other costs were paid in full in accordance with Department Regulation 2520-1, Interest on Delinquent Debt, and 4 C.F.R. 102.13.

The letters further advised Ms. Franta:

"As a Federal employee, you have the following rights:

1. The right to inspect and copy the records relating to the delinquency or other debt. Charges will be assessed for copying;

2. The right to enter into a written agreement for a repayment schedule different from that proposed so long as your terms of repayment are agreeable to FSA;

3. The right to a hearing conducted by a USDA Administrative Law Judge or a hearing official from outside USDA. The hearing will consider the existence of the delinquency or other debt, the amount of the delinquency or other debt, and/or percentage of disposable pay to

be deducted each pay period. The timely filing of a petition or a hearing will stop collection proceedings;

4. The right to a final decision on a hearing at the earliest practical date, but not later than 60 calendar days after you file your hearing petition;

5. The right to request a waiver of salary overpayment. You may also question the amount or the validity of a salary overpayment or general delinquency or other debt by submitting a claim to the Comptroller General in accordance with General Accounting Office procedures;

6. The right to have any moneys paid on or deducted for the delinquency or other debt which are later waived or found not owed to the United States to be promptly refunded to you unless there are applicable contractual or statutory provisions to the contrary."

Ms. Franta responded by letter, dated May 16, 1996, stating that she found the letters to be confusing. Her confusion was caused by another letter advising her that an administrative offset would also be made against sums accumulated in her pension fund to pay this debt. On May 30, 1996, Nancy L. New, Director Program Division, FSA, wrote to Ms. Franta and explained the distinction between a salary offset and an administrative offset. On June 12, 1996, Ms. Franta filed a petition for a hearing; because of her initial confusion her letter filed after the 30 day time limitation was accepted by the certifying official of FSA who wrote her to that effect on June 20, 1996.

On June 24, 1996, the underlying documents which constitute the administrative record was sent to me by the certifying official of FSA who appointed Nancy L. New, Director Program Division to make arrangements for a hearing in accordance with my directions.

I determined that it was appropriate to conduct a hearing by telephone conference call as authorized by the governing regulations (7 C.F.R. § 1951.111(g)(6).)

On July 2, 1996, at 2:00 P.M. EDT, a telephonic hearing was initiated. Participating were Nancy L. New, Marc A. Smith and Craig Iverson for FSA, and Ms. Franta together with her attorneys Jack Crickenberger and Penny Walker. The offices of the FSA representatives are at 441 South Salina Street, Suite 356, Syracuse, New York. Mr. Crickenberger and Ms. Walker are officed at 3921 Old Lee Highway, Suite 71A, Fairfax, Virginia 22030.

We reviewed the history and nature of the loan which the Farmers Home Administration had made to Ms. Franta and her then husband, David, whom she subsequently divorced and is now deceased. The arguments advanced on Ms. Franta's behalf, were all equitable in nature and a settlement proposal was advanced for consideration by FSA. I decided to adjourn the hearing to allow the proposal to be explored and to reconvene the hearing later in the month. Subsequently, I was advised that the parties required more time to explore settlement possibilities and the reconvening of the hearing was delayed. On August 19, 1996, the hearing by telephone conference was reconvened at 2:00 P.M. EDT. FSA was represented by Ms. New and Ms. Franta participated together with her attorneys Mr. Crickenberger and Ms. Walker.

I was advised that FSA had rejected the settlement proposal and that the amount now available in Ms. Franta's pension fund was adequate to pay in-full the debt and all accumulated interest. It again appeared that every argument asserted on Ms. Franta's behalf was equitable in nature and there were no legal arguments available against the imposition of the salary offset. I explained to the parties that the powers conferred by the governing regulation 7 C.F.R. § 1951.111(g), do not include equity powers. I am limited by the regulation to considering the written submissions and documents provided by the debtor and FSA unless a statute authorizes or requires consideration to also be given to a waiver of the debt. No statutory authority of this type was shown applicable. Inasmuch as Ms. Franta's attorneys requested the delay of the proceeding so that her settlement proposal could be considered by FSA, the sixty day period for issuing a written decision was accordingly lengthened as authorized by 7 C.F.R. § 1951.111(g)(7).

Upon consideration of the written submissions and documents provided by Ms. Franta and FSA as well as the arguments made at the hearing by telephone conference, the following findings, conclusions and analysis is made supporting the salary offset to collect the debt owed by Ms. Franta.

FINDINGS

1. In 1985, David and Joanne Franta borrowed $13,000.00 from the Farmers Home Administration to start a small strawberry business. The annual interest rate was 10 1/4% and the loan was to be paid in 7 years through 8 installments due on the 1st of January of each year. The promissory note they signed contained a promise by each borrower to "jointly and severally" pay the loan's principal and interest.

2. Loan payments were not made as agreed and, in 1989, the Farmers Home Administration rescheduled the loan to better enable the Frantas to pay. The annual interest rate was reduced to 9 1/2% and the Frantas were given six years to pay the then balance of $12,475.32.

3. In 1990, the Frantas separated with David Franta retaining possession of the farm equipment.

4. In 1994, the Frantas submitted a partial compromise offer under Farmers Home Administration Instruction 1956-B, which was rejected as incomplete. They were notified of the rejection by telephone on November 8, and November 16, 1994.

5. The Frantas divorced in 1994, and subsequent to his remarriage, David Franta died on December 7, 1994.

6. Joanne Franta had become a federal employee prior to the 1994 partial compromise offer she and David Franta submitted.

7. Upon their divorce, David Franta resided in New York where the farm equipment purchased with the loan money was located. Joanne Franta moved to Virginia where she is currently employed by the federal government.

8. On March 12, 1996, the entire indebtedness due on the promissory notes was accelerated for failure to make payments as scheduled and written notice to that effect was sent to Joanne Franta.

9. In that Joanne Franta is a federal employee, salary offset was initiated on May 2, 1996, and an administrative offset respecting her pension fund was initiated on May 3, 1996.

10. By letter dated May 16, 1996, Joanne Franta responded to the letters she received. Inasmuch as her response indicated she did not understand the differences between the two offset actions, Nancy L. New, Director Program Division, by letter dated May 30, 1996, undertook to explain the differences and Ms. Franta's right to a review by an Administrative Law Judge of the salary offset action, and a review by the USDA National Appeals Division of the administrative offset.

11. Joanne Franta has petitioned for review of both actions and the administrative offset review is currently pending.

12. As of April 30, 1996, Joanne Franta owed $11,261.25on the debt's principal and $6,504.69in interest. Interest continues to accrue at the rate of $2.93per day.

CONCLUSIONS

Joanne Franta and her then husband, David Franta borrowed $13,000.00on July 19, 1985, which they "jointly and severally" promised to fully pay with interest of 10 1/4% by July 19, 1992. Instead the note's installment payments were rescheduled in 1989 to better enable them to pay the debt at a reduced rate of interest. Currently, $11,261.25of the principal debt is still owed, plus interest to date of $6,835.78,whereby, $18,097.30is owed as of August 21, 1996.

The various settlement proposals Ms. Franta submitted to FSA were considered and rejected. I have been advised that the amount of money that is currently set aside to pay her pension is sufficient to fully pay this debt and for that reason there is no incentive for FSA to accept a smaller amount or reduced installment payments. The administrative offset review is likely to be decided in approximately sixty days.

The regulations allow up to 15% of a federal employee's disposable pay to be deducted and sent directly to the creditor agency. FSA has requested that $381.00per pay period be deducted in repayment of the debt. Ms. Franta admits that this deduction would not exceed 15% of her disposable pay.

Accordingly, starting with her October 24, 1996, pay check, $381.00shall be deducted each pay period until such time as the entire debt which Ms. Franta owes to the Farm Service Agency has been paid or satisfied in full. Moreover, interest shall continue to accumulate on the debt until it is paid or satisfied in full.

[This Decision and Order became final August 21, 1996.--Editor]

In re: NANCY K. BENEDA.
FS Docket No. 97-0001
Decision and Order filed November 8, 1996.

Salary offset - Less than 15% deduction from disposable pay.

Chief Judge Victor Palmer approved the imposition of a salary offset on the respondent, but reduced the amount of the deduction. Respondent is a federal employee with an outstanding and overdue loan from the United States government. The FSA imposed a 15% offset, or a deduction of $112 from each paycheck, which Chief Judge Palmer reduced to $100.

Mike Robinson, Dean Altenhofen, Amy Roeder, and Jack Salava, for Complainant.

Dana Brewer, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

On August 16, 1996, the Farm Service Agency (FSA), sent its employee, Nancy K. Beneda notice that it intended to impose a salary offset pursuant to 7 C.F.R.§ 1951.111. The letter informed Ms. Beneda that FSA had reviewed its records and determined that she owed the U.S. Government $99,623.02on an overdue farm loan, which it intends to collect by offsetting fifteen percent of her salary until the debt and all accumulated interest and other costs are paid in full. Pursuant to 7 C.F.R.§ 1951.111(e), the letter also informed her of her rights and responsibilities including the right to a hearing by a USDA Administrative Law Judge. Ms. Beneda filed a petition for a hearing on September 16, 1996. The petition did not deny the existence of the debt, but requested that the offset amount be less than fifteen percent. I reviewed the administrative record--consisting of the salary offset notice, hearing petition, notice of acceleration, promissory notes, real estate mortgages, and shared appreciation agreement--and determined that an oral hearing was appropriate.

A telephone hearing was held on November 6, 1996, at 11:00 a.m., EST. Ms. Beneda participated, along with her attorney, Dana Brewer. FSA was represented by Mike Robinson, Dean Altenhofen, Amy Roeder, and Jack Salava.

Findings

1. On October 15, 1981, Nancy and Lonnie Beneda borrowed $168,400 from the FSA. The annual interest rate was 13.25 %, and the loan was to be paid in annual installments of $22,861. On February 16, 1989, the note was reamortized and a shared appreciation agreement was entered into in exchange for a write down of the debt. Under the new note, $77,943.23was due at a rate of 11.25 %, in annual installments of $6,756.

2. Nancy and Lonnie Beneda failed to make the loan payments as agreed, and failed to respond to servicing notices sent by the FSA. Accordingly, on August 2, 1996, the FSA sent Mr. and Mrs. Beneda notice that the entire amount due was being accelerated.

3. Nancy Beneda is a federal employee subject to salary offset under 7 C.F.R. § 1951.111. FSA sent Ms. Beneda notice of its intent to offset her

salary on August 16, 1996. She responded with a petition for a hearing on September 16, 1996.

4. Ms. Beneda currently owes $100,875.35 consisting of $73,874.64 unpaid principal and $27,000.70 unpaid interest, plus any amount due under the terms of the shared appreciation agreement.

5. Ms. Beneda currently earns a salary of [redacted] annually, or a net pay of approximately [redacted] biweekly. FSA seeks to deduct fifteen percent, which amounts to [redacted] from each paycheck.

6. Other financial obligations of the Beneda household include automobile payments, credit card debt, and another agricultural loan, which together amount to approximately [redacted] per month.

7. Other household income includes Mr. Beneda's salary of [redacted] per month, and any farm income; although, the farm suffered an overall loss for 1995.

Conclusions

Ms. Beneda has not denied the existence of the loan but has requested that the offset amount be less then fifteen percent to enable her to meet other financial obligations without suffering financial hardship. The regulations provide that:

> If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in approximately 3 years. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. Certifying Officials are responsible for determining the size and frequency of the deductions. However, the amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

7 C.F.R. § 1951.111(i). Disposable pay is defined as:

> Pay due an employee that remains after required deductions for Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for life and health insurance benefits, and such other deductions required by law to be withheld.

7 C.F.R. § 1951.111(b)(4).

I have noted Ms. Beneda's other financial obligations, as well as Mr. Lonnie Beneda's salary of [redacted] per month, and the potential for farm income. Upon consideration of the amount of the debt, as well as Ms. Beneda's ability to pay, I have determined that a deduction of $100 from each paycheck--which is less than 15% of her net, or disposable, pay--is appropriate. Ms. Beneda is able to pay $200 per month; and reducing the amount of the offset any further would be unrealistic considering the enormity of the debt.

Accordingly, $100 shall be deducted each pay period until such time as the entire debt which Ms. Beneda owes to FSA has been paid or satisfied in full. Moreover, interest shall continue to accrue on the debt until it is paid or satisfied in full.

[This Decision and Order became final November 8, 1996.--Editor]

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: MIKE THOMAS.
HPA Docket No. 94-0028.
Decision and Order filed July 15, 1996.

Civil penalty — Disqualification order — Horse soring — Past recollection recorded — Palpation.

The Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he found that Respondent entered, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore. The ALJ assessed a civil penalty of $2,000against Respondent and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show or horse exhibition. A horse may be found to be sore based upon the professional opinion of USDA veterinarians who relied solely upon palpation of the horse's pasterns. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553). Hearsay evidence is admissible under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice governing this proceeding, (7 C.F.R. §§ 1.130-.151). Past recollection recorded in the form of affidavits and a summary made while the events were fresh in the witnesses minds is reliable, probative, and substantial. *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is not controlling in this proceeding. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a $2,000civil penalty.

Sharlene A. Deskins, for Complainant.
Earl Rogers, III, Morehead, KY, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

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I. INTRODUCTION

This case is a disciplinary proceeding instituted pursuant to the Horse Protection Act, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151)(hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on April 4, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that on March 26, 1993, Mike Thomas (hereinafter Respondent) entered for the purpose of showing or exhibiting a horse known as "Jubilee's

True Love" as Entry No. 843, in Class No. 46, at the National Walking Horse Trainers Show at Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)).

On April 26, 1994, Respondent filed an Answer in which Respondent admits that on March 26, 1993, he entered for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" as Entry No. 843, in Class No. 46, at the National Walking Horse Trainers Show at Shelbyville, Tennessee, but denies that the horse was sore in violation of 15 U.S.C. § 1824(2)(B).

A hearing was held on May 10, 1995, in Lexington, Kentucky, before Administrative Law Judge James W. Hunt (hereinafter ALJ). Earl Rogers III, Esquire, of Michael R. Campbell & Associates, Morehead, Kentucky, represented Respondent, and Sharlene A. Deskins, Esquire, Office of the General Counsel, United States Department of Agriculture, represented Complainant.

The ALJ filed an Initial Decision and Order on September 7, 1995, in which the ALJ found that Respondent violated section 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)); assessed a $2,000 civil penalty against Respondent; and disqualified Respondent from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition for 1 year.

On October 10, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).[1] On December 15, 1995, Complainant filed Complainant's Opposition to the Respondent's Appeal Petition and Brief in Support Thereof, and on December 19, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's Conclusion of Law.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

II. ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

A. Facts

Respondent . . . is in the business of training horses. He also owns horses. On March 26, 1993, [Respondent] entered for the purpose of showing or exhibiting one of the horses he owned, Jubilee's True Love, in the National Walking Horse Trainers Show in Shelbyville, Tennessee.

Jubilee's True Love was examined at the show by a designated qualified person (hereinafter DQP), Charles Thomas, [who] said the horse was alert and led freely, but reacted to palpation by flinching [her] foot and demonstrated "consistent sensitivity in the front of both front feet." [Charles] Thomas, who is not related to Respondent Mike Thomas, said a mild reaction to palpation is sufficient to "excuse" a horse from competing in the show but not enough to consider it sore. (Tr. 201-03, 216, 222.)

[Jubilee's True Love] was then examined by two [United States Department of Agriculture (hereinafter] USDA) veterinary medical officers, Dr. Lynn Bourgeois and Dr. Scott Price. Dr. Bourgeois testified that he and Dr. Price examined approximately 300 horses at the 4-day show and found 7 to be sore. [(Tr. 28-29.) Dr. Bourgeois] said that the DQPs disqualified about 4[6 horses from participation in the National Walking Horse Trainers Show. (Tr. 29-30.)] Both [Dr.] Bourgeois and [Dr.] Price are experienced veterinarians. (Tr. [14-16, 24, 79-81].)

[Dr.] Bourgeois said that USDA veterinarians conduct separate examinations of horses. They must agree before finding a horse sore. (Tr. 49-51.)

Dr. Bourgeois said that, when he examines a horse, he palpates its feet to determine whether it is sore. Palpation, he said, is one of various diagnostic tools to determine soreness. Other . . . "indicators" [of soreness] include a horse's gait, alertness, breathing, temperature, and inflammation. However, [Dr.] Bourgeois testified that even when these other indicators are normal, the horse may still be sore. Inflammation, for instance, may be subcutaneous and therefore not visible, and the gait of a sore horse may be normal when examined because of being ["basically] at rest,["] but [a horse may] experience pain when "you speed him up" with a rider during the exhibition which would affect its gait in the show ring. Some horses, he said, are also more stoic

[than other horses and, therefore, do not manifest soreness as readily as horses that are less stoic]. (Tr. 30-3[6], 38, 56, 62, 70-71, 73-74.)

[Dr.] Bourgeois said that he relies on a horse's reaction to bilateral digital palpation to determine whether the horse is sore because he knows of no explanation for a bilateral reaction other than chemicals or devices. A horse's reaction to palpation, he said, provides [an] objective criterion [by which] to determine whether a horse is sore. (Tr. 45, 54-56, 70.)

[Dr.] Bourgeois said he does not remember his specific examination of Jubilee's True Love, but . . . he recorded the results on a USDA Summary of Alleged Violations form [(APHIS Form 7077)] on which he indicated "extreme pain responses" to bilateral palpation. (CX 2.) At the end of the show that day, [Dr.] Bourgeois prepared an affidavit in which he stated:

> I approached the horse from the left side, put my hand on its neck and proceeded on down to pick up the forelimb. Palpation of anterior pastern elicited repeated marked pain responses characterized by attempts to remove limb from my grasp, abdominal tucking, and shuffling of hind feet forward. I then repeated this procedure on right forelimb and again elicited pain responses characterized by repeated attempts to remove limb from my grasp, abdominal muscle tucking, and shuffling of rear feet forward.
>
> . . . .
>
> This horse, in my professional opinion, was sored by overwork in action devices (chains), chemicals or a combination of both.

CX 3, pp. 1-2.

Dr. Bourgeois said that he relied only on palpation to find that the horse was sore. (Tr. 70-71.)

Dr. Scott Price testified that he observes examinations of a horse by other veterinarians and then conducts his own examination regardless of what the others may have found. The purpose in soring is not to cripple a horse, he said, but to exaggerate its gait when exhibited. When chains strike the sored area, they cause pain and affect the horse's gait. Like Dr. Bourgeois, [Dr.] Price said that there are various pain indicators, and that just one of them, if "bad enough," can show that a horse is sore. (Tr. 90, 111, 115.)

[Dr.] Price testified that palpation is a diagnostic tool and [is] one of the procedures he learned in veterinary medical school. [Dr. Price] said he palpates by applying pressure with the ball of his thumbs until the thumbnail

begins to change color. He then looks for a reaction. A sound horse, he said, does not react to palpation, whereas a sored horse will respond through consistent pain reaction to the palpation, such as flexing its shoulder muscles, clenching its abdominal muscles, or shifting its weight. (Tr. 99[-100], 104, 109-112. . . .)

When it was suggested that a horse's reaction to palpation was a "learned reaction" or "learned response," [Dr.] Price said that, if that were the case, 98 percent of the horses would be "written up" because of having "chains and weights and rollers applied to their feet." (Tr. 131.) He said that, of approximately 10,000horses he has examined, he has found [between 1½ and] 2 percent [of the horses] sore. (Tr. 101.)

[Dr.] Price also said that a "silly"horse can be distinguished from a sored horse because its reactions to palpation are inconsistent:

> A silly horse has an inconsistent response to our palpation, and we always give the benefit of the doubt to the exhibitor when we have any questions if that's the case. A sore horse gives a complete and repetitive and consistent response and I can elicit it when I go back to that spot repeatedly. And usually I go back and check that leg again to make sure in my mind that I can call this a sore horse.

Tr. 97.

He said that "anxious"or "nervous"horses are similar to "silly"horses, but that a "fractious"horse is one that will not allow itself to be examined. Price said fractious horses are usually excused from competition. (Tr. 97-98.)

[Dr.] Price said that, when he finds a horse sore, he prepares an affidavit when the examination is fresh in his mind and that he prepared [an] affidavit in this case[, (CX 4),] in the evening during the show. (Tr. 87.) In his affidavit concerning his examination of Jubilee's True Love, he said:

> At 6:50 p.m., I examined the horse. The horse was extremely sore in a large area on the anterior aspect of both front pasterns. The horse jerked violently, and gave a consistent & repetitive withdrawal to palpation. Additional signs of soreness included shifting weight, and rippling of shoulder & abdominal muscles in response to palpation. This horse was definitely not silly; it was sore.

CX 4, p. 1.

Respondent . . . testified that he has never been charged with violating the Horse Protection Act in the years that he has been training and showing horses. He said that Jubilee's True Love was trained in chains, but that no chemicals or substances, other than grease, were ever put on the horse's feet. . . . (Tr. 315-30.)

The horse's trainer, [Mr.] Jimmy Acree, testified that he applied grease to [Jubilee's True Love's] legs to keep the skin moist and prevent chains from irritating the skin. He said that no substances other than grease were ever put on the horse's feet. [Mr.] Acree said he observed the USDA veterinarians examine [Jubilee's True Love] from about 40 feet away and that he did not see any pain reactions. He also said that, when he palpated the horse's feet, there was some movement but that it was not consistent. He said the horse was "silly." (Tr. 170-87.)

[Mr.] Jamie Hankins, another horse trainer, was asked to check the horse after [she] was returned to the stable. [Mr.] Hankins said the horse was "flighty" and that, when he palpated the horse's pasterns, there was no consistent reaction. (Tr. 233[-34], 242-43, 267.)

[Dr.] Ray Miller, a doctor of veterinary medicine who was attending the show, then examined Jubilee's True Love at the request of Respondent's wife. Dr. Miller has 25 years of experience as an equine practitioner and is a member of the Equine Practitioner Association. [(Tr. 272.)] The record does not show how soon Dr. Miller examined the horse after the examination by the USDA veterinarians. [Dr.] Miller indicated that he was asked to examine the horse after "[t]hey had just gotten back to the barn with her." (Tr. 277.)

In any event, Dr. Miller said he started his examination by looking at the condition and attitude of Jubilee's True Love and that he observed that [she] "was a three year old mare in good health, in good condition, very alert, turning around." He said that there was no sign of inflammation, that the horse's temperature was normal, that [her] gait was normal, and that [she] moved freely. He testified that it is a common practice to put grease on a horse's legs and that grease sometimes, but not normally, causes an allergic reaction. (Tr. 277, 292-93.)

[Dr.] Miller then proceeded to palpate the horse's feet, which, he said, is a diagnostic tool to detect pain that he has used for 25 years, and which, he said, other veterinarians had been using to check horses for pain even before the enactment of the Horse Protection Act. (Tr. 279.) However, reaction to palpation, he said, may also be due to reasons other than pain, such as being a "learned response." [(Tr. 290-91.) Dr.] Miller further testified that, although palpation is a diagnostic tool, it alone is not sufficient to make a diagnosis that a horse is sore. He said that a group of veterinarians had concluded in a

study called the "Atlanta Protocol" that just one factor or indicator of pain, such as palpation, is not "definitive" in determining whether a horse is sore. (Tr. 288-89.)

[Dr.] Miller said, when he began his examination of Jubilee's True Love[, she] had an "arrogant" attitude and did not want to be palpated. [(Tr. 278-79.)] When he did palpate her, Dr. Miller said, there was "some movement," but he did not describe the nature of the movement or its intensity. However, he indicated that it was more than slight by not agreeing with a question that referred to the movement as only "slight." (Tr. 278, 312.)

Although the horse moved when palpated, [Dr.] Miller testified, the movement was not consistent. He said that for a reaction to palpation of a specific area to be a pain response it must be repeatable. (Tr. 279.) He further testified:

> When you're palpating the area and you get movement from the horse, the movement, to have any diagnostic value, needs to be repeatable. So when I say repeatable, when I get movement right here, then I'll leave that area and I go on around and check elsewhere, taking my time so the horse will forget this area, and then I go back to it and palpate it again. And if, you know, you get the same response two, three or four times in a row, then that's repeatable and it's notable. If it's not, then it's not notable.

Tr. 310-11.

Dr. Miller concluded that, based on his overall exam of Jubilee's True Love, [she] was not sore. (Tr. 289, 312.)

B. Law

Section [2](3) of the Horse Protection Act . . . provides that:

> (3) The term "sore" when used to describe a horse means that—
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

[15 U.S.C. § 1821(3).]

Section [6](d)(5) of the Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore:

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

[15 U.S.C. § 1825(d)(5).]

Section [5](2) [of the Act] prohibits not only the showing or exhibiting of a sore horse, but also "(B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore." [(15 U.S.C. § 1824(2)(B).)] "'Entering,' within the meaning of the Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians." *In re William Dwaine Elliott* [(Decision as to William Dwaine Elliott)], 51 Agric. Dec. 334, 344 (1992), [*aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993)].

C. Discussion

Complainant contends that, based on the affidavits of Drs. Bourgeois and Price, Jubilee's True Love demonstrated bilateral pain when palpated.

[Complainant,] therefore, contends that the horse was sore when Respondent . . . entered [her] in the [National Walking Horse Trainers] Show.

Respondent, contending that the horse was not sore, argues that: (1) The affidavits by Drs. Bourgeois and Price were prepared in anticipation of litigation; (2) The affidavits are not reliable evidence; (3) Palpation alone cannot be relied upon to find that a horse is sore; (4) There has been no rule making on palpation; (5) Congress has prohibited the use of palpation; and (6) Respondent has rebutted any presumption that Jubilee's True Love was sore.

1. . . . Drs. Bourgeois and Price . . . were credible witnesses and they each conducted an independent examination of Jubilee's True Love as part of their job to seek compliance with the Horse Protection Act. . . . There is no evidence that anyone told them what findings to make or what to say in their affidavits. There is also no evidence that they were biased in favor of finding that [Jubilee's True Love] was sore. On the contrary, of 300 horses they examined [at the 4-day National Walking Horse Trainers Show], they found that only 7 were sore.

. . . [I]f their [affidavits] were to be regarded as unreliable just because of the potential for litigation, the farfetched argument could be made that any report prepared by an official in the course of seeking compliance with a federal statute could be considered unreliable for the same reason.

2. Respondent cites . . . *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), for the proposition that veterinarian-prepared affidavit[s and Summary of Alleged Violations forms are] unreliable hearsay. However, decisions by the [United States Court of Appeals for the] District of Columbia and [the United States] Court of Appeals [for the Sixth Circuit] in 1995 take the opposite position. They hold that such documents can constitute substantial evidence. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995)[, *cert. denied*, 116 S.Ct. 88 (1995)]; *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406 (6th Cir. 1995). The Secretary, of course, also takes the same position. [*In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio)], 52 Agric. Dec. 298 (1993)[, *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)].

It is notable that[, in *Young*, the United States Court of Appeals for] the Fifth Circuit cites the same [United States] Supreme Court decision, *Richardson v. Perales*, 402 U.S. 389 (1971), to support its holding that [the] veterinarian[-prepared affidavits and the Summary of Alleged Violations form at issue are] not reliable, as the [United States Court of Appeals for the District of Columbia] and [the United States Court of Appeals for the] Sixth

Circuit cite to support their position[, in *Crawford* and *Bobo* respectively,] that [the veterinarian-prepared affidavits and the Summary of Alleged Violations forms at issue in those cases are] reliable. In *Perales*, [*supra*, 402 U.S.] at 402, the [United States Supreme] Court held that an unsworn written report by a physician of an examination he conducted can, despite being hearsay, constitute substantial evidence, even though the physician is not present at the hearing for cross-examination. According to *Perales*, therefore, it seems clear that a report by a veterinary medical doctor of a medical examination he or she conducted can be considered probative and reliable evidence. Moreover, it would appear that [Dr. Bourgeois' and Dr. Price's affidavits, (CX 3, 4),] are even more reliable and probative than the [report at issue] in *Perales* since [Dr. Bourgeois' and Dr. Price's affidavits] are sworn statements, and [Dr. Bourgeois and Dr. Price testified] at the hearing [and were available for and subjected to] cross-examination [by Respondent. Further, even the unsworn Summary of Alleged Violations form at issue in the instant proceeding, (CX 2), is more reliable and probative than the report at issue in *Perales* because those who prepared and signed the Summary of Alleged Violations form, Dr. Bourgeois, Dr. Price, and Mr. David B. Head, testified at the hearing and were available for and subjected to cross-examination by Respondent.] However, the actual weight to accord a[n affidavit or] report can, of course, vary, depending on such matters as the circumstances in which the [document] was prepared and its substantive content. . . . I find, in the circumstances here, as discussed below, that . . . Drs. Bourgeois' and Price's [affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2),] are reliable and probative.

3. Respondent also cites the Fifth Circuit's *Young* decision for the proposition that palpation is an unreliable indicator of soreness. In *Young*, the court found that palpation is not reliable because [several highly qualified experts for the Petitioner testified that soring could not be diagnosed through palpation alone, the Petitioner introduced a written protocol signed by a group of highly competent veterinarians coming to the same conclusion, and the Judicial Officer's basis for rejecting this evidence seemed, to the *Young* court, to be simply that the proposition that palpation alone is unreliable is contrary to agency policies and prior agency decisions. Further, the *Young* court found that the Judicial Officer failed to identify] medical or scientific data supporting palpation as a diagnostic technique. [*Young, supra*, 53 F.3d at 731.)]

There is, however, no indication in this case that palpation is an unreliable pain indicator. On the contrary, Respondent's expert witness, Dr. Miller, used palpation to determine if [Jubilee's True Love] was sore and testified that

other veterinarians were using palpation [to determine whether horses were sore] even prior to [enactment of] the Horse Protection Act. [(Tr. 279.)] Veterinarians testifying for Respondents in other cases have also verified the reliability of palpation. For instance, in *In re William Earl Bobo*, 53 Agric. Dec. 176, 190 (1994), it was stated that, although they did not believe that palpation was sufficient to show that a horse was sore, "all four veterinarians who testified for Respondents acknowledged that repeated reaction to palpation of specific locations on a horse's pastern can be an authentic indication of soreness." Dr. Price also testified that palpation was a procedure he learned in veterinary medical school. [(Tr. 104.)]

In these circumstances, I find that palpation is a [reliable technique to detect pain in horses,] commonly used and accepted . . . by doctors of veterinary medicine. . . .

However, while Dr. Miller indicated that palpation is an accepted examination procedure, he also contended that it should not be relied on alone to determine whether a horse is sore. The Secretary's position, on the other hand, is that palpation alone is sufficient to determine whether a horse is sore. . . . The Secretary further states that [USDA] veterinarians also use other diagnostic techniques, such as observing the horse's gait, when examining a horse. However, in virtually all recent cases, as here, when USDA veterinarians determine that a horse is sore, it is on the basis of palpation alone.

The basic argument, therefore, is not whether palpation is a legitimate diagnostic tool -- which the record shows it is -- but whether the results of palpation constitute sufficient substantial evidence to raise the presumption that a horse is sore. As pointed out in *In re C.M. Oppenheimer*, 54 Agric. Dec. [221, 310] (1995), "USDA veterinarians are merely providing *evidence*, through their diagnosis, to fact-finders, who then determine if a particular horse is sore under the Act." It is the Secretary's policy . . . that a veterinarian's findings based solely on palpation can be sufficient to support such a presumption of soreness. However, the evidentiary value of the veterinarian's findings depends on whether the report of the examination was timely prepared, (*Cf. In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1369 (1994)), and whether the veterinarian specifically and accurately documents his or her findings in the report. "In order for a report of an examining veterinarian, as a medical expert in the field of animal care, to constitute the substantial evidence needed to show that a horse is sore, the report must do more than merely express the opinion that a horse is sensitive; the report must also set forth the facts (objective findings) that form the basis for the

expert's conclusion. Otherwise, the expert's opinion is entitled to little weight." *In re Linda Wagner, supra*, 52 Agric. Dec. at 305. A report that lacks adequate findings will therefore fail to support the conclusion that a horse is sore. . . .

In the instant case, . . . Drs. Bourgeois and Price . . . prepared [their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2),] when the events were fresh in their minds, and [the documents] contain adequate objective findings to support their conclusions that Jubilee's True Love was sore.

4. Respondent contends that, in relying on palpation, USDA has created a substantive rule without following the required notice-and-comment rule making process. Palpation, however, is [a procedure used to examine horses to determine compliance with the Act and regulations issued under the Act. A "rule" under the Administrative Procedure Act is defined as:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

> Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be

important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy, nor does palpation describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making, nor does it regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

> "Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the Act and regulations.

43 Fed. Reg. 18,514, 18,525 (1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Act and the regulations issued under the Act. Except for minor editorial changes, the definition of the word

"inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

> "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1).]

Respondent argues that even though the regulations refer to palpation, they do not define the "protocol" [to be used to palpate horses,] except for [the protocol to be used by the] DQPs. (9 C.F.R. § 11.21[(a)](2).) The record in this case shows that palpation is a diagnostic procedure taught in veterinary medical school and is used not only by doctors of veterinary medicine and DQPs, but also by laypersons. Horse trainers [Mr.] Jimmy Acree and [Mr.] Jamie Hankins indicated that they knew the "protocol" for palpating horses, [(Tr. 192-93, 228, 241-43, 258-59),] while Respondent . . . said he knew the pain signs to look for when a horse is palpated. (Tr. 324.) Respondent's wife also apparently knew how to palpate. (Tr. 243.) Therefore, as palpation is a commonly known, accepted, and used diagnostic tool, there appears no need to spell out a "protocol" with which persons in the horse exhibition industry are already familiar.

This "protocol," as described at the hearing (and as described by the court in *Young, supra*, [53 F.3d] at 729-30), [consists of] pressure applied with the ball of the thumb to the horse's pastern areas while looking to see if there are any objective reactions or signs of pain by the horse, such as withdrawing its foot or tightening of its stomach muscles.

If there is a reaction, the examiner, as Drs. Bourgeois, Price, and Miller all emphasized, returns to the area causing the reaction to determine if the horse displays a consistent or repeatable bilateral "abnormal sensitivity." If the reaction is consistent, it is evidence of pain, and, [in accordance with section

6(d)(5) of the Act, (15 U.S.C.§ 1825(d)(5)),] raises the presumption that the horse is sore. The presumption may, of course, be rebutted. . . .

In short, neither palpation nor the "protocol" [for conducting palpation] is a substantive rule that has to undergo the . . . rule making process. . . .

5. Respondent contends that [the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1993,] Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992), prohibits the use of palpation alone to determine whether a horse is sore. This question was certified in this case to the Judicial Officer, as the Secretary's representative, for a ruling. The Judicial Officer ruled that this law does not prohibit the finding that a horse was sore based solely on digital palpation as the only diagnostic test to determine whether a horse was sore. . . . [*In re Mike Thomas*, 54 Agric. Dec. 1096 (1995) (Ruling on Certified Question)].

6. Finally, Respondent argues that [he] has rebutted any presumption that Jubilee's True Love was sore. For the reasons already discussed, I find that the reports prepared by Drs. Bourgeois and Price are reliable and probative substantial evidence showing that [Jubilee's True Love] displayed signs of bilateral pain when [her] pasterns were palpated. There is no evidence that the horse's reaction to palpation was a "learned response."

The testimony presented by non-veterinarians [Mr.] Acree and [Mr.] Hankins, despite their [familiarity] with palpation, is insufficient to rebut the findings and conclusions of the USDA veterinarians, Drs. Bourgeois and Price. *In re Bill Young*, 53 Agric. Dec. 1232, 1291 (1994)[, *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)].

As for Dr. Miller, I find that he was a credible witness concerning his examination of Jubilee's True Love. However, he examined the horse at some undisclosed period of time -- possibly an hour or two -- after the examinations by Drs. Bourgeois and Price. While there is no evidence that an anesthetic was given to [Jubilee's True Love] before Dr. Miller's examination, it is not unusual for a horse to be found sore at one examination, but found not sore at a later examination during the same show. *In re Jackie McConnell*, 44 Agric. Dec. 712, 722 (1985). Dr. Miller, moreover, did find that [Jubilee's True Love] reacted when he palpated [her], but found that the reaction was not repeatable. The DQP, on the other hand, who examined the horse about the same time as the USDA veterinarians, did, like them, find that the horse's reactions were repeatable and consistent. Complainant has thus shown by a preponderance of the evidence that, when the USDA veterinarians examined [Jubilee's True Love, she] was sore. Accordingly, as Jubilee's True Love was sore at least during this phase of the entering process, [she] was sore when

[she] was entered in the [National Walking Horse Trainers] Show[, on March 26, 1993]. *In re William Dwaine Elliott, supra.*

As for the sanction, the Secretary's policy is to assess a minimum penalty of $2,000 for a first-time violation and a 1-year disqualification. *In re Linda Wagner, supra.* That sanction . . . will be imposed here.

D. Findings of Fact

1. Respondent Mike Thomas was the owner and trainer of a horse known as "Jubilee's True Love."

2. On March 26, 1993, Respondent entered Jubilee's True Love for the purpose of showing or exhibiting [the horse] in the National Walking Horse Trainers Show in Shelbyville, Tennessee.

3. Jubilee's True Love was examined on March 26, 1993, by USDA veterinary medical officers, Drs. Lynn Bourgeois and Scott Price. When they palpated the horse's pastern areas, they observed consistent and repeatable signs of bilateral pain. They concluded that the horse would suffer pain while walking or moving.

4. Drs. Bourgeois and Price recorded their findings in sworn affidavits [and a Summary of Alleged Violations form] when the results of their examinations were fresh in their [minds].

5. No litigation was pending . . . at the time the affidavits [and Summary of Alleged Violations form] were prepared.

E. Conclusion of Law

Respondent Mike Thomas violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore.

III. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's Appellant Brief (hereinafter RAB).

A. Complainant's Past-Recollection Recorded Evidence Was Properly Admitted and Is Reliable, Probative, and Substantial

Respondent contends that:

> I. THE ALJ ERRONEOUSLY ALLOWED INTO EVIDENCE THE AFFIDAVITS AND SUMMARY OF ALLEGATIONS [SIC] FORMS PREPARED BY THE USDA VETERINARIANS AND ERRONEOUSLY RELIED ON SAID DOCUMENTS TO SUPPORT A FINDING THAT THE HORSE IN QUESTION IN THIS ACTION WAS IN VIOLATION OF THE HORSE PROTECTION ACT.

RAB, p. 1.

I disagree with Respondent. The ALJ properly admitted into evidence and relied upon Dr. Bourgeois' affidavit, (CX 3); Dr. Price's affidavit, (CX 4); and the Summary of Alleged Violations form (APHIS Form 7077) prepared and signed by Drs. Bourgeois and Price, and Mr. Head, (CX 2).

Respondent contends that the admission of and reliance on CX 2, 3, and 4 were erroneous for a number of reasons. First, Respondent contends that CX 2, 3, and 4 were erroneously admitted because neither Dr. Bourgeois nor Dr. Price "could independently recall" their examinations of Jubilee's True Love on March 26, 1993. (RAB, p. 1.)

In almost every Horse Protection Act case, USDA veterinarians testifying about the examination of a horse have no recollection of the examination at the time of the hearing. Often USDA veterinarians examine hundreds of horses each year and are asked to testify about the examination of a single horse a year or more after conducting the examination.

In the instant proceeding, Dr. Bourgeois and Dr. Price conducted a routine examination of Jubilee's True Love over 2 years prior to the date of the hearing. Dr. Bourgeois testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, and examining horses, but he did not remember examining Jubilee's True Love. (Tr. 16-18.) Dr. Bourgeois' affidavit, (CX 3), is dated March 27, 1993, the day after he examined Jubilee's True Love at the National Walking Horse Trainers Show. Dr. Bourgeois testified that he prepares affidavits regarding horses that he has examined either during the show or on the day after the show at which he examines them, (Tr. 18-19); and that, while he could not recall the particular time he prepared the affidavit concerning his examination of Jubilee's True Love, he did prepare it the night he examined Jubilee's True Love. (Tr. 47, 51-52, 71.) Dr. Bourgeois' affidavit states:

> I Lynn P. Bourgeois am a Veterinary Medical Officer employed by the United States Department of Agriculture, Animal Care. I was assigned to monitor the 25th Annual National Walking Horse Trainer's

Show held at the Calsonic Arena in Shelbyville[,]Tenn[.,]on March 24-27[,]1993. Other USDA personnel monitoring this show were Animal Care Veterinary Medical Officer Scott Price and Regulatory Enforcement Investigators David Head and John Eades. National Horse Show Commission Designated Qualified Persons working this show were Charles Thomas, Bob Flynn, Johnny Block and Rick Statham.

At approximately 6:45 PM on the evening of 3/26/93 a horse identified as Entry # 843 in Class 46 was presented to DQP Charles Thomas for pre-show examination. Mr. Thomas' palpation of anterior pasterns of both forelimbs revealed pain responses. Mr. Thomas excused horse from showing and issued a DQP ticket for bilateral sensitivity.

I then requested and received permission from custodian to examine horse. I approached the horse from the left side, put my hand on its neck, and proceeded on down to pick up the forelimb. Palpation of anterior pastern elicited repeated marked pain responses characterized by attempts to remove limb from my grasp, abdominal tucking, and shuffling of hind feet forward. I then repeated this procedure on right forelimb and again elicited pain responses characterized by repeated attempts to remove limb from my grasp, abdominal muscle tucking, and shuffling of rear feet forward.

Dr. Price then palpated this horse and found extreme pain responses in both fore pasterns. This pain response was also characterized by attempts to withdraw limb, shuffling hind feet forward and abdominal clenching.

Dr. Price and I conferred and concurred this was a sore horse as defined by the Horse Protection Act. Dr. Price then informed custodian of our decision and introduced him to Investigators John Eades and David Head who prepared an APHIS 7077 Alleged Violation of Horse Protection Act.

This horse, in my professional opinion, was sored by overwork in action devices (chains), chemicals or a combination of both.

This statement is true and correct to the best of my knowledge.

CX 3, pp. 1-2.

Dr. Price testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, and remembered examining Jubilee's True Love and finding that she was sore. (Tr. 81-85, 125-26.) Dr. Price's affidavit, (CX 4), is dated March 26, 1993, the day he examined Jubilee's True Love at the National Walking Horse Trainers Show. Moreover, Dr. Price testified that he remembered preparing the affidavit during the show, (Tr. 87). Dr. Price's affidavit states:

> I was assigned to work the National Walking Horse Trainers Show in Shelbyville, TN, Mar. 24-27, 1993, to enforce the Horse Protection Act and evaluate the DQP's. Dr. Lynn Bourgeois and myself were the USDA veterinarians and Mr. David Head and Mr. John Eades represented Regulatory[.]
>
> Exhibitor 843 entered in Class 46 presented a horse to DQP, Charles Thomas for pre-show inspection. The horse palpated extremely sore and I witnessed the horse present additional signs of soreness by clenching abdominal and shoulder muscles, shifting weight, and repeatedly and consistently jerking feet upon palpation. The horse was issued a 2-foot sensitivity by the DQP.
>
> Dr. Lynn Bourgeois examined the horse next. I witnessed this inspection [illegible]. The horse was again extremely sore and clearly demonstrated the other indications of soreness mentioned above.
>
> At 6:50 P.M., I examined the horse. The horse was extremely sore in a large area on the anterior aspect of both front pasterns. The horse jerked violently, and gave a consistent and repetitive withdrawal to palpation. Additional signs of soreness included shifting weight, and rippling of shoulder and abdominal muscles in response to palpation. This horse was definitely not silly; it was sore.
>
> Dr. Bourgeois and I agreed the horse was in violation of the Horse Protection Act. I informed the custodian of the horse, Mike Thomas, that he was in violation of the Horse Protection Act.

In my professional opinion this horse was sored using action devices, chemical substances, or a combination. This horse was very sore, and would have definitely experienced pain while moving.

I swear these statements to be true and correct.

CX 4, pp. 1-2.

Mr. David B. Head, a USDA investigator authorized under section 1 of the Act of January 31, 1925, (7 U.S.C. § 2217), to take affidavits, testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, (Tr. 143-44, 149), and remembered taking Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), the night Drs. Bourgeois and Price examined Jubilee's True Love. (Tr. 155-57.) Mr. Head testified that his signature on Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), signifies that the affidavits were signed and sworn by the affiants in Mr. Head's presence. (Tr. 148-49.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Head, Dr. Price, and Dr. Bourgeois. Dr. Price recalls completing that part of the form for which he was responsible within an hour or two after examining Jubilee's True Love. (Tr. 89, 95.) Mr. Head testified that, after Jubilee's True Love had been examined by Drs. Bourgeois and Price, he obtained information from Respondent at the National Walking Horse Trainers Show in order to complete lines 1 through 21 and line 27 on the Summary of Alleged Violations form. (CX 2; Tr. 144-45.)

The documents in question, (CX 2, 3, 4), are hearsay evidence. However, neither the Administrative Procedure Act under which this proceeding is conducted nor the Rules of Practice applicable to this proceeding precludes the introduction of hearsay evidence. The Administrative Procedure Act provides with respect to the taking of evidence that:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act. *See, e.g., Richardson v. Perales, supra*, 402 U.S. at 409-10 (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act, (5 U.S.C. § 556(d)), renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings).

The only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). The documents at issue in the instant proceeding bear satisfactory indicia of reliability and were properly admitted into evidence. The documents were signed by the individuals who prepared them and Dr. Bourgeois' and Dr. Price's statements are affidavits sworn before Mr. Head, an individual authorized by law, 7 U.S.C. § 2217, to take affidavits. Dr. Bourgeois and Dr. Price were trained to examine horses to determine whether they are "sore" as defined by the Horse Protection Act and had years of experience conducting these examinations.[2] Mr. Head testified that he is a trained investigator and had years of experience investigating cases under the Horse Protection Act.[3] None of the individuals who prepared the

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[2]Dr. Bourgeois testified that he has been examining horses to determine whether they are sore for 15 years and has taken at least one Horse Protection Act course each year for the last 15 years. (Tr. 15-16.) Dr. Price testified that he has been examining horses to determine whether they are sore since 1987, that he has examined more than 10,000 horses, and that, except for 1 year, he took yearly Horse Protection Act courses beginning in 1987. (Tr. 80-81.)

[3]Mr. Head testified that he has been an investigator for the Animal and Plant Health Inspection Service for "almost 15 years"; has attended three courses on investigation at the Federal Law Enforcement Academy in Glynco, Georgia; and has been investigating Horse Protection Act cases since February 1988. (Tr. 142-43.)

documents in question had reason to record their findings in other than an impartial fashion.[4] The documents reflect a thorough recording of Dr. Bourgeois' and Dr. Price's activities conducted in the performance of their duties to enforce the Act and their observations and conclusions regarding Jubilee's True Love. While Dr. Bourgeois does not remember examining Jubilee's True Love and Dr. Price only remembers examining her and finding her sore, their affidavits and the Summary of Alleged Violations form were created almost contemporaneously with the observations they relay. All of the individuals who prepared the documents testified at the hearing in this proceeding and were available for and subject to cross-examination by Respondent. (Tr. 13-157.)

Further, hearsay evidence can constitute substantial evidence if reliable. *Bobo, supra*, 52 F.3d at 1414; *Crawford, supra*, 50 F.3d at 49; *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986); *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Past recollection recorded is reliable, probative, and substantial and fulfills the requirements of the Administrative Procedure Act, (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witnesses' minds. *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Bill Young, supra*, 53 Agric. Dec. at 1253; *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims*, 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995). Responsible hearsay has long been admitted and relied upon

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[4]The DQPs disqualified approximately 46 horses from participation in the National Walking Horse Trainers Show. (Tr. 29-30.) Dr. Bourgeois and Dr. Price examined approximately 300 horses at the National Walking Horse Trainers Show and found only 7 to be sore. (Tr. 28-30, 43.) Dr. Price testified that, of the over 10,000 horses he has examined, he has only found between 1½ and 2 percent to be sore. (Tr. 101.) Dr. Bourgeois, Dr. Price, and Mr. Head all testified that at the time they prepared the affidavits and Summary of Alleged Violations form in question, they were USDA employees. (Tr. 13-15, 79-80, 142-43.) I infer, based upon their employment status, that Dr. Bourgeois, Dr. Price, and Mr. Head were all salaried employees and that their salaries, benefits, and continued employment by USDA were not dependent upon either their finding Jubilee's True Love "sore" or the statements they made in the affidavits and the Summary of Alleged Violations form in question. Dr. Price testified that, if we have any question whether a horse is sore or not sore within the meaning of the Act, "we always give the benefit of the doubt to the exhibitor . . . ." (Tr. 97.)

in the Department's administrative proceedings,[5] and I find no basis for the exclusion of Dr. Bourgeois' affidavit, (CX 3), Dr. Price's affidavit, (CX 4), or the Summary of Alleged Violations form, (CX 2).

Second, Respondent contends that Dr. Bourgeois' affidavit, (CX 3), Dr. Price's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), are not reliable because they were prepared in anticipation of litigation. (RAB, pp. 2-3.) Respondent cites *Young* as authority for the proposition that documents prepared in anticipation of litigation are unreliable, as follows:

> Relying on *Palmer v. Hoffman*, 318 US 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) and *United States v. Stone*, 604 F2d 922, 925-26 (5th Cir. 1979)[, t]he *Young* Court noted that documents prepared in anticipation of litigation do not carry sufficient indicia of reliability.

RAB, p. 3.

The Court in *Young* states:

> The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. *See Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [477], 87 L.Ed. [645] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

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[5] *In re Big Bear Farm , Inc.*, 55 Agric. Dec. ___, slip op. at 37 (Mar. 15, 1996); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 11 (Feb. 7, 1996); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

In *Young*, the court found that the Summary of Alleged Violations form and affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found, and, thus, were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act which provided:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading" (318 U.S. at 114). Specifically, the Court held:

> The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees.

But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

. . . .

> The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations form under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)). The documents were properly admitted. *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1222-24 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)). The only issue was whether the affidavits prepared by USDA veterinarians and the Summary of Alleged Violation form in question in *Young* were inherently unreliable and lacking in probative value.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the USDA's Animal and Plant Health Inspection Service under the Horse Protection Act is investigating suspected violations of the Horse Protection Act and litigating Horse Protection Act cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of USDA veterinarians and inspectors to detect violations of the Horse Protection Act and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is "the inherent nature of the business in question," (318 U.S. at 115), and the preparation of the Summary of Alleged Violations forms and affidavits is the most important of the "methods systematically employed for the conduct of the business as a business." (*Id.*)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials

throughout the Federal Government who, like the USDA veterinarians and inspectors, "prepare summary reports and affidavits only when administrative proceedings are anticipated." (53 F.3d at 730.) Moreover, like the USDA veterinarians, there are undoubtedly law enforcement officers throughout the Federal Government who handle such a high volume of work that they could not possibly remember the details of a particular violation by the time they appear at an administrative hearing several years later, and who are, therefore, totally dependent on past records made while the events were fresh in their minds. Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

Stone, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*, just discussed. The issue in *Stone* was "whether the government violated the hearsay rule and the defendant's right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession." (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth "the activities of the office or agency." (604 F.2d at 925.) The court held, however, that the affidavit "violates the hearsay rule and the defendant's confrontation right" (604 F.2d at 924), as follows:

> This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. *See, e.g. Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5 Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

604 F.2d at 925-26.

As stated above, under the discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman*, was railroading, not litigating. That was not true in *Young*. Furthermore, here, again, we are not concerned with the admission of the USDA veterinarians' affidavits and the Summary of Alleged Violations form as business records, since they were properly admitted under the Administrative Procedure Act, (5 U.S.C. § 556(d), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even under the Federal Rules of Evidence, it appears that the documents at issue in *Young* would have been admissible, and the documents at issue in the instant proceeding would be admissible, under Rules 803(5), 803(6), and 803(8)(C), which provide:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> **(5) Recorded Recollection**
>
> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
>
> **(6) Records of regularly conducted activity**
>
> A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes

business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(5), 803(6), 803(8)(C).

USDA veterinarian affidavits and Summary of Alleged Violations forms such as those at issue in *Young* and the instant proceeding would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Bourgeois and Price and Mr. Head have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Act. Hence, there was no basis for the court's view in *Young*, and there is no basis in the instant proceeding, for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations forms lacked trustworthiness merely because they were prepared in anticipation of litigation.

The Judicial Officer has noted, with respect to affidavits prepared by USDA veterinarians for the same purpose as the affidavits and the Summary of Alleged Violations form at issue in the instant proceeding:

> Such affidavits are regularly made as to all horses that are "written-up" and are kept in the ordinary course of the Government's business. There is no exclusionary rule applicable to our proceedings which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Similarly, the affidavits by Dr.

> Kendall, Dr. Wood and Dr. Thompson should have been received as evidence. The affidavits were not unduly repetitious merely because the witnesses testified as to the same matters set forth therein. In fact, I would attach more weight to the affidavits prepared within a few days of the event than to the testimony given 17 months later.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1435 (1979).

Third, Respondent contends that Dr. Bourgeois' affidavit and Dr. Price's affidavit and the Summary of Alleged Violations form lack reliability because they only contain observations that Jubilee's True Love was sore and contain no observations that she was not sore. (RAB, p. 3.) Respondent cites *Young* as authority for this contention, as follows:

> [T]he *Young* Court noted that the documents prepared by USDA veterinarians lack reliability because they contained only observations that the horse was sore and contained no observations that indicated that the horse was not sore. *Young* at 731. In that respect the *Young* case is exactly as the present case. Both USDA veterinarians noted only abnormalities with respect to the horse. (TR 37, 113) At the same time both doctors indicated that there were numerous other indicators of soreness which were not noted with respect to Jubilee's True Love. (TR 32-37, 109-114)

RAB, p. 3.

Both Dr. Bourgeois and Dr. Price testified that they only recorded observations that indicated that Jubilee's True Love was sore, (Tr. 37, 113-14). I disagree with Respondent's contention that Drs. Bourgeois' and Price's failure to record Jubilee's True Love's "normal conditions" on their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2), affects the reliability of those documents.

As early as 1978, the Department recognized the change in soring practices from the earlier years, stating:

> Prior to and immediately after passage of the Horse Protection Act of 1970, it required little knowledge or skill to recognize a sored horse. Soring was flagrant and obviously visible to the naked eye. However, the horse with bloody legs and open sores on the pasterns is a thing of the past. Soring today is devious and is seldom evident to the untrained or inexperienced observer.

43 Fed. Reg. 18,514,18,521-22(1978).

In recent years, soring methods have become even more sophisticated. Therefore, USDA veterinarians do not see many of the signs of soring that were previously prevalent, and frequently all signs will be normal except the horse's reaction to palpation. *In re Kim Bennett*, 55 Agric. Dec. ___, slip op. at 32 (Jan. 3, 1996). When a horse consistently and repeatedly gives a pain reaction to palpation on both front feet only on particular areas of the pasterns (almost always symmetrically located on the pasterns where the chains will hit them), and USDA veterinarians have used techniques to determine that the reaction is not due to natural factors, such as excitement or nervousness, USDA veterinarians can reliably conclude that the horse is sore because of chemical or mechanical devices.[6] The fact that in all other respects the horse is "normal" does not tend even in the slightest degree to prove that the horse was not sore. The failure of USDA veterinarians to record irrelevant data does not affect the reliability of the documents prepared.

Fourth, Respondent contends that:

> Another indici[um] of unreliability of these documents is that although the ALJ specifically found that the doctors recorded their findings when the results of the examinations were fresh in their memor[ies] (Decision and Order of the ALJ page 15, Finding of Fact No. 4) neither of these doctors can recall when the documents were prepared. (TR 49, 122)

RAB, p. 4.

While neither Dr. Bourgeois nor Dr. Price could recall the exact time during which they completed and signed their respective affidavits, (CX 3, 4), and the Summary of the Alleged Violations form, (CX 2), the record clearly establishes that Dr. Bourgeois examined Jubilee's True Love at approximately 6:45p.m.,March 26, 1993,and Dr. Price examined Jubilee's True Love at 6:50

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[6]In the instant proceeding, both Drs. Bourgeois and Price noted that Jubilee's True Love consistently and repeatedly gave "marked" and "extreme" pain responses to palpation on both front feet only on particular areas of the pasterns. (CX 2,3,4.) Further, Dr. Bourgeois and Dr. Price determined that Jubilee's True Love's reaction to palpation was not due to natural factors. (CX 4; Tr. 24-28, 83-84, 95-99, 114-15) Both Dr. Bourgeois and Dr. Price concluded that Jubilee's True Love was sore because of a chemical or mechanical device or a combination of the two. (CX 2, 3, 4.).

p.m., March 26, 1993, (CX 2, 3, 4); that Dr. Price's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), were completed before midnight, March 26, 1993; and that Dr. Bourgeois' affidavit, (CX 3), was completed early in the morning, March 27, 1993.

Dr. Bourgeois' affidavit, (CX 3), is dated March 27, 1993, the day after he examined Jubilee's True Love at the National Walking Horse Trainers Show. Dr. Bourgeois testified that he prepares affidavits regarding horses that he has examined either during the show or on the day after the show at which he examines them, (Tr. 18-19); and that, while he could not recall the particular time he prepared the affidavit concerning his examination of Jubilee's True Love, he did prepare it the night he examined Jubilee's True Love. (Tr. 47, 51-52, 71.)

Dr. Price's affidavit, (CX 4), is dated March 26, 1993, the day he examined Jubilee's True Love at the National Walking Horse Trainers Show. Moreover, Dr. Price testified that he remembered preparing the affidavit during the show. (Tr. 87.)

Mr. Head testified that he remembered taking Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), the night Drs. Bourgeois and Price examined Jubilee's True Love. (Tr. 155-57.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Head, Dr. Price, and Dr. Bourgeois. Dr. Price recalls completing that part of the form for which he was responsible within an hour or two after examining Jubilee's True Love. (Tr. 89, 95.) Mr. Head testified that, after Jubilee's True Love had been examined by Drs. Bourgeois and Price, he obtained information from Respondent during the National Walking Horse Trainers Show in order to complete the "top portion," "items one through 21," and line 27 on the Summary of Alleged Violations form. (Tr. 144-45; CX 2.)

The record establishes that all of the documents in question, (CX 2, 3, 4), were completed within 6 or 7 hours of Dr. Bourgeois' and Dr. Price's examinations of Jubilee's True Love while the events recorded were fresh in their minds. The fact that neither Dr. Bourgeois nor Dr. Price could recall the precise time they prepared the documents in question does not affect the reliability of the documents.

B. *Young* Is Not Controlling

Respondent contends that the decision in *Young* is controlling in this proceeding. (RAB, p. 4.) I disagree with Respondent. Section 6(b)(2) and section 6(c) of the Act, in relevant part, provide:

(b)(2) Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit . . . .

. . . .

(c) . . . The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)].

15 U. S. C. § 1825(b)(2), (c).

The record establishes that Respondent resides in and has his place of business in North Middletown, Kentucky. (Tr. 315, 325, 329.) Therefore, appeal of the instant proceeding will lie to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit, not the United States Court of Appeals for the Fifth Circuit.

Respondent further contends that the Fifth Circuit's decision in *Young* is controlling because Respondent presented testimony from individuals other than himself who examined Jubilee's True Love on March 26, 1993, and concluded that she was not sore. Respondent states:

[T]he *Young* Court . . . found it significant that in cases in which VMO Affidavits and Summary Reports constituted substantial evidence the owners and trainers in those cases presented no other evidence but their own testimony that the horse was not sore. *Young* at 731, (footnote 3) In the present case[, Respondent] presented not only his own testimony, but the testimony of the groom of Jubilee's True Love, the testimony of another trainer who observed the animal immediately prior to and after her examination, the testimony of the DQP, and the testimony of an independent veterinarian. Further, all of these individuals examined Jubilee's True Love. Further, all of these individuals found Jubilee's True Love was not sore. Therefore, the decision in *Young* is not inconsistent with other Circuit Court of Appeals decisions and is consistent with the facts in this case.

RAB, p. 4.

The court in *Young* states:

It is important to note that in reviewing an administrative decision, this court must look to the evidence in "the record considered as a whole, not just evidence supporting the [agency's] findings." *N.L.R.B. v. Pinkston-Hollar Constr. Services, Inc.*, 954 F.2d 306, 309 (5th Cir. 1992) (citation omitted). In this case the petitioners also presented substantial evidence indicating that the horse was not sore.[3]

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[3]In cases rejecting the appeals of trainers and owners contesting a soreness finding on the grounds that VMO affidavits and summary reports cannot constitute substantial evidence, both the Third and Sixth Circuits found it important that the petitioners in the cases before them presented no counter-evidence, aside from the petitioner's own testimony, showing that the horse in question was not sore. *Gray v. U.S. Dept. of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Wagner v. Dept. of Agric.*, 28 F.3d 279, 282-83 (3d Cir. 1994).

Young, supra, 53 F.3d at 731 n.3.

An examination of Horse Protection Act cases reveals that testimony by persons other than those alleged to have violated the Act is not unique to *Young* and that courts have found affidavits prepared by USDA veterinarians and Summary of Alleged Violations forms to be substantial evidence despite testimony from persons, other than the alleged violators, that the horses that were the subject of those cases were not sore. For example, in *Crawford*, the United States Court of Appeals for the District of Columbia found that USDA veterinarians' affidavits constituted substantial evidence even though neither of the veterinarians had an independent recollection of the events recorded in their affidavits and persons other than those alleged to have violated the Act testified, as follows:

> Petitioner offered her own testimony and that of her husband, her trainer, and a friend, as to the horse's condition and the circumstances surrounding the examination. Of those witnesses only petitioner observed the veterinarians' examination of the horse . . . . The others merely testified as to alternative reasons for the horse's reaction to diagnosis, that the horse was agitated because it had been transported with a mare in season and that the examination area, where the horse was required to remain for over an hour, was crowded. . . .

Crawford, supra, 50 F.3d at 49.

Similarly, in *Bobo*, the United States Court of Appeals for the Sixth Circuit found affidavits prepared by four USDA veterinarians sufficient to invoke the presumption of 15 U.S.C. § 1825(d)(5) that the horse in question was sore despite the failure of three of the USDA veterinarians to recall the events recorded in their respective affidavits and testimony of two veterinarians offered by Petitioner who examined the horse in question and found that he was not sore.

Therefore, if, as Respondent contends, *Young* stands for the proposition that affidavits given by USDA veterinarians and Summary of Alleged Violations forms cannot be substantial evidence, if persons, other than those charged with violating the Act, testify that the horse was not sore, then *Young* is inconsistent with decisions in other circuits. As appeal will not lie to the United States Court of Appeals for the Fifth Circuit, *Young* is not controlling in this proceeding. Moreover, I do not agree with Respondent's contention that the *Young* court held that affidavits given by USDA veterinarians and Summary of Alleged Violations forms cannot constitute substantial evidence of a violation of the Act if persons, other than those charged with violating the Act, testify that the horse in question was not sore. Rather, the decision in *Young* was limited to the particular record under review in *Young*. The court in *Young* states that, "[i]t is important to note that in reviewing an administrative decision, this court must look to the evidence in the 'record . . . .'" *Young, supra*, 53 F.3d at 731.

C. Palpation Alone Is Sufficient to Establish That Jubilee's True Love Was Sore When Entered

Respondent contends that:

> II. ABNORMAL RESPONSE TO DIGITAL PALPATION ALONE CANNOT JUSTIFY A FINDING THAT A HORSE IS SORE WITHIN THE MEANING OF THE HORSE PROTECTION ACT.
>
> In the present case[,] both USDA veterinarians based their opinion that Jubilee's True Love was sore within the meaning of the Horse Protection Act upon the results of digital palpation. (TR 71 and Claimant's Exhibit 4) The ALJ also found that Jubilee's True Love was sore based upon the results of the digital palpation examinations. No other indicator of soreness [was] testified to as being present in this

action by any witness. The acceptance of digital palpation alone as the sole tool for determining whether or not a horse is sore and in violation of the Horse Protection Act was expressly rejected by the *Young* Court.

Therefore, not only were the documents introduced into evidence by the U.S. Department of Agriculture unreliable, but the examination and opinions generated therefrom are unacceptable.

RAB, p. 5.

1. Palpation Is a Highly Reliable Method of Determining Whether a Horse Is Sore

Palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Act. *In re Kim Bennett, supra*, slip op. at 6; *In re Eddie C. Tuck, supra*, 53 Agric. Dec. at 292. This Department's reliance on palpation alone to determine whether a horse is sore within the meaning of the Act is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses under the Act. *In re Kim Bennett, supra*, slip op. at 7.

2. Respondent's Reliance on *Young* Is Misplaced

Respondent's reliance on the rejection of digital palpation alone to determine whether a horse is "sore" within the meaning of the Act by the United States Court of Appeals for the Fifth Circuit is misplaced for three reasons.

a. Appeal of This Proceeding Will Not Be to the Fifth Circuit

First, appeal in this case will not lie to the United States Court of Appeals for the Fifth Circuit. Section 6(b)(2) and section 6(c) of the Act, in relevant part, provide:

(b)(2) Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such

person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit . . . .

. . . .

(c) . . . The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)].

15 U. S. C. § 1825(b)(2), (c).

The record establishes that Respondent resides in and has his place of business in North Middletown, Kentucky. (Tr. 315, 325, 329.) Therefore, appeal of the instant proceeding will lie to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit, not the United States Court of Appeals for the Fifth Circuit. Both the District of Columbia Circuit and the Sixth Circuit have accepted the view that reaction to digital palpation alone can provide a sufficient evidentiary basis to conclude that a horse is "sore" within the meaning of the Act. *Bobo, supra*, 52 F.3d at 1411-13; *Crawford, supra*, 50 F.3d at 49-50.

b. This Proceeding Is Distinguishable From the Proceeding Under Review in Young

This case is distinguishable from the case in *Young*. The court in *Young* arrived at its holding that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse based upon several factors that are not present in this proceeding.

First, the court in *Young* states that:

The reliability of the veterinarians' conclusions recorded in the hearsay documents, based almost exclusively on the results of digital palpation, are also called into question by significant evidence presented at the hearing supporting the conclusion that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Several highly qualified expert witnesses for the petitioners testified that soring could not be diagnosed through palpation alone. Petitioners also offered a written protocol signed by a group of prominent veterinarians coming to the same conclusion.

Young, supra, 53 F.3d at 731.

Respondent called five witnesses, only one of whom testified as an expert witness with respect to the reliability of palpation alone as an indicator that a horse is sore within the meaning of the Act. All five of Respondent's witnesses testified that they use palpation to determine whether a horse is sore.[7] While one of Respondent's witnesses, Mr. Jamie Hankins, testified that he had attended seminars jointly conducted by USDA and the Horse Show Commission in which he was taught that digital palpation was not the sole method for determining whether a horse was sore, (Tr. 228-29), Respondent called only one witness, Dr. Ray Miller, who testified that based upon his experience and research there is no single "factor or indicator" that is definitively determinative of whether a horse is sore. (Tr. 288.)

Respondent did not introduce any written protocol which concludes that digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act. However, one of Respondent's witnesses, Dr. Ray Miller, did make reference to the "Atlanta Protocol" as support for his opinion that "you couldn't rely on one aspect of a diagnosis and consistently make a good diagnosis." (Tr. 288.)

Unlike the Petitioner in *Young*, Respondent did not present testimony of "[s]everal highly qualified expert witnesses" and offer "a written protocol signed by a group of prominent veterinarians" supporting a conclusion that an observed reaction to digital palpation alone is not a reliable indicator that a horse is sore within the meaning of the Act. *Young, supra*, 53 F.3d at 731.

Second, the court in *Young* based its observation that a reaction to digital palpation alone is not a reliable indicator of a sore horse on the court's

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[7]Mr. Jimmy Acree, a horse trainer that worked for Respondent for 8 or 10 years, testified that he knew how to palpate a horse and that he palpated Jubilee's True Love on numerous occasions, including at the National Walking Horse Trainers Show on March 26, 1993. (Tr. 170-71, 182, 186-87, 192-93.) Mr. Charles Lavoy Thomas, the DQP who inspected Jubilee's True Love at the National Walking Horse Trainers Show on March 26, 1993, testified that he knew how to palpate a horse and that he palpated Jubilee's True Love on March 26, 1993. (Tr. 198, 202, 214, 216.) Mr. Jamie Hankins, a professional horse trainer who had horses stabled near Respondent's horses at the National Walking Horse Trainers Show, testified that he had been trained to palpate, palpated Jubilee's True Love on March 26, 1993, and observed others, including Respondent's wife, palpate the horse. (Tr. 226, 230-31, 240-41, 243-44, 259-60, 269-70.) Dr. Ray Miller, a doctor of veterinary medicine, testified that he knew how to palpate and that he palpated Jubilee's True Love on March 26, 1993. (Tr. 276-81, 301-02, 309-312.) Respondent testified that he observed palpation on numerous occasions and observed the DQP, Dr. Bourgeois, and Dr. Price palpate Jubilee's True Love on March 26, 1993. (Tr. 320, 322, 324.)

perception of the Judicial Officer's basis for rejecting evidence that palpation alone is not reliable. The *Young* court believed that the Judicial Officer's basis for rejecting such evidence was "simply that it is contrary to the agency's policies and the agency's prior decisions." *Young, supra*, 53 F.3d at 731. Since *Young* was decided, the Judicial Officer dispelled this misperception of the basis for rejecting such evidence. The Department's view that palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act is not based simply on "the agency's policies and the agency's prior decisions," as stated by the court in *Young, supra*, 53 F.3d at 731. Rather, the Department's position regarding the reliability of palpation is based on the experience of a large number of USDA veterinarians, many of whom have examined thousands of horses for soreness under the Act. *In re Kim Bennett, supra*, slip op. at 7.

Third, the court in *Young* found that:

> In cases where the Secretary of an agency does not accept the findings of the ALJ, this court "'has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement.'" *Pinkston-Hollar Constr. Services, Inc.*, 954 F.2d at 309-10 (citation omitted); *Garcia v. Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993) (stating that "[a]lthough this heightened scrutiny does not alter the substantial evidence standard of review, it does require us to apply it with a particularly keen eye, especially when credibility determinations are in issue. . . .).
>
> . . . .
>
> . . . We hold that in light of the significant evidence calling into question the probative value and reliability of that documentary evidence where we are required to apply stricter scrutiny to the JO's conclusions which contradict the ALJ and in light of the substantial counter-evidence indicating that the horse was not sore, the JO's determination was not supported by substantial evidence and his decision should be reversed and judgment should be rendered in favor of Young and Sherman. [Footnote omitted.]

Young, supra, 53 F.3d at 732.

Since an important basis for the court's reversal in *Young* was the ALJ's adverse findings of fact, the court's decision in *Young* is not on point in the

instant proceeding, because the ALJ and the Judicial Officer herein agree on the findings of fact and the conclusion: *viz.*, Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C.§ 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore.

c. *Young* Was Erroneously Decided

Even if appeal herein went to the United States Court of Appeals for the Fifth Circuit, and the record herein was indistinguishable from that in *Young*, the split decision (2-1) that a reaction to digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act is erroneous and would not be followed by this Department. *See In re Kim Bennett, supra*, slip op. at 11 n.5. The Department's many other reasons for rejecting *Young* are fully articulated in *In re Kim Bennett*, which is attached hereto as an Appendix.

IV. SANCTION

Respondent contends that:

> III. THE PENALTY ASSESSED AGAINST [RESPONDENT] WAS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

RAB, p. 5.

I disagree with Respondent. The evidence in the instant case supports the ALJ's conclusion that Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore. The $2,000 civil penalty assessed by the ALJ against Respondent and the 1-year disqualification period imposed against Respondent by the ALJ for Respondent's violation of the Act were reasonable, supported by the evidence, consistent with the Act and this Department's sanction policy, and designed to achieve the remedial purposes of the Act.

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals

the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring"horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained

> sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.
>
> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

> [T]he nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses,

ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." In most cases, the maximum civil penalty of $2,000 per violation is warranted. *In re C.M. Oppenheimer, supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1323 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Linda Wagner, supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott, supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper*, 42 Agric. Dec. 20, 62 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purposes of showing or exhibiting Jubilee's True Love at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore. The nature, extent, and gravity of the violation are revealed by Dr. Bourgeois' and Dr. Price's description of Jubilee's True Love's responses to palpation which they described variously as "extreme pain responses," (CX 2); "extreme pain—foot withdrawal, abdominal tucking & clenching, attempt to rock back on hind feet," (CX 2); "repeated marked pain responses characterized by attempts to remove limb . . ., abdominal tucking, and shuffling of hind feet forward," (CX 3, p. 1); and "[t]he horse jerked violently, and gave a consistent & repetitive withdrawal to palpation." (CX 4, p. 1.) I find that, under these circumstances, the nature, extent, and gravity of Respondent's violation of the Act were sufficient to warrant the assessment of a civil penalty of $2,000.

The record also establishes Respondent's culpability. Respondent used action devices (chains) on Jubilee's True Love's legs during training. (Tr. 319.) Respondent, who was the owner of Jubilee's True Love, then entered her in the National Walking Horse Trainers Show. Persons who enter horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Act when entered. *See In re Keith Becknell*, 54 Agric. Dec. 335, 340 (1995) (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sored).

Although Respondent may not have intended to "sore" Jubilee's True Love by using chains during training, intent is of no consequence under the Act and regulations issued under the Act. The Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait," and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2:

> The legislation makes the following substantive modifications in the existing law governing this program:
>
> 1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent, who at the time of the hearing in the instant proceeding was 42, had been training and exhibiting Tennessee Walking Horses his entire life as a full-time occupation. (Tr. 315-16.) Despite Respondent's experience as a trainer of Tennessee Walking Horses, he entered Jubilee's True Love while she was sore and breached his guaranty that Jubilee's True Love would not be sore when he entered her for the purpose of showing or exhibiting her in the National Walking Horse Trainers Show. I find that, under these circumstances, Respondent's degree of culpability was sufficient to warrant the assessment of a civil penalty of $2,000.

Further, the record establishes that Respondent has the ability to pay a civil penalty of $2,000 and that the assessment of a $2,000 civil penalty would not affect Respondent's ability to continue to do business. (Mr. Acree testified that he worked for Respondent as an assistant trainer for 8 or 10 years, that he earned about $170 per week in 1993, and that Respondent was training approximately 25 horses in 1993 (Tr. 171, 188-89)); (Respondent testified that he has clients that pay him on a monthly basis, that he owned Jubilee's True Love, that he owned one horse at the time of the hearing and could own as many as 10 horses within a day after the hearing, that he could not pay $2,000, but he could probably borrow the money, that he gets paid $350 per month or more for each horse he trains, and that he trains a maximum of 20 horses at one time (Tr. 316, 328-31).)

The administrative officials charged with responsibility for achieving the congressional purpose of the Act recommended and the ALJ assessed a $2,000 civil penalty against Respondent. An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of $2,000 per violation is warranted.

Section 6(c) of the Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under the Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Act or the regulations issued under the Act and for a period of not less than 5 years for any subsequent violation of the Act or the regulations issued under the Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Act by those persons who had the economic means to pay civil penalties as a cost of doing business. *See* H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

Section 6(c) of the Act, (15 U.S.C. § 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty. Section 6(b)(1) of the Act, (15 U.S.C. § 1825(b)(1)), requires that the Secretary consider the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in

determining the amount of the civil penalty to be assessed, but the Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C. § 1825(c).) *See In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Act for the first time. *In re Tracy Renee Hampton*, *supra* (Respondent assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the Act); *In re Cecil Jordan*, *supra* (Respondent Crawford assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Act); *In re Linda Wagner*, *supra* (Respondents assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Act); *In re John Allan Calloway*, 52 Agric. Dec. 272 (1993) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Act).

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Act, in addition to the assessment of a civil penalty, is warranted.

The ALJ's Initial Decision and Order disqualified Respondent as follows:

> Respondent Mike Thomas is disqualified for one year from showing, exhibiting, or entering any horse directly, or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition.

Initial Decision and Order, p. 15.

Section 6(c) of the Act provides, in relevant part, that:

> [A]ny person who . . . is subject to a final order under [15 U.S.C. § 1825(b)] assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction . . . .

15 U.S.C. § 1825(c).

The Complainant, one of the administrative officials charged with the responsibility for achieving the congressional purpose of the Horse Protection Act requested that the Order issued in this proceeding include a provision disqualifying Respondent from:

> (1) showing, exhibiting or entering any horse, or otherwise participating in any horse show or exhibition, and (2) judging or managing any horse show, horse exhibition, horse sale or auction.

Complaint, p. 3.

The ALJ gives no explanation for not disqualifying Respondent from judging, managing, and otherwise participating in any horse sale or auction. (Initial Decision and Order.) Complainant did not appeal the Initial Decision and Order, and in Complainant's Opposition to the Respondent's Appeal Petition and Brief in Support Thereof (hereinafter CORA), states that the Initial Decision and Order should be affirmed. (CORA, p. 3.) While in most circumstances I would include in any disqualification order a disqualification from judging, managing, and otherwise participating in any horse sale or auction, I have not done so in the instant proceeding based upon

Complainant's request that the Initial Decision and Order be affirmed. (CORA, p. 3.)

For the foregoing reasons the following Order should be issued.

V. ORDER

1. Respondent Mike Thomas is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition. The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

2. Respondent Mike Thomas is assessed a penalty of $2,000,which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

APPENDIX

In re Kim Bennett, 55 Agric. Dec. ____ (Jan. 3, 1996).
[Not published herein--Editor.]

In re: JIM SINGLETON AND JACKIE SINGLETON.
HPA Docket No. 94-0012.
Decision and Order filed July 23, 1996.

Entering sore horse — Preponderance of the evidence — Appeal of credibility determinations — Complaint dismissed.

The Judicial Officer affirmed the decision by Administrative Law Judge Paul Kane (ALJ) dismissing the Complaint which alleges that Respondent Jim Singleton entered for the purpose of showing or exhibiting, showed, and allowed the entry and showing of a horse while it was sore, and Respondent Jackie Singleton showed a horse while it was sore. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. Complainant's evidence is not strong enough to justify reversal of the ALJ's findings of fact. However, the Judicial Officer disagreed with most of the Initial Decision and Order and did not adopt it as the final Decision and Order. Even if a party's disagreement with the Judge's decision is based solely upon the Judge's determination as to the credibility of witnesses, the party may appeal to the Judicial Officer in

accordance with 7 C.F.R. § 1.145(a), and the Judicial Officer can, in appropriate circumstances, reverse a decision by an ALJ even though the ALJ's decision is based on the ALJ's determination as to the credibility of witnesses.

Denise Y. Hansberry, for Complainant.
Jim Singleton and Jackie Singleton, Pro se.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151).

The proceeding was instituted by a Complaint filed on March 30, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) on June 15, 1991, Respondent Jim Singleton entered for the purpose of showing or exhibiting, showed, and allowed the entry and showing of a horse known as "Lots A Cash" as Entry 402, in Class No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A), (B), and (D); and (2) on June 15, 1991, Respondent Jackie Singleton showed a horse known as "Lots A Cash" as Entry No. 402, in Class No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A). (Complaint, p. 2.)

On April 18, 1994, Respondents filed an Answer stating:

> We are in receipt of the USDA Complaint, HPA Docket No. 94-12. We admit that Jim Singleton is the trainer and owner of the horse known as "Lots a Cash" and that he entered and showed this horse as Entry No. 402, Class No. 21, on June 15, 1991, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee. We further admit that Jackie Singleton was the exhibitor of the horse known as "Lots a Cash", Entry No. 402, Class No. 21, on June 15, 1991, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee. We do not admit to entering for the purpose of showing or exhibiting, showed, and allowed the entry and showing of the horse known as "Lots a Cash" as Entry No. 402, in Class

No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore.

Answer.

A hearing was held on January 27, 1995, in Murfreesboro, Tennessee, before Administrative Law Judge Paul Kane (hereinafter ALJ). Jim Singleton and Jackie Singleton appeared pro se and Denise Y. Hansberry, Office of the General Counsel, United States Department of Agriculture, represented Complainant.

On November 30, 1995, the ALJ filed an Initial Decision and Order dismissing the Complaint with prejudice. On February 2, 1996, Complainant appealed to the Judicial Officer, to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] Respondents filed a response to Complainant's appeal on February 28, 1996, and on February 29, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record in this case, I am dismissing the Complaint. Complainant's evidence, when considered in the light of Respondents' evidence, is just barely adequate to sustain Complainant's burden of proof.[2] Had the ALJ found that Respondents

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

[2]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43

violated the Act, I would have affirmed. However, the record is not strong enough to justify a reversal of the ALJ's adverse findings of fact.

Moreover, since an appeal in this case would most likely be to the United States Court of Appeals for the Sixth Circuit,[3] which circuit is of great importance to the Tennessee Walking Horse industry, and, thus, to the Department's Horse Protection Act regulatory program, I do not believe that such a close case should be presented to the Sixth Circuit.

Since the case turns on the particular testimony and exhibits in this case, no useful purpose would be served by analyzing the evidence in detail. It should be noted, however, that, while the record is not strong enough to justify a reversal of the ALJ's dismissal of the Complaint, I disagree with much of the ALJ's 28-page Initial Decision and Order. Therefore, I am not adopting the ALJ's Initial Decision and Order as the final Decision and Order in this case.

Moreover, I do not agree with Respondents' contention that Complainant should be chastised for appealing the ALJ's Initial Decision and Order. Respondents state in Respondents' Reply To Complainant's Appeal Of Administrative Law Judge's Decision (hereinafter RRCA) that:

(1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941, n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

[3]Section 6(b)(2) of the Act, in relevant part, provides that: "Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. . . ." (15 U.S.C. § 1825(b)(2).) Section 6(c) of the Act, in relevant part, provides that: "The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)]." (15 U.S.C. § 1825(c).) The record establishes that Respondents reside in and have their place of business in Nolensville, Tennessee. Therefore, appeal of the instant proceeding would be to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit.

> Respondents also request [that the Judicial Officer] chastise the Complainant for bringing this appeal in light of the fact that the decision below was based in great part on the ALJ's credibility assessment of numerous witnesses; a basis difficult to undermine in the appeal process.

RRCA, p. 4.

Section 1.145(a) of the Rules of Practice provides:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Section 1.145(a) of the Rules Practice, (7 C.F.R. § 1.145(a)), clearly provides that a party who, for any reason, disagrees with the Judge's decision, or any part thereof, may appeal to the Judicial Officer. Even if a party's disagreement with the Judge's decision is based solely upon the Judge's determination as to the credibility of witnesses, the party may appeal to the Judicial Officer in accordance with 7 C.F.R. § 1.145(a), and the Judicial Officer can, in appropriate circumstances, reverse a decision by an ALJ even though the ALJ's decision is based on the ALJ's determination as to the credibility of witnesses.[4]

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[4] *In re William Joseph Vergis*, 55 Agric. Dec. ___, slip op. at 15-16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D.

For the foregoing reasons, the following Order should be issued.

Order

The Complaint is dismissed with prejudice.

In re: JOHN T. GRAY AND GLEN EDWARD COLE.
HPA Docket No. 94-0035.
Decision and Order as to Glen Edward Cole filed August 19, 1996.

Horse soring — Allowing entry of a sore horse — Credibility determinations — Hearsay admissible — Past recollection recorded — Palpation — Civil penalty — Disqualification order.

The Judicial Officer reversed the Decision of Judge Kane (ALJ) and found that Respondent Cole allowed the entry, for the purpose of showing or exhibiting, of a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). The proponent of an order has the burden of proof in proceedings under the Administrative Procedure Act, and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Hearsay evidence is admissible in administrative proceedings and can constitute substantial evidence if reliable. Past recollection recorded is reliable, probative, and substantial

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Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See also *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not stricly bound by the credibility determinations of the ALJ); *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) (the Judicial Officer is not required to accept the ALJ's findings of fact even when those findings are based on credibility determinations); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

evidence if recorded while the events were fresh in the witnesses' minds. Respondent admitted that he was the owner of the horse and the horse was entered in a horse show. Complainant proved that the horse was entered while sore and that the entry was with Respondent's authorization. Respondent introduced evidence that he took an affirmative step to prevent soring. However, even applying the test in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (1994), Respondent allowed the entry of the horse while sore because Respondent's evidence that he instructed his trainer not to sore the horse is not credible. Palpation alone is a reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a $2,000 civil penalty.

Tejal Mehta, for Complainant.
L. Thomas Austin, Dunlap, TN, for Respondent Glen Edward Cole.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151).

The proceeding was instituted by a Complaint filed on April 4, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) on March 9, 1991, John T. Gray entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); and (2) on March 9, 1991, Glen Edward Cole allowed the entry, for the purpose of showing or exhibiting, of a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). (Complaint, p. 2.)

Pursuant to section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), Mr. Gray agreed to the entry of a Consent Decision in which he admitted that he was the trainer of Threat's Black Bum and entered Threat's Black Bum as Entry No. 530, in Class No. 155, on March 9, 1991, at the Georgia National Horse Show at Perry, Georgia. (Consent Decision and Order as to John T. Gray, pp. 1-2.) Administrative Law Judge Paul Kane (hereinafter ALJ)

entered a Consent Decision and Order as to John T. Gray on February 2, 1995.

On May 2, 1994, Glen Edward Cole (hereinafter Respondent) filed an Answer of Glen Edward Cole (hereinafter Answer) admitting that at all times material to this proceeding he was the owner of Threat's Black Bum which was entered as Entry No. 530, in Class No. 155, on March 9, 1991, at the Georgia National Horse Show at Perry, Georgia, and denying that on March 9, 1991, he allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore. (Answer, pp. 1-2.)

On January 18, 1995, pursuant to section 1.137 of the Rules of Practice, (7 C.F.R. § 1.137), Complainant filed a Motion to File Amended Complaint to add an allegation that on March 9, 1991, Respondent also *entered*, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). Complainant cited as the basis for the motion the need "to accom[m]odate recent case law (*Baird v. [United States Dep't of Agric.*, 39 F.3d 131] (6th Cir. [1994]))." (Motion to File Amended Complaint, p. 1.) On February 1, 1995, Respondent filed an Objection to Amended Complaint stating that Complainant's Motion to File Amended Complaint "comes late and the [C]omplainant filed this matter quite sometime ago and has failed to file any amendments to its [C]omplaint." (Objection to Amended Complaint.)

Section 1.137(a) of the Rules of Practice provides:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> (a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with the consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

Complainant had filed a Motion to Assign a Date for Oral Hearing prior to filing Complainant's Motion to File Amended Complaint, and on February 8, 1995, the ALJ issued an Order Denying Motion to Amend Complaint on

the ground that Complainant had not shown the required good cause to amend the Complaint.

A hearing was held on February 14, 1995, in Chattanooga, Tennessee, before the ALJ. Mr. L. Thomas Austin, Esq., represented Respondent and Tejal Mehta, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. During the hearing, Complainant moved to amend the Complaint to conform to the evidence to add an allegation that on March 9, 1991, Respondent entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). (Tr. 80-81.) The ALJ denied Complainant's motion on the grounds that: (1) Complainant had not introduced evidence that establishes that Respondent entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); and (2) Complainant did not have good cause for amending the Complaint. (Tr. 81-82.) Complainant renewed the Motion to File Amended Complaint and the motion to amend the Complaint to conform to the evidence in Complainant's Proposed Findings of Fact, Proposed Conclusions of Law, Proposed Order, and Memorandum in Support Thereof (hereinafter Complainant's Proposal), filed April 13, 1995. (Complainant's Proposal, p. 10.)

On October 12, 1995, the ALJ filed an Initial Decision and Order dismissing the Complaint with prejudice. (Initial Decision and Order, p. 25.) Moreover, the ALJ denied Complainant's renewed Motion to File Amended Complaint and Complainant's motion to amend the Complaint to conform to the evidence. (Initial Decision and Order, pp. 23-24.) On December 12, 1995, Complainant appealed to the Judicial Officer, to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35),[1] and on March 4, 1996, the case was referred to the Judicial Officer for decision.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Based upon a careful consideration of the entire record in this case, I find that Complainant has carried his burden of proof by a preponderance of the evidence, which is all that is required,[2] with respect to the allegation that on March 9, 1991, Respondent allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D).

The allegation that Respondent also *entered* Threat's Black Bum in the Georgia National Horse Show is more difficult. I agree with Complainant that both the ALJ's denial of Complainant's Motion to File Amended Complaint and Complainant's motion to amend the Complaint to conform to the evidence were in error. To forfend any possibility, or even an appearance, of prejudice against Respondent, I would have remanded this proceeding to the ALJ had he not retired. Respondent would then have had an opportunity to reopen the hearing and offer further evidence regarding the *entry* of Threat's Black Bum in the Georgia National Horse Show. However,

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[2]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 3 n.2 (July 23, 1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941, n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

inasmuch as a Remand Order to the original ALJ is not possible, and I do not believe, in any event, that any anticipated evidence regarding Respondent's *entry* of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, would be quite strong enough to justify remanding the case for a new hearing before a different Administrative Law Judge, I do not here remand the proceeding. Thus, I do not find that Respondent *entered* Threat's Black Bum in the Georgia National Horse Show.

I have not adopted the ALJ's Initial Decision and Order in this case because I disagree with much of the Initial Decision and Order. Nevertheless, I do agree with a number of the ALJ's findings of fact, which are referenced in the discussion and findings of fact in this Decision and Order.

Applicable Statute

Section 2(3) of the Horse Protection Act provides:

. . . .

(3) The term "sore" when used to describe a horse means that--

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).
Section 5(2) of the Horse Protection Act provides:

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).
Section 6(d)(5) of the Horse Protection Act provides:

(d) . . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

Discussion

Respondent is an individual whose mailing address is [redacted] (Answer ¶ 2, p. 1; Initial Decision and Order, Findings of Fact No. 1, p. 4.) Respondent testified that he has been in the blue jean manufacturing business most of his life and has owned horses for approximately 30 years, many of which have been Tennessee Walking Horses. (Tr. 83, 92.) While Respondent shows Tennessee Walking Horses, he is primarily engaged in breeding and selling Tennessee Walking Horses. (Tr. 93-95.) At the time of the hearing in this proceeding, Respondent owned between 12 and 15 Tennessee Walking Horses. (Tr. 92.)

Respondent acquired a Tennessee Walking Horse known as "Threat's Black Bum" in May 1990, (CX 7), and was the sole owner of Threat's Black Bum at all times relevant to this proceeding. (Answer ¶ 4, p. 1; Initial Decision and Order, Findings of Fact No. 2, p. 2; CX 7.) In November 1990, Respondent moved Threat's Black Bum and a number of his other horses from Tennessee to Florida for boarding with and training by John T. Gray. (CX 7; Tr. 15-17, 22-23, 25, 84, 99-100.) Mr. Gray testified that his training methods included the use of chains. (Tr. 17.) Threat's Black Bum remained in Mr. Gray's custody until April 1991, when Respondent moved Threat's Black Bum back to his premises in Tennessee. (Tr. 22-23, 88, 95-96.)

On March 9, 1991, Mr. Gray entered Threat's Black Bum as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (CX 1, 2, 3; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.) Mr. Gray testified that, while Respondent did not know that Mr. Gray was going to enter Threat's Black Bum in the Georgia National Horse Show, he had general authorization from Respondent to enter Threat's Black Bum in horse shows and entered Threat's Black Bum in two or three shows during the period Threat's Black Bum was in his custody, (Tr. 18-19, 32, 99-100, 108).

Respondent testified that he did not know that Threat's Black Bum would be entered in the Georgia National Horse Show and learned of the entry 2 weeks after the show. (Tr. 88-89.) Moreover, Respondent testified that he did not authorize Mr. Gray to show Threat's Black Bum in horse shows. (Tr. 87, 91.)

The ALJ found that:

> Based upon visual and aural observations, the appearance and demeanor at the hearing, their recollections and qualifications, the testimony of Messrs. Gray and Cole is assigned great credibility. The evidence presented by Messrs. Gray and Cole at the hearing establish the truth of the matters therein described, being worthy of belief and entitled to credit.

Initial Decision and Order, Findings of Fact No. 12, p. 7.

Normally the Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them and may make separate determinations of witnesses' credibility. The standard on court review is whether there is substantial evidence to support the Judicial Officer's

contrary decision. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[3]

The evidence presented by Mr. Gray regarding Mr. Gray's authority to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show, is in direct conflict with the evidence presented by Respondent. If I were to find, as the ALJ did, that the evidence presented by Mr. Gray and the evidence presented by Respondent each establish the truth of the matters therein described, I would be required to make contradictory findings of fact; *viz.*, that Respondent did, and did not, authorize Mr. Gray to enter Threat's Black Bum in horse shows while Threat's Black Bum was in Mr. Gray's custody. I therefore reject the ALJ's finding that the evidence

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[3]See also *In re Jim Singleton, supra*, slip op. at 5; *In re William Joseph Vergis*, 55 Agric. Dec. ___, slip op. at 16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc., v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiners finding on credibility); *3 Kenneth C. Davis, Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

presented by Mr. Gray and Respondent "establish the truth of the matters therein described," (Initial Decision and Order, Findings of Fact No. 12, p. 7), and make my own credibility determinations regarding whether Respondent gave Mr. Gray authority to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show.

I find Mr. Gray's consistent testimony that Respondent gave him general authorization to enter Threat's Black Bum in horse shows credible. Respondent's testimony that Mr. Gray did not have authority to enter Threat's Black Bum in horse shows is not credible because: (1) Respondent's affidavit states that he both transferred complete custody of Threat's Black Bum to Mr. Gray and hired Mr. Gray to train Threat's Black Bum by methods and devices chosen by Mr. Gray, (CX 7); and (2) Respondent testified that, in January 1991, he attended the "Howie in the Hills" horse show, in which Threat's Black Bum was entered and shown by Mr. Gray, but had no objection to Mr. Gray's entering or showing Threat's Black Bum in that horse show, (Tr. 86, 91).

On March 9, 1991, at the Georgia National Horse Show, designated qualified person (also known as a "DQP"),[4] Bo Turner, conducted a pre-show examination of Threat's Black Bum, found Threat's Black Bum to be bilaterally sensitive in the front feet, disqualified Threat's Black Bum from showing, and issued a DQP ticket. (Initial Decision and Order, Findings of Fact No. 5, p. 5; CX 3, 4; Tr. 71.)

Two veterinarians, Dr. Hugh V. Hendricks and Dr. Ronald S. Zaidlicz, employed by the United States Department of Agriculture (hereinafter USDA), examined Threat's Black Bum after the DQP examination. While both Dr. Hendricks and Dr. Zaidlicz recall attending the Georgia National Horse Show on March 9, 1991, neither could recall their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 6, p. 5; Tr. 48-49, 68-69.)

At the time of his examination of Threat's Black Bum, Dr. Hendricks had extensive experience examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act. Specifically, Dr. Hendricks testified that: (1) he had been examining horses to determine whether they were sore since 1978; (2) he personally examined over 1,000

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[4]The term "Designated Qualified Person or DQP" is defined in 9 C.F.R. § 11.1. The certification and licensing requirements for designated qualified persons are set forth in 9 C.F.R. § 11.7. The inspection procedures required to be followed by designated qualified persons are described in 9 C.F.R. § 11.21.

horses to determine whether they were sore; (3) he saw at least 10,000horses examined; (4) he had attended approximately one Horse Protection Act course each year since 1978; and (4) he taught a number of Horse Protection Act courses. (Tr. 44-45.) The record does not establish how much experience Dr. Zaidlicz had examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act, at the time he examined Threat's Black Bum. (Tr. 62-64.)[5]

Dr. Hendricks recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 3), as follows:

> I, H. V. Hendricks am a veterinarian employed with USDA, APHIS, AC. On 3/9/91 I was assigned to work the GA National Horse Show held at Perry, GA. My duties were to inspect horses for compliance with the Horse Protection Act.
>
> On this date I observed the DQP examine a horse entered by John T. Gray. This was a black, 4 year old, male horse named "Threats Black Bum" entered into Class # 155 as exhibitor # 530. On palpation by the DQP he found the horse to be sensitive in both front feet. The horse was disqualified by the DQP and a ticket was issued.
>
> I then examined this entry. Upon palpation of the right and left fore pasterns the horse exhibited a strong and definite pain response. The anterior surface of the fore pasterns just above the coronet band were very sensitive. The horse was also sensitive on the posterior-medial and lateral aspects of both fore pasterns. When the painful areas were palpated the horse would jerk his head upward and try to

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[5]At the time of the hearing in this proceeding, February 14, 1995, Dr. Zaidlicz had been employed by USDA as a veterinary medical officer for 4½ years. Therefore, at the time Dr. Zaidlicz examined Threat's Black Bum, he had only been employed by USDA for approximately 7 months. While Dr. Zaidlicz testified that he attended one Horse Protection Act training course in 1991,(Tr. 63), the record does not establish whether Dr. Zaidlicz attended this course prior to or after his examination of Threat's Black Bum on March 9, 1991. Further, while Dr. Zaidlicz testified that he attended approximately 25 or 26 horse shows to examine horses to determine whether they were sore during the first year he was employed by USDA as a veterinary medical officer, (Tr. 62), the record does not establish how many, if any, of these horse shows preceded the Georgia National Horse Show at which Dr. Zaidlicz examined Threat's Black Bum.

remove his foot from my grip. The abdominal muscles would tighten in response to the pain. The left fore limb was very stiff and was reluctant to flex. The way of going was not normal in that the horse was reluctant to lead.

Dr. Ron Zaidlicz another USDA veterinarian was asked to examine this horse. The horse exhibited the same responses that I found upon his palpation.

Dr. Zaidlicz and I conferred and were in total agreement that this horse was "sore" as defined by the Horse Protection Act.

CX 3.

Dr. Hendricks completed his affidavit on March 9, 1991, within a few hours after his examination of Threat's Black Bum, and executed the affidavit on March 12, 1991. (CX 3; Tr. 37, 55.)

Dr. Zaidlicz recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 4), as follows:

I Ronald S. Zaidlicz DVM am a veterinarian employed with USDA APHIS/REAC. On March 9, 1991 I was assigned to work in the inspection area of the Georgia National Horse Show Perry Georgia. My duties were to work with Dr. Hugh Hendricks USDA APHIS/REAC to monitor and evaluate the Designated Qualified Person (DQP) in the performance of his duties and to examine horses for compliance with the Horse Protection Act.

On this day March 9, 1991 I observed DQP AM "Bo" Turner perform a Preshow exam on a Black 4 yr old stallion named "Threats Black Bum" entered in class # 155 as exhibitor # 530. This horse exhibited pain responses in both front pasterns and was turndown for showing by the DQP Turner and issued a ticket for soreness in both front feet. The horse was then examined by Dr. Hendricks and I observed the same pain responses in both front pasterns when palpated. Dr. Hendricks then asked me to examine the horse. I performed a soreness exam on the horse myself and upon digital palpation of the left forepastern area using light to moderate pressure the horse exhibited definite pain responses over the anterior, posterior lateral & medial surfaces of the pastern. Upon examination and digital palpation of the right forepastern the horse show definite pain responses on the

anterior, posterior, lateral & medial aspects of the pastern. The horses left forelimb was also very stiff and the horse was reluctant to flex left leg for examination of left forepastern. In observing the way of going of the horse he was tucked up behind and very stiff on left hind leg at a walk. Upon examination of both right and left forepasterns the horse would exhibit pain by pulling head up, pulling affected limb back, tensing the abdominal & flank muscles and shifting his weight to the rear. The pain responses were consistent and repeatable each time the areas marked on VOWS Form 19-7 were palpated.

After my exam Dr. Hendricks and I conferred and were in complete agreement that the horse was bilaterally sore and met the criteria to be classified as a "sore" horse as defined by the Horse Protection Act.

Dr. Hendricks then informed the custodian of the horse Mr. John Gray of our findings and that the USDA was writing the horse up as a "sore" horse.

CX 4.

Dr. Zaidlicz completed and executed his affidavit on March 9, 1991, within a few hours after his examination of Threat's Black Bum. (CX 4; Tr. 37-38, 70-71.)

Drs. Hendricks and Zaidlicz also recorded their observations and conclusions regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after their examinations of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.) The Summary of Alleged Violations form, (CX 2), is signed by Drs. Hendricks and Zaidlicz and Mr. Austin L. Bellflower, a USDA investigator, who testified that he completed lines 1 through 23 on the form immediately after Threat's Black Bum was found to be sore. (Tr. 36-37.)

Based upon their examinations of Threat's Black Bum, Drs. Hendricks and Zaidlicz believe that Threat's Black Bum experienced pain while moving. (Tr. 52-53,
71-72.)

Mr. Gray offered no evidence which might controvert the findings made by Drs. Hendricks and Zaidlicz. Mr. Gray did assert that he had examined the forelimbs of Threat's Black Bum prior to proceeding to the exhibition area and that the results of his examination were negative. (Initial Decision and Order, Findings of Fact No. 7, pp. 5-6; Tr. 108.) Mr. Gray asserted that any

pain displayed by Threat's Black Bum upon examination by Mr. Turner and Drs. Hendricks and Zaidlicz was the result of injury suffered by Threat's Black Bum when he tripped over a concrete curbing. (Initial Decision and Order Findings of Fact No. 7, p. 6; Tr. 28, 107-08.) Mr. Gray did not display any history of education in veterinary sciences. (Initial Decision and Order, Findings of Fact No. 7, p. 6.) Respondent stated in his affidavit that he was not at the Georgia National Horse Show, and, therefore, did not know whether Threat's Black Bum was sore or not when he was entered in the Georgia National Horse Show. (CX 7.)

I disagree with the ALJ's findings that testimony given by Dr. Hendricks and Dr. Zaidlicz regarding their actions and observations of March 9, 1991, is not credible, because they had no recollection of their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 12, p. 7.) I agree with the ALJ's finding that Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), are admissible hearsay, but I find it difficult to discern from the Initial Decision and Order the weight that the ALJ gave these documents.[6]

In almost every Horse Protection Act case, USDA veterinarians testifying about the examination of a horse have no recollection of the examination at the time of the hearing. Often USDA veterinarians examine hundreds of horses each year and are asked to testify about the examination of a single horse a year or more after conducting the examination.

In the instant proceeding, Dr. Hendricks and Dr. Zaidlicz conducted a routine examination of Threat's Black Bum almost 4 years prior to the date of the hearing. Dr. Hendricks' affidavit concerning his examination of Threat's Black Bum, (CX 3), is dated March 12, 1991, 3 days after he examined Threat's Black Bum. Dr. Hendricks testified that he prepared the affidavit on March 9, 1991, the date he examined Threat's Black Bum, while the examination was fresh in his mind. (Tr. 55.) Dr. Zaidlicz's affidavit concerning his examination of Threat's Black Bum, (CX 4), is dated March 9, 1991, the date he examined Threat's Black Bum, and Dr. Zaidlicz testified that he prepared the affidavit concerning his examination of Threat's Black Bum, while the examination was fresh in his mind. (Tr. 71.)

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[6]The ALJ states: "The record does not enjoy the testimony of Drs. Hendricks and Zaidlicz which might describe that which they did and saw. Thus, there was no testimony concerning their examinations to which credibility might be attached. The memorializations of their activities, CX 2, 3 and 4, are hearsay documents received into the record for what they are." (Initial Decision and Order, Findings of Fact No. 12, p. 7.)

Mr. Austin L. Bellflower, a USDA investigator authorized under section 1 of the Act of January 31, 1925, (7 U.S.C. § 2217), to take affidavits, testified that he remembered attending the Georgia National Horse Show on March 9, 1991, (Tr. 34), and remembered taking Dr. Hendricks' affidavit, (CX 3), in Atlanta on March 12, 1991. Mr. Bellflower testified: "I believe [Dr. Hendricks] said he wrote [his affidavit] directly after he left the horse show that night and drove home, but I met him in Atlanta, Georgia, on the following Monday morning and I took this affidavit. He swore to it then." (Tr. 37.) Mr. Bellflower also testified that he remembered taking Dr. Zaidlicz's affidavit, (CX 4), on March 9, 1991, the night Dr. Zaidlicz examined Threat's Black Bum. (Tr. 36-37.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Bellflower, Dr. Hendricks, and Dr. Zaidlicz. Dr. Hendricks testified that he completes that part of the Summary of Alleged Violations form for which he is responsible within a few minutes after his examination. (Tr. 50-51.) Mr. Bellflower testified that, "[d]irectly after" Threat's Black Bum had been examined by Drs. Hendricks and Zaidlicz, he completed lines 1 through 23 on the Summary of Alleged Violations form. (CX 2; Tr. 36-37.)

Dr. Hendricks' and Dr. Zaidlicz's affidavits and the Summary of Alleged Violations form in question, (CX 2, 3, 4), are hearsay evidence. However, neither the Administrative Procedure Act under which this proceeding is conducted nor the Rules of Practice applicable to this proceeding precludes the introduction of hearsay evidence. The Administrative Procedure Act provides with respect to the taking of evidence that:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

> Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act. *See, e.g.*,

Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act, (5 U.S.C. § 556(d)), renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings).

The only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). The documents at issue in the instant proceeding bear satisfactory indicia of reliability and were properly admitted into evidence. The documents were signed by the individuals who prepared them and Dr. Hendricks' and Dr. Zaidlicz's statements are affidavits sworn before Mr. Austin L. Bellflower, an individual authorized by law, 7 U.S.C. § 2217, to take affidavits. Dr. Hendricks was trained to examine horses to determine whether they are "sore" as defined by the Horse Protection Act and Dr. Hendricks had years of experience conducting these examinations. Mr. Bellflower testified that he had been an investigator for the Animal and Plant Health Inspection Service for 20 or 25 years, (Tr. 33), and had investigated cases under the Horse Protection Act for 8 or 10 years, (Tr. 34). None of the individuals who prepared the documents in question had reason to record their findings in other than an impartial fashion.[7] The documents reflect a thorough recording of Dr. Hendricks' and Dr. Zaidlicz's activities conducted

[7]Dr. Hendricks, Dr. Zaidlicz, and Mr. Bellflower all testified that, at the time they prepared the affidavits and Summary of Alleged Violations form in question, they were USDA employees. (Tr. 33, 42, 60-61.) I infer, based upon their employment status, that Dr. Hendricks, Dr. Zaidlicz, and Mr. Bellflower were all salaried employees. Moreover, I infer that their salaries, benefits, and continued employment by USDA were neither dependent upon their finding Threat's Black Bum either sore or not sore, nor upon the statements they made in the affidavits and the Summary of Alleged Violations form in question. Drs. Zaidlicz and Hendricks testified that, if they have any doubt about whether a horse is either sore or not sore, within the meaning of the Horse Protection Act, they always give the benefit of the doubt to the owner or custodian of the horse. (Tr. 48, 67.)

in the performance of their duties to enforce the Horse Protection Act and their observations and conclusions regarding Threat's Black Bum.

While neither Dr. Hendricks nor Dr. Zaidlicz remembers examining Threat's Black Bum, (Tr. 49, 68-69), their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2), were created almost contemporaneously with the observations and conclusions they relay when their examinations of Threat's Black Bum were fresh in their minds. (Tr. 55, 71.)

All of the individuals who prepared the documents testified at the hearing in this proceeding and were available for and subject to cross-examination by Respondent. (Tr. 33-75, 112-116.)

Hearsay evidence can constitute substantial evidence if reliable. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1414 (6th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995); *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986); *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Past recollection recorded is reliable, probative, and substantial and fulfills the requirements of the Administrative Procedure Act, (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witnesses' minds. *In re Mike Thomas*, 55 Agric. Dec. ___, slip op at 29 (July 15, 1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Bill Young*, 53 Agric. Dec. 1232, 1253 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision); *In re Eddie C. Tuck, supra*, 53 Agric. Dec. at 284; *In re Jack Kelly, supra*, 52 Agric. Dec. at 1300; *In re Charles Sims, supra*, 52 Agric. Dec. at 1264; *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995).

Even under the Federal Rules of Evidence, it appears that the Summary of Alleged Violations form, (CX 2), Dr. Hendricks' affidavit, (CX 3), and Dr. Zaidlicz's affidavit, (CX 4), would be admissible under Rules 803(5), 803(6), and 803(8)(C), which provide:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .

(5) Recorded Recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(5), 803(6), 803(8)(C).

USDA veterinarian affidavits and Summary of Alleged Violations forms, such as those at issue in the instant proceeding, would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate

circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Hendricks and Zaidlicz and Mr. Bellflower have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Horse Protection Act. Hence, there is no basis, in the instant proceeding, for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations form lacked trustworthiness.

The Judicial Officer has noted, with respect to affidavits prepared by USDA veterinarians for the same purpose as the affidavits and the Summary of Alleged Violations form at issue in the instant proceeding:

> Such affidavits are regularly made as to all of the horses that are "written-up" and are kept in the ordinary course of the Government's business. There is no exclusionary rule applicable to our proceedings which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Similarly, the affidavits by Dr. Kendall, Dr. Wood and Dr. Thompson should have been received as evidence. The affidavits were not unduly repetitious merely because the witnesses testified as to the same matters set forth therein. In fact, I would attach more weight to the affidavits prepared within a few days of the event than to the testimony given 17 months later.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1435 (Remand Order), final decision, 38 Agric. Dec. 1539 (1979).

Responsible hearsay has long been admitted and relied upon in the Department's administrative proceedings.[8] I find that Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged

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[8] *In re Mike Thomas, supra*, at 29; *In re Big Bear Farm, Inc.*, 55 Agric. Dec. ___, slip op. at 37 (Mar. 15, 1996); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 11 (Feb. 7, 1996); *In re Dane O. Petty, supra*, 43 Agric. Dec. at 1466; *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton, supra*, 38 Agric. Dec. at 1435; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Violations form, (CX 2) are admissible and reliable, probative, and substantial evidence, and that Dr. Hendricks and Dr. Zaidlicz are credible witnesses.

Dr. Hendricks' and Dr. Zaidlicz's affidavits describing their findings that Threat's Black Bum exhibited abnormal sensitivity in both front feet are sufficient to raise the statutory presumption of soreness, (15 U.S.C. § 1825(d)(5)), which was not rebutted by Respondent. Moreover, there is no need to rely on the statutory presumption since both Drs. Hendricks and Zaidlicz expressed their expert opinions, which I accept, that Threat's Black Bum was "sore" within the meaning of the Horse Protection Act, (CX 3, 4), and that Threat's Black Bum would have been likely to experience pain while moving. (Tr. 52-53, 71-72.)

Based upon Dr. Hendricks' testimony, Dr. Zaidlicz's testimony, Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), I agree with the ALJ's finding that Threat's Black Bum was sore when he was entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show on March 9, 1991. (Initial Decision and Order, Findings of Fact No. 13, p. 7.)

Respondent admits that at all times material to this proceeding he was the owner of Threat's Black Bum and that Threat's Black Bum was entered as Entry No. 530, in Class No. 155, on March 9, 1991, in the Georgia National Horse Show at Perry, Georgia. (Answer ¶ 4, p. 1.) Complainant proved by much more than a preponderance of the evidence, which is all that is required,[9] that Threat's Black Bum was sore when he was entered in the Georgia National Horse Show, and that Threat's Black Bum was entered in the Georgia National Horse Show with Respondent's permission or acquiescence. These facts are sufficient to establish that Respondent allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D).

Moreover, even applying the test in *Baird v. United States Dep't of Agric., supra*, the record establishes that Respondent allowed the entry of Threat's Black Bum in violation of 15 U.S.C. § 1824(2)(D). The *Baird* court states:

> In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by

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[9]See footnote 2.

establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824. [Footnote omitted.]

Baird v. United States Dep't of Agric., supra, 39 F.3d at 137.

The *Baird* court reversed the Judicial Officer's finding that the Petitioner allowed the entry of sored horses "[b]ecause we find that petitioner actually attempted to prevent, rather than allow, the exhibition or entry of his horses while they were sore." *Baird v. United States Dep't of Agric, supra*, 39 F.3d at 132.

In the instant proceeding, Complainant has "made out a prima facie case of a § 1824(2)(D) violation" required by *Baird*. The record clearly establishes that: (1) Respondent owned Threat's Black Bum at all times relevant to this proceeding, (Answer ¶ 4, p. 1); (2) Threat's Black Bum was entered in the Georgia National Horse Show, (Answer ¶ 4, p. 1); and (3) Threat's Black Bum was sore when entered, (CX 2, 3, 4). While Respondent did offer evidence that he took an affirmative step in an effort to prevent the soring that occurred, I cannot "justifiably credit" that evidence because it is contradicted not only by Mr. Gray, the trainer who entered Threat's Black Bum in the Georgia National Horse Show, but also by Respondent himself.

During the period November 1990 to April 1991, Respondent repeatedly inspected his horses at Mr. Gray's Florida premises. (Tr. 18, 85.) Mr. Gray consistently testified that Respondent never gave him any instructions regarding the method by which Respondent's horses, including Threat's Black Bum, were to be trained. Specifically, Mr. Gray testified as follows:

[BY MS. MEHTA]

Q. How long had you been training Threats Black Bum for Mr. Cole?

[BY MR. GRAY]

A. At the time of the show or --

Q. Well, prior to the show how long did you train it?

A. The horses came in late November of 1990.

Q. Okay. And you stated that the horse was also boarded at your stable; right?

A. Yes.

Q. Did Mr. Cole give any instructions to you as to how to train a horse?

A. No, he did not.

Q. There were no instructions whatsoever?

A. No.

Q. So did he leave it completely to your judgment on how to train the horse?

A. All decisions were made by myself when I was in Florida or whoever rode or took the horse out. Mr. Cole had no input whatsoever into it.

Q. Okay. Did Mr. Cole ever come to inspect the horse while it was being trained by you?

A. He came down occasionally on other business and would stop in and if one of his horses happened to be working or happened to be out, he might watch it for a few minutes. And I do recall one specific show that he went to watch his horses be ridden.

. . . .

Q. Okay. Were the other two of Mr. Gray's horses that you trained, were they also entered in horse shows at the same time?

A. I believe only one other was ever taken to a show.

Q. How long have you trained Tennessee Walking Horses?

A. Well, as a trainer -- I am not a trainer. I've always been an amateur and sometimes not a very good one at that. I've never held a trainer's license or professed to be a trainer of horses, but if any time you take a horse out of the stall or ride a horse or whatever you personally do handling a horse, you're training the horse, you are actually training the horse, and if that is training a horse, then I am the trainer.

. . . .

Q. And [Respondent] authorized your training of [Threat's Black Bum]?

A. Yes.

Q. And the horses you had with him?

A. Yes.

. . . .

Q. You stated earlier that Mr. Cole said nothing at all about the training of the horse or anything that he wanted or did not want done to the horse?

A. No, he gave no specific guidelines as far as --

Q. Did he say anything, you better not do this, you better do this?

A. No.

. . . .

BY MR. AUSTIN

Q. Mr. Gray, as far as the horses you had down there, did Mr. Cole -- when he brought those down there -- I think that was in late November; is that correct?

[BY MR. GRAY]

A. Yes.

Q. And was it pretty well assumed that you would not be soring horses? I mean, was that pretty well a normal assumption that you and Mr. Cole had, that you wouldn't be soring these horses or anything like that?

A. I would believe that to be an assumption, yes.

Tr. 17-19, 100, 105-06.

Respondent's affidavit of May 10, 1991, clearly states that Respondent did not take affirmative steps to prevent soring of Threat's Black Bum, as follows:

I make this affidavit to J. R. Odle who has identified himself as an employee of the U.S. Department of Agriculture.

I am the sole owner of a Tennessee Walking Horse named "Threats Black Bum." I have owned this horse since May 1990. I own about 30 Walking Horses and have been owning Walking Horses for about 30 years. I hired John Gray to train this horse along with about 4 other show horses. He had complete custody of my horses and chose all the methods and devices used to train the horse.

CX 7.

On the one hand, Respondent variously testified regarding the steps he took to prevent the soring of Threat's Black Bum while he was in Mr. Gray's custody, as follows:

[BY MR. AUSTIN]

Q. And did you and Mr. Gray prior to moving the horses down there ever have any discussion about what you were telling him as far as how you wanted your horses taken care of or anything about the soring devices?

[BY MR. COLE]

A. To my knowledge he wasn't even supposed to even show the horses. That's the way we discussed that, and I'm opposed to the soring devices in any way. Never have sored one and of course I've never shown one.

Q. Did you talk to Mr. Gray about the soring situation?

A. Yes.

Q. And what did he assure you as far as the soring was concerned?

A. Well, Mr. Gray assured me he wouldn't do that.

. . . .

Q. Mr. Cole, you've given an affidavit to Mr. Odle and told him, you know, you've been I guess trail riding and living with horses for some 30 years. Do you condone soring of any kind?

A. No.

Q. And did you specifically let Mr. Gray know that?

A. Yes.

. . . .

[BY MS. MEHTA]

Q. Did you leave any instructions with Mr. Gray regarding the training of the horses?

[BY MR. COLE]

A. No. I don't know how to train.

Q. So you didn't tell him anything about that?

A. No, ma'am.

Q. Did you leave it completely to his judgment?

A. Yes, ma'am.

Tr. 87-91.

On the other hand, Mr. Gray consistently testified that he never received any instructions from Respondent regarding the method by which Threat's Black Bum was to be trained.

Respondent's sworn affidavit clearly states that Respondent left "the methods and devices used to train [Threat's Black Bum]" to Mr. Gray. (CX 7.) Respondent's testimony variously supports and contradicts both Mr. Gray's testimony and Respondent's own affidavit. Under these circumstances, Respondent's testimony that he instructed Mr. Gray not to sore Threat's Black Bum is not credible, and I find that Respondent did not take affirmative steps to prevent Mr. Gray's soring Threat's Black Bum.

The ALJ devoted a significant portion of the Initial Decision and Order to a discussion of palpation. (Initial Decision and Order, pp. 8-19.) The ALJ concludes that the determination that palpation alone is sufficiently reliable to evidence soring is a rule and that USDA failed to promulgate this rule in accordance with the Administrative Procedure Act, (5 U.S.C. § 553). (Initial Decision and Order, pp. 14, 19.) Not only is the ALJ's discussion irrelevant to this proceeding because Dr. Hendricks and Dr. Zaidlicz based their conclusions on Threat's Black Bum's "way of going" as well as palpation, but the ALJ's conclusion that palpation is a rule is in error.

Palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act. *In re Mike Thomas, supra*, slip op. at 45; *In re Kim Bennett*, 55 Agric. Dec. ___ slip op. at 6 (Jan. 3, 1996); *In re Eddie C. Tuck, supra*, 53 Agric. Dec. at 292. This Department's reliance on palpation alone to determine whether a horse is sore within the meaning of the Horse Protection Act is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses under the Horse Protection Act. *In re Kim Bennett, supra*, slip op. at 7.

Palpation is a procedure used to examine horses to determine compliance with the Horse Protection Act and the regulations issued under the Horse

Protection Act. A "rule" under the Administrative Procedure Act is defined as:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

> Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy and does not describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making or regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in

accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Horse Protection Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

> "Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the [Horse Protection] Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the [Horse Protection] Act and regulations.

43 Fed. Reg. 18,514, 18,525 (1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Horse Protection Act and the regulations issued under the Horse Protection Act. Except for minor editorial changes, the definition of the word "inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

> "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the [Horse Protection] Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from

the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1).

Findings of Fact

1. Respondent Glen Edward Cole is an individual whose mailing address is (b) (6) (Answer ¶ 2, p. 1; Initial Decision and Order, Findings of Fact No. 1, p. 4.)

2. At all times relevant to this proceeding, Respondent was the owner of the horse known as "Threat's Black Bum." (Answer ¶ 4, p. 1; Initial Decision and Order, Findings of Fact No. 2, p. 5; CX 7.)

3. In November 1990, Respondent moved a number of his horses, including Threat's Black Bum, from Tennessee to Florida for boarding with and training by John T. Gray. (CX 7; Tr. 15-17, 22-23, 25, 84, 99-100.) Threat's Black Bum remained in John T. Gray's custody until April 1991, when Respondent moved Threat's Black Bum back to his premises in Tennessee. (Tr. 22-23, 88, 95-96.)

4. At all times relevant to this proceeding, John T. Gray was the trainer of Threat's Black Bum. (Consent Decision and Order as to John T. Gray, pp. 1-2; CX 7; Tr. 16-17, 84, 91.)

5. During the period November 1990 to April 1991, Respondent repeatedly inspected his horses at John T. Gray's Florida premises. (Tr. 18, 85.) Respondent did not instruct John T. Gray with respect to the methods or devices to be used to train his horses, including Threat's Black Bum. Respondent failed to direct John T. Gray not to sore Threat's Black Bum, and Respondent did not take any affirmative steps to prevent soring of Threat's Black Bum, while Threat's Black Bum was in Mr. Gray's custody. (CX 7; Tr. 17-18, 91, 105-06.) John T. Gray's training methods included the use of chains. (Tr. 17.)

6. On March 9, 1991, Threat's Black Bum was entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (Answer ¶ 4, p. 1; CX 1, 2, 3, 4; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.)

7. On March 9, 1991, John T. Gray entered Threat's Black Bum as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (CX 1, 2, 3; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.)

8. Respondent knew that John T. Gray showed Threat's Black Bum in horse shows and, in January 1991, attended one of the shows in which Threat's Black Bum was entered and shown. (Tr. 18, 86, 91, 99-100.) John T. Gray had general authorization from Respondent to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show at Perry, Georgia, during the period November 1990 to April 1991, when Threat's Black Bum was in John T. Gray's custody. (Tr. 18-19, 91, 99-100.)

9. On March 9, 1991, at the Georgia National Horse Show, designated qualified person ("DQP"), Bo Turner, conducted a pre-show examination of Threat's Black Bum, found Threat's Black Bum to be bilaterally sensitive in the front feet, disqualified Threat's Black Bum from showing, and issued a DQP ticket. (Initial Decision and Order, Findings of Fact No. 5, p. 5; CX 3, 4; Tr. 71.)

10. Two veterinarians, Dr. Hugh V. Hendricks and Dr. Ronald S. Zaidlicz, employed by USDA, examined Threat's Black Bum after the DQP examination. Both Dr. Hendricks and Dr. Zaidlicz recall attending the Georgia National Horse Show on March 9, 1991, but at the time of the hearing in this proceeding neither Dr. Hendricks nor Dr. Zaidlicz could recall their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 6, p. 5; Tr. 48-49, 68-69.)

11. At the time of his examination of Threat's Black Bum, Dr. Hendricks had extensive experience examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act. (Tr. 44-45.)

12. Both Dr. Hendricks and Dr. Zaidlicz found that Threat's Black Bum experienced pain in both front legs in the same areas. (Initial Decision and Order, Findings of Fact No. 6, p. 5; CX 2, 3, 4.)

13. Dr. Hendricks observed that, upon palpation, Threat's Black Bum exhibited strong and definite pain responses by jerking his head upward, trying to remove his foot from Dr. Hendricks' grasp, showing a reluctance to flex his limbs, and tightening of abdominal muscles. Dr. Hendricks observed that these pain responses were consistent and repeated. Dr. Hendricks also observed that Threat's Black Bum's "way of going" was not normal. (CX 2, 3.)

14. Dr. Zaidlicz observed that, upon palpation, Threat's Black Bum exhibited definite pain responses by pulling his head up, pulling his affected limbs back, tensing his abdominal muscles, and shifting his weight to the rear. Dr. Zaidlicz observed that these pain responses were consistent and repeated. Dr. Zaidlicz also observed that Threat's Black Bum's "way of going" was not normal. (CX 2, 4.)

15. Drs. Hendricks and Zaidlicz conferred after their examinations of Threat's Black Bum and agreed that Threat's Black Bum was "sore," as that term is defined in the Horse Protection Act. (CX 2, 3, 4; Tr. 54, 71.)

16. Dr. Hendricks recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 3), which he completed on March 9, 1991, within a few hours after his examination of Threat's Black Bum, and executed on March 12, 1991. (CX 3; Tr. 37, 55.) Dr. Hendricks also recorded his observations and conclusion regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after his examination of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.)

17. Dr. Zaidlicz recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 4), which he completed and executed on March 9, 1991, within a few hours after his examination of Threat's Black Bum. (CX 4; Tr. 37-38,
70-71.) Dr. Zaidlicz also recorded his observations and conclusion regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after his examination of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.)

18. Dr. Hendricks' affidavit, (CX 3), which contains a record of his observations and conclusion regarding Threat's Black Bum, was recorded when his examination of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, was fresh in Dr. Hendricks' mind. (CX 3; Tr. 55.) Dr. Zaidlicz's affidavit, (CX 4), which contains a record of his observations and conclusion regarding Threat's Black Bum, was recorded when his examination of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, was fresh in Dr. Zaidlicz's mind. (CX 4; Tr. 71.) Drs. Hendricks and Zaidlicz completed and signed a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), when their examinations of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, were fresh in their minds. (CX 2; Tr. 50-52.)

19. Based upon their examinations of Threat's Black Bum, Drs. Hendricks and Zaidlicz believe that Threat's Black Bum experienced pain while moving. (Tr. 52-53, 71-72.)

20. Mr. Gray offered no evidence which might controvert the findings made by Drs. Hendricks and Zaidlicz. However, Mr. Gray did assert that he had examined the forelimbs of Threat's Black Bum prior to proceeding to the exhibition area and that the results of his examination were negative. (Initial Decision and Order, Findings of Fact No. 7, pp. 5-6; Tr. 108.) Mr. Gray asserted that any pain displayed by Threat's Black Bum upon examination by

Mr. Turner and Drs. Hendricks and Zaidlicz was the result of injury suffered by Threat's Black Bum when he tripped over a concrete curbing. (Initial Decision and Order, Findings of Fact No. 7, p. 6; Tr. 28, 107-08.) Mr. Gray did not display any history of education in veterinary sciences. (Initial Decision and Order, Findings of Fact No. 7, p. 6.)

21. Threat's Black Bum was sore when Respondent allowed Threat's Black Bum to be entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show on March 9, 1991. (CX 2, 3, 4.)

Conclusion of Law

Respondent Glen Edward Cole violated section 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)), by allowing the entry, for the purpose of showing or exhibiting, of a horse known as "Threat's Black Bum" at the Georgia National Horse Show in Perry, Georgia, on March 9, 1991, while the horse was sore.

Sanction

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring"horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.
>
> The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a

blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

> [T]he nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." In most cases, the maximum civil penalty of $2,000 per violation is warranted. *In re Mike Thomas, supra*, slip op. at 53; *In re C.M. Oppenheimer, supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1323 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Linda Wagner, supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott, supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper, supra*, 42 Agric. Dec. at 62.

Respondent violated section 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)), by allowing the entry, for the purpose of showing or exhibiting, of Threat's Black Bum at the Georgia National Horse Show in Perry, Georgia, while the horse was sore. The nature, extent, and gravity of

the violation are revealed by Dr. Hendricks' and Dr. Zaidlicz's description of Threat's Black Bum's responses to palpation and "way of going," as follows:

> Upon palpation of the right and left fore pasterns[, Threat's Black Bum] exhibited a strong and definite pain response. The anterior surface of the fore pasterns just above the coronet band were very sensitive. The horse was also sensitive on the posterior-medial and lateral aspects of both fore pasterns. When the painful areas were palpated the horse would jerk his head upward and try to remove his foot from my grip. The abdominal muscles would tighten in response to the pain. The left forelimb was very stiff and was reluctant to flex. The way of going was not normal in that the horse was reluctant to lead.

CX 3.

> On this day March 9, 1991 I observed DQP AM "Bo" Turner perform a Preshow exam on a Black 4 yr old stallion named "Threats Black Bum" entered in class # 155 as exhibitor # 530. This horse exhibited pain responses in both front pasterns and was turndown for showing by the DQP Turner and issued a ticket for soreness in both front feet. The horse was then examined by Dr. Hendricks and I observed the same pain responses in both front pasterns when palpated. Dr. Hendricks then asked me to examine the horse. I performed a soreness exam on the horse myself and upon digital palpation of the left forepastern area using light to moderate pressure the horse exhibited definite pain responses over the anterior, posterior lateral & medial surfaces of the pastern. Upon examination and digital palpation of the right forepastern the horse show definite pain responses on the anterior, posterior, lateral & medial aspects of the pastern. The horses left forelimb was also very stiff and the horse was reluctant to flex left leg for examination of left forepastern. In observing the way of going of the horse he was tucked up behind and very stiff on left hind leg at a walk. Upon examination of both right and left forepasterns the horse would exhibit pain by pulling head up, pulling affected limb back, tensing the abdominal & flank muscles and shifting his weight to the rear. The pain responses were consistent and repeatable each time the areas marked on VOWS Form 19-7 were palpated.

CX 4.

I find that, under these circumstances, the nature, extent, and gravity of Respondent's violation of the Horse Protection Act are sufficient to warrant the assessment of a civil penalty of $2,000.

The record also establishes Respondent's culpability. Respondent hired Mr. Gray to train Threat's Black Bum and some of his other horses, (CX 7; Tr. 15, 84-85, 100). Respondent failed to direct Mr. Gray not to sore his horses, (Tr. 17-18, 105-06), and, in fact, Respondent states in his affidavit that Mr. Gray "had complete custody of my horses and chose all methods and devices used to train the horse[s]." (CX 7.) John T. Gray, Respondent's trainer, used action devices (chains) on Threat's Black Bum's legs during training. (Tr. 17.) Respondent then allowed the entry of Threat's Black Bum in the Georgia National Horse Show. Owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when entered. *In re Mike Thomas, supra*, slip op. at 54 (Respondent is an absolute guarantor that his use of action devices during training will not cause the horse to be sored); *In re Keith Becknell, supra*, 54 Agric. Dec. at 340 (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sored).

Although Respondent did not instruct Mr. Gray to sore Threat's Black Bum, (Tr. 108), and there is no evidence in the record that Respondent intended to have Threat's Black Bum sored, intent is of no consequence under the Horse Protection Act and regulations issued under the Horse Protection Act. The Horse Protection Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait," and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th

Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2:

> The legislation makes the following substantive modifications in the existing law governing this program:
>
> 1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent, at the time of the hearing, had owned Tennessee Walking Horses for approximately 30 years, (CX 7; Tr. 83), and then owned approximately 12-15 Tennessee Walking Horses, (Tr. 92). Despite Respondent's experience as an owner of Tennessee Walking Horses, Respondent allowed the entry of Threat's Black Bum while the horse was sore. I find that, under these circumstances, Respondent's degree of culpability is sufficient to warrant the assessment of a civil penalty of $2,000.

Further, the record establishes that Respondent has the ability to pay a civil penalty of $2,000 and that the assessment of a $2,000 civil penalty would not affect Respondent's ability to continue to do business. (Respondent testified that: he owned approximately 12-15 Tennessee Walking Horses, (Tr. 92); he is in the blue jean manufacturing business, (Tr. 83); and he breeds and sells Tennessee Walking Horses for pleasure, (Tr. 92, 94)).

The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend that a $2,000 civil penalty be assessed against Respondent. (Complainant's Proposal, pp. 22, 28; Complainant's Appeal Brief, p. 26.) An examination of the record in the instant proceeding does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of $2,000 per violation is warranted.

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under section 6(b) of the Horse Protection Act, (15 U.S.C. § 1825(b)), may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Horse Protection Act or the regulations issued under the Horse

Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act or the regulations issued under the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who had the economic means to pay civil penalties as a cost of doing business. *See* H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1706.

Section 6(c) of the Horse Protection Act, (15 U.S.C.§ 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty assessed under 15 U.S.C. § 1825(b). While section 6(b)(1) of the Horse Protection Act, (15 U.S.C.§ 1825(b)(1)), requires that the Secretary consider the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in determining the amount of the civil penalty to be assessed, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C.§ 1825(c).) *In re Mike Thomas, supra*, slip op. at 57 (the nature, circumstances, extent, and gravity of the prohibited conduct and the degree of culpability, the history of prior offenses, ability to pay, and effect on ability to continue to do business are not relevant factors in determining whether to issue a disqualification order under the Horse Protection Act); *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Horse Protection Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Horse Protection Act for the first time. *In re Mike Thomas, supra* (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for

first violation of the Horse Protection Act); *In re Tracy Renee Hampton, supra* (Respondent assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Cecil Jordan, supra* (Respondent Crawford assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Linda Wagner, supra* (Respondents assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re John Allan Callaway, supra* (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act).

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824. The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend that Respondent be disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. (Complainant's Proposal, pp. 22, 28; Complainant's Appeal Petition, p. 26.)

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Glen Edward Cole is assessed a civil penalty of $2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Tejal Mehta, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

2. Respondent Glen Edward Cole is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

In re: GARY R. EDWARDS, LARRY E. EDWARDS, CARL EDWARDS & SONS STABLES, WILLIAM V. BARKLEY, JR., and KAY BARKLEY.
HPA Docket No. 91-0113.
Decision and Order as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables filed November 5, 1996.

Civil penalty — Disqualification order — Exhibiting a sored horse — Preponderance of the evidence — Statutory presumption — Palpation — Past recollection recorded.

The Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondent Gary R. Edwards exhibited a horse while the horse was sore, but held that the other Respondents, Larry E. Edwards and Carl Edwards & Sons Stables, did not violate the Horse Protection Act (the owners had earlier consented). Respondent Gary R. Edwards was assessed a civil penalty of $2,000and was disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, and from managing, judging, or otherwise participating in any horse show, exhibition, sale, or auction. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinions of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded made while the events were still fresh in the minds of the witnesses is reliable, probative, and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raises the statutory presumption of a sore horse. The evidence of very extreme pain response upon palpation is also sufficient to make a *prima facie* case, which supports a finding of a violation of the Horse Protection Act, even in the absence of the presumption. There is no substantial evidence to support the ALJ's conclusion that the horse's abnormal sensitivity was caused by a "stumble" in the show. The *Martin* case does not help Respondents. Only

Respondent Gary R. Edwards exhibited Rare Coin; Respondent Larry E. Edwards, a partner, and Carl Edwards & Sons Stables, the partnership, did not violate the Horse Protection Act. Pre-show passage by the DQP is meaningless to the post-show USDA inspection. Respondents' expert who had never examined the horse, but merely analyzed the videotape, given little weight. Respondent who exhibited the horse has no status to direct USDA veterinary staff on the proper method of examination of the horse. USDA and its witnesses are not biased against owners, exhibitors, or trainers of Tennessee Walking Horses. ALJ's Third Initial Decision and Order, like the two before it, are reversed and vacated because the ALJ failed to correct errors as directed by the Judicial Officer. ALJ's two new theories on palpation, that palpation is a rule subject to APA rule making and that palpation lacks a required "scientific" basis, are both rejected. ALJ erred: by giving no or scant credibility to USDA witnesses, by inferring that testimony of additional USDA experts would have been adverse to Complainant, and by assigning unwarranted great weight and credibility to Respondents' witnesses, even after Judicial Officer guidance on this issue. The ALJ's attack on palpation evidence, based upon the *Young* decision, is refuted by the Judicial Officer's *Bennett* decision. Respondent was an absolute guarantor that the horse would not be sore when exhibited. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 5-year disqualification on Respondent, in addition to a $2,000 civil penalty.

Colleen A. Carroll, for Complainant.
Peter N. Priamos, Torrance, CA, for Respondents.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

TABLE OF CONTENTS

I. INTRODUCTION.

This case is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831)(hereinafter the Horse Protection Act), which proceeding the Judicial Officer remanded to Administrative Law Judge Paul Kane (hereinafter ALJ) for correction of enumerated ALJ refusals to follow established United States Department of Agriculture (hereinafter USDA) policy and precedent. My review of the record and of the ALJ's Third Initial Decision and Order (Aug. 11, 1995) (hereinafter Third IDO) reveals that the ALJ's refusals to follow USDA policy and precedent are not corrected therein. Consequently, this proceeding would have been now thrice remanded to Judge Kane had he not retired. However, a third remand not being possible, the Third IDO is necessarily reviewed herein.

The ALJ summarizes the Complaint (which was amended to charge "exhibiting" in lieu of "entering"), as follows:

> The Administrator of the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture, by complaint filed March 11, 1991, alleges that on May 30, 1990, respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables, acting through Gary R. Edwards, entered, and William V. Barkley, Jr. and

> Kay Barkley allowed the entry,[1] of a horse, for the purpose of showing or exhibiting, while the horse was sore, in violation of the Horse Protection Act, Pub. L. 91-540, December 9, 1970, 84 Stat. 1404, as amended. . . .

Third IDO, pp. 1-2 (footnote omitted). However, the ALJ erroneously concludes by ordering that "[p]roof of the essential allegation having failed, the complaint as to Gary R. Edwards, Larry E. Edwards and Carl Edwards & Sons Stables is, in all aspects, dismissed with prejudice." (Third IDO, p. 31.)

On November 20, 1995, Complainant appealed to the Judicial Officer to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).[2] On January 23, 1996, Respondents filed "Respondent's Response to Appeal Petition of Third Initial Decision and Order, and Points and Authorities in Opposition to Appeal of Complainant" (hereinafter Respondents' Response), and on January 29, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Third IDO is reversed and vacated. My final Decision and Order finds that Respondent Gary R. Edwards committed the violation charged in the Amended Complaint, and imposes a $2,000 civil penalty and a 5-year disqualification order on Respondent Gary R. Edwards, which is the sanction requested by the administrative officials for this Respondent.

A. Complaint.

The Administrator of the Animal and Plant Health Inspection Service, USDA (hereinafter Complainant), by Complaint filed March 11, 1991, alleges in pertinent part:

I

---

[1]Respondents William V. Barkley, Jr., and Kay Barkley entered into a Consent Decision filed January 10, 1992, and are, therefore, no longer parties to this proceeding.

[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

A. Respondent Gary R. Edwards is an individual whose mailing address is (b) (6)

B. Respondent Larry E. Edwards is an individual whose mailing address is (b) (6)

C. Respondent Carl Edwards & Sons Stables is a partnership in which Respondents Gary R. Edwards and Larry E. Edwards are partners.

D. . . . .

E. At all times material herein, Respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables were the trainers of the horse known as "Rare Coin" and, through Respondent Gary R. Edwards, entered this horse as Entry No. 524, in Class No. 9, on May 30, 1990, at the Money Tree Classic Horse Show at Columbia, Tennessee.

II

On May 30, 1990, Respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables, acting through Respondent Gary R. Edwards, in violation of section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "Rare Coin" as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show at Columbia, Tennessee, while the horse was sore. (The Amended Complaint charges Respondents with *exhibiting* a sore horse under section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)).

Complainant seeks the imposition of civil penalties and the disqualification of Respondents from participation in horse shows, exhibitions, sales, and auctions for a period of time. By separate Answers filed April 3, 1991, Respondents, through counsel, deny the allegation of the Complaint that the horse was sore.

B. Chronology.

A hearing was held on December 19 and 20, 1991, in Birmingham, Alabama, before the ALJ. Proposed findings and briefs were subsequently filed by counsel. The ALJ issued three successive Initial Decisions and Orders, each dismissing the Complaint. Dismissals were based in large part on the ALJ's erroneous conclusion that the documentary evidence, which the ALJ determined was the sole evidentiary basis in support of the Complaint, lacked trustworthiness sufficient to sustain the government's burden of proof by a preponderance of the evidence, because the government's witnesses had

no present recollection of the events alleged in the Complaint. Complainant timely appealed each Initial Decision and Order, *seriatim*.

Complainant is represented by Colleen A. Carroll, Esq., Washington, D.C. Respondents are represented by Paul D. Priamos, Esq., Torrance, California.

C. Statutes.

The following statutory provisions are applicable to this case:
Section 2(3) of the Horse Protection Act provides:

> As used in this chapter unless the context otherwise requires:
>
> . . . .
>
> (3) The term "sore" when used to describe a horse means that—
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

Section 5(2) of the Horse Protection Act provides:

> The following conduct is prohibited:
>
> . . . .
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

Section 6(b)(1) of the Horse Protection Act provides:

> (1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(c) of the Horse Protection Act provides:

> (c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of

this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

Section 6(d)(5) of the Horse Protection Act provides:

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

II. RESPONDENT GARY R. EDWARDS EXHIBITED RARE COIN AT THE MONEY TREE CLASSIC HORSE SHOW WHILE THE HORSE WAS SORE.

Upon consideration of all matters of record, the following Findings of Fact and Conclusions of Law are reached. As a result thereof, there is entered an Order assessing Respondent Gary R. Edwards a civil penalty of $2,000 and disqualifying Respondent Gary R. Edwards from showing, exhibiting, or entering any horse or from otherwise participating in any horse show, exhibition, sale, or auction for a period of 5 years.

A. Findings of Fact.

1. Respondents Gary R. Edwards and Larry E. Edwards are individuals whose mailing address is (b) (6) [redacted] they are general partners, along with their mother, Etta Edwards, in Respondent Carl Edwards & Sons Stables. (Answer ¶ I; Tr. 374-77, 467, 471-72.)

2. Respondent Carl Edwards & Sons Stables is a general partnership engaged in the business of boarding and training Tennessee Walking Horses; the business address is Route 4, Box 212, Dawson, Georgia 31742. (Answer ¶ I; Tr. 409-11.) However, while the partnership's trainers, Larry E. Edwards, Gary R. Edwards, and Ernest Upton, are all trainers licensed by the National

Horse Show Regulatory Commission, Carl Edwards is deceased, and neither Etta Edwards nor Carl Edwards & Sons Stables are licensed trainers. The licensed trainers all train their own separate horses and very rarely, if ever, work with another trainer's horses. (CX 6, p. 1; Tr. 376-77, 409-12, 467, 472.)

3. At all times material herein, Respondent Gary R. Edwards was the trainer of the horse known as "Rare Coin," and, on May 30, 1990, Respondent Gary R. Edwards exhibited Rare Coin as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show in Columbia, Tennessee (hereinafter the Money Tree Classic). (CX 4, item no. 14, CX 6, p. 1; RX 1, p. 1; Tr. 376.)

4. On May 30, 1990, Rare Coin tied for second place in his class, and was thereafter examined by Dr. Tyler Riggins and Dr. Allen M. Knowles, two highly qualified and very experienced USDA, Animal and Plant Health Inspection Service (hereinafter APHIS), Veterinary Medical Officers (hereinafter VMOs), who found a "very extreme pain response" on the front and rear of Rare Coin's right pastern and an "extreme pain response" on the front and rear of Rare Coin's left pastern. Both VMOs' expert opinions were that the soreness was caused by either caustic chemicals, mechanical devices, or a combination of caustic chemicals and mechanical devices. (CX 2, 3, 4; Tr. 102, 108-09, 187.)

5. Rare Coin was likely to have experienced pain in both pasterns of his front feet when exhibited as Entry No. 524, in Class No. 9, at the Money Tree Classic, on May 30, 1990. (CX 2, 3, 4.)

6. Drs. Riggins and Knowles recorded their findings in sworn affidavits and a Summary of Alleged Violations, VOWS Form 19-7, while the results of their examinations were fresh in their minds.

7. Although Drs. Riggins and Knowles did not remember the Money Tree Classic in great detail, they did remember working that show. Their testimony, based upon their affidavits, (CX 2, 3), and Summary of Alleged Violations, VOWS Form 19-7, (CX 4), is past recollection recorded, and is routinely admitted and given appropriate weight.

8. The horse show interruption episode on the videotape, (RX 3), does not reveal that Rare Coin stumbled, or that his forelegs hit the ground, each other, or anything else; but, rather, that Rare Coin reared and moderately bucked.

B. Conclusion of Law.

On May 30, 1990, Respondent Gary R. Edwards, in violation of section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), exhibited the

horse known as "Rare Coin" as Entry No. 524, in Class No. 9, at the Money Tree Classic, while the horse was sore.

C. Discussion.

The Amended Complaint alleges that Rare Coin was sore on May 30, 1990, when Gary R. Edwards exhibited Rare Coin at the Money Tree Classic, and that, the partnership, Carl Edwards & Sons Stables, and a general partner, Larry E. Edwards, are deemed also to have violated the Horse Protection Act. (The Amended Complaint did not name general partner Etta Edwards as a Respondent deemed also to have violated the Horse Protection Act.)

Complainant, as the proponent of an Order, has the burden of proof in cases under the Administrative Procedure Act (hereinafter APA), such as this one, and the standard of proof by which the burden is met is the preponderance of the evidence standard.[3] In this proceeding, Complainant has shown by much more than a preponderance of the evidence that Respondent Gary R. Edwards has committed the violation alleged in the Amended Complaint. However, Complainant has failed to show that either

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[3]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); In re Jim Singleton, 55 Agric. Dec. ___, slip op. at 3 n.2 (July 23, 1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

Larry E. Edwards or Carl Edwards & Sons Stables can properly be deemed also to have violated the Horse Protection Act.

1. Complainant's Case.

Complainant presented the testimony of two highly qualified and very experienced USDA VMOs, Drs. Tyler Riggins and Allen Knowles. Both VMOs examined Rare Coin on May 30, 1990, and determined that Rare Coin was abnormally and bilaterally sensitive. (Tr. 101-04, 112-21 (Dr. Riggins), Tr. 185-208 (Dr. Knowles).) Dr. Riggins has been a VMO for 26 years, and was previously in private practice. (Tr. 83.) Dr. Knowles was in private practice for 2 years and has been a VMO for 18 years. (Tr. 171-72.) Dr. Riggins has examined 7,000 to 8,000 horses over the past 10 years, and Dr. Knowles has examined around a thousand horses each year, between 1974 and 1990, for soreness under the Horse Protection Act. (Tr. 84-85, 172.)

Each VMO described in detail the procedure he uses to examine a horse for abnormal, bilateral sensitivity. (Tr. 85-87 (Dr. Riggins), Tr. 174-80 (Dr. Knowles).) Both VMOs conducted the same basic examination, and they both followed their normal procedures when they examined Rare Coin. (Tr. 86-87, 111-12, 157-58, 174-75, 193.)

The VMOs, as explained by Dr. Riggins, watch the way a horse walks and look for signs of pain during palpation, including withdrawing of the feet, tucking of the abdominal muscles, jerking of the head, and rearing, as follows:

[BY MS. CARROLL:]

Q. And what are you looking for when you're doing this examination?

[BY DR. RIGGINS:]

A. I'm looking for how the horse will react to my palpation. Moving the foot, jerking the foot, moving the body, shifting of the weight to the back, tightening of muscles and jerking of the head and all those [things] . . . .

. . . .

Q. And what kind of things are you looking for in the horse's way of walking?

A. Well, a free, easy kind of gait and not pulling or he's walking like he's not kind of sore-footed or something. It's just a free and easy gait is one we like to see.

Tr. 87-88.

The VMOs always return to the area which, upon palpation, caused a pain response from the horse to see if the response is repeated. (Tr. 93-94, 175-76.) Dr. Riggins testified that a horse that is not sore will not respond repeatedly to palpation of specific areas, as follows:

[BY MS. CARROLL:]

Q. . . . Can you tell me what you mean by sore?

[BY DR. RIGGINS:]

A. When I apply pressure on a horse's pastern, the horse will respond and I will have some body movement or jerking the foot or have a pain response to that pressure, that's what I kind of define as being sore.

Q. And are those responses that would not come from a horse that's not sore?

. . . .

A. When you apply pressure on a horse, sometimes a horse will move his foot. But a horse won't consistently move the foot when you apply pressure unless it's sore in that area. And that's why I can't respond to that yes or no, because some time a horse will just move his foot. And, then, you've got to determine whether he's moving it from being sore and, therefore, you go back to the place a time or two just to determine this.

Tr. 92-93.

The veterinarians testified that they must agree that a horse is sore in both feet before they will "write it up." (Tr. 98, 181-82, 184.) When they agree, they document their findings on a Summary of Alleged Violations, VOWS

Form 19-7. (Tr. 97-98, 100-01, 182-84.) Thereafter, each VMO prepares an affidavit based on that form and his memory of the examination. (Tr. 101.)

Both VMOs recalled working at the Money Tree Classic in May 1990, and both testified that their duties were to observe the DQPs examine the horses, try to prevent sore horses from entering the show, and examine horses after they come out of the show. (Tr. 101, 184-85.) The USDA examines winning horses because, as Dr. Knowles testified: "[W]e decided several years ago that if anything was done to one of the horses to aid in winning that it would obviously be one of the winners that it was done to." (Tr. 185; also, see Dr. Riggins' similar testimony at Tr. 101-02.)

Dr. Riggins testified that he recalled examining Rare Coin because he won second place. (Tr. 102, 108-09, 111; CX 2.) Dr. Knowles prepared a VOWS Form 19-7 immediately after he and Dr. Riggins examined Rare Coin and agreed that the horse was sore. (Tr. 203-04.) Both VMOs testified that Complainant's Exhibit No. 4 is the same VOWS Form 19-7 they filled out on Rare Coin, that it accurately reflects their examinations, and that they had agreed on what Dr. Knowles wrote. (Tr. 102-04, 106, 108, 187-88, 203.) Although Dr. Knowles did not remember the details of his examination, he testified that his notations on the VOWS Form 19-7 accurately reflect his observations at the time and were made on the day he examined Rare Coin. (CX 4; Tr. 187-89.) Each VMO prepared an affidavit within 24 hours of his examination. (CX 2, 3; Tr. 29-31, 108, 161, 203-05, 209.)

Rare Coin was written up as sore because of bilateral, abnormal pain responses to palpation. Moreover, the VMOs' testimony and documentary evidence allows the conclusion that Rare Coin probably experienced pain during his performance in the show. (CX 4, item no. 35; Tr. 291.)

Rare Coin's bilateral, abnormal pain responses raises the presumption under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)), that Rare Coin was sore. *See Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), *printed in* 40 Agric. Dec. 922, 924-25 (1981) (burden of persuading trier of fact that horse was sored remains with Secretary, and presumption in 15 U.S.C. § 1825(d)(5) shifts burden of going forward with evidence to Respondent, once the Secretary has introduced evidence of bilateral, abnormal sensitivity or inflammation); *In re Eldon Stamper*, 42 Agric. Dec. 20, 27 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Respondents failed to rebut the presumption through evidence that the horse's abnormal, bilateral sensitivity was caused by something other than soring. Gary R. Edwards testified that he had added "a wedge" to Rare Coin's

shoes that morning, and suspected that it caused the horse to stumble and injure himself. (Tr. 384-85.) Under the Horse Protection Act, a horse that suffers physical pain or distress, inflammation, or lameness as a result of artificial means is a sore horse. (15 U.S.C. § 1821(3).) Therefore, even if it were true and could be proven that the added wedge caused the stumble and a resultant injury, which I find is by no means clearly the case on this record, (as is explained, *infra*), it still would not necessarily relieve Gary R. Edwards from liability for exhibiting Rare Coin, while the horse was sore.

Rare Coin gave an "exaggerated pain response" when the USDA veterinarians palpated his front pasterns. (Tr. 113.) Dr. Riggins examined the horse first, as described in his testimony:

Q. (By Ms. Carroll) Can you describe your examination of Rare Coin?

[BY DR. RIGGINS:]

A. I picked up the left front foot -- left front foot, examined the posterior pastern, moved to the -- pulled the foot forward, examined the right, I mean, the pastern on the same foot, on the left foot, anterior pastern. Put it down, went around the horse and examined the back pastern on the right foot and the front pastern. And I got pain responses in both posterior and anterior pastern on both feet.

Q. Were there any specific areas that gave you a response?

A. Yes, across the back on the back pastern and across the front of the front pastern on both feet.

Q. Can you gauge how much response you got?

A. I got exaggerated pain response.

Q. How was that demonstrated to you?

A. By trying to pull the foot back, raising that foot up, jerking the head back, tightening muscles, shifting the feet and type responses like that.

Q. Okay. Was one foot more responsive than the other?

A. Yes, I had the right foot got more pain response than I did on the left foot.

Q. Okay. And you talked about some withdrawal. I mean, would that -- a quick motion or a slow motion?

A. Just -- it was a rather quick one. When I would put pressure on the foot, the horse would try to withdraw the foot from me.

Q. And during your examination were you -- you were able to complete the examination according to the procedure you described earlier?

A. Yes, ma'am.

Q. Did you revisit areas that gave you a response?

A. I went back to them enough times so that I was sure I was getting a pain response in those areas.

Q. Okay. Did you palpate any area above the pastern?

. . . .

A. Yes, I normally -- that's what I do.

Q. Okay. Did you get any response in these areas?

A. I -- the only pain response I got was when I examined the pastern, the anterior and fronterior [sic] pastern.

Tr. 112-14.

Dr. Riggins recorded the results of his examination in his affidavit the next day, as follows:

On this night I examined a sorrel horse that showed in class 9 as exhibitor #524 and tied in second place. I first checked the left foot. When I palpated the posterior and anterior pasterns, the horse showed

extreme pain responses by jerking its foot and tucking the abdominal muscles.

When I palpated the posterior and anterior pasterns of the right front foot, the horse would raise its head, jerk the foot and tuck the abdominal muscles showing signs of very extreme pain.

CX 2, p. 1.

Dr. Knowles noted that, during Dr. Riggins' examination, the horse showed take-away movement of the forelimbs along with tightening of the abdominal muscles. (CX 3; Tr. 207-08.) When Dr. Knowles examined Rare Coin, he responded the same way. (CX 3; Tr. 196-98, 208.)

I approached the left side of the horse and picked up the left front foot. I found an extreme pain response on both the posterior and anterior pastern. The horse tried to withdraw his foot, tightened his abdominal muscles, and shifted weight to his rear legs when the painful areas were palpated. I moved to the right foot and found an even more severe pain response on this posterior and anterior pastern. The horse showed an extreme take-away response, along with tightening of the abdominal muscles, and shifting of weight to the rear feet when the painful areas were palpated.

CX 3.

Dr. Riggins watched Dr. Knowles' examination and saw that "[h]e got practically the same response that I did and in the same areas of the foot that I got." (Tr. 120.) Even Gary R. Edwards agreed that Rare Coin reacted abnormally when Drs. Riggins and Knowles and DQP Charles Thomas palpated his feet. (Tr. 424.)

An examination of the evidence convinces me that Rare Coin was likely to have experienced pain while moving in the show, and, therefore, was "sore" within the meaning of the Horse Protection Act, (15 U.S.C.§ 1821(3)). Rare Coin wore chains in the show. (CX 4, item no. 25; RX 3 at 9:59.) These action devices hit Rare Coin in the same areas that responded to palpation, as described by Dr. Riggins specifically, as "across the back on the back pastern and across the front of the front pastern on both feet," (Tr. 113, 291). Dr. Knowles, moreover, testified that the VOWS Form 19-7 indicates exactly where he (Dr. Knowles) illustrated that Rare Coin responded to palpation on specific areas of his front pasterns, (CX 4, item no. 35):

[BY MS. CARROLL:]

Q. . . . What do they indicate?

[BY DR. RIGGINS:]

A. The Xs indicate where we found the painful responses.

Q. And where are those Xs?

A. All across the anterior pastern and the posterior pastern.

Tr. 199-200.

Those areas correspond to the places where the chains were placed during the actual exhibition of Rare Coin. (RX 3 at 9:59.) Dr. Knowles testified that: "We found pain in the pastern area on both anterior and both posterior surfaces, which is essentially the same places that the chain would contact the horse." (CX 4, item no. 35; Tr. 291.) Thus, I infer, that Rare Coin, who abnormally responded to palpation of certain areas on both his front pasterns, was in pain when he was exhibited just moments before with action devices that hit the pasterns on those same areas.

Dr. Riggins concluded that Rare Coin was sored by the use of caustic chemicals and/or chains, based on the "way the horse reacted to my examination" and on his knowledge of no "other way that a horse could be sore except by those two." (Tr. 124, 144, 149.) Dr. Knowles agreed, adding that caustic chemicals can be visually undetectable. (CX 3; Tr. 162, 198-99.)

2. Respondents' Case.

In Respondents' Proposed Findings of Fact, Conclusions of Law, Order and Brief; and Memorandum of Points and Authorities in Opposition to Complainant's Motion to Amend Complaint (hereinafter Respondents' Proposal) (June 17, 1992), Respondents proposed findings and made other arguments, some of which are reproduced here below, as pertinent:

- that at all times material herein, Gary R. Edwards was Rare Coin's trainer;

- that Gary R. Edwards exhibited Rare Coin as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show in Columbia, Tennessee, on May 30, 1990;

- that other Respondents named in the Complaint (Larry E. Edwards and Carl Edwards & Sons Stables) and one non-Respondent (Etta Edwards), whether variously licensed as horse trainers, or not, or included as general partners in Carl Edwards & Sons Stables, or not, were in no way involved, or assisted Gary R. Edwards, in any of the training, entering, or exhibiting of Rare Coin at the Money Tree Classic;

- that Complainant's CX 4, VOWS Form 19-7, lists Gary R. Edwards as the trainer (item no. 14), the presenter (item no. 7), and the rider (item no. 16) of Rare Coin, but the form does not mention Larry E. Edwards or Carl Edwards & Sons Stables;

- that Gary R. Edwards entered Rare Coin in the pertinent event, as the two involved VMOs watched DQP Charles Thomas pass Rare Coin in pre-show inspection, which makes clear that the horse was not sore before the show;

- that the horse's owner (W.V. Barkley, Jr.) took a video of Rare Coin in the pertinent event, which is in this record as RX 3;

- that, after the pertinent event, on the video appear Dr. Randy Baker and Respondent Gary R. Edwards, as Dr. Baker examines Rare Coin; and

- that the videotape, made during the event, shows that Rare Coin "stumbled" twice, breaking the horse's breast strap, which stumbling occasioned a several-minute break for horse and rider to compose themselves.

Up to this point, I agree with Respondents' arguments and proposed findings, except I find that the horse did not actually stumble and that the pre-show passage by a DQP for entry does not "make clear that the horse was not sore before the show," even when the DQP's examination is witnessed by two

USDA VMOs. Moreover, I do not agree with the remainder of Respondents' case, reproduced below, for the reasons explained, *infra*:

- that during the pertinent event, Rare Coin injured himself in the pastern area of both front legs when Rare Coin twice stumbled in the ring;

- that qualified horse expert Dr. Jay Humburg testified that the video, (RX 3), caused Dr. Humburg to believe that it is possible that Rare Coin injured both front pasterns when he stumbled;

- that Dr. Humburg testified he could not determine soreness in a horse by palpation alone, but he would need to see the horse move;

- that the government VMOs relied upon palpation alone, and barely saw the horse led up to them;

- that Gary R. Edwards right away took Rare Coin through post-show inspection, telling the DQP and both VMOs that the horse had stumbled badly and had hurt himself;

- that the VMOs did not adequately examine Rare Coin post-show for injuries;

- that the video-taped, post-show examination of Rare Coin by Dr. Baker revealed no evidence of heat, redness, scurf, inflammation, or swelling in either front pastern;

- that Dr. Baker's statement after his examination and his testimony at the hearing was that the horse was not chemically sored;

- that there are no scientific studies to show whether digital palpation tests can determine soreness under the Horse Protection Act;

- that the evidence of Rare Coin's stumbling twice in the ring, and resultant injury, rebuts the presumption that the horse was sore by artificial means;

- that Respondents urge that it is not irrelevant that Rare Coin passed the pre-show inspection; and

- that USDA and government witnesses are biased against the owners, exhibitors, and trainers of Tennessee Walking Horses, that USDA VMOs do not even examine other breeds at multi-breed shows, and that this bias caused Drs. Riggins and Knowles to assume that Rare Coin was sore.

3. A Preponderance of the Evidence Supports a Finding That Rare Coin Was Sore at the Post-Show Inspection at the Money Tree Classic, on May 30, 1990, in Columbia, Tennessee.

Much more than a mere preponderance of the evidence supports the finding that Respondent Gary R. Edwards exhibited Rare Coin, while sore. I adopt Complainant's version of the facts set forth in the *Discussion*, *supra*, because those facts are fully supported in the record. To summarize: two very experienced and well-qualified USDA VMOs both found Rare Coin bilaterally and abnormally sensitive during the routine post-show exam for a (tied for) second place horse. They agreed to write up Rare Coin as sore when both VMOs got "very extreme pain response" in the front and back of the right pastern and "extreme pain response" in the front and back of the left pastern. They concluded that Rare Coin probably experienced pain during the show. Their conclusion was based on the fact that the chains Rare Coin wore in the show were configured to strike directly upon the spots determined to be extremely painful by the VMOs. The VMOs documented their findings on VOWS Form 19-7 and both VMOs supplemented their VOWS Form 19-7 with testimony and a sworn affidavit. Both VMOs testified that part of their routine examination is to observe whether the horse leads freely.

Abnormal, bilateral sensitivity raises the statutory rebuttable presumption of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)). I find that this record evidence is sufficiently strong to support a *prima facie* case of soring irrespective of, and in addition to, the rebuttable presumption.

Respondents' case, in summary, is that Rare Coin was not sore pre-show, as evidenced by the fact that Rare Coin was passed by the DQP in the presence of the two attending USDA VMOs. Moreover, Respondents argue that any soreness found post-show was caused by Rare Coin stumbling twice during the show and not caused by chemical soring. Respondents attack, as

unreliable, digital palpation evidence if used as the only diagnostic evidence. Also, Respondents challenge the methodology and efficacity of the examinations performed on Rare Coin by USDA's VMOs.

Additionally, Respondents' expert witnesses, Drs. Humburg and Baker, supported Respondents' argument that stumbling could possibly have caused Rare Coin's bilateral, abnormal sensitivity. Respondents' veterinary witnesses testified that Rare Coin had no heat, scurf, swelling, inflammation, or redness in either leg after the show. Dr. Baker testified that he opined that Rare Coin was not chemically sored.

Finally, Respondents argue that the digital palpation test has no scientific basis; that the stumbling evidence rebuts the statutory presumption that Rare Coin's abnormal, bilateral sensitivity was artificially induced; and that, in any event, USDA and government witnesses are biased against the Tennessee Walking Horse breed, and its owners, exhibitors, and trainers.

I have carefully examined the record evidence, in light of Respondents' arguments, and I find that Respondents have neither rebutted the statutory presumption nor overcome the preponderance of the evidence produced by Complainant.

a. Rare Coin's "Stumbling" Was Actually Rearing and Bucking, Which Do Nothing to Rebut the Presumption.

Respondents' most important argument is that Rare Coin stumbled twice during the show, which Respondents contend explains any soreness detected by the USDA VMOs in the horse's pasterns. Respondents' argument actually has two parts: (1) that Respondents' evidence of a non-artificial cause (stumbling) for abnormal, bilateral sensitivity of both of the horse's pasterns rebuts the presumption of soreness under section 6(d)(5) of the Horse Protection Act, (15 U.S.C.§ 1825(d)(5)); and (2) that should the presumption of soreness be rebutted, the evidence of a non-artificial cause (stumbling) is sufficiently dispositive of the evidence of abnormal, bilateral sensitivity that Complainant's *prima facie* case is not then supported by a preponderance of the evidence, unless Complainant has specific evidence of an artificial means of soring under *Martin v. United States Dep't of Agric.*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24).

I have very carefully examined the autoptic[4] evidence, the horse show videotape, (RX 3). I find that Rare Coin did not "stumble" in either alleged "stumbling" sequence; but, rather, that Rare Coin did "rear," and moderately "buck." These distinctions are important because the definitions of these words, as used in horse parlance, place a very different connotation on what the videotape reveals that Rare Coin actually did at the Money Tree Classic.

Webster's Ninth New Collegiate Dictionary 1171 (1986) defines "stumble" as "to trip in walking or running" and "to walk unsteadily or clumsily." However, the word "rear" has a specific horse connotation: "to cause (a horse) to rise up on the hind legs," and "*of a horse*: to rise up on the hind legs." (Emphasis in original) (*Id.* at 981.)

Similarly, although not as descriptive of what Rare Coin actually did--but still more accurate than "stumble"--is that Rare Coin "bucked." "Buck" also has a horse parlance meaning: "to throw (as a rider) by bucking" and "*of a*

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[4]I find RX 3, the videotape of Entry No. 524 (Rare Coin), Class No. 9, at the Money Tree Classic, showing Rare Coin (*but not* including Dr. Baker's subsequent examination, which is recorded on RX 3 after the horse show), to be autoptic/demonstrative evidence, upon which no testimony is needed to determine the truth of the matter contained therein:

> **Evidence**
>
> . . . .
>
> *Autoptic evidence*. Type of evidence presented in court which consists of the thing itself and not the testimony accompanying its presentation. Articles offered in evidence which the judge or jury can see and inspect. Real evidence as contrasted with testimonial evidence; *e.g.* in contract action, the document purporting to be the contract itself, or the gun in a murder trial. ***See Demonstrative evidence.***

Black's Law Dictionary 556 (6th ed. 1990).

> **Demonstrative evidence**. That evidence addressed directly to the senses without intervention of testimony. Such evidence is concerned with real objects which illustrate some verbal testimony and has no probative value in itself. People v. Diaz, 111 Misc.2d 1083, 445 N.Y.S.2d 888, 889. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

Id. at 432.

horse or mule: to spring into the air with the back arched." (Emphasis added) (Id. at 184.)

Rare Coin did not throw the rider, when he sprang into the air with back arched, but observation of the videotape, (RX 3), reveals that the horse reared and moderately bucked. Rare Coin can be seen putting both front feet forcefully down at the same time; but, at no time can Rare Coin be seen to trip or stumble. Rare Coin's pasterns, then, certainly never made contact with the ground, or with each other. Therefore, I find that the videotape reveals that Rare Coin did not stumble, trip, or bring his pasterns into contact with the ground, with other objects, or with each other.

However, Rare Coin did rear and buck at two easily discernible points in the exhibition, breaking a "breast" strap. After a period of time, the competition resumed, with no discernible harm to Rare Coin. (RX 3.) I find that the broken strap likewise had no discernible effect on Rare Coin.

I am also convinced that Rare Coin was not injured in the rearing episode, because Rare Coin continued to perform and performed well enough to tie for second place in a 5-horse field. Thus, I reject the ALJ's conclusion, (Third IDO, p. 28), that Dr. Knowles deviated from proper regulatory parameters when he testified that he assumed Rare Coin was not injured because he was allowed to continue to compete after the "stumble" and won second place (tied). (Tr. 290.) Moreover, Rare Coin was not chosen for examination by USDA VMOs because the horse appeared injured, was lame, or had a suspicious gait; but, rather, the horse was examined for the routine reason that the horse placed second (tied). All first and second place horses are examined post-show by these USDA VMOs. (Tr. 185-86.)

Initially, as for "stumbling" as an explanation for soreness, the United States Court of Appeals for the Sixth Circuit has not accorded stumbling the status of automatically explaining bilateral sored conditions in horses sensitive to touch in suspicious places on both front legs, as explained in *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). In the *Fleming* case, the Judicial Officer addressed such stumbling, as follows:

> Chief Judge Campbell's findings and conclusions are abundantly supported by the record and the applicable law. The evidence against respondent is as strong as in any case I have seen under the Horse Protection Act. Accordingly, the initial decision and order is adopted as the final decision in this proceeding. . . .
>
> . . . .

3. Respondent further urges that the horse[] injured itself while in the show ring (Finding of Fact 4) and, presumably, that injury was mistaken by the USDA veterinarians as an indication of abusive soring.

Respondent's explanation is that the horse stumbled in the ring and dragged its right leg in the dirt. While this might explain a bruise on the horse's right foreleg, the USDA veterinarians, however, found abnormal sensitivity on both the anterior and posterior aspects of both forelegs. The horse also had an abnormal thermal pattern (indicating abnormal inflammation) on both the anterior and posterior aspect of both forelegs. Thus, the accidental injury could not have produced the sensitivity found in both forelegs. Further, there is also evidence in the record which tends to show that the fall would not have resulted in the open wound on the horses' right front pastern. Dr. James' deposition, pp. 9-10.

In re Preach Fleming, *supra*, 40 Agric. Dec. at 1522, 1530.

On review, the Sixth Circuit disposed of the stumbling-made-the-horse-sore argument in a footnote, as follows:

The appellants did present some alternative explanations for their horses' sored conditions. Appellant Preach Fleming argued that his horse slipped to one "knee" during its performance and Joe Fleming stated that his horse had suffered a flare-up of tendonitis. Rowland and Meadows suggested that their horse had been "quicked" in one hoof by improper shoeing. None of these explanations, however, contradict the USDA proofs. *Neither quicking in one hoof or a slip to one knee, for example, explains why both of the horse's legs were abused, inflamed and sensitive to touch in an equal degree in the same locations.* Tendonitis, the examining veterinarians testified, would not cause the soreness they found. There was also evidence that tendonitis would not explain the variations in thermo patterns found on the horse. The ALJ fully considered these arguments and weighed the evidence accordingly.

Fleming v. United States Dep't of Agric., 713 F.2d 179, 187-88 n.12 (6th Cir. 1983) (emphasis added).

Similarly, USDA VMOs in the case, *sub judice*, testified that stumbling did not explain the pattern and type of abnormal, bilateral sensitivity they found in Rare Coin. (Tr. 93-95, 132-34, 166-67, 178, 180-81, 314-15, 323-26.)

Moreover, the VOWS Form 19-7 clearly shows "very extreme pain response" on the front and back of the right pastern, and "extreme pain response" on the front and back of the left pastern.

Thus, in the *Fleming* case, where the horse actually stumbled, and the horse's leg actually made contact with the ground, the Sixth Circuit still did not accept stumbling as an explanation for bilateral, abnormal sensitivity. Here, as in *Fleming*, I conclude that, even if the horse stumbled, (I do not believe Rare Coin actually stumbled), it does not explain the (very) extreme pain responses on the front and back of both of Rare Coin's pasterns, at just the locations on the pasterns at which the chains would hit. I find that Rare Coin did not injure himself by stumbling, but merely, and harmlessly, reared and bucked. Nevertheless, as in *Fleming*, even if Rare Coin is seen to have stumbled, it does not explain the pattern and severity of the sore spots detected.

b. The *Martin* Decision Does Not Help Respondents.

The ALJ and Respondents hinge a great deal of their conclusions and arguments herein, respectively, on *Martin v. United States Dep't of Agric.*, *supra*.[5] (Third IDO, pp. 24, 27-28; Complainant's Appeal of Third Initial Decision and Order; and Memorandum of Points and Authorities in Support of Appeal (hereinafter Complainant's Appeal of Third IDO), p. 33 (Nov. 20, 1995); Respondents' Response, p. 5).

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[5]The United States Court of Appeals for the Sixth Circuit did not publish *Martin*, instead placing it under Sixth Circuit Rule 24, which reads in pertinent part:

> (c) Citation of Unpublished Decisions. Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel *serves a copy thereof on all other parties* in the case and on the court. *Such service may be accomplished by including a copy of the decision in an addendum to the brief.*

United States Court of Appeals for the Sixth Circuit, Rule 24(c) (emphasis added). (A copy of *Martin* is attached as Appendix A.)

A citation to *Martin* in either the United States Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit,[6] where *Martin* does not obtain, is certainly not controlling there. Yet, *Martin* may be addressed hypothetically under the facts of this case, *sub judice*.

I conclude that *Martin* does not help Respondents herein. Since the *Martin* opinion is attached hereto, there is no need to explicate the whole case, which contains other issues such as burden of proof, burden of persuasion, and past recollection recorded, which are important elsewhere. For this part of the case, the statutory presumption, and the Department's burden after a Respondent rebuts the presumption, are paramount.

Essentially, *Martin* holds that, when Complainant has introduced *substantial* evidence of abnormal, bilateral sensitivity, thereby raising the statutory presumption under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)), but Respondent has produced *credible* evidence of a natural cause for the soreness, thus rebutting the presumption, Complainant must then produce *specific* evidence that the horse was sored by artificial means. *Martin v. United States Dep't of Agric.*, *supra*, slip op. at 12-13.

The *Martin* court defined "substantial" evidence, which definition is excerpted, just below; but, it did not define "credible" evidence. For purposes of this discussion, I will use definitions from Black's Law Dictionary:

> **Credible.** Worthy of belief; entitled to credit. ***See Competency; Character; Reputation.***
>
> *Credible evidence.* Evidence to be worthy of credit must not only proceed from a credible source but must, in addition, be "credible" in itself, by which is meant that it shall be so natural, reasonable and

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[6]Section 6(b)(2) of the Horse Protection Act, in relevant part, provides that: "Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] . . . may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. . . ." (15 U.S.C. § 1825(b)(2).) Section 6(c) of the Horse Protection Act, in relevant part, provides that: "The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)]." (15 U.S.C. § 1825(c).) The record establishes that Respondents reside in and have their place of business in Dawson, Georgia. Therefore, appeal of the instant proceeding would be to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Eleventh Circuit.

> probable in view of the transaction which it describes or to which it relates as to make it easy to believe it, and credible testimony is that which meets the test of plausibility. Indiana Metal Products v. N.L.R.B.,C.A.Ind. 442 F.2d 46, 52.

Black's Law Dictionary 366-67 (6th ed. 1990).

In *Martin*, the court carefully set forth the substantial evidence standard (actually citing *Fleming*), as follows:

> This court reviews a USDA decision under the Horse Protection Act to determine whether the proper legal standards were employed and whether substantial evidence supports the decision. 15 U.S.C. § 1825(b)(2). Substantial evidence consists of evidence adequate for a reasonable fact finder to reach the conclusion. *Fleming*, 713 F.2d at 188. Substantial evidence:
>
> > [I]s more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantiality of the evidence must be based upon the record taken as a whole. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
>
> *Murphy v. Secretary of HHS*, 801 F.2d 182, 184 (6th Cir. 1986) (citations omitted).

Martin v. United States Dep't of Agric., *supra*, slip op. at 10.

(1) Respondents' Evidence of "Stumbling" Is Not Credible Evidence to Rebut Presumption Under *Martin*.

As has been shown, "stumbling" is not credible evidence for an alternative explanation for the type of bilateral, sored condition detected in the horse in the Sixth Circuit's *Fleming* case, and I do not find that stumbling explains Rare Coin's condition either. Moreover, with Rare Coin, it is actually rearing and bucking, which is even a less plausible explanation for bilateral sensitivity than the actual stumble in *Fleming*, where one of the horse's forelegs hit the track.

Thus, Respondents fail under *Martin* to rebut the presumption, because the facts herein do not fulfill the *credible* evidence standard required by *Martin*. In weighing the evidence, the *Martin* court specifically recognized the Judicial Officer's authority to draw his own inferences, not encumbered by the contrary determinations of the ALJ, as long as substantial evidence supports the Judicial Officer's conclusion, as follows:

> The JO is not bound by the ALJ's determination, and is free to draw his own inferences, so long as substantial evidence supports the JO's conclusion. *Rowland v. USDA*, 43 F.3d 1112, 1114 (6th Cir. 1995).

Martin v. United States Dep't of Agric., *supra*, slip op. at 10-11.

I find that there is substantial evidence that Rare Coin's rearing and bucking form no alternative explanation for the VMOs' subsequent post-show determination of extreme bilateral sensitivity. Therefore, I find that Rare Coin did not stumble, but did rear and moderately buck, and was not injured thereby.

The Eleventh Circuit has held that, once the Department's position is supported by substantial evidence, the role of the reviewing court is limited, and the court must affirm the Secretary's findings:

> Our role as a reviewing court is limited. We must affirm the findings of the Secretary of Agriculture if they are supported by substantial evidence. 15 U.S.C. § 1825(b)(2); *see also Fleming v. USDA*, 713 F.2d 179, 188 (6th Cir. 1983). Substantial evidence is:
>
> > something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.
>
> *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966). If the ultimate findings and conclusions could reasonably have been drawn from the primary evidentiary facts we, as a reviewing court, may not "displace the . . . [Secretary's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).

Thornton v. United States Dep't of Agric., 715 F.2d 1508, 1510 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295, 297 (1992).

It cannot be fairly held on this record that the Secretary may not reasonably choose to conclude that Rare Coin's abnormal, bilateral extreme soreness was caused artificially by Respondents' actions, rather than to conclude that Rare Coin's rearing and bucking somehow "naturally" caused "very extreme pain responses" on his right pastern, front and back, and "extreme pain responses" on his left pastern, front and back, and in the very places where chains were placed to strike on the sore spots. For these reasons, even under *Martin*, I conclude that Rare Coin was sored by artificial means, because rearing and bucking during the show form no credible evidence that the horse was sore from natural causes.

(2) If Merely Plausible Evidence, and Not Actual Evidence, Which Is Also Credible, Is Allowed to Rebut Under *Martin*, USDA Will Disregard *Martin*.

To continue the analysis of *Martin*, *vis-a-vis* the case, *sub judice*, I note that both proceedings feature the ALJ finding that Respondents had rebutted the presumption. In *Martin*, the ALJ had found that the abnormal, bilateral sensitivity was caused by a recurring fungal infection, rather than by artificial means. When the Judicial Officer reversed, based upon the testimony of USDA VMOs, the Sixth Circuit found that the Judicial Officer erred, as follows:

> However, the issue of whether the presumption was rebutted by Petitioners is more difficult. The ALJ found that Petitioners had rebutted the presumption, by providing evidence that the sensitivity was caused by a recurring fungal infection, rather than by artificial means. The JO rejected this inference, noting that the USDA's doctors found no evidence of fungus and had opined that the soreness was caused by artificial means. We believe that the *JO failed to credit adequately the evidence* that the horse's fungus was recurring, and had in fact visibly erupted again about nine days after the show at issue in this case, after the trainer stopped applying medication. We find that Petitioners rebutted the presumption that soreness was a result of artificial means, by producing testimony that Pride's Dixie Queen suffered from a recurring fungus, and expert testimony that this fungus could cause sensitivity without being visible.

Martin v. United States Dep't of Agric., *supra*, slip op. at 12 (emphasis added).

This passage is somewhat supportive of the Department's position, because it recognizes that the Judicial Officer has the responsibility to determine the credit Respondents' "natural cause" evidence deserves. However, the *Martin* court is patently (and I believe erroneously) concerned with "credible" evidence of a natural cause for the soreness, rather than substantial evidence, to determine if the presumption is rebutted, because the *Martin* court so held, as follows:

> We hold that, once the party accused of soring the horse has produced credible evidence of a natural cause for the soreness, the agency must produce evidence that the horse was made sore by artificial means.

Martin v. United States Dep't of Agric., *supra*, slip op. at 13).

The *Martin* court's finding--that once Respondents have produced any "credible" evidence of a natural cause and expert testimony that the natural cause could cause (not even "did cause") the sensitivity, the presumption is (seemingly) automatically rebutted--could make enforcement of the Horse Protection Act extremely difficult.

This difficulty follows because the *Martin* court went on to place an almost insurmountable burden on the Department in cases where the presumption is rebutted. To wit, the *Martin* court recognized that USDA veterinarians found the soreness to be caused by artificial means, but the court found no specific record evidence of chemical or physical injury to the horse, as follows:

> We recognize that the USDA veterinarians stated that the horse's soreness was from artificial means. The record does not demonstrate any evidence or reasoning to support the examining doctors' belief that the soreness was caused artificially. It appears from the testimony that they reached their conclusion without observing any specific evidence of chemical or physical injury to the horse. For example, they did not record observing scars, *see Rowland v. USDA*, 43 F.3d 1112 (6th Cir. 1995) or irritation, inflammation, or evidence of use of caustic chemicals. *See Elliott v. Administrator, APHIS*, 990 F.2d 140, 146 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *Thornton v. USDA*, 715 F.2d 1508 (11th Cir. 1993). Their only specific observation was that the horse "showed excessive movement of the forelimbs along with tightening of the abdominal muscles" when palpated by Dr. Riggins, and

a "mild pain response" in her left foot and a "moderate pain response" in her right foot when palpated by Dr. Knowles. Dr. Riggins speculated at the hearing that such a response would not be due to a fungal infection that was not visible, but admitted he had no basis for this belief.

Martin v. United States Dep't of Agric., *supra*, slip op. at 13.

Thus, if Respondents introduce "credible natural cause evidence" combined with "expert supporting testimony," which combination automatically results in the rebutting of the soring presumption, the *Martin* court requires specific evidence of an artificial cause. The Department has never before been required to determine the exact methods used to sore a horse. This lack of a requirement to show specific evidence of soring was addressed in *Billy Gray*, where the Judicial Officer relied on the Eleventh Circuit's reasoning to reject an argument for such specific evidence, as follows:

> Thus, Complainant's evidence is sufficient to raise the presumption of soreness under the Act; as both VMO's signed their affidavits on November 6, 1987, the day of the event, and the Summary of Alleged Violations form was completed on November 9, 1987, the third day after the event. Respondent's criticism of the methodology, length of time, and thoroughness of the USDA veterinarians' examinations--which Respondent condemns as *conclusory*--is not persuasive that the bilateral abnormal sensitivity found by both VMO's cannot support a finding of soreness. (Respondent's Appeal Brief at 22-25.)
>
> In fact, the ALJ properly addressed this argument in her discussion of the kinds and amounts of "specific factual data" accumulated by the VMO's and recorded contemporaneously with their decision on *soreness* (Initial Decision at 18-19). Respondent argues that USDA did not allege and prove a specific cause of "sore," but, rather, formulated "indicia of pain" (this is the ALJ's term (*Id.*)) leading to a *conclusory* determination of a violation.
>
> This argument is completely without merit. *The Department does not have to prove the specific cause of injury*. This has already been set forth, *supra*, in the excerpt from my decision in *Edwards* (*citing Gray* and *Holcomb*), which was recently *affirmed per curiam* by the Eleventh Circuit, whereupon the Supreme Court denied *certiorari*. Thus,

Respondent's derivative argument--that no *prima facie* case was made--also fails.

In re Billy Gray, 52 Agric. Dec. 1044, 1076 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994) (emphasis added).

This issue is of sufficient importance to the enforcement of the Horse Protection Act that the referenced language from *Gray* is reproduced below. In *Gray*, the Sixth Circuit affirmed the Department's reasoning based on *In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992). The language concerning *Edwards*, as set forth in *Gray*, is as follows:

> The evidence that "Pride's Night Prowler" was sore relates in part on the observations by two USDA veterinarians and the Show's Designated Qualified Person of the reaction of "Pride's Night Prowler" to their palpation of the horse's front pasterns. Frequently, the evidence relates solely to observations based on palpation. As stated in *In re Edwards*, 49 Agric. Dec. 919, 919 (1990) (Order Denying Petition for Reconsideration of *In re Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 946 F.2d 1549 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992)), "[i]n many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns." In the original decision in *Edwards*, in affirming the finding of the ALJ that the horses involved in the case were sore, based solely on evidence of the horses' reaction to palpation, the Judicial Officer stated (49 Agric. Dec. at 204–06):
>
> > Respondents contend, in particular, that no thermovision was used here, but thermovision has not been used by the Department at a horse show since about 1981 (Tr. 485-86). Ample precedent exists for finding that a horse was sored, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. See, e.g., *In re Purvis*, 38 Agric. Dec. 1271, 1274-79 (1979); *In re Whaley*, 35 Agric. Dec. 1519, 1523 (1976). As stated in *Purvis, supra*, 38 Agric. Dec. at 1273-74:

Both veterinarians determined that the horse was sored primarily because mild or light palpation of the pastern area of each front foot revealed a sensitive spot about the size of a dime on the medial surface of the bulb of the heel on the rear portion of each front foot. The sensitive spots were almost identically located on each foot, and were in the exact spot where the collar worn on the feet during the Show would "bang" as the feet moved up and down.

In *re Whaley*, *supra*, 35 Agric. Dec. at 1523, it is stated:

Respondent Groover testified that the horse was not sored. In addition, the respondents argued that complainant did not use a swab test, photographs or thermographs. . . .[5]

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[5]As held in *In re A.S. Holcomb*, HPA Doc. No. 18, 35 Agr Dec [1165, 1167] (decided July 26, 1976), the professional opinion of a Department veterinarian based on his physical examination of a horse is sufficient to support a finding that a horse was sored.

In *In re Gray*, 41 Agric. Dec. 253, 254-55 (1982), it is stated:

Experience in many Horse Protection Act cases over the years demonstrates that many horses which have been sored show evidence of pain only on the anterior portion of the legs or only on the posterior portion of the legs. This is not unusual and does not discredit evidence that the horse was sore. *It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore.* [Footnote omitted.] Moreover, the statute raises a presumption that a horse is sore "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" (15 U.S.C. § 1825(d)(5)). There is no requirement that the

horse manifest abnormal sensitivity on both the anterior and posterior surfaces of its forelimbs or hindlimbs.

In *In re Holcomb*, 35 Agric. Dec. 1165, 1167 (1976), it is stated:

> It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait. *It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.*

In re Billy Gray, supra, 52 Agric. Dec. at 1069-71 (emphasis added).

The preceding analysis should convince a reviewing panel that substantial evidence supports the Judicial Officer's determination that the alleged stumbling forms no explanation for the peculiar sored condition of Rare Coin.

Regarding the *Martin* analysis, the court's holding is that the Judicial Officer has the authority and responsibility to credit adequately the "natural cause" evidence, regardless of Respondents' expert testimony evidence. *Martin v. United States Dep't of Agric., supra*, slip op. at 12. To wit, the Judicial Officer may find the presumption not rebutted if Respondents' natural cause evidence is not creditable (the court probably meant "plausible"), even if the Respondents' expert witness declares that such a natural cause *theoretically* could cause the detected soreness.

The future may hold the unhappy event that a reviewing panel decides to implement the following flawed *Martin* reasoning: thence forth the presumption of soreness is automatically rebutted once a Respondent puts on any credible/plausible evidence of a natural cause for a sored horse, combined with expert testimony that such natural cause is a plausible explanation for the soreness. If so, the Judicial Officer will nonetheless not acquiesce to *Martin's* mandate for specific evidence of the artificial means of soring the horse. Such a requirement is unprecedented in the case law, appears nowhere in the

statute, contravenes the intent of Congress, and, ultimately, could make it impossible to enforce the Horse Protection Act.

(3) Regardless of the Rebuttable Presumption Requirements in *Martin*, Respondents Herein Are Subjected to the Exception in *Martin* for a Certain Pattern and Severity of Bilateral Sensitivity.

Having said all this about *Martin*, Respondents herein are still not helped by *Martin*. This result follows from the particular language used by the VMOs to describe the pain suffered by Rare Coin. As set forth above, Rare Coin had "very extreme pain response" on both the front and back of the right pastern; and "extreme pain response" on the front and back of the left pastern. The sore spots were specifically described by the VMOs to be just where the chains would hit during a show, making it extremely likely that the horse would experience pain while moving. Dr. Riggins testified that he knew of no other way for Rare Coin to be sore than by caustic agents and chains. It could not happen by slipping or falling down in the show ring. (Tr. 144; see also Tr. 132, 142, 159.)

Under these circumstances, *Martin* has an exception to the specific evidence requirement, as follows:

> Unlike other cases in which we have found "soring" that meets the requirements of the statute, the doctors here did not find that the horse's soreness was in such a pattern or so severe that there could be "no other means of producing this pattern of inflammation," *Gray*, 39 F.3d at 677, nor did the doctors find scars and lesions that indicate use of chemical agents and mechanical devices, *Fleming v. USDA*, 713 F.2d at 188.

Martin v. United States Dep't of Agric., *supra*, slip op. at 16-17.

I find that the particular pattern of bilateral, abnormal sensitivity and the severity of soreness exhibited by Rare Coin, as documented by the VMOs, are such that there could be no other means of producing this pattern of inflammation than by artificial means. Both USDA veterinarians testified that their professional opinion was that Rare Coin's pain had been caused by artificial means, and they excluded other possible causes of it. (Tr. 132, 142, 144, 159; and see Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief; and Memorandum of Points and Authorities in Support

of Complainant's Motion to Amend, pp. 14-18 (May 7, 1992).) Consequently, even if Respondents are allowed to rebut the presumption of soreness under section 6(d)(5) of the Horse Protection Act, (15 U.S.C.§ 1825(d)(5)), and the Department has no specific evidence of soreness by artificial means, the *Martin* decision still allows Respondents to be held liable for soring Rare Coin because the pattern and the severity of the bilateral, abnormal sensitivity are such that there exists no other means of causing such a sored condition than by artificial means.

(4) *Prima Facie* Case.

As pointed out in section 3.a., *supra*, Complainant has put on evidence much more than sufficient to make out a *prima facie* case. In fact, Gary R. Edwards admits that the horse did not pass the USDA examination, and that the horse moved when palpated. (CX 5A.)

I find that there is a great deal of very accurate detail in support of the *prima facie* case in Complainant's Appeal of Third IDO, Part II, "The Respondents Did Not Rebut the Government's Evidence," pp. 27-42 (Nov. 20, 1995). I agree with Complainant's explication of the facts and evidence from the record, which support the *prima facie* case. Rather than increase the size of this already lengthy Decision and Order, I adopt pages 27-42 of Complainant's Appeal of Third IDO as my own and attach the pertinent part as Appendix B.

c. Respondents' Remaining Arguments Have No Merit.

Respondents' remaining arguments are either without merit, or if meritorious, do not obviate Respondent Gary R. Edwards' violation. Respondents are correct that Gary R. Edwards and only Gary R. Edwards trained Rare Coin. I accept all of Respondents' arguments to the effect that Gary R. Edwards is solely responsible for any violation herein, and that Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables did not violate the Horse Protection Act.

(1) Only Gary R. Edwards Is Properly Found to Have Exhibited Rare Coin.

Specifically, Complainant's Appeal of Third IDO, pp. 47-49, cites the State of Georgia law of partnerships and various record exhibits and testimony to make the argument that general partners of a stable, and the stable, itself, must be held jointly liable for Horse Protection Act violations, such as the one here. However, Complainant cites neither a section of the Horse Protection Act, nor any pertinent case law, to support this argument. A finding that the general partners in Carl Edwards & Sons Stables and that Carl Edwards & Sons Stables violated the Horse Protection Act is not supported by the evidence in this record. Only Gary R. Edwards has been shown liable for the violation herein. This conclusion is based upon the wording of the Horse Protection Act and the case law, because the Horse Protection Act does not mention "trainers," but does mention owners, as follows:

> The ALJ concluded that Complainant had wrongfully gone against Erma as trainer, when the evidence was that Jack actually trained the horse (Initial Decision at 5 (Findings 3, 4), 12 (Discussion)). However, it is irrelevant who trained the horse. What is important concerning the statute is whether *someone* "entered" the horse, which comes under section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B))—"entering . . . in any horse show . . . any horse which is sore," or whether an owner allowed the entry of a horse which is sore (15 U.S.C. § 1824(2)(D)). The Act says nothing about *trainers*, but does prohibit *owners* specifically from *allowing* the prohibited activities (15 U.S.C. § 1824(2)(D)). Realistically, it is usually the trainer who enters the horse, but it does not have to be, under the Act. I find that both Jack Kelly and Erma Kelly were each more than sufficiently involved in the *entry process* for both to have violated section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), by entering "Jo Jack's Pride" in the horse show, while the horse was sore, for the additional reasons below.
>
> "'Entering,' within the meaning of the Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians." *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir. 1993), *cert. denied*, 114 S.Ct 191 (1993). "[T]he entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited." (*Id.* at 342). In affirming *Elliott*, the court stated (*Elliott v. Administrator*, *supra*, 990 F.2d at 145):

> Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a show would seem to encompass all the requirements —including inspection—and the time necessary to complete those requirements.
>
> Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. . . . We conclude that the USDA's interpretation of "entering" is reasonable and not contrary to Congressional intent and thus we are bound to give it effect. *Chevron U.S.A.*, 467 U.S. at 842.

In *In re [Billy] Gray*, 52 Agric. Dec. [1044, 1055, 1081 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994)], it is stated:

> [E]ntry is a process which includes a variety of actions such as the paying of the entry fee, the preparation of the horse for exhibition, and the pre-show presentation of the horse for inspection to the Designated Qualified Person ("DQP") and to the Department's representatives.

Accord In re [Linda] Wagner (Decision as to Roy E. Wagner and Judith E. Ruzio), 52 Agric. Dec. 298, 314–16 (1993), [*aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)]; *In re [John Allan] Callaway*, 52 Agric. Dec. 272, 292–94 (1993).

From the foregoing, it is clear that *both* Respondents were very involved in entering the horse, all during the entry process. Thus, I find that both Respondents, as owners, allowed the entry of the horse—a fact

to which Respondents stipulated. Moreover, the Respondents both conducted actions which were integral parts of *entering* the horse (Findings 4 and 5), and both are found to have entered "Jo Jack's Pride."

In re Jack Kelly, 52 Agric. Dec. 1278, 1297-99 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994).

Here, the question is who "exhibited" Rare Coin. The Summary of Alleged Violations, VOWS Form 19-7, (CX 4), lists Gary R. Edwards as custodian (item no. 8), the person who transported Rare Coin (item no. 9), and the person who entered the horse (item no. 10). Respondents argue that only Gary R. Edwards entered and exhibited Rare Coin. I conclude that Gary R. Edwards unquestionably exhibited Rare Coin, but the evidence does not establish that Larry E. Edwards or Carl Edwards & Sons Stables entered or exhibited Rare Coin.

(2) Pre-show Passage by DQP Meaningless to Post-show USDA Inspection.

I reject Respondents' next argument, to wit, that Rare Coin was proven to be not sore before the show, because the two attending USDA VMOs observed DQP Charles Thomas pass the horse for entry. There are a number of reasons why pre-show passage of a horse by a DQP is of no particular significance to the Department in determining post-show a sore horse, but, I make no attempt to list them all.

First, DQPs use a different methodology and terminology than USDA VMOs. Although from a medical standpoint "sensitivity" is not the equivalent of "sore," the DQP system uses it as synonymous with sore, as explained in *Young*, as follows:

9. Mr. Young presented the horse to the Designated Qualified Person (DQP),[8] Harold White, for pre-show inspection. (CX 7; Tr. 295)

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[8]The Department's regulations (9 C.F.R. § 11.7 (1993)) provide for the certification and licensing of Designated Qualified Persons pursuant to the Act at 15 U.S.C.A. § 1823(c) (West 1982 & Supp. 1993).

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10. At the pre-show inspection, DQP White rejected "A Mark For Me" because the horse was sensitive in both front feet. (CX 2, 3; Tr. 385) [From a medical viewpoint,] "[s]ensitivity" is not the equivalent of "sore." ([Tr. 90,] CX 2) ["[B]ut the DQP system uses it as synonymous" with sore. (Tr. 90.) However, DQP White did not personally use the term "sensitive" as equivalent to the term "sore." (Tr. 385-390)]

In re Bill Young, 53 Agric. Dec. 1232, 1240 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision).

Moreover, "sore" is a legal term defined in section 2 of the Horse Protection Act; while "sensitivity" is important in determining the raising of the presumption under section 6(d)(5) of the Horse Protection Act. However, only a "fact-finder makes the determination as to whether or not a horse was 'sore.'" *Elliott, supra*, 990 F.2d at 146. A fact-finder is the ALJ or the Judicial Officer in these proceedings.

This proceeding's DQP, Charles Thomas, testified in the *Bobo* case, and it is clear from his testimony that just 4 days prior to the May 30, 1990, Money Tree Classic at issue herein, Mr. Thomas defined "sensitivity" to mean only that a horse repeatedly moved his feet in reaction to palpation of specific areas of both pasterns, even though the DQP official rule book defines "sensitive" in essentially the same language used to define "sore" in the Horse Protection Act, as follows:

6. "Ultimate Beam," a stallion, was examined by the Designated Qualified Person ("DQP") Charles Thomas at approximately 9 p.m., on May 26, 1990, prior to the scheduled competition. DQP Thomas excused the horse from competition after he found that "Ultimate Beam" was sensitive in both front feet. (CX 2) *Mr. Thomas testified that his finding of "sensitive" meant only that the horse repeatedly moved his feet in reaction to palpation of specific areas of both pasterns.* (Tr. 381-384)

7. A DQP is employed by the National Horse Show Commission, whose official rule book defines "sensitive" in essentially the same language used to define "sore" in the Act. Rule VIII, at page 96 of the rule book, defines "sensitive" in relevant part as follows:

> Any other substance or a device that has been used by the person or on any limb of the horse or a person has engaged in

> practice involving a horse as a result of such application, inf[liction], injection or use or practice such horse suffers or can reasonably be expected to suffer physical pain or distress, inflammation or lameness when walking, trotting, or otherwise moving. . . . (Tr. 371-372)

In re William Earl Bobo, 53 Agric. Dec. 176, 179 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995) (emphasis added).

Section 5 of the Horse Protection Act and USDA regulations specifically state that the DQP system is in place to prevent liability from exhibiting a sore horse to descend upon show management, (*see* 9 C.F.R. § 11.20(1990); and *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 48 n.3 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995)), as follows:

> The DQP is typically a person employed by the horse show to inspect horses and determine if the horses are sore. DQPs are utilized to protect the show management from liability under the Act. See 15 U.S.C. § 1824(3). The DQP here, Charles Thomas, was employed through the National Horse Show Commission.

This information shows that the ALJ's dictum is erroneous, when the ALJ states: "the 1976 amendments to the Act . . . brought the DQP program to the service of the Department. . . ." (Footnote omitted.) (Third IDO, p. 10.) In actuality, the DQP program serves the horse industry, not the Department, as noted above.

Moreover, passage of a horse pre-show by a DQP is of little importance to a post-show determination of soreness. The United States Court of Appeals for the Sixth Circuit has excellent reasoning in *Fleming*, *supra*, 713 F.2d at 187 n.11, which is particularly appropriate here, because the court lists the reasons why pre-show examinations are superseded by the post-show examination: (1) the chains may cause soreness, (2) anesthetics can mask pre-show pain until the show, (3) when all horses must go through pre-show examination, sheer numbers may make such examinations cursory, and (4) pre-show examinations are often conducted by local, non-veterinarian personnel, whose motivations can be very different from USDA's VMOs, as follows:

> The appellants also argue as a part of their reliability argument, that only pre-show examinations should be used in determining

soreness. This is part and parcel of their contention that post-show evidence is so unreliable as to violate due process but further asserts that the pre-show exam is of such greater reliability that due process requires reliance on it alone. We are not convinced that due process requires such a result unless it is first shown that the post-show exam is in fact inherently unreliable in ways that cannot be measured by the ALJ in evaluating the evidence. There are a number of variables which literally demand the use of the post-show examination procedure. First, the use of action devices such as chains may cause the prohibited soreness during performance. Such injury, prohibited by the Act, cannot be uncovered in a pre-show exam. Second, use of a quick acting anesthetic prior to the pre-show exam may mask otherwise existing soreness until the horse is ready for actual showing. While there is no evidence that this practice was employed in the present case, its potential use is justification for utilizing post as well as pre-show examination. Third, the present regulations require that all horses to be shown must go through the pre-show screening. Because of the number of horses involved the pre-show exam is necessarily short and cursory. There are obvious cost advantages to everyone involved in selecting only horses that exhibit signs of pain during performance for a thorough post-show examination. Moreover, the pre-show exam is not always conducted by a veterinarian and always involves local personnel who must deal with the interested parties on a daily basis. Such personnel may be reluctant to disqualify a horse from being shown—especially since their decision is virtually unreviewable. For these reasons we find unpersuasive the appellants' suggestion that the pre-show examination must, as a matter of due process, be determinative on the USDA.

Fleming, *supra*, 713 F.2d at 187 n.11.

(3) Dr. Jay Humburg's Testimony Entitled to Little Weight.

Respondents cite Dr. Jay Humburg's testimony as a basis for finding that Rare Coin injured both front pasterns by stumbling during the show. I accord Dr. Humburg's testimony little weight. Dr. Humburg did not personally examine Rare Coin. Moreover, any viewer can observe the videotape, (RX 3), and determine whether the horse stumbled and thereby injured the front and back of both front pasterns. This situation is not one where the expert

was there, saw the event, and immediately examined the horse. We are able to see what Dr. Humburg saw, no more and no less. Therefore, Dr. Humburg's testimony contains very little persuasive content.

Of course, under the *Martin* decision, discussed, *supra*, even Dr. Humburg's expert opinion, that the videotape shows that the horse stumbled and that it is possible that Rare Coin thereby injured both front pasterns, (Tr. 448, 458), could be crucial, because *Martin* requires expert opinion endorsing a credible, natural cause to rebut the presumption of soreness. Respondents herein have two experts, Drs. Humburg and Baker, to fulfill that requirement. However, Dr. Baker's testimony for this analysis does not mention stumbling, as explained, *infra*. Further, Dr. Humburg's expert opinion is based solely upon a videotape; thus, his expert opinion is unpersuasive and entitled to little weight.

(4) Both USDA VMOs Evaluated Way of Going, Used Proper Palpation Technique, and Used Other Diagnostics.

Respondents' next argument is that USDA VMOs relied solely upon digital palpation and "barely saw the horse led up to them." This argument is rejected, for a number of reasons.

Both USDA veterinarians state in their affidavits that they watched the horse lead. (Dr. Riggins: "I watched the horse as it was being led and the horse did not lead completely normal." (CX 2, p. 3.) Dr. Knowles: "We watched this horse to check his way-of-going as he was led away. The horse moved freely with only a slightly tight rein." (CX 3.))

Dr. Riggins testified that watching the horse walk is part of his examination:

[BY MS. CARROLL:]

Q. Do you also look at the way a horse walks when you're not palpating it?

[BY DR. RIGGINS:]

A. I try to observe the horse when he's walking up to me. And I observe horses other -- when somebody else is going to examine them, I observe how they walk.

Q. And what kind of things are you looking for in the horse's way of walking?

A. Well, a free, easy kind of a gait and not pulling or he's walking like he's not kind of sore-footed or something. It's just a free and easy gait is one we like to see.

Tr. 88.

And, specifically, Dr. Riggins testified that he observed Rare Coin to walk with a "tight rein":

[BY MS. CARROLL:]

Q. Okay. This examination was post-show. Can you describe how the horse was walking?

[BY DR. RIGGINS:]

A. When he was being led away, the horse didn't walk -- he walked with a slight, tight rein and it wasn't completely normal with an easy-going gait. He led a little reluctant.

Q. And now when you say a "tight rein" what does that mean?

A. Well, they kind of have to -- kind of pulling the horse along there. He's not leading with a loose rein and easy-going, shifting motion or walking motion. He was a little bit tight walking.

Q. Could that be a result of his having been exhibited right before the examination?

A. Not normally, no. If the horse hadn't been exhibited, he'd still walk with -- walk normal.

Q. Is that a sign of soreness?

A. It could be a sign of soreness.

Q. Was that reluctance to lead pronounced or mild?

A. Mild.

Tr. 115.

Dr. Knowles similarly testified that his normal procedure for examining a horse is to "see the horse move either as he's coming up or going away from us." (Tr. 174.) Dr. Knowles also similarly described Rare Coin as "leading a little stiff, the rein slightly tight." (Tr. 208.)

In the Discussion, *supra*, entitled "Complainant's Case," I detail the basis for the USDA VMOs' determination that Rare Coin was sore; *e.g.*, reluctance to lead normally, walking with a slightly tight rein, not showing a free and easy gait, action devices (chains) banging precisely upon the sore spots causing pain while moving, and, upon palpation, excessive movement of the forelimbs, raising of the head, jerking of the feet, tucking of the abdominal muscles, withdrawing of the feet, and shifting weight to the rear legs. Significantly, the horse showed extreme take-away response and extreme pain response when the forelimbs were palpated. Thus, I find that the VMOs used other diagnostics and observed the horse walk and did not rely solely upon palpation to determine that Rare Coin was sore. The United States Court of Appeals for the Sixth Circuit has specifically reviewed the type of VMO examinations described and has stated that such examinations entail more than digital palpation, as follows:

> Furthermore, a review of the Summary of Alleged Violation forms, J.A. 95, 102, shows that VMOs are required to do more than digital palpation when examining a horse. The forms call for an evaluation of factors such as "way of going," "general appearance, attitude and stance," "respiration," "perspiration," and "compliance with the 'scar rule.'" Drs. Clawson and Riggins indicated on the form which they filled out that Ultimate Beam's perspiration, respiration, general appearance, attitude, and stance were "ok," that the horse "move[d] out good (sic)," and that the horse was in compliance with the scar rule. J.A. 95. On the form filled out by Drs. Dienhart and Wood, they indicated that Ultimate Beam's way of going was "normal -- led freely on loose rein," and that the horse's general appearance, attitude and stance were "normal." J.A. 102. Thus, the examination by the VMOs in this case did consist of more than digital palpation.

Bobo v. United States Dep't of Agric., 52 F.3d 1406, 1413 n.2 (1995).

However, even if the examination did consist solely of digital palpation, the Judicial Officer has consistently relied upon the sufficiency of palpation evidence alone as a highly reliable method of determining whether a horse is sore. In the Second Remand Order in this proceeding, *sub judice*, the Judicial Officer used *Bobo*, *supra*, to make this point, as follows:

> The courts have recognized that the palpation technique used by USDA's veterinarians is designed to distinguish between consistent and localized pain responses and responses because the horse did not want to be touched. For example, in *Bobo v. USDA*, [52] F.3d [1406, 1409, 1412, 1415 (6th Cir. 1995)], the court stated [Bracketed material in original, but happens to be true here, as well]:
>
> > In addition, both Drs. Clawson and Riggins [(Dr. Riggins is one of the two USDA veterinarians in the present case)] testified that in palpating a horse's pastern, they employ examination methods that would distinguish consistent and localized pain response to palpation from the reaction of a nervous or skittish horse, which generally would react to touching anywhere on its foot.
>
> . . . .
>
> It is the Secretary's interpretation of his own regulations that evidence based on palpation alone may serve as the basis for a finding of "soreness" under the HPA. Brief of Respondent at 37. *See also In re Tuck*, 53 Agric. Dec. 261, 1994 WL 271821 at *21, *23 (1994) ("Frequently, in [HPA] cases, the evidence relates solely to observations based on palpation. [P]alpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the [HPA].").
>
> . . . .
>
> Finally, although petitioners Bobo and Mitchell both testified that Ultimate Beam's responses which were observed by Drs. Clawson and Riggins at the Shelbyville show were the result of Ultimate Beam's nervousness or high strung nature,

> both Drs. Clawson and Riggins testified that they use methods, such as coming back and repalpating a spot at which they obtained a response to palpation to see if the horse responds consistently, in order to distinguish a pain reaction from a reaction due to a horse that is nervous, high strung, or silly about its feet.

In re Gary R. Edwards, 54 Agric. Dec. 348, 365 (1995).

(5) Gary R. Edwards' Rapid Presentation of Rare Coin to Post-show USDA Inspection and His Alleged Warning to Medical Staff of Stumbling Are of No Consequence--VMOs' Post-show Exam of Rare Coin Adequate.

Respondents' next argument is that immediately after exhibiting Rare Coin, Gary R. Edwards took Rare Coin through post-show inspection, telling the DQP and both VMOs that the horse stumbled badly and hurt himself, but that the VMOs did not adequately examine Rare Coin post-show for injuries.

Respondents' argument lacks merit. Rare Coin was not examined because of injury or observed lameness; but, rather, because he tied for second place. Thus, Gary R. Edwards' self-described expeditious presentation of Rare Coin for examination and his information about stumbling is not significant.

Moreover, the trainer of a horse has no authority to instruct USDA VMOs on the proper method of examination for abnormal, bilateral sensitivity under the Horse Protection Act. I have already set forth in detail the thoughtful, methodical, and detailed examination process used by USDA VMOs in general, and, specifically, what was done in Rare Coin's examination. There is no significant or convincing evidence in this record that any injury to Rare Coin (I have already determined that Rare Coin did not stumble and was not injured) would have escaped the detailed physical examination of Rare Coin by two very experienced and expert USDA VMOs.

However, even if I were to find that Rare Coin had sprained his shoulders when the horse reared and bucked, it still would not exculpate Respondents. The pattern of the sore spots located on both the front and back of both front pasterns precisely located where the chains would hit during the show, and the severity of the pain responses by the horse when these areas were palpated, cannot be explained by sore tendons or sprains to the shoulders of Rare Coin. Both VMOs are very experienced and have examined thousands of Tennessee

Walking Horses, and both VMOs testified that such shoulder injuries, if they happened, would not explain the pain they found. (Dr. Riggins: Tr. 132; Dr. Knowles: Tr. 293-94,314-15,324-26.) (Also, see CX 4, item no. 36(6), which indicates that Drs. Riggins and Knowles found both of Rare Coin's forelegs' tendons "normal.")

(6) Dr. Randall Baker's Examination Is Remote in Time, Yet Is Very Consistent with USDA VMOs' Findings, Except Dr. Baker Unpersuasively Rules Out Chemical Soring.

Respondents' next argument is that Dr. Randall Baker's post-show examinations (May 30 and 31, 1990) revealed no heat, redness, swelling, scurf, or other inflammation, and that Dr. Baker testified that he did not believe Rare Coin was chemically sored.

Other than Dr. Baker's later opinion at the hearing about Rare Coin not being chemically sored, the USDA VMOs' examinations found the same thing as Dr. Baker: a lack of heat, redness, swelling, inflammation, or scurf. A careful reading of Dr. Baker's testimony, which is essentially past-recollection-recorded evidence ([By Judge Kane]: "It's apparent that the witness [Dr. Baker] must rely on the document to refresh his recollection" (Tr. 223)), and based upon RX 1 and RX 2 (the two "to-whom-it-may-concern" letters dated May 30 and 31, 1990), reveals that Dr. Baker thought it "impossible to perform a reliable examination of the pasterns by digital palpation," because Rare Coin "would almost continuously try to take his leg away from you anytime he was touched below the knee." (RX 1.) This observation is consistent with the USDA VMOs' description of Rare Coin's pronounced take-away response.

Moreover, in Dr. Baker's letters, conspicuous by its absence is any statement that the horse was injured by stumbling. In fact, no mention is made of stumbling at all, and Dr. Baker could not recall Respondents' mentioning a stumble before his examination of Rare Coin. ([By Dr. Baker]: "I don't recall that an injury was discussed or not discussed." (Tr. 219.))

I accord Dr. Baker's testimony and letters credibility, but little weight on the issues, for a number of reasons. Dr. Baker's letters mention neither stumbling nor chemical soring. But, Dr. Baker testified about both issues, as follows:

[BY MR. PRIAMOS:]

Q. What significance is the last sentence, "The pastern skin was clean and free of scurf or other evidence of inflammation"?

[BY DR. BAKER:]

A. In most cases, when an animal is sored chemically, so to speak, within 24 to 48 hours, you will have scurfing or flaking of the skin where this has occurred, a dandruff like condition where the skin flakes up.

Q. And there was none of that on this horse?

A. No, sir, there was not.

Q. And if the horse had injured himself in the ring in the canter by falling to its fetlock position, could the horse have been exhibiting these symptoms that you've described and not have the redness, heat or swelling of the tissues?

A. Yes, sir, that could be possible.

Q. Did Gary Edwards tell you that the horse injured himself in the ring?

A. Yes, sir, he did at some point in the examination. I'm not sure at what point, but he did.

Q. What did he tell you?

A. He told me the horse had stumbled and rocked back when he was cantering or attempting to canter.

Tr. 225.

Just a few moments later, at the hearing, Dr. Baker then testified that not knowing of the (alleged) injury to Rare Coin would not be necessary to differentiating between an injury and a chemically sored horse; and that there were enough other signs to use, as follows:

Q. (By Mr. Priamos) Right. So if you were going to determine, by digital palpation, if a horse were sore under the Horse

Protection Act, would you want to first know whether or not the horse was injured in the ring?

[BY DR. BAKER:]

A. That information could be helpful, but usually, there are enough signs, other than that information, to differentiate between an injury and a chemically sore horse.

Q. Let me ask it a different way. In your experience, what symptoms would a chemically sore horse exhibit?

A. A chemically sored horse would walk with an altered gait, they'll put more weight on their rear legs than they will their front legs, often will have their ears back, they're not alert. A chemically sored horse will usually have some swelling of the pastern tissues, may or may not see redness, sometimes can feel heat in the tissues, will respond to digital palpation usually in a uniform manner on both of the front pasterns, rectal temperature may be elevated one to two degrees and you may have a moderate elevation of respiration rate and heart rate on a chemically sored horse.

Tr. 228.

I note that Dr. Baker's belief that knowledge of an alleged injury is not necessary to a proper diagnosis is in agreement with Drs. Riggins' and Knowles' testimony that they did not have to be informed of a "stumble" and possible injury to be able to properly examine Rare Coin. (Tr. 131-33, 289-93.) Moreover, I have examined Dr. Baker's list of symptoms for a chemically sored horse, *supra*, and I find that Dr. Baker's list of symptoms is much too superficial, general, and vague to supersede the opinions of very qualified USDA VMOs who actually examined the horse at the end of the show. The Judicial Officer has consistently held that examinations by private veterinarians conducted after the USDA examination will not likely outweigh the disinterested USDA VMOs' conclusions, for many reasons. Usually, the main reason is the possibility of a quick-acting anesthetic, as follows:

Finally, Dr. Carver was not present when the horse was turned down by the DQP or found sore by the USDA veterinarians. I discount her findings to some extent because of the possibility that a

quick-acting anesthetic could have been applied to the horse's legs to mask the pain symptoms. The ALJ's statement that "no evidence of tampering was submitted" (Initial Decision at 26) misses the point. The *possibility* of tampering causes me to discount, to some extent, a later examination. As stated in *In re Bill Young*, 53 Agric. Dec. [1232, 1292 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)]:

> **I. Possibility of Anesthetic Masking Pain for Subsequent Examinations.**
>
> In addition, I customarily discount to some extent the results of examinations conducted after the USDA veterinarians have determined that a horse is sore because of the possibility that a quick-acting anesthetic can be applied to a horse's legs to mask the pain symptoms. Congress recognized that "sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H.R. REP. NO. 1174, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1700). Although Respondents' experts expressed the view that they would have been able to detect such a practice, Dr. Knowles expressed the professional opinion that you might not be able to tell whether an anesthetic substance had been used, depending on the process (Tr. 120-21, 131-32; see also Dr. Crichfield's testimony, Tr. 225). Similarly, "Respondent's expert, Dr. Miller, agreed [at a hearing held in another case in November 1992] that a topical anesthesia might not, or probably would not, be detected (Tr. 417-18)." *In re McConnell*, 52 Agric. Dec. 1156, 1168 (1993), *aff'd*, 23 F.3d 407 (Table) (6th Cir. 1994) (text in WESTLAW). In the present case, the opportunity to apply an anesthetic substance was limited, since the horse was in public view during the brief period before it was examined by Respondents' experts. But even though other persons could possibly have seen Respondents or someone acting on their behalf take a few seconds to rub a cream or spray a product on the horse's pasterns, whether such persons would have made an issue out of the matter, if it happened, is problematical. [Footnote omitted.] But even without this possibility, I regard the views

of the two financially disinterested USDA veterinarians as more weighty than the views of the private veterinarians in view of the profit-motive discussed above, as well as the fact that the USDA veterinarians are more experienced than the private veterinarians in detecting soreness under the Horse Protection Act.

. . . .

The Sixth Circuit recognized in *Fleming v. USDA*, 713 F.2d 179, 187 n.11 (6th Cir. 1983), that "use of a quick acting anesthetic prior to the pre-show exam may mask otherwise existing soreness until the horse is ready for actual showing." The same type of anesthetic can be applied immediately after the USDA examination to mask the pain during an examination by a private veterinarian.

In re C.M. Oppenheimer, 54 Agric. Dec. 221, 315-17 (1995).

This case, *sub judice*, presents a little different situation, however, because Dr. Baker found the horse's pasterns too difficult to examine. Rare Coin's obvious continued extreme sensitivity in his pasterns sometime after the show is consistent with the USDA VMOs' findings of a very sore horse. Thus, rather than evidence of the use of a numbing agent, we have Dr. Baker complaining of an inability to even touch Rare Coin below the knee. (RX 1.) Dr. Baker did not observe the horse from the time of the post-show examination until the horse was presented to him in the side area. The period of time elapsed appears to be about 30 minutes, (Tr. 452).

The Judicial Officer has, as long ago as 1985, stated that non-contemporaneous examinations by private veterinarians will not likely outweigh the USDA examinations, unless certain safeguards are followed:

In *In re Jackie McConnell*, 44 Agric. Dec. 712, 726 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992), I stated that it is not likely that any single examination conducted after the USDA examination will ever outweigh the Department's examination unless certain safeguards are followed, *viz.*:

He [Dr. O'Brien] further candidly conceded that after the horse was examined by the Department's veterinarians, an

anti-inflammatory drug could have been given orally or by injection, and that he would not have been able to detect such a drug (Tr. 549).

Considering all of the circumstances, here, as in *In re Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), in which a later examination was also conducted by Dr. O'Brien, Dr. O'Brien's subsequent examination is not given as much weight as the more immediate examination by two USDA veterinarians. In *Thornton*, the Judicial Officer suggested (41 Agric. Dec. at 894 n.11):

> If horse owners and trainers are interested in having an examination by private veterinarians of horses found sore by the Department, I would suggest that their associations have two or more private veterinarians present at horse shows to examine horses *immediately* after the USDA examinations. If this is done, the Department should provide a Department employee to keep continuous watch over the horses to see that they are not tampered with. Perhaps the Department could immediately reexamine any horse not found sore by the private veterinarians, in the presence of the private veterinarians. Possibly, one or more private veterinarians could observe the initial USDA examinations (that would depend on whether their presence would interfere too much with the examinations). The Department should make every reasonable effort to accommodate a responsible effort to afford horse owners and exhibitors the right to have a meaningful independent examination.
>
> Unless some such procedure is followed by horse owners and trainers, it is not likely that testimony by a single veterinarian [as to an examination] conducted at some later time will outweigh testimony by two or more disinterested USDA veterinarians as to their examinations conducted shortly after a show.

In re C.M. Oppenheimer, *supra*, 54 Agric. Dec. at 317-18.

To summarize, Dr. Baker's testimony was based upon past-recollection-recorded evidence. The letters relied upon mention neither stumbling nor chemical soring. Dr. Baker's testimony on the facts is consistent with those facts found by the USDA VMOs. Dr. Baker opined that Rare Coin's sensitivity was not caused by chemical soring; but, that a stumble *could* cause the soreness found by USDA. Although I find Dr. Baker a credible witness, his testimony deserves little weight, due to the remoteness in time of his examinations, and the speculative nature of his views based, as they were, not on actual evidence, but, on opinion only.

(7) The Argument That There Is a Lack of Scientific Studies to Support Palpation Is Without Merit.

Respondents' next argument is that no scientific studies support digital palpation as a means to detect soreness under the Horse Protection Act. This argument is rejected for a number of reasons. (*See also* section III.B.1.b., *infra*, which more fully analyzes this point.)

First, this argument was included by the ALJ, *sua sponte*, and was not one originally briefed and argued by the parties. Respondents' counsel did question Dr. Riggins about scientific studies, but Dr. Riggins responded that digital palpation has been used for over 20 years to detect soreness with excellent results, whether one calls that scientific studies or not. (Tr. 133-37.)

Moreover, Complainant's Appeal of Third IDO, pp. 21-25, addresses this issue by noting that "[n]othing in the Act, the Rules of Practice, or the case law requires that the USDA's inspection procedure must meet 'generally accepted scientific methods' and the ALJ cites no authority for such a requirement." I agree with Complainant, and adopt the reasoning at pages 21-25 of Complainant's Appeal of Third IDO.

Furthermore, the requirement of "scientific evidence" by an ALJ has been rejected by the Judicial Officer, as follows:

> In the Initial Decision, pp. 27-32, Judge Baker apparently gave weight to the fact that there was no "scientific" or "objective" evidence to substantiate the professional opinions by complainant's experts that the horse was sored when it was shown on November 12, 1976. Specifically, the complainant's experts detected no odor of oil of mustard, took no swab of the horse's pasterns and did not remove any tissue for biopsy. If Judge Baker gave any weight to those matters, that

was error. It is to be expected that a person who sores a horse will wash the chemical away before the horse is exhibited so that no trace of the chemical will remain to be detected. As stated in *In re A. S. Holcomb*, 35 Agr Dec 1165, 1167 (1976); see, also denial of petition for reconsideration, 35 Agr Dec 1347, 1349 (1976):

> It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait. It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1428 (1979) (Order Remanding Case).

Finally, I note that, throughout the testimony, Respondents' expert veterinarians testified that they, themselves, use digital palpation in their practices. Ironically, Respondents' counsel complains that USDA VMOs did not *palpate* Rare Coin's shoulder to detect the alleged injury. (Tr. 133-34, 141-42, 391.)

(8) USDA and Its Witnesses Are Not Biased Against Tennessee Walking Horses' Owners, Exhibitors, or Trainers.

Respondents' final argument is that USDA and its government witnesses are biased against the owners, exhibitors, and trainers of Tennessee Walking Horses, and that USDA VMOs do not check the other breeds of horses at multi-breed shows. Respondents argue that this negative attitude results in a bias, which just assumes that Tennessee Walking Horses, like Rare Coin, are sore. (Tr. 140-41.) This argument is totally devoid of merit and is rejected for the reasons below.

I have very recently issued a Decision and Order regarding the soring of a pleasure horse, and, while I dismissed the case for reasons not pertinent here, this prosecution refutes Respondents' argument. (*In re Jim Singleton*, 55 Agric. Dec. ___ (July 23, 1996.)

Moreover, Dr. Riggins testified herein at length that the other breeds are examined, if they are in a show, and they place first or second:

> Q. (By Mr. Priamos) In 1990, how many horses, other than Tennessee Walking Horses and Racking Horses, did you examine using the palpation test at a horse show?
>
> [BY DR. RIGGINS]:
>
> A. Well, I examine all horses, including colts, that show in a show. Now, if they had any other horses there, I examine them just like I do the Tennessee Walking Horse.
>
> . . . .
>
> Q. And you're telling this Court you have no idea if you checked one horse or a million horses that were other than Tennessee Walking Horses and Racking Horses in 1990 at horse shows?
>
> A. Of all the shows I went to, I don't know what kind of horses they had at all these shows, but I examined all the horses for the winning in all the classes of all the classes. So I don't know what other horses were there besides Tennessee Walking Horses.
>
> Q. Are you saying you can't determine if a horse is other than a Tennessee Walking Horse?
>
> A. Yes, we have examined gaited horses and a lot of gaited horses we've examined in the show.
>
> Q. What horse show in 1990 did you examine one gaited horse?
>
> A. Whatever -- if there's any gaited horses in the show, I examined them.

. . . .

Q. Did you have a preconceived notion that this horse [Rare Coin] was sore and not injured before you examined it?

A. No, sir.

Tr. 138-41.

Having established that USDA examines various breeds of horses at these shows, it must be stated that Tennessee Walking Horses are the Department's focus. The Tennessee Walking Horse is prized for its high-stepping, showy gait called the "big lick," and reviewing courts have established that this should be the focus of USDA's enforcement efforts under the Horse Protection Act:

> Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made "sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal "sore" gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse "sore" is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

Elliott v. Administrator, Animal & Plant Health Inspection Service, 990 F.2d 140, 144 (6th Cir.), *cert. denied*, 114 S.Ct. 191 (1993). *Accord Baird v. United States Dep't of Agric.*, 39 F.3d 131, 132 n.1 (6th Cir. 1994.)

Similarly, the Judicial Officer has considered this bias argument, as follows:

> Respondents' brief advances an argument that appears wholly misplaced. They point out that the Department's enforcement efforts

are primarily directed against the soring of Tennessee Walking Horses and argue that because no case has ever been pressed involving any other kind of horse, the Department is discriminating against owners of Tennessee Walking Horses in violation of the fifth and fourteenth amendments to the United States Constitution.

This unusual argument is simply answered by the fact that the soring techniques proscribed by the Horse Protection Act are used primarily on Tennessee Walking Horses. The legislative history of the Act pertains exclusively to the soring of this breed and indicates that the Act was designed specifically to protect this type of horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4870-4872. Tennessee Walking Horses are judged on the basis of their performance of the "big lick," a stride that, unfortunately, can be improved by inflicting so much pain in a horse's forefeet that it prefers to hold them high rather than let them touch the ground. The reliable testimony of Dr. Cook, a former head of the APHIS Horse Protection Program, indicates that performance standards based upon gait--and the corresponding training techniques--are generally associated with Tennessee Walking Horses and racking horses. The testimony further indicates that the Department's enforcement resources are limited and are directed at Tennessee Walking Horses and racking horses because soring of other breeds of horses is not a significant problem. Tr. 171. APHIS has therefore properly focused on Tennessee Walking Horses and racking horses in its enforcement of the Act.

In re Pat Sparkman, 50 Agric. Dec. 602, 611 (1991).

III. THE THIRD INITIAL DECISION AND ORDER IS REVERSED AND VACATED.

The Third IDO is reversed and vacated for the reasons below.

A. Introduction.

This proceeding has been twice remanded to the ALJ. The ALJ has issued three Initial Decisions and Orders, and the Judicial Officer has issued two Remand Orders, as follows:

1.	First Initial Decision and Order (First IDO)	June 26, 1992
2.	First Remand Order (JO FRO)	August 24, 1993
3.	Second Initial Decision and Order (Second IDO)	June 30, 1994
4.	Second Remand Order (JO SRO)	June 9, 1995
5.	Third Initial Decision and Order (Third IDO)	August 11, 1995

The Judicial Officer's August 24, 1993, First Remand Order (hereinafter JO FRO) was predicated upon the ALJ's refusal in the First Initial Decision and Order (hereinafter First IDO) of June 26, 1992, to allow Complainant to amend the Complaint to conform to the proof. My review of this exchange reveals that the Judicial Officer was correct, in all respects, to reverse, vacate, and remand the First IDO.

The Judicial Officer's Second Remand Order (hereinafter JO SRO) of June 9, 1995, catalogued the errors in the ALJ's Second Initial Decision and Order (hereinafter Second IDO) of June 30, 1994. My approach herein is to determine just where the ALJ failed in the Third IDO of August 11, 1995, to follow the Judicial Officer's specific guidance in the JO SRO. This method obviates the explication of the ALJ's Second IDO, which, after all, was reversed and vacated in the JO SRO. Thus, the ALJ's Third IDO is reversed and vacated for the following reasons (all of the points in the Third IDO have been considered, and are hereby reversed and vacated, even if an individual point is not separately discussed herein).

B. Third IDO Fails to Correct Errors As Listed in JO SRO, and Commits More Errors.

Generally, the Third IDO capitulates on some of the items reversed by the Judicial Officer in JO SRO; continues to proffer some erroneous items; invents new erroneous items; removes most of the Discussion from the Third IDO, which supported the Second IDO's Findings of Fact; adds new language to Findings of Fact Nos. 9 and 14; and adds new Finding of Fact No. 15. The Third IDO offers the appearance of responding to and perhaps acquiescing to the mandates of the JO SRO, but does not really respond or acquiesce.

1. Two New Palpation Theories Advanced in Third IDO Are Rejected.

The Third IDO advances two new palpation evidence theories, which were not advanced in either the First IDO or Second IDO: digital palpation is a "rule" which was not properly implemented according to the Administrative Procedure Act's rule making process, and palpation evidence has no "scientific" basis or clinical experience to support it. Both of these newly advanced theories are without merit and are hereby rejected, for the reasons below.

a. Digital Palpation Need Not Be Subjected to APA Rule Making.

The ALJ's new attack on palpation evidence is based upon his finding that a rule making must be undertaken and completed: "notice and rule making have never been followed to address the reliability of palpation as the sole method to detect soring." (Third IDO, p. 13). However, in a recent case in which this issue was raised, I found that rule making was not necessary:

> 4. Respondent contends that, in relying on palpation, USDA has created a substantive rule without following the required notice-and-comment rule making process. Palpation, however, is [a procedure used to examine horses to determine compliance with the Act and regulations issued under the Act. A "rule" under the Administrative Procedure Act is defined as:
>
> > [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]
>
> 5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

> Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy, nor does palpation describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making, nor does it regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

> "Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the Act and regulations.

43 Fed. Reg. 18,514,18,525(1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Act and the regulations issued under the Act. Except for minor editorial changes, the definition of the word "inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

> "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1).]

Respondent argues that even though the regulations refer to palpation, they do not define the "protocol" [to be used to palpate horses,] except for [the protocol to be used by the] DQPs. (9 C.F.R. § 11.21[(a)](2).) The record in this case shows that palpation is a diagnostic procedure taught in veterinary medical school and is used not only by doctors of veterinary medicine and DQPs, but also by laypersons. Horse trainers [Mr.] Jimmy Acree and [Mr.] Jamie Hankins indicated that they knew the "protocol" for palpating horses, [(Tr. 192-93, 228, 241-43, 258-59),] while Respondent . . . said he knew the pain signs to look for when a horse is palpated. (Tr. 324.) Respondent's wife also apparently knew how to palpate. (Tr. 243.) Therefore, as palpation is a commonly known, accepted, and used diagnostic tool, there appears no need to spell out a "protocol" with which persons in the horse exhibition industry are already familiar.

This "protocol," as described at the hearing (and as described by the court in *Young, supra*, [53 F.3d] at 729-30), [consists of] pressure applied with the ball of the thumb to the horse's pastern areas while looking to see if there are any objective reactions or signs of pain by the horse, such as withdrawing its foot or tightening of its stomach muscles.

If there is a reaction, the examiner, as Drs. Bourgeois, Price, and Miller all emphasized, returns to the area causing the reaction to determine if the horse displays a consistent or repeatable bilateral "abnormal sensitivity." If the reaction is consistent, it is evidence of pain, and, [in accordance with section 6(d)(5) of the Act, (15 U.S.C. § 1825(d)(5)),] raises the presumption that the horse is sore. The presumption may, of course, be rebutted. . . .

In short, neither palpation nor the "protocol" [for conducting palpation] is a substantive rule that has to undergo the . . . rule making process. . . .

In re Mike Thomas, 55 Agric. Dec. ____, slip op. at 16-19 (July 15, 1996).

Palpation evidence is not a "rule," and the ALJ's requirement of a rule making is in error and is rejected.

b. Palpation Need Not Have a Scientific Basis.

The ALJ's other new palpation theory in the Third IDO is that one of Respondents' expert witnesses, Dr. Humburg, based his opinion that "palpation alone is not sufficient to detect soring," (Finding of Fact No. 15), on "scientific evidence." (Third IDO, p. 21.) Moreover, the ALJ also adds to the Third IDO's Finding of Fact No. 9 the sentence: "Drs. Riggins and Knowles did not advance any scientific grounds to support their opinion," (*id.* at 7). In order to respond properly to this new and erroneous conclusion, both the completely new Finding of Fact No. 15 and the characterization of Dr. Humburg's testimony should be displayed:

> 15. The testimony of Dr. Humburg, Professor of Animal Surgery and Medicine, Auburn University, a certified member of the American Board of Veterinary Practitioners in Equine Practice, (Tr. 444) and an author of the Auburn Study, reveals there are no scientific studies to support the conclusion that palpation alone is a protocol sufficient to detect the practice of soring prohibited by the Horse Protection Act. (Tr. 446-447)

Third IDO, p. 8.

> Dr. Humburg testified that palpation alone is not sufficient to detect soring. (Finding #15) As has been found, his qualifications are unique,[9] and significant weight is assigned to his testimony. The finding permitted by Dr. Humburg's conclusion is based on scientific evidence, in contradistinction to the Department's policy which appears to be based on the execution of predetermined goals. The Department's insistence that ". . . there is no debate as to the sufficiency of palpation evidence alone. . ." *Gary Edwards, et al.*, (second remand) slip op. at 18, does not recognize that such a proclamation has no stature from scientific principles, and no standing under the Administrative Procedure Act, as has been herein noted. . . .

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[9]The study Dr. Humburg co-authored is identified in *Kim Bennett, et al.*, H.P.A. Dkt. No. 93-6, Initial Decision at n. 25.

Third IDO, p. 21.

The ALJ's Finding of Fact No. 15, *supra*, states that Dr. Humburg is "a certified member of the American Board of Veterinary Practitioners in Equine Practice," but, Dr. Humburg's testimony actually only claims that he is "*certified by* the American Board of Veterinary Practitioners in Equine Practice." (Tr. 444.) If being certified by this Board means that one is actually on the Board, it is not evident in this record. The ALJ invests Dr. Humburg with expertise and stature, neither supported by the record nor even claimed by Dr. Humburg.

Similarly, the study referenced in footnote 25 of the ALJ's Initial Decision and Order in ***Bennett***, HPA Docket No. 93-6 (Feb. 28, 1995), to which the ALJ refers in footnote 9 of his Third IDO (*Edwards*), merely states:

> 25/ Purohit, Ram C. "Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors (Summary of the Research from September, 1978 to December, 1982)." School of Veterinary Medicine, Auburn University. 53 Fed. Reg. 14,779 (April 26, 1988).

Dr. Humburg is not even listed as a co-author of this study. Dr. Humburg testified that he became Board certified in Equine Practice in 1981, (Tr. 444). The study referenced in footnote 25 is stated to be a summary of research conducted between September 1978 and December 1982, (Tr. 444). Moreover, the purposes, principles, and outcome of this study are not explained in this record, and I am at a loss to understand how the ALJ could consider this information persuasive regarding the issue of Dr. Humburg's expertise.

When Dr. Humburg is asked about the Auburn Study, his answer is anything but an expert opinion, as follows:

> Q. For how long have you dealt with Tennessee Walking Horses?
>
> A. Well, I've had a considerable association with them for the last 18 years during the time that I have returned to the staff at Auburn University.
>
> Q. Are you one of the co-authors of the Auburn study?

A. I worked with Dr. Perolak [sic] on that study. I was --

Q. Who was this study prepared for?

A. The study was prepared for the United States -- for the USDA.

Q. And what was the purpose of that study?

A. Initially it was to validate the use of thermovision as a means of determining pain in the lower legs of deeded [sic] horses.

Tr. 445. The reader has no indication of Dr. Humburg's actual expertise.

In any event, as the ALJ wrote in his Initial Decision and Order in *Bennett*, he was aware that the Judicial Officer has determined the Auburn and Ames studies to be "outdated, irrelevant and no longer valid" (the ALJ's words) (Initial Decision and Order, HPA Docket No. 93-6 (Feb. 28, 1995), at 23-24).

The ALJ apparently based this *Bennett* reasoning on *In re Bill Young*, *supra*. In *Young*, the Judicial Officer explains why the Ames and Auburn Studies are obsolete:

> [T]he Ames study . . . and a similar study done a few years later at Auburn University, both of which are relied on by Respondents' experts . . ., are no longer relevant to today's soring practices because both studies were done before the Scar Rule was promulgated in 1979 . . . . The Scar Rule creates an irrebuttable presumption of law that a horse born on or after October 1, 1975, having specified lesions, is a sore horse, in violation of the Act. [Footnote omitted.] As a result of the Scar Rule, the soring that is seen today is completely different from the soring seen in the mid-1970's, which formed the basis for the Ames and Auburn studies. The present soring is far more subtle, "mainly of the skin and the immediate underlying tissues, the subcutaneous tissues there, not involving the deeper tissues of muscle or bone or tendons" . . ., which were involved during the 1970's. . . . [Footnote omitted.]

In re Bill Young, *supra*, 53 Agric. Dec. at 1270.

Although the United States Court of Appeals for the Fifth Circuit reversed the Judicial Officer's decision in *Young* (on other grounds), the court did not address the Ames and Auburn Studies. Moreover, since the Fifth Circuit's

decision in *Young*, the two Judicial Officer decisions discussed below (*Bennett* and *Thomas*) have addressed the Department's position *vis-a-vis Young*.

Before his retirement in January 1996, former Judicial Officer Donald A. Campbell wrote, in affirming this ALJ's dismissal of the Complaint in the *Bennett* Initial Decision and Order, that *Young* would not be followed by the Department. *In re Kim Bennett*, 55 Agric. Dec. 176, 205, 218-19 (1996). The *Bennett* decision is also notable because Judicial Officer Campbell disagreed "with practically everything stated in [Judge Kane's] 47-page Initial Decision" and wrote a Decision and Order refuting Judge Kane's *Bennett* Initial Decision. *Id.*, 55 Agric. Dec. at 177.

More recently, I decided in the *Thomas* case that, even if the appeal were to the Fifth Circuit, the *Young* case would not be followed:

> **c. *Young* Was Erroneously Decided**
>
> Even if appeal herein went to the United States Court of Appeals for the Fifth Circuit, and the record herein was indistinguishable from that in *Young*, the split decision (2-1) that a reaction to digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act is erroneous and would not be followed by this Department. *See In re Kim Bennett, supra*, [55 Agric. Dec. at 185]. The Department's many other reasons for rejecting *Young* are fully articulated in *In re Kim Bennett*, which is attached hereto as an Appendix.

In re Mike Thomas, *supra*, slip op. at 50. (Both *Bennett* decisions, the ALJ's Initial Decision and Order (Feb. 28, 1995), and the Judicial Officer's Decision and Order (Jan. 3, 1996), are attached as Appendices C and D, respectively.)

Therefore, on this record, I must disagree with the significant weight the ALJ erroneously assigns to Dr. Humburg's testimony. Moreover, I reject the ALJ's characterization of Dr. Humburg's testimony that Dr. Humburg "reveals that there are no scientific studies to support" palpation alone as a means to detect soring. (Third IDO, Finding of Fact No. 15.)

Dr. Humburg did not testify as declaimed by the ALJ. Rather, Dr. Humburg's testimony was in response to a question, and this is the extent of it, as follows:

[BY MR. PRIAMOS:]

Q. And are there any scientific studies to show whether the digital palpation tests can determine if a horse is sore under the Horse Protection Act?

[BY DR. HUMBURG:]

A. I don't believe there are.

Tr. 446.

It was error for the ALJ to conclude that no scientific studies exist to support palpation alone as a means to detect soring on the basis of this one-sentence question and one-sentence "belief" statement.

The ALJ also committed error by stating that "[t]he finding permitted by Dr. Humburg's conclusion is based on scientific evidence in contradistinction to the Department's policy which appears to be based on the execution of predetermined goals." (Third IDO, p. 21.) There is no support in the record for this statement that Dr. Humburg's one-sentence answer to a "scientific studies" question somehow becomes a conclusion upon which a "scientific-evidence-based" finding is made by the ALJ.

Finally, on this point, the ALJ attempts to infuse Dr. Humburg with some expertise or ability beyond USDA VMOs. The ALJ's statement, *supra*, which implies that Dr. Humburg's conclusions are based upon "scientific evidence," while USDA VMOs' conclusions are not, is completely erroneous, for at least two reasons. First, Dr. Humburg did not physically examine Rare Coin on the night of May 30, 1990; in fact, Dr. Humburg never examined Rare Coin in person. The fact is that Dr. Humburg's testimony is based totally upon watching the autoptic evidence videotape, (RX 3). I must observe how unscientific any hard and fast opinions on a particular horse's soreness must necessarily be when based solely on videotape. In fact, I have made my own determinations based upon RX 3, but they are not scientific.

Moreover, had Dr. Humburg examined Rare Coin, the record reveals that Dr. Humburg would have used the same diagnostic techniques used by USDA VMOs, as follows:

[BY MR. PRIAMOS:]

Q. What else would you use besides the palpation test?

[BY DR. HUMBURG:]

A. I'd watch the horse move. I would, of course, palpate the animal. If I had it available, I would use thermovision to get some idea as to the amount of heat in the area. I'd try to make sure that the animal wasn't sore from -- or lame -- from some other reason.

. . . .

Q. Now, if -- presume that Mr. Edwards told these government vets before their palpation exam that the horse stumbled twice and might've injured itself in the ring. What kind of tests should the vets have used to determine whether or not the horse was injured in the ring?

A. If I were -- had been in their shoes, I believe I would have asked to have the horse moved so that I could observe the manner in which he moved.

I, of course, would've done the normal routine of palpation of the pastern area. But then in addition to that, I would have palpated the entire limb, flexing and extending the joints so that I could have an appreciation for whether he had injured some other area.

Tr. 447, 451.

The examination described by Dr. Humburg differs in no significant way from the examination conducted by USDA VMOs.

2. The Four Major Errors From the Second IDO Are Not Corrected.

The JO SRO addresses four major errors in the Second IDO: (1) the ALJ gave slight or no credibility to USDA VMOs, (JO SRO, 54 Agric. Dec. 348, 351-63 (1995); (2) the ALJ inferred that testimony of additional USDA experts, if called, would be adverse to Complainant, (JO SRO, *supra*, 54 Agric. Dec. at 363-65); (3) the ALJ expressed a number of erroneous views as to palpation evidence, (JO SRO, *supra*, 54 Agric. Dec. at 365-68); and (4) the ALJ assigned great credibility to Respondents' witnesses, (JO SRO, *supra*, 54 Agric. Dec. at 368-69).

a. Slight or No Credibility to USDA Witnesses.

The JO SRO states that "[i]t was reversible error for the ALJ to assign slight or no credibility to [USDA VMOs'] testimony solely because of their lack of present recollection at the time of the hearing" (JO SRO, *supra*, 54 Agric. Dec. at 351). Nevertheless, proper scrutiny of the Third IDO reveals the ALJ's finding that USDA VMOs' testimony and affidavits are not "substantial evidence to . . . reach the conclusion . . . of soring . . . because both Dr. Knowles and Dr. Riggins had no, or scant, recollection, of what they saw and heard." (Third IDO, pp. 25-26.) Moreover, the ALJ not only retains the language of Finding of Fact No. 14 appearing in the Second IDO, which was specifically reversed by the Judicial Officer's language in the JO SRO, but the ALJ makes additional erroneous findings in Finding of Fact No. 14 in the Third IDO. The ALJ's erroneous findings in Finding of Fact No. 14 in the Third IDO is reversible error. I totally agree with the Judicial Officer's detailed explication of this issue in JO SRO, showing the ALJ's error. (JO SRO, *supra*, 54 Agric. Dec. at 351-63.) Since that in-depth analysis is part of the record, it need not be replicated here.

b. ALJ's Inference That Testimony of Additional USDA Experts, If Called, Would Have Been Adverse to Complainant.

The Judicial Officer also found reversible error when the ALJ drew an inference (see the ALJ's language in Second IDO, pp. 13-14) that the testimony of additional USDA experts, if called, would have been adverse to Complainant, (JO SRO, *supra*, 54 Agric. Dec. at 363). Since both USDA VMOs who examined Rare Coin testified at the hearing, there is no basis for drawing an adverse inference. However, the ALJ again makes the very same adverse inference against Complainant, merely changing the wording slightly. (Third IDO, p. 29.) The ALJ's adverse inference is reversible error.

c. Palpation Evidence and ALJ's Erroneous or Incomplete Views.

The ALJ renews his attack on palpation evidence in the Third IDO, based this time on the recent *Young* case, *supra*. (Third IDO, pp. 21-23.) I conclude that the ALJ's palpation analysis is devoid of merit, because it is based upon both a number of false premises and bad case law. (The *Young* case.)

As detailed above, Dr. Humburg's conclusions were not based upon "scientific"evidence. (See III.B.1.b.,*supra*.) The Ames and Auburn Studies are obsolete, as explained above. Dr. Humburg saw the videotape, (RX 3), but never actually examined Rare Coin. The ALJ's "great credibility" accorded Dr. Humburg's testimony, (see Finding of Fact No. 14 in Second IDO and Third IDO), was questioned by the former Judicial Officer in the JO SRO, *supra*, 54 Agric. Dec. at 369-71. I find that the great credibility accorded this witness is misplaced.

The ALJ's language about the Department's "policy"being based upon "predetermined goals,"(Third IDO, p. 21), is obviously a reaction to the dicta in *Young*. The ALJ uses the *Young* (5th Circuit) language to attack both the *Crawford* (D.C. Circuit) and the *Bobo* (6th Circuit) decisions. Both *Crawford* and *Bobo* correctly decided the palpation issue. In the Fourth Circuit, the *Elliott* decision correctly decides the palpation issue; while in the Eleventh Circuit, the *Thornton* and *Edwards* decisions are correct. The other circuits, which have a palpation decision, are also compatible with the Department's position. However, an aberrational case like *Young*, if not corrected, would make it extremely difficult to enforce the Horse Protection Act in those jurisdictions in which *Young* is followed.

Young's effect on enforcement of the Horse Protection Act is one of the primary reasons for the former Judicial Officer's position in *Bennett*, that *Young* would not be followed by this Department, even in the Fifth Circuit. The former Judicial Officer anticipated that *Young* might be cited in an attempt to destroy the Department's Horse Protection Act enforcement efforts. Consequently, Judicial Officer Campbell responded to *Young*, as it turns out, in almost precisely the way that this ALJ has used *Young* herein. I have carefully reviewed *Bennett*, and find myself in complete agreement with all of Judicial Officer Campbell's views expressed therein and I have excerpted portions of *Bennett* to respond to the Third IDO's attack on the reliability of digital palpation as the sole means of detecting soreness.

However, before *Bennett* is displayed, I hasten to point out that the proceeding, *sub judice*, differs substantially from *Young*. Unlike in *Young*, Respondents herein did not offer a written protocol (like the Atlanta Protocol for training DQPs), signed by a group of prominent veterinarians, concluding that digital palpation alone is not a reliable indicator of a sore horse. Both private veterinarians, Dr. Humburg and Dr. Baker, qualified as experts, admitted to using palpation in their diagnoses.

Returning to *Bennett*, in which the *Young* decision is refuted, only those parts of *Bennett* concerning issues not already addressed herein, will be included:

> Turning to another issue, the ALJ challenges the reliability of palpation alone to prove soreness under the Act. In addition, the majority decision in *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), discussed at great length below, also questions the reliability of palpation evidence alone to prove a soring violation. But it has been held by the Judicial Officer in every case in which the issue was relevant that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. See, e.g.,*In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261,292 (1994) ("Based upon my examination of the record in this case, in addition to my examination of the records in 57 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act" (*Ibid.*)), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994). As shown below, my view is not based simply on "the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. USDA* (53 F.3d at 731), but, rather, on the accumulated knowledge gained from reading the testimony of a large number of veterinarians, many of whom had 10 to 20 years of experience in examining many thousands of horses for soreness under the Horse Protection Act. That view has been accepted by both circuits to which an appeal would lie in this case. *Bobo v. USDA*, 52 F.3d 1406, 1411-13 (6th Cir. 1995); *Crawford v. USDA*, 50 F.3d 46, 49-50 (D.C. Cir. 1995)[, *cert. denied*, 116 S.Ct. 88 (1995)]. Moreover, in *Bobo*, the Sixth Circuit rejected the same type of evidence (including evidence as to the Atlanta Protocol, discussed below) presented by two of the same expert witnesses relied on by Respondents in the present case, stating (52 F.3d at 1412):
>
> > The witnesses presented by petitioners, particularly Drs. Proctor and Johnson, testified that other factors, in addition to palpation, should be considered when determining whether a horse is "sore." These witnesses expressed the view that other signs, such as lameness or inflammation, must be present in addition to a reaction to digital palpation, before a

> horse can be found to be "sore." However, pursuant to 15 U.S.C. § 1821(3), a horse need only "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness," to be considered "sore" within the meaning of the HPA. Thus, pursuant to the statute, the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is "sore" under the HPA.

Just as in criminal cases, where there is a small group of expert witnesses with excellent credentials who testify repeatedly that DNA evidence is not a reliable means of determining the identity of a person who left blood at a murder scene, in Horse Protection Act cases, there is a small group of expert witnesses (including Drs. D.L. Proctor, Jr., Jerry H. Johnson, and Raymond C. Miller) with excellent credentials who testify repeatedly that palpation alone is not a reliable method of determining soreness under the Horse Protection Act. The primary additional indicator they demand is lameness, i.e., a gait dysfunction. But as explained by the Sixth Circuit in *Bobo, supra*, their view is squarely contrary to the explicit language of the Horse Protection Act.

The small group of experts, who misread the Horse Protection Act and who erroneously believe that gait dysfunction is a necessary element of soreness, met in Atlanta in 1991 and developed a "Recommended Protocol for DQP Examinations" . . ., which is referred to in HPA hearings as the Atlanta Protocol. That is the "written protocol" relied on by the majority opinion in *Young v. USDA* (53 F.3d at 731). The Atlanta Protocol states, *inter alia*, "It should be further noted that digital palpation, in and of itself, is not a reliable diagnosis of soring".... Dr. Raymond C. Miller, one of the members of the group who developed the Atlanta Protocol, testified in this case that he and the other experts who wrote the Atlanta Protocol believe that gait dysfunction is a necessary element of soreness, [Dr. Miller's testimony omitted].

. . . .

My reasons for rejecting the views of the "Atlanta Protocol" experts were set forth at length in *In re Bill Young*, 53 Agric. Dec. 1232, 1267-

83 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), as follows:[5] [material from *Young* omitted]

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[5]The Department's decision in *Bill Young* sets forth the views that will be followed by this Department in all future cases, including cases in which an appeal would lie to the Fifth Circuit, for the reasons set forth below. As shown in this lengthy quotation, my basis for rejecting the views of the Respondents' experts who testified in *Bill Young*, and who were part of the small group that developed the Atlanta Protocol, were not "simply that [their views are] contrary to the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. USDA* (53 F.3d at 731).

. . . .

Two of the participants at the [Atlanta Protocol] meeting, Dr. Vaughan and Dr. Purohit, had done basic research in the mid-1970's for the (outdated) Auburn study, discussed above . . ., which is similar to the (outdated) Ames study in 1975 . . ., discussed above. At least Dr. Proctor, if not all of the private veterinarian participants, agreed with the (outdated) 1975 Ames study. . . .

The July 24, 1991, consensus, just quoted . . ., is squarely contrary to the Horse Protection Act, which requires no more than that a horse can reasonably be expected to suffer pain (produced by man) when moving (15 U.S.C. § 1821(3)(D)). There is no requirement in the Act that the horse exhibit redness, swelling, heat or interference with function. The general consensus of the July 24, 1991, meeting . . . is, in effect, a prescription for repealing the Horse Protection Act, while leaving in its place a facade to give lip-service to the purposes of the Horse Protection Act. If the Department were to accede to the principles set forth in [the Atlanta Protocol], soring, as it exists today, could be practiced virtually with impunity. To be sure, a few cases could still be brought, e.g., if someone abused a horse to the extent that it violated

the Scar Rule, or if the soring was so inept that it caused a gait deficit. Considering all of the Horse Protection Act cases decided by the Judicial Officer from June 29, 1990, to the present[28] (not involving the irrebuttable presumption

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[28]No Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990.

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created by the Scar Rule), [in which the horses were found to be sore by the Judicial Officer,] the evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation.[29] Even as to the other six horses in which there was some evidence of a slight gait deficit (usually failing to lead freely with a loose rein, and sometimes tucked under),[30] the primary evidence in each case was the palpation evidence. There can be no doubt about the fact that under the . . . consensus of the 1991 Atlanta meeting (RX 4), the sophisticated, subtle practice of soring practiced today to improve the gait of Tennessee Walking Horses would be untouchable.

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[29]*In re Burks*, 53 Agric. Dec. [322, 328-29, 339-42 (1994)]; *In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 269-78, 283-84, 286-94 (1994) (two horses), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)]; *In re Martin*, 53 Agric. Dec. [212, 223-24 (1994), *rev'd per curiam*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24)]; *In re Bobo*, 53 Agric. Dec. [176, 198-201 (1994) (same horse, two shows), *aff'd*, 52 F.3d 1406 (6th Cir. 1995)]; *In re Kelly*, 52 Agric. Dec. 1278, 1288-95 (1993), [*appeal dismissed*, 38 F.3d 999 (8th Cir. 1994)]; *In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-62 (1993); *In re Watlington*, 52 Agric. Dec. 1172, 1187-92 (1993) (one of two horses); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993), [*rev'd*, 39

F.3d 131 (6th Cir. 1994)]; *In re Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 308-13 (1993), *aff'd*, [28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)]; *In re Callaway*, 52 Agric. Dec. 272, 284-89 (1993); *In re Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 262-66 (1993); *In re Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, [32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24)]; *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, [510 U.S. 867] (1993); *In re Smith*, 51 Agric. Dec. 327, 328-31 (1992); *In re Sparkman*, 50 Agric. Dec. 602, 612-14 (1991); *In re Holt*, 49 Agric. Dec. 853, 856-57 (1991); *In re Edwards*, 49 Agric. Dec. 188, 195-97, 204-06 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, [503 U.S. 937 (1992)].

[30]*In re Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1229, 1235 (1993), [*aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995)]; *In re Watlington*, 52 Agric. Dec. 1172, 1192 (1993) (one of two horses); *In re McConnell*, 52 Agric. Dec. 1156, 1160 (1993), *aff'd*, 23 F.3d 407, [1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994)]; *In re Crowe*, 52 Agric. Dec. 1132, 1152 (1993); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993) (one of two horses), [*rev'd*, 39 F.3d 131 (6th Cir. 1994)]; *In re Gray*, 52 Agric. Dec. 1044, 1073-74 (1993), [*aff'd*, 39 F.3d 670 (6th Cir. 1994)].

. . . .

Footnotes 29 and 30 quoted above list all the cases decided by the Judicial Officer from September 12, 1985, to August 31, 1994, under the Horse Protection Act (not involving the irrebuttable presumption created by the Scar Rule) in which the horses were found by the Judicial Officer to be sore, and the accompanying text explains that the

evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation. To bring those statistics up to date, there have been six subsequent cases, and in all six cases, the evidence that the horses were sore consisted entirely of the horses' reactions to palpation.[6] Hence, as to 25 of the 31 horses found sore by the Judicial Officer from September 12, 1985, to the present, or 80.6%, the sole evidence was the horses' reaction to palpation.

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[6]*In re Keith Becknell*, 54 Agric. Dec. 335, 337-38, 339-40, 344-45 (1995); *In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 287 (1995); *In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1363-65, 1367-70 (1994); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1337-42, 1345-46 (1994), [*aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996)]; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1305-06 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Bill Young*, 53 Agric. Dec. 1232, 1253-67 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision).

To require additional evidence, e.g.,a gait deficit (lameness) would totally defeat the purpose of the Act. As the court noted in *Elliott v. Administrator, Animal & Plant Health Inspection Service*, 990 F.2d 140, 144 (6th Cir.), *cert. denied*, [510 U.S. 867] (1993):

> Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made "sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N.4870, 4871. [Bracketed material by the court.]

If horses had to be sore enough to cause a gait deficit, that would totally defeat the congressional purpose to prevent the soring of horses done to improve their gait.

Although the horses' reaction to palpation constituted the only evidence that the horses were sore in 80.6% of the cases since September 12, 1985, that is not to suggest that in any of those cases, digital palpation was the only diagnostic test employed by the APHIS veterinarians to determine whether or not the horses were sore. As stated in my decision in *Bill Young*, *supra* (53 Agric. Dec. at 1286):

> USDA veterinarians never conduct an examination based solely on digital palpation, without also looking at the general appearance of the horse, and its way of going, etc. (Findings 14, 30). However, after considering various diagnostic tests, including the general appearance and way of going of the horse, it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act. That is, even though the horse's general appearance, etc., and way of going was normal, if digital palpation demonstrated that the horse could reasonably be expected to suffer pain when moving, that would be enough under the express terms of the Act to bring a case for soring.

This same view was stated in a letter dated May 29, 1991, from Dr. Joan M. Arnoldi, Deputy Administrator, APHIS, to Dr. Raymond C. Miller, as follows (RX 14, p. 1):

> All APHIS veterinarians involved in horse protection are carefully instructed on the clinical signs exhibited by a sore horse. The use of palpation is only one means of making a determination. Several clinical considerations are reviewed in taking action on an alleged sore horse.

The views quoted above from my decision in *Bill Young* will be followed by this Department notwithstanding the split decision by the Court of Appeals reversing *Bill Young*. The "expert testimony and a written protocol [i.e., the Atlanta Protocol]" relied on by the Court in *Young v. USDA* (53 F.3d at 731) is devoid of merit, for the reasons quoted above. One Circuit Judge dissented in *Young v. USDA* (53 F.3d at 732), and only one Circuit Judge reversed, since a District Judge sitting by designation was the third Judge on the panel. Hence the case

is not a strong precedent even in the Fifth Circuit. Moreover, the Court explained (53 F.3d at 732):

> In cases where the Secretary of an agency does not accept the findings of the ALJ, this court "'has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement.'" *Pinkston-Hollar Const. Services, Inc.*, 954 F.2d at 309-10 (citation omitted); *Garcia v. Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993) (stating that "[a]lthough this heightened scrutiny does not alter the substantial evidence standard of review, it does require us to apply it with a particularly keen eye, especially when credibility determinations are in issue. . . .).
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> . . . .
>
> . . . We hold that in light of the significant evidence calling into question the probative value and reliability of that documentary evidence where we are required to apply stricter scrutiny to the JO's conclusions which contradict the ALJ and in light of the substantial counter-evidence indicating that the horse was not sore, the JO's determination was not supported by substantial evidence and his decision should be reversed and judgment should be rendered in favor of Young and Sherman. (Footnote omitted.)

Since an important basis for the Court's reversal in *Young v. USDA* was the ALJ's adverse findings of fact, the Court's decision in *Young v. USDA* would not be in point if the ALJ in a future case finds the facts against the Respondent.

In re Kim Bennett, supra, 55 Agric. Dec. at 180-82, 185, 201-05 (meaningless transcript and exhibit citations are omitted).

d. ALJ Erroneously Assigned Great Credibility to Respondents' Witnesses.

The final point from the JO SRO is that the ALJ erroneously assigned great credibility to Respondents' expert witnesses. I have already discounted Dr. Humburg's testimony, and I have also indicated that examinations like Dr. Baker's, which are remote in time and place from the post-show examination by the USDA VMOs, are inherently less reliable than examinations conducted immediately after and in close proximity to the USDA VMOs' examinations. I am persuaded by the following text from the JO SRO that Dr. Baker's testimony can be reliably expected to support any Respondents' innocence; nevertheless, I consider Dr. Baker's testimony credible and give it appropriate weight based upon the facts and the record, as follows:

> 14. Based upon the appearance, demeanor and qualifications, the testimony of Drs. Baker and Humburg concerning their observations is assigned great credibility.

Several months earlier, the same ALJ stated with respect to the same two witnesses (*In re Ernest Upton*, 53 Agric. Dec. 239, 251 (1994)):

> The testimony of Dr. Randall Baker reveals that he made no record of his examination of Mr. Upton's horse. Neither he nor Mr. Upton established how much time had elapsed following the examinations of "Flipping Gold" by Drs. Riggins and Knowles before Dr. Baker examined the horse. Under Departmental precedent, examinations conducted after the horse has left the inspection area do not generally warrant the same probative value as the Government examinations because of the opportunity for tampering. *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 610 (H.P.A. Dkt. No. 88-58) (January 24, 1991). *Richard L. Thornton et al.*, 41 Agric Dec. 870, 878 (H.P.A. Dkt. No. 125) (May 19, 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). Further, Dr. Baker testified that when conducting a palpation examination he applies just enough pressure to slightly pit the skin. Dr. Crichfield's testimony revealed that lightly touching the skin in this manner is not a meaningful examination. (Tr. 215) While Dr. Baker based his conclusion that "Flipping Gold" was not sore on his physical examination, Dr. Baker would describe the presence of "soreness," a legal conclusion, to exist only if it resulted in a

display of gait deficiency in both forelegs. While respondent's other expert witness, Dr. Humburg, expressed caution about relying on evidence derived from palpation under some circumstances, he agreed that evidence of repeatable, localized, responses to palpation, such as those displayed by "Flipping Gold," were an indication of noxious stimuli, rather than incidental reaction to pressure, being handled, or reacting to distraction.

In *In re William Earl Bobo*, 53 Agric. Dec. 176, 185 (1994), *aff'd*, [52 F.3d 1406 (6th Cir. 1995],I adopted the decision of another ALJ who stated:

Dr. Baker's testimony impressed me as highly professional and forthright. However, he has only limited experience in examining horses for compliance with the Act. (Tr. 399) However, both he and Dr. O'Brien revealed their misunderstanding of the examination criteria by expressing the erroneous view that a horse must exhibit an abnormal gait to be sore as defined by the Act. (Tr. 399, 404, 414-415, 443)

In *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994), I found:

16. Dr. Randall Baker, a veterinarian, and a recognized expert [in the "field of veterinary medicine in equine practice (Tr. 375),"]has specialized in equine practice of fifteen years, including the diagnoses of diseases and afflictions of Tennessee Walking Horses. (Tr. 373-375) [However, unlike the APHIS VMOs, Dr. Baker is not qualified as an expert in detecting artificially-induced soreness in these horses. Dr. Baker admits that a significant portion of his income is derived from employment by owners and trainers of Tennessee Walking Horses. (Tr. 392) Complainant made an offer of proof at the hearing, which I accept as evidence (7 C.F.R. § 1.141(g)(7)), that Dr. Baker has "repeatedly been called upon by members of the industry to examine their horses after those horses have been found sore by the United States Department of

> Agriculture, and that he has, in every case, testified that he has not found the horse to be sore." (Tr 389)][4]

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[4]For examples of Dr. Baker's testimony, see *In re Bill Young*, 53 Agric. Dec. 1232, 1287 n.32 (1994), [*rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)]; *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272-73, 303-04 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Judy Martin*, 53 Agric. Dec. 212, 220, 225-28, 231 (1994), *rev'd per curiam*, [57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995)] (citation limited under 6th Circuit Rule 24); *In re Ernest Upton*, 53 Agric. Dec. 239, 245, 251 (1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 180, 184-86 (1994), *aff'd*, [52 F.3d 1406 (6th Cir. 1995)]; *In re Elizabeth Marie Hestle*, 52 Agric. Dec. 1270, 1274, 1276 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 277, 282 (1993); *In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 857 (1990).

JO SRO, *supra*, 54 Agric. Dec. at 369-71.

Finally, the JO SRO states that "[n]o Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990," (JO SRO, *supra*, 54 Agric. Dec. at 367 n.28). Based upon this language, the ALJ says that "[t]his Act has not been consistently enforced." (Third IDO, p. 9.) Actually, the industry was given an opportunity to regulate itself during this time period. See *Sparkman*, as follows:

> In 1985, it was APHIS policy not to cite anyone proceeded against by horse show operators under the authority granted them pursuant to the DQP program. After the DQP program had been professionalized to permit the industry to police itself, APHIS had largely refrained from direct enforcement of the Horse Protection Act. Subsequently, these self-policing activities were re-evaluated and found insufficient.

In re Pat Sparkman, *supra*, 50 Agric. Dec. at 611-12.

However, during this period, the Department continued to process cases. Ironically, the same Respondents (not counting the owners), were charged with similar Horse Protection Act violations, as herein, on May 22, 1986, and April 9, 1987; the Complaint was filed on December 3, 1987; and the Judicial Officer issued his Decision and Order imposing sanctions on June 29, 1990.

In re Larry E. Edwards, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

IV. SANCTION.

The evidence in the instant case supports the conclusion that Respondent Gary R. Edwards violated section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), by exhibiting a horse known as "Rare Coin" at the Money Tree Classic Horse Show at Columbia, Tennessee, on May 30, 1990, while the horse was sore. A $2,000 civil penalty will be assessed against Respondent Gary R. Edwards and a 5-year disqualification period will also be imposed, for the reasons below. These sanctions are reasonable, supported by the evidence, consistent with the Horse Protection Act and this Department's sanction policy, and designed to achieve the remedial purposes of the Horse Protection Act.

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring"horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.
>
> The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs

are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50

Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

> [T]he nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." In most cases, the maximum civil penalty of $2,000 per violation is warranted. *In re John T. Gray*, 55 Agric. Dec. ____, slip op. at 42 (Aug. 19, 1996); *In re Mike Thomas*, *supra*, slip op. at 53; *In re C.M. Oppenheimer, supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, *supra*, 53 Agric. Dec. at 1323; *In re Linda Wagner, supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott, supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper*, *supra*, 42 Agric. Dec. 62.

Respondent violated section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), by exhibiting Rare Coin while the horse was sore. The nature, extent, and gravity of the violation are revealed by Dr. Riggins' and Dr. Knowles' description of Rare Coin's responses to palpation which they described variously as "very extreme pain response"; "extreme pain response"; "extreme withdrawal response"; "tighten abdominal muscles"; "change stance"; and "jerk foot back." (CX 4.) Dr. Riggins testified that on a soreness scale of 1 to 10, with 1 not sore, and 10 the maximum soreness,

Rare Coin was an 8 or 9. (Tr. 119.) Dr. Riggins also testified that he was aware of no other way than artificial means for a horse to have this type of soreness. (Tr. 132, 142, 144, 159.) Dr. Knowles testified that this type of soreness could not be explained by a sprain or shoulder/tendon injury, and Dr. Knowles had watched the videotape. (Tr. 315,323-24.) I find that, under these circumstances, the nature, extent, and gravity of Respondent Gary R. Edwards' violation of the Horse Protection Act are sufficient to warrant the assessment of a civil penalty of $2,000.

The record also establishes Respondent Gary R. Edwards' culpability. Both VMOs testified, and their affidavits state, that Rare Coin was sored by the use of caustic chemicals, mechanical devices, or both. (CX 2, 3.) Respondent most likely used action devices (chains) on Rare Coin's legs during training. Gary R. Edwards, who was the trainer of Rare Coin, then exhibited him in chains in the horse show. (RX 3 at 9:59;CX 4, item no. 25.) Respondent Gary R. Edwards admitted Rare Coin was sore after the show. (CX 5A, p. 1.) Persons who exhibit horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when exhibited. *See In re John T. Gray*, *supra*, slip op. at 44 (Owners who allow entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act, when entered); *In re Mike Thomas*, *supra*, slip op. at 54 (Respondent is an absolute guarantor that his use of action devices during training will not cause the horse to be sored); *In re Keith Becknell*, 54 Agric. Dec. 335,340 (1995) (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sored).

Although Respondent may not have intended to "sore" Rare Coin by using chains during training or at the show, intent is of no consequence under the Horse Protection Act and regulations issued under the Act. The Horse Protection Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C.§ 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait,"

and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2:

> The legislation makes the following substantive modifications in the existing law governing this program:
>
> 1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent Gary R. Edwards, at the time of the hearing, had been training and exhibiting Tennessee Walking Horses his entire adult life as a full-time occupation, since 1964. (CX 5A; Tr. 374.) Despite Gary R. Edwards' experience as a trainer of Tennessee Walking Horses, he exhibited Rare Coin while the horse was sore and breached his guaranty that Rare Coin would not be sore when he exhibited him in the Money Tree Classic. I find that, under these circumstances, Gary R. Edwards' degree of culpability is sufficient to warrant the assessment of a civil penalty of $2,000.

Further, the record establishes that Respondent Gary R. Edwards has the ability to pay a civil penalty of $2,000 and that the assessment of a $2,000 civil penalty would not affect his ability to continue to do business. Respondent Gary R. Edwards testified at the hearing that he was then training approximately 18-20 horses. (Tr. 412.) Gary R. Edwards also testified that he is a general partner in Carl Edwards & Sons Stables, with brother Larry E. Edwards, and mother Etta Edwards, and that they have exhibited well over 13,000 horses, and have had "well over 100" world champion walking horses. (Tr. 374.) Respondent Gary R. Edwards has been party to a Horse Protection Act Consent Decision, which, however, plays no part in this sanction. However, Respondent Gary R. Edwards has prior violations for entering horses while sore, for which he was assessed a $2,000 civil penalty and disqualified for 2 years and which did not prevent him from continuing

in business. *In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend a $2,000 civil penalty against Respondent Gary R. Edwards. An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of $2,000 per violation is warranted.

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under the Horse Protection Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Horse Protection Act or the regulations issued under the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act or the regulations issued under the Horse Protection Act. Respondent Gary R. Edwards is subject to the 5-year disqualification, based upon his prior violations of the Horse Protection Act. (*See In re Larry E. Edwards, supra.*)

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who had the economic means to pay civil penalties as a cost of doing business. *See* H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1706.

Section 6(c) of the Horse Protection Act, (15 U.S.C.§ 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty. Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), requires that the Secretary consider the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in determining the amount of the civil penalty to be assessed, but the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C. § 1825(c).) *See In re John T. Gray, supra*, slip op. at 47; *In re Mike Thomas, supra*, slip op. at 57; *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982),

aff'd, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Horse Protection Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Horse Protection Act for the first time. *In re John T. Gray*, *supra*, (Respondent Gary Edward Cole assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Mike Thomas*, *supra* (Respondent assessed a civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Tracy Renee Hampton*, *supra* (Respondent assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Cecil Jordan*, *supra* (Respondent Crawford assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Linda Wagner*, *supra* (Respondents assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re John Allan Callaway*, 52 Agric. Dec. 272 (1993) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the Horse Protection Act). However, Respondent Gary R. Edwards is a repeat offender.

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the

instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for a second violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Section 6(c) of the Act provides, in relevant part, that:

> [A]ny person who . . . is subject to a final order under [15 U.S.C. § 1825(b)] assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction . . . .

15 U.S.C. § 1825(c).

The Complainant, one of the administrative officials charged with the responsibility for achieving the congressional purpose of the Horse Protection Act, requested that the Order issued in this proceeding include a provision disqualifying Respondent Gary R. Edwards from:

> (1) showing, exhibiting or entering any horse, or otherwise participating in any horse show or exhibition, and (2) judging or managing any horse show, horse exhibition, horse sale or auction.

Complaint, p. 4.

For the foregoing reasons the following Order should be issued.

V. ORDER.

1. Respondent Gary R. Edwards is assessed a civil penalty of $2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417,within 30 days from the date of service of this Order on Respondent.

2. Respondent Gary R. Edwards is disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

APPENDIX A

Martin v. United States Dep't of Agric., 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24), *printed in* 54 Agric. Dec. 198 (1995).

[Not published herein.--Editor.]

APPENDIX B

Complainant's Appeal of the Third Initial Decision; and Memorandum of Points and Authorities in Support of Appeal, pp. 27-42 (Nov. 20, 1995).

[Not published herein.--Editor.]

APPENDIX C

ALJ's Kim Bennett Initial Decision and Order (Feb. 28, 1995).

[Not published herein.--Editor.]

APPENDIX D

In re Kim Bennett, 55 Agric. Dec. 176 (1996).

[Not published herein.--Editor.]

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISION

In re: MMI INTERNATIONAL CORPORATION, MILK MAID, INC., AND HARJIT SINGH.
DNS Docket No. CCC-96-0001.
Decision and Order, filed November 8, 1996.

Nonprocurement suspension - Decision of suspending official affirmed - Time limitations - Harmless error - Mitigating factors need not be considered.

Chief Judge Victor Palmer affirmed the temporary suspension of the respondents which was based on respondents' fraudulent acquisition of government funds. It was error for the suspending official to issue a decision more than 45 days after respondents initial submission in opposition without issuing an extension for good cause. However, because the untimeliness was caused by the respondents' own untimely submissions the harmless error doctrine applies. There was sufficient evidence of fraud, which is a proper cause for suspension under the regulations, and there was an immediate need to protect the public. Mitigating factors need not be considered in suspension proceedings. The suspension was, therefore, not arbitary and capricious and an abuse of discretion, or not in accordance with the law, and should be affirmed.

August Schumacher, Jr., Suspending Official.
Maureen T. Maher, for Complainant.
William W. Taylor, III, Stephen J. Bronis, Deborah J. Jeffrey, and Eleanor H. Smith, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515,which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515,the regulations that implement a government wide system for nonprocurement debarment and suspension (Regulations).[1]

On August 29, 1996 respondents, MMI International, Milk Maid, and Harjit Singh filed a timely appeal of the decision of the suspending official,

[1]The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a government wide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

August Schumacher, Jr., Administrator of the Foreign Agricultural Service, United States Department of Agriculture, which suspended the respondents from participating in government programs for a temporary period pending completion of an investigation by the Department of Justice, or ensuing legal debarment, or Program Fraud Civil Remedies Act proceedings. The suspension is based on evidence of fraud and false statements made in connection with eight contracts awarded to MMI under the Dairy Export Incentive Program (DEIP) in 1993.

The Commodity Credit Corporation (CCC) issued the suspension on August 17, 1996 pursuant to 7 C.F.R. § 3017.400which allows for suspension when: (1) There exists adequate evidence of one or more of the causes set out in § 3017.405,and (2) Immediate action is necessary to protect the public interest. The Notice of Suspension informed MMI that the causes relied upon under § 3017.405were as follows:

> (1) There is adequate evidence to suspect the commission of: (a) fraud in connection with obtaining or performing a public agreement, and making false statements; and
>
> (2) There is adequate evidence of the violation of the terms of a public agreement so serious as to affect the integrity of an agency program, such as (a) a willful failure to perform in accordance with the terms of one or more public agreements, and (b) a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement.

Administrative Record, exhibit A.

The respondents had thirty days from the issuance of the Notice of Suspension in which to submit information and argument in opposition. 7 C.F.R.§ 3017.412. Respondents sought and obtained an extension of time in which to file its response, and then timely filed it June 4, 1996. Thereafter, respondents made five additional submissions for consideration by the suspending official on June 19, July 3, July 8, July 10, and July 26. The suspending official issued a decision on July 26, 1996 which affirmed the suspension.

Pursuant to 7 C.F.R.§ 3017.515,suspension decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the suspension if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Respondents filed a timely appeal on

August 29, 1996. The appeal contained a request for a hearing which is denied as the regulations make it clear that the decision by the administrative law judge is based solely on the administrative record. 7 C.F.R. § 3017.515(b).

On September 4, 1996, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, the suspending official submitted a Response in Opposition to the Appeal, and filed the Administrative Record on September 13, 1996. Respondents were granted a three-day extension for good cause shown and filed a Reply to the Response on September 26, 1996.

Findings

MMI International is a small, minority-owned company based in Fort Lauderdale, Florida which packages and sells powdered milk. Milk Maid was the predecessor to MMI and has now been phased out. Harjit Singh is currently, and was at all times relevant to this proceeding, the exclusive owner and operator of both companies. All three are named as respondents in this action. MMI has participated in two USDA programs, the Food for Progress Program and the Dairy Export Incentives Program (DEIP). Both programs promote the export of powdered milk and are administered by the Foreign Agricultural Service (FAS), on behalf of the CCC. The DEIP program invites bids from dairy exporters to sell milk to specified countries where prices are below the cost of production in the United States. Qualified bids are accepted and bonuses are awarded to subsidize the price differential.

In 1992, respondents contracted to sell 1,000 metric tons of powdered milk to General Milling, a company in the Philippines, for well below cost, in the mistaken belief that the Philippines was an eligible destination for DEIP bonuses. When MMI learned of the mistake, it lobbied to have the Philippines added to the program, and in the alternative, attempted to obtain milk from a less expensive European source. When its attempts to legally perform the contract failed, MMI devised a scheme whereby it created a company called Marhar in the United Arab Emirates, an eligible country for DEIP. Between June 28 and December 21, 1993, the respondents submitted and the CCC accepted eight bids to sell powdered milk to Marhar, in the

U.A.E.[2] Following the milk shipments, MMI submitted documentation to the CCC indicating that the milk had been received in Dubai, U.A.E. In fact, the milk had been removed from the shipping vessels in Singapore and diverted to General Milling in the Philippines. In addition, the actual ports of departure were different from those MMI specified in the bids. If MMI had reported the port changes, the bonus amounts would have been decreased. As a result of these contracts, MMI received $1,018,679.50 in bonus money which it retains to this date.

Conclusion

There is sufficient evidence in the administrative record to support the suspending official's decision to impose a temporary suspension pending further government action. Although the suspending official did not file the decision within forty-five days as required by the Regulations, the doctrine of harmless error applies because the delay was caused by the respondents ' own untimely submissions. Accordingly, the decision of the suspending official is affirmed.

Discussion

A. Timeliness and manner of review

Respondents first appeal on the ground that the suspension must be vacated as untimely and therefore not in accordance with the law. The regulations set a forty-five day time limit, but also provide that the suspending official may extend the deadline for good cause. 7 C.F.R. § 3017.413. Respondents ' first submission was made on June 4, 1996. Respondents then made additional submissions on June 19, July 3, July 8, July 10, and July 26. The suspending official rendered his decision on July 26, without issuing a notice of extension. Respondents contend that the decision should have been rendered on July 19, forty-five days after the initial submission. Complainant maintains that the decision was not due until forty-five days after respondents' final submission. Language in prior cases suggests the conclusion that

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[2]These bids resulted in contracts GSM-511A-8-PGU-NDM-2CA; GSM-511A-8-PGU-NDM-3CA;GSM-511A-8-PGU-NDM-4CA;GSM-511A-8-PGU-NDM-5CA;GSM-511A-8-PGU-NDM-6CA; GSM-511A-8-PGU-NDM-7CA; GSM-511A-8-PGU-NDM-8CA; and GSM-511A-8-PGU-NDM-9CA.

the deadline must be measured from the first submission; and if more time is needed after additional submissions are made, an extension must be filed. *In re: William E. Johnston*, 51 Agric. Dec. 1103, 1111 (Dec. 23, 1992), held that there was good cause for an extension when the respondent submitted additional materials for consideration. In *Johnston*, however, the suspending official properly filed a notice of extension. *In re: Young's Food Stores*, Inc., 53 Agric. Dec. 1403 (Dec. 1, 1994), vacated a debarment as untimely where the debarring official did not issue an extension. That case differs from the present one in that the decision was rendered more than forty-five days after the final submission by the respondent; still, the importance of giving the respondent notice was stressed.

> In its Response [complainant] now seeks to justify the delay after the fact by explaining that extra time had been devoted to careful consideration of . . . complicated issues' in the decision. This explanation is belied by the fact that there is no mention of such an extensive review and deliberation by the debarring official in the Notice of Debarment, where it would have been most appropriate. If the debarring official were allowed to extend the decision-making period without providing any justification to the Respondent, then the rule would, in effect, be nullified.

Id., at 1406.

In *In re: Lewis Eugene McCravy*, 55 Agric. Dec. 254 (Feb. 8, 1996), the complainant argued that since it is possible for the respondent to submit information and argument for up to thirty days after the notice of appeal, the deadline for issuing a decision should not be measured from the respondent 's initial submission, but rather from the end of the thirty day response period. It urged that any other interpretation would force the debarring official to either wait until the end of the thirty day period and then write a rushed decision, or issue a decision and then have further timely information submitted. *Id.*, at 257-58. That argument was rejected in favor of respondent 's argument that if the debarring official needs more time he can simply issue an extension.

> Even if respondent makes his only submission on the first day of the 30-day response period, should the debarring official wait until the end of such response period to assure that no further submissions are made, he still has 15 days from the end of such period within which to issue

> his decision or extend his time by means of a one-paragraph form letter and comply with the Regulations.

Id., at 258. Although *McCravy* does not address what should be done if further submissions are actually made, the same logic applies. If the suspending official receives further submissions he can still issue the decision within the original time limits; or, if he needs more time he has fifteen days to provide notice of an extension.

The CCC received the respondents ' first submission on June 4, 1996, thus setting the decision deadline for July 19, 1996. After the respondents made an additional submission on June 19, the suspending official should have issued an extension if he felt that it was needed. In fact, all but respondents ' final submission were made within the forty-five day period. The suspending official could have timely extended the deadline after any of them. Instead, he issued a decision, without explanation, on July 26, one week after the deadline.

The untimely issuance of the decision was, however, harmless error since it was caused by respondents' own improper actions. Only respondents' first submission was timely. All of the additional submissions were filed beyond the appeal period, and could have been refused by the suspending official, but were instead accepted and considered. The respondents willingly submitted additional materials and asked that the suspending official consider them. They cannot now claim that they were harmed by delay resulting from the acceptance and consideration of their own untimely submissions.

This conclusion is consistent with prior cases which held that it is not harmless error to issue an untimely decision. The previous cases reasoned that because time is of the essence in these proceedings, time limits must be enforced against all parties with equal consistency. Not doing so would result in an unfair advantage to the government, and therefore the error would not be harmless. *See In re: Eugene McCravy*, 55 Agric. Dec. 254, 259 (Feb. 8, 1996); *In re: Robert M. Miller*, 53 Agric. Dec. 1411, 1414 (Dec. 28, 1994); *In re: Young's Food Stores*, 53 Agric. Dec. 1403, 1406 (Dec. 1, 1996). The time limits were not enforced against the respondents, and it was respondents' untimely submissions that caused the agency delay. Therefore, no inconsistency or unfair advantage to the government will arise from treating the delay as harmless error.

Respondents also cite as error the agency's failure to immediately turn over the Notice of Opposition materials to the suspending official. There is evidence that instead of handing over each submission individually, the agency

collected the documents and turned them over as a compiled administrative record along with a decision memorandum on July 26, 1996. The Regulations provide that the "USDA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 3017.411 through § 3017.413." 7 C.F.R. § 3017.410(b). The suspending official had the record before him, and rendered an institutional decision based upon the evidence in the record and all of respondents submissions. The internal procedures used by CCC and FAS were not inconsistent with the regulations or principles of fundamental fairness. Therefore, they cannot be found to be not in accordance with law, not based upon the applicable standards of evidence, or arbitrary, capricious or an abuse of discretion.

B. Immediate action necessary to protect the public interest

Respondents next contend that the suspending official failed to show that there was an immediate need for the suspension. The CCC allowed more than two years to pass between the initial discovery of possible wrongdoing by MMI and the notice of suspension. In the interim, CCC continued to do business with MMI. Specifically, between December 1, 1993 and April 17, 1996, CCC granted, and MMI successfully performed, fifteen contracts. Respondents maintain that CCC cannot claim there is an immediate need to protect the public from MMI after continuing to do business with them with knowledge of the prior acts. Furthermore, MMI claims that the completed contracts show that it is presently responsible, and that the suspension is therefore punishment for past acts, and not protection from future acts as intended by the regulations. *See David K. Alberta,* 94 WL 16893 (Ag. B.C.A. Apr. 25, 1994).

CCC responds that there was no more delay than necessary to obtain sufficient evidence of wrongdoing, and that it continued to do business with MMI only because it did not have enough evidence to suspend. There is sufficient evidence in the record to support this contention. Although the Office of the Inspector General (OIG) began its investigation in December of 1993, it did not provide its investigation report to CCC until February of 1996. Although CCC became aware of the allegations in 1994, without the results of OIG's investigation it did not have sufficient evidence to take action. As soon as CCC received the report, it asked MMI to voluntarily exclude itself from the programs. When MMI then submitted a DIEP bid, CCC issued the suspension.

Respondents' claims that they were prejudiced by the two year time lapse are unfounded. They argue that they took out loans and purchased new equipment with the belief that a suspension was not forthcoming. Respondents, however, were aware that they had committed fraudulent acts, and were under investigation. There is no statute of limitations on suspension proceedings. The regulations merely provide that "[i]nformation concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration." 7 C.F.R. § 3017.410. The agency followed these requirements. Respondents cannot claim to be prejudiced simply because they thought their conduct was being overlooked, when in fact the investigation was still pending.

Respondents further maintain that the public would not be protected, but would actually be harmed by the suspension. Its employees will lose their jobs. Dairy producers will lose it as an outlet. Humanitarian relief organizations will lose an important milk supply. The Small Business Administration will lose money on a guaranteed loan. Even though the suspension shall have adverse effects, USDA's need to protect the integrity of its programs, and to protect the public from further dishonest dealings, sufficiently outweighs them and makes the suspension necessary. The government cannot be required to conduct business with dishonest individuals because some individuals, or even the government, might profit from the dealings. For example, *Joseph Construction Company v. Veterans Administration of the United States*, 595 F. Supp. 448, 452 (N.D. Ill. 1984) found that: "[t]he contracting agency must consider all relevant factors, such as the low bidder's reliability and honesty, in addition to the amount of the bid in order to determine whether a contract would be advantageous to the government."

Due process concerns require that a person not be suspended without a hearing unless there is an immediate need to protect the public. It is, however, immediately necessary to protect the public from a company that cannot be trusted to do business with the government in a responsible and honest way. Section 3017.115states that:

> In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

There is sufficient evidence that MMI is not presently responsible and cannot be trusted. It submitted falsified documents in order to obtain more than one million dollars to which it was not entitled, and it retains that money today. MMI has betrayed the public trust, and suspension is needed to ensure that it does not have access to public funds while further legal proceedings are pending. *William E. Johnston*, 51 Agric. Dec. 1103 (Dec. 23, 1992), held that, "absent suspension, [the respondent] was poised to become the beneficiary of additional government commitments on new projects during the period of deliberation on his proposed debarment. These circumstances clearly called for suspension to protect the public interest." *Id.*, at 1111. Similar circumstances exist here and the suspension is, therefore, equally necessary.

C. Adequate cause

Respondents next contend that there is legally insufficient evidence of cause because the CCC continued to do business with MMI after learning of the fraudulent contracts. Respondents rely on *David K. Alberta*, 94 WL 161893 (Ag. B.C.A., April 25, 1994) and *Silverman v. United States Department of Defense*, 817 F. Supp. 846 (S.D. Cal. 1993), which both vacated debarments that were based on past misconduct alone. Those cases, however, are not persuasive. First, both vacated debarments, not suspensions. Second, the government continued to do business with the respondents in those cases after the criminal convictions that constituted the bases for the debarments. Since convictions constitute a presumption of misconduct there was no reason for the delay in those cases. In the instant case, the CCC simply continued to do business with MMI until it had sufficient evidence to justify the suspension. Furthermore, the complainant is persuasive in its argument that respondents have been suspended not only for past misconduct, but also for their continuing failure to return the fraudulently obtained funds. Respondents have not shown themselves to be presently responsible by making any effort to forgo the benefits of their past misconduct.

Respondents also argue that the suspending official should have considered mitigating factors when issuing his decision. The standard for suspension, however, does not require consideration of mitigating factors. The standards for debarment and suspension are different. Debarment requires that "the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision." 7 C.F.R. § 3017.300. Suspension, instead, only requires consideration of whether there is adequate evidence of one or more of the causes for suspension set forth in the

regulations, and whether there is an immediate need for the suspension. 7 C.F.R. § 3017.400.

Likewise, it is not necessary for the suspending official to articulate his decisionmaking process as fully as in a debarment proceeding. Section 3017.413(c) merely requires the notice of the suspending official's decision to include the following:

> (i) Reference to the previously issued notice of suspension;
> (ii) The reason(s) for the action taken in this notice.
> (iii) The effective date(s) of the suspension taken in this notice and, where appropriate, the period of the suspension;
> (iv) Advice that the suspension is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or designee authorized by an agency head makes a determination referred to in § 3017.215.

The letter Mr. Shumacher sent to Harjit Singh on July 26, 1996 contained all of the required information and is therefore sufficient in form.

A lower standard is appropriate for suspension because of its temporary nature. Legal or administrative proceedings must be initiated within twelve months after the date of the suspension notice. There is the possibility of a six month extension, but the period may not in any event exceed eighteen months. If additional proceedings are not initiated within the applicable period, the suspension is terminated. 7 C.F.R. § 3017.415(b). A debarment on the other hand can be imposed for as many as five years. 7 C.F.R. § 3017.320.The harshness of debarment necessitates the more detailed analysis and consideration of mitigating factors that the respondents requested here.

The respondents also claim that the suspending official erroneously considered evidence which should have been treated as confidential. Respondents sent a memorandum containing admissions to the United States Attorney's Office as part of confidential settlement negotiations. Subsequently, respondents waived any confidentiality when it forwarded multiple copies of the memorandum to the USDA and invited OGC attorney Maureen Meher to share the document with interested parties. The copies were not supplied in the context of settlement negotiations, and the USDA had no reason to treat the document volunteered by the respondents as confidential. The references to confidentiality and offers of settlement in the memorandum were directed to the U.S. Attorneys Office, not USDA. Respondents cite a D.C. Bar Ethics Opinion which states that a recipient of confidential information is obligated to consult the sender to determine if a

waiver was intended. The opinion, however, is meant to address a situation where confidential information is accidentally transmitted to opposing counsel, and therefore does not apply to this situation where respondents knowingly sent copies of the document to the USDA.

It is noted, however, that even if the memorandum were to be excluded, there is sufficient evidence in the record of fraud and false statements without the admissions. This evidence includes bills of lading, container tracking records from the shipping vessels, and correspondence between Mr. Singh and General Milling. In sum, there is sufficient evidence to support the suspending official's decision, and it therefore cannot be considered arbitrary and capricious and an abuse of discretion, or not based on the applicable standard of evidence, or not in accordance with the law. Consequently, the decision of the suspending official shall be affirmed.

Order

The decision of the suspending official is hereby affirmed. The effective date of the suspension is April 17, 1996. This order is final and not appealable within the Department.

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final November 8, 1996.-Editor]

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: SANDRA L. REID.
P.Q. Docket No. 95-0047.
Decision and Order filed July 17, 1996.

Default — Bringing prohibited fruit into United States from Jamaica — Failure to file timely answer — Civil penalty — Notice and opportunity for hearing.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $375 against Respondent for importing a mango into the United States in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c). The Rules of Practice, 7 C.F.R. § 1.145(a), provide that appeal to the Judicial Officer must be filed within 30 days after service of the decision. Respondent's appeal to the Judicial Officer filed 32 days after service of the Default Decision could have been denied as being late-filed. However, in accordance with the Rules of Practice, 7 C.F.R. § 1.139, a Default Decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision allows the Judicial Officer to grant up to a 4-day extension of time for filing an appeal, and Respondent was granted a 2-day extension. Under the Rules of Practice, Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Department is not required to hold a hearing; therefore, under *Kaplinsky*, the civil penalty requested in the Complaint is reduced by one-half.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding for the assessment of a civil penalty for a violation of the Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-154, 156-165, 167) (Acts), and a regulation promulgated under the Acts, (7 C.F.R. § 319.56(c)). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151)(hereinafter the Rules of Practice), by a Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on June 29, 1995. The Complaint, which alleges that on or about August 7, 1994, Sandra L. Reid

(hereinafter Respondent) imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), was served on Respondent on October 26, 1995. Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice, (7 C.F.R. § 1.136), and on March 22, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued a Default Decision and Order (hereinafter Default Decision) in which the Chief ALJ found that, on or about August 7, 1994, Respondent imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States, and assessed a civil penalty of $375 against Respondent.

On June 4, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] On June 28, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Default Decision and Order, and on July 3, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Respondent failed to file an Answer within the time prescribed in [section 1.136(a) of the Rules of Practice,] (7 C.F.R. § 1.136(a)). Section 1.136(c) of

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

the Rules of Practice, (7 C.F.R. § 1.136(c)), provides that the failure to file an Answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an Answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139.)

Findings of Fact

1. Sandra L. Reid is an individual whose mailing address is (b) (6) (b) (6)

2. On or about August 7, 1994, Respondent imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated the Acts and a regulation issued under the Acts, (7 C.F.R. § 319.56(c)). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

00 Respondent was served with the Default Decision on May 3, 1996, and on June 4, 1996, 32 days after service, Respondent filed an appeal. (Letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated May 13, 1996, and filed June 4, 1996 (hereinafter Appeal Petition).) Section 1.145(a) of the Rules of Practice provides:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

Respondent's late-filed appeal could be denied. However, section 1.139of the Rules of Practice provides:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145[,(7 C.F.R § 1.145)]. . . .

7 C.F.R. § 1.139.

Thus, in accordance with section 1.139of the Rules of Practice, (7 C.F.R. § 1.139), a default decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision was placed in the Rules of Practice so that if an appeal is inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal. *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-301 (1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Company, Inc.*, 43 Agric. Dec. 1106, 1108 (1984). The Default Decision had not become final on June 4, 1996, when Respondent filed the Appeal Petition and the postmark on the envelope containing Respondent's Appeal Petition indicates that Respondent mailed the Appeal Petition from Brooklyn, New York, on May 22, 1996. (Envelope containing Respondent's Appeal Petition.) Under these circumstances, I am granting a 2-day extension of time to Respondent for filing her appeal.[2] Thus,

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[2]Had the Default Decision become final prior to Respondent's filing an appeal, the Judicial Officer would not have had jurisdiction to consider Respondent's appeal. *In re Field Market Produce, Inc.*, 55 Agric. Dec. ___, slip op. at 10 (July 10, 1996); *In re Ow Duk Kwon*, 55 Agric. Dec. ___, slip op. at 6-7 (June 6, 1996); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994); *In re K. Lester*, 52 Agric. Dec. 332 (1993); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986);

Respondent's Appeal Petition filed June 4, 1996, is deemed to have been timely filed.

Respondent contends in the Appeal Petition that she was not provided with an opportunity for a hearing. (Respondent's Appeal Petition.) I disagree and find that Respondent was provided with an opportunity for a hearing and that Respondent waived the hearing by failing to file a timely Answer.

On June 29, 1995, the Office of the Hearing Clerk sent a letter dated June 29, 1995, and one copy each of the Complaint and the Rules of Practice to Respondent at Respondent's last known address, (b) (6) (b) (6) [3] by certified mail. The envelope containing the June 29, 1995, letter from the Office of the Hearing Clerk and one copy each of the Complaint and the Rules of Practice was returned to the Office of the Hearing Clerk by the postal service marked "No such street ___ number _x_."

Section 1.147(c)(1) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

In re William T. Powell, 44 Agric. Dec. 1220 (1985); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978); *In re Willie Cook*, 39 Agric. Dec. 116 (1978).

[3] Prior to the institution of this proceeding, Respondent sent a letter dated January 3, 1995, to Mr. Christian, Regulatory Enforcement, United States Department of Agriculture, Animal and Plant Health Inspection Service, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782, concerning the violation which is the subject of this proceeding. Respondent states in her January 3, 1995, letter that her return address is (b) (6) (b) (6). (See attachment to letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated November 27, 1995, and filed December 8, 1995.) This January 3, 1995, letter is the latest correspondence in the record from Respondent prior to the issuance of the Complaint. Respondent's filings in this proceeding variously identify her address as (b) (6) (b) (6) and (b) (6) and Respondent has responded intermittently to documents served on her in this proceeding at 149- (b) (6) and (b) (6) Therefore, for the purposes of this proceeding, I find that service in accordance with the Rules of Practice at either (b) (6), or (b) (6) (b) (6), constitutes proper service on Respondent.

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last know[n] residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

On October 26, 1995, the Office of the Hearing Clerk served Respondent, at 149-53 255th Street, Rosedale, New York 11422, by ordinary mail, in accordance with 7 C.F.R. § 1.147(c)(1), with one copy each of the Complaint, the Rules of Practice, and the June 29, 1995, letter from the Office of the Hearing Clerk.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said

allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[,(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . .

7 C.F.R. § 1.139.

§ 1.141 Procedure for Hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. . . .

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on October 26, 1995, states: The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200,in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136(a)). The admission by the answer of all the material allegations of fact contained in the complaint constitutes

> a waiver of a hearing. Failure to deny or otherwise respond to any allegation in this complaint constitutes an admission of the allegation. Failure to file an answer within the prescribed time constitutes an admission of the allegations in this complaint and a waiver of a hearing.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely Answer. Moreover, the accompanying June 29, 1995, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> Most importantly, you have *20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint.* It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

Letter from Joyce A. Dawson, Hearing Clerk, to Ms. Sandra L. Reid, dated June 29, 1995, p. 1. (Emphasis in original.)

Respondent's Answer was due November 15, 1995, and Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R.§ 1.139). On November 16, 1995, the Office of the Hearing Clerk sent a letter to Respondent at 149-53255th Street, Rosedale, New York 11422, stating, "Your answer to the Complaint has not been received within the allotted time. You will be informed of any future action taken in this matter."

On December 8, 1995, Respondent filed a response[4] to the November 16, 1995, letter from the Office of the Hearing Clerk stating that she had previously answered the Complaint filed in the instant proceeding, as follows:

> RE: Letter Dated 11/16/95
>
> Dear Ms. Dawson:
>
> Your letter stated that an "..answer to the Complaint has not been received within the allotted time.". This staement [sic] is false. I was made aware of the problem in a letter(dated 09/29/94) which I received on 10/03/94 from Alan Christian. I promptly responded in two letters 11/94 and 1/95. A copy of the 1/95 letter is attached for your review. The letter was sent within the allotted time of 20 days.

Letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated November 27, 1995, and filed December 8, 1995.

Attached to Respondent's December 8, 1995, filing is a copy of a letter dated January 3, 1995, from Respondent[5] to Mr. Christian, Regulatory Enforcement(NY94169), USDA, APHIS, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782. Respondent attached the November 1994 letter, referenced in her December 8, 1995, filing, to her filing of March 19, 1996. Respondent's November 15, 1994, letter is addressed to Mr. Christian, Regulatory Enforcement(NY94169), USDA, APHIS, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782.[6] Respondent contends in her December 8, 1995, filing that her letters of November 15, 1994, and January 3, 1995, were prompt responses to a letter dated September 29, 1994, from Alan Christian.

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[4]Respondent's December 8, 1995, filing identifies her return address both in the filing and on the envelope containing the filing as: "Sandra L. Reid, (b) (6) (b) (6) "

[5]Respondent's letter of January 3, 1995, identifies her return address as: "Sandra L. Reid, (b) (6) "

[6]Respondent's letter of November 15, 1994, identifies her return address as: "Sandra L. Reid, (b) (6) "

Section 1.136(a) of the Rules of Practice, (7 U.S.C. § 1.136(a)), provides that "[w]ithin 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . ." The Complaint instituting this proceeding was not issued until June 26, 1995, and was not filed until June 29, 1995. Respondent's letters dated November 15, 1994, and January 3, 1995, which Respondent contends were in prompt response to a letter dated September 29, 1994, from Alan Christian could not have operated as a timely Answer to the Complaint because they were not filed with the *Hearing Clerk within 20 days after service of the Complaint on Respondent.* Rather, Respondent's letters of November 15, 1994, and January 3, 1995, were sent to Regulatory Enforcement, United States Department of Agriculture, Animal and Plant Health Inspection Service, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782, 7 months and 5 months respectively *before* the Complaint was filed. The record clearly establishes that Respondent did not file the January 3, 1995, letter with the Hearing Clerk until December 8, 1995, 43 days after service of the Complaint on Respondent, and did not file the November 15, 1994, letter with the Hearing Clerk until March 19, 1996, 145 days after service of the Complaint on Respondent.

On December 8, 1995, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Default Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Default Decision and Order (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Respondent was served with the Motion for Proposed Default Decision and Proposed Default Decision on March 7, 1996. On March 19, 1996, Respondent filed a response to the Complainant's Motion for Proposed Default Decision and Proposed Default Decision in which she contends that she had responded to the Complaint in a timely fashion, as follows:

> This letter is the third attempt to resolve this matter. A letter dated 12/8/95 was received yesterday 3/11/96. This escalated beyond belief. The incident occured [sic] in 1994, two(2) years ago. I have responded in a timely fashion to all notices sent.

> I am again requesting a hearing to resolve this matter. . . . This is a rather one-sided process. I have not been allowed to represent myself. . . .

Letter from Respondent to Regina A. Paris, Legal Technician, Office of the Hearing Clerk, dated March 12, 1996, and filed March 19, 1996.

Respondent attached the letters dated November 15, 1994, and January 3, 1995, which she had sent to Mr. Christian and her filing of December 8, 1995, to her March 19, 1996, response to Complainant's Motion for Proposed Decision and Proposed Decision.

On March 22, 1996, the Chief ALJ filed the Default Decision. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[7] Respondent has shown no basis for setting aside the Default Decision here.[8]

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[7] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[8] *See In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer

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proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re JerrySeal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[9] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

However, had Respondent been permitted to present any affirmative defenses out of time, it is still extraordinarily unlikely that Respondent could prevail. Excuses for illegally importing fruit that presents a significant risk of introducing plant pests into the United States are routinely rejected by the Judicial Officer. One piece of fruit bearing a plant pest could cause, *inter alia*, hundreds of millions of dollars in damaged fruit, eradication expense, and quarantine of United States produce. The Animal and Plant Health Inspection Service, the agency charged with responsibility for administering the Federal Plant Pest Act and the Plant Quarantine Act, is committed to protecting American agriculture from the introduction of plant pests into the United States; and the Secretary, in turn, is committed to vigorous enforcement of the Acts and regulations issued under the Acts to support the Animal and Plant Health Inspection Service's efforts.

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[9] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

For the foregoing reasons, the following Order should be issued.

Order

Respondent, Sandra L. Reid, is assessed a civil penalty of $375.[10] Respondent shall send a certified check or money order for $375, payable to the "Treasurer of the United States," to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, MN 55403

within 30 days after service of this Order on Respondent.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-47.

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[10]Respondent has failed to file a timely Answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the $750 civil penalty requested in the Complaint is reduced by one-half. *See In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 633-34 (1988); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201, 2210-11 (1985).

In re: BIBI UDDIN.
P.Q. Docket No. 95-0055.
Decision and Order filed August 23, 1996.

Notice and opportunity for hearing — Failure to file an answer — Default — Bringing prohibited fruit into United States from Guyana — Intent as an element of the violation — Civil penalty.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $250 against Respondent for importing approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas), in violation of 7 C.F.R. § 319.56. Respondent was served with the Complaint and Complainant's Motion for Default Decision in accordance with 7 C.F.R. § 1.147(c)(1). Under the Rules of Practice, (7 C.F.R. §§ 1.136(c),.139), Respondent's failure to file a timely Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. Respondent's denial of the material allegations of the Complaint, filed more than 9 months after service of the Complaint on Respondent, is too late. Intent is not relevant to an administrative proceeding for the assessment of a civil penalty for a violation of a regulation issued under the Plant Quarantine Act. The civil penalty assessed against Respondent is warranted and consistent with civil penalties requested and assessed in similar circumstances.

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of August 20, 1912, as amended, (7 U.S.C. §§ 151-154, 156-165, 167) (hereinafter the Plant Quarantine Act), and the regulations promulgated under the Plant Quarantine Act, (7 C.F.R. §§ 319.56-.56-8). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151), and the Rules of Practice Governing Proceedings Under Certain Acts, (7 C.F.R. §§ 380.1-.10) (hereinafter the Rules of Practice), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on August 21, 1995. The Complaint, which alleges that on or about August 31, 1994, Bibi Uddin (hereinafter Respondent) imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, was served on Respondent on October 5, 1995. Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice, (7 C.F.R. § 1.136). On July 3, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W.

Palmer (hereinafter Chief ALJ) issued a Default Decision and Order (hereinafter Default Decision) in which the Chief ALJ found that, on or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, and assessed a civil penalty of $250 against Respondent.

On July 22, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] On August 12, 1996, Complainant filed Complainant's Response to Respondent's Appeal of the Default Decision and Order to the Judicial Officer (hereinafter Complainant's Response), and on August 15, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Respondent failed to file an Answer within the time prescribed in [section 1.136(a) of the Rules of Practice,] (7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice[, (7 C.F.R. § 1.136(c)),] provides that the failure to file an Answer within the time provided under [7 C.F.R. §] 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an Answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139.)

Findings of Fact

1. Bibi Uddin, Respondent herein, is an individual whose mailing address is (b) (6)

2. On or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56,because the importation of bitter melons and sapodillas from Guyana into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact, Respondent has violated 7 C.F.R. § 319.56. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter, dated July 12, 1996, addressed to Complainant's counsel, Ms. Susan C. Golabek, which was filed on July 22, 1996 (hereinafter Respondent's Appeal Petition), appears to be and is treated herein as Respondent's appeal of the Default Decision.[2] Respondent raises three issues in Respondent's Appeal Petition.

First, Respondent contends that she did not receive "past correspondence" regarding the instant proceeding, as follows:

> [T]he complaint also alleges that I failed to answer within the time "prescribed and that such failure [was] deemed an admission of the allegations . . . and constitute[d] a waiver of hearing." As I was in the process of moving to a new apartment, I did not receive past correspondence from your department. In several telephone conversations, departmental employees have verified that they indeed

[2]The record contains an almost identical letter, dated July 11, 1996, from Respondent, addressed to Complainant's counsel, Ms. Susan C. Golabek, which was filed on July 19, 1996. The issues raised in Respondent's July 19, 1996, filing are identical to the issues raised in Respondent's Appeal Petition.

received returned mail. As such, my silence on the matter does not indicate consent to the allegations but rather reveals that I was not apprised of the matter. Had I known of the complaint, I would have responded as I am doing now.

Respondent's Appeal Petition.[3]

On August 22, 1995, the Office of the Hearing Clerk sent a letter dated August 22, 1995, and one copy each of the Complaint and the Rules of Practice to Respondent at Respondent's last known address, [redacted], by certified mail. The envelope containing the August 22, 1995, letter from the Office of the Hearing Clerk and one copy each of the Complaint and the Rules of Practice was returned to the Office of the Hearing Clerk by the postal service marked "UNCLAIMED." The envelope also bears the crossed-out notation "[redacted]."

Section 1.147(c)(1) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal

[3]Contrary to Respondent's contention, the Complaint does not allege that Respondent "failed to answer within the time 'prescribed and that such failure [was] deemed an admission of the allegations . . . and constitute[d] a waiver of hearing.'" Statements regarding the effect of Respondent's failure to file an Answer are contained in Complainant's Motion for Adoption of Proposed Default Decision and Order (hereinafter Complainant's Motion for Default Decision), Complainant's Proposed Default Decision and Order (hereinafter Complainant's Proposed Default Decision), and the Default Decision.

place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

On October 5, 1995, the Office of the Hearing Clerk served Respondent at (b) (6), by ordinary mail, in accordance with 7 C.F.R. § 1.147(c)(1), with one copy each of the Complaint, the Rules of Practice, and the August 22, 1995, letter from the Office of the Hearing Clerk. (October 5, 1995, Memorandum to the File from Regina A. Paris, Hearing Clerk's Office.)

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[,(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . .

7 C.F.R. § 1.139.

§ 1.141 Procedure for Hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. . . .

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on October 5, 1995, states:

The respondent shall have twenty (20) days after service of this Complaint in which to file an Answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an Answer within the prescribed time shall constitute an admission of the allegations in this Complaint and a waiver of a hearing.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely Answer. Moreover, the accompanying August 22, 1995, letter

from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> Most importantly, you have *20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint*. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

August 22, 1995, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Bibi Uddin, p. 1. (Emphasis in original.)

The Complaint, the Rules of Practice, and the August 22, 1995, letter from the Office of the Hearing Clerk sent to Respondent by ordinary mail on October 5, 1995, were not returned to the Office of the Hearing Clerk. (Complainant's Response, p. 1.) Respondent's Answer was due October 25, 1995. Respondent's first filing in this proceeding is dated July 11, 1996, and was filed July 19, 1996. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)).

On February 15, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On February 16, 1996, the Office of the Hearing Clerk sent a letter dated February 16, 1996, and one copy each of the Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to Respondent at Respondent's last known address, [redacted], by certified mail. The envelope containing the February 16, 1996, letter from the Office of the Hearing Clerk and one copy each of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision was returned to the Office of the Hearing Clerk by the postal service marked "RETURNED TO SENDER." The envelope also bears the notation "[redacted]."

On April 10, 1996, the Office of the Hearing Clerk sent one copy each of Complainant's Motion for Default Decision and the February 16, 1996, letter

from the Office of the Hearing Clerk to Respondent at [redacted], by certified mail. The return receipt card was returned to the Office of the Hearing Clerk, but it did not bear any signature or the date of delivery. (May 2, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Postmaster, Ozone Park, New York.) On June 4, 1996, the Office of the Hearing Clerk served Respondent by ordinary mail, at [redacted] with one copy each of Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk. (June 4, 1996, note from RAParis.) The June 4, 1996, mailing was not returned to the Office of the Hearing Clerk. (Complainant's Response, p. 2.) The February 16, 1996, letter from the Office of the Hearing Clerk informs Respondent that she has 20 days from the date of service of the letter in which to file objections to Complainant's Proposed Default Decision. (February 16, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Bibi Uddin.)

Respondent failed to file objections to Complainant's Motion for Default Decision within 20 days, as provided in 7 C.F.R.§ 1.139,and, on July 3, 1996, the Chief ALJ filed the Default Decision. The Office of the Hearing Clerk sent the Default Decision, which Respondent received, by certified mail, to Respondent at [redacted].

The record clearly establishes that: (1) on October 5, 1995, the Office of the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the August 22, 1995,letter from the Office of the Hearing Clerk, in accordance with 7 C.F.R.§ 1.147(c)(1); (2) on June 4, 1996, the Office of the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk, in accordance with 7 C.F.R.§ 1.147(c)(1); and (3) Respondent received the Default Decision, which was mailed on July 5, 1996, by the Office of the Hearing Clerk, by certified mail, to Respondent at [redacted], the same address to which the Office of the Hearing Clerk sent Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk.

Respondent does not explain the apparent conflict between her assertion that she did not have actual notice of this proceeding until she received the Default Decision and the fact that the Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk were mailed to Respondent at the same address as the Default Decision, which she received. Nonetheless, Respondent's actual notice of this proceeding and the documents sent to Respondent are not required under the

Rules of Practice or under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Service in accordance with the Rules of Practice afforded Respondent due process. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (due process does not require receipt of actual notice in every case).

The Rules of Practice, which provide for service by regular mail to Respondent's last known residence after a certified mailing is returned marked by the postal service as unclaimed or refused, which procedure was followed here, meet the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S.Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E. 2d 1344, 1346 (1982), the court held:

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Accordingly, Respondent was properly served with the Complaint, Complainant's Motion for Default Decision, and the Default Decision. Respondent failed to file a timely Answer to the Complaint; therefore, the Default Decision was properly issued in this proceeding.

Second, Respondent contends that the Findings of Fact in the Default Decision are inaccurate, as follows:

> Because the facts stated in the Default Decision and Order were glaringly inaccurate, I am submitting this appeal in order to address the false allegations concerning my importation of foreign produce. Officials distorted or erroneously documented the quantity and type of fruit which I had on my person when I returned from my vacation. The complaint states that on August 31, 1994, I imported "seven (7) cucurbits (bitter melons) and twenty (20) Manilkara zapota (sapodillas)" from Guyana into the U.S. Suffice it to say, I have neither heard of cucurbits nor sapodillas. Furthermore, I would not be inclined to transport 27 of them along with my luggage in tow. In truth, I actually was in possession of five (5) mangos upon my return to the United States, which I promptly relinquished to U.S. Customs Officials when they informed me that the practice was prohibited.

Respondent's Appeal Petition.

Respondent's denial of the allegations in the Complaint comes too late. Section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), requires that within 20 days after service of the Complaint, Respondent shall file an answer with the Hearing Clerk. Respondent was served with the Complaint on October 5, 1995. Respondent's July 19, 1996, filing and Respondent's Appeal Petition, denying the allegations in the Complaint, were filed more than 9 months after the Complaint was served on Respondent. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in

the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)). Further, Respondent was served with Complainant's Motion for Default Decision on June 4, 1996, which states that Respondent, by her failure to file an Answer, is deemed to have admitted that on or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56. Section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), provides that Respondent may file objections to Complainant's Motion for Default Decision within 20 days after service of the motion on Respondent. Respondent's first filing in this proceeding was filed July 19, 1996, and Respondent's Appeal Petition was filed July 22, 1996, 45 and 48 days respectively after Complainant's Motion for Default Decision was served on Respondent.

Third, Respondent contends that:

> [D]ue to the misrepresentation of the facts, my unawareness that the importation of fruit was prohibited, and my lack of knowledge of the motion levied against me, the contention that a civil penalty of $250 is "warranted and appropriate" as a deterrent is specious at best. The imposition of such a fine is utterly egregious.

Respondent's Appeal Petition.

Section 10 of the Plant Quarantine Act provides:

> **§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty**
>
> Any person who knowingly violates any provision of this chapter or any rule or regulation promulgated by the Secretary of Agriculture under this chapter, or who knowingly forges or counterfeits any certificate provided for in this chapter or in any such rule or regulation, or who, knowingly and without the authority of the Secretary, uses, alters, defaces, or destroys any such certificate shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding $5,000, by imprisonment not exceeding one year, or both. Any person who violates any such provision, rule, or regulation, or who forges or counterfeits any such certificate, or who, without the authority of the Secretary, uses, alters, defaces, or destroys

any such certificate, may be assessed a civil penalty by the Secretary not exceeding $1,000. . . .

7 U.S.C. § 163.

Respondent's contention that she was not aware that "the importation of fruit was prohibited" is not relevant to this administrative proceeding for the assessment of a civil penalty for a violation of a regulation issued under the Plant Quarantine Act. In order to achieve the congressional purpose of the Plant Quarantine Act and to prevent the importation into the United States of items that could be disastrous to United States agriculture, it is necessary to hold violators responsible, irrespective of lack of evil motive or intent to violate the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act. *See, e.g.,In re Francisco Escobar, Jr.*,54 Agric. Dec. 392,418 (1995), *aff'd per curiam*, No. 95-60081 (5th Cir. Aug. 23, 1995) (unpublished) (it is irrelevant to the assessment of a civil penalty under the Federal Plant Pest Act, the Plant Quarantine Act, and the Act of February 2, 1903, that Respondent had no intention of bringing items into the United States); *In re Robert N. Watts, Jr.*,53 Agric. Dec. 1419,1428 (1994) (under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty); *In re Unique Nursery & Garden Center* (Decision as to Valkering, U.S.A., Inc.), 53 Agric. Dec. 377, 421-22 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995) (under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613,636 (1988) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of approximately 4 peaches and approximately 5 plums placed in Respondent's baggage without her knowledge); *In re Kathleen D. Warner*,46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (Judicial Officer found that Respondent could be assessed a civil penalty for an inadvertent or unintentional violation of the plant quarantine laws caused by a misunderstanding or failure of communication between Respondent and an Oriental inspector); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of plantains placed in Respondent's luggage without her knowledge); *In re Rene Vallalta*,45 Agric. Dec. 1421,1423 (1986) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of a cacao seed pod placed in Respondent's luggage without his knowledge); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201,2209 (1985) (under the Plant

Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty).

Even if Respondent were permitted to present affirmative defenses out of time, it is still extraordinarily unlikely that Respondent could prevail. Excuses, for illegally importing fruit that presents a significant risk of introducing plant pests into the United States, are routinely rejected by the Judicial Officer. One piece of fruit bearing a plant pest could cause, *inter alia*, hundreds of millions of dollars in damaged fruit, eradication expense, and quarantine of United States produce. The Animal and Plant Health Inspection Service, the agency charged with responsibility for administering the Plant Quarantine Act, is committed to protecting American agriculture from the introduction of plant pests into the United States; and the Secretary, in turn, is committed to vigorous enforcement of the Plant Quarantine Act and regulations issued under the Plant Quarantine Act to support the Animal and Plant Health Inspection Service's efforts.

Under these circumstances, the assessment of a civil penalty of $250 against Respondent is not "utterly egregious," as Respondent contends, but rather, is warranted and appropriate and consistent with civil penalties requested and assessed in similar circumstances. *See, e.g., In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) ($375 civil penalty assessed for the importation of a fresh mango into the United States from Jamaica, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c)); *In re Christian King*, 52 Agric. Dec. 1333 (1993) ($750 civil penalty assessed for the importation of approximately 5 to 8 pounds of fresh okra into the United States from Sierra Leone, in violation of 7 C.F.R. § 319.56); *In re Carol F. Hines*, 52 Agric. Dec. 336 (1993) ($375 civil penalty assessed for the importation of mangoes and pomegranates into the United States from Guyana, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56); *In re Alicia Piedad Valero*, 52 Agric. Dec. 328 (1993) ($375 civil penalty assessed for the importation of fresh mango fruits into the United States from Ecuador, in violation of 7 C.F.R. § 319.56); *In re Vanessa Hopkins*, 51 Agric. Dec. 1212 (1992) ($375 civil penalty assessed for the importation of approximately 2 mangoes into the United States from Trinidad, in violation of 7 C.F.R. § 319.56); *In re Rousseline Claude*, 51 Agric. Dec. 1209 (1992) ($375 civil penalty assessed for the importation of mangoes into the United States from Haiti, in violation of 7 C.F.R. § 319.56); *In re Shulamis Kaplinsky, supra* ($250 civil penalty assessed for the importation of approximately 4 peaches and approximately 5 plums into the United States from Israel, in violation of 7 C.F.R. § 319.56(c)); *In re Sotirios Foundas*, 47

Agric. Dec. 611 (1988) ($125 civil penalty assessed for the importation of 10 pounds of chestnuts into the United States from Greece, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Lawrence Craig*, 47 Agric. Dec. 606 (1988) ($375 civil penalty assessed for the importation of approximately 3 avocados into the United States from Mexico, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Mercedes Capistrano, supra* ($250 civil penalty assessed for the importation of plantains into the United States from the Philippines, in violation of 7 C.F.R. § 319.56(c)); *In re Rene Vallalta, supra* ($250 civil penalty assessed for the importation of approximately 1 cacao seed pod into the United States from El Salvador, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56).

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[4] Respondent has shown no basis for setting aside the Default Decision here.[5]

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[4] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[5] *See In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid, supra* (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425

(1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[6] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

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someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[6] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

For the foregoing reasons, the following Order should be issued.

Order

Respondent, Bibi Uddin, is assessed a civil penalty of $250.[7] Respondent shall send a certified check or money order for $250, payable to the "Treasurer of the United States," to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within 30 days after service of this Order on Respondent.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-55.

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[7]Respondent has failed to file a timely Answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the $500 civil penalty requested in the Complaint is reduced by one-half. *See In re Shulamis Kaplinsky, supra*, 47 Agric. Dec. at 633-34 (1988); *In re Richard Duran Lopez, supra*, 44 Agric. Dec. at 2210-11 (1985).

MISCELLANEOUS ORDERS

In re: GERAWAN FARMING, INC., a CALIFORNIA CORPORATION.
95 AMA Docket Nos. F&V 916-1 & 917-1.
Order Dismissing Petition filed August 29, 1996.

Donald Tracy, for Complainant.
Brian Leighton, Clovis, CA, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Petitioner's August 28, 1996, motion to withdraw its petition is granted. Respondent has no objection to said withdrawal.

It is ordered that the petition filed herein on July 13, 1995, be withdrawn without prejudice pursuant to 7 C.F.R. § 900.53.

In re: CAL-ALMOND, A DIVISION OF MORVEN PARTNERS L.P., A DELAWARE LIMITED PARTNERSHIP.
96 AMA Docket No. F&V 97-0001.
Order Denying Interim Relief filed December 24, 1996.

The Judicial Officer denied an application for interim relief. Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Moreover, even if Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's application for interim relief would be denied based upon established precedent.

Garrett B. Stevens, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On November 26, 1996, CAL-ALMOND, a Division of Morven Partners L.P., a Delaware Limited Partnership (hereinafter Petitioner), instituted a proceeding under the section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter AMAA), (7 U.S.C. § 608c(15)(A)), regulations issued under the AMAA entitled *Almonds Grown in California*, (7 C.F.R. §§ 981.1-.474, .481), and the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (hereinafter Rules of Practice), (7 C.F.R. §§ 900.50-.71), seeking, *inter alia*, interim relief, as follows:

V

INTERIM RELIEF

21. Petitioner is entitled to interim relief pursuant to 7 C.F.R. § 900.70 permitting Petitioner to escrow "speech-related" assessments into an interest bearing account, and without penalty, pending a final decision on the merits.

Petitioner's Petition at 7, ¶ V(21).

On November 27, 1996, Respondent was served with Petitioner's Petition. Respondent did not file an answer to Petitioner's application for interim relief, and, on December 23, 1996, the case was referred to the Judicial Officer for a decision regarding Petitioner's application for interim relief.

Petitioner's application for interim relief is denied for the following reasons.

First, Petitioner's application for interim relief is denied because Petitioner has not complied with the requirements for filing an application for interim relief. (7 C.F.R. § 900.70(a), (b).) Petitioner's application for interim relief is included in its petition for declaratory relief, a refund of assessments, a preliminary and permanent injunction, and attorney fees under the Equal Access to Justice Act. The Rules of Practice require that Petitioner file a separate application for interim relief. (7 C.F.R. § 900.70(a).)

Second, even if Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's application for interim relief would be denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief. *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Cal-Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan Farming, Inc.*, 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co.*, 48 Agric. Dec. 79 (1989); *In re Cal-Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*,

47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

For the foregoing reasons, the following Order should be issued.

Order

Petitioner's application for interim relief is denied.

In re: HARLAND A. VALIQUETTE.
A.Q. Docket No. 96-0003.
Order Dismissing Complaint filed October 10, 1996.

Susan Golabek, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on November 30, 1995, be dismissed.

In re: COLIN JOHNSON.
A.Q. Docket No. 95-0042.
Order Dismissing Complaint filed November 21, 1996.

Scott Safian, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint, filed herein on August 7, 1995, be dismissed.

In re: J. C. "JACK" WILLIAMS.
A.Q. Docket No. 92-0013.
Order Dismissing Complaint filed December 12, 1996.

Cynthia Koch, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on December 6, 1991, be dismissed.

In re: BETTY AALSETH.
AWA Docket No. 95-0075.
Supplemental Order filed August 8, 1996.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Supplemental Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's license as a dealer under the Animal Welfare Act, as amended, contained in the order in this case on October 13, 1995, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

In re: KRISTINA K. FOLSOM d/b/a KRITTER KORRAL.
AWA Docket No. 96-0054.
Dismissal of Complainant filed August 20, 1996.

Denise Y. Hansberry, for Complainant.
Respondent, Pro se.
Dismissal of Complaint issued by Victor W. Palmer, Chief Administrative Law Judge.

Complainant has requested that the complaint be dismissed and for the reasons stated by complainant it is hereby dismissed.

In re: SHIRLEY MYERS, d/b/a SHIRLEY'S POODLES PARLOR.
AWA Docket No. 93-0038.
Order Dismissing Complaint filed August 29, 1996.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Order Dismissing Complaint issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon Motion of the Complainant and for good cause shown, the complaint in this matter, as amended, is dismissed, with prejudice.

In re: JAMES MICHAEL LATORRES
AWA Docket No. 96-0056.
Order of Dismissal filed September 9, 1996.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Order of Dismissal issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint field herein on June 7, 1996, be dismissed without prejudice.

In re: LORIN WOMACK, d/b/a LAND O'LORIN EXOTICS.
AWA Docket No. 95-0031.
Supplemental Order filed September 24, 1996.

James Booth, for Complainant.
Respondent, Pro se.
Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon the motion of Complainant, the Animal and Plant Health Inspection Service, the suspension of respondents' license as a exhibitor under the Animal Welfare Act, as amended, contained in paragraph three of the Order issued in this case on June 19, 1996, is hereby terminated. However, paragraphs one and two of the Order are still in effect and are not affected by this supplemental Order.

This Order shall be effective upon issuance. Copies shall be served upon the parties.

In re: THOMAS F. SCHOENFELD.
AWA Docket No. 96-0013.
Motion to Dismiss filed October 25, 1996.

Donald Tracy, for Complainant.
Respondent, pro se.
Motion to Dismiss issued by Victor W. Palmer, Chief Administrative Law Judge.

FOR GOOD CAUSE SHOWN, this case is hereby dismissed without prejudice.

In re: NORMAN TROSPER d/b/a DAWG GONE KENNEL.
AWA Docket No. 96-0032.
Supplemental Order filed November 5, 1996.

Tejal Mehta, for Complainant.
David W. Urbom, Arapahow, NE., for Respondent.
Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion for a supplemental order is granted, and the suspension of the respondent's license pursuant to the order issued June 25, 1996, is hereby terminated.

This order shall become effective immediately, copies shall be served upon the parties.

In re: LARRY MARKO.
AWA Docket No. 96-0034.
Supplemental Order filed December 16, 1996.

Donald Tracy, for Complainant.
Respondent, Pro se.
Supplemental Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the Suspension of respondent's license as a dealer under the Animal

Welfare Act, as amended, contained in the Order issued in this case on August 29, 1996, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

In re: JEFF FORTIN and LIZANN FORTIN, d/b/a BEAVER CREEK KENNELS.
AWA Docket No. 96-0072.
Order filed December 19, 1996.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

For good cause shown and upon motion of complainant, the complainant, the complaint in this matter is dismissed.

In re: FAR WEST MEATS AND MICHAEL A. SERRATO.
FMIA Docket No. 91-0002, PPIA Docket No. 91-0001.
Ruling on Certified Questions filed September 27, 1996.

Harold J. Reuben and Scott C. Safian, for Complainant.
Brett T. Schwemer, Washington, D.C., for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On September 5, 1996, Administrative Law Judge James W. Hunt certified two questions to the Judicial Officer. The first question certified by Judge Hunt is, as follows:

> Can a question be certified to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)) when the question arises in the context of a proceeding for which there is no appeal to the Judicial Officer?

September 5, 1996, Certification of Questions to the Judicial Officer.

Answer: Yes.

Section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice) provides:

§ 1.143 Motions and requests.

. . . .

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145[, (7 C.F.R.§ 1.145),]shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R.§ 1.143(e).

The only expressed limitation in section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), on the authority of an administrative law judge (hereinafter ALJ) to certify a question to the Judicial Officer, is temporal; *viz.*, the ALJ must certify the question prior to the filing of an appeal pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). While this limitation appears to anticipate that any question certified by an ALJ to the Judicial Officer would arise in a proceeding with a right of appeal to the Judicial Officer, the Rules of Practice do not explicitly place this limitation on the ALJ's authority to certify questions. Moreover, it does not appear that any party would be harmed by allowing an ALJ to certify a question in a proceeding in which there is no right of appeal to the Judicial Officer, and I find that the better practice would be to reserve discretion in the Judicial Officer to provide requested guidance to ALJs where it is not expressly prohibited.

The second question certified to the Judicial Officer by Judge Hunt arises in connection with a Consent Decision that has become final,[1] and the Judicial Officer has no jurisdiction to hear an appeal of that Consent

[1]The Stipulation and Consent Decision in the instant proceeding became final on November 8, 1991.

Decision.[2] However, since there has been no appeal to the Judicial Officer in the instant proceeding pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145), I find that Judge Hunt may certify the question to the Judicial Officer even though the question arises in connection with a proceeding in which there is no right of appeal to the Judicial Officer.

The second question certified by Judge Hunt is, as follows:

> If such a question can be certified, the question is whether an administrative law judge has the authority to entertain [R]espondents' motion in this proceeding to modify a consent decision?

September 5, 1996, Certification of Questions to the Judicial Officer.[3]

Answer: An ALJ has authority to entertain and to rule on motions to modify Consent Decisions.

Section 1.143(a) and (b)(1) of the Rules of Practice provides:

§ 1.143 Motions and requests.

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[2]*In re Velasam Veal Connection*, 55 Agric. Dec. ___, slip op. at 4-6 (June 25, 1996) (FMIA Docket No. 96-6, PPIA Docket No. 96-5); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1475-76 (1988).

[3]Judge Hunt's second question certified to the Judicial Officer refers to "*[R]espondents'* motion . . . to modify a consent decision." (September 5, 1996, Certification of Questions to the Judicial Officer. (Emphasis added.)) Respondent's Motion to Modify Consent Decision does not clearly indicate whether the motion is filed by both Respondents in this proceeding or only one of the Respondents in this proceeding. The motion to modify the consent decision is entitled "*Respondent's* Motion to Modify Consent Decision" (emphasis added) and is signed by Mr. Brett T. Schwemer, "Counsel for Far West Meats." The body of Respondent's Motion to Modify Consent Decision states that "*respondents* respectfully move that the Administrative Law Judge (ALJ) modify the Consent Decision entered between *respondents'* Far West Meats (Far West) and Michael A. Serrato, and the complainant United States Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS) on November 8, 1991." (Respondent's Motion to Modify Consent Decision, p. 1. (Emphasis added.)) I infer from the record, particularly the body of Respondent's Motion to Modify Consent Decision, that both Respondent Far West Meats and Respondent Michael A. Serrato are represented by Mr. Brett T. Schwemer and, thus, both Respondents filed Respondent's Motion to Modify Consent Decision.

> (a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147[, (7 C.F.R. § 1.147)], (2) requests for subpoenas pursuant to § 1.149[,(7 C.F.R. § 1.149)], and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to filing an appeal of the Judge's decision pursuant to § 1.145[,(7 C.F.R. § 1.145)],except motions directly relating to the appeal. . . .
>
> (b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143(a), (b)(1).

Respondent's Motion to Modify Consent Decision: (1) was filed prior to the filing of an appeal of the ALJ's decision pursuant to § 1.145 of the Rules of Practice, (7 C.F.R. § 1.145); (2) is not a motion directly relating to an appeal; and (3) is not a motion to dismiss on the pleadings. Under these circumstances, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), not only authorizes an ALJ to entertain Respondent's Motion to Modify Consent Decision, but requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and rule on the motion.[4]

Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), provides that *any* motion will be entertained other than a motion to dismiss on the pleading. Generally, the word *any* is broadly inclusive.[5] Section

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[4]*See generally In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (the Judicial Officer, as well as the ALJ, is bound by the Rules of Practice, which state that "[a]ny motion will be entertained other than a motion to dismiss on the pleading").

[5]*See United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (the use of the words *each* and *any* to modify *employee* which, in turn, is defined to include *any* employed individual, discloses congressional intention to include all employees within the scope of the Fair Labor Standards Act, unless specifically excluded); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992) (the word *any* is generally used in the sense of *all* or *every* and its meaning is most comprehensive), *cert. denied sub nom. Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Kalmbach, Inc. v. Insurance Company of the State of Pennsylvania, Inc.*, 529 F.2d 552, 556 (9th Cir. 1976) (the common understanding of the word *any* is that it means *all* or *every*; generally, though not necessarily, the word *any* serves to enlarge the noun it modifies); *FDIC v. Winton*, 131 F.2d 780, 782 (6th Cir. 1942) (the word *any* modifying the word *deposits* in a provision of the Federal Reserve Act means *one indiscriminately of whatever kind or quantity*); *Kuhlman v. W. & A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927) (an Act giving *any* seaman authority to sue,

1.143(a) of the Rules of Practice, (7 C.F.R.§ 1.143(a)), provides that the ALJ shall rule upon *all* motions and requests filed or made prior to filing an appeal of the ALJ's decision pursuant to 7 C.F.R. § 1.145, except motions directly relating to the appeal. As commonly used, the word *all* does not permit an exception or exclusion not specified.[6] Moreover, the context in which the words *all* and *any* are used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), and section 1.143(b)(1) of the Rules of Practice, (7 C.F.R.§ 1.143(b)(1)), respectively, provides no basis for reading the words *all* and *any* narrowly.

Thus, I find section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and section 1.143(a) of the Rules of Practice, (7 C.F.R.§ 1.143(a)), requires an ALJ to rule on Respondent's Motion to Modify Consent Decision.

While the Rules of Practice do not explicitly address the modification of Consent Decisions, section 1.138of the Rules of Practice, (7 C.F.R.§ 1.138), describes the nature of Consent Decisions and the ALJ's limited jurisdiction with respect to entry of Consent Decisions, as follows:

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applies to *every*seaman); *Kmart Corp. v. Key Industries, Inc.*, 877 F. Supp. 1048, 1051 (E.D. Mich. 1994) (the word *any* in a provision of the Michigan long-arm statute includes *each* and *every*); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (the word *any* is a broad and comprehensive term); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 792 (1978) (Remand Order) (the word *any* is a broad and comprehensive term, and there is no basis for engrafting an exception not stated), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984).

[6]*See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (*all* means all, not substantially all); *McLean v. United States*, 226 U.S. 374, 383 (1912) (*all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (*all* means the whole of that which it defines, not less than its entirety; its purpose is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (*all* means *the whole, the sum of all the parts, the aggregate*;*all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Insurance Co. v. Cimarron Insurance Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of*; a statute which says *all* excludes nothing); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (a more comprehensive and all-inclusive word than *all* can hardly be found in the English language; there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945).

§ 1.138 Consent decision.

At any time before the Judge files the decision, *the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties* with appropriate space for signature by the Judge, *and shall contain* an admission of at least the jurisdictional facts, *consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document.* Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

7 C.F.R. § 1.138. (Emphasis added.)

A Consent Decision entered in accordance with section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), mirrors the agreement between parties previously engaged in litigation with one another. An ALJ, presented with the parties' agreement in the form of a decision that contains no error on its face, is required to enter the agreement as the ALJ's Consent Decision. The ALJ has no jurisdiction either to modify the terms of the agreement before its entry as a Consent Decision, or to refuse to enter the agreement as a Consent Decision, for any reason, including the ALJ's well-founded belief that the terms are unjust or that one or more of the parties cannot possibly comply.[7] An ALJ's attempted modification of the parties' agreement and entry of that modified agreement as a purported Consent Decision would not constitute the entry of a Consent Decision, but rather, would constitute a nullity.

Once the written agreement of the parties is entered by the ALJ, it becomes the ALJ's decision, and it is no longer an agreement between the

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[7] *In re David Harris*, 50 Agric. Dec. 683, 701-06 (1991) (Ruling on Certified Questions) (even if error exists, but the error is not apparent on the face of the document embodying the parties' agreement, the ALJ is required by the Rules of Practice to enter the document as a Consent Decision without any further procedure); *In re Herman Lee Hall, Jr.*, 50 Agric. Dec. 373, 374 (1991) (since the parties consented to a decision, the ALJ has no jurisdiction to challenge the Department's compliance with the Administrative Procedure Act and is required to enter a Consent Decision); *In re Gateway Freight Services, Inc.*, 49 Agric. Dec. 902, 904 (1990) (since the jurisdictional issue raised by the ALJ is not apparent on the face of the document, the ALJ must enter the parties' agreement as a Consent Decision).

parties.[8] Nonetheless, I find that the entry of a Consent Decision in accordance with section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), does not so enlarge the ALJ's jurisdiction that he or she may, either *sua sponte* or at the request of one or more parties to the Consent Decision, modify the Consent Decision when a party to the Consent Decision opposes the modification. Such a modification of a previously-entered Consent Decision would result in the creation of a document that would not reflect the agreement of the parties, and, therefore, would not be a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138). Moreover, if an ALJ had jurisdiction to modify a Consent Decision in a manner that affects a party and is opposed by that party, many parties engaged in litigation might be reluctant to resolve the litigation by the entry of a Consent Decision.

Respondents contend that judges, under Rule 60(b) of the Federal Rules of Civil Procedure and their broad equity powers, have great discretion to dissolve or modify consent decrees. (Memorandum in Support of Respondent's Motion to Modify Consent Decision, p. 4.) While I agree with Respondents that Rule 60(b) provides judges with discretion to dissolve and modify consent decrees,[9] the Federal Rules of Civil Procedure are not

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[8] *See generally United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) (consent decrees and orders have attributes of contracts and of judicial decisions, or administrative orders; while they are arrived at by negotiation between the parties, they must be approved by the court or administrative agency); *Pope v. United States*, 323 U.S. 1, 12 (1944) (it is a judicial function and an exercise of the judicial power to render judgment on consent; a judgment on consent is a judicial act); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (we reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992) (while consent decrees have many of the attributes of a contract voluntarily undertaken, they are judicial acts); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979) (consent decrees are judicial acts, but are recognized as having many of the attributes of a contract voluntarily undertaken), *cert. denied sub nom. Thornburgh v. Philadelphia Welfare Rights Org.*, 444 U.S. 1026 (1980).

[9] It should be noted, however, that, while Rule 60(b) of the Federal Rules of Civil Procedure does provide Judges with flexibility to revise consent decrees, the burden is on the moving party to establish that a significant change in circumstances warrants revision of the consent decree. See, e.g., *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992) (while a court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that modification will be warranted in all circumstances; a party seeking modification bears the burden of establishing that a significant change in

(continued...)

applicable to this Department's proceedings conducted under the Rules of Practice. Moreover, relief under Rule 60(b) of the Federal Rules of Civil Procedure is equitable in nature,[10] and neither the ALJs nor the Judicial Officer can provide equitable relief under the Rules of Practice. *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976).

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[9](...continued)
circumstances warrants revision of the decree, and, if the moving party meets the standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances); *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961) (the district court has power to modify a consent decree and sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the consent decree unworkable); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc., supra*, 977 F.2d at 561 (when litigation is ended by the deliberate choice of the parties, a movant's burden for modification of a consent order is particularly heavy, for while consent decisions are judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken; still modification of a consent order under Fed. R. Civ. P. 60(b) is not precluded in appropriately exceptional circumstances); *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application; in the exercise of that power, consent decrees may be modified in appropriate cases on the basis of material changes in operative law or facts, but, in general, modification should be granted only when the change in circumstances urged by the movant was largely beyond that party's control and when compliance has been put beyond reach despite a good faith effort of the movant to comply); *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (a court may modify the parties' rights and obligations under a consent decision but modification should rarely be granted and the party seeking modification bears a heavy burden of demonstrating that new and unforseen conditions have produced such extreme and unexpected hardship that the decree is oppressive).

[10]*King v. Greenblatt*, 52 F.3d 1, 5 (1st Cir.) (relief from a decree under Rule 60(b)(5) is equitable in nature), *cert. denied sub nom. Class of 48 + 1 v. Greenblatt*, 116 S. Ct. 175 (1995); *United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994) (relief under Rule 60(b)(6) is an exercise of the court's equitable power); *National Credit Union Adminis. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)'s catch-all phrase — any other reason justifying relief — has been described as a grand reservoir of equitable power); *Plyler v. Evatt, supra*, 924 F.2d at 1324 (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1208 (7th Cir. 1984) (relief under Rule 60(b) of the Federal Rules of Civil Procedure is essentially equitable in nature and is to be administered on equitable principles).

Settlement agreements in administrative proceedings before this Department are enforced in the absence of extraordinary circumstances.[11] Since a Consent Decision under the Rules of Practice is to reflect agreement of the parties, the ALJ should not modify the Consent Decision in a manner that is opposed by one or more of the parties, but rather, in extraordinary circumstances, should vacate the Consent Decision. The parties would then be free to proceed with litigation of the case or to agree to the entry of a new Consent Decision.

Thus, while an ALJ has jurisdiction to entertain and rule on Respondent's Motion to Modify Consent Decision, the ALJ should not modify the Stipulation and Consent Decision entered on November 8, 1991, even if he or she finds that extraordinary circumstances require that the Consent Decision should not be enforced. Instead, if the ALJ determines that extraordinary circumstances exist, the ALJ should vacate the Stipulation and Consent Decision. The parties would then be free to proceed with litigation of the case or to agree to the entry of a new Consent Decision.

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[11] *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 5 (May 21, 1996) (Order Denying Petition for Reconsideration) (Respondent failed to demonstrate any extraordinary circumstances which would warrant setting aside the settlement agreement voluntarily reached with Complainant on the record); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 14 (Feb. 7, 1996) (Complainant's request to modify settlement agreement reached by the parties on the record, denied); *In re Moore Mktg. Int'l, Inc., supra*, 47 Agric. Dec. at 1477 (even if Respondent's appeal were proper under the Rules of Practice, Respondent's request to modify Consent Decision based upon alleged mutual mistake of fact would be denied on the merits since it would not be in the public interest to upset the consent agreement of the parties); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Rodney W. Dick*, 42 Agric. Dec. 784, 785 (1983) (even if the Judicial Officer had jurisdiction to consider Respondent's motion to be relieved from the Consent Decision, Respondent's motion would be denied because a party's unilateral mistake as to the legal effect of the Consent Decision is not a ground for permitting a party to withdraw from a settlement agreement); *In re Mountainside Butter & Egg Co., supra*, 38 Agric. Dec. at 799-80 (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976) (voluntary settlements in administrative proceedings should be enforced in the absence of extraordinary circumstances), *aff'd*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

In re: RAY SHAPE, d/b/a SHAPE LIVESTOCK.
BPRA Docket No. 93-0001.
Order Dismissing Complaint Without Prejudice filed November 21, 1996.

Sharlene A. Deskins, Attorney for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondent is dismissed without prejudice.

In re: HANDLERS AGAINST PROMOFLOR.
FCFGPIA Docket No. 96-0001.
Order Denying Interim Relief filed November 5, 1996.

The Judicial Officer denied an application for interim relief. Under the governing Rules of Practice, (7 C.F.R. §§ 900.52(c)(2)-.71,1200.50-.52),interim relief is only available to a person who files a petition pursuant to 7 C.F.R. § 900.52. (See 7 C.F.R. § 900.70(a).) Petitioner filed its petition pursuant to 7 C.F.R. § 1200.52,not 7 C.F.R. § 900.52;therefore, interim relief is not available to Petitioner. Further, even if interim relief had been available, Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Finally, even if interim relief had been available to Petitioner and Petitioner had filed a separate application for interim relief in accordance with the applicable Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent.

Denise Y. Hansberry, for Respondent.
Brian C. Leighton, Clovis, California, and James A. Moody, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On September 3, 1996, Handlers Against Promoflor (hereinafter Petitioner) instituted a proceeding under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (hereinafter FCFGPIA), (7 U.S.C. §§ 6801-6814), the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order (hereinafter FCFGPIO), (7 C.F.R. §§ 1208.1-.85),and the Rules of Practice Governing Proceedings on Petitions to Modify or be Exempted from Research, Promotion and Education Programs (hereinafter Rules of Practice), (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), seeking, *inter alia*, interim relief, as follows:

> [Petitioner] seeks interim relief enjoining further collection of the tax from [Petitioner] members on the ground that even a temporary tax

or escrow account violates the First Amendment rights of [Petitioner] members.

In the alternative, [Petitioner] seeks interim relief allowing [Petitioner] members to escrow taxes, its members' assessments, in an interest-bearing account pending a decision of the case on the merits so that [Petitioner] members' taxes are not used by the Council to convey the messages complained of herein, and so that there is an available source of money to refund when [Petitioner] prevails.

Petition ¶¶ 36-37, at 13.

On October 9, 1996, Respondent filed Motion to Dismiss Petition of Handlers Against Promoflor and Memorandum in Support of Motion to Dismiss Petition of Handlers Against Promoflor, but did not specifically address Petitioner's request for interim relief. On October 31, 1996, Petitioners filed Opposition to AMS's Motion to Dismiss on the Grounds of Form, and on November 1, 1996, the case was referred to the Judicial Officer for a decision regarding Petitioner's request for interim relief.

Petitioner's request for interim relief is denied for the following reasons.

First, interim relief is not available to Petitioner. Section 900.70(a) of the Rules of Practice provides:

§ 900.70 Applications for interim relief.

(a) *Filing the application.* A person who has filed a petition pursuant to [7 C.F.R.] § 900.52 may by separate application filed with the hearing clerk apply to the Secretary [f]or an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

7 C.F.R. § 900.70(a). The petition-filing provisions in 7 C.F.R. § 900.52 are not applicable to this proceeding. Rather, the petition-filing provisions applicable to this proceeding are set forth in 7 C.F.R. § 1200.52. The petition herein was filed pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief, which is only available to a person who has filed a petition pursuant to 7 C.F.R. § 900.52, is not available to Petitioner.

Second, even if I found that Petitioner had filed its petition in accordance with 7 C.F.R. § 900.52 (which I do not so find), Petitioner's request for

interim relief would be denied because Petitioner has not complied with the requirements for filing an application for interim relief. (7 C.F.R. § 900.70(a), (b).) Petitioner's request for interim relief is included in its petition for declaratory relief, for exemption from and modification of the FCFGPIO, (7 C.F.R. §§ 1208.1-.85), and for attorneys' fees and costs under the Equal Access to Justice Act, and the Rules of Practice require that Petitioner file a separate application for interim relief. (7 C.F.R. § 900.70(a).)

Third, even if interim relief had been available to Petitioner in this proceeding and Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief. *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Cal-Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan Farming, Inc.*, 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co., Inc.*, 48 Agric. Dec. 79 (1989); *In re Cal-Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981). The reasons for denial of applications for interim relief from marketing orders are applicable to Petitioner's application for interim relief from the FCFGPIO, (7 C.F.R. §§ 1208.1-.85), issued pursuant to the FCFGPIA, (7 U.S.C. §§ 6801-6814).[1]

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[1] *See generally In re Gallo Cattle Co.*, 55 Agric. Dec. 340, 342 (1996) (the reasons for denial of interim relief from marketing orders are applicable to Petitioner's application for interim (continued...)

For the foregoing reasons, the following Order should be issued.

Order

Petitioner's application for interim relief is denied.

In re: McCAFFREY MANAGEMENT INC., and JAMES J. McCAFFREY III.
FMIA Docket No. 96-0004/PPIA Docket No. 96-0003.
Order of Dismissal filed November 8, 1996.

Darlene M. Bolinger, for Respondent.
Mark D. Dopp, and Edward L. Weindenfeld, Washington, D.C., for Complainant.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on February 29, 1996, be dismissed without prejudice.

In re: FAR WEST MEATS and MICHAEL A. SERRATO.
FMIA Docket No. 91-0002, PPIA Docket No. 91-0001.
Clarification of Ruling on Certified Questions filed November 27, 1996.

The Judicial Officer clarified the September 27, 1996, Ruling on Certified Questions in *In re Far West Meats*. The word *entertain*, as used in section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), means *consider* and does not authorize or require an ALJ to make any particular ruling. The word *rule*, as used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), means *decide* and does not authorize or require an ALJ to make a particular ruling. Thus, while an ALJ is required by section 1.143(b)(1) of the Rules of Practice to *entertain* motions and required by section 1.143(a) of the Rules of Practice to *rule* on motions, neither section 1.143(b)(1) nor section 1.143(a) authorizes or requires an ALJ to make a particular ruling. An ALJ does not have jurisdiction to modify a previously-entered Consent Decision, when a party to the Consent Decision opposes the modification. Such a modification would result in the creation of a document that would not reflect the agreement of the parties. The resulting

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[1](...continued)
relief from the Dairy Promotion and Research Order, (7 C.F.R. §§ 1150.101-.187), issued pursuant to the Dairy Production Stabilization Act of 1983, (7 U.S.C. §§ 4501-4513)).

document would not constitute a Consent Decision under section 1.138of the Rules of Practice, (7 C.F.R. § 1.138),but rather, would be a nullity. Further, section 1.138of the Rules of Practice provides that a Consent Decision becomes final upon issuance. Once the Consent Decision is issued, the administrative proceeding is closed and the ALJ has no jurisdiction over the proceeding, except to vacate the Consent Decision in extraordinary circumstances. Therefore, while an ALJ must entertain a motion to modify a Consent Decision and must rule on the motion to modify a Consent Decision, the ALJ has no jurisdiction to grant the motion and enter a modified Consent Decision, if the motion is opposed by one or more of the parties to the previously-entered Consent Decision. The extraordinary circumstances exception is limited to an examination of circumstances that relate to the assent of the parties to the agreement and the ALJ may only vacate a Consent Decision if the ALJ finds that there was no genuine assent to the agreement that was entered as a Consent Decision. A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an ALJ may vacate a Consent Decision.

Harold J. Reuben, Scott C. Safian, and Howard D. Levine, for Complainant.
Brett T. Schwemer, Washington, D.C., for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On September 5, 1996, Administrative Law Judge James W. Hunt certified two questions to the Judicial Officer. On September 27, 1996, I issued a Ruling on Certified Questions, *In re Far West Meats*, 55 Agric. Dec. ___ (Sept. 27, 1996). On October 9, 1996, Complainant filed Complainant's Motion for Extension of Time to Petition Judicial Officer to Reconsider Ruling on Certified Questions (hereinafter Complainant's Motion), and on October 11, 1996, I issued a Ruling on Complainant's Motion in which I provided the parties with an opportunity to file written comments and stated that I would review the Ruling on Certified Questions in light of any timely-filed written comments.[1] (Ruling on Complainant's Motion for Extension of Time to

[1]Complainant's Motion, filed pursuant to section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (hereinafter Rules of Practice), (7 C.F.R. § 1.146(a)(3)), requested an "extension of time to file a petition to reconsider the decision of the Judicial Officer on the questions certified in this case." Complainant's Motion was denied because the September 27, 1996, Ruling on Certified Questions was not a *decision* as that term is defined in section 1.132of the Rules of Practice, (7 C.F.R. § 1.132).

Section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), provides that an administrative law judge (hereinafter ALJ) may certify questions to the Judicial Officer. Since questions may only be certified by an ALJ, requests for clarification or review of Rulings on Certified Questions generally should be made by the ALJ who certifies the question. Judge Hunt did not ask that I clarify or review the September 27, 1996, Ruling on Certified Questions.
(continued...)

Petition Judicial Officer to Reconsider Ruling on Certified Questions and Order Requesting Comments on Ruling on Certified Questions at 4.) Respondents and Complainant filed written comments on the Ruling on Certified Questions on November 8, 1996. (Respondents' Comments on Ruling on Certified Questions and Complainant's Comments on Ruling on Certified Questions.)

The first question certified by Judge Hunt is, as follows:

> Can a question be certified to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R.§ 1.143(e)) when the question arises in the context of a proceeding for which there is no appeal to the Judicial Officer?

September 5, 1996, Certification of Questions to the Judicial Officer.

I answered Judge Hunt's first certified question in the affirmative, stating that:

> Section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice) provides:
>
> **§ 1.143 Motions and requests.**
>
> . . . .
>
> (e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145[,(7 C.F.R.§ 1.145),]shall be made by and in the discretion of the Judge. The Judge may either rule

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[1](...continued)
Nonetheless, since the September 27, 1996, Ruling on Certified Questions could raise significant issues which might impact United States Department of Agriculture programs, and Judge Hunt did not oppose the parties' filing comments on the September 27, 1996, Ruling on Certified Questions or my review of the Ruling in light of any comments received from the parties, I agreed to review the September 27, 1996, Ruling on Certified Questions in light of any comments filed by the parties.

> upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.
>
> 7 C.F.R. § 1.143(e).

> The only expressed limitation in section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), on the authority of an administrative law judge (hereinafter ALJ) to certify a question to the Judicial Officer, is temporal; *viz.*, the ALJ must certify the question prior to the filing of an appeal pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). While this limitation appears to anticipate that any question certified by an ALJ to the Judicial Officer would arise in a proceeding with a right of appeal to the Judicial Officer, the Rules of Practice do not explicitly place this limitation on the ALJ's authority to certify questions. Moreover, it does not appear that any party would be harmed by allowing an ALJ to certify a question in a proceeding in which there is no right of appeal to the Judicial Officer, and I find that the better practice would be to reserve discretion in the Judicial Officer to provide requested guidance to ALJs where it is not expressly prohibited.

In re Far West Meats, supra, slip op. at 1-2. Neither Respondents' Comments on Ruling on Certified Questions nor Complainant's Comments on Ruling on Certified Questions addresses the Ruling on Judge Hunt's first certified question, and I find no basis for clarifying the September 27, 1996, Ruling on Certified Questions as it relates to Judge Hunt's first certified question.

The second question certified by Judge Hunt is, as follows:

> If such a question can be certified, the question is whether an administrative law judge has the authority to entertain [R]espondents' motion in this proceeding to modify a consent decision?

September 5, 1996, Certification of Questions to the Judicial Officer.

I answered Judge Hunt's second certified question in the affirmative. *In re Far West Meats, supra*, slip op. at 3-6. While Respondents and Complainant agree with the answer in the September 27, 1996, Ruling on Certified Questions to Judge Hunt's second certified question, both Respondents and

Complainant commented on the Ruling as it relates to Judge Hunt's second certified question.

As an initial matter, I note that the September 27, 1996, Ruling on Certified Questions contains a discussion of matters that, while related to Judge Hunt's second certified question, are outside the scope of the narrow question asked by Judge Hunt. I find that a response to some of the comments filed by the parties would necessitate my discussion of matters that are even more remotely related to Judge Hunt's second certified question than the discussion in the September 27, 1996, Ruling on Certified Questions. Therefore, I have restricted this clarification of the September 27, 1996, Ruling on Certified Questions to those comments filed by the parties that most directly relate to Judge Hunt's second certified question.

First, Complainant requests that:

> [I] clarify that section[] 1.143(a) and (b)(1) of the Rules of Practice do not enlarge an administrative law judge's jurisdiction or authority to grant relief--they only require that an administrative law judge entertain and rule on motions such as Respondent's Motion To Modify Consent Decision.

Complainant's Comments on Ruling on Certified Questions at 20. I agree with Complainant that section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R.§ 1.143(a),(b)(1)), does not enlarge an ALJ's authority to grant relief. Moreover, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R.§ 1.143(a), (b)(1)), contains explicit limitations on an ALJ's authority to grant relief. Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R.§ 1.143(b)(1)), prohibits an ALJ from entertaining a motion to dismiss on the pleading. Section 1.143(a) of the Rules of Practice, (7 C.F.R.§ 1.143(a)), prohibits an ALJ from ruling on any motion upon the filing of an appeal of the ALJ's decision and prohibits an ALJ from ruling on any motion directly relating to the appeal.

Complainant cites my failure in the September 27, 1996, Ruling on Certified Questions to distinguish between an ALJ's obligation to rule and an ALJ's authority to make a particular ruling as a possible source of confusion. (Complainant's Comments on Certified Questions at 7.) In this regard, the September 27, 1996, Ruling on Certified Questions addresses an ALJ's obligation to entertain motions and rule on motions, as follows:

Section 1.143(a) and (b)(1) of the Rules of Practice provides:

§ 1.143 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147[,(7 C.F.R. § 1.147)], (2) requests for subpoenas pursuant to § 1.149[,(7 C.F.R. § 1.149)], and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to filing an appeal of the Judge's decision pursuant to § 1.145[,(7 C.F.R. § 1.145)], except motions directly relating to the appeal. . . .

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143(a), (b)(1).

Respondent's Motion to Modify Consent Decision: (1) was filed prior to the filing of an appeal of the ALJ's decision pursuant to § 1.145 of the Rules of Practice, (7 C.F.R. § 1.145); (2) is not a motion directly relating to an appeal; and (3) is not a motion to dismiss on the pleadings. Under these circumstances, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), not only authorizes an ALJ to entertain Respondent's Motion to Modify Consent Decision, but requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and rule on the motion.

Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), provides that *any* motion will be entertained other than a motion to dismiss on the pleading. Generally, the word *any* is broadly inclusive. Section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), provides that the ALJ shall rule upon *all* motions and requests filed or made prior to filing an appeal of the ALJ's decision pursuant to 7 C.F.R. § 1.145, except motions directly relating to the appeal. As commonly used, the word *all* does not permit an exception or exclusion not specified. Moreover, the context in which the words *all* and *any* are used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), and section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), respectively, provides no basis for reading the words *all* and *any* narrowly.

Thus, I find section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), requires an ALJ to entertain Respondent's Motion to Modify

Consent Decision and section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), requires an ALJ to rule on Respondent's Motion to Modify Consent Decision.

In re Far West Meats, supra, slip op. at 3-6. (Footnotes omitted.)

I agree with Complainant that the September 27, 1996, Ruling on Certified Questions does not distinguish between the obligation under section 1.143(a) and (b)(1) of the Rules of Practice to entertain and rule on motions on the one hand and authority to make a particular ruling on the other hand. I did not make this distinction in the September 27, 1996, Ruling on Certified Questions only because, as Complainant states, the distinction is "obvious."[2] However, since my failure to make the distinction could be a possible source of confusion, my views regarding the distinction are as follows.

Section 1.143(b)(1) of the Rules of Practice requires ALJs to *entertain* motions other than motions to dismiss on the pleadings. While the meaning of the word *entertain*, when used in connection with an authorization or requirement to entertain a motion or petition, varies according to its surroundings,[3] it generally means *consider* and has not been construed to authorize or require a judge to make a particular ruling.[4] I find that the word *entertain*, as used in section 1.143(b)(1) of the Rules of Practice, means *consider* and does not authorize or require an ALJ to make any particular ruling.

Section 1.143(a) of the Rules of Practice requires ALJs to *rule* on all motions filed or made prior to filing an appeal of the ALJ's decision, except motions directly relating to an appeal. While the word *rule* has been variously

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[2]Complainant's Comments on Ruling on Certified Questions at 7.

[3]*Brown v. Allen*, 344 U.S. 443, 461 (1953); *Denholm & McKay Co. v. Commissioner*, 132 F.2d 243, 247 (1st Cir. 1942); *Ortiz v. Public Service Comm'n*, 108 F.2d 815, 817 (1st Cir. 1940).

[4]*See, e.g., Ribaudo v. Citizens National Bank of Orlando*, 261 F.2d 929, 932 (5th Cir. 1958) (where the court must *entertain* a petition, it seems to be that the court must consider the petition on the merits); *Fernandez v. Carrasquillo*, 146 F.2d 204, 206 (1st Cir. 1944) (when the published rules of the court permit the filing of a petition for rehearing, that means the court will ordinarily consider such petition on the merits, *i.e.*, *entertain* it; when the petition for rehearing is thus considered and disposed of, it has been *entertained* by the court although the court may deny the petition without setting the case down for reargument and without any written opinion); *Denholm & McKay Co., supra*, 132 F.2d at 247 (*entertainment* of a petition for rehearing apparently means merely that the court considers on the merits the grounds urged in the petition for rehearing).

defined,[5] I have not found any circumstance in which the word *rule* has been construed as authorizing or requiring a judge to make a particular ruling. I find that the word *rule*, as used in section 1.143(a) of the Rules of Practice, means *decide* and does not authorize or require an ALJ to make a particular ruling. Thus, while an ALJ is required by section 1.143(b)(1) of the Rules of Practice to *entertain* motions and required by section 1.143(a) of the Rules of Practice to *rule* on motions, neither section 1.143(b)(1) nor section 1.143(a) requires or authorizes an ALJ to make a particular ruling.

As stated in the September 27, 1996, Ruling on Certified Questions, an ALJ does not have jurisdiction to modify a previously-entered Consent Decision, when a party to the Consent Decision opposes the modification. Such a modification would result in the creation of a document that would not reflect the agreement of the parties. The resulting document would not

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[5] **Rule**, *v.* To command or require by a rule of court; as, to rule the sheriff to return the writ, to rule the defendant to plead, to rule against an objection to evidence. To settle or decide a point of law arising upon a trial, and, when it is said of a judge presiding at such a trial that he "ruled" so and so, it is meant that he laid down, settled, or decided such and such to be the law.

Black's Law Dictionary 1331 (6th ed. 1990).

rule. . . . An order of court; a specific direction or requirement of a court, made in a particular matter or proceeding, with respect to the performance of some act incidental thereto. . . .

Ballentine's Law Dictionary 1127 (3d ed. 1969).

RULE. . . . .

An order or direction. See ORDER.
To establish by direction; to determine; to decide.

2 Bouvier's Law Dictionary 2975 (3d rev. 1914).

RULE (*Decide*), ***verb***
adjudge, adjudicate, ascertain, come to a conclusion, come to a determination, conclude, decide by judicial sentence, declare, declare authoritatively, decree, deliver judgment, determine, draw a conclusion, establish, exercise judgment, find, fix conclusively, give an opinion, give judgment, hold, make a decision, make a resolution, pass judgment, pass sentence, pass upon, pronounce, pronounce judgment, reach an official decision, resolve, settle by decree, umpire **ASSOCIATED CONCEPTS:** rule from the bench

Legal Thesaurus 457 (1980).

constitute a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), but rather, would be a nullity. *In re Far West Meats, supra*, slip op. at 7-8. Further, section 1.138 of the Rules of Practice provides that a Consent Decision becomes final upon issuance, as follows:

> **§ 1.138 Consent decision.**
>
> At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. *The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance* to become effective in accordance with the terms of the decision.

7 C.F.R. § 1.138. (Emphasis added.) Once the Consent Decision is issued, the administrative proceeding is closed and the ALJ has no jurisdiction over the proceeding, except to vacate the Consent Decision in extraordinary circumstances described in the September 27, 1996, Ruling on Certified Questions and further described *infra* pp. 10-13.

Therefore, while an ALJ must entertain a motion to modify a Consent Decision and must rule on the motion to modify a Consent Decision, the ALJ has no jurisdiction to grant the motion and enter a modified Consent Decision, if the motion is opposed by one or more of the parties to the previously-entered Consent Decision.[6]

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[6]The parties may agree upon modifications to a Consent Decision and move that the ALJ modify the Consent Decision by the entry of those modifications. Only when the ALJ finds that the parties have agreed to and requested the entry of a modification may an ALJ enter a modification of the Consent Decision. *See In re Leonard Wade Yager*, 48 Agric. Dec. 1046 (1989) (the ALJ entered modifications to the Consent Decision that were agreed upon and requested by the parties); *cf. In re Leonard McDaniel*, 46 Agric. Dec. 125 (1987) (the Judicial Officer modified the original order issued in *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) only

(continued...)

The September 27, 1996, Ruling on Certified Questions provides:

> Settlement agreements in administrative proceedings before this Department are enforced in the absence of extraordinary circumstances. Since a Consent Decision under the Rules of Practice is to reflect agreement of the parties, the ALJ should not modify the Consent Decision in a manner that is opposed by one or more of the parties, but rather, in extraordinary circumstances, should vacate the Consent Decision.

In re Far West Meats, supra, slip op. at 10. (Footnote omitted.)

Complainant requests that I clarify that:

> [T]he extraordinary circumstances exception is limited to an examination of the circumstances under which the consent decision was entered. And . . . the extraordinary circumstances exception does not permit an examination of conditions which have changed since the issuance of the consent decision.

Complainant's Comments on Ruling on Certified Questions at 20-21.

I agree with Complainant that the extraordinary circumstances exception is limited to an examination of circumstances under which the Consent Decision was entered. Moreover, the only circumstances under which the Consent Decision was entered that an ALJ may examine are circumstances that relate to the assent of the parties to the agreement that was subsequently entered as a Consent Decision. The ALJ may only vacate a Consent Decision if the ALJ finds that there was no genuine assent to the agreement that was entered as a Consent Decision because of factors such as fraud or duress.[7]

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[6](...continued)
because the parties agreed to the modification and requested that the Judicial Officer modify the original Decision and Order).

[7]*See In re Jim Fobber*, 55 Agric. Dec. 74, 77 (1996) (Order Denying Petition for Reconsideration) (Respondent failed to demonstrate any extraordinary circumstances which would warrant setting aside the settlement agreement voluntarily reached with Complainant on the record); *In re Jim Fobber*, 55 Agric. Dec. 60, 71 (1996) (Complainant's request to modify settlement agreement reached by the parties on the record, denied); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988) (even if Respondent's appeal were proper under the Rules of (continued...)

A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an ALJ may vacate a Consent Decision.

While Rule 60(b) of the Federal Rules of Civil Procedure provides judges with discretion to dissolve and modify consent decrees based upon a change of circumstances that makes compliance with the consent decree inequitable,[8]

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[7](...continued)
Practice, Respondent's request to modify Consent Decision based upon alleged mutual mistake of fact would be denied on the merits since it would not be in the public interest to upset the consent agreement of the parties); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Rodney W. Dick*, 42 Agric. Dec. 784, 785 (1983) (even if the Judicial Officer had jurisdiction to consider Respondent's motion to be relieved from the Consent Decision, Respondent's motion would be denied because a party's unilateral mistake as to the legal effect of the Consent Decision is not a ground for permitting a party to withdraw from a settlement agreement); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 799-80 (1978) (Remand Order) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976) (voluntary settlements in administrative proceedings should be enforced in the absence of extraordinary circumstances), *aff'd*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

[8]E.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (a party seeking modification bears the burden of establishing that a significant change in circumstances warrants revision of the decree, and, if the moving party meets the standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances; a party seeking modification of a consent decree may meet its initial burden by showing a significant change in factual conditions or in law); *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961) (the district court has power to modify a consent decree and sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the consent decree unworkable); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992) (a consent injunction may be modified when circumstances have sufficiently changed and unexpected hardship and inequity have resulted); *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application; in the exercise of that power, consent decrees may be modified in appropriate cases on the basis of material changes in operative law or facts, but, in general, modification should be granted only when the change in circumstances urged by the movant was
(continued...)

the Federal Rules of Civil Procedure are not applicable to this Department's proceedings conducted under the Rules of Practice.[9] Moreover, relief under Rule 60(b) of the Federal Rules of Civil Procedure is equitable in nature,[10] and neither the ALJs nor the Judicial Officer can provide equitable relief under the Rules of Practice. *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976).

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[8](...continued)
largely beyond that party's control and when compliance has been put beyond reach despite a good faith effort of the movant to comply); *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (a court may modify the parties' rights and obligations under a consent decision but modification should rarely be granted and the party seeking modification bears a heavy burden of demonstrating that new and unforseen conditions have produced such extreme and unexpected hardship that the decree is oppressive).

[9]*In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (the Federal Rules of Civil Procedure are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture); *see Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (the Federal Rules of Civil Procedure do not apply to administrative hearings); *In re Ron Morrow*, 53 Agric. Dec. 144, 154 (1994) (the Federal Rules of Civil Procedure are not applicable to disciplinary proceeding conducted under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) pursuant to the Rules of Practice), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Miguel A. Machado* (Decision as to Respondent Cozzi) (Remand Order), 42 Agric. Dec. 820, 832 (1983) (the Rules of Practice do not provide for discovery in sharp contrast to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[10]*King v. Greenblatt*, 52 F.3d 1, 5 (1st Cir.) (relief from a decree under Rule 60(b)(5) is equitable in nature), *cert. denied sub nom. Class of 48 + 1 v. Greenblatt*, 116 S. Ct. 175 (1995); *United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994) (relief under Rule 60(b)(6) is an exercise of the court's equitable power); *National Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)'s catch-all phrase — any other reason justifying relief — has been described as a grand reservoir of equitable power); *Ptyler v. Evatt, supra*, 924 F.2d at 1324 (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1208 (7th Cir. 1984) (relief under Rule 60(b) of the Federal Rules of Civil Procedure is essentially equitable in nature and is to be administered on equitable principles).

In re: BILLY JACOBS, SR.
HPA Docket No. 95-0005.
Order Denying Petition for Reconsideration filed September 20, 1996.

Failure to file timely petition for reconsideration.

The Judicial Officer denied the Petition for Reconsideration because it was not timely filed. If it had been timely filed, it would have been denied on the merits for the reasons set forth in the Decision and Order filed August 15, 1996.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151)(hereinafter the Rules of Practice). On August 15, 1996, I issued a Decision and Order assessing Billy Jacobs, Sr. (hereinafter Respondent) a civil penalty of $3,000 for a violation of section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)). (Decision and Order, pp. 4, 17.) On August 23, 1996, the Office of the Hearing Clerk served Respondent with a copy of the Decision and Order and a letter from the Office of the Hearing Clerk dated August 15, 1996. Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the

> matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The August 15, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the time for filing a petition for reconsideration, as follows:

> Enclosed is a date-stamped copy of the decision and order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.
>
> Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.
>
> Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's decision within **10** days of service of the decision. An original and **three** copies of the petition for reconsideration must be filed with this office.

August 15, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Mr. Billy Jacobs, Sr. (Emphasis in the original.)

On September 5, 1996, 13 days after Respondent was served with the Decision and Order, Respondent filed a Petition for Reconsideration. Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice, (7 C.F.R. § 1.146(a)(3)), to be filed within 10 days after service of the Decision and Order, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[1]

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[1]See *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Petition for Reconsideration, filed approximately 2 months after service of the Decision and Order, dismissed); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Petition for Reconsideration dismissed, since it was not filed within 10 days after service of the Decision and Order); *In re Robert Aull*, 50 Agric. Dec. 356 (1991) (Petition for Reconsideration, filed 11 days after service of the Decision and Order, denied); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Petition for Reconsideration, filed more than 4 months after service of the Decision and Order, dismissed); *In re Toscony Provision Co.* 45 Agric. Dec. 583 (1986) (Petition for Reconsideration denied, since

Moreover, if Respondent's Petition for Reconsideration had been timely filed, it would have been denied for the reasons set forth in the Decision and Order filed August 15, 1996. Since Respondent's Petition for Reconsideration was not timely filed, there will be no change in the date by which payment must be made, as required by the Decision and Order.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's Petition for Reconsideration is denied.

In re: WILLIAM EARL BOBO and JACK MITCHELL.
HPA Docket No. 91-0202.
Order Lifting Stay Order filed November 7, 1996.

Colleen Carroll, for Complainant.
Boyce C. Cabaniss, Austin, TX, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On January 12, 1994, the Judicial Officer issued a Decision and Order assessing each Respondent a civil penalty of $2,000 and disqualifying each Respondent for a period of 2 years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, exhibition, or horse sale or auction. *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *petition for reconsideration denied*, 53 Agric. Dec. 210 (1994). Respondents appealed the Decision and Order to the United States Court of Appeals for the Sixth Circuit and the Judicial Officer issued a Stay Order pending the outcome of proceedings for judicial review. *In re William Earl Bobo*, 53 Agric. Dec. 212 (1994).

The United States Court of Appeals denied Respondents' petition for review, *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406 (6th Cir. 1995), and Complainant filed a Motion to Lift Stay Order on June 6, 1996, stating that

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it was not filed within 10 days after service of the Decision and Order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Petition for Reconsideration, filed 17 days after service of the Decision and Order, denied).

Respondents have not filed any further appeal petitions and the time for filing such appeal petitions has expired. Respondents have not responded to Complainant's Motion to Lift Stay Order.

Therefore, the Stay Order issued in this proceeding is lifted. The disqualification provisions of the Order filed on January 12, 1994, shall become effective on the 30th day after service of this Order on Respondents, and Respondents shall pay the civil penalty assessed in the Order filed on January 12, 1994, within 30 days after service of this Order on Respondents.

In re: DEAN BYARD, LaRUE McWATERS, and ANN McWATERS.
HPA Docket No. 94-0038.
Order Vacating Decision and Reopening Case filed August 19, 1996.

Denise Hansberry, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

The decision filed on May 6, 1996, as to respondent Dean Byard was not properly served on him. Accordingly, for this reason, complainant's motion to reopen the case is granted. It is ordered that the decision filed on May 6, 1996, as to respondent Dean Byard be vacated and that the case be reopened.

In re: LUTHER HANKINS and DEBBIE HANKINS BALLARD.
HPA Docket No. 95-0001.
Order Dismissing Complaint as to Respondent Debbie Hankins Ballard filed December 23, 1996.

Robert Ertman, for Complainant.
Walton B. Johnson, Louisville, KY, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon motion of complainant and for good cause shown, the complaint as to respondent Debbie Hankins Ballard is dismissed with prejudice.

In re: THERESA HETTY JOHN.
P.Q. Docket No. 96-0036.
Order Dismissing Complaint filed September 5, 1996.

James A. Booth, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on August 9, 1996, be dismissed.

In re: GEORGE BAMFO.
P.Q. Docket No. 96-0039.
Dismissal of Complaint filed September 20, 1996.

Howard D. Levine, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

At Complainant's request the Complaint in this case is hereby dismissed.

In re: RAMONA CHOY.
P.Q. Docket No. 96-0029.
Order Granting Motion To Dismiss Without Prejudice filed November 20, 1996.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on April 3, 1996, be dismissed without prejudice, this the 20th day of November 1996.

DEFAULT DECISIONS

ANIMAL QUARANTINE AND RELATED LAWS

In re: THERESA M. ZAK.
A.Q. Docket No. 95-0038.
Decision and Order filed March 19, 1996.

Failure to file an answer - Importation of ham and pork sausage from Germany into the United States without the required certificate - Civil penalty.

Jane Settle, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty, as authorized by section of the Act of February 2, 1903, as amended (21 U.S.C. § 122), for a violation of the regulations governing the importation of meat products from Germany (9 C.F.R. §94 *et. seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et.seq*, and 7 C.F.R. § 1.130 *et. seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111) and regulations promulgated thereunder (9 C.F.R. § 94 *et. seq.*), by an amended complaint filed on August 3, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This amended complaint alleges that on or about October 3, 1994, respondent imported approximately, one (1) ham and one (1) pork sausage from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the amended complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the amended complaint are adopted and set forth in the Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Theresa M. Zak is an individual whose mailing address is (b) (6) (b) (6) [redacted].

2. On or about October 3, 1994, respondent imported approximately on (1) ham and one (1) pork sausage from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

Conclusion

By reason of the Finding of Fact set forth above, the respondent has violated the Act of February 3, 1903, as amended, and the regulations issued under that Act (9 C.F.R. § 94 *et. seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars (375.00)[2]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Division
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-38.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the

[2]The respondent has failed to file an answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, Agric. Dec. 849 (199)0.

Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final April 30, 1996.-Editor]

In re: JOSE ANTONIO CABALLERO.
A.Q. Docket No. 95-0039.
Decision and Order filed June 12, 1996.

Failure to file an answer - Importation of horse from Mexico into United States without inspection at port of entry, certificate of veterinary officer or written application for inspection - Importation of horse from Mexico into United States without shipment directly to designated port or quarantine or entry at designated port - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of a horse from Mexico into the United States (9 C.F.R. § 92.300 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and regulations promulgated thereunder the Act, by a complaint filed on July 14, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent filed an answer with the Hearing Clerk but failed to file within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jose Antonio Caballero is an individual with a mailing address of [redacted] (b) (6) [redacted].

2. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being inspected at a port of entry, as required.

3. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being shipped directly to a designated port, as required.

4. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being accompanied by a certificate of a salaried veterinary officer, as required.

5. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being quarantined at a designated port, as required.

6. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being entered at a designated port of entry, as required.

7. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without first presenting a written application for inspection, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act, 9 C.F.R. § 92.300 *et seq.* Therefore, the following Order is issued.

Order

Jose Antonio Caballero, respondent is hereby assessed a civil penalty of one thousand five hundred dollars ($1,500.00).[1] This penalty shall be payable

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[1]The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, 49 Agric. Dec. 849 (1990).

to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 95-39

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding.

[This Decision and Order became final July 22, 1996-Editor]

In re: DENNIS PROELL.
A.Q. Docket No. 96-0006.
Decision and Order filed June 11, 1996.

Failure to file an answer - Interstate movement of equine infection anemia reactor horse without required certificate - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of a horse from Wisconsin to Minnesota (9 C.F.R. § 75.4(b), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and regulations promulgated thereunder, by a complaint filed on January 19, 1996, by the Acting

Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about July 25, 1995, respondent moved an equine infectious anemia reactor horse from Wisconsin to Minnesota, in violation of 9 C.F.R. § 75.4(b) because the horse was moved unaccompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Dennis Proell is an individual whose mailing address is [redacted].

2. On or about July 25, 1995, respondent moved an equine infection anemia reactor horse from Wisconsin to Minnesota, unaccompanied by a certificate, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 75.4(b). Therefore, the following Order is issued.

Order

Respondent Dennis Proell, is hereby assessed a civil penalty of five hundred dollars ($500.00)[1]. This penalty shall be payable to the "Treasurer

[1]The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, 49 Agric. Dec. 849 (1990).

of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 96-06.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final July 22, 1996.-Editor]

ANIMAL WELFARE ACT

In re: CHARLES E. LOHNES, BEVERLY A. LOHNES and VERMONT VIEW ANIMAL PARK.
AWA Docket No. 96-0007.
Decision and Order filed July 23, 1996.

Failure to file an answer - Failure to construct and maintain facilities in structurally sound manner and good repair - Failure to provide outdoor animal with adequate shelter from inclement weather - Failure to keep food and water receptacles clean and sanitized - Failure to maintain primary enclosure in clean and sanitary condition - Failure to keep premises clean and in good repair and free of accumulations of trash - Failure to control weeds, grass and bushes - Failure to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care - Cease and desist order - Civil penalty - License disqualification.

James Booth, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act (Act), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint by the acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed on November 30, 1995, alleging that the respondents willfully violated the Act.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent to respondents Charles E. Lohnes, Beverly A. Lohnes, and Vermont View Animal Park, by the Hearing Clerk by certified mail on December 1, 1995, and was returned unclaimed. Pursuant to section 1.147(b), copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondents by the Hearing Clerk by regular mail on January 3, 1996. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R.

§ 1.139). Since Respondents have failed to file an answer within the time prescribed in the Rules of Practice, the material facts alleged in the complaint are admitted by respondents' failure to file an answer. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

I.

1. Charles E. Lohnes and Beverly A. Lohnes are individuals doing business as Vermont View Animal Park, a partnership in which they are general partners. Respondents' mailing address is RD 2 - Box 73-A, Hoosick Falls, New York 12090.

2. At all times material herein, the respondents, doing business as the Vermont View Animal Park, were operating as an exhibitor as defined in the Act and the regulations.[2]

3. When the respondents became licensed and annually thereafter, they received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On January 29, 1993, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standards specified below:

a. Supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.50(c) and 3.125(c));

b. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b));

c. The premises were not kept clean and free of accumulations of trash (9 C.F.R § 3.131(c));

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[2]The Respondents had a class "C" exhibitor license through out the entire time period of all the allegations of violations listed in the complaint and up until April 3, 1996. On March 13, 1996, Respondents surrender their exhibitor license (No. 21-C-067, expiration date: 11/01/96) to an APHIS REAC animal care inspector in the presence of a New York State police officer who were attempting to obtain emergency veterinary care for a male African lion in extreme distress that was euthanized shortly thereafter. The surrender of their license was effective on April 3, 1996.

d. Substances that are toxic to nonhuman primates were stored in food storage areas (9 C.F.R. § 3.75(e)); and

e. The respondent failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of one nonhuman primate (9 C.F.R. § 3.81).

5. On May 5, 1993, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

6. On May 5, 1993, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standards specified below:

a. Supplies of food were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.50(c) and 3.125(c));

b. Housing facilities for rabbits and other animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. §§ 3.53(a)(1) and 3.125(a));

c. Food receptacles for rabbits and other animals were not kept clean and sanitized (9 C.F.R. §§ 3.54 and 3.129(b));

d. Water receptacles were not kept clean and sanitary (9 C.F.R. §§ 3.55 and 3.130); and

e. Primary enclosures were not kept clean, as required (9 C.F.R. §§ 3.56(a) and 3.131(a)).

7. On July 21, 1993, APHIS inspected the respondents' facility and found the following willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standard specified as follows: Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals securely, and to restrict the entrance of other animals (9 C.F.R. § 3.75(a)).

8. On September 29 1993, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

9. On September 29, 1993, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standards specified below:

a. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. § 3.125(a));

b. The premises were not kept clean and free of accumulations of trash (9 C.F.R § 3.131(c)); and

c. Water receptacles were not kept clean and sanitary (9 C.F.R. § 3.130).

10. On October 13, 1994, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

11. On October 13, 1994, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standards specified below:

a. Housing facilities for nonhuman primates and other animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals securely, and to restrict the entrance of other animals (9 C.F.R. § 3.75(a) and 3.125(a));

b. Food receptacles for animals were not kept clean and sanitized (9 C.F.R. § 3.129(b)); and

c. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

3. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations and standards issued under the Act. Therefore, the following Order is issued.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;
(b) Failing to provide animals kept outdoors with shelter from inclement water;
(c) Failing to keep food and water receptacles clean and sanitized;
(d) Failing to maintain primary enclosures for animals in a clean and sanitary condition;
(e) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes; and
(f) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

2. Respondents are jointly and severally assessed a civil penalty of TEN THOUSAND DOLLARS ($10,000.00), which shall be paid by a certified check or money order made payable to the Treasurer of the United States. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.W.A. Docket No. 96-07.

3. Respondents' are disqualified from applying for a new license for a period of one (1) year from the effective date of this Order.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

[This decision and order became final and effective September 13, 1996-Editor.]

In re: LARRY WESTFALL
AWA Docket No. 96-0040.
Decision and Order filed June 14, 1996.

Failure to file a timely answer - Failure to construct and maintain housing facilities in structurally sound and repaired manner - Failure to provide adequate veterinary care - Failure to remove excreta and food waste from primary enclosures - Failure to regularly remove and dispose of waste in a manner that minimizes disease risks - Failure to keep premises clean and in good repair - Failure to maintain primary enclosure so that it protects animals from injury - Failure to permit APHIS employees to conduct inspection - Cease and desist order -Civil Penalty - License suspension.

Tejal Mehta, Complainant.
Respondent, pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that Larry Westfall, hereafter the respondent, wilfully violated the Act.

The complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the respondent on April 16, 1996, by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are

admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Larry Westfall, hereinafter referred to as respondent, is an individual whose address is (b) (6) [redacted]

2. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

3. On February 10, 1993, APHIS inspected respondent's facility and found that housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)) in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

4. On April 15, 1993, APHIS inspected respondent's facility and found that provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

5. On June 28, 1993, APHIS inspected respondent's facility and found that excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

6. On September 28, 1993, APHIS inspected respondent's facility and found that housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)).

7. On April 7, 1994, APHIS inspected respondent's facility and found the following wilful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the standards specified below:

A. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)); and

B. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

8. On August 10, 1994, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in wilful violation of section 2.40 of the regulations (9 C.F.R. § 2.40 (1993)).

9. On August 10, 1994, APHIS inspected respondent's facility and found the following wilful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R.§ 3.1(a));

B. Primary enclosures for dogs were not constructed and maintained so that the floors protect the animals' feet and legs from injury (9 C.F.R. §§ 3.6(a)(1); 3.6(a)(2)(ii), (x));

C. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)); and

D. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

10. On October 6, 1994, respondent was not home to permit APHIS employees to conduct a complete inspection of his animal facilities, in wilful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

11. On October 14, 1994, APHIS inspected respondent's facility and found that provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.1(d)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)).

12. On December 16, 1994, respondent was not home to permit APHIS employees to conduct a complete inspection of his animal facilities, in wilful

violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

13. On January 11, 1995, APHIS inspected respondent's facility and found that provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.1(d)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following order is authorized by the Act and warranted under the circumstances.

Order

Complainant proposes, as a sanction, a cease and desist order, a 30-day suspension of respondent's license, and a $4,000 civil penalty. The complaint itself, however, did not allege a specific amount for a civil penalty, but only that one be assessed "in accordance with section 19 of the Act (7 U.S.C. § 2149)." Section 19 provides, in part, that "the Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." Complainant does not indicate that consideration was given to these factors in its proposed civil penalty.

Although not timely filed, respondent did file an answer to the complaint and also filed a response to complainant's motion for a default decision. Respondent states, among other things, that he is disabled and receives no more than $4,000 a year from the sale of his animals. The complaint further shows that the nature of the violations for the most part related to housekeeping items rather than any cruel or inhumane treatment of the animals. Finally, there is no allegation that respondent has had a history of failing to comply with the Act. In these circumstances, a civil penalty of $2,000 will be assessed, as well as a cease and desist order and a 30-day license suspension.

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating

the Act and the regulations issued thereunder, and in particular, shall cease and desist from:

A. Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

B. Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

C. Failing to remove excreta and food waste from primary enclosures daily in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors.

D. Failing to make provisions for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks.

E. Failing to keep the premises, including buildings and surrounding grounds, in good repair, and clean and free of trash, junk, waste, and discarded matter, and failing to keep weeds, grasses and bushes under control in order to protect the animals from injury and to facilitate the required husbandry practices.

F. Failing to construct and maintain primary enclosures so that the floors protect the animals' feet and legs from injury.

G. Failing to permit APHIS employees to conduct a complete inspection of the animal facilities.

2. Respondent is assessed a civil penalty of $ 2,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for a period of 30 days and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this order shall become effective on the first day after service of this decision on the Respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final and effective August 2, 1996.]

In re: JEANETTE FORD.
AWA Docket No. 96-0004.
Decision and Order filed August 19, 1996.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Jeanette Ford on March 29, 1996.[1] Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Jeanette Ford has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

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[1]The Hearing Clerk attempted to serve a copy of the complaint and the Rules of Practice on the respondent by certified mail but the documents were returned marked unclaimed. Pursuant to section 1.147(c) of the Rules of Practice, the Hearing Clerk mailed a copy of the complaint and the Rules of Practice by regular mail to the respondent on March 29, 1996.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

1. Jeanette Ford, hereinafter referred to as respondent, is an individual whose address is (b) (6) [redacted].

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. The respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, dogs and/or cats to a licensed dealer on eleven occasions. The sale of each animal constitutes a separate violation. Each violation occurred on or about the date listed in the following table:

DATE	ANIMALS	DATE	ANIMALS
01/28/94	5 puppies	10/14/94	5 kittens
05/13/94	4 puppies	10/21/94	5 puppies
	1 kitten		1 kitten
05/20/94	2 puppies	11/18/94	6 puppies
	1 kitten	11/25/94	10 puppies
05/27/94	13 kittens		2 kittens
06/17/94	3 puppies	12/02/94	3 puppies
06/24/94	4 kittens		

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular,

shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of $11,000, which is hereby suspended provided that respondent does not violate the Act and the regulations and standards for a period of two years from the date this order becomes effective.

3. Respondent is disqualified for a period of two years from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice,
7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.
[This decision became final and effective November 29,1996]

In re: CITY OF ORANGE, CALIFORNIA, COMMUNITY SERVICES DEPARTMENT, d/b/a EISENHOWER PARK.
AWA Docket No. 96-0044.
Decision and Order filed September 12, 1996.

Default — Failure to file a timely answer — Civil penalty — Cease and desist order — Sanction policy.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The civil penalty assessed is warranted and appropriate in light of the factors that must be considered under section 19(b) of the Act, (7 U.S.C. § 2149(b)), and the Department's sanction policy, and is consistent with civil penalties assessed in previous cases for similar violations of the Act and the Regulations and Standards issued under the Act.

Colleen A. Carroll, for Complainant.
David Rudat, Orange, California, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act), and the Regulations and Standards promulgated under the Animal Welfare Act, (9 C.F.R. §§ 1.1-3.142)(hereinafter the Regulations and Standards). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151), and the Rules of Practice Governing Proceedings Under the Animal Welfare Act, (9 C.F.R. §§ 4.1-.11) (hereinafter the Rules of Practice), by a Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on April 22, 1996. The Complaint, which alleges that the City of Orange, California, Community Services Department, doing business as Eisenhower Park (hereinafter Respondent), willfully violated the Animal Welfare Act and the Regulations and Standards, was served on Respondent on May 7, 1996. Section 1.136(a) of the Rules of Practice provides that Respondent may file an Answer to the Complaint within 20 days after service of the Complaint on Respondent, (7 C.F.R. § 1.136(a)). Administrative Law Judge James W. Hunt (hereinafter ALJ) extended the time for Respondent to file its Answer from May 28, 1996, to June 3, 1996. (Order Extending Time to Answer Complaint.)

Respondent failed to answer by June 3, 1996, and on July 26, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), the ALJ issued a Proposed Decision and Order Upon Admission of Facts By Reason of Default (hereinafter Default Decision) in which the ALJ assessed a civil penalty of $5,000 against Respondent and ordered Respondent to cease and desist from various practices, including engaging in activity for which a license is required under the Animal Welfare Act and Regulations without being licensed; failing to ensure that animals have access to adequate uncontaminated food and water; failing to maintain a written program of veterinary care; failing to ensure that adequate barriers are maintained between the animals and the public and that employees are present during periods of public contact; failing to maintain adequate records; and failing to ensure that facilities and enclosures for animals provide adequate shelter, and are constructed, maintained, and cleaned, as required.

On August 12, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R.

§ 2.35.)[1] On August 22, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order (hereinafter Complainant's Response), and on August 26, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

. . . Respondent has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by Respondent's failure to file a [timely] Answer, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice[, (7 C.F.R. § 1.139).]

Findings of Fact

1. [The] . . . City of Orange, California, is a municipality that owns and operates Eisenhower Park, located at 2894 North Tustin Avenue, Orange, California 92666 (also referred to hereinafter as the Premises), through the city's Community Services Department. The mailing address of the Community Services Department is 326 East Almond Avenue, Orange, California 92661.

2. At all times mentioned herein, Respondent . . . was operating Eisenhower Park as an exhibitor, as that term is defined in the [Animal Welfare] Act and the Regulations and Standards.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

3. On September 22, 1993, [the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter] APHIS), inspected the Premises and found that:

a. Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to maintain the Premises clean and free from accumulations of trash [and by failing] to protect the health of the animals, in violation of section 3.131(c) of the Standards, (9 C.F.R. § 3.131(c));

b. Respondent willfully violated section 2.131(c)(2) of the Regulations, (9 C.F.R. § 2.131(c)(2)), by failing to have a responsible employee or attendant present at all time[s] during periods of public contact;

c. Respondent willfully violated section 2.131(c)(4) of the Regulations, (9 C.F.R. § 2.131(c)(4)), by allowing the public to feed animals, but failing to provide appropriate food; and

d. Respondent willfully violated section 2.25(a) of the Regulations, (9 C.F.R. § 2.25(a)), by exhibiting animals without being licensed.

4. On September 22, 1993, February 25, April 11, and August 30, 1994, and January 27, 1995, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to comply with the Standards, as follows:

a. Respondent failed to provide shelter for animals kept outdoors to protect them and prevent discomfort, in violation of section 3.127(b) of the Standards, (9 C.F.R. § 3.127(b)); and

b. Respondent failed to maintain outdoor housing facilities in good repair so as to protect the animals from injury and to contain them, in violation of section 3.125(a) of the Standards, (9 C.F.R. § 3.125(a)).

5. On September 22, 1993, February 25, April 11, July 26, and August 30, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to provide animals with food, free from contamination, in violation of section 3.129(a) of the Standards, (9 C.F.R. § 3.129(a)).

6. On February 25, 1994, APHIS inspected the Premises and found that:

a. Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to take adequate measures to prevent contamination of food, in violation of section 3.129(b) of the Standards, (9 C.F.R. § 3.129(b)); and

b. Respondent had willfully violated section 2.131(b)(1) of the Regulations, (9 C.F.R. § 2.131(b)(1)), by failing to . . . maintain sufficient distance or barriers [or both] between the animals and the general viewing public, so as to ensure the safety of the animals and the public.

7. On April 11, July 26, and October 3, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to make potable water accessible to animals as necessary for the health and comfort of the animals, and to keep water receptacles clean and sanitary, in violation of section 3.130 of the Standards, (9 C.F.R. § 3.130).

8. On April 11, May 3, and July 26, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.40(a)(1) of the Regulations, (9 C.F.R. § 2.40(a)(1)), by failing to have a written program of veterinary care.

9. On July 26, August 30, and October 3, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.75(b)(1) of the Regulations, (9 C.F.R. § 2.75(b)(1)), by [failing to] make, keep, and maintain records or forms disclosing information concerning the acquisition of animals.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact, Respondent has violated sections 2.25(a), 2.40(a), 2.75([b]), 2.100(a), and 2.131(b) and (c) of the Regulations, [(9 C.F.R. §§ 2.25(a), .40(a), .75(b), .100(a), .131(b), (c))], and sections 3.125(a), 3.127(b), 3.129(a) [and (b)], 3.130 and 3.131(c) of the Standards, [(9 C.F.R. §§ 3.125(a), .127(b), .129(a), (b), .130, .131(c))].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter dated August 9, 1996, addressed to Joyce Dawson, Hearing Clerk, United States Department of Agriculture, which was filed on August 12, 1996 (hereinafter Respondent's Appeal Petition), appears to be and is treated herein as Respondent's appeal of the Default Decision.

Respondent's Appeal Petition, Respondent's first and only filing in this proceeding, contains responses to the allegations in the Complaint. (Respondent's Appeal Petition, pp. 1-2.)

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[,(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . .

7 C.F.R. § 1.139.

§ 1.141 Procedure for Hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. . . .

7 C.F.R. § 1.141(a).

The Complaint, Rules of Practice, and a letter dated April 23, 1996, from the Office of the Hearing Clerk, were served on Respondent on May 7, 1996, by certified mail. The Complaint states:

> The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130*et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint, p. 4.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying April 23, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> Most importantly, you have *20 days from the receipt of this letter to file with the Hearing Clerk an original and five copies of your written and signed answer to the complaint*. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

April 23, 1996, letter from Joyce A. Dawson, Hearing Clerk, to City of Orange California, Community Services Department, dba Eisenhower Park, p. 1. (Emphasis in original.)

On May 22, 1996, the ALJ extended the time for Respondent's Answer from May 28, 1996, to June 3, 1996. (Order Extending Time to Answer Complaint.)

Respondent failed to answer by June 3, 1996, and on June 18, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed Complainant's Motion for Adoption of Proposed Decision and Order (hereinafter Complainant's Motion for Default Decision) and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Complainant's Proposed Default Decision). The Office of the Hearing Clerk

served a letter dated June 18, 1996, and one copy each of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on Respondent, by certified mail, on July 1, 1996. The Office of the Hearing Clerk's June 18, 1996, letter states, as follows:

> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

June 18, 1996, letter from Joyce A. Dawson, Hearing Clerk, to City of Orange California, Community Services Department, dba Eisenhower Park.

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and, on July 26, 1996, the ALJ filed the Default Decision, which was served on Respondent on August 6, 1996.

Respondent's response to the allegations in the Complaint comes too late. Section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), requires that within 20 days after service of the Complaint, the Respondent shall file an Answer with the Hearing Clerk. Respondent was served with the Complaint on May 7, 1996, and the time for Respondent to file an Answer was extended by the ALJ from May 28, 1996, to June 3, 1996. Respondent's Appeal Petition, Respondent's first and only filing in this proceeding, was filed on August 12, 1996, 70 days after Respondent's Answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a),(c)), and a waiver of hearing, (7 C.F.R. §§ 1.139,.141(a)). Further, Respondent was served with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on July 1, 1996, which states that Respondent, by its failure to file an Answer, is deemed to have admitted the material allegations in the Complaint. Section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), provides that Respondent may file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service of the motion on Respondent. Respondent's first filing in this proceeding, Respondent's Appeal Petition, was filed August 12, 1996, 42 days after Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were served on Respondent.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[2] Respondent has shown no basis for setting aside the Default Decision here.[3]

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[2]*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A.Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3]*See In re Bibi Uddin*, 55 Agric. Dec. ___ (Aug. 23, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In*

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable

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re Joe L. Henson, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

of permitting them to discharge their multitudinous duties.'"[4] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived its right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R.§ 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

Respondent contends that it has made "efforts to comply in good faith," has corrected the violations alleged in the Complaint, and is now "in complete compliance" with the Animal Welfare Act and the Regulation and Standards. Based upon these contentions, Respondent asserts that it should not be assessed a civil penalty of $5,000. (Respondent's Appeal Petition, p. 3.)

Section 19(b) of the Animal Welfare Act provides:

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[4] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent operates a 25-acre park in which an "animal area" is located. (Respondent's Appeal Petition, p. 1.) Respondent exhibits approximately 24 deer, (Respondent's Appeal Petition, attachment 7), approximately 20 chickens, (Respondent's Appeal Petition, attachment 1), and an unspecified

number of rabbits, (Respondent's Appeal Petition, p. 2), at its facility. The annual licensing fee regulations, (9 C.F.R. § 2.6), classify exhibitors by the number of animals exhibited. Under this scheme, Respondent's facility is considered moderate-sized. While there is nothing in the record to indicate that Respondent deliberately mistreated its animals or that Respondent has a history of violations previous to those alleged in the Complaint, Respondent repeatedly and willfully violated the Animal Welfare Act and the Regulations and Standards. Most of the violations are serious and could have impaired the health of the animals.

Complainant could have sought the assessment of $2,500 for each of the 30 violations alleged in the Complaint, or a total of $75,000. In light of the amount that Complainant could have requested, and the number of violations and serious nature of many of the violations, the sanction of a civil penalty of $5,000 and a cease and desist order requested by Complainant and imposed by the ALJ is appropriate and warranted.

Moreover, an examination of other cases brought by APHIS for similar violations reveals that civil penalties similar to those sought by Complainant and assessed by the ALJ in this case have been assessed in the past.[5]

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[5] *See, e.g., In re Big Bear Farm, Inc.*, 55 Agric. Dec. ___ (March 15, 1996) ($6,750 civil penalty and a 45-day license suspension for 36 violations of the Animal Welfare Act and the Regulations and Standards); *In re Otto Berosini*, 54 Agric. Dec. 886 (1995) ($7,500 civil penalty and 60-day license suspension for 46 violations of the Animal Welfare Act and the Regulations and Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) ($5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act and the Regulations and Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) ($2,000 civil penalty and 60-day license suspension for violations of the Animal Welfare Act and the Regulations and Standards on four different dates over a 13-month period); *In re James Petersen*, 53 Agric. Dec. 80 (1994) ($5,000 civil penalty and 1-year license disqualification for numerous violations of the Animal Welfare Act); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047 (1992), *aff'd sub nom. Wilson v. USDA*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)) ($5,000 civil penalty and a 30-day license suspension for 61 violations of the Animal Welfare Act and the Regulations and Standards); *In re Dwight Carpenter*, 51 Agric. Dec. 239 (1992) ($3,000 civil penalty and 6-month license suspension for 13 violations of the Animal Welfare Act and the Regulations and Standards); *In re S.S. Farms Linn County, Inc., supra*, ($10,000 civil penalty and 1-year license suspension for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re Rudolph Vrana*, 43 Agric. Dec. 1758 (1984) ($3,000 civil penalty and 30-day license suspension for 14 violations of the Animal Welfare Act and the Standards); *In re Donald Stumbo*, 43 Agric. Dec. 1079 (1984), *aff'd*, 779 F.2d 35 (2d Cir. 1985) (not to be cited as precedent) ($4,000 civil penalty and 120-day license suspension for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re Willard Lambert*, 43 Agric.

Further, I disagree with Respondent's contention that the assessment of a $5,000 civil penalty is inappropriate because Respondent has made "efforts to comply in good faith," has corrected the violations alleged in the Complaint, and is now "in complete compliance" with the Animal Welfare Act and the Regulation and Standards. (Respondent's Appeal Petition, p. 3.)

This Department's policy is that the subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations or Standards has no bearing on the fact that a violation has occurred. *In re Big Bear Farm, Inc., supra*, slip op. at 44-45; *In re Pet Paradise, Inc., supra*, 51 Agric. Dec. at 1069-70, 1075. Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations in 9 C.F.R. pt. 2 and the Standards in 9 C.F.R. pt. 3. (9 C.F.R. § 2.100(a).) This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.

Under these circumstances, the assessment of a civil penalty of $5,000 against Respondent is warranted and appropriate and consistent with civil penalties requested and assessed in similar circumstances.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent City of Orange, California, Community Services Department, d/b/a Eisenhower Park, is assessed a civil penalty of $5,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 30 days after service of this Order on Respondent to:

Colleen A. Carroll

Dec. 46 (1984) ($1,000 civil penalty for 5 violations of the Animal Welfare Act and the Standards); *In re Lorraine McBryde*, 42 Agric. Dec. 1375 (1983) ($500 civil penalty for 2 violations of the Animal Welfare Act and the Regulations); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983) ($500 civil penalty for 1 violation of the Animal Welfare Act).

United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, D.C. 20250-1417

2. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. Engaging in activity for which a license is required under the Animal Welfare Act and Regulations without being licensed;

b. Failing to ensure that animals have access to adequate uncontaminated food and water;

c. Failing to maintain a written program of veterinary care;

d. Failing to ensure that adequate barriers are maintained between the animals and the public, and that employees are present during periods of public contact;

e. Failing to maintain adequate records; and

f. Failing to ensure that facilities and enclosures for animals provide adequate shelter, and are constructed, maintained, and cleaned, as required.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

In re: JAMES B. GARRETTSON d/b/a Garrettson Enterprises.
AWA Docket No. 96-0053.
Decision and Order filed September 17, 1996.

Failure to file an answer - Operating as a dealer without being licensed - Operating as an exhibitor without being licensed - Cease and desist order - Civil Penalty - License Disqualification.

Tejal Mehta, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator,

Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that James Brandon Garretson, hereafter the Respondent, willfully violated the Act.

The complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondent by ordinary mail on June 27, 1996.[1] Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. James Brandon Garretson, dba Garretson Enterprises, hereinafter referred to as respondent, is an individual whose address is (b) (6) (b) (6).

2. The respondent, at all times material herein, was operating as a dealer and an exhibitor, as defined in the Act and the regulations.

3. From June 11, 1994, and continuing to the present, respondent has been operating as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent offered for sale and sold numerous exotic animals in commerce. The sale or offer for sale of animal constitutes a separate violation.

4. On June 11, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported two lions. The sale transaction for each animal constitutes a separate violation.

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[1]The Hearing Clerk attempted service on respondent James Brandon Garretson by certified mail on May 15, 1996. Upon return of the complaint as "Unclaimed" on June 18, 1996, the Hearing Clerk served respondent by ordinary mail as per § 1.147 of the Rules of Practice (7 C.F.R. § 1.136).

5. On June 26, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported one tiger. The sale transaction for each animal constitutes a separate violation.

6. On August 8, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported one lion. The sale transaction for each animal constitutes a separate violation.

7. On November 10, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two lions and one tiger. The transportation of each animal constitutes a separate violation.

8. On March 1, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported one tiger. The transportation of each animal constitutes a separate violation.

9. On May 2, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two tigers. The transportation of each animal constitutes a separate violation.

10. On May 5, 1995, respondent operated as an exhibitor as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent exhibited two tigers. The exhibition of each animal constitutes a separate violation.

11. On May 6, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two tigers. The transportation of each animal constitutes a separate violation.

12. On June 16, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R.

§ 2.1). Specifically, respondent bought and transported one black bear. The sale transaction of each animal constitutes a separate violation.

13. On June 27, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent sold one black bear. The sale transaction of each animal constitutes a separate violation.

14. On July 3, 1995, respondent operated as an exhibitor as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R.§ 2.1). Specifically, respondent exhibited two tigers. The exhibition of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist violate the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of $ 11,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for a one year period from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after service of this decision on the Respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice,
7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.
[This decision became final and effective October 28, 1996-Editor]

FEDERAL CROP INSURANCE ACT

In re: GERALD A. KLEIN.
FCIA Docket No. 96-0001
Decision and Order filed August 22, 1996.

Admission of material allegations - Filing false and inaccurate information with the FCIC - Disqualification.

Kimberly Arrigo, for Complainant.
Orell D. Schmitz, Bismark, North Dakota, for Respondent.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

The respondent, Gerald A. Klein, admitted that he filed false and inaccurate information with the Federal Crop Insurance Corporation and agreed to be disqualified.

Pursuant to section 506 of the Federal Crop Insurance Act (7 U.S.C. § 1506)(the Act), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent, unless there is an appeal to the Judicial Officer in accordance with § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision became final and effective September 30, 1996.-Editor]

In re: TED JOHN WAGGONER.
FCIA Docket No. 96-0002.
Decision filed September 6, 1996.

Failure to file an answer - Providing false and inaccurate information to FCIC or to an insurer with respect to an insurance plan or policy - Disqualification.

Kimberly Arrigo, for Complainant.

Respondent, Pro se.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent. Ted John Waggoner, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfullyand intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision became final and effective October 16, 1996.-Editor]

In re: BRYANT WINSTON ODLAND.
FCIA Docket No. 96-0006.
Decision filed September 4, 1996.

Failure to file an answer - Providing false and inaccurate information to FCIC to an insurer with respect to an insurance plan or policy - Disqualification.

Kimberly Arrigo, for Complainant.
Respondent, Pro se.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure

of the respondent, Brain Winston Odland, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfullyand intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision became final and effective October 18, 1996.-Editor]

PLANT QUARANTINE ACT

In re: PRIVATE JET EXPEDITIONS, INC.
P.Q. Docket No. 95-0056.
Decision and Order filed March 7, 1996.

Failure to file an answer - Failure to provide advance notification of aircraft - Civil Penalty.

Jane Settle, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations notification of foreign aircraft arriving in the United States (7 C.F.R.§ 330.111)[hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq* and 7 C.F.R. §§ 1.130 *et seq*.

This proceeding was instituted under the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq*), the Act of February 2, 1903, as amended (21 U.S.C. § 111) (Acts), and the regulations promulgated thereunder, by a complaint filed on August 21, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about May 6, 1994, at Cincinnati/Northern Kentucky International Airport, in Cincinnati, Ohio, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 528/529 from Barbados, in violation of 7 C.F.R. § 330.111. Also, on or about January 7, 1995, at Lambert Field in St. Louis, MO, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 801 from Mexico, in violation of 7 C.F.R. § 330.111.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Private Jet Expeditions, Inc., is a company doing business in the states of Ohio and Missouri with a mailing address of 3520 Piedmont Road, Suite 300, Atlanta, GA 20205.

2. On or about May 6, 1994, at Cincinnati/Northern Kentucky International Airport, in Cincinnati, Ohio, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 528/529 from Barbados, in violation of 7 C.F.R. § 330.111.

3. On or about January 7, 1995, at Lambert Field in St. Louis, MO, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 801 from Mexico, in violation of 7 C.F.R. § 330.111.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 330.111). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00)($500.00 per count)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334

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[1]The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran* Lopez, 44 Agric. Dec. 2201 (1985).

Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-56.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 29, 1996-Editor]

In re: YOLANDA M. GUERRERO.
P.Q. Docket No. 95-0064.
Decision and Order filed April 10, 1996.

Failure to file an answer - Importation of plums from Ecuador into United States - Civil penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on September 26, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about January 9, 1995, the respondent imported approximately five pounds of plums (*Spondias* spp.) from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of plums from Ecuador into the United States is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing.

7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Yolanda M. Guerrero, respondent herein, is an individual whose mailing address is (b) (6)

2. On or about January 9, 1995, the respondent imported approximately five pounds of plums (*Spondias* spp.) from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of plums from Ecuador into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred fifty dollars ($ 250.00).[1] This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

[1]Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-64.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final July 27, 1996-Editor]

In re: MANUEL JESUS PALAGUACHI.
P.Q. Docket No. 96-0007.
Decision and Order filed May 3, 1996.

Failure to file an answer - Importation of apples and peaches from Ecuador into the United States - Civil Penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 8, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about March 24, 1995, the respondent imported approximately one pound each of apples and peaches from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of apples and peaches from Ecuador into the United States is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this

Decision is issued pursuant to section 1.139of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Manuel Jesus Palaguachi, respondent herein, is an individual whose mailing address is (b) (6)

2. On or about March 24, 1995, the respondent imported approximately one pound each of apples and peaches from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of apples and peaches from Ecuador into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred fifty dollars ($ 250.00).[1] This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-07.

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[1]Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final July 22, 1996-Editor]

In re: FEDERICO GALLEGOS-SIGALA.
P.Q. Docket No. 96-0028.
Decision and Order filed August 22, 1996.

Failure to file an answer - Importation of avocados into the United States from Mexico - Civil Penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on April 3, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Federico Gallegos-Sigala is an individual whose mailing address is [redacted] (b) (6)

2. On or about August 1, 1995, at El Paso, Texas, respondent imported four (4) avocados from Mexico into the United States in violation of Section 7 C.F.R. § 319.56 because importation of avocados is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-28.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final October 2, 1996.-Editor]

In re: Bork Tree Farms, Inc., also d/b/a B & S Tree, B & S Tree Farm, and B & S Tree Co., Norman's Brokerage, Inc., also d/b/a Normans Truck Brokerage, Inc., LaFave Recycling, Independent Operator Inc., Heidema Brothers, Inc., Stan Koch & Sons, Windy Hill Foliage, Inc., Todd Transportation, Inc., Zweber Trucking, Green Enterprise Lines, Midwest Transportation, Inc., Keith Wright Trucking, P & H Trucking Co., Hensley, Inc., Zeitner & Sons, Inc., Ankrum Trucking, Inc., Karl's Transport, Inc., Lykes Transport, Inc., ATI Enterprises, Ltd., Buchan Trucking Co., Pyle Truck Line, Inc., Action Carriers, Inc., and Dittmer Transit.
P.Q. Docket No. 96-0027.
Decision and Order as to Dittmer Transit filed August 23, 1996.

Failure to file an answer - Interstate movement of trees from a gyspy moth generally infested area to a not generally infested area without a certificate or permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of trees from a gypsy moth generally infested area to or near a not generally infested area (7 C.F.R. § 301.81 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about April 23, 1994, Respondent Dittmer moved interstate approximately fifty-three (53) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Hinckley, MN, without a certificate or permit, as required.

The Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings

of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Dittmer Transit (Dittmer), Respondent, is a business with a mailing address of 445 27th Street South, Fargo, ND 58103.

2. On or about April 23, 1994, Respondent Dittmer, in violation of 7 C.F.R. § 301.45-4(a), moved interstate approximately fifty-three (53) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Hinckley, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Acts and the regulations issued under the Acts). Therefore, the following Order is issued.

Order

Respondent Dittmer is hereby assessed a civil penalty of two hundred fifty dollars ($250.00)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

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[1]The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-27.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final October 4, 1996.-Editor]

In re: ADELE CRISTE.
P.Q. Docket No. 96-0024.
Decision and Order filed September 5, 1996.

Failure to file an answer - Offered raw chili peppers for shipment from Hawaii to the continental United States - Civil penalty.

Jane H. Settle, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations importation of fruits and/or vegetables from Hawaii to the continental United States (7 C.F.R. §§ 318.13(b) and 318.13-2(a)) [hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. §§ 1.130 *et. seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167) (Acts), and the regulations promulgated thereunder, by a complaint filed on March 27, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about July 8, 1995, respondent offered to a common carrier, specifically the United States Postal Service approximately 2 ounces of raw chili peppers for shipment from Hawaii to the Continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a) because such products are prohibited movement from Hawaii into the continental United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.13(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.1.36(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. §1.136(a) shall be deemed an admission of the allegations in

the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. §1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. §1.139).

Findings of Fact

1. Adele Criste, is an individual with a mailing address of (b) (6) (b) (6).

2. On or about July 8, 1995, respondent offered to a common carrier, specifically the United States Postal Service, approximately 2 ounces of raw chili peppers for shipment from Hawaii to the Continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a) because such products are prohibited movement from hawaii into the continental United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. §§ 318.13(b) and 318.13-2(a)).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy five dollars (375.00)[1]. This penalty shall be payable to the "Treasure of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Service Office

[1]The respondent failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-24.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of the Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final October 14, 1996.-Editor]

In re: ROSENDA MATIAS.
P.Q. Docket No. 96-0009.
Decision and Order filed October 25, 1996.

Failure to file an answer - Importation of fresh mangoes into the United States from the Dominican Republic - Civil penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on December 12, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of

the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Rosenda Matias is an individual whose mailing address is (b) (6) (b) (6).

2. On or about April 8, 1995, respondent imported fresh mangoes from a foreign country, Dominican Republic, to a place within the United States, Jamaica, New York, in violation of Section 7 C.F.R. § 319.56-2(e).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred and dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-09.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the

Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final December 7, 1996-Editor]

CONSENT DECISIONS

(Not published herein-Editior)

ANIMAL QUARANTINE AND RELATED LAWS

Gil Comeaux. A.Q. Docket No. 96-0010. 9/18/96.

Gumersindo Marin-Cazarez. A.Q. Docket No. 96-0014. 10/4/96.

Martha Gonzalez Rodriguez. A.Q. Docket No. 96-0016. 11/1/96.

Jeffrey S. Craig and Greencastle Livestock Market, Inc. A.Q. Docket No. 95-0001. 11/27/96.

ANIMAL WELFARE ACT

Donald Schrage and Mary Ruth Schrage, d/b/a Rabbit Ridge Kennels. AWA Docket No. 95-0061. 7/8/96.

Jim Armstrong. AWA Docket No. 95-0021. 7/16/96.

David Piper, Jr. d/b/a Everglades Wonder Gardens. AWA Docket No. 95-0049. 7/24/96.

Allen's Exotic Animals, Inc., and Lonnie D. Allen. AWA Docket No. 96-0043. 7/30/96.

Michael Wyche and Debbie Wyche d/b/a CAT TALES. AWA Docket No. 96-0015. 8/22/96.

Sugarloaf Dolphin Sanctuary, Inc. and Lloyd A. Good, III. AWA Docket No. 96-0055. 8/27/96.

Norristown Zoological Society, d/b/a Elmwood Park Zoo. AWA Docket No. 96-0027. 8/28/96.

Larry Marko. AWA Docket No. 96-0034. 8/29/96.

Southern Nevada Zoological Park, Inc., Nevada Zoological Foundation, and Pat Dingle. AWA Docket No. 95-0076. 8/30/96.

Rose Groll. AWA Docket No. 96-0022. 9/5/96.

Robert Grady and Lynette Grady, d/b/a Cripple Creek Kennels. AWA Docket No. 95-0011. 9/9/96.

Betty Honn's Animal Adoptions Ltd. and Betty Honn. AWA Docket. No. 95-0080. 9/11/96.

Frank Strout. AWA Docket No. 96-0009. 9/18/96.

Roy Lee Jones, d/b/a, Exotic Love Cattery. AWA Docket No. 96-0014. 9/24/96.

William L. Hargrove, d/b/a U. S. Research Farm. AWA Docket No. 95-0047. 10/8/96.

Randall B. Huffstutler. AWA Docket No. 95-0051. 10/15/96.

Bill Delozier and Three Bears Gift Shop. AWA Docket No. 95-0015. 10/16/96.

Craig A. Perry d/b/a Perry's Wilderness Ranch and Zoo. AWA Docket No. 96-0025. 10/21/96.

Romulus E. Scalf d/b/a Steel City Zoo. AWA Docket Nos. 95-0078 and 96-0059. 10/23/96.

Michigan State University. AWA Docket No. 95-0079. 12/19/96.

Sun Jet International Airlines, a Delaware corporation. AWA Docket No. 96-0046. 12/23/96.

FEDERAL MEAT INSPECTION ACT

Velasam Veal Connection, and Simon Samson. FMIA Docket No. 96-0008. 8/6/96.

John Krusinski, d/b/a Krusinski's Finest Meats. FMIA Docket No. 96-0007. 8/8/96.

Johnson & Johnson Meats, Inc. d/b/a Johnson & Johnson Wholesale Meats and James Boyd Johnson, III. FMIA Docket No. 95-0005. 9/4/96.

Mohawk Meat Packing Co., and Charles Bonnici. FMIA Docket No. 97-0001. 10/22/96.

Jordan Supply House and Richard R. Seyfried. FMIA Docket No. 96-0005. 10/30/96.

GRAIN STANDARDS ACT

Foxley Grain Company, Inc. G.S.A. Docket No. 96-0001. 8/26/96.

HORSE PROTECTION ACT

Harlan Minton and Nancy Minton. HPA Docket No. 94-0063. 8/13/96.

Conley Dockery. HPA Docket No. 96-0001. 8/20/96.

Sandra Huffman. HPA Docket No. 95-0002. 10/30/96.

Luther Hankins. HPA Docket No. 95-0001. 12/23/96.

PLANT QUARANTINE ACT

Nirmala Shiwmangal. P.Q. Docket No. 95-0062. 7/17/96.

Lykes Transport, Inc. P.Q. Docket No. 96-0027. 8/1/96.

Carolyn K. Wood, d/b/a Tropical Connections. P.Q. Docket No. 96-0030. 8/9/96.

C.H. Robinson Co. P.Q. Docket No. 96-0030. 8/9/96.

Action Carriers, Inc. P.Q. Docket No. 96-0027. 8/20/96.

Robin S. Stein, d/b/a Foliage Link, Inc. P.Q. Docket No. 96-0030. 8/26/96.

Vern Thuney Trucking. P.Q. Docket No. 96-0030. 9/17/96.

Mesilla Valley Transportation. P.Q. Docket No. 96-0015. 9/19/96.

American Airlines, Inc. P.Q. Docket No. 96-0034. 10/16/96.

Amerijet International, Inc. P.Q. Docket No. 95-0043. 11/4/96.

Buchan Trucking Co. P.Q. Docket No. 96-0027. 11/21/96.

Continental Airlines. P.Q. Docket No. 94.0020. 12/10/96.

Petal L. Evans. P.Q. Docket No. 96-0031. 12/20/96.

POULTRY PRODUCTS INSPECTION ACT

Velasam Veal Connection, and Simon Samson. PPIA Docket No. 96-0007. 8/6/96.

John Krusinski, d/b/a Krusinski's Finest Meats. PPIA Docket No. 96-0006. 8/8/96.

Johnson & Johnson Meats, Inc. d/b/a Johnson & Johnson Wholesale Meats and James Boyd Johnson, III. PPIA Docket No. 95-0004. 9/4/96.

Mohawk Meat Packing Co., and Charles Bonnici. PPIA Docket No. 97-0001. 10/22/96.

Jordan Supply House and Richard R. Seyfried. PPIA Docket No. 96-0004. 10/30/96.